



To

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Response from **Amicus the Union** on the Compensation Act - Regulation of Claims Management Services - Consultation on draft conduct rules for authorised persons (SECTION ONE) and Compensation Act – Regulation of Claims Management Services – Consultation on Part 2 (SECTION TWO)

Responses to both sought by 29 August 2006

Amicus is the UK's second largest trade union, with a greater number of members in the private sector than any other union and it is the fastest growing in the public sector. Now with 1.2 million members, Amicus has members in a range of industries including financial services, manufacturing, print, media, the voluntary and not for profit sectors, local government and NHS health professionals.

The Union Legal Service

Amicus members, in common with many other citizens have a need for legal services. Trade Unions are in a unique position to provide advice and assistance particularly in the field of employment law. Indeed the right of members to benefit from the protection the Union can provide is a fundamental human right.

Amicus members in common with the vast majority of other union members in the UK are also provided with advice and assistance in relation to any personal injury claim, whether at work or otherwise and at no cost to the member. This support is also available to the member's family.

The Union also provides a free legal advice service and free wills. There is also a conveyancing and probate service, which is the only part of the Legal Service Package where there is a cost to the member.

Response to Consultation Documents - Executive Summary

- 1) We believe it remains an issue that the role of Trade Unions is underestimated in the context of claims. Paragraph 3 of the “Consultation on draft conduct rules for authorised persons” refers to “Previous consultation” and refers to consumer sectors, but we were not included in that sector, not were we included as a sector in our own right. We are not only interested in the context of handling claims. We are pleased to be exempt in that regard, for reasons stated elsewhere and not least for the reason that the employment advice and assistance we provide constitutes a fundamental right for members.
- 2) The fact is that we represent a very substantial proportion of consumers in this field. That we do gives us information born of experience that can benefit all consumers. We welcome the invitation to attend and participate in Regulatory Consultation Group meetings in future. We are concerned to ensure that the regulatory function is effective to protect all consumers.
- 3) We are keen not to lose sight of one of the main drivers of this initiative, namely defeating the perception of claims culture. The result of the process should avoid an opportunity for claims managers to claim that they are authorised by the DCA or the Regulator, when there may be inadequate controls or enforcement.
- 4) We are keen to encourage informed choice, but to discourage advertising and other efforts designed to drum up claims, which may not benefit the consumer or which may encourage claims without merit.
- 5) We are keen to ensure that conflict of interest is avoided.
- 6) Experience has dictated that the unscrupulous and the profit motivated organisations will exploit any loopholes.
- 7) There must be clear regulation that does not impact adversely on those whose principles or rules require high standards, when those who are less scrupulous will comply with minimum requirements at best.

Section One:

Consultation on draft conduct rules for authorised persons

List of questions for response

Question 1. **Are there any additional points that should be included in the conduct rules?**

Comments: Yes. See below and “additional comments” at the end of this section. We are concerned to ensure that enforcement is effective, in the interests of consumers. We are mindful that this is a matter for the rules and also relates to resources, as well as being affected by operational issues.

In principle the rules should seek to apply protection of the sort afforded to clients of solicitors by means of the professions’ rules. See, for example, the client account provisions in the rules, which we approve of.

Question 2. **Is the distinction provided for in the rules between all businesses, those that have a contractual relationship and those that manage claims, a sensible one?**

Comments: Yes, it would appear so.

Question 3. **Are the general principles in paragraphs 1 to 4 appropriate?**

Comments: (This refers to draft rules part 1 page 1.)

No. Businesses should be obliged to act in the interests of those seeking redress, free from conflict, in so far as is possible, and above any obligation to shareholders or other similar profit motive.

Question 4. **Are all the factors that would exclude a person from being involved in claims management services appropriate?**

Comments: (This refers to draft rules part 1 paragraph 5.)

Yes, but there should be an additional exclusion for those who have worked for an organisation or business or been a proprietor (including shareholder) involved with significant breaches of these rules and in any case after authorisation has been cancelled.

Question 5. Should the tied agent concept be provided for or should any individual or business that provides claims management services be authorised in its own right?

