Better Regulation Task Force

# Better Routes to Redress

May 2004

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# 1 Foreword

### Compensation Culture: Exploding the Urban Myth

It is a commonly held perception that the United Kingdom is in the grip of a "compensation culture". Newspapers complain that the UK is becoming like the United States with stories of people apparently suing others for large sums of money, and often for what appear to be trivial reasons. Media reports and claims management companies encourage people to "have a go" by creating a perception, quite inaccurately, that large sums of money are easily accessible.

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.

Handling compensation claims can be expensive. One large council we spoke to estimated that this year it would spend over £2 million of its highways budget of nearly £22 million handling claims for compensation. Multiply that by all the local authorities and councils are spending a staggering amount of money each year dealing with compensation claims. Many claims will be genuine, and should act as an encouragement for better risk management, but many may be spurious. It is the money spent dealing with these claims which could be better spent for the benefit of local residents.

The prospect of litigation for negligence may have positive effects in making organisations manage their risks better, but an exaggerated fear of litigation, regardless of fault can be debilitating. The fear of litigation can make organisations over cautious in their behaviour. Local communities and local authorities unnecessarily cancel events and ban activities which until recently would have been considered routine. Businesses may be in danger of becoming less innovative - and without innovation there will be no progress.

This report looks at what has created the perception of a compensation culture; how that perception is fuelled; and the damage that the perception, unless tackled, will do for the prosperity and well-being of the UK. We also consider how people with genuine grievances - especially those who in the past may not have had access to justice - can have better access to redress, and make recommendations about how the process can be improved.

We trust that this report will act as a catalyst for an informed debate about how the perception of the compensation culture can be tackled. The issue is too important to ignore.

Government and its Agencies have a large part to play in starting the debate, but they cannot provide all the solutions to the problem. Others, in particular insurance companies, all branches of the legal profession, the media and commentators must play their part. We will continue to watch the debate with interest.

David Arculus
Chairman
Better Regulation Task Force

Teresa Graham
Chair, Litigation sub-group

# 2 Introduction

Almost every day there is a report in the media - newspaper, radio or television, suggesting that the United Kingdom is in the grip of a compensation culture. Headlines shout about people trying to claim what appear to be large sums of money for what are portrayed as dubious reasons.

> "The culture that is crippling Britain"
> Daily Mail. 21 February 2004
>
> "Blame culture 'is road to suicide' Lloyd's Chairman believes Britain is following America's compensation path into an abyss for insurers"
> Daily Telegragh. 3 February 2004
>
> "A chef who cut his finger is suing a hotel for £25,000 compensation by claiming no-one warned him about the danger posed by an avocado"
> BBC News website. 6 January 2004
>
> "Postman sues customer who sent 'too many' letters"
> Daily Telegraph. 20 December 2003

But what is not always reported is the outcome. The reality is often very different. Litigating is not easy. Many claims never reach court. Some will, of course, be settled out-of-court; others disappear because the claim had little chance of succeeding in the first place. For a claimant to succeed they have to be able to prove that first someone else owed them a duty of care and then that the same person was negligent.

The term "compensation culture" is not used to describe a society where people are able to seek compensation. Rather a "compensation culture" implies that a decision to seek compensation is wrong. "Compensation culture" is a pejorative term and suggests that those that seek to "blame and claim" should be criticised. It suggests greed; rather than people legitimately enforcing their rights. Few would oppose the principle that if people's rights are infringed, appropriate action should be available to the injured party to gain compensation from the guilty party. So why the double standards?

This report looks at the impact of and the reality behind the "compensation culture". It examines how those with a genuine grievance can seek and gain appropriate redress efficiently and effectively. We look at how people enter the redress process and how the service they receive is funded; what mechanisms exist to weed out frivolous or vexatious claims; what forms of redress are available, and how they might be made more available. Central to our report is the injured party - the most important person in the process.

Developments in recent years, principally 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 have increased access to justice.

But they have also meant that more people have been encouraged 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.

Responses from 212 councils in England and Wales revealed that 85 per cent of councils agree that "The introduction of conditional fee arrangements has increased the annual cost to my authority of handling compensation claims."

Suing the council - helping the citizen or harming the community?
Zurich Municipal and Local Government Association. January 2004

"Spiralling employers' liability claims costs under the spot light."
Insurance Day. 23 December 2003

"UK must find answer to the growing liability cover crisis."
Sir John Egan. President, CBI. January 2004

Local authorities are spending a great amount of money dealing with all the claims they receive. Every claim made, however frivolous or vexatious it is eventually found to be, has to be handled. That costs money: money raised from local residents; and money which could otherwise be spent on maintaining roads and pavements. Those who make unsubstantiated claims fail to realise that they ultimately are the ones that have to pay through higher taxes. But the local authorities believe that if they do not challenge every claim, the floodgates could open.

"Local authorities can see a positive impact on their budgets by proactively handling CFA claims. Maintenance of records, regular inspections of assets and services and the implementation of risk management policies is key to managing the claims process."

Zurich Municipal. January 2004

Others would do well to follow their lead. Business should be more inclined to challenge claims rather than settling out of court. One successfully challenged case might persuade others to do the same.

"The [Trafford] centre has told would-be litigants that it should not be seen as a soft touch, ready to pay "no win, no fee" lawyers on the grounds that fighting demands would be cheaper than a minor payout."

The Guardian. 14 May 2004

An apology can also go a long way. We need to move away from the situation where an apology is seen as an admittance of liability. In a survey commissioned by the Chief Medical Officer in 2002[1], 34 per cent of respondents who have been affected by medical injury wanted an apology or explanation.

However the so-called "compensation culture" cannot be blamed for all these problems. Some have arisen from poor operational practices by companies.

We recognise that the "compensation culture" is a very controversial issue, but it is one we feel needs to be debated. Those with grievances need a system of redress that provides them with effective remedies; whilst those without should be kept out of the system. It is important for us to realise that we have to take responsibility for our own actions - and not seek someone else to blame when things go wrong. Aside from starting a debate on "compensation culture", this report looks at the regime of seeking and securing redress from the perspective of our five principles of good regulation - proportionality, accountability, consistency, transparency and targeting.

### 2.1 Scope of the report

The report primarily concentrates on personal injury redress, rather than other forms of litigation, such as commercial or employment. Personal injury litigation attracts most attention from the media and commentators, and was raised most frequently in our stakeholder meetings. We do comment on the apparent disparity of views about personal and commercial redress activity.

### 2.2 Structure of the report

This report is essentially in two halves. In section 3, we examine the perception of the "compensation culture", what has created it, what fuels it, and try to explode some of the urban myths which surround this issue.

In section 4, we report on, and make recommendations to improve, the systems by which people with genuine grievances are able to secure redress.

[1] MORI survey 2002 commissioned for Chief Medical Officer report “Making Amends”. June 2003

We look at how accessible, transparent and effective they are; what other forms of redress, besides compensation, are available and how they could be made more widely available; and what more should be done to prevent redress having to be sought in the first place - prevention is better than cure.

### 2.3 Recommendations

All our recommendations are also listed in section 4 of the report. Most of our recommendations are made to the Government, but there are so many non-Governmental players with an interest in this issue that we would like them also to consider how they can play an active part in implementing our recommendations.

A full list of recommendations is given below. Where feasible we have suggested deadlines for action. Some of the recommendations involve research which we appreciate will not be completed for some time. We would like the Department for Constitutional Affairs to co-ordinate all this research and ensure it is kept on track for completion by the deadlines we recommend.

As with all Task Force reports the Government is committed to respond to this report within 60 days of publication.

#### *2.3.1 Full list of recommendations*

## Recommendation 1: Claims Management Companies

**(i) Regulation**

The Task Force recommends that:

- by September 2004, the Claims Standards Federation 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. The Claims Standards Federation should work towards approval of its Code by the OFT by September 2005;

and if, by December 2005, progress is not made:

- the Department for Constitutional Affairs should step in and regulate the sector.

**(ii) Advice for consumers**

The Task Force recommends that the Department for Constitutional Affairs should immediately publicise through directgov[2], and other Government websites aimed at consumers, the protection which consumers have against claims management companies.

[2] www.direct.gov.uk

**(iii) Advertising**
The Task Force recommends that the Chief Medical Officer and the NHS Chief Executive should issue immediately joint guidelines to NHS hospitals and surgeries on the content of advertising by claims management companies on their premises.

### Recommendation 2: Small Claims Track

The Task Force recommends that the Department for Constitutional Affairs should carry out research into the potential impact of raising the limit under which personal injury claims can be pursued through the small claims track. The research should establish a limit which best balances the benefits to the claimant and to society against the costs, but justify any limit lower than £5000. The research should report by May 2005.

### Recommendation 3: Ombudsmen

(i) The Task Force recommends that the Cabinet Office, working with the public services ombudsmen, should examine and remove overlaps between the work of the ombudsmen. This work should be completed by November 2004, with a view to making any changes in 2005.

(ii) The Task Force recommends that all ombudsmen should publicise their valuable work better to all sections of society.

### Recommendation 4: More consideration of mediation and rehabilitation

The Task Force recommends that the Department for Constitutional Affairs, working with the Rules Committee, should strengthen the pre-action protocols that deal with mediation and rehabilitation. The protocols should require parties to provide an explanation of why they had rejected mediation or rehabilitation as a means of resolving a dispute. The judge should consider this explanation in awarding costs.

### Recommendation 5: Towards contingency fees

The Task Force recommends that the Department for Constitutional Affairs should carry out, by May 2005, research into the potential impact and effectiveness of contingency fees in securing access to justice in the UK.

## Recommendation 6: Rehabilitation

(i) The Task Force recommends that the Chief Medical Officer should lead a cross-Departmental group to assess the economic benefits of greater NHS-provided rehabilitation. The group should report by February 2005.

(ii) The Department for Work and Pensions should lead a group, which includes insurers, lawyers, HSE, the NHS and other interested parties, to look at developing mechanisms for earlier access to rehabilitation. The group should make recommendations by February 2005.

## Recommendation 7: Promoting better management of occupational health

The Task Force recommends that the Health and Safety Executive should publicise better its information on the beneficial tax provisions relating to employers purchasing occupational health support.

## Recommendation 8: Managing risk and lower insurance premiums

The Association of British Insurers should work to extend its "Making the Market Work" scheme to other organisations, such as schools, hospitals and local authorities who would also benefit from better insurance terms for good risk management.

### 2.4 Our approach

We announced this study in July 2003 and were pleased by the response our press release generated. A copy of the press release can be found at Annex A. A great number of people wrote and asked to meet us. We are very grateful for the frankness with which everyone contributed. A list of all those who contributed to this study is given at Annex B.

### 2.5 The response

David Lammy MP, Parliamentary Under-Secretary of State at the Department for Constitutional Affairs, has agreed to respond to this report on behalf of the Government. We are grateful to him and Lord Falconer, the Secretary of State for Constitutional Affairs, for the interest they have taken in our work. Their officials have been very helpful throughout the study, as we have got to grips with this complex issue.

# 3 The compensation culture: it's all in the mind

> "It is all about the compensation culture."
>
> Daily Mail. 31 March 04
>
> "A compensation culture of "blame, claim and gain" is a growing threat to the public services, Stephen Byers, the former Minister, will argue today."
>
> Financial Times. 10 March 04
>
> "Everyone loves to bemoan the rise of "compensation culture". Yet the idea is largely a myth. In fact we could do with being more litigious.
>
> New Statesman. March 04

Who is correct? Unfortunately the answer is not that simple.

Almost everyone we spoke to in the course of this study told us that they did not believe that there is a compensation culture in the UK. They argued that the reality is somewhat different, because the number of accident claims, including personal injury claims, is going down (see table1[3] ), and that this proves the absence of a compensation culture in the UK. However, it ignores the fact that many claims are settled out of court, and more seriously, that people believe that there is a "compensation culture" in the UK.

It is this perception, and the impact it is having on the UK as a whole, which needs to be tackled. Quoting statistics will not win the argument whilst the papers run "compensation culture" stories.

There is undoubtedly a perception that that the public have a greater tendency now than ever before to seek redress if they suffer an injustice or injury, which they believe was someone else's fault. People look for someone else to blame for their misfortune.

Advances in science and technology also mean that links between cause and effect are better understood. In the health arena, for example in areas such as passive smoking or occupational exposure to asbestos, this has led to a large increase in claims.

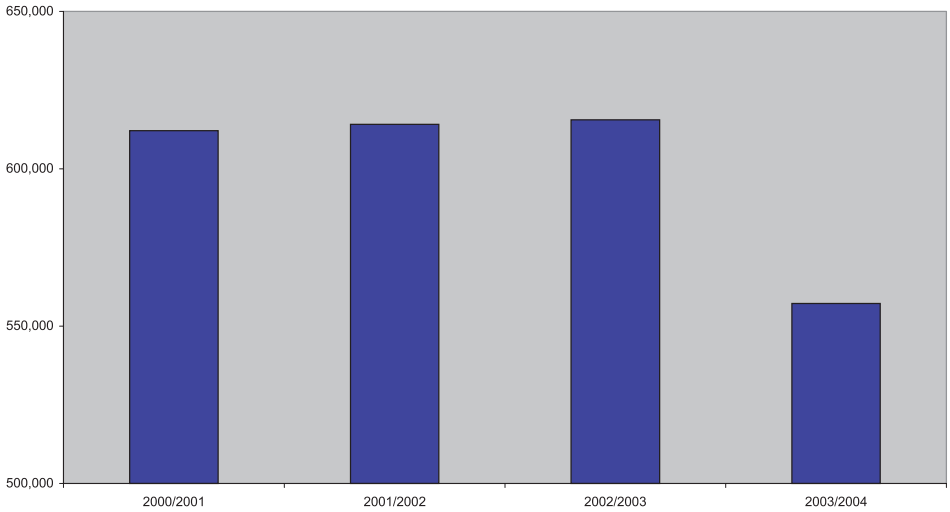
The current perceived problems can be put down to a combination of factors, which all occurred around the same time. These were the abolition of legal aid for most personal injury claims; the introduction of conditional fee arrangements; and the appearance and growth of claims management companies. These all led to the apparent explosion of litigation in the latter half of the 1990s and the early years of the 21st century.

There is little doubt that claims management companies, and especially those which previously dominated the market: The Accident Group (TAG) and Claims Direct, fed an enormous number of claims into the system. Both companies have now collapsed, but they have left a legacy that has not been good for any of those involved in helping people to pursue claims. It is now less likely that either lawyers or insurance companies will be prepared to fund claims that do not have a high chance of success.

[3] Compensation Recovery Unit 2003-04. www.dwp.gov.uk/advisers/compensation_recovery.asp

We found that notwithstanding this people are still being encouraged to "have a go" by the more unethical claims management companies, when they probably know the claim has only a very remote chance of succeeding.

**Table 1 : Total number of accident cases registered**




### 3.1 Don't believe everything you read

Regardless of perception, the truth behind the "compensation culture" is somewhat different to how it is portrayed by the media and commentators.

Many of the stories we read and hear either are simply not true or only have a grain of truth about them. The truth behind the famous, or rather infamous, McDonald's coffee case, which is often held up as a shining example of the "compensation culture", is different to how it is reported or quoted. Newspapers readily use the incident to highlight the "compensation culture".

**Media creates a storm in a coffee cup**

"We live in a compensation culture. Everyone's running scared of litigation. Terror of being sued means it's only minutes until pavements are painted with gigantic government warnings in case we catch our stilettoes in a crack and sue the local council. And overpaid café lattes will carry huge labels lest you burn your tongue and slap a writ on them like the American plonker who gulped her McDonald's coffee and took Ronald McD to the cleaners."

Vanessa Feltz. Daily Star. 15 November 2003

The truth about this "American plonker" is starkly different:

Stella Liebeck (79) was trying to add cream to her coffee while she was a passenger in a stationary car. The spillage was her fault but she could not have expected the consequences:

- the coffee was served at 88°C (190°F). Any temperature above 65°C (149°F) will cause serious burns;
- there had been 700 prior complaints against this super-heated coffee;

McDonald's:

- knew of the risk of severe burns from its coffee;
- decided not to warn customers of the risk despite knowing most of their customers would not recognise it;
- knew its coffee was not fit for consumption as served; and
- did not intend to change its policies in the light of the evidence at trial.

Although hospitalised for 8 days and disabled for 2 years with third degree burns, Mrs Liebeck did not want to litigate but McDonald's refused to refund her $10,000 medical expenses;

The jury awarded $200,000 compensatory damages and $2.7million punitive damages. The court reduced this to $160,000 and $480,000 respectively.

Under these circumstances few would object to the injured woman having a right to claim for damages.

### 3.2 Litigating is not easy

Litigating, or pursuing a case to court, is only one form of redress. The majority of claims never make it to court. In order to litigate successfully the party who accuses (the claimant) another of acting in a negligent manner has to be able to prove that the other party (the defendant) owed them a duty of care and was negligent. This is the tort of negligence. Three principal elements determine whether a duty of care exists between two parties:

- proximity: the claimant must prove that the defendant was in a sufficiently close relationship with them, so that the defendant could reasonably foresee the consequences of their actions to the claimant. For example, road users are considered to be in a proximate relationship with one another, as are doctors and patients;

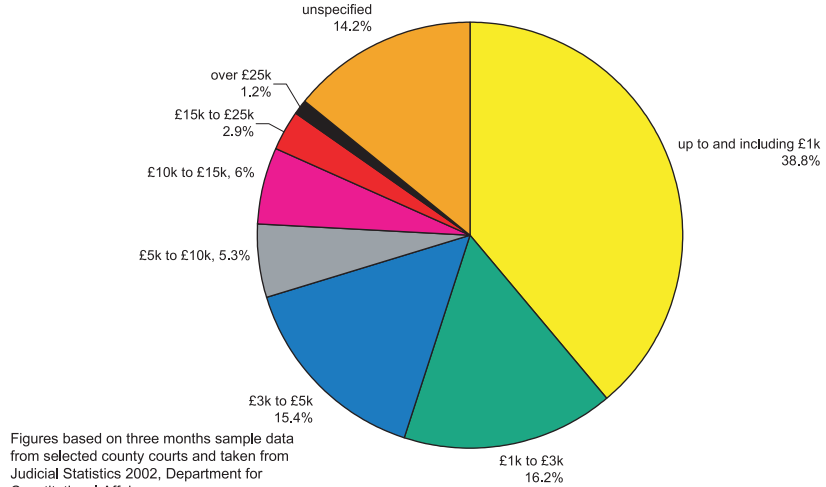
- reasonable foreseeability: the claimant must prove that it was reasonable for the defendant to foresee that their actions or inactions would cause the claimant harm; and

- fault: the claimant must prove that the harm caused was the fault of the defendant

Proving each of these three factors is not easy. New legal cases are always setting precedents as to how the three concepts might be interpreted. The shift in recent years has been over what kinds of experiences are now appropriate to try to litigate against. Whole new types of claims that were simply not considered by lawyers 20 or 30 years ago are now being pursued. However, despite what the media would lead us to believe such claims do not always succeed.

### 3.3 What excessive payments?

**Table 2: County Courts: claims issued by amount of claim, 2002**




Figures based on three months sample data from selected county courts and taken from Judicial Statistics 2002, Department for Constitutional Affairs

There is also a great mismatch between the size of payments people are led to believe they will receive and the reality. Claims management companies, holding out the promise of large compensation awards, fuel much of this. In reality the majority of payments are very small. As table 2 above shows, looking at all the claims issued by the County Courts in 2002, 55 per cent were for under £3000[4].

[4] Judicial Statistics 2002. Department for Constitutional Affairs.

### 3.4 UK versus US

It is often said that the UK is going down the same litigious route as the US. This is fortunately not the case. Statistics show that tort 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 also compares favourably with a number of other countries - see table 3.

| Table 3: International tort costs as a percentage of GDP in 2000[5] | |
|---|---|
| Denmark | 0.4% |
| United Kingdom | 0.6% |
| France | 0.8% |
| Canada | 0.8% |
| Japan | 0.8% |
| Switzerland | 0.9% |
| Spain | 1.0% |
| Australia | 1.1% |
| Belgium | 1.1% |
| Germany | 1.3% |
| Italy | 1.7% |
| United States of America | 1.9% |

Between 1989 to 2000 (except in 1993 when the figure went up to 0.7 per cent) this figure has remained at 0.6 per. Over the same period the figure in the US has fluctuated between 2.28 per cent and 1.88 per cent.

There are two key reasons why the UK could not follow the US litigious route:

- in civil cases in the UK, unlike the US, juries are seldom used. Juries will often be more sympathetic towards a claimant; they can identify with him or her, and will therefore be inclined to award higher damage awards;

- punitive damages can only be awarded in very restrictive circumstances;

- the loser pays the costs of both sides. The general presumption in the UK is that costs follow the event. In reality, the loser will pay the costs of the winner so far as is reasonable. This is known in the UK as the cost-shifting rule and acts as a powerful disincentive in the UK to pursuing a case that is unlikely to be won.

It is also said that because the UK does not have contingency fee arrangements (the fee paid is a percentage of the damages won) that we are avoiding going down the US route. Contingency fees are discussed in more detail in the next section of the report, but the Task Force does not agree that the lack of contingency fees prevents US-style litigation. It is more a combination of juries not setting damages and the cost-shifting rule, which act as a bulwark against the US system.

[5] US Tort Costs 2000. Trends and Findings on the Costs of the US Tort System. Tillinghurst - Towers Perrin. February 2002.

In the UK there are also a number of measures in place to weed out vexatious and frivolous claims. Some were introduced as part of the Woolf Reforms, for example rules requiring pre-action disclosure and a requirement to consider mediation. Others are local initiatives, for example many local authorities now insist on the claimant or claimant's solicitor attending a site visit for every pavement claim made against them. This reduces the number of claims being taken forward, and is more economically viable than paying out on every claim made.

### 3.5 Keeping the perception alive: the media

The perception of the "compensation culture" is largely, though not entirely, perpetuated by the media. Whilst appearing to despise the phenomenon, it fills many column inches in newspapers. The media regularly report claims for apparently exorbitant sums, without later reporting the final outcome, which may have been very different. They also report stories from other parts of the world without pointing out that such cases would be unlikely to succeed here.

**"It has got to be true; I read it in a newspaper...."**

- Kathleen Robertson of Austin, Texas, was awarded $780,000 by a jury after breaking her ankle tripping over a toddler who was running amok inside a furniture store. The owners of the store were understandably surprised at the verdict, considering the misbehaving tyke was Ms Robertson's son.

- Carl Truman, 19, of Los Angeles won $74,000 and medical expenses when his neighbor ran his hand over with a Honda Accord. Mr. Truman apparently didn't notice someone was at the wheel of the car whose hubcap he was trying to steal.

- A Philadelphia restaurant was ordered to pay Amber Carson of Lancaster, Pennsylvania $113,500 after she slipped on a spilled soft drink and broke her coccyx. The beverage was on the floor because Ms. Carson threw it at her boyfriend 30 seconds earlier during an argument.

- In November 2000, Mr. Grazinski purchased a brand new 32-foot Winnebago motor home. On his first trip home, having joined the freeway, he set the cruise control at 70 mph and calmly left the driver's seat to go into the back and make himself a cup of coffee. Not surprisingly, the Winnie left the freeway, crashed and overturned. Mr. Grazinski sued Winnebago for not advising him in the handbook that he could not actually do this. He was awarded $1,750,000 plus a new Winnebago.

Source: www.stellaawards.com, though the last was recently reported on The Scotsman website on 24 February 2004

Running such stories can only encourage some to think that they could make similar claims here.

We would ask the media to take more care in how it reports apparent "compensation culture" stories, and especially to adopt the fair approach of always telling the outcome of a claim.

"Cancelled! The perilous children's pancake race too expensive to insure."
Daily Mail. 20 February 2004

"Pancake race beats the killjoys."
Daily Mail. 25 February 2004

### 3.6 Keeping the perception alive: commentators

Senior commentators, who are frequently reported, also perpetuate the perception of the "compensation culture". They make speeches decrying the "compensation culture" without offering any solutions. Such speeches also give the impression that there are dual standards being applied to people litigating. Commentators are fond of criticising "ordinary" people, but rarely criticise big companies or well-known figures for litigating. This gives the impression that there is something wrong if "ordinary" individuals exercise their rights. People should be able to claim redress when rights have been infringed.

It would be helpful if those in positions of influence could resist talking about the "compensation culture". Doing so only perpetuates the problem. 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.

### 3.7 Impact of the "compensation culture" perception

The threat of litigation, or just a complaint or claim, can have some positive effects. We have already mentioned improved risk assessments in the case of schools and maintenance work by local authorities. It can also help to improve the provision of goods and services without the need for Government intervention. Those who complain loudest about the current system need to think about the alternatives.

However, there are also negative aspects of the "have a go" culture. Dealing with complaints and claims costs a great deal of money. One large local authority we met estimated that, for highways liability claims alone, it will have spent over £2 million in 2003/04 (including staff costs, claims handlers and premiums) from its £22 million highways budget. Multiply this by the 409 local authorities in England and Wales it comes to a staggering figure. Of course, some of the claims each local authority handles will be genuine but a large number will be vexatious or frivolous. Dealing with these puts an enormous drain on local authority' resources; resources which come from local residents and businesses and which could be better spent for the benefit of the same residents and businesses.

Fear of litigation does change behaviour. Reporting incidents that appear trivial, and may be urban myths, will encourage others to change their behaviour. There are more serious examples of an overly cautious approach being taken. Pharmaceutical companies are more wary about developing new drugs for fear of litigation, and some doctors prefer to carry out a caesarean section to a natural birth because it is perceived as less risky (despite caesarean section not being risk free[6]). Excessive risk aversion is not helpful to the UK's prosperity nor well-being.

### 3.8 Is the tide turning?

Recently an important legal precedent was established which should make people understand that they need to be responsible for their own actions and should anticipate risk.

In the case of Tomlinson v Congleton Borough Council [2004] 1 AC 46, where Mr Tomlinson suffered severe injuries by making a shallow dive into a lake, the House of Lords eventually found in favour of the Borough Council. Their Lordships found that although the Council had a duty of care to both visitors and trespassers to its property, it was not, on the facts of the case, reasonable to expect the council to protect Mr Tomlinson from his own actions.

"An important issue of freedom [was] at stake."
Lord Hoffman (Tomlinson v Congleton BC [2004] 1 AC 46 at 83 per Lord Hoffman

"it 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 entitled."
Lord Hobhouse (Tomlinson v Congleton BC [2004] 1 AC 46 at 96 per Lord Hobhouse)

"simply sporting about in the water with his friends, giving free rein to his exuberance. And why not? And why should the council be discouraged by the law of tort from providing facilities for young men and young women to enjoy themselves in this way? Of course there is some risk of accidents arising out of the joie-de-vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone."
Lord Scott (Tomlinson v Congleton BC [2004] 1 AC 46 at 100 per Lord Scott)

[6] Caesarean Section. National Institute for Clinical Excellence. Clinical Guideline 13. April 2004

The Tomlinson case is already having an impact:

- the case of Simonds v Isle of Wight [2004] ELR 59 relates to a five year old child falling off a swing and breaking his arm. The court found that the council was not liable for the damage on the grounds that essentially a swing is a swing and does present an inherent and obvious risk. If a parent lets their child use a swing, they might get hurt;

- in the case of Martin v Peterborough City Council, [2003] EWHC 2925 a woman damaged her ankle down a pothole on the edge of a park. Her Honour Judge Kirkham remarked that, having been directed to Tomlinson v Congleton Borough Council, she was aware of the "need for people to look after themselves" and decided that the Council could not be liable.

Perhaps these cases will help reduce the number of ill-conceived litigation cases. At least they might help persuade Councils and others that they do not need to take extreme steps to avoid accidents.

# 4 Making the system better for genuine claims

In this section of our report we look at the processes by which people can seek redress; how litigation is funded; how non-monetary forms of redress can be promoted; and what others can do to prevent people needing to seek redress in the first place.

### 4.1 Routes to redress: claims management companies

## Recommendation 1: Claims Management Companies

**(i) Regulation**
The Task Force recommends that:

- by September 2004, the Claims Standards Federation 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. The Claims Standards Federation should work towards approval of its Code by the OFT by September 2005;

and if, by December 2005, progress is not made:

- the Department for Constitutional Affairs should step in and regulate the sector.

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The Task Force recommends that the Department for Constitutional Affairs should publicise through Directgov[7], and other Government websites aimed at consumers, the protection which consumers already have against claims management companies.

**(iii) Advertising**
The Task Force recommends that the Chief Medical Officer and the NHS Chief Executive should issue immediately joint guidelines to NHS hospitals and surgeries on the content of advertising by claims management companies on their premises.

Claims management companies came up as an issue at almost every meeting we held. Everyone called for the Government to regulate the sector. Whilst claims management companies work in the litigation arena they do not form part of a statutorily self-regulated profession, for example solicitors are members of a profession which is regulated under the Solicitors Act 1974 and the Courts and Legal Services Act 1990.

The role of claims management companies has developed as a conduit between a claimant and a wide range of service providers. Those involved are primarily solicitors who are engaged in personal injury work, although clinical negligence is increasingly covered as well.

The Access to Justice Act 1999 abolished legal aid for most personal

[7] www.direct.gov.uk

injury work and introduced recoverability ("after the event" insurance premiums and the lawyer's additional reward in a conditional fee case became recoverable from the loser as well as normal costs, which created a demand for a new way of financing cases). 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 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 non-transparent and complex systems of referral fees and charges. The losing side ultimately picks up their costs.

There is no doubt that when they first appeared, claims management companies helped many to access justice who may never have thought they would be able to claim for an accident or injury because of the potential costs involved. But the sector was characterised by hard-sell advertising and direct-marketing which encouraged people to "have a go" even if there was little chance of actually achieving the large payout being dangled as an inducement. We heard about people being encouraged to make claims for tripping over the same paving slab or driving over the same pothole. Ultimately the whole sector was brought into disrepute and culminated in the demise of market leaders: The Accident Group and Claims Direct. There is however a danger that the demise of these companies will lead to the possibility of many one-man bands.

The more reputable companies that remain in the sector have realised that they need to put their house in order if they are to avoid strict Government regulation. They have acknowledged the need for an official governing body - a trade association - to govern the actions of claims management companies and individuals who want to work within the sector. The Claims Standards Federation has been set up. It is the governing body of the claims management industry, although unfortunately not all companies have joined the Federation. The Federation is developing a code of conduct that its members will have to abide by, and against which consumers will be able to judge member companies. If consumers only go to companies who are members of the Federation it may help squeeze out the more disreputable companies.

**Areas covered by the Claims Standards Federation Code of Practice**

- relationship with customer
- advertising
- sales practices
- explanation of contract
- claims procedures
- documentation
- duty to disclose information
- competence and training
- remuneration
- sub-agents
- complaints handling
- financial requirements
- use of the Claims Standards Federation name

Nearly everyone we met suggested that claims management companies should be regulated. Many made the call very vociferously - however few could suggest a model for the regulation of the sector.

The Task Force listened to these calls, but in line with our previous work, most recently on alternatives to state regulation[8], we believe that other forms of regulation should be tested first, and in particular co-regulation - that is self-regulation with a statutory underpinning.

We would like to see the Claims Standards Federation work towards Office of Fair Trading approval of their Code of Practise. This is not a simple process and will require the Federation and its members actively to demonstrate that its Code works before it is approved. We would particularly like the sector to improve its performance on disclosing how their operations are funded.

We appreciate that we cannot oblige the Federation to comply with our recommendation, but hope that it will do so because of the discipline OFT approval should bring to the sector coupled with the possibility of avoiding the expense of Government regulation. Approval of the Code should inject more consumer confidence into the sector.

**OFT's Consumer Codes Approval Scheme: core criteria for approval**[9]

- a commitment to provide customers with adequate information about goods and services
- the use of clear and fair contracts
- user friendly and speedy procedures for dealing with customer complaints
- low cost, independent redress if a complaint is not dealt with satisfactorily

[8] Imaginative Thinking for Better Regulation. Better Regulation Task Force. September 2003
[9] Consumer Codes of Practice. Office of Fair Trading. 2003. For more information see: www.oft.gov.uk/business/codes/default.htm

As Sir David Clementi has recognised in his recent work on the provision of legal services[10] the current structure for the regulation of the sector does not lend itself to the regulation of claims management companies. It is essential that the Clementi review results in a regulatory model that could incorporate claims management companies should the need arise in the future. The Government should keep the need for regulation under close review.

This will keep the sector under warning that if it does not improve its practices strict regulation will be brought in.

### 4.1.1 Current controls and information to consumers

It is not true that claims management companies are currently totally unregulated. It is just that they are not subject, like many other companies, to sector specific regulation. Claims management companies have to comply with whole rafts of consumer legislation, such as the Supply of Goods and Services Act 1982, the Unfair Contracts Term Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Trades Descriptions Act 1968. Similarly those who incorporate as a limited company are subject to the jurisdiction of the Department of Trade and Industry. The Financial Services Authority will soon regulate those companies that sell insurance. The Advertising Standards Authority (ASA) and the Office for Communications (OFCOM) will, in certain circumstances, control advertising by claims management companies.

Consumer groups told us that consumers would find it helpful to know what protection they already have against the actions of unscrupulous claims management companies. The Task Force would like to see the Government better publicise what protection already exists. Consumer advice agencies also have a role in promoting awareness amongst consumers about the sector.

### 4.1.2 Advertising

Claims management companies and solicitors gain much of their business through direct advertising on the television or in the media. Their services can also be found easily via the Internet.

Much of the advertising of claims management companies is aimed at less well off people and holds out the promise of great riches. One advertisement that we heard about featured a young woman looking at a sports car and saying "I've always wanted one of those and now I have had an accident I can have one". Such advertising is entirely inappropriate to personal injury cases where damages are very limited and aimed at putting clients back in the position they would have been in had they not suffered the wrong.

We were asked very strongly to recommend the banning of all advertising by claims management companies, but did not agree. The ASA and OFCOM should enforce their rules more rigorously and the section of the Claims Industry Federation's Code of Practice that deals with advertising should also be enforced.

There is one area of claims management company advertising that should be dealt with as a matter of urgency: advertising in NHS premises.

[10] Review of the Regulatory Framework for Legal Services in England and Wales. Sir David Clementi. March 2004

We were shown an advertisement (reproduced below) as an example of advertising which often appears. We also heard about hospital and doctor's appointment cards having the telephone number of a claims management company on the reverse.

We find this sort of advertising totally distasteful. The vast majority of doctors and nurses do not deliberately set out to harm patients.

Some NHS hospitals and surgeries may receive payment for featuring the telephone number of a claims management company on their appointment card, but we are not convinced it is the most appropriate way for the NHS to receive funding. Whilst it would be difficult to ban such advertising, we would like to see strict guidelines on such advertising introduced. It would also be helpful if such adverts also included information on NHS in-house complaint systems.

### 4.2 Routes to redress: small claims track

## Recommendation 2: Small Claims Track

The Task Force recommends that the Government carry out research into the potential impact of raising the limit under which personal injury can be taken through the small claims track. The research should establish a limit which best balances the benefits to the claimant and society against the costs. The research should report by May 2005.

In England and Wales there is currently a three-track system for dealing with civil cases in court according to the value and complexity of the case:

- small claims track: for most cases worth less than £5,000; dealt with informally by a district judge;
- fast track: for cases worth from £5,000 to £15,000; dealt with under a fixed timetable; and
- multi track: for cases worth over £15,000, or which are unusually complex; Such cases are closely supervised by a judge and tailored to each case.

In our review we looked at the small claims track, more commonly known as the small claims court, as it handles the majority of cases that follow a judicial route. We considered whether it could be used to handle more personal injury cases. Whilst the value of claims that are dealt with under the small claims track is £5,000; for personal injury cases and housing repair cases it is only £1,000. The £5,000 limit rose from £3,000 in April 1999 and from £1,000 in January 1996. The personal injury and housing repair limits have not been raised accordingly. We questioned whether they should be. Few of the claims in these two categories involve sums of less than £1,000. The effect of this restriction has been to exclude almost all personal injury and housing cases from the small claims jurisdiction.

Because of the £1,000 limit almost all personal injury cases are heard under fast-track (and, to a lesser extent multi-track) procedures, which is much more costly than a small claims hearing would be. Lawyers argued that personal injury cases were too complex to be dealt with under the small claims track, and therefore legal advice would be needed to ensure the most beneficial result for the claimant. Personal injury cases usually also need some form of medical evidence. This can be also expensive and under current rules, only limited costs can be recovered from the defendant.

The small claims regime in England and Wales has been designed specifically with claimants in mind. It provides a cheap and simple mechanism by which people who are unfamiliar with legal procedures can bring their disputes to the courts. They can dispense with the services of lawyers if they wish to do so.

Even though a dispute may involve only a small sum of money, the small claims procedure gives litigants in person a fighting chance of success against a represented and wealthier opponent, without having to run the risk of financial ruin in the process (since they do not have to pay their opponent's costs if they lose). The whole process is designed to be more informal and less adversarial. In the small claims track the judge plays a proactive role at hearings. This role involves, in particular, helping litigants in person to present their own evidence and assisting them in putting questions to the other side.

In 2002 the Lord Chancellor's Department published research into the impact of raising the limits for small claims track regime cases from £3,000 to £5,000 (except in personal injury and housing repair cases). The research showed that it did not result in a huge increase in cases and there was a great deal of satisfaction expressed about the service by both litigants and the judiciary[11].

Given the work being carried out in the area of fixed fees (dealt with later in this report), the Task Force believes that the time is now right to examine again whether the limit for personal injury claims should be raised above £1,000[12]. The issue has not been examined since 1999. The research should concentrate on the implications of raising the limit for personal injury claimants, and should include changes to allow the claimant to claim reasonable medical expenses from the defendant. We believe that allowing more personal injury claimants to go through the small claims track process will increase access to justice for many as it will be less expensive, less adversarial and less stressful.

### 4.3 Routes to redress: ombudsmen

## Recommendation 3: Ombudsmen

(i) The Task Force recommends that the Cabinet Office, working with the public services ombudsmen, should examine and remove overlaps between the work of the ombudsmen. This work should be completed by November 2004, with a view to making any changes in 2005.

(ii) All ombudsmen should publicise their work better to all sections of society. The Task Force would welcome seeing communication strategies by September 2004.

In the course of this study we met a number of ombudsmen. Ombudsmen provide a valuable dispute resolution service that is less adversarial than the court service. Their service is free for the person raising the complaint. In most cases, before approaching an ombudsman, the complainant must first have exhausted any internal complaint procedures the defendant may have. Ombudsmen generally work by reviewing documentation on a complaint without the complainant having to appear in person. Ombudsmen operate to a quality standard scheme operated by the British and Irish Ombudsman Association (BIOA). To achieve recognition, ombudsmen services must meet four criteria:

[11] Lay and Judicial Perspectives on the Expansion of the Small Claims Regime. John Baldwin. Department for Constitutional Affairs. Research Series No 8/02. September 2002

[12] We have not commented in this report on housing disrepair claims, but the Department for Constitutional Affairs may wish to examine the £1,000 limit for such claims at the same time.

- independence from the organisations they investigate;
- effectiveness;
- fairness; and
- public accountability.

Ombudsmen are expected to be user-friendly and to assist complainants in making their complaint - although they cannot give advice. The inquisitorial method of dispute resolution used by ombudsmen means that complainants do not have to compile a great deal of evidence in order to prove their case. Ombudsmen can also require a company within its jurisdiction to hand over a file, which a complainant may not have been able to access.

We did however also hear some complaints about ombudsmen services. Primarily their work is not well known to those who would use their services (except in some notable cases like the Financial Ombudsman Service) and their responsibilities appear to overlap. Few would understand where the responsibilities of the Parliamentary and Health Ombudsman end and those of the Local Government Ombudsman start.

The Treasury is reviewing the work of the Financial Ombudsman Services, and the Government has indicated that it is keen to explore what more can be done under existing statutory arrangements to promote joint working between ombudsmen and ensure that ombudsmen arrangements are fit for purpose. The Government has made clear that it shares the ombudsmen's commitment to deliver an accessible, flexible and comprehensive ombudsman service[13]. It should ensure however that their work does not overlap, and could do this first with the public sector ombudsmen (principally the Parliamentary and Health Ombudsman and the Local Government Ombudsman). This would build on the the review of the public sector ombudsmen carried out by Philip Collcutt, which said that the ombudsmen need to respond to the changing face of public service delivery[14].

We also considered the need for a more general consumer ombudsman, but decided that in an already crowded ombudsmen market one more would only add to the confusion. The BIOA website lists 11 ombudsmen relating to England, and another 15 complaint-handling bodies.

The DTI is just about to launch the "Consumer Direct" pathfinders. Consumer Direct will be a consumer information helpline, which will give generic advice on alternative dispute resolution mechanisms. If successful its remit could be expanded to include dispute resolution.

[13] Government response to the Public Administration Select Committee's Third Report of Session 2002 - 03 "Ombudsman Issues". July 2003

[14] Review of the Public Sector Ombudsmen in England. Philip Collcutt. Cabinet Office. April 2000

### 4.4 Routes to redress: mediation

## Recommendation 4: More consideration of mediation and rehabilitation

The Task Force recommends that the Department for Constitutional Affairs, working with the Rules Committee, should strengthen the pre-action protocols that deal with mediation and rehabilitation (see later in the report). The protocols should require parties to provide an explanation of why they had rejected mediation as a means of resolving a dispute. The judge should consider this explanation in awarding costs.

One of the aims of the Woolf Reforms was to increase the use of mediation to resolve disputes before they reached the courts. There are signs that mediation is increasingly being used:

- the Department for Constitutional Affairs is running a number of schemes which encourage and support mediation;
- the Department for Trade and Industry has just published research carried out by the National Consumer Council on alternative dispute resolution processes for consumer disputes[15], which highlighted the value of mediation;
- the National Health Service Litigation Authority regularly offers mediation to resolve clinical negligence cases; and
- ACAS facilitates mediation.

The Centre for Effective Dispute Resolution recently reported that in 2003 it handled 634 mediation cases - a 35 per cent increase on the previous year[16].

Of course mediation is not the answer to every dispute. Although when mediation works it works well. Because they have been involved in the process, parties generally accept a decision more readily if it has been mediated rather than imposed. It is most suitable where there is a continuing relationship between parties, for example employer/employee, supplier/manufacturer. Mediation can be expensive; it takes trained people to do it properly; and adequate accommodation has to be provided.

Mediation can work at any stage in a dispute process, but the closer a dispute gets to court the more difficult it can be for mediation to succeed. It also becomes more expensive. By that stage views will probably have become entrenched and substantial costs will have been incurred.

The Task Force supports the work Government and others are doing on mediation. Despite a recent ruling[17], the Task Force would like to see the courts do more to encourage greater use of mediation. The pre-action protocols should require parties to say whether they have considered mediation and provide an explanation if the answer is no. It is too easy to say no without being challenged.

[15] Seeking Resolution. Department of Trade and Industry and National Consumer Council. January 2004
[16] CEDR mediation figures reach all time high. 24 February 2004. www.cedr.co.uk
[17] Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday [2004] EWCA (civ) 576

### 4.5 Controlling costs: conditional or contingency fees?

## Recommendation 5: Towards contingency fees

The Task Force recommends that the Department for Constitutional Affairs should carry out, by May 2005, research into the potential impact and effectiveness of contingency fees in securing access to justice in the UK.

Conditional Fee Arrangements (CFAs) were introduced by the Courts and Legal Services Act 1990. They made it possible for an agreement to be drawn up between lawyer and claimant that made it clear that part or all of the lawyer's fee was payable only in the event of success. CFAs are limited to arrangements specified by order by the Lord Chancellor. The first order came in force in July 1995, and limited conditional fee arrangements to personal injury cases, insolvency cases and cases before the European Court of Human Rights. By the end of the 1990s CFA were available for all civil proceedings other than family.

The 2000 reforms made CFAs more complicated. These complications were seized on by the defendant liability insurers to try to reduce their cost exposure. The insurers mounted a campaign of legal challenges to the new regime including challenging 'technical' points on solicitors' individual CFAs. This satellite litigation delayed the closing of hundreds of thousands of claims. It is also likely to have increased the overall amount of expenditure on legal costs - estimated by the insurance industry as making up between 30 - 40 per cent of claims costs - due to the numerous court battles on these issues including an appeal to the House of Lords. The Department for Constitutional Affairs (DCA) recognised that CFAs needed to be simplified and carried out a consultation exercise on this in the second half of 2003[18]. DCA is expected to publish its firm proposals for reform by the summer.

The Task Force hopes that simplified arrangements will make it much easier for someone entering a CFA agreement to understand the process. The Task Force does however believe that the Government now needs to give some serious thought to alternatives to CFAs if, in two years, they are still viewed as overly complex and continue to be the cause of much satellite litigation. The Task Force would therefore recommend that the Government research the likely impact of contingency fees in the UK.

Contingency fees are where the fee paid is a percentage of the damages. It can either be a percentage taken from the damages, or a percentage of the damages but paid in addition to the damages. Contingency fees would certainly have the benefit of bringing costly satellite litigation to an end, and be more transparent for the claimant.

We were told when we started this study, that the UK should never consider contingency fees as they would lead to higher damages and an explosion in the "compensation culture".

[18] Simplifying CFAs: A consultation on the Conditional Fee Agreement regime including the: Conditional Fee Agreements; Collective Conditional Fee Agreements. Department for Constitutional Affairs. June 2003

Contingency fees need not lead to an explosion in the "compensation culture" if the other safeguards are left in place, such as the cost shifting rule and juries not setting damages.

If contingency fees were introduced the percentage could be set as a maximum, but law firms allowed to charge less if they wished. This would bring market competition into the personal injury litigation arena, which presently does not exist (except on the defendants' side where the insurance companies control the costs charged by those who provide them with legal services).

### 4.6 Controlling costs: fixed recoverable costs and success fees

Given the recent concerns about the apparent spiralling legal costs of litigating, apart from looking to simplify conditional fee arrangements, the Government working with others (primarily the Civil Justice Council) has been considering whether fixed recoverable costs and success fees could be introduced for certain types of claim. Fixed recoverable costs and success fees, like contingency fees, are a much more transparent way of funding a claim.

The Civil Justice Council has led a costs mediation process involving all the major claimant and defendant organisations to try to resolve the differences over legal costs and to create a more stable regime. The DCA has supported this work including funding essential research to underpin the mediations and implementing the solutions developed. This process has led to the introduction in October 2003 of a fixed recoverable costs regime for road traffic accident (RTA) personal injury claims not exceeding £10,000 settled pre issue of court proceedings and the fixed recoverable success fees for all RTA cases from June 2004. RTA claims are relatively low value, occur in very high numbers, and liability is often easy to establish.

Work is underway to try to fix recoverable success fees in employers' and public liability claims. Such claims are often more complicated than RTAs, because proving liability can be harder. We support the work being done. All those involved in the discussions should participate actively and constructively. Fixing the amount of recoverable legal costs should help these amounts become more predictable and proportionate. Insurers will be able to reserve more accurately against claims, the legal costs paid by losing defendants will be more effectively controlled and claimants should see their claims settled more quickly.

### 4.7 Controlling costs: streamline the claims process

Another way of addressing costs is, of course, to streamline the claims process.

The Department for Work and Pensions (DWP) review of Employers' Liability Compulsory Insurance (ELCI) in 2003 highlighted this issue. One of the recommendations in the final stage report was for the Government to work with stakeholders, for example lawyers, insurers, representatives of business and unions to plan a pilot scheme for resolving claims more cost effectively, quickly and fairly.

The development of this pilot scheme is now underway. The pilots will focus on low value (up to £10,000) accident claims and will be designed to test a

number of options, identified by stakeholders, for improving the existing process. The pilots will target the unnecessary costs at the start of the claims process - incident notification to investigation - and then explore how to process claims cost effectively - claim negotiation and settlement. The aim is to ensure investigatory and other work undertaken remains proportionate to the complexity and the value of the claim. As well as reducing costs the plan is to deliver a faster - but more transparent - outcome for claimants and, through earlier notification, increase opportunities for rehabilitation.

Stakeholders are working towards agreeing a pilot specification. The pilots should start by the end of June 2004. The Task Force will be watching the development and evaluation of these pilots with interest.

### 4.8 Better redress: rehabilitation

## Recommendation 6: Rehabilitation

(i) The Task Force recommends that the Chief Medical Officer should lead a cross-Departmental group to assess the economic benefits of greater NHS-provided rehabilitation. The group should report by February 2005.

(ii) 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 group should report by February 2005.

"The danger is that the longer anyone is off work with back pain the greater the risk of chronic pain and disability, and the lower chance of ever returning to work. By 6 weeks off work, there is a 10 - 40 per cent risk (depending on circumstances) of still being off work at 1 year. By 6 - 12 months off work, there is a 90 per cent chance of never returning to any form of work in the foreseeable future."

Back pain, Incapacity for Work and Social Security Benefits.
Waddell, Aylward and Sawney. 2002

"Patients seeking or receiving compensation for chronic low back pain reported more pain, depression and disability than a matched group without compensation involvement."

The Effect of Compensation Involvement on the Reporting of Pain and Disability by Patients Referred for Rehabilitation of Chronic Low Back Pain.
Rianville et al. 1997

The case for prompt intervention through rehabilitation could not be better made.

Rehabilitation was mentioned at every meeting we held as an area where more work should be done to increase its availability and uptake. Whilst considerable progress has been made over the last few years, in particular following the Government's review of Employers' Liability Compulsory Insurance led by the Department for Work and Pensions, international comparisons suggest that the UK lags behind. The International Underwriters Association has estimated that the chance of a paraplegic returning to employment is at least 50 per cent in Scandinavia; 32 per cent in the USA; but only 14 per cent in the UK[19]. But rehabilitation makes good economic sense. The Association of British Insurers has estimated that savings to the Exchequer of the order of £1.3 billion might be achieved if the UK's record of rehabilitation were improved[20]. Rehabilitation, whilst not an alternative to litigation, can also lower the level of damages that need to be paid to people pursuing a personal injury claim for loss of earnings.

**What is rehabilitation?**

The range of services and interventions which can be included under the heading "rehabilitation" is extremely diverse and includes:

- acute medical attention;
- accurate early assessment and diagnosis;
- pain relief;
- physical therapies (chiropractice, podiatry, physiotherapy, osteopathy, complementary therapies etc);
- wider therapies (e.g. speech therapy);
- surgery;
- psychological/psychiatric treatment, including counselling, cognitive/behavioural therapy, drug-based rehabilitation;
- ergonomic support;
- graduated return to work;
- retraining;
- counselling, for example for stress;
- work placement;
- any combination of the above.

[19] Third UK Bodily Injury Awards Study. International Underwriting Association. March 2003

[20] As estimated by the Association of British Insurers (www.abi.org.uk) in 2003 in a paper entitled "Rehabilitation - The Way Forward". The figure is based on estimates of the increased tax revenue generated by those returning to the workforce and the consequent reduction in benefit payments. It does not however take account of the cost of the infrastructure required to bring about widespread return to work.

In order to be most successful rehabilitation has to occur promptly after an injury or illness has occurred. It must deal not only with the medical aspects of an injury or illness, but also the psychological and social aspects.

The aim of redress is to attempt to return the injured party as far as possible to the situation they were in before the accident. This is most often done by the payment of money, but a greater place needs to be found for rehabilitation. There have been a number of recent initiatives to encourage greater take up of rehabilitation. For example new schemes sponsored jointly by the Department for Work and Pensions and the Department of Health, such as Pathways to Work and the Job Retention and Rehabilitation pilots, are testing innovative ways of helping people to stay in work or return to work following the onset of illness, injury or disability.

A number of private businesses have also realised that rehabilitation makes good business sense, and have developed models that others could follow.

**Honda UK**

**Safety Policy - Statement**

"We will ensure a safe and healthy working environment by building safety into our process and equipment and by achieving the highest level of safety awareness in our associates.

There can be no production without safety."

Honda is pro-active about its rehabilitation. As far as possible it looks to manage injuries arising out of the car construction process through close attention to ergonomics. All employees, who will be working on the car construction line have pre-employment checks to identify any pre-existing injuries or symptoms which may develop into an injury; and on-site physiotherapy is provided for injuries. Honda is also looking to provide on site rehabilitation to enable people to get back to work as quickly as possible. Honda has realised that rehabilitation makes good economic sense.

In 1999 liability insurers and re-insurers launched the Rehabilitation Code of Practice. The Code is based on the principle that most injured people want to make as full and speedy a recovery as possible and that their medical psychological, social and practical needs should be considered as a matter of priority. The theory was very simple. As well as benefiting the injured person and their family, rehabilitation reduces the cost and duration of most claims. Insurers rightly did not hide this fact. This established best practice in the management of personal injury claims. Whilst a voluntary document, the Code has received widespread endorsement.

The problem now is that a demand is being generated which cannot be met.

The private sector has responded to this demand, but the National Health Service is hampered by a lack of resources and competing priorities. The resources could be there. Although there would have to be initial investment, if people who are currently on some form of sickness or disability benefit could receive rehabilitation that got them back to work, less money would need to be spent on benefits. The Government should carry out some research into the economics of greater NHS provision of rehabilitation, and we see the Chief Medical Officer as best placed to lead that research.

#### 4.8.1 Early access to rehabilitation

Some are concerned that if rehabilitation is provided before liability is established for an injury or the full extent of an injury is known, then in the long run it may be difficult to establish who should pay and whether the early treatment provided was correct.

Rehabilitation is most effective when provided early and it would be helpful if rehabilitation could be provided quickly when appropriate. Liability for costs can be sorted out later. The most important thing is that the injured person receives prompt treatment and does not have to wait until his "advisers" work out who is going to pay the bill as too often happens at present.

### 4.9 Tax breaks for occupational health management

## Recommendation 7: Promoting better management of occupational health

The Task Force recommends that the Health and Safety Executive should publicise better its information on the beneficial tax provisions relating to the purchase of occupational health support

It is undoubtedly true that a healthy workforce will be a productive workforce. Employers should be proactive about managing their employees' health at work. Private medical care provided free, or cheaply, by employers to employees is generally subject to tax on the employee. If tax is due, there will also be National Insurance Contributions due from the employer on the same amount as for tax. There are however circumstances where a benefit charge does not arise on health related items:

- treatment for work-related conditions or accidents;
- health screening and check-ups;
- welfare counselling;
- equipment and services for disabled workers; and
- recreational and sporting facilities.

Full details are set out in a Health and Safety Executive leaflet that is published on its website[21], and is linked to the Small Business Service and Department of Trade and Industry websites, though unfortunately few employers will know about it.

[21] www.hse.gov.uk/pubns/taxrules.pdf

The Health and Safety Executive should promote the guidance more prominently. We know for example that the British Chambers of Commerce would be happy to send a copy to all its members.

### 4.10 Prevention is better than cure, and lower insurance premiums could help

Of course the best way to prevent any litigation, or threat of litigation, is to manage those risks that cause people to have accidents or suffer injuries. Employers are required by law to manage their health and safety risks. The risk of prosecution for non-management of health and safety risks should be a strong enough incentive to make employers act. But other incentives are also needed such as linking risk management to insurance premiums. Businesses which demonstrate that they manage their risks could be charged a lower insurance premium.

The Health and Safety Executive has recently published a research report on the development of a health and safety performance index[22] for businesses and others. The index is intended for use by organisations with over 250 employees and has two purposes. First, by following the index, businesses will understand better how they are managing health and safety performance in their organisation. They will be able to identify where action is required. Over time this should reduce the number of accidents and incidents of workplace ill-health, and hopefully the number of claims made against an employer.

Second, the index will assist external stakeholders (in the context of this report - insurance companies) in assessing how well an organisation manages its risks and responsibilities towards workers and the public. Insurers could decide premiums on the basis of this information.

Unfortunately, at nearly 100 pages the index is not very user-friendly for small businesses, although HSE is addressing this by turning the index into a web-based user-friendly tool[23].

HSE is also developing a version of the index for small and medium sized enterprises (SMEs) that it hopes to publish in this autumn. This will be much shorter and tailored for use by SMEs. HSE is developing the tool in close association with insurers. This version of the index should enable insurers to recognise those SMEs that manage health and safety well, and in turn offer them more advantageous insurance terms. This work is supported by the Department of Work and Pension's review of Employers' Liability Compulsory Insurance.

Trade associations can also do a great deal to assist their members. Many trade associations have health and safety schemes that help their members to manage their health and safety risks. The Association of British Insurers will assess[24] schemes against its criteria for good health and safety management, and it is hoped that this will lead to those businesses who comply with the scheme being rewarded through better insurance terms.

It would be helpful if a similar scheme could be set up for other organisations. One school we spoke to, for example, told us that their insurance premiums

[22] Health and Safety Performance Index & Calculating the Index. Health and Safety Executive. October 2003

[23] www.hse.gov.uk/research/chaspi.htm

[24] Making the Market Work. Association of British Insurers. www.abi.org.uk. September 2003

had more than doubled in the last year, and they were not able to get a discount for being a school that managed its risks well.

## Recommendation 8: Managing risk and lower insurance premiums.

The Association of British Insurers should work to extend its "Making the Market Work" scheme to other organisations, such as schools, hospitals and local authorities who would also benefit from better insurance terms for good risk management.

Insurance companies could also do more to help similar organisations learn from each other in managing similar risks. When we started this study we attended a conference where local authorities were learning from each other how they managed claims against them for damage to cars from potholes and slips and trips on their pavements. It was good to see insurance companies involved in this initiative.

# 5 Final comment

It is important in a civilised country like ours that people who suffer an injustice or injury are able to seek effective redress in the most efficient way. This may be monetary compensation, but often redress can take other forms, ranging from an apology through to rehabilitation to help someone literally get back on their feet again. Unfortunately because of all the stories we see in the media and the past activities of claims management companies, claiming redress is viewed by many as not the right thing to do. People should "put up and shut up" seems to be the attitude. This is wrong - if people have rights they should be able to enforce them. But it is wrong to lead people to believe that it is someone else's fault and someone else is to blame every time something goes wrong. We all have a responsibility for our own actions and our own safety.

As we said at the start of this report we hope that our work will initiate a debate about tackling the perception of a "compensation culture" in the UK. But equally we hope that if the Government and others accept and act on our recommendations, that those who have a genuine claim for redress find a system that is efficient, effective and easy to follow.

# Annex A
# Press release announcing study

Better Regulation Task Force

## PRESS RELEASE

17 July 2003

TASK FORCE ANNOUNCES STUDY INTO REGULATORY ASPECTS OF LITIGATION AND COMPENSATION

David Arculus, chairman of the Better Regulation Task Force, today announced the first of the Task Force's forthcoming programme of studies for 2003/04.

Mr Arculus said: "Our role is to examine issues where regulation can be made to work more effectively. The issue of litigation is rarely out of the headlines. Large compensation awards continue to make news. Our question is - is litigation the most effective and efficient regulatory tool for making amends? Or are the only people that really gain insurance companies and lawyers?"

"The issue is balance. It is important that people are able to enforce their rights and to be protected, but has it become too difficult for all of us. Fear of litigation can make businesses and public sector organisations improve their performance, but it can also put a huge drain on resources - both in time and money - and result in over cautiousness. There are also the emotional costs of litigation, which can be very stressful."

"What are the options for better regulation now and in the future? Our study will look at:
whether the risk of litigation promotes good practice and compliance with the law;
what is the impact of the fear of litigation on the public and private sectors?
the efficiency of the claims process?
whether the system is accessible for everyone - or does it encourage abuse?"

Teresa Graham who will lead the Task Force's work on litigation, said:

"Everyone says that litigation has got completely out of hand in the States, and I don't want to see that happen here. People must be able to gain redress for genuine harm they have suffered. But the fear of litigation can be very stifling. School trips get cancelled; firework displays fizzle out; playgrounds get pulled down; volunteering hampered…the list goes on."

"This important study will start in the autumn but in the meantime the Task Force would welcome your views. We are interested in hearing from as wide a range of stakeholders as possible - businesses, the public sector, trade unions, insurance companies, lawyers, personal injury specialists, the voluntary sector and of course, members of the public who have direct experience of the claims process."

# Annex B
# Contributors to review

ACAS
Accident and Advice Helpline
Advice Services Alliance
Association of British Insurers
Association of Chief Police Officers
Association of Independent Financial Advisers
Association of Local Authority Risk Managers
Association of Personal Injury Lawyers
Assured Assistance Ltd
Babington House School
Beachcroft Wansboroughs
British Chambers of Commerce
Browne Jacobson
Castle Hill Infant School
Confederation of British Industry
Centre for Effective Dispute Resolution
Chief and Assistant Chief Fire Officers' Association
Chief Medical Officer
Citizens Advice Bureau
Civil Justice Council
Claims Injury Federation
Commission for Racial Equality
DEMOS
Department for Constitutional Affairs
Department for Work and Pensions
Department of Trade and Industry
Disability Rights Commission
EEF
Federation of Small Businesses
Financial Ombudsman Service
Financial Services Authority
Ford and Warren Solicitors
Forum of Personal Injury Lawyers
Forum of Private Business
General Council of the Bar
Guise Solicitors
H M Treasury
Health and Care Management Ltd
Health and Safety Commission
Health and Safety Executive
Hill Dickenson
Home Office
Honda UK
Institute of Directors
International Underwriters Association Rehabilitation Working Party
Invaro Legal Services
Irwin Mitchell Solicitors
John Pickering and Partners
Juris Legal Services
Kenningham Underwood Armstrong

Kirklees Metropolitan Council
KSB Law
Kynixa
Law Society
Leigh, Day and Co
Local Government Ombudsman
London Solicitors Litigation Authority
Lord Levene, Chairman, Lloyds of London
Lovells
Marsh Ltd
Motor Accident Solicitors Society
National Consumer Council
NHS Litigation Authority
Norwich Union
Nottingham Law School
Office for the Supervision of Solicitors
Office of Fair Trading
Office of the Deputy Prime Minister
Office of the Legal Services Ombudsman
Office of the Premier of New South Wales
Office of the Telecommunications Ombudsman
Oxera
Parliamentary and Health Service Ombudsman
Pensions Ombudsman
Peter Kilfoyle MP
Peter Thurlow Public Relations
Prison Service
RAC Legal
Royal and Sun Alliance
Royal Hospital School
Russell Jones and Walker
Secure Trust Banking Group plc
Swiss Re
Thamesmead School
Thompsons
Trades Union Congress
Transport and General Workers Union
Treasury Solicitors
Unem Provident
Zurich Municipal

# Annex C

**Better Regulation Task Force and its approach**

The Better Regulation Task Force is an independent advisory group established on 1997. Members, appointed in the first instance for two years, are unpaid. They come from a variety of backgrounds - from large and small businesses, citizen and consumer groups, unions and those responsible for enforcing regulation - and all have experience of regulatory issues. The Chair, appointed initially for three years in April 2002, is David Arculus. Officials from the Regulatory Impact Unit in the Cabinet Office provide support for the Task Force.

**Terms of reference**

The Task Force's terms of reference are:

"To advise the Government on action to ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted."

**Members of the Task Force**

| | |
|---|---|
| David Arculus, Chairman | Severn Trent plc |
| Teresa Graham, Deputy Chair | Baker Tilly |
| Matti Alderson | Fire Horses* |
| Jean Coussins | Portman Group^ |
| Stephen Falder | HMG Paints* |
| Michael Gibbons | Consultant: utility sector |
| Kevin Hawkins | British Retail Consortium |
| Deirdre Hutton | National Consumer Council |
| Kirit Patel | Day Lewis Group^ |
| Simon Petch | CONNECT (retired May 2003)* |
| Ian Peters | EEF |
| Penelope Rowlatt | Independent economist |
| Janet Russell | Kirklees Metropolitan Council |
| Eve Salomon | Independent consultant: communications^ |
| Sukhvinder Stubbs | Barrow Cadbury Trust |
| Tim Sweeney | Consultant: financial services |
| Rex Symons | Bournemouth Primary Care NHS Trust |
| Sarah Veale | Trades Union Congress^ |
| Simon Ward | Consultant: hospitality industry* |
| Victoria Younghusband | Lawrence Graham |

* *Stood down from Task Force on 31 March 2004*
^ *Appointed to Task Force on 14 April 2004*

A Register of Members' Interests has been drawn up and is on the Task Force website at www.brtf.gov.uk or is available on request.

# Annex D
# Sub-group members

**Teresa Graham OBE (Chair)** is a Senior Adviser to Baker Tilly, Chartered Accountants, specialising in providing business advice to ambitious growing companies. She is a non-executive member of the Steering Board of the Department of Trade and Industry's Small Business Service (and Chair of its Audit Committee) and a member of the DTI's Small Business Council. Teresa is also non-executive Chairman of four small businesses. She is currently leading the Graham review of Small Firms Loan Guarantee scheme for the Government.

**Deirdre Hutton CBE** is Chair of the National Consumer Council. She is also Deputy Chair of the Financial Services Authority and Vice-Chair of the European Food Safety Authority. She is Chairman of the Food Chain Centre.

**Janet Russell** is Director of Environment and Transport at Kirklees Metropolitan Council. She is also a Local Government Authority (LGA) representative on the Health and Safety/Local Authority liaison committee, a LGA Public Protection Advisor and was a member of the Defra Regulatory Taskforce.

**Victoria Younghusband** is a Partner in the Corporate department at the law firm Lawrence Graham, and is a published author and regular speaker on regulatory issues, including corporate governance.

**Task Force secretariat**
Philip Clarke
Nick Arculus
Sara Mason

# Annex E
# Principles of Good Regulation

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| **Proportionality** | **Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.**<br><br>Policy solutions must be proportionate to the perceived problem or risk and justify the compliance costs imposed - don't use a sledgehammer to crack a nut. All the options for achieving policy objectives must be considered - not just prescriptive regulation. Alternatives may be more effective and cheaper to apply. "Think small first". Regulation can have a disproportionate impact on small businesses, which account for 99.8% of UK businesses. EC Directives should be transposed without gold plating. Enforcement regimes should be proportionate to the risk posed. Enforcers should consider an educational, rather than punitive approach where possible. |
| **Accountability** | **Regulators must be able to justify decisions, and be subject to public scrutiny.**<br><br>Proposals should be published and all those affected consulted before decisions are taken. Regulators should clearly explain how and why final decisions have been reached. Regulators and enforcers should establish clear standards and criteria against which they can be judged. There should be well-publicised, accessible, fair and effective complaint and appeals procedures. Regulators and enforcers should have clear lines of accountability to Ministers, Parliaments and assemblies and the public. |
| **Consistency** | **Government rules and standards must be joined up and implemented fairly.**<br><br>Regulators should be consistent with each other, and work together in a joined-up way. New regulations should take account of other existing or proposed regulations, whether of domestic, EU or international origin. Regulation should be predictable in order to give stability and certainty to those being regulated. Enforcement agencies should apply regulations consistently across the country. |

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| **Transparency** | **Regulators should be open and keep regulations simple and user friendly.**<br><br>Policy objectives, including the need for regulation, should be clearly defined and effectively communicated to all interested parties. Effective consultation must tale place before proposals are developed, to ensure that stakeholders' views and expertise are taken into account. Stakeholders should be given at least 12 weeks, and sufficient information, to respond to consultation documents. Regulations should be clear and simple, and guidance, in plain English, should be issued 12 weeks before the regulations take effect. Those being regulated should be made aware of their obligations, with law and best practice clearly distinguished. Those being regulated should be given the time and support to comply. It may be helpful to supply examples of methods of compliance. The consequences of non-compliance should be made clear. |
| **Targeting** | **Regulation should be focused on the problem, and minimise side effects.**<br><br>Regulations should focus on the problem, and avoid a