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Compensation Bill [HL]

Bill 155 of 2005-06

This paper discusses the provisions of the *Compensation Bill [HL]* which had its first reading in the House of Commons on 27 March 2006.

The Bill is one of a number of initiatives being pursued by the Government in its stated determination to prevent a compensation culture from developing, to tackle perceptions that could lead to a disproportionate fear of litigation and to risk-averse behaviour, to discourage and resist bad claims and to improve the system for those with a valid claim for compensation.

Part 1 of the Bill is intended to deal with the matters a court may take into account when considering whether there has been a breach of the duty of care in an action for negligence or breach of statutory duty. Part 2 would deal with the regulation of claims management services.

Catherine Fairbairn

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Summary of main points

The question of whether a "compensation culture" actually exists, or alternatively whether there is only a perception of a compensation culture, has been debated for some time. It has been argued that a fear of being sued, whether or not this is justified, may be leading to excessive risk aversion and may be affecting the willingness of individuals to volunteer to supervise potentially dangerous activities.

The *Compensation Bill [HL]* was introduced in the House of Lords on 2 November 2005. The Bill completed its passage through the House of Lords on 27 March 2006 and had its first reading in the House of Commons as Bill 155 of 2005-06 on the same day. The Bill is one of a number of initiatives being pursued by the Government in its stated determination to prevent a compensation culture from developing, to tackle perceptions that could lead to a disproportionate fear of litigation and to risk-averse behaviour, to discourage and resist bad claims and to improve the system for those with a valid claim for compensation.

The main provisions of the Bill are as follows:

- Part 1 would apply in relation to claims in negligence or breach of statutory duty. The court would have discretion to consider whether the standard of care demanded of the defendant might prevent a desirable activity from being undertaken or might discourage people from becoming involved with a desirable activity.

  This provision has proved controversial. The Government states that it would not change the law but would reflect the existing approach of the courts and that it would provide reassurance about how the law does work. The clause has received some support, including from the Conservative peer, Lord Hunt of Wirral and from the All Party Parliamentary Group on Adventure and Risk in Society, although amendments to its operation have been suggested. Others, including the Constitutional Affairs Committee and Lord Goodhart, Liberal Democrat Shadow Lord Chancellor and Spokesperson for Constitutional Affairs, have called for the clause to be dropped, arguing that it would serve no useful purpose and that it might lead to litigation about the meaning of the term "desirable activity".

- Part 2 would deal with the regulation of claims management services. The Government has announced that, in the light of an independent assessment of its potential, the Claims Standards Council would not be the regulator. Other options are still being considered.

  The general objective of regulation of claims managers has received all party support although a number of amendments have been debated. Many of the issues raised in opposition amendments moved in Grand Committee were addressed by the significant number of Government amendments which were passed at Report stage and in the further information provided by the Government in its Policy Statement and Model Rules which were published on 2 March 2006.

The Bill would apply only to England and Wales.

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I Introduction and background

A. The 'compensation culture'

It has been argued that factors such as the lifting of laws banning solicitors from advertising, the growth of accident management companies, increased awareness about the right to claim compensation and the availability of 'no-win, no-fee' agreements, have given rise to some perception of there being a 'compensation culture'. This has been defined as:

> The desire of individuals to sue somebody, having suffered as a result of something which could have been avoided if the sued body had done their job properly.[1]

"Compensation culture" has also been referred to as a "claims culture" or a "'have a go' culture".

The question of whether a compensation culture really does exist, and the costs associated with the perception of its existence have been considered on a number of occasions.

1. Institute of Actuaries

In its 2002 report, *The Cost of Compensation Culture*, the Institute of Actuaries estimated the cost of compensation in the UK as approximately £10b per year, over 1% of GDP. It stated that:

> This cost has been increasing at 15% per year recently and is set to continue rising at over 10% per year. Over a third of the total is legal and administration expenses. This seems a fundamentally inefficient way of delivering compensation. [2]

The Report included findings about public attitudes on the subject:

> The majority of the "public" believe attitudes to compensation have changed in the last five years and that this is a bad thing. However, most of them would happily make a claim against the NHS or Local Authorities, but were less keen to claim against their employer or neighbour.[3]

The Report also examined the non-financial costs of a compensation culture. These included an increase in defensive procedures (eg in medicine); lost management time spent assessing risks; and possible worse care and safety as a fear of being sued becomes a disincentive to admitting liability or pointing out unsafe practices.

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1 The Institute of Actuaries, *The Cost of Compensation Culture,* December 2002, http://www.actuaries.org.uk/files/pdf/giro2002/Lowe.pdf

2 http://www.actuaries.org.uk/files/pdf/giro2002/Lowe.pdf

3 *Ibid*

Julian Lowe, Chairman of the Actuaries' Working Party commented:

> Some have argued that the shift towards an individual's right to compensation has forced big business and public authorities to behave more responsibly. We believe that a more litigious society would be a bad thing because the costs, both financial and in terms of restricting activities, outweigh the benefits of providing better compensation to accident victims.[4]

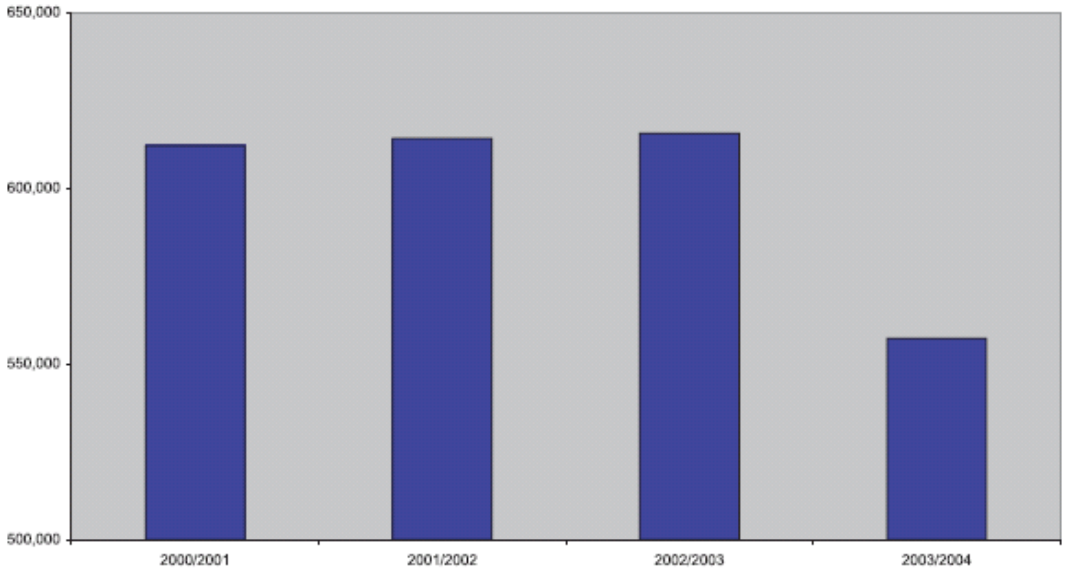
2. Better routes to redress

a. The Report

The Better Regulation Commission (the successor to the Better Regulation Task Force) is an independent advisory body whose terms of reference are to advise the Government on action to reduce unnecessary regulatory and administrative burdens; and ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted.[5]

In May 2004, the Better Regulation Taskforce published its Report, *Better Routes to Redress* (sometimes referred to as the 'Arculus Report').[6] The Report focused on the "commonly held perception that the United Kingdom is in the grip of a 'compensation culture'" which it considered to be a myth. The following table, included in the Report indicates that the number of accident claims, including personal injury claims, is actually falling:

Table 1 : Total number of accident cases registered



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4 Faculty and Institute of Actuaries press release, *Compensation culture now costing UK 1% of GDP (£10bn a year'), say Actuaries,* 17 December 2002, http://www.actuaries.org.uk/DisplayPage.cgi?url=%2Fpr-rels%2F2002%2F021217_compensation_pr.html;printer_friendly=1

5 http://www.brc.gov.uk/about_us/

6 http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf

However, the BRTF acknowledged that this ignores the fact that many claims are settled out of court, and that people believe that there is a "compensation culture" in the UK:

> It is this perception that causes the real problem: the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims. The judicial process is very good at sorting the wheat from the chaff, but all claims must still be assessed in the early stages. Redress for a genuine claimant is hampered by the spurious claims arising from the perception of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real.
>
> It has got to be right that people who have suffered an injustice through someone else's negligence should be able to claim redress. What is not right is that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions and then expect someone else to pick up the pieces when something goes wrong, regardless of whose fault it was. [7]

The Report considered that the impact of the myth could make organisations over-cautious in their behaviour leading them unnecessarily to cancel events and ban activities which until recently might have been considered to be routine. It also considered that recent developments such as the introduction of "no win no fee" arrangements - where the claimant only pays their lawyer's fees in the event of success - and the emergence of claims management companies had encouraged more people to "have a go" at claiming redress for a wrong they feel they have suffered:

> We live in a much richer, but more risk averse, society than ever before. We are also much better informed about our rights, which means we are more aware when there is a case to answer. However some people may be persuaded, by what they have read in the papers or through the contact they have had with claims management companies, to look for compensation where none is available and therefore decide to "have a go". This has had both positive and negative impacts. On the positive side the public sector, such as schools, rather than cancelling trips and activities as the media would have us believe, have become much better at assessing and managing risks. Local authorities have put sophisticated systems in place to manage, for example, repairs to their pathways and highways.
>
> However, on the negative side, the "have a go" culture that encourages people to pursue misconceived or trivial claims:
>
> - has put a drain on public sector resources;
> - may make businesses and other organisations more cautious for fear of litigation;
> - contributes to higher insurance premiums; and
> - clogs up the system for those with indisputable claims.[8]

The Report pointed to the value of an apology and to a need to move away from the situation where an apology is seen as an admission of liability.

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7 *Ibid* p3
8 *Ibid* p6

Part 3 of the Report is entitled "The compensation culture: it's all in the mind". In this part the BRTF commented on why it considered that there is a perception that a compensation culture exists and also on factors which it considered militate against the existence of such a culture including:

- many of the stories portrayed by the media and commentators either are not true or only have a grain of truth about them

- litigating is not easy and the majority of claims never reach court

- there is a great mismatch between the size of payments people are led to believe they will receive and the reality: in 2002, 55% of claims issued by the County Courts were for under £3,000

- statistics show that relevant legal costs in the UK in 2000 were 0.6 per cent of GDP, compared with 1.9 per cent of GDP in the US. The UK could not follow the US litigious route partly because in civil cases in the UK, unlike the US, juries (which will often be sympathetic towards a claimant and award higher damages awards) are seldom used; because punitive damages can only be awarded in very restrictive circumstances; and because of the disincentive caused by the requirement that the loser pays the reasonable costs of the winner

- the perception of the compensation culture is largely, though not entirely, perpetuated by the media: claims for exorbitant sums are reported but not the final outcome which may have been very different, and stories from other parts of the world are reported without any comment that such cases would be unlikely to succeed in the UK

- senior commentators also perpetuate the perception: it would be more beneficial to educate people to understand that compensation is minimal in most cases and to educate those litigated against that the best way to avoid litigation is to be aware of the risks and to have taken cost effective measures to manage them

- the threat of litigation, or just a complaint or claim, can have some positive effects as well as negative effects. Fear of litigation does change behaviour

The Report made a number of recommendations including that there should be more regulation of claims management companies, publicity about the protection which consumers have against claims management companies and guidelines to NHS hospitals and surgeries on the content of advertising by claims management companies on their premises. In particular, the Task Force recommended that by September 2004, the Claims Standards Federation[9] should approach the Office of Fair Trading to apply for approval of its Code of Practice, which should set out how claims management companies should operate, that the Claims Standards Federation should work towards approval of its Code by the OFT by September 2005 and that if, by December 2005,

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[9] The Claims Standards Federation was the trade association in the claims management industry at that time, but it has subsequently been wound up and the Claims Standards Council has been formed. See section III C of this paper below

progress had not been not made, the Department for Constitutional Affairs should regulate the sector.

b. The Government response

The Government Response to the Better Regulation Task Force Report*, Tackling the "Compensation Culture"* was published in November 2004.[10] The Government stated its determination to deal with the problems associated with the perception of a compensation culture:

> The Government is determined to scotch any suggestion of a developing 'compensation culture' where people believe that they can seek compensation for any misfortune that befalls them, even if no-one else is to blame. This misperception undermines personal responsibility and respect for the law and creates unnecessary burdens through an exaggerated fear of litigation.
>
> (...)
>
> Of course the Government believes that people who have a genuine claim should be able to enforce their right to compensation. Otherwise people would be able to offload the cost of their negligence onto their victim or the taxpayer. But we strongly oppose any culture where people believe that if there is an injury there must inevitably be someone else to blame, and someone else to pay. And we oppose people being encouraged to believe it is always worth "having a go", however meritless the claim. This creates false expectations that there is easy money just waiting to be had. Some personal injury advertising does just this.

The Government denied any link between the alleged existence of a compensation culture and the *Human Rights Act* and said that accident claims are not soaring. It stated its intention to take action: both to tackle practices that help spread the misperceptions and false expectations; and to improve the effectiveness and efficiency of the system for those who have a genuine claim to compensation:

> But we must also tackle the causes of the underlying problems. So in consultation with the various sectors, we will develop appropriate guidance on issues like health and safety. We will encourage appropriate and proportionate risk management procedures and promote the need for responsible behaviour, not only from those in charge of the activity but also from those taking part. These actions will not only help to give those providing the activity confidence about risk, its management and their role but will also give the insurance industry confidence that risk is being managed responsibly. And while Government cannot determine the commercial pressures upon them, we want to encourage local authorities and their insurers to resist bad claims if they are made. Where state bodies are involved, we will do our bit to resist such claims, because not doing so only encourages more bad claims to be made.

The Government set out its intention to work with other interested parties to develop further policies including those that would:

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[10] 10 November 2004, http://www.brc.gov.uk/downloads/word/betterroutestoredress.doc

- reduce accidents in the first place through better health and safety measures and proportionate risk assessment procedures
- encourage good occupational health plans
- promote the availability of affordable insurance
- encourage better and earlier rehabilitation
- publicise the law to make it clear that compensation will be awarded only where an injury is caused through someone else's fault; and that contributory negligence will be taken into account
- ensure proper regulation of claims management companies
- encourage alternative dispute resolution: often an explanation and an apology are what the injured and the bereaved most want
- provide procedural, legal aid and costs rules which facilitate good claims, but make it clear there is a price to be paid for meritless or false claims
- encourage the media and senior commentators to ensure that the debate is constructive, informed and evidence-based.

The Government stated that it would set up a Ministerial Steering Group to take this work forward in a co-ordinated way across Government. The Ministerial Steering Group would be informed by an Action Group to be set up by the Department for Constitutional Affairs.

The Government agreed that that the claims management sector must be properly regulated:

> We agree that the claims management sector should be given one last chance to put its own house in order and if it doesn't then we will consider how new formal regulation could be introduced. The Government wants to see a major change in quality and behaviour by claims management companies so that the service provided to consumers is significantly improved and consumers' expectations are not raised falsely through potentially misleading advertising and other sales practices. We also want to see a renewed focus on improving transparency of processes and fees, better quality control and the speedier conclusion of any claims made. An improvement in the services provided to, and relationships with, solicitors, funders and insurers is another important requirement.
>
> (...)
>
> The development of an industry body that can act as a 'self-regulator' provides an opportunity to produce much improved service levels, better standards and an independent compliance and complaints regime. The [Claims Standards Council (CSC)] has a key role to play in ensuring that this improvement continues if it can deliver on its promises. The success of the CSC will depend partly on being able

to establish sufficient credibility with key stakeholders in the personal injury sector.

The Government also agreed with a number of other BRTF's recommendations including that:

- there should be improved consumer guidance
- advertisements that encourage people to claim compensation should not be displayed on NHS premises
- research should be undertaken into the benefits and costs of raising the small claims personal injury limit of £1,000
- the Chief Medical Officer should lead a cross-Departmental group to assess the economic benefits of greater NHS provided rehabilitation
- the Department for Work and Pensions should lead a group, which includes insurers, lawyers, HSE and the NHS and others, to develop mechanisms for earlier access to rehabilitation
- the Health and Safety Executive should publicise better its information on the beneficial tax provisions relating to employers purchasing occupational health support.

The Government accepted in principle that parties should seriously consider resolving disputes by means of various alternative dispute resolution (ADR) processes including mediation.

B. Conditional fee agreements

Conditional Fee Agreements (CFAs), otherwise known as "no-win, no-fee agreements" were introduced by the *Courts and Legal Services Act 1990* and are used between solicitors and clients. The basis of the agreement is that the solicitor will not get paid for the work done for the client if the case is lost. If the case is successful, the solicitor can charge a success fee in addition to the normal fee to compensate for the risk of not being paid. If the case is lost, the client may, however, be ordered to pay the other party's legal costs and expenses and clients often take out associated "after the event" (ATE) insurance to cover this potential liability.

The *Access to Justice Act 1999* allows the recovery of success fees and the premium for ATE insurance to be recovered from the losing party.

Community Legal Service funding (civil legal aid) is not available for most types of personal injury claims and so many of these actions are now covered by CFAs.

C. *The Promotion of Volunteering Bill*

The *Promotion of Volunteering Bill* was a Private Member's Bill, presented by Julian Brazier MP. It had its first reading on 7 January 2004, was published on 27 February

and had its second reading on 5 March 2004. The Bill was considered by Standing Committee but was talked out at Report stage.

Julian Brazier had made it clear that he wished to promote a bill to reduce the burden of legislation and the risks of litigation for charities and voluntary organisations. The central provision was contained in Clause 2**.** The intention was to protect volunteers from being sued; if they were sued, the court would have had to take sufficient account of special factors such as the relationship between a volunteer and the person for whom the volunteer is providing a service, and the risks inherent to certain activities.

More information about this bill is available in Library Research Paper 04/21.

D. *The Compensation Bill*

The *Compensation Bill [HL]* was introduced in the House of Lords on 2 November 2005 as Bill 35 of 2005-05. The Bill completed its passage through the House of Lords on 27 March 2006 and had its first reading in the House of Commons as Bill 155 of 2005-06 on the same day. The Government has also published Explanatory Notes to the Bill.[11]

Various Government statements about the Bill and what it is intended to achieve have been made since it was first announced.

A background note to the Queen's speech, published on 17 May 2005 by the Department for Constitutional Affairs, spoke of the Government's determination to tackle the perception of the compensation culture and that the Bill "would discourage any false perceptions that compensation is available for any untoward incident that may occur and ensure that invalid claims are discouraged and resisted".

On 26 May 2005, the Prime Minister made a speech to the Institute of Public Policy Research in which he spoke of the "compensation culture" and the need to replace it with a "common sense culture". He said that the *Compensation Bill* would do two things. It would limit the work of claims management companies or "claims farmers". In addition, he said:

> The Bill will also clarify the existing common law on negligence to make clear that there is no liability in negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill. Simple guidelines should be issued. Compliance should avoid legal action. This will send a strong signal and it will also reduce risk-averse behaviour by providing reassurance to those who may be concerned about possible litigation, such as volunteers, teachers and local authorities.[12]

In House of Lords debate on the *Compensation Bill,* Baroness Ashton of Upholland, Parliamentary Under-Secretary of State for Constitutional Affairs, commented on the Prime Minister's speech in relation to how the Bill had actually evolved:

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11 Bill 155-EN, http://www.publications.parliament.uk/pa/cm200506/cmbills/155/en/index_155.htm

12 http://www.pm.gov.uk/output/Page7562.asp

> As regards the Prime Minister's speech, he was speaking before we reached the point of developing this legislation, so, in a sense, his guidelines have translated into the work we have done around the legislation itself.[13]

When the Bill was published on 3 November 2005, Baroness Ashton of Upholland made a written ministerial statement:

> The Bill will provide better safeguards for consumers of claims management services and will reassure those concerned about possible litigation that the law of negligence takes the social value of activities into account and that they will not be found liable if they adopt reasonable standards and procedures.
>
> The Bill sets out the proposed legislative framework for the regulation of claims management services to provide effective protection for consumers and to tackle the bad practices that have been a common feature of the claims management sector. Regulation will be applied to initially to areas where consumers are most at risk - personal injury, criminal injuries compensation, employment, housing disrepair and claims for redress in relation to the mis-selling of financial products such as endowment policies.
>
> The Bill will provide for regulation that is effective, proportionate to the risk involved, and creates the minimum burden necessary. The Bill will deliver a level playing field of consumer protection so that whomever a consumer seeks advice and assistance from they can expect a quality service and proper mechanism for redress if a problem arises.
>
> (...)
>
> The Bill's provision on negligence reflects recent judgments of the higher courts. It makes clear that when considering a claim in negligence, in deciding what is required to meet the standard of care in particular circumstances, a court is able to consider the wider social value of the activity in the context of which the injury or damage occurred. It provides that the court can have regard to whether requiring particular steps to be taken to meet the standard of care might prevent a desirable activity from being undertaken or might discourage people involved in providing the activity from doing so.[14]

E. Other Government action

The *Compensation Bill* is only one of a number of initiatives being undertaken by the Government to tackle the perception of the existence of a compensation culture. Other work includes:

1. Matters outlined in speech by Lord Falconer of Thoroton

In a speech entitled, *Risks and redress: preventing a compensation culture,* Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor, spoke of the Government's commitment to preventing a compensation culture from

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[13] HL Deb 20 December 2005 c 251GC
[14] HL Deb 3 November 2005 cc29-30 WS

developing, to tackle perceptions that could lead to a disproportionate fear of litigation and risk-averse behaviour, to discourage and resist bad claims and to improve the system for those with a valid claim for compensation:

> I believe we are successful as a nation in improving health and safety standards. It is vital compensation claims continue to play their part in that improving health and safety. But we must be clear that our continued commitment to legitimate compensation claims is entirely consistent with rejecting a culture which says for every injury there must be somebody liable to pay. That culture stultifies reasonable risk taking it hits organisational efficiency and competitiveness and it prevents worthwhile activity. For too many organisations - business, public and voluntary sector - it makes them believe - often wrongly - that hoops they have to go through are too many so they do not try.[15]

Lord Falconer confirmed that a Ministerial Steering Group had been established with Ministers from across Government including the Departments of Health, Work and Pensions, and Education and Skills, the Home Office, Office of the Deputy Prime Minister, Treasury, and the DTI. He also confirmed that the Ministerial Steering Group would be supported by various groups, including the legal profession, insurers, trade unions, voluntary and consumer groups, business, local authorities and the judiciary.[16]

Lord Falconer outlined six strands on which the Government was working:

- public awareness: he said it was necessary to help people to understand when they could and could not claim compensation and, in this regard, the Government was working closely with Advicenow, part of the Advice Service Alliance, to promote their *Claiming Compensation* leaflet. Lord Falconer said that the Government could reassure people, and organisations, that they should not cease their activities because of unfounded fears of litigation

- risk management and affordable insurance: those responsible for delivering services and those using them needed to be better informed about their rights and about their responsibilities. Lord Falconer said that part of the Government's work was aimed at promoting affordable insurance and at encouraging insurers to provide incentives for good health and safety performance when setting premiums.

- regulation: introducing statutory regulation quickly would help ensure that consumers are better protected when dealing with claims managers

- advertising: Lord Falconer spoke of advertising which "seems aimed at raising false hopes of compensation and encouraging people to bring weak, spurious claims". He said that he did not favour a ban on all claims advertising and that advertising could promote access to justice for people with genuine claims and raise awareness of

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15 17 November 2005, http://www.dca.gov.uk/speeches/2005/lc171105.htm

16 Further details of the membership of the Ministerial Steering Group and the supporting Action Group are included in a Department for Constitutional Affairs press release 053/05, *Tackling the 'compensation culture' new action group meets,* 23 February 2005, http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=147728&NewsAreaID=2&NavigatedFromDepartment=True

people's rights. However, the emphasis would be on stopping improper advertising. In this regard, the Home Office and Department of Health had contacted chief officers and NHS Trusts to encourage them to take steps to discourage inappropriate personal injury advertising on their premises

- rehabilitation: early rehabilitation could reduce the exclusion of people from the labour market, help the injured party to make a fuller and quicker recovery and reduce the levels of compensation that need to be paid

- improving the claims process: although the Government wanted to discourage bad claims, it did not want to discourage genuine victims from making claims. Where appropriate redress is awarded, Lord Falconer said that it should be done so in a timely, proportionate and cost effective way. This might involve raising the limit for small claims and in all cases, "making a valid claim must result in appropriate and fair redress being provided in a way that is more efficient, less adversarial and less stressful for the injured party". Various matters needed to be addressed including:

    - finding ways to secure earlier admissions of liability
    - considering whether areas of the process might involve duplication of work or unnecessary work
    - ensuring that medical and other expert evidence is proportionate and pitched at the right level
    - promoting earlier and better rehabilitation
    - making more use of alternative dispute resolution

2. The *NHS Redress Bill*

The *NHS Redress Bill*, currently before Parliament, would reform the way lower value clinical negligence cases are handled in the NHS to provide redress, including investigations, explanations, apologies and financial redress where appropriate, without the need to go to court. This Bill will be the subject of a separate Library research paper.

3. Report on effects of advertising

The DCA and the Advertising Standards Authority commissioned research to explore the adequacy of the current regulatory regime covering advertising in respect of compensation claims for personal injuries. A report, *Effects of advertising in respect of compensation claims for personal injuries*, was published in March 2006.[17]

Findings in the Report include:

> There is a strong widely held belief that the UK has developed a culture of people making false compensation claims for personal injuries....
>
> No straightforward link has been identified between public mistrust of the claims process and advertising for claims companies. Advertising is one of many influences....

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[17] http://www.dca.gov.uk/legist/compensation_advertising.pdf

> Response to compensation-claims advertising is centred on the concept of fairness, both in the negative sense of concerns about false claiming and in the positive sense that it is opening up access to justice. Advertising is not a significant barrier to claiming...
>
> Although a small number of those surveyed admit they "might be tempted to make an exaggerated claim for a personal injury", findings do not suggest that exposure to advertising is driving this...
>
> Despite having strongly-held views (often negative) on the topic of injury-compensation claiming, the public has very limited understanding of what is actually involved in making a claim...
>
> Some ads are actively reinforcing mis-perceptions of the claims process. Ads are encouraging the popular view of claiming as an easy, straightforward process...
>
> It is far from clear whether advertisers could, or should, be forced via regulation to do more to educate consumers. Revealing more about the potential complexity of claiming might put off potential legitimate claimants...
>
> Two areas do emerge as potential causes of concern in that there is a clear risk of consumers being misled:
>
> > Conditional-fee arrangements - there is a lack of certainty, even among stakeholders, as to what "no win, no fee" means and whether it protects consumers from disbursements. Consumers are, by and large, processing the term on a very basic level primarily registering the 'no fee' component.
> >
> > The need for a third-party to be at fault - some ads do not mention the need for someone to be at fault for a compensation claim to be possible.
>
> Current advertising Codes would seem to cover the above issues, though if loop holes were being exploited, there may be a need to tighten this framework.

On Report in the House of Lords, Baroness Ashton set out the Government's intentions with regard to the research findings:

> The intention is to present the research to the code-owning bodies, the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice, so that they can judge whether changes to the advertising codes would be necessary or appropriate. The Department for Constitutional Affairs does not plan to legislate on advertising, other than to ensure that the rules governing the activities of persons authorised to provide claims management services place those persons under a duty to market their services responsibly. To breach the rules would be a conduct issue, much as solicitors are covered. If the ASA has upheld a complaint about an advertisement placed by an authorised person, this would likely lead to a disciplinary investigation by the regulator.[18]

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[18] HL Deb 7 March 2006 c719

F. The Constitutional Affairs Committee Report

On 3 November 2005, the Constitutional Affairs Committee announced the launch of an inquiry into Compensation Culture and Contingency Fees, to coincide with the introduction of the *Compensation Bill* and the *NHS Redress Bill*.[19]

The Committee's report, *Compensation Culture* was published on 1 March 2006[20] and the Government's response to the report was published on 3 May 2006.[21] The Report covers a number of areas including the effect of the move to "no win, no fee" conditional fee agreements, the *Compensation Bill*, the *NHS Redress Bill* and risk aversion in public bodies. The Committee's specific comments and recommendations in relation to the law of negligence and the regulation of claims management companies are considered, in context, in later sections of this paper. Other comments and recommendations made by the Committee include:

1. Conditional Fee Agreements

The Committee found that Conditional Fee Agreements (CFAs) were introduced, in part, to widen access to justice, and that there had been some success in meeting this aim. The Committee also considered that CFAs had not directly caused the perception of a compensation culture:

> The statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims. Nonetheless, we agree with the conclusions drawn by Citizens Advice, that the introduction of CFAs (and with it a class of unregulated intermediaries acting as claims managers) has adversely affected the reputation of legal service providers, whether professional lawyers or not. The increased awareness of the public that it is possible to sue without personal financial risk, when combined with media attention to apparently unmeritorious claims being brought, has contributed to a widely held opinion that we do indeed have a compensation culture.[22]

2. Excessive risk aversion

The Committee found that there was plenty of evidence of excessive risk aversion and a mistaken perception that it is caused by litigation.[23] It considered that the media or public perception of a compensation culture did not seem to have been affected by the fact that the actual number of claims might be falling and that, in part, this might be due to the large number of stories of risk aversion in the national media. The Committee cited

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19 Constitutional Affairs Committee Press Notice No.7 of Session 2005-06, *Constitutional Affairs Committee launches inquiry into UK's 'Compensation Culture'* 3 November 2005

20 Constitutional Affairs Committee, *Compensation Culture*, 1 March 2006, HC 754 2005-06, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf

21 *Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: NHS Redress Bill,* Cm 6784, May 2006, http://www.official-documents.co.uk/document/cm67/6784/6784.pdf

22 *Ibid* para 17

23 *Ibid* para 31

published examples of risk averse behaviour and said that risk aversion also affects the willingness of individuals to volunteer.
The Committee found that risk aversion has a number of complex causes including:

> advertising by claims management companies, selective media reporting, a lack of information about how the law works and, on occasion, a lack of common sense amongst those who implement health and safety guidelines. Risk aversion of this sort is a concerning modern phenomenon that has an adverse effect on both individuals and the economy as a whole. Instead of a statutory provision restating the law of negligence what is required is a clear leadership by the Government. This should include an education programme making clear that risk management does not equate to the avoidance of all risk and active engagement by the Health and Safety Executive to ensure that it adopts an approach which is proportionate, it does not over-regulate vulnerable sectors and instead offers appropriate advice and support.[24]

The Committee stressed the importance of addressing the issue of risk aversion:

> Methods of stemming current levels of risk aversion go to the heart of the compensation culture debate. While the number of people claiming compensation may not have risen in recent years, a contrary perception remains. The fear of prosecution by the Health and Safety Executive is likely to combine with the exaggerated fear of being sued to discourage people from planning or undertaking activities which require risk management and may also impact on the competitiveness of business.[25]

In its response, the Government said that it was satisfied that the Health and Safety Executive's (HSE's) approach to delivering reductions in injuries, ill health and working days lost is about controlling risks rather than eliminating them. It said that sensible risk control measures should lead to improved health and safety outcomes and enable, rather than proscribe, potentially hazardous activities to the benefit of the UK economy.[26]

The Government agreed that health and safety should not be used as an excuse to justify decisions taken wholly, or mainly for other reasons.[27] The Government also agreed that more must be done to promote understanding that sensible risk management is about controlling risks so as to protect people, not attempting to eliminate risk altogether. It added that action was already under way to deal with this issue.[28]

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24 *Ibid* p3
25 *Ibid* para 52
26 Paragraph 24, *Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: NHS Redress Bill,* Cm 6784, May 2006, http://www.official-documents.co.uk/document/cm67/6784/6784.pdf
27 *Ibid* paragraphs 29 and 30
28 *Ibid* paragraph 34

II The law of negligence and breach of statutory duty

A. Current law

1. Liability for negligence

Not every careless act gives rise to a claim under the tort of negligence. In order for a claim to be successful, three elements must be present:

- There must be a duty to take care. This is decided in relation to the facts at issue in a particular case, or in other words, did *this* defendant owe a duty of care to *this* claimant. It has been held that, in addition to the foreseeability of damage, in any situation giving rise to a duty of care it is also necessary that there should be sufficient "proximity" between the parties, and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.[29]

- There must be a breach of that duty. It has been held that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[30]

- There must be actual damage caused as a result of the breach of the duty to take care. The damage must not be too remote a consequence of the breach of duty.

Lord Atkin commented on the liability in negligence as follows:

> [I]n English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[31]

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29 *Caparo Industries plc v Dickman* [1990] 2 AC 605
30 *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex 781 at 784
31 *Donoghue v Stevenson* [1932] AC 562 at 580

This is an area of law governed mainly by common law (case law), and, as such, it has evolved largely through a series of court judgments. When considering the nature of a particular duty of care, and the liability of any party, several factors may need to be considered including, for example, the age, experience and expertise of the persons concerned, the dangers of the particular activity, the risks of the injury occurring, the foreseeability of the particular accident occurring, and whether adequate steps were taken to prevent the incident.

Even if a claimant successfully proves all the elements of a claim for negligence, the claim may still fail if the defendant shows that (s)he is entitled to rely on a specific defence. For example, there is a defence of *volenti non fit injuria,* also known as voluntary assumption of risk - or consent - which effectively means that a defendant cannot bring a claim in respect of harm suffered as a result of something to which (s)he consented, for example a lawful surgical operation. In other words the defendant will not succeed if (s)he voluntarily assumed the risk.

2. Breach of statutory duty

A breach of a statutory duty may also give rise to a claim in tort. In some cases there may be an overlap with the tort of negligence, because the existence of a statutory duty may indicate that a risk ought to have been foreseen. However, if a statute imposes strict liability, the defendant may be liable even if (s)he has not been negligent. Strict liability means that liability is conferred simply by carrying out a particular action, or being in a particular place; an intention to act, or any blameworthy conduct, does not have to be shown.

3. Occupiers' liability

Under the *Occupiers' Liability Act 1957* an owner or occupier is responsible for taking such care, as is reasonable in all the circumstances of the case, to see that a visitor will be reasonably safe in using the premises for the purpose of which he is invited to be there. However, the Act does not impose any obligation on an owner or occupier to a visitor who willingly accepts risks.

It may be sufficient, in some circumstances, to discharge the duty to visitors by erecting warning signs, but this will depend on the facts of the case and on whether in all the circumstances this was enough to enable the visitor to be reasonably safe. The provisions of the *Unfair Contract Terms Act 1977* may restrict the occupier's ability to exclude or restrict his liability for negligence. Section 2 of the *Unfair Contract Terms Act 1977* provides:

> (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

> (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

The definition of negligence in the Act expressly includes breach of the common duty of care imposed by the *Occupiers' Liability Act 1957.* However, section 2 of the Act applies only to situations where there is a liability for breach of duty arising from things done in the course of a business or from the occupation of premises used for the business purposes of the occupier.

The *Occupiers' Liability Act 1984* gives a more limited protection to trespassers. It also enables a business occupier to exclude liability to those whom he allows on to his land for recreational or educational purposes, provided that it is not part of his business to grant access for such purposes.

4. Recent Cases

Different views have been expressed about cases in this area. For example, the All Party Group on Adventure and Risk in Society has put together a list headed "Some perverse judgments" as an Appendix to their briefing on the *Compensation Bill.*

Among the cases cited are the following:

> 1) Hedley -v- Cuthbertson, QB Division, Dyson j, (20 June 1997) Supplied by Roy Amlot QC.
>
> A professional mountain guide was held liable for the death of his fellow climber because of his failure to take adequate safety precautions when proceeding with a manoeuvre. This was not based on any dispute about facts. It was based on the judge's decision that he believed the mountain guide overestimated the potential danger posed by a rock fall, in a split second decision, taken on the mountain face.
>
> The decision was received with considerable dismay in the worlds of mountain/rock climbing and other inherently dangerous sports.
>
> 2) Joseph Morrison -v- The Scout Association, Date of Accident 08.08.00, Litigation commenced 06.09.00, Judgement given by H H Judge Brownlee at Newtownards 6.11.02. Supplied by John Grantham Insurance Manager, The Scout Association.
>
> A Scout Campsite had created a water slide on a gentle slope, by laying a length of heavy duty polythene on the ground which was then covered with soapy water. The supervising adults explained that people should not run and 'dive' onto the sheet but that they should simply sit at the top. For safety, the participants were provided with lightweight, plastic, canoeing helmets and were instructed to fasten these securely before descending.
>
> A youth leader with a party of non scout-children decided to have a go. He selected a helmet without reference to the supervising Scout Leaders (who were checking that the helmets were secure) and dived headlong down the slope. The loosely fitted helmet struck the ground and the front slipped down cutting the bridge of his nose.

> This was a relatively minor injury. However, a claim was brought and the matter proceeded to trial. The Scouts lost and the Judge held that the Scout Leaders should have ensured that people could not get on to the slide without the helmets being checked.

Conversely, in House of Lords debate on the *Compensation Bill*, Lord Goodhart, Liberal Democrat Shadow Lord Chancellor and Spokesperson for Constitutional Affairs, said:

> There are, of course, reports of cases where damages have been awarded to people who are the authors of their own misfortunes. It is difficult to find authentic texts for these judgments and I suspect that some of them are urban myths. Some of them are reported; some were decided before the law was clarified in the Tomlinson case; and some are simply bad decisions, which are unavoidable in any legal system.[32]

5. *Tomlinson* v *Congleton Borough Council*

In *Tomlinson v Congleton Borough Council,*[33] the claimant suffered a broken neck as a result of diving into a lake in a council-run country park. Swimming in the lake was prohibited, and the defendants displayed prominent notices reading "dangerous water: no swimming" and employed rangers with the duty of giving oral warnings against swimming and handing out safety leaflets. Reversing the decision of the Court of Appeal, the House of Lords held that any risk of the claimant suffering injury had arisen not from any danger due to the state of the defendants' premises or to things done or omitted to be done on them within section 1(1)(a) of the *Occupiers' Liability Act 1984,* but from the claimant's own misjudgment in attempting to dive in too shallow water; that that had not been a risk giving rise to any duty on the defendants; and that, in any event, it had not been a risk in respect of which the defendants might reasonably have been expected to afford the claimant some protection. The council was not legally obliged to safeguard irresponsible visitors against obvious dangers. Lord Hoffman said:

> I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.[34]

Lord Hobhouse commented on the policy of the law in this area:

> [I]t is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly

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32 HL Deb 7 March 2006 c647
33 [2004] 1 AC 46
34 At pp84-85

> entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. ...In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. [35]

B. The Bill

Part 1 deals with negligence and breach of statutory duty.

Clause 1 is entitled "Deterrent effect of potential liability" and, according to the Government's Explanatory Notes published with the Bill, it is intended to deal only with the issue of whether there has been a breach of the duty of care (and not with the other elements necessary to establish a claim in negligence[36]):

> 10. This provision is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. It is 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.[37]

Clause 1 has provoked much debate, in part as to whether it would serve any useful purpose, and so is set out in full below:

> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

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35 *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 at 96-97

36 See section II A 1 of this paper above

37 Bill 155-EN, http://www.publications.parliament.uk/pa/cm200506/cmbills/155/en/06155x--.htm#index_link_2

> (b) discourage persons from undertaking functions in connection with a desirable activity.

The Government's Explanatory Notes state that "this provision reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts".

The Clause was originally intended to deal only with negligence. However, following concerns raised in earlier debates, a Government amendment was made on Report to extend the scope of the Clause to include breach of statutory duty.

Clause 2 was added by way of amendment moved by the Conservative peer, Lord Hunt of Wirral, on Report, and would provide that an apology, offer of treatment or other redress shall not of itself amount to an admission of negligence or breach of statutory duty. On Report, Baroness Ashton of Upholland opposed the proposed amendment although she said that she appreciated and understood what was being sought.[38]

The amendment was passed by 157 votes to 144.

At third reading, Baroness Ashton announced that, after reflection, the Government accepted the amendment as it stood.[39]

C. Issues and debate

1. Constitutional Affairs Committee Report

In its recent Report, *Compensation Culture,* the Constitutional Affairs Committee referred to Clause 1 as "the most controversial element" of the Bill and said that it should not be included. It said that it was not clear precisely what effect the provision was meant to have and that it seemed unnecessary to use primary legislation merely to restate the existing law. A number of witnesses, including the Law Society, representatives from the insurance industry and the TUC had raised concerns about the clause. The Committee also quoted evidence from the Lord Chief Justice:

> The Lord Chief Justice, while wishing to avoid too specific a comment about Clause 1, thought that it was "quite impossible to encapsulate the law of negligence in a single sentence". He said:
>
> I do not know who is going to read [clause 1]. The average man in the street is unlikely to be reading clause 1. As far as the judges are concerned, and judges and lawyers are the ones likely to be reading statutes, the clause sets out to define the position at common law, not to change it, and I would hope that most judges are now fairly well aware of the position at common law. Lord Hoffmann enunciated it very clearly fairly recently in the case of Tomlinson.[40]

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38 HL Deb 7 March 2006 c 664

39 HL Deb 27 March 2006 c575

40 Constitutional Affairs Committee, *Compensation Culture*, 1 March 2006, HC 754 2005-06, para 61 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf

The Committee considered volunteers to be an important interest group that the Clause aimed to protect and that the Government should clarify whether or not it was intending to provide them with some form of defence to negligence, and if so how consequential issues and difficulties would be addressed.

The Committee concluded:

> We agree with the majority of the evidence that we have received that clause 1 to the Compensation Bill [Lords] is unnecessary. We have concluded that it should not be in the Bill. While it is undoubtedly well meaning, it satisfies neither those who wish to reduce risk aversion in society, nor those requiring legal certainty. It is impossible to encapsulate the law of negligence in a single sentence.
>
> If clause 1 were implemented, it would undoubtedly, at least in the short term, lead to an increase in costly satellite litigation to define what is a "desirable activity". Moreover, the wide breadth of that term (or any alternative proposed such as "social value" or "utility") could have unforeseen consequences, since while the Government states that it is not intended to change the law, it is likely that interested parties will seek to rely upon the clause before the courts in order to improve their shield against liability. This could result in possibly inconsistent decisions where judges try to refine further the concept of "desirable activity".[41]

In its response, the Government disagreed with the Committee's conclusion which it said was based on certain misconceptions about the nature and purpose of the clause, and that the Committee did not adequately recognise the benefits the clause would bring:

> The Government believes that the clause will have a range of different benefits. It will reassure those concerned about possible litigation about how the law in this country works, and will help counter the view that organisations should cease activities because of a fear of litigation. It forms a valuable part of the work the Government is undertaking to tackle perceptions that lead to risk averse behaviour and fear of litigation, and to improve the system for those with valid claims. And it will support the other initiatives being developed as part of that work to improve public awareness and promote better risk management. It will also ensure that all courts are fully aware of the guidance given by the higher courts which is reflected in the clause. [42]

The Government confirmed that the clause was intended to reflect the existing law in one area, that is the ability of the courts, when considering what amounts to reasonable care, to take into account not only the likelihood and seriousness of possible injury, but also the nature of the activity from which the risk arose and the impact of the preventative measures which it is argued should have been taken.

The Government discounted the Committee's concerns about the term "desirable activity" and satellite litigation:

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41 *Ibid* paras 67-8

42 Paragraph 39, *Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: NHS Redress Bill,* Cm 6784, May 2006, http://www.official-documents.co.uk/document/cm67/6784/6784.pdf

> the clause will not create any new cases – it simply identifies a factor which the courts can already take into account as part of a process they already undertake in cases of negligence and breach of statutory duty. Also, the clause is permissive, not mandatory – it does not require the court to consider the desirability of an activity in every case. The court can decide whether it is relevant in any particular case, as it does now. In addition, the court is not required to give the factor in clause 1 any greater weight than the many other factors that will be relevant in an individual case. So while defendants may wish to argue that the activity to which the claim relates is a desirable one, the decision the court will reach on the claim does not depend on its view on that point.[43]

The Government also confirmed that the desirability of an activity would not provide a defence against carelessness, and that a defendant would not be able to use the argument that the activity he or she engaged in was desirable to avoid having to show that he or she took a reasonable degree of care.

The Government considered that the clause would help to reduce the number of "ill-conceived, speculative or frivolous claims", and would influence the basis on which settlements are reached: "It will discourage the bringing of claims based on the proposition that reasonable care involves all steps required to prevent accidents in any conceivable circumstances, regardless of the effect of requiring those steps".

The Government also confirmed that it had no intention of changing the law in a way which would put claimants injured through the negligence of volunteers or others at a disadvantage.

2. House of Lords Debate

Introducing the Bill at second reading in the House of Lords, Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, Department for Constitutional Affairs spoke of the Government's determination to "tackle practices that stop normal activities taking place because people fear litigation, or have become risk-averse. We want to stop people from being encouraged to bring frivolous or speculative claims for compensation."[44] She continued that the provisions of the Bill would reassure people who are concerned about being sued that, if they adopt reasonable standards and procedures, they would not be found liable.

Clause 1 was discussed for more than seven hours in Grand Committee and then for more than two hours on Report. Peers debated proposed amendments to Clause 1 but also whether the Clause actually achieved anything and whether it should be included in the Bill.

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[43] *Ibid* paragraph 42

[44] HL Deb 28 November 2005 c81

a. The purpose of Clause 1 and whether it should be removed

Baroness Ashton stated throughout the debates that Clause 1 was intended to reflect the current law as set out by the courts in a number of cases, and not to change the law. In Grand Committee, Baroness Ashton said:

> We are not amending the law; using the Tomlinson judgment to a degree but not exclusively, we are trying to bring together something that says, "This is the state of the law".[45]

In Grand Committee, Baroness Ashton set out what the Clause is intended to achieve:

> we have a real perception that the law has become in doubt, either because people believe that the courts are making decisions in an inappropriate or wrong way, or because people's behaviour is changing due to their belief that the law does not do what we say it does. We want to make sure that the law is not in doubt. I understand from the advice that I have as a government Minister ... that it is a function of legislation to remove doubt in the law. I am not trying to amend the law, but to take away doubt.[46]

Baroness Ashton refuted a suggestion by Lord Phillips of Sudbury, the Liberal Democrat Spokesperson for the Home Office, that Clause 1 would effectively fix the common law as it stands meaning that the House of Lords would not be able in the future to go back to the issues covered by the Clause. Baroness Ashton said that she did not believe that Clause 1 would bind the House of Lords inappropriately to the way in which the common law operates now or would operate in future.[47]

The Conservative peer, Lord Hunt of Wirral, expressed his party's support for the general objective of bringing clarity to the law of negligence.[48] He moved amendments which he said were designed to improve the Clause rather than to defeat it.[49] However in Grand Committee he said:

> [The Minister] clearly said that this clause does not amend the law. I have to reveal to her that the courts will believe that we are amending the law. They do not believe that—if I may put it like this—a selection of noble Lords with some of the finest brains in the country would spend their time seeking to pass a clause that did nothing at, and that did not amend the law one jot or iota. We have to clarify this: either the clause amends the law, or it does not amend the law. If it does not amend the law, what is the point of it?
>
> Courts will take the view that we do not sit around passing laws that have nil effect—that do nothing at all.[50]

Lord Hunt also spoke of the difficulties the Clause might create:

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45 HL Deb 15 December 2005 c190GC
46 HL Deb 15 December 2005 c196GC
47 HL Deb 20 December 2005 c264GC
48 HL Deb 28 November 2005 c90
49 HL Deb 15 December 2005 c224GC
50 HL Deb 15 December 2005 c194GC

> It might be an oxymoron to say that Clause 1 is there so that people will understand the law. In fact, Clause 1 introduces a number of concepts which make the law more difficult to understand. Either the law is satisfactory at present, as the Minister says it is, or it is not, in which case Clause 1 is necessary.[51]

Lord Goodhart, Liberal Democrat Shadow Lord Chancellor and Spokesperson for Constitutional Affairs, called Clause 1 "at best unnecessary and may well lead to confusion and still more litigation".[52]

In a Grand Committee debate on whether Clause 1 should stand part of the Bill, Lord Goodhart argued that it presented a danger:

> The courts may regard it as saying something other than simply restating the law. The courts, after all, tend to regard legislation as creating new law. Therefore, the fact that this new provision appears in Clause 1 increases the risk of litigation because it makes the standing of existing case law uncertain. Is Tomlinson still the last word on the law or have we moved on from that? If so, how far and in what direction? A court can take into account Explanatory Notes as an aid to the interpretation of a statute, but it will not allow Explanatory Notes to override what it regards as the unambiguous meaning of a provision.
>
> Frankly, the Government are treating a real problem with a placebo. It may make you think you feel better, but it does you no real good. There has of course been some pressure that we should have a different Clause 1 that goes beyond the restatement of law and changes the law in favour of the defendants. That is something that we would object to. I believe that we should not lower the duty of care to a level at which injured claimants, many of whom are children, cannot recover damages where there has been genuine negligence as opposed to a justifiable acceptance of the risk. Some school trips are not well managed and involve running risks that are not proportionate. The fact that activities that may be desirable and carry a public benefit have inherent risks does not exclude the duty, even when you accept those risks, to minimise them so far as practicable.[53]

The Crossbench peer, the Earl of Erroll argued that it was essential that the clause stand part:

> The misconception is real. It is out there with the general public, lawyers and insurance companies, whether you like it or not. Why not restate the law in a precise way so that lawyers can see in one brief clause exactly what it is?[54]

The Conservative peer, Viscount Eccles disagreed:

> If something does nothing in a practical sense but does something only in a vaguely hopeful psychological sense, I do not think it is worth including.[55]

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51 HL Deb 15 December 2005 c198GC
52 HL Deb 28 November 2005 c87
53 HL Deb 15 December 2005 c232GC
54 HL Deb 15 December 2005 c236GC
55 HL Deb 15 December 2005 c237GC

Lord Goodhart returned to this issue on Report and moved an amendment to leave out Clause 1 which he said was a serious point of principle.[56] He set out his concerns:

> The court will have to consider what a desirable activity is. To what extent will the fact that the activity is desirable mean that standards of care are reduced? With Clause 1, I fear that we will have a good many years of satellite litigation over the interpretation, which will lead to restrictions on the ability of the common law to develop flexibly and in line with the needs of the day.
>
> Clause 1 could be interpreted so as to restrict what I think most of us would regard as legitimate claims for damages. ... The fact that the leader may be a volunteer is no excuse for their lacking the necessary skill.[57]

Lord Goodhart also repeated a point made by the Association of Personal Injury Lawyers that if schools, not-for-profit organisations or other promoters of desirable activities have reduced standards of care, parents would be less likely to entrust their children to them and access to activities would be reduced.

Lord Lucas disagreed with the proposed amendment and said that "Clause 1 is the heart of the Bill".[58]

The Earl of Erroll also supported Clause 1:

> Common law can still evolve; all we are trying to do is put a stake in the ground and say, "We think that the courts, as the legislators, have been drifting in the wrong direction. Please look at which direction you are going in, and evolve the common law in a slightly different direction, strengthening the power of the risk takers in society to be able to go out and take risks".[59]

Lord Hunt disagreed that the Bill would be better off without Clause 1:

> Part 1 is not necessarily about changing the law, but it certainly is about changing the manner in which people and courts behave. Even if it does not go as far as one would wish, I agree with my noble friend Lord Lucas that, at least, it takes us in the right direction. ...
>
> I therefore see Clause 1 as part of a broader campaign to restore common sense and civility to society in general and to the litigation system in particular.[60]

Lord Goodhart pressed for a division and his amendment was defeated by 173 votes to 55.

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56 HL Deb 7 March 2006 c647
57 HL Deb 7 March 2006 c648
58 HL Deb 7 March 2006 c649
59 HL Deb 7 March 2006 c651
60 HL Deb 7 March 2006 c654

b. Proposed amendments

Baroness Ashton resisted an amendment moved by Lord Hunt in Grand Committee which would have changed the word 'may' to 'shall' in Clause 1, with the effect that courts would have been obliged to consider the matters set out in the Clause. Lord Hunt said that he envisaged that there would be 'endless satellite litigation' about both whether and how the judge should exercise the discretion.[61] Baroness Ashton defended the use of the word 'may':

> The reason why we said "may" rather than "shall" is that when a court looks at a negligence claim it takes into account all the circumstances of an individual case; those circumstances, of course, vary dramatically from one case to another... It would not be appropriate to require the courts to take the factor in Clause 1 into account in all cases, which would be the effect of changing "may" to "shall". In some cases, it will just not be relevant, so by making that change we would be trying to make the courts do something that in the normal course of their activities we would not expect them to do—which is, to take into account factors that have no relevance at all. So we have said that they may take them into account, but we are not requiring them to, because of the range and variety of cases.[62]

Peers also debated the term 'desirable activity' and whether this should be replaced with something which might be more easily understood. Lord Hunt moved an amendment in Grand Committee (later withdrawn) proposing the term 'purpose of public benefit'. He said that 'desirable activity' would be a step into the unknown because nobody would know what it means[63] and that an activity desirable in the minds of some would be undesirable in the minds of others.[64] He intended that "public benefit" would be defined by a separate amendment.

Lord Goodhart agreed with Lord Hunt;

> if we are saddled with Clause 1, we should try to make it as good as possible. I entirely agree with the noble Lord, Lord Hunt, that the main problem is the use of the phrase "desirable activity". It raises the questions of desirable to whom? What are the criteria for deciding what is desirable? What distinguishes what is desirable from what is undesirable? All those add unnecessary complications. It is much better to use the test of public benefit or public interest. That is a clearer definition by far than using "desirable activity", and the courts would not have great difficulty deciding what is in the public interest or for the public benefit; it is the sort of decision that courts constantly have to take. That reflects the views of the Appellate Committee on the Tomlinson case, where an adverse decision from the Lords might well have led to the closure of a public park—at least for a period while works were undertaken to make sure that the quarry in which the lake was situated was totally inaccessible. ...
>
> Having got that far, I do not think it either practicable or desirable to try to define public interest or public benefit, and it is better to leave it to the courts. Any

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61 HL Deb 15 December 2005 c199GC
62 HL Deb 15 December 2005 c200GC
63 HL Deb 15 December 2005 c203GC
64 HL Deb 15 December 2005 c205GC

> definition could lead to the exclusion of activities that were in the public interest, or the inclusion of activities that were not.[65]

Baroness Ashton confirmed that the term 'desirable activity' had been chosen deliberately because it had not been used previously in legislation and would enable the courts to consider a range of different activities in a new way.[66] She called the term a "comprehensible phrase that the courts will be able to examine and interpret."

Baroness Ashton resisted an amendment moved in Grand Committee[67] and then again on Report[68] by Lord Hunt of Wirral which attempted to restrict liability to those who willingly accepted a risk or entered onto land or into premises with the intention of committing an offence. Baroness Ashton said that it could be difficult to assess the intentions of the claimant and that the courts were already able to look at the whole range of circumstances.[69] On a division on Report, the amendment was defeated by 147 votes to 109.

In Grand Committee, Lord Hunt of Wirral moved several amendments, based on the example of legislation in New South Wales, intended to:

- Introduce the concept that if contributory negligence is established, damages might be reduced by up to 100%.[70] Lord Hunt explained that the *New South Wales Civil Liability Act 2002* sets out that the risk must be foreseeable and not insignificant. Lord Goodhart argued that 100 per cent contributory negligence was a logical impossibility. Baroness Ashton resisted the amendment, which was withdrawn, saying that the *Law Reform (Contributory Negligence) Act 1945* already allowed the courts to take sufficient account of contributory negligence and that case law had established that the courts seemed able to take it into account in an appropriate and proper manner.[71]

- State that a defendant would not owe a greater duty to a claimant who is intoxicated and also that it would be assumed that a claimant had contributed to his injury.[72] Baroness Ashton felt that this would be a considerable shift in the law and that the present law already allowed the courts to weigh up all the evidence and come to a conclusion that put the carelessness of an individual in the right context.[73]

- Allow the courts to take into account the financial and resource constraints on public authorities when considering whether steps should be taken.[74] Lord Hunt said that the amendment provided the opportunity to reflect on the "very substantial costs involved in frivolous and vexatious claims". The Earl of Erroll argued that this

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65 HL Deb 15 December 2005 c205GC
66 HL Deb 15 December 2005 c213GC
67 HL Deb 15 December 2005 c225GC
68 HL Deb 7 March 2006 c669
69 HL Deb 7 March 2006 c673
70 HL Deb 20 December 2005 c258GC
71 HL Deb 20 December 2005 c264GC
72 HL Deb 20 December 2005 c267GC
73 HL Deb 20 December 2005 c271GC

> provision should apply to all, not just to public authorities. Baroness Ashton pointed to other work which was being done to support organisations to accept real claims but to resist bad claims and not just to give in and settle. She said that legislation would not be needed but rather that the problem should be tackled by good example and practice.[75]

The Conservative peer, Lord Lucas, moved an amendment in Grand Committee which would have added a new clause to make it possible for someone to avoid liability by means of a notice. Baroness Ashton argued against the amendment, which was withdrawn. She said that there were circumstances in which a notice would be inadequate and that it would not be possible to determine all circumstances.[76]

The Crossbench peer, Lord Greenway, moved an amendment in Grand Committee intended to require the court to take into account any adverse consequence to the community of a finding of negligence. He explained:

> Where negligence is found in any case it can profoundly affect any community in relation to sporting or recreational activities taking place. In the main instance it deters would-be volunteers who are frightfully important in the scheme of things in relation to recreation.[77]

Baroness Ashton said that, in general, the courts are very capable of determining the circumstances and taking into account all the different factors.[78] She acknowledged the importance of volunteers and said:

> It is important that we equip volunteers with the confidence as much as anything that in the circumstances in which they operate—provided they operate effectively, properly and with due care—they will be treated properly and not be found wanting, if that is not appropriate.
>
> ... On the other hand, particularly with children and young people, you have to ensure that the quality of the support they get when taking on activities that may be "risky" is adequate to ensure that they are not put at undue risk. That balance is important.

Baroness Ashton pointed to difficulties with the proposed amendment:

> First, if someone has been found liable, we have someone who needs support or help who has been a victim, and their ability to get redress has been reduced or negated by another factor, which is not right. Secondly, it could have an effect that I am sure is not wanted, which is about making sure that activities that have a major impact on the community are properly insured, because insurance plays an important part.
>
> I do not want to do anything in the Bill that might push us in that other direction of encouraging people to act less responsibly.[79]

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74 HL Deb 20 December 2005 c273GC
75 HL Deb 20 December 2005 c279GC
76 HL Deb 15 December 2005 c242GC
77 HL Deb 20 December 2005 c288GC
78 HL Deb 20 December 2005 c289GC
79 HL Deb 20 December 2005 c290GC

On Report, Lord Hunt of Wirral moved an amendment designed to exclude from Clause 1 claims by an employee against an employer arising out of the course of his employment.[80] He explained why he felt that this was necessary:

> The risk created by Clause 1, in the workplace context, is that we may be in real danger of creating a two-tier standard of health and safety. If the "desirable activity" test applies in employers' liability claims, we will in effect be saying that, where an employee has been injured—because of breach of statutory duty by the employer—the nature of the activity in which the employer is engaged may make a difference to the outcome. I know that local authorities and other public sector employers are concerned about that. They certainly do not want to be regarded as second-class employers, particularly in the field of health and safety. Those concerns are, understandably and rightly, mirrored by those of the TUC on behalf of employees.[81]

Baroness Ashton resisted the amendment saying that, in the *Tomlinson* case, it had been made clear that courts could also consider the extent to which the claimant was freely and voluntarily undertaking the activity in question. The court had specifically given as an example the situation of an employee who might have no genuine or informed choice if their work required them to take particular risks. She put on record how Clause 1 would affect employees:

> It is important that the courts can consider the balance between these factors and the other factors involved in reaching an appropriate decision in each individual case. Clause 1 does not affect the courts' ability to do this or to reach the view that the factor in Clause 1 might be outweighed by other relevant factors. Concern has been expressed that the clause might lead to people working in one area—for example, the emergency services—being treated differently from those in other areas because one type of activity might be considered desirable while another would not. ... That is not the case. The factor in Clause 1 is not given any greater weight than any other relevant factor, and the courts will consider all relevant points in reaching a decision. In addition, Clause 1 will not be applicable in the vast majority of cases of a claim for breach of statutory duty between an employee and his or her employer, because the statutory duties in question are strict duties and liability does not depend on whether the employer took reasonable care. ...
>
> The clause does not change the law in a way that would lead to the courts treating one type of worker any differently from another, or that would disadvantage employees generally. As I have said already, it is important to recognise what Clause 1 does and does not do. It provides that courts may, not must, take into account whether particular steps that, it is argued, should have been taken to avoid the injury loss would have had a particularly adverse impact on the desirable activity. It does not require the court to take that factor into account, nor to give it any weight; still less to make it a paramount consideration. I hope that I have put on the record absolutely clearly what this clause would not do and the effect it would not have on employers and employees.[82]

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[80] HL Deb 7 March 2005 c676
[81] HL Deb 7 March 2005 c677
[82] HL Deb 7 March 2006 cc679-80

The amendment was withdrawn.

Baroness Ashton also resisted a further amendment moved by Lord Hunt on Report which would have restricted the clause to claims for damages in respect of personal injury and death. She said that this would be contrary to the Government's approach, because it would reduce the flexibility available to the courts to balance the impact of precautions against the risk involved and the nature of the activity giving rise to the risk.[83]

D. Reactions to the proposals

1. All Party Parliamentary Group on Insurance and Financial Services

The All Party Parliamentary Group on Insurance and Financial Services (APPGIFS) recommended that Clause 1 should be dropped:

> This is not a new definition of negligence. So we ask what is the government hoping to achieve? Is it an attempt to deter frivolous claims? We are sceptical that it will have this effect because if it leads to more activity or fewer precautions or both, more claims could result. Perhaps it is meant to encourage organisers of public events or school trips to be less fearful of possible legal action if something goes wrong. Certainly that does appear to be the political thinking behind the Bill as evidenced by ministerial comment.
>
> (...)
>
> There is a very serious danger of expensive and time consuming litigation being launched to clarify the purpose of the Bill if Part 1 of the bill stands as proposed.
>
> On balance, while we there are ways of strengthening Part 1, the APPGIFS believes it serves little useful purpose: it should be dropped.[84]

2. All Party Parliamentary Group on Adventure and Risk in Society

The All Party Parliamentary Group on Adventure and Risk in Society (ARISc) stated that it supports sensible safety measures, but that changes in the law are needed "to prevent the slow strangulation of risk taking and adventure in sport and recreation". The Group welcomed Clause 1 but called for amendments to strengthen its operation:

> We believe that Clause 1 of the bill represents a modest step in the right direction. Strengthening the bill with the amendments proposed here would take us further down the same road
>
> Adventure training and recreation groups in Britain today have already gone well beyond the sensible process of establishing good safety procedures. Whole areas of activity have disappeared and many have withdrawn from providing opportunities for young people to take responsibility. To take just two examples,

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83 HL Deb 7 March 2006 cc681

84 All Party Parliamentary Group on Insurance and Financial Services, *Report of an enquiry into the Compensation Bill and the Compensation Culture,* November 2005, http://db.riskwaters.com/data/post/pdf/compensationreport1105.pdf

> the second biggest teaching union has advised teachers not to participate in school trips and there are 80,000 youngsters who cannot get places in the Scouts or Girl Guides because of a shortage of instructors. A large-scale survey of barriers to volunteering in sport and outdoor activities was carried out in 2003 by the Central Council for Physical Recreation (CCPR). Of the eight factors identified as barriers to volunteering in theses fields, "The blame culture and fear of litigation" came top by a considerable margin.
>
> (...)
>
> We believe that the problem is the failure of many in the courts to recognise the inherent risk in giving people the opportunity for adventure and taking responsibility. Some helpful judgments by the House of Lords in the last three years have only partially restored the balance. The steady growth in insurance premia and large numbers of out of court payments simply reflect genuine appraisals by legal advisers of the attitudes of the courts in recent years, rather than their pandering to urban myths.[85]

ARISc also commented on the position taken in other common law jurisdictions:

> The growth of perverse judgments in some courts over the last few years has been a feature of all the major common-law jurisdictions, apart from New Zealand where negligence claims in this field have been effectively nationalised. To combat it, many American states and Western Australia -- whose legal climate is arguably closer to our own -- have taken steps to protect sport and adventure training from unreasonable litigation.

3. The Law Society

The Law Society expressed concerns about the inclusion of Clause 1 in the *Compensation Bill*:

> We recognise that the Government's intention is that Clause 1 should simply restate the law, rather than amend it. However, we are concerned that, as currently drafted, Clause 1 may encourage the courts to take a different approach. The clause appears to imply that courts may find an organisation to have been negligent on the facts, using the reasonable care test, but then go on to decide that the organisation should not be liable for that negligence where the organisation has made it clear that a finding of negligence will lead to them ceasing to undertake the activity in question. We believe that this would undermine proper safety standards and deny redress to people who have been injured by negligence.
>
> The Law Society urges Government to confirm that it does not intend to change the current law, and to explain why it does not believe that Clause 1 would have that effect. If, for example, the negligence provision in this Bill could allow schools

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[85] *Compensation Bill (Lords) Proposed amendments by the All Party Group on Adventure and Risk in Society*

> to provide a lower duty of care, it could be a licence for people to take dangerous risks. That cannot be right.[86]

4. Association of British Insurers (ABI)

The ABI expressed concern that care must be taken to ensure that the clarification of the law of negligence in the Bill does not trigger expensive cases to test out the new boundaries:

> The ABI agrees that it is essential that the law on negligence is clearly understood. Measures that address this successfully are welcome. But lawmakers should proceed with care in order that we don't soon find ourselves plunged into a further round of test cases.[87]

5. Trades Union Congress (TUC)

The TUC expressed concern that Clause 1 might promote uncertainty and also about the effect the Clause might have on claims by workers:

> The TUC is concerned that the provision on negligence means that the current common law (which is both clear and well established) will now have to be read in conjunction with this new provision. This will lead to a period of uncertainty. In addition the TUC is concerned that the proposed wording will mean that any worker injured in a 'desirable activity' will have to show a higher degree of negligence than a worker suffering the same injury in any other activity. It is unclear what constitutes a 'desirable activity'. It is likely to be interpreted by the courts as including areas such as school excursions, and volunteer work, but could also be interpreted as covering many public or essential services.
>
> The Government has indicated that its intention is simply to clarify the existing law to make it clear that there is no liability and negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill. The TUC does not believe that the proposed wording within the bill does that. Instead the provision will lead to a two-tier civil compensation system with workers in occupations deemed a 'desirable activity' being denied access to the civil courts.
>
> There have been indications that the proposed wording is meant to reflect the judgement in Tomlinson v Congleton BC, which looked at the issue of liability in a case where a youth seriously injured himself after diving into a lake where diving was prohibited. However there are at least two significant differences between the Bill and the judgement given in the Court of Appeal. The first is that this judgement referred to 'social value' and not 'social activity'. These are very different and the latter is much wider.

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[86] The Law Society, *Parliamentary Brief, Compensation Bill. Second Reading House of Lords,* 28 November 2005, http://www.lawsociety.org.uk/secure/file/148585/d:/teamsite-deployed/documents/templatedata/Internet%20Documents/Parliamentary%20briefings/Documents/compensationbillllordssecondreading.pdf

[87] Association of British Insurers, Compensation Bill – ABI Briefing Note, 28 November 2005, http://www.abi.org.uk/Display/File/595/Compensation_Bill.pdf

Secondly, the judgement was never intended to cover those who undertake an activity as part of their work. It related to those who choose to take risky activities. This was made quite clear in the judgement, where Lord Hoffman commented 'a duty to protect against obvious risks...exists only in cases where there is no genuine informed choice, as in the case of employees.' This clear distinction is not made in the Bill.

Whether any new legislation is necessary is highly doubtful. The Tomlinson judgement stands regardless of any legislation. In addition, the TUC has shown in its recent report 'The Compensation Myth' that there is no compensation culture within the UK. Personal injury claims are falling and the real scandal is the low levels of compensation awarded to those few workers who are successful.

The TUC therefore believes that the proposal for a clause intended to deter compensation claims is not only unnecessary, but does not even meet the aims the Government had claimed for it.[88]

6. Girlguiding UK

Girlguiding UK is a registered charity and states that it is the UK's largest voluntary organisation for girls and young women, with around 600,000 members. Girlguiding UK welcomed the Bill but called for the tightening up of Clause 1 to ensure that it would be effective in reducing the fear of litigation for its 70,000 volunteers including:

- When considering a claim of negligence, the court should take into account if the person undertaking the activity obeyed the instructions given by the individual providing the activities.

- With a view to combating the climate of fear, Girlguiding UK believe an apology or expression of sympathy or regret should not constitute an admission of liability and should not be relevant to determination of fault.

Girlguiding UK Head of Guiding Development, Jennie Lamb commented:

> Girlguiding UK recognises the need to maintain high safety standards in providing any activity for children and young people and hopes that the Compensation Bill will succeed in eliminating the climate of fear for volunteer leaders. We want the Bill to renew the recognition by the public at large that there is an acceptable degree of risk in worthwhile activities for children and young adults.
>
> We have a waiting list of 50,000 girls and need 8,000 more volunteers to fulfil demand. It is therefore vitally important that common sense must come to the fore. The perception that anyone working with other people's children risks being sued for even the most minor accident is hugely detrimental to children's freedom to partake in out of school groups such as guiding, by discouraging existing volunteers to run activities and deterring new ones.
>
> Special attention should also be made in the Bill to the expression of sympathy or regret by a volunteer in the event of an accident. Accidents, by definition, are

[88] TUC, *Compensation Bill,* 16 November 2005, http://www.tuc.org.uk/h_and_s/tuc-11020-f0.cfm

> incidents without blame. The Bill should acknowledge that an expression of sympathy or regret should not be relevant in determining fault.[89]

7. The Scout Association

Derek Twine, Chief Executive of The Scout Association, gave evidence to the Constitutional Affairs Committee about the difficulties encountered in recruiting adult volunteers:

> Scouting's experience is that the increasing burdens of the threat of litigation, regulatory legislation, and trustees' compliance, have a negative impact on its efforts to recruit and retain the adult volunteers, and on the activities provided.
>
> Derek testified that there is no doubt that for the volunteers who give freely of their time, then the negative impact of the "compensation culture" is a reality.
>
> He was able to quote data from a survey recently carried out by The Scout Association. The survey, conducted in December 2005 of over 1,100 adult volunteers, told us that:
>
> - 49% agree or strongly agree that the retention of existing volunteer leaders is made more difficult because of fears of being sued
> - 69% agree or strongly agree that the recruitment of new volunteer leaders is made more difficult because of fears of being sued
> - 92% agree or strongly agree that risk-aversion is affecting the range and nature of activities being offered to young people
>
> Much of Scouting's educational programme is based on young people learning to make decisions for themselves through adventure in the outdoors. This is a challenge in an increasing climate of an anti-risk culture. Currently, 30,000 girls and boys are on the waiting list to join Scouting, but they are denied the opportunity because it is proving increasingly difficult to recruit enough volunteer adult leaders.
>
> Derek advised that if a volunteer leader in Scouting follows the rules, the procedures and the risk-management, then they will be supported, both by a comprehensive insurance regime and by training, but in the current "compensation culture" climate many of those volunteers still feel nervous and fearful, and modify the programme of activities to eliminate risk.
>
> Derek briefed the Committee that Scouting has developed training and resource material to help its volunteers assess and sensibly manage risk (freely available on the web at www.scouts.org.uk), but external pressures are often seen as being to avoid all risks at all times.[90]

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89 *Girlguiding UK response to Compensation Bill,* 1 December 2005, http://www.girlguiding.org.uk/xq/asp/sID.140/aID.1591/qx/new/press/article.asp#maincontent

90 *Scout Association CEO warns 'compensation culture' is affecting adult recruitment,* 11 January 2006, http://www.scouts.org.uk/news/archive/2006/jan/110106.html

8. Association of Personal Injury Lawyers

The Association of Personal Injury Lawyers (APIL) welcomed the call made by the Constitutional Affairs Committee for clause 1 of the *Compensation Bill* to be dropped:

> Denise Kitchener, the association's chief executive, said the Constitutional Affairs Select Committee, in its report on compensation culture, had injected common sense into the debate surrounding the controversial clause.
>
> "The aim of this part of the Compensation Bill was to change the perception of those who wrongly believe they can be sued for anything," she said. "APIL has always maintained that perceptions cannot be addressed or changed through legislation and, as the select committee highlights in its report, the law of negligence cannot be encapsulated in a single clause."
>
> "Clause 1, if it remains in the bill, is likely to cause confusion and further unwanted debate about what the law means," said Kitchener. "What is actually needed is education, not legislation, about how the law works."
>
> APIL also backed the select committee's assertion that risk aversion should be addressed through "...changing practices and perceptions in the field of health and safety and risk management..."
>
> "We strongly believe that it is a lack of education about risk assessment which leads people to fear being sued," said Kitchener. "It is crucial that those in a position of care have a clear understanding that provided they discharge their duties, they have nothing to fear from the law.
>
> "APIL has repeatedly said that responsible risk management should promote activity and not restrict it, and we agree with the committee that far more has to be done to educate people to this effect."[91]

III Regulation of claims management services

Part 2 of the *Compensation Bill* deals with the regulation of claims management services. A significant number of Government amendments were passed at Report stage, in part to address concerns expressed in earlier debates, and also to address concerns raised by the Delegated Powers and Regulatory Reform Committee which considered it inappropriate that so many key features of the proposed regulatory scheme should be left to delegated legislation.[92] The Committee's conclusion was "in view of the nature and extent of the proposed delegations, we recommend that the House seeks extensive amendment of this bill," both in relation to specific provisions and in relation to the policy framework itself.

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[91] *APIL back calls to remove controversial clause from Compensation Bill*, 1 March 2006, http://www.apil.com/pdf/press_releases/press_release_910.pdf

[92] Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2005–06, 24 November 2005, HL 73, http://www.publications.parliament.uk/pa/ld200506/ldselect/lddelreg/73/73.pdf

On 2 March 2006, following calls in debate in the House of Lords for more detail to be provided about the regulation of claims management services, the Government published a policy statement[93] and draft model rules.[94] The policy statement outlines the proposed use of secondary legislation which would be authorised by the Bill. Although the Bill envisages that the Regulator would prescribe the appropriate rules, the Government developed the model rules, which the Regulator might wish to adopt, following informal consultation with key organisations and some claims management practitioners.

This part of this paper sets out information about the current position and a summary of the main areas relating to the regulation of claims management services covered by the Bill. It includes, where appropriate, references to an independent assessment commissioned by the Government of the potential of the Claims Standards Council (CSC) to be designated as the regulator under the Bill (the Boleat Report) and to the CSC's response to the report, to the Report of the Constitutional Affairs Committee and to the Government's response to that Report, to the Government's policy statement and model rules, and to debate in the House of Lords and comments from interested parties.

A. Background

1. Claims managers

The role of claims managers has been described as follows:

> Claims managers gather cases either by advertising or direct approach. The claims manager then either acts for the client to pursue a claim or as an intermediary between the claimant and the lawyers who may represent them. Claims managers make money from several sources - referral fees from solicitors, commission on auxiliary services, after the event insurance and sometimes from loans to the client.[95]

The Government has estimated that there are approximately 500 companies operating in the claims management sector and that the number is likely to reduce significantly once regulation is introduced.[96]

The Better Regulation Taskforce's report, *Better Routes to Redress*, commented on the effect on claims management companies of the removal of public funding for most personal injury claims:

> Although there were a few claims management companies around before 2000, the Access to Justice reforms shifted the burden of funding personal injury claims from the public to the private sector therefore increasing significantly the demand

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93 Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement* , 2 March 2006 http://www.dca.gov.uk/legist/policy_statement.pdf

94 Department for Constitutional Affairs, *Model Rules for authorised persons,* 2 March 2006, http://www.dca.gov.uk/legist/model_rules.pdf

95 Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p4, http://www.dca.gov.uk/legist/policy_statement.pdf

96 *Ibid*

> on private sector providers. This change, combined with the relatively slow response of solicitors' firms to respond to the new market opportunities, created the conditions for a rapid growth in the claims management sector.
>
> In essence, a system was created where the client perceived no risk because their arrangements with the lawyer were "no win no fee" and their opponent's costs would be covered by funding, and if they won, the defendant would pay their costs. Neither is there any incentive for the claimant to keep their own costs down. Claims management companies take advantage of this system by gathering accident cases by advertising or direct marketing, administering the cases, and then farming them out to solicitors up and down the country. The companies earn their money by nontransparent and complex systems of referral fees and charges. The losing side ultimately picks up their costs.[97]

Some well publicised examples of failed claims management companies are considered by many to have highlighted the need for more comprehensive regulation in this area. Claims Direct collapsed in 2002 (Claims Direct has now been relaunched and is trading under new owners) and the Accident Group was placed in administration in 2003.

In its report published in December 2004, *No win, no fee, no chance,* Citizen's Advice commented on the practices of claims management companies and the effect of the collapse of two market leaders:

> Historically, CMCs have been characterised by hard-sell advertising and direct marketing, which encourage people to 'have a go' even if there is little chance of actually achieving the substantial damages dangled as an inducement. It has also been alleged that they had been inflating insurance premiums. ...
>
> During the period 2001 to 2003, there has been a significant rise in reports from CABx expressing concerns about clients' experiences when trying to claim compensation for injuries. They reported many problems with marketing and sales practices, high insurance premiums, and complex agreements. Many of these were directly related to the business practices of the (now insolvent) two market leaders, Claims Direct and the Accident Group.
>
> The profit levels gained from mass claims farming do not appear to have been sustainable as two larger claims management companies have gone bust amidst allegations of fraud. According to Datamonitor, "The collapse of the market leader, The Accident Group, will have dramatic repercussions for the ATE sector. The main impacts include: fragmentation of competition; doubts over the sustainability of accident intermediaries' business models; and the withdrawal of ATE insurers and banks from the market." These events have brought the long-term sustainability of this market into question.
>
> Some commentators have asserted that following the demise of both Claims Direct and the Accident Group, all is well with the personal injury market and that conditional fees are now working satisfactorily. Citizens Advice challenges this assertion. Our evidence continues to reveal that consumers experience

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[97] May 2004, http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf

> numerous problems with the practices of claims managers, claims assessors and unregulated advisers.[98]

In Grand Committee, Lord Hunt of Wirral raised concerns about the activity of claims management companies in relation to endowment shortfall:

> Under the existing system, the individual has a procedure which can be followed that is completely free of charge. If they feel that they have been mis-sold an endowment policy and as a result will suffer a shortfall in the sum available to repay the mortgage at the key moment, they are entitled to bring forward a claim. Through the FSA and the ombudsman a procedure is in place for such a claim to be dealt with speedily and at no cost at all.
>
> Lo and behold, claims management companies have leapt into this arena. I have before me two examples of comparatively recent advertisements from two organisations that make no reference to the fact that a free service is available. I could cite many others. ...
>
> On further investigation, it becomes clear that what is widely advertised as a windfall is actually, of course, a shortfall. But by the intervention of claims management companies in this vital arena, every shortfall of necessity now remains a shortfall because the company takes a fee of up to 25 per cent plus VAT that comes out of the compensation which, as we know, comes out of the resources of the policyholders. So the consumer is losing in every possible way. Many people are very concerned about what is happening.[99]

2. The regulatory framework

There is already some regulation, both specific and general, which applies to claims management activities. These were identified in the Boleat report[100] as follows:

> The following general consumer legislation is relevant –
>
> - The Trades Descriptions Act 1968.
> - The Unfair Contract Terms Act 1977.
> - The Supply of Goods and Services Act 1982.
> - The Unfair Terms and Consumer Contracts Regulations 1999.
> - The Consumer Protection (Distance Selling) Regulations 2000.
> - The Electronic Commerce Regulations 2002.
> - The Financial Services (Distance Marketing) Regulations 2003.

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98 Citizens Advice, *No win, no fee, no chance,* December 2004, http://www.citizensadvice.org.uk/microsoft_word_-_no_win-_no_fee-_no_chance_report_final.pdf

99 HL Deb 20 December 2005 cc293-4GC

100 See Section III B 1 of this Research Paper below

2.3 In addition, there is also –

- The regulation of advertising by the Advertising Standards Authority.
- Regulating the sale and conduct of after-the-event and before-the-event insurance by the Financial Services Authority.
- Regulation of loans taken out to finance legal activity under the Consumer Credit Act.
- Regulation of solicitors by the Law Society.[101]

The Boleat Report also identified three types of organisation which it said are frequently confused:

- A regulatory body is set up by statute with the responsibility and powers to regulate a sector of the economy or a specific activity.
- A self-regulatory body is set up by people within a sector to regulate by agreement activity in that sector.
- Trade associations are set up by organisations within a sector to promote the interests of companies in the sector, generally through representation and related information and advice services.[102]

3. The Legal Services Board

A White Paper, *The Future of Legal Services: Putting Consumers First,* published on 17 October 2005, set out plans for an overarching Legal Services Board which would oversee the operation of frontline regulatory bodies such as the Law Society and the Bar Council.[103] In debate in the House of Lords, Baroness Ashton confirmed that the Government envisaged that the Legal Services Board would replace the Secretary of State as the oversight regulator of the claims management sector.[104] She also confirmed that eventually the Government would wish to integrate with the reforms in this area.[105]

B. The Bill

This part of this paper sets out a summary of the main provisions in the Bill which deal with the regulation of claims management services. The Explanatory Notes published by the Government with the Bill give a more detailed explanation of the clauses in the Bill.[106]

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[101] Boleat Consulting, *The Claims Standards Council Report,* 22 December 2005, paragraphs 2.2 and 2.3 http://www.dca.gov.uk/legist/csc_report.pdf
[102] *Ibid* paragraph 4.2
[103] CM 6679, http://www.dca.gov.uk/legalsys/folwp.pdf
[104] HL Deb 28 November 2005 c98
[105] HL Deb 16 January 2006 c173GC
[106] Bill 155-EN, http://www.publications.parliament.uk/pa/cm200506/cmbills/155/en/06155x--.htm#index_link_2

1. The regulation of claims management services

Clause 3 would provide for the regulation of the activity of providing claims management services. Those carrying out the activity would need to be either:

- authorised to do so by the regulator
- subject to exemption under an Order made by the Secretary of State
- subject to a temporary waiver by the Regulator – this could be for up to six months and only in favour of a person the Secretary of State intends to exempt or
- an individual providing claims management services but not in the course of a business.

Contravention of this provision would be made a criminal offence by Clause 6, which also sets out that the penalty for the offence would be a maximum of up to two years imprisonment. On Report, Baroness Ashton accepted an amendment moved by Lord Goodhart, with support from Lord Hunt of Wirral, the effect of which is that the Bill would no longer include a defence based on ignorance of the law.[107]

A person authorised by the Regulator to provide claims management services could be a claims management company. The Explanatory Notes set out the effect this provision is intended to have:

> Thus employees or members of a company or other organisation would be covered by the authorisation granted to the 'parent' company or organisation for which they are providing claims management services, avoiding the need for specific authorisation of each individual (natural) person.[108]

Those in control of the company would need to satisfy the criteria for authorisation and be competent to ensure employees under their supervision provide regulated services in accordance with the rules and code of practice. In its policy statement, the Government stated that it would be a requirement of the rules that those in a management or controlling capacity provide personal details (names, addresses, dates of birth and details of other partnerships or directorships held in the last five years) as well as information about criminal records, their involvement in proceedings in any court or tribunal, and any relevant proceedings of a body exercising functions in relation to a trade or profession and qualifications.[109]

Claims management services are defined in Clause 3(2) as “advice or other services in relation to the making of a claim”. The claim may be for compensation, restitution, repayment or other remedy or relief in respect of loss or damage or in respect of an obligation – whether pursued through the courts or by other means (examples of which

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[107] HL Deb 7 March 2006 c703

[108] Paragraph 22

[109] Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p12, http://www.dca.gov.uk/legist/policy_statement.pdf

are given in the Explanatory Notes as the Employment Tribunals, Criminal Injuries Compensation Scheme or complaints about the mis-selling of financial products such as endowment policies).

Clause 3(3) sets out examples of activities which would constitute the provision of services.

Although the definition of claims management services is very wide and capable of including all services, the Government has stated that it intends to narrow down the actual range of services to be covered by regulations. The Government's policy statement sets out that regulation would apply initially to claims management services in relation to claims for:

- personal injury
- housing disrepair
- employment
- criminal injuries compensation and
- compensation for the mis-selling of financial products (including endowment mis-selling).

It also states that other sectors could be added if concerns emerged.

2. The Regulator

Clause 4 sets out provisions relating to the regulator.

The clause would enable the Secretary of State to:

- designate a person to be the regulator
- establish a person to be the regulator (if there is no existing body suitable for designation) or
- to be the regulator himself.

Clause 4(2) sets out the criteria which would have to be met before the Secretary of State might designate a person as the regulator. The Secretary of State must be satisfied that:

- the person is competent to act as regulator: the Explanatory Notes indicate that it is likely that the Secretary of State will take into account a wide range of possible factors including an appropriate infrastructure, suitable internal governance

arrangements, adequate financial and staffing resources, and appropriate regulatory policies[110]

- the regulator would make arrangements to avoid any conflict of interest between its regulatory functions and any other functions and

- the regulator would promote the interests of persons using claims management services – in particular by:

    - setting and monitoring standards of competence and conduct for authorised persons (the Explanatory Notes specify that this might be done, for example, by prescribing rules of conduct and a code of practice);

    - promoting good practice by authorised persons, particularly the provision of information about charges and other matters (according to the Explanatory Notes this would include information about the availability of free, alternative means of pursuing a claim);

    - promoting practices likely to facilitate competition between claims management companies (in response to concerns raised in Grand Committee, Baroness Ashton had confirmed with the Office of Fair Trading that it did not have responsibility for competition in relation to any regulator designated under the Bill[111]) and

    - ensuring that consumers are protected (including putting in place a mechanism for handling complaints).

A Government amendment was made on Report to specify, more fully than had previously been the case, guidelines as to the criteria to be applied by the Secretary of State and to address concerns raised in earlier debates. The exact criteria would be left to regulations.

The regulator would have to comply with directions given by the Secretary of State and to have regard to any code of practice issued by the Secretary of State. On Report, Baroness Ashton confirmed that the Secretary of State would resort to issuing directions only if the designated body was not efficiently and effectively regulating the sector.[112]

The regulator would also have to try to meet any targets set by the Secretary of State. Attempts in House of Lords debate to change the wording of this requirement were unsuccessful. Baroness Ashton said that in the context of the principles of administrative law, a requirement to try to meet targets "is no less strict than a requirement to take all

[110] para 26
[111] HL Deb 7 March 2006 c692
[112] HL Deb 7 March 2006 c695

reasonable steps. Unless the regulator has taken all reasonable steps, he will not have tried sufficiently to satisfy his legal duty."[113]

The Secretary of State would have to lay before Parliament any code of practice issued by him to the regulator.

Clause 4(9) would provide that while no person is designated as regulator, the Secretary of State "shall exercise functions of the Regulator". A Government amendment was made on Report, following consideration of an earlier amendment in the same terms moved by Lord Hunt, to make this a mandatory requirement by replacing the word "may" with the word "shall".

The Government's policy statement sets out that the regulator would have to demonstrate a competency to regulate in a way which is proportionate, accountable, consistent, transparent and targeted. The regulator would also need to demonstrate that it could apply the recommendations of the Hampton Report[114] accepted by the Government including that all regulatory bodies adopt a risk-based approach to regulation.

3. Exemptions

The Government has stated that it does not intend that members of a professional regulatory body (such as solicitors) should be subject to double regulation and so these providers would be exempted by Order from authorisation.[115] The Bill would also exclude from the need for authorisation those persons established or appointed under an enactment (e.g. statutory ombudsman). Provisions relating to exemptions, which might be for a specified person or class of person, in specified circumstances or by a specified person or class of person in specified circumstances, are included in Clause 5.

The Government's policy statement sets out that the standards of service provided by candidates for exemption would be a key consideration and that the Secretary of State would need to exercise the power to exempt in accordance with general public law principles –"fairly and reasonably, taking into account relevant criteria, ignoring irrelevant criteria, not fettering his discretion (e.g. by refusing to consider a particular class), and not delegating his power (e.g. by leaving it up to someone else to decide who fits the criteria)."[116]

The policy statement also sets out minimum criteria which it is likely that an organisation would have to meet in order to satisfy the Secretary of State that it qualifies for exemption:

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[113] HL Deb 7 March 2006 c697

[114] Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement,* March 2005

[115] Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p4, http://www.dca.gov.uk/legist/policy_statement.pdf

[116] Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p8, http://www.dca.gov.uk/legist/policy_statement.pdf

- If exempting a person providing claims management services who is already subject to regulation by a professional body, ...that it has in place appropriate rules and codes of conducts regulating the behaviour of its members.
- If exempting other persons or classes of persons ...that it has appropriate standards in place that will provide adequate protection to claimants. These may include details of the organisational structure, a clear statement of the key objectives for the organisation and that it has an appropriate complaints mechanism in place if things go wrong.

The Secretary of State would be able to attach certain conditions that the exempted person must comply with. The policy statement specifies that this might include a requirement that the exempt person should have regard to a specified code of practice or apply the same standards as authorised persons.[117]

On 9 January 2006, in a written answer, Bridget Prentice, Parliamentary Under-Secretary of State at the Department for Constitutional Affairs, confirmed that, as announced by Baroness Ashton at second reading, the Government intended to exempt trade unions by secondary legislation and that such an exemption might be subject to conditions, including a requirement to have regard to the code of practice issued by the new regulator.[118] In its response to the Constitutional Affairs Committee report, the Government stated it would take full account of any concerns and other comments made before coming to a final decision on this issue.[119]

4. Enforcement powers of the Regulator

Clause 7 would provide the Regulator with considerable enforcement powers.

The Regulator would be able to apply to court for an injunction to restrain the provision of regulated claims management services by anyone other than a person who is authorised, exempt or subject to a waiver.

The Regulator would also have power to investigate whether any criminal offence had been committed relating to the provision of regulated claims management services, and to institute proceedings in respect of an offence. In addition, the Regulator would have related powers including power to call for information or documents, to seek a warrant authorising the entry and search of premises and to take copies of written and electronic records found in a search, in each case subject to regulations which the Secretary of State would be required to make. The Explanatory Notes include examples of the matters which might be included in the regulations.

Regulations would detail the investigative steps that the Regulator should consider in determining if an offence has been committed and also set relevant time frames.

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[117] Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p9, http://www.dca.gov.uk/legist/policy_statement.pdf

[118] HC Deb 9 January 2006 c231W

[119] Paragraph 73, *Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: NHS Redress Bill,* Cm 6784, May 2006, http://www.official-documents.co.uk/document/cm67/6784/6784.pdf

5. Regulations

Clause 8 and the Schedule set out provisions that might be included in regulations to be made under the Bill relating to the authorisation of claims managers and the functions of the regulator. These are explained in detail in the Government's Explanatory Notes.

Regulations might, for example, cover:

- granting waivers
- establishing the process for granting authorisation including the charging of fees
- the conduct of authorised persons including making a code of practice
- the investigation and determination of consumer complaints
- disciplinary arrangements
- the requirements for indemnity insurance
- establishing a compensation scheme (payments from which would be made only as a last resort where the authorised person's own indemnity insurance would not cover any loss)
- appeals and
- enforcement of the terms or conditions of authorisation.

The Government's policy statement says that the regulations would set the boundaries and clarify the statutory requirements on the regulator and authorised persons.[120] It also sets out more detailed information about how the regulations might operate in each of the areas specified above.

A number of Government amendments were made on Report including:

- In order to address a concern of the Delegated Powers and Regulatory Reform Committee, the Bill now provides that regulations could require applicants for authorisation to provide relevant information about themselves and any other persons connected with the business. Baroness Ashton said that this would ensure that the regulator could properly assess the competence and suitability of those controlling the company. She also said that controlling individuals would be required to provide personal information about criminal records, their involvement in proceedings before any court or tribunal and any findings against them by a professional or regulatory body. The regulator might check this information against criminal records, the Disqualified Directors Register or records of disciplinary action held by professional or regulatory bodies.[121]

- There is now provision about the scope of authorisation which could be granted. Baroness Ashton explained:

> we wanted to make clear that when granting authorisation, the regulator can determine the scope of that authorisation—both according to the type of claim

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[120] Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p11, http://www.dca.gov.uk/legist/policy_statement.pdf

[121] HL Deb 7 March 2006 cc713-4

> handled and the level of advice provided. It is important that we reflect this for two reasons: first, the complexity of the regulatory task is directly related to the complexity of the work authorised persons undertake on behalf of consumers, so both the level of fees and the stringency of the authorisation process will need to vary accordingly; and, secondly, some rules will apply only to more complex work—for example, some rules would be relevant only if the claims management company offered advice to the consumer on their claim.[122]

- The Regulations would also require the regulator to satisfy himself of the competence and suitability of an applicant before granting authorisation and the regulator would be obliged to apply the criteria set out in regulations. The Schedule now includes matters which might be included in the criteria to be applied. Baroness Ashton confirmed that controlling individuals would be required to make a statement of competence demonstrating that they had the knowledge and skills required to provide the regulated service, including details of relevant experience. The applicant, person or organisation would be required to certify that they had read and understood the rules and codes of practice, and sign a declaration that they complied, and would continue to comply, with them.[123]

- There would now be a mandatory requirement (not discretionary as previously) for the regulations to enable the regulator to issue a code of practice about the conduct of authorised persons.

- The provision relating to complaints handling has been amended. Baroness Ashton set out the intended effect of the amended provision:

> When a consumer feels that a complaint to an authorised person has not been resolved, they may refer the matter to the regulator. We envisage that there will be a separate division within the administrative structure to investigate and determine the complaint. It may be possible for the regulator to delegate some of its complaints handling functions, which would provide a flexible mechanism for dealing with an unpredictable number of complaints. As noble Lords know, delivering the functions in practice will ultimately depend on the determination we make of the regulator. If the complaint is upheld, the regulator will either issue a warning or take disciplinary action.
>
> A decision of the regulator to suspend or cancel a person's authorisation would have the effect of determining a civil right and would be subject to Article 6 of the European Convention on Human Rights. To ensure compliance with the convention, regulations will provide that such decisions will not come into effect for a period of 28 days, during which time authorised persons can appeal the decision to the tribunal, which we have already indicated will be set up and which we agreed under previous amendments. This will ensure that an authorised person has a fair hearing before an independent and impartial tribunal for the purposes of Article 6.
>
> However, when multiple or particularly serious allegations are involved, regulations will provide the regulator with the discretion to apply to refer

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[122] HL Deb 7 March 2006 c714
[123] HL Deb 7 March 2006 c715

> disciplinary matters directly to the tribunal without himself reaching a decision. The regulator will have the power to seek an interim direction prohibiting the provision of claims management services pending a full hearing. This could be used when there was the potential for serious harm to consumers. The arrangements envisaged for handling complaints are an interim measure pending the creation of the proposed Office for Legal Complaints under the proposed reforms to the wider framework for the regulation of legal services.[124]

- The compensation scheme would apply only to claims management companies that handle clients' money. Again Baroness Ashton explained how the provision was intended to operate:

> When an authorised person has been paid money directly on behalf of a client but fails to pass this on, for whatever reason, the client should in the first instance try to recover the money from the person's professional indemnity insurance. There may be circumstances in which the insurance will not cover the loss—for example, when the company has not paid the premium, or the company has become insolvent. There may also be circumstances where the authorised person had acted dishonestly. In those circumstances, the authorised person would either be unable or unwilling to meet the loss. The compensation scheme may therefore provide a remedy to recompense the client with the money he has lost.
>
> There may also be circumstances in which the authorised person is unwilling to pay the money because he disputes the cost. Informing clients of the costs involved in bringing a claim and continuing to keep them informed of costs will be a requirement of the rules. Any breach of this requirement might result in the regulator taking action against the authorised person for misconduct.
>
> ... funding for a compensation scheme will be met by authorised persons; also, ...payments or financial assistance will not be met from government funding.[125]

In Grand Committee, Baroness Ashton said that she hoped that regulations would be in place by the end of 2006.[126]

6. Further offences

It would be an offence to obstruct the Regulator (without reasonable excuse) (Clause 9) or to pretend to be authorised or exempt or subject of a waiver. It would also be an offence to offer to provide regulated claims management services where provision of such services would constitute an offence (Clause 10).

7. The Claims Management Services Tribunal

The Claims Management Services Tribunal would be established by Clause 11 which would also make provisions about its constitution and proceedings. The Tribunal would act both as an appellate tribunal and as a disciplinary tribunal.

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[124] HL Deb 7 March 2006 c722
[125] HL Deb 7 March 2006 cc723-4
[126] HL Deb 20 December 2006 c300GC

Clause 12 would specify the circumstances in which an appeal or reference could be made to the Tribunal.

A person would be able to appeal to the Claims Management Services Tribunal if the Regulator:

- refuses the person's application for authorisation
- grants the person authorisation on terms or subject to conditions
- imposes conditions on the person's authorisation
- suspends the person's authorisation or
- cancels the person's authorisation.

The Regulator would be able to refer to the Tribunal, with or without findings of fact or recommendations:

- a complaint about the professional conduct of an authorised person, or
- the question whether an authorised person has complied with a rule of professional conduct.

The Tribunal would be able to deal with the appeal or reference in a number of ways.

There would be an onward right of appeal against a decision of the Tribunal to the Court of Appeal.

These clauses were added by way of Government amendments on Report and address a particular concern raised by the Delegated Powers and Regulatory Reform Committee.

On Report, Baroness Ashton explained the provision in some detail:

> This will involve establishing a new tribunal in legislation, but we propose that its members should be the members of the Financial Services and Markets Tribunal, and that it should be administrated using the existing infrastructure. This will provide an efficient means of hearing what is likely to be a small number of appeals, making the best use of existing judicial and administrative resources. The purpose of the tribunal is both to act as a disciplinary tribunal to which the regulator refers an allegation of misconduct or breach of the rules, and to act as an appellate tribunal where an authorised person appeals against decisions of the regulator. ...
>
> The amendments provide that the president, deputy president and members of the tribunal shall be the president, deputy president and members of the Financial Services and Markets Tribunal. There is also provision for the Lord Chancellor to make rules about the proceedings of the tribunal, which will be made subject to statutory instrument subject to the negative resolution procedure. The administration of the tribunal will be dealt with by the Tribunals Service which is being created as an executive agency of the Department for Constitutional Affairs in April 2006.[127]

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[127] HL Deb 7 March 2006 cc710-11

The Government anticipates that the number of appeals is likely to be small given the number of firms operating in the market.[128]

C. The Claims Standards Council

The Claims Standards Council (CSC) was established in September 2004 as a non-profit making company limited by guarantee and is governed by a Board of Trustees. It was formed to represent organisations and individuals interested in the development of regulation in the UK. The CSC states that at present it has approximately 150 members, and applicants undergoing the membership process.[129]

The Government commissioned an independent assessment of the potential of the Claims Standards Council (CSC) to be designated as the regulator under the *Compensation Bill*. Boleat Consulting carried out this work and published a report on 22 December 2005.[130] According to Baroness Ashton, the Report was not written with publication in mind, but after consulting its author, Mark Boleat, the Report was released, although parts regarded as including commercially or financially sensitive information were withheld. The CSC response to the Report dated January 2006, has also been released, again with sensitive information withheld. Subsequently, in House of Lords debate on Report, Baroness Ashton confirmed that the Government had decided that the CSC would not be the regulator on the basis of the Report and the response.[131]

1. The Boleat Report

The Report found that establishing statutory regulation which would be delivered by a non Government/private body would not be easy, that this was an innovative approach for which there is no obvious precedent, and that the diverse and fragmented nature of the industry presented particular difficulties. The report specifically mentioned that the Government's intention to exempt solicitors and trade unions from the legislation would reduce the scope of the regulatory regime and the ability to spread overheads widely.

The Boleat Report includes information about the history of the CSC:

> In 2003, the industry responded to the BRTF inquiry and the Law Society supported initiative to develop codes of practice by amalgamating two representative bodies, the Personal Injury Federation and the Personal Injury Association, into what became known as the Claims Standards Federation (CSF). However, there were deep divisions within the CSF and suspicion of it, as a result of which it had a very small membership. The BRTF report provided the impetus for another industry initiative. In August 2004, the decision was taken to wind up the CSF and a few weeks later the CSC was formed with the aim of testing the industry's appetite for voluntary regulation. Unlike the CSF the CSC was

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[128] Department for Constitutional Affairs, *Regulation of Claims Management Companies Policy Statement*, 2 March 2006, p10, http://www.dca.gov.uk/legist/policy_statement.pdf

[129] http://www.claimscouncil.org/

[130] Boleat Consulting, *The Claims Standards Council Report,* 22 December 2005, http://www.dca.gov.uk/legist/csc_report.pdf

[131] HL Deb 7 March 2006 c685

> established primarily as a regulator, with trade association functions being secondary.
>
> The new association began with only a very small number of members and by the end of 2004 membership had increased to just ten. The publication of the BRTF report in September 2004 led to greater interest in the Council, and this was accentuated when a conference was held in Birmingham in February 2005. However, membership was still slow to increase and in March 2005 the government announced its intention to introduce statutory regulation. This has proved to be the real impetus for membership growth (common in trade associations generally, where a strong "enemy" is the main determinant of membership growth). By the end of October 2005, membership had increased to 104 companies, and by the end of October to 173.[132]

The Report set out information about the current governance of the CSC and detailed its membership and recent activities. It stated that the Council undertakes a combination of trade association, regulatory and commercial activities, but has lacked the funds to do the necessary work to establish itself as an effective self-regulatory body.

It continued by identifying challenges faced by the CSC:

> In developing its future work programme the Council faces a number of major challenges –
>
> - It does not have adequate resources.
>
> - To some extent it has been overtaken by the announcement that there will be a statutory regulator which leads some in the industry to believe that they can simply wait until a new regulator is created (as it may not be the CSC) rather than seek to shape how the regulator will work.
>
> - It is not supported by many of the big claims management companies and the supply chain. This is partly because the Council is considered to be too closely aligned with particular commercial interests and to have unsatisfactory governance arrangements.
>
> - There is very limited involvement of claims management companies in the running of the organisation.[133]

The Report also included information about the CSC's plans:

> The Council has accepted the need to separate regulatory and representative roles. It intends to achieve this by helping to establish a Claims Standards Institute which will be the representative body and which will take on the trade association functions and also responsibility for training of staff. The Council intends to provide some funding to help get the Institute off the ground and members' subscriptions will largely be transferred to the Institute in its work. The

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[132] Boleat Consulting, *The Claims Standards Council Report,* 22 December 2005, paragraphs 4.6 – 4.7 http://www.dca.gov.uk/legist/csc_report.pdf

[133] *Ibid* paragraph 4.23

> current intention is for the Institute to begin operating in January 2006. However, there are no detailed plans for the Institute.
>
> The Council is planning to complete work on the code of practice early in 2006 so that it can form part of the launched CSC.[134]

The Report considered the steps which it felt would be necessary for the Claims Standards Council to take in order to be in a position to be designated as a regulator:

> If the Council wishes to be in a position to be designated as a regulator, it must formally make that decision and publish firm plans to divest itself of trade association and commercial activities. It would need to embark on a major programme comprising –
>
> - Introducing new governance arrangements. This should include a new memorandum and articles and appropriate involvement of industry and independent representatives.
>
> - Increasing the membership, in particular to cover the major claims management companies not currently in membership.
>
> - Developing the code of practice and introducing arrangements to ensure that members comply with the code. This will be a major but achievable task which is central to the establishment of any sort of regulatory regime for claims management activities. The code should be capable of being approved under the Office of Fair Trading Approved Codes Scheme.
>
> - Obtaining the resources to implement the programme. The Compensation Bill regulatory impact assessment estimates that the designation of a regulator under the new regime is likely to incur start up costs of £0.5 million. The running costs of a private sector regulator are estimated to be between £1.5 million and £2.1 million a year. If designated, the Council would probably need substantial underwriting from the government or other stakeholders.[135]

2. The response from the Claims Standards Council

The Claims Standards Council (CSC) responded to the Boleat Report in January 2006.[136] The response focused upon the structural and organizational changes the organisation would have to undertake to demonstrate that it is 'fit for purpose' to be a front line regulator. In addition, the response set out aspects of the process for managing regulatory changes which would be relevant in assessing the CSC's fitness for purpose.

The response stressed four "key points" to emphasize the nature of the challenge already faced by the CSC:

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[134] *Ibid* paragraph 5.2
[135] *Ibid* Executive summary
[136] Claims Standards Council, *Response to the Boleat Report,* January 2006, http://www.dca.gov.uk/legist/csc_represp.pdf

- Deep rooted opposition to any form of regulation and accountability which has led to CSC staff being threatened and assaulted
- No previous attempt has been made to introduce a regulatory regime into such a hostile environment and one that will strongly resist change.
- The under-funded CSC has achieved a considerable track record of deliverables in many regulatory dimensions not least in commanding respect and active support from consumers and consumer organizations.
- Those who comprise the CSC organization (Board members and Advisory Council) are wholly independent and have no commercial interests within the industry.

The Response concluded with a confirmation of the CSC's determination and ability to be appointed the regulator:

> The current staff and Advisory Council of the CSC unequivocally and publicly avow their intention of seeking to become a front-line regulator and do so in full knowledge of what is entailed. In that sense their achievements in the last year or so against a particularly hostile environment and one where no ready signposts existed, has indicated two important elements of fitness for purpose: willingness and ability. To survive the organization and its managers had to be singularly determined; able to implement a strategy that delivered consumer interests and skilled at judiciously balancing competing demands from other stakeholders.
>
> In this response the CSC has added further important features of its claim to be found fit for purpose. ...
>
> Finally, the largely unpaid 'hobby' of the last fifteen months has culminated in an unrivaled degree of expertise and knowledge essential to the development of a regulatory framework. If the CSC is not found fit for purpose then we would be very reluctant to sever any relationship in future developments and would offer-up options for continued involvement.

The CSC website sets out the ways in which the CSC aims to become the statutory regulatory body and how it hopes to achieve its aim.[137]

3. Government reaction to the Boleat Report and the response

On Report, Baroness Ashton confirmed that the Government had decided that the CSC would not be the regulator on the basis of the Report and the response:

> While the CSC has considerable expertise of the claims management market, I have to be sure, as noble Lords would expect me to be, that it could be an effective statutory regulator. It is a very young organisation, and if it was designated as a regulator it seems to me that it would be designated a task beyond its current capabilities or near future potential. Becoming a statutory regulator would be a big leap and would not be achieved easily. I do not believe that the CSC would be able in a quick timescale to take on the great responsibilities that statutory regulation brings with it.

[137] http://www.claimscouncil.org/

> I am not seeking to criticise the CSC; far from it. It has done a remarkable job in highlighting bad practices, trying to tackle poor services and developing a starting point for model rules to be recognised by the Better Regulation Task Force as a body worth giving the chance to try to make self-regulation work. As the Constitutional Affairs Select Committee commented in its recent report:
>
> "Although the existing Claims Standards Council might seem a credible candidate as an organisation to be named as regulator . . . a more professional solution is required if regulation is to be effective".
>
> I would encourage the CSC to consider options for continuing involvement, and to continue to contribute to identifying abuses, raising standards and helping to shape the implementation of the legislation, and we need a strong trade body to provide that crucial representation for the claims management sector—a body that we can work with to ensure that regulation is applied effectively and sensibly. The CSC could provide that role, although it is up to the industry to decide.[138]

D. Who would be the Regulator?

Having ruled out the Claims Management Council as the potential regulator, Baroness Ashton set out the Government's thinking on who might fulfil that role. In the longer term, there were various relevant factors:

- the Legal Services Board to be proposed in the forthcoming draft *Legal Services Bill*, could have an overview regulatory role
- Baroness Ashton considered that, in the context of wider changes in relation to regulations, parties such as the Law Society, who were currently not interested in being regulator, would develop competences in new areas
- the unfair commercial practices directive might also have implications for this area of work.

In the short and medium term, Baroness Ashton said that the Government was considering two options: first, whether there was an existing regulator that, within its abilities, competencies and interests, would be willing to become regulator. Secondly, the Government would look at the way in which the Secretary of State might regulate:

> The elements of direct regulation would include the Secretary of State as regulator, with an individual appointed or designated with the appropriate responsibility for carrying out the regulation. There will be a non-statutory advisory committee made up of representative stakeholders—financial services, the legal profession, consumer groups, insurance and the claims sector—to oversee and advise on these arrangements. A monitoring and compliance function would be contracted out to a suitable unit, be responsible to the regulator for carrying out authorisation, monitoring, complaints, enforcement and general "back office" work. There would be a tribunal to consider appeals against decisions of the regulator...

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[138] HL Deb 7 March 2006 c684-5

> That would be the framework around which the Secretary of State would play the role. My noble and learned friend would not be sitting in a room trying to regulate, but he would have an overseeing function.[139]

E. Model Rules

Model rules, referred to as a "pre-consultation draft for discussion purposes only" were published by the DCA on 2 March 2006.[140]

The rules are in two parts:

- general requirements and
- rules governing contact with clients

The Government stated that it was intended to cover in one document all the rules that would apply to authorised persons, whether they are provided for in the main legislation or in rules themselves.

The DCA has identified certain points which emerged in pre-consultation discussions for highlighting in any formal consultation exercise on the actual rules to be adopted:

- The rules should be as consistent as is practical and sensible with the rules that apply to solicitors or insurers when dealing with their clients in similar circumstances – "as level a playing field as possible would be a desirable outcome".
- The rules should reflect the fact that claims management companies are not financial institutions and most do not handle client money – "The key requirements would seem to be that to submit accounts and to have PI insurance (the provision of which in itself would be a useful regulatory check because insurers won't insure providers that might be high risk)."
- The DCA states that "there seems general agreement with the idea of banning cold calling in person or with prohibiting any marketing activity in public places unless approved by the relevant organisation. However, there is some disagreement about trying to do so in relation to mail shots and e-mails – methods that solicitors and insurance companies are permitted to carry out. Cold calling other than in person is governed by industry codes and it would be possible to rely on these".
- The authorised person's responsibilities in relation to misleading advertising could be reinforced in the rules perhaps with explicit reference to the applicable ASA codes.

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[139] HL Deb 7 March 2006 c686

[140] Department for Constitutional Affairs, *Model Rules for authorised persons,* 2 March 2006, http://www.dca.gov.uk/legist/model_rules.pdf

- Although some companies would prefer a cooling off period of 7 to 14 days, most seem to accept that 14 days was reasonable for a well run business. The DCA states that 14 days is supported by OFT.

F. Issues and debate

1. The Constitutional Affairs Committee's Report

In its Report, *Compensation Culture,* the Constitutional Affairs Committee noted that the vast majority of stakeholders had welcomed the second part of the Bill.[141] The Committee said that it was pleased that regulation of claims farmers was to be introduced but commented on the lack of detail in the proposed scheme (further details have since been provided). It said that self-regulation of claims management companies would be insufficient and undesirable. The Committee favoured a system whereby claims managers would be subject to the same type of overarching supervision as that proposed by the Government for the legal profession. The Committee also suggested that some limits should be placed on the nature and placement of advertisements by claims management companies.

In its response the Government pointed to the further details which had now been provided. On the subject of advertising, the Government agreed that it should not be misleading. It said that the model rules it had issued set out that advertising must:

- Not make misleading or exaggerated statements.
- Not use expressions such as 'no win, no fee' without qualification unless there is no possibility of the client having to meet any costs he may have incurred in connection with the claim, including the purchase of an insurance policy or interest on a loan taken out to fund the purchase of an insurance policy.
- Clearly identify the name of the advertiser.
- Not offer an immediate cash payment or a similar benefit as an inducement for making a claim
- Not seek to imply that compensation may be used in a way that is inconsistent with the cause of the claim.
- Not seek to imply a relationship with any official or other organisation where no such relationship exists.
- In the case of all written advertising and promotional material state that the business is regulated by the Claims Management Regulator (and give the authorisation number).[142]

2. House of Lords debate

At second reading, Baroness Ashton said that the Government wished to curb practices falling into three main areas:

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[141] Constitutional Affairs Committee, *Compensation Culture*, 1 March 2006, HC 754 2005-06, para 69 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf

[142] Paragraph 64, *Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: NHS Redress Bill,* Cm 6784, May 2006, http://www.official-documents.co.uk/document/cm67/6784/6784.pdf

> first, encouraging frivolous claims by raising false hopes about the compensation available through aggressive marketing techniques; secondly, misleading consumers about the options for funding their claim—in some cases, not letting them know that a free alternative exists, and in others, selling inappropriate additional services for their own gain, such as loans to fund insurance premiums, without clear advice on their purpose; and thirdly, providing poor-quality advice where claims managers act directly for consumers.[143]

The Conservative peer, Lord Hunt of Wirral, and Lord Goodhart, Liberal Democrat Shadow Lord Chancellor and Spokesperson for Constitutional Affairs, both expressed support for the general objective of regulation of claims managers. However, they moved a number of amendments and pressed consistently in Grand Committee for more detailed information about the proposed scheme and the identity of the Regulator.[144]

In Grand Committee Lord Goodhart said that "there are clearly abuses here which need the firm hand of regulation. We shall do all we can to assist in achieving that result".[145]

Lord Hunt spoke of two themes which would characterise dealing with the remainder of the Bill: "first, to ensure that there are no loopholes in the legislation that can easily be exploited; and, secondly, to ensure that as much material as possible is set out in the Bill and is not left to secondary legislation".[146]

Lord Hunt also spoke of a general aim:

> I want to ensure that when selling claims management services, there should be a requirement on that organisation or person to ensure that whatever happens, the individual vulnerable person knows what sort of contract he is entering into and what the obligations and eventual cost will be. The whole ethos of "no win, no fee" gives one impression, but the actuality is very different.[147]

Baroness Ashton agreed that transparency of cost was critical. She said that her personal ambition was to have everything ready by October 2006 and that consultation had already started.[148]

On Report, Baroness Ashton confirmed that the Government had put in place a budget of £750,000 a year for two years with the ambition that regulation should be self-financing.[149] In Grand Committee, Baroness Ashton gave more information about the costs involved with different models of regulator.[150] However, she justified the inclusion in the Bill of the power for the Government to pay grants to the regulator:

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143 HL Deb 28 November 2005 c82
144 HL Deb 28 November 2005 c90
145 HL Deb 20 December 2005 c301GC
146 HL Deb 16 January 2006 c141GC
147 HL Deb 16 January 2006 c148GC
148 HL Deb 16 January 2006 c148GC
149 HL Deb 7 March 2006 c684
150 HL Deb 23 January 2006 cc310-313GC

> I have allowed within the Bill an opportunity for the Government to subsidise because, having established a regulator, the number of companies in the market may decline to the point where the Government may need to subsidise for a while until the numbers grow again. Equally, other forms of regulation may be taken on by the regulator which will provide an income base to allow the regulator to become self-financing. That is my ambition and I hope to achieve it very quickly.[151]

Lord Hunt and Lord Goodhart introduced a number of amendments designed to replace the word "may" with the word "shall" in order to change discretionary requirements into mandatory ones, some of which were accepted and others not.

Many of the issues raised in opposition amendments moved in Grand Committee were addressed by Government amendments moved on Report and in the further information provided by the Government in its Policy Statement and Model Rules. Accordingly, this part of this Research Paper does not consider the earlier debates and amendments which were resolved in this way.

Other proposed amendments on specific provisions included:

a. Provision of regulated claims management services

Lord Hunt moved an amendment both in Grand Committee and on Report the intention of which was to seek reassurance that the Government had considered the potential impact of the provision of cross-border services. He said that it was essential that the new framework would do everything possible to catch all those seeking to sell services to people in this country.[152]

Baroness Ashton said that a company providing any kind of claims management in England and Wales would have to be authorised to do so, otherwise it would commit an offence. Enforcement could involve extradition proceedings depending on the particular circumstances and country involved.[153] The amendment was withdrawn on each occasion.

b. The Regulator

Lord Hunt of Wirral expressed his support, on, more than one occasion, for a regulator to be based on the model of the Financial Services Authority (FSA):

> The key features to which I refer are that the FSA is a totally independent body whose powers are based in statute rather than contract. The FSA has the power to make rules as to the authorisation of specific firms and, in addition, for approved persons within those firms. That allows for a situation where a company must be authorised before it can carry out specific types of business. The key personnel in that firm must also be approved for that specific role within the firm and will have individual liability for compliance with the rules. Of course, there is a

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[151] HL Deb 23 January 2006 cc315GC
[152] HL Deb 16 January 2006 c150GC
[153] HL Deb 7 March 2006 c688

> central register for authorised firms and approved individuals. There is continuing assessment on compliance with the rules.[154]

He contrasted this with membership organisations such as the Claims Standards Council which he said would always look for what is in the best interests of its membership.

Lord Goodhart supported Lord Hunt and said "It seems entirely wrong that the Claims Standards Council should be the regulator".[155] Lord Goodhart spoke of the risk of conflict of interest if the regulator was an association whose members conduct claims management business. He moved an amendment in Grand Committee, which was later withdrawn, which would have provided that the office of the regulator must be a public office.[156]

On Report, Lord Hunt moved an amendment which would have ensured that where authorisation is granted to a limited company or some other corporate entity there would still be individual accountability through the designation of one or more individuals as "approved persons".[157] Baroness Ashton said that while this worked well in the context of the large organisations involved in the financial services industry, she thought that it might be unnecessarily complex for more modest organisations.

In Grand Committee, Lord Goodhart moved an amendment which would have required the regulator to be independent of any provider of claims management services.[158] Baroness Ashton replied that those concerned with regulation have invaluable knowledge and expertise of the market and the Government were not convinced that it would be possible to regulate effectively without involving them. She agreed that the regulator should not be influenced by commercial interests, but said that the requirement to avoid conflicts of interest would be sufficient to ensure that.[159]

In Grand Committee, Lord Hunt of Wirral moved an amendment which would have added in a duty for the regulator to promote the wider concept of social responsibility.[160] Baroness Ashton agreed with the sentiments behind the amendment but did not want to put this on the face of the Bill. The amendment was withdrawn.

c. Exemptions

On Report, Baroness Ashton confirmed that it was intended to exempt insurance companies, insurance brokers and their agents in respect of claims by their policyholders and persons for whom they had arranged insurance: "That is designed to cover the normal business of insurance companies and their claims-handling agents—an activity already regulated by the Financial Services Authority."[161]

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154 HL Deb 16 January 2006 c176-7GC
155 HL Deb 16 January 2006 c178GC
156 HL Deb 16 January 2006 c181GC
157 HL Deb 7 March 2006 c682
158 HL Deb 16 January 2006 c187GC
159 HL Deb 16 January 2006 c188GC
160 HL Deb 23 January 2006 c300GC
161 HL Deb 7 March 2006 c690

In Grand Committee, Lord Goodhart argued that the exemption for solicitors and other legal professions should be in the Bill, rather than in secondary legislation, because of the importance of recognising the independence of the legal profession.[162] While confirming that the Government would not impose double regulation on those already regulated, Baroness Ashton said she did not want to exclude anyone from the scope of regulation because it was conceivable that the Government would want regulation to cover certain bodies in relation to some type of claim in future.[163]

d. Enforcement

On Report, Lord Goodhart moved an amendment, which was later withdrawn, which would have transferred responsibility for prosecutions for offences under Clause 6 from the regulator to the police.[164] Lord Goodhart said that in view of the number of companies to be regulated, he found it difficult to envisage that the regulator would be justified in having an office capable of handling criminal prosecutions:

> Surely, it would be much more cost-efficient for the regulator to be able to conduct an investigation and, if the investigation gives one reason to believe that an offence has been committed, rather than have a department in his or her own office that could conduct prosecutions, to hand over responsibility for prosecutions to the police and leave them to get on with it.

Baroness Ashton disagreed that the costs would be excessive:

> On the contrary, the power of the regulator to institute proceedings could avoid wasteful duplication of effort. The regulator will have specialist knowledge of the industry and of the circumstances underlying the offence. We believe that a prosecution could, in most circumstances, be more efficiently and effectively undertaken by the regulator. However, if the number of offences proves to be very small, it may be more cost-effective for the prosecutions to be undertaken by the Crown Prosecution Service. There is nothing in the Bill that could prevent that. In some circumstances, particularly where the offences were linked with matters outside the scope of the Bill, the regulator would be likely to hand the matter over to the Crown Prosecution Service to take action. Of course, if the regulator should prosecute, then he should seek legal advice externally, which would also keep costs to a minimum.[165]

G. Reaction to the proposals

1. All Party Parliamentary Group on Insurance and Financial Services

The APPGIFS stated that it was much more positive about the second part of the Bill and the proposals for statutory regulation of claims management companies than it was about Part 1. It also commented on who should be appointed as Regulator:

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[162] HL Deb 23 January 2006 c317GC
[163] HL Deb 23 January 2006 c320GC
[164] HL Deb 7 March 2006 c704
[165] HL Deb 7 March 2006 c705

> This is the real focus of the draft legislation and we think it essential that the proposed framework works and achieves the desired outcome.
>
> The Bill establishes a statutory framework for the regulation of CMCs. However the Bill does not in itself create the new regulator. It merely allows the Secretary of State to designate an appropriate person. He can only create a new body if he thinks that no existing body is suitable for designation.
>
> It may be that this arrangement is intended to allow the existing Claims Standards Council to put itself forward for nomination as the regulator. We do not believe this is remotely good enough. The CSC has done a fantastic job in trying to bring order to the chaos of the claims services industry. But the CSC has no money and relies entirely on volunteers.
>
> If the government wants the CSC to be the new regulator it should say so now. We think the better option is to create a new statutory body in the Bill and provide the resources needed for it to succeed. The Gambling Act 2005 created a new Gambling Commission and government provided resources for it to begin preparation for its work immediately after second reading. The same should happen here otherwise it will be years before the provisions of this Bill take effect and numerous consumers and insurers will be ripped off in the meantime.
>
> (...)
>
> With legal fees now taking 40% or more of average claims costs maybe there is a case for limiting fees in a greater number of cases. At the same time that Parliament is being asked to approve the Compensation Bill to get a firm grip on the "non-lawyer" claims farmers, the Legal Services Bill proposes to allow "non-lawyers" to manage and promote the services of legal firms. This opens up the possibility of CMCs masquerading as lawyers, with the potential both for further abuse and the prospect of undermining the new regulatory regime.
>
> This prospective loophole must be closed by ensuring that the two Bills work in tandem and not with the provisions of one Bill set firmly against the aims of the other.[166]

2. The Law Society

The Law Society welcomed the overall aim of the *Compensation Bill* to introduce regulation to the claims market:

> The Law Society welcomes the introduction of regulation of claims handlers in the Compensation Bill. There is now a significant body of evidence that the public needs protection from unregulated claims companies who employ unacceptable practices, such as cold calling, aggressive selling, insurance mis-selling and encouraging of frivolous claims.

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[166] All Party Parliamentary Group on Insurance and Financial Services, *Report of an enquiry into the Compensation Bill and the Compensation Culture,* November 2005, http://db.riskwaters.com/data/post/pdf/compensationreport1105.pdf

> The Law Society believes the legislation should explicitly exclude solicitors, and others who are already fully regulated in claims handling by an appropriate professional body.
>
> The Law Society believes the Bill should introduce a freestanding regulator, as was introduced for licensed conveyancers. If, by the time the Bill is passed, there is a body which is suitable to appoint as the statutory regulator, it would be relatively straightforward to convert it into the statutory regulator. If no such body emerges, it would be preferable for the regulatory structure to be established in the Bill rather than left to secondary legislation.[167]

3. Citizens Advice

Citizens Advice welcomed the publication of the *Compensation Bill* as the first step towards effective regulation of the claims management industry. Citizens Advice Head of Social Policy, Dan Vale said:

> We are delighted that the Government has responded to demands to regulate the claims industry. Too often we have seen claims firms targeting people when they at their lowest, and getting claimants to sign up to loan arrangements they don't understand. It is the rogue practices of claims management firms that have helped fuel the misguided idea that there is a 'compensation culture' in this country.
>
> Injury victims and others with legitimate claims deserve better than this. The rules on entitlement and the process for claiming compensation need to be clear and transparent, and the industry needs to recognise that it is dealing with vulnerable consumers who find the whole system complex and confusing. People are entitled to expect a high standard of service, advice and information on their rights. Self regulation is not working, so it is therefore only right that companies providing these services should be required to be licensed.[168]

4. Association of British Insurers (ABI)

The ABI expressed support of the proposal to regulate claims management companies:

> In our view, regulation should apply to all those organisations that undertake claims management activities across the sector and we welcome the fact that the Bill aims to achieve this goal.
>
> The reputation of claims management companies has been eroded as a result of activities mainly in the personal injury sector – consumer complaints have risen, several high profile market leaders have collapsed and there is increasing evidence of “hard sell tactics”.

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[167] The Law Society, *Parliamentary Brief, Compensation Bill. Second Reading House of Lords,* 28 November 2005, http://www.lawsociety.org.uk/secure/file/148585/d:/teamsite-deployed/documents/templatedata/Internet%20Documents/Parliamentary%20briefings/Documents/compensationbillllordssecondreading.pdf

[168] Citizens Advice, *Citizens Advice welcomes regulation of claims farmers,* 4 November 2005, http://www.citizensadvice.org.uk/index/pressoffice/press_index/press-051104.htm

> We are also concerned that claims management companies are moving into other sectors, particularly complaints about endowment mortgages. Engaging the services of a claims management company means that they inevitably lose a large percentage of their compensation. Some customers may not realise that they can receive a free and effective complaints service.[169]

5. TUC

The TUC welcomed the regulation of the claims management industry but expressed concern at the lack of a specific exemption for trade unions and the voluntary sector within the Bill:

> Over the past five years there has been a catalogue of abuses by 'claims farmers'. Some of these have been associated with companies that have since folded. However there are many others in the market who are clearly encouraging frivolous claims, taking a considerable proportion of settlements, or advertising aggressively within certain areas. This is particularly a problem within parts of the country formerly associated with mining or asbestos work.
>
> However the TUC is concerned that there is no specific exemption for trade unions and the voluntary sector within the Bill. These bodies are set up to support workers or victims and do so not for commercial reasons, but to assist the claimant. There is good reason why trade unions, and the voluntary sector, should be specifically exempted from the legislation and that only commercial claims management companies should be targeted.
>
> To do otherwise, would be potentially to allow any exemption to be removed by this, or a future government, without any further recourse to Parliament. Any regulation of trade unions could cover not only personal injury cases, but all union legal work, including taking cases for unfair dismissal or discrimination.[170]

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[169] Association of British Insurers, *Compensation Bill – ABI Briefing Note,* 28 November 2005, http://www.abi.org.uk/Display/File/595/Compensation_Bill.pdf

[170] TUC, *Compensation Bill,* 16 November 2005, http://www.tuc.org.uk/h_and_s/tuc-11020-f0.cfm