Comments: (This refers to draft rules part 1 paragraph 7 and the consultation document paragraph 13.)

We believe that any business providing claims management services should be authorised in its own right.

Question 6. Should holding professional indemnity insurance be a requirement for authorisation? Would it be possible in practice for authorised businesses to obtain such insurance from the outset or should requirements be phased in to allow sufficient time for a market to develop?

Comments: (This refers to draft rules part 1 paragraph 10.)

There should be a requirement for protection by way professional indemnity insurance or demonstrable assets, or “self insurance” to cover relevant claims.

Under the draft Compensation (Claims Management Services) Regulations (C(CMS)R), we note that Regulation 13 (5) envisages a mandatory requirements to comply with any direction of the Regulator in this regard.

Question 7. Are the requirements in paras 11-14 sufficient or would more guidance be helpful in respect of a model complaints scheme?

Comments: (This refers to draft rules part 1 paragraphs 11-14)

There should be an appeal to an outside person or body with motivation to ensure high standards.

At present the draft rules do not provide for a desirable time period set for any substantive

complaint to be adjudicated upon.

The complainant should be sent details of the appeal procedure along with the decision.

It would be helpful if there was a model scheme.

For the sole practitioner, an appeal to an outside person or body with motivation to ensure high standards, would be particularly appropriate.

Reference should also be made to the Regulators role and functions.

Question 8. Should specific rules on training and competence be developed? If so, are there suitable models which could be considered for a small sector?

Comments: (This refers to the draft rules part 1 paragraph 15)

Although the rules as drafted lack detail, we believe the answer to this question is - Yes. That this is a problem is no excuse to leave the consumer at the mercy of the untrained and incompetent. There are examples of people having to show adequate training and accreditation before being approved or licensed in many sectors. An example is the many self employed electricians and plumbers.

Question 9. Are the general principles in paragraph 1 appropriate?

Comments: (This refers part 2 of the draft Rules)

The answer is – Yes. However there is a substantial caveat to that answer as there should be included a clear obligation to advise consumers properly as to alternative funding arrangements and assistance. (Consider this point also in relation to the draft rules part 2, paragraph 15 especially at e) and paragraph 20).

Question 10. Should only cold calling in person be prohibited or should this be a wider prohibition?

Comments: There should be a wider prohibition. The purpose is to avoid the perception of a “compensation culture”. The emphasis should be on access for the right to claim and not trawling for claims.

Question 11. Are the proposals on advertising and sales generally appropriate?

Comments: There should be requirements for adequate explanations:

To confirm the level of qualification, or none;

To say whether the organisation will act or simply refer:

To confirm that advice will be given on alternative funding arrangements.

If the result is that organisations who advertise pass on claims to those who are more efficient and operate at no cost then the consumer will benefit. Organisations will be encouraged to improve their service to compete. If there is no obligation at least to advise effectively on alternatives, those prepared to advertise extensively will capture claims at the expense of the consumer.

There may be a problem in that organisations may now seek to gain from the fact that they are "Authorised by the DCA in the provision of claims management services".

Question 12. **Is 14 days appropriate for a cooling off period?**

Comments: Yes.

Question 13. **Are the requirements for the taking on of business generally appropriate?**

Comments: No. There should be emphasis on the need to advise properly as to alternative funding arrangements for free choice. (See also draft rules Part 2 paragraph 9).

Question 14. **Are the arrangements for managing a claim appropriate?**

Comments: (This refers to draft rules part 2 paragraph 4)

Paragraph c) might be a worry to claimants, but a clear warning against fraud should be included.

Paragraph e) should be expanded to refer to union legal services for members and their families (as well as BTE) and the advice should include proper advice as to the effect of any alternative funding or support.

In relation to paragraph f), we would point out that Amicus does (and we believe other unions do) seek to influence the way solicitors handle cases. For example, if a member was to complain that a case was wrongfully turned down, we might well arrange for a review and

it is not unknown for the solicitor's decision to be wrong. We hope other organisations might do likewise. We would also supply information about successes or failures that we believe would affect the way cases should be handled. We may take a policy decision, for instance, to consider the setting of a precedent relating to a particular set of circumstances. This influence applies in the main to personal injury and employment cases (widely defined). This is for the benefit of claimants, potential claimants and the claims handling in general.

Thus (even though unions are to be exempt), paragraph f) should be amended to apply to influence to the detriment of claimants or potential claimants.

Question 15. Is the provision in respect of taking reasonable steps to ascertain whether the client has BTE insurance sufficiently clear?

Comments: (This refers to the draft rules part 2 paragraph 5.1).

No. There is perhaps an obvious omission in that it is not specified what should happen when the position is ascertained. Further this should clearly spell out the availability of the unions' legal service to members and their families, which is widespread. "Other insurance cover" or "other cover" is not an adequate addition to "BTE".

Question 16. Are the provisions in respect of arranging ATE insurance appropriate?

Comments: (This relates to part 2 paragraph 5.2).

Again we say there should be a reminder as to alternatives, including union legal services.

Question 17. Are the arrangements for providing loans reasonable?

Comments: (This relates to part 2 paragraph 6 of the draft rules).

Again this should add "having previously advised as to alternatives and again at the time".

Those who benefit from the unions' schemes do not require loans.

Question 18. Are the arrangements for handling money appropriate?

Comments: (This relates to part 2 paragraph 7 of the draft rules).

Yes.

There may be the additional requirement to account for interest on clients money, as there is

on solicitors.

Question 19. Are the proposed arrangements for informing clients of the Regulator's decision to suspend, cancel or vary authorisation appropriate?

Comments: Yes. There should be information for the client about how they can go forward in such circumstances.

Otherwise we consider it would be wise to set out the consequences of the claims manager ceasing to act in a particular set of circumstances, so that the consumer remains protected in so far as is possible. An additional section should be considered imposing obligations on a business to inform a client of changes to arrangements that may affect them, or if the business is no longer able to act as agreed. Consideration should be given to "interventions" of the sort the Law Society can engage in for the benefit of clients.

We would also wish for the following **additional points** to be considered:

a) Concerning paragraph 14 of the Consultation Paper – Finance and draft Rules

In our view the Regulator should not only require that solvency is maintained and appropriate systems and controls are effective, but also require audited accounts. That audited accounts may only follow after a delay is a poor reason for not requiring them at all, particularly if the obligations referred to in the previous sentence are required in conjunction. Regulation 13(5) (g) of the draft C(CMS)R, appear to make the production of accounts a mandatory requirement and we agree that this is appropriate.

b) Concerning paragraph 20 and 21 of the consultation paper – compliance, enforcement and discipline (see also draft rules 16 and 17)

There is a clearly a lack of detail in relation to how these matters will work in practice. We are concerned to ensure that regulation is effective in protecting the consumer. We are not aware of any draft document or consultation in relation to these particular matters and confirm that we would wish to have an opportunity to comment further.

c) Concerning paragraph 22 of the consultation paper – provision of information to the Regulator (and see draft rules 18 to 23)

We believe that the information supplied should include standard form information supplied by the claims manager to the client or consumer. This information to the consumer should include accurate information about alternative funding arrangements and alternative forms of support.

Information should also be supplied that relates to the performance of the authorised business, including their results on behalf of clients.

d) Concerning paragraph 25 of the draft rules - data protection

It is a minor point, but we consider that this is superfluous or should read businesses will need to register with the Information Commissioner and Regulator may check compliance.

e) The circumstances resulting in cancellation etc of authorisation should include for significant or persistent breaches of the Rules. In this regard consideration should be given to amendment to draft rule 5.

Section Two

Compensation Bill – Regulation of Claims Management Services – Consultation on Part 2

List of questions for response

Question 1. **Are there any other sectors that should be included and why? If there are any specific areas that should be included please give details and relevant evidence to substantiate this.**

Comments: This response is prepared from the perspective of the trade union as a very significant representative of consumers (including members and their families) as well as the trade union as provider of claims management services.

Subject to the response to question 2 below, we believe the sectors listed at paragraph 14 of the consultation paper are the most appropriate at the outset.

We would add at this point that we agree the exemption for the 4 groups listed in Paragraph 7 on page 3 of the consultation paper. Our response takes this into account.

However, we raise the issue of the former or retired member who may approach the union (as is a relatively common event) and is referred to the union's specialist lawyers in relation to a matter which may involve an industrial disease perhaps. Amicus would refer such a person on, without financial reward, or any intention of a legally binding relationship with the potential claimant, but would do so in the expectation that the lawyers would treat the suffering individual (or the spouse in the case of a fatal disease) without taking any money from the potential claimant at any time, even from damages if the claim was successful. We should not require regulation in such circumstances, or face a penalty for acting in such a way.

See also case example 2 from the appendix below.

Question 2. **What comments do you have (if any) on the precise definitions for the areas to be covered?**

Comments: Under the Regulation 4(3) of the draft Regulated Claims Management Services Regulations (C(RCMS)R), we believe that it should be specified that death by disease or accident is intended to be covered.

Further, claims involving the Motor Insurers Bureau should be expressly covered.

In addition claims following assault, false arrest or imprisonment should be covered.

In relation to employment, and paragraph 4(3) (c) reference could be made to include matters within the jurisdiction of the Employment Tribunals at any time, as well as other specific matters. That would ensure there was no doubt that claims for detriment under public interest disclosure provisions and a variety of other matters, were to be covered and this would assist in relation to potential claims from additional rights established in future.

Question 3. What comments do you have (if any) on how the activities should be defined? What other activities (if any) should be specified in the Order and why?

Comments: The list of activities at Regulation 4 (2) appears to us at this time to be both comprehensive and appropriate.

Question 4. Is it appropriate to exclude third party capture by liability insurance companies? It would be helpful to have evidence to support any arguments.

Comments: It is certainly not appropriate to exclude third party capture by liability insurance companies. See Appendix for evidence and case examples.

There is a clear conflict of interest. Under Law Society Rules Solicitors would be rightly prevented from acting for both parties in a similar situation and there should be no bending of such principles for liability insurers.

Liability insurers have financial responsibilities to shareholders and others and the temptation or pressure to fail to advise on all heads of damage or to admit responsibility so as to pay out less, is too great to accept a lack of regulation.

The FSA does not regulate the activities of liability insurers in this area and has no culture of doing so. The FSA does not prevent mis-selling, but may provide a remedy to those who are sophisticated enough to take action when they become aware of the problem.

Liability insurers fail in their responsibility to admit liability as often as they should. They should be encouraged to offer rehabilitation whether a claimant is represented or not.

One leading insurer has stated on more than one occasion that they do not see why they should advise people of the right to seek independent advice and representation and do not

intend to do so. Others do not do so as much as they should and cannot be expected to do so without encouragement.

There is also clear evidence of insurers and companies they own seeking significant sums by way of referral fees when they pass on claimants they have “captured”.

Question 5. Paragraph 11 (5) sets out the factors that the Regulator may take into account in assessing whether to grant authorisation to an applicant. Are there any additional factors that should be included?

Comments: Paragraph 11 (5) of the draft Claims Management Services Regulations should also include factors relating specifically to address bad practices in the field of claims management activities. Subparagraph (g) should not be limited to information about fees, and should include information about alternative support and funding arrangements.

Consideration should be given to the fact that the Regulator may have too much discretion to be too lenient, or arbitrary. There should be clear guidelines about the circumstances in which an applicant is unsuitable.

Question 6. Does paragraph 11 (6) set out all the factors that the Regulator should take into account in deciding whether an individual is suitable to provide regulated claims management services or to be involved in the management or ownership of a claims management business?

Comments: We refer to the comments we made above in relation to question 5. The principles also apply in relation to this question and Regulation 11 (6) of the draft C(CMS) Regulations.

Question 7. Are the mandatory requirements for obtaining authorisation sufficient? Please give reasons for your answer

Comments: Whilst we have concerns about enforcement and efficacy of regulation, we believe that the mandatory requirements appear sufficient.

Question 8. What should be the minimum requirements for PI insurance? What types of claims management businesses will have difficulty in obtaining the appropriate cover?

Comments: (See “consultation on draft conduct rules for authorised persons” question 6, as there is a degree of overlap).

Whilst it is fair to confirm that unions have experienced excessive demand for premiums for Professional Indemnity Insurance and most chose not to carry it, it would generally indicate a significant risk to the consumer if a particular organisation had difficulty obtaining cover. It is a key element of the business of claims management that the consumer be assured of redress in the event of negligence or fraud. If an organisation cannot demonstrate a policy of insurance, it should instead be required to demonstrate appropriate “self insurance” by means of a fund or otherwise an ability to pay for its mistakes.

Question 9. **What other comments (if any) do you have on the draft Regulations?**

Comments: This is a complex set of issues and the consultation process appears to reflect that. We wonder why there may be a need for more than one set of Regulations at this time. Unions are included now among those invited to attend the Claims Management Regulatory Consultative Group and we will seek to participate in a constructive manner in the interests of the consumer, whether as union members, or a family member or not. We will take the opportunity to make further comments in that context, with a view to making the Regulations and the Regulatory framework effective and successful.

To conclude, we welcome the opportunity to continue to participate in the efforts to make Part 2 of the Compensation Act a success to protect all consumers.

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Appendix to Amicus response to consultation over regulation under Part 2 of the Compensation Act 2006

Evidence - case examples for Question 4

The consultation paper states: “A number of interested parties have identified the position of liability insurers who seek to capture a person injured by their policy holder... it is not fully regulated by the FSA ... [but] There is a strong case for exempting liability insurers in respect of this activity. *There is no evidence of consumers receiving poor service from liability insurers* in this respect.”

This is not our experience. The following are just 10 examples which form a very small proportion of recent cases where the insurers have behaved in a way that they are incited to behave as a result of their obligations in conflict with the prompt payment of appropriate levels of damages to claimants (whether represented or not). Inevitably the examples are not all cases captured by liability insurers in respect of persons injured by their policy holder. They are examples provided (all but one) by two law firms used by Amicus.

Nevertheless, even those cases where the claimant was always represented by the union demonstrate clearly how those who are unrepresented will suffer. Many such unrepresented people are never even aware of the extent to which they are short changed or deprived of their entitlement to compensation.

1. Mrs F's case. She slipped on a mushroom on the floor at a Tesco Store on 9 January 2005. She wrote to Tesco's on the 5 May 2005 initiating a claim for damages. They asked her for more information. On the 8 June 2005 Tesco wrote to her denying liability. In the denial they state “the issue of floor cleanliness has been dealt with in the English courts and it has been established that a ratio of less than one accident to 214,000 customers is the cut off for proof that a good cleaning regime is in operation. At [the store involved in the accident] the ratio is almost 1:300000 therefore we have no offer to make you.”

Most would have given up, but Mrs F then sought assistance through Amicus, as her husband is a member. Our lawyers elicited a response from Tesco's liability insurers on 15 August stating that they saw no reason to alter the decision on liability. Questions were raised on an issue which had arisen from disclosure that no janitor

was on duty at the time of the accident. Tesco were pressed to reveal documents they possessed relating to research they had conducted regarding the reduction of slipping injury when sealed packaging was used. On the 4 October 2005 the insurer wrote admitting liability.

2. Mr C died in September 2004 from bronchopneumonia with the presence of asbestosis. The Coroner on 20 October 2004 confirmed his employment in a naval dockyard from 1941 to 1987 would have brought him into contact with asbestos dust and the verdict was death by industrial disease.

The family initiated a claim without legal representation. On the 7 July 2005 the insurer wrote that they were unable to confirm their position in relation to legal liability as it was unclear. They also said they had instructed a doctor to prepare a medical report. The family heard nothing of significance after that. Luckily a relative of Mr C was a union member and the union provided initial advice which led to expert lawyers being instructed.

They wrote a formal disease protocol letter on 15 February 2006. The claim was not acknowledged and the lawyer called the insurers on the 7 March. At that time, he was told the file could not be located. The lawyers wrote again on the 7 March and made a further telephone call on the 13 March. The letter and telephone call were not returned. And so it went on until the 11 May 2006, the first letter was received from the insurers which stated that “we can confirm that our file of papers has now been found and we are currently waiting for medical evidence.” A gap of 10 months between correspondence from the insurers where it appears the file had been lost and nothing done to advance the claim.

That these examples involve unions is not the key point in this context.

3. Mr G worked as a picker with the ACC Distribution and developed a work related upper limb disorder. His picking rate is monitored and he had a target, but the insurers reported that the documents had been lost. An application was made for pre action disclosure, which was contested. The claimant’s representatives were successful. The response was a witness statement from the insurance representative saying that all of the documents had been lost. Her status was questioned as she did not work for the employers and had not carried out the searches herself. Meanwhile a disillusioned manager suspecting that the employer was holding back documents gave the claimant details of his picking rates. An application has now been made to debar the employers from defending the actual claim.

4. Unfortunately Mr G's experience is not unique. **Mr H** worked in the booths of the ferry terminal. Several folders of documents were disclosed through the liability insurers. Mistakenly there was an email within the documents passing between the defendants in-house insurance manager and the HR officer where they clearly appear to be conspiring to withhold various documents and make various documents privileged when they may not have been. An application to the court was made. The documents subsequently disclosed contained an ergonomist reports on the booths out of which the claimant worked and details of an employee who had problems on the booths prior to the claimant.

5. Mr M sat on a chair which collapsed beneath him. The chair was work equipment and liability is absolute. A long letter of claim was written by union lawyers. The response, after a month was to say that the letter of claim was not compliant with protocol. After nearly 4 months the another letter said that the precedent case of Stark v Post Office was not relevant, but after 6 months the Defendants finally wrote saying that they case handler had changed and that they agreed that the letter of claim was compliant and that Stark was relevant. They said to disregard the previous letters. It took 15 months, however, before liability was admitted.

6. Mr J also injured himself when liability is strict. He caught his hand in a circular saw as the guard did not come down far enough. The accident documents make it clear that Mr J missed a "working safely presentation", there was no safe working practice for the saw, the training was inadequate and that consideration was being given to fitting a second guard. An offer of a 50/50 split on liability has now been met with exasperated solicitors commencing proceedings.

7. Ms O, made a claim through her union lawyers in August 2005 after injuring her leg, when she fell down stairs due to the dangerous position of a photocopier which was moved to another location after the accident. Liability was always in dispute. The insurer refused to meet and discuss the case.

A medical report was sent to the insurer in November 2005 and there was an offer made in March 2006 based on an assessment on full liability - of £500. There was a later Part 36 offer, with the incumbent threat of costs consequences to the claimant, of £1,500, after court proceeding were issued. There was a payment into court on 17 July 2006 of £3,000 Part 36. The claim settled at the end of July 2006 for £3,250, with a trial date on the horizon and liability still in dispute.

And this case is one of many that demonstrates one of the fundamental weaknesses in the Frontier Economic/ABI report manipulating figures by using a banding approach and failing to compare like with like in any event.

8. Ms R's is another such case. She works for Lever Faberge and suffered a number of injuries including to her thumb, teeth, nose, chest and knees. The Insurance Company initially offered £3,595.00. After 15% contributory negligence they finally agreed that the claimant was in fact due £8,372.50.

9. Mr B claimed for his upper limb RSI. Liability remained in issue, but the insurers initially offered £6,000.00. They increased to £7,500.00 and then to £12,000.00. Eventually after further negotiation the insurers agreed to pay £20,000.00 plus CRU.

10. In Mr D's it is also inconceivable that the liability insurers would have offered him what he was entitled to if he had been unrepresented. An important aspect of his case was a *Smith v Manchester* claim. Mr D works for Jaguar Cars and he suffered a back injury due to slipping on water on steps.

The day before the Hearing the Defendants offered £4,000 damages which was promptly rejected. The District Judge awarded £4,500 in respect of the "Smith" head of claim alone. General damages were awarded at £7,500 and with special damages and interest the total award was £13,797. 18.

There are any number of other case examples. Further details and additional evidence can be supplied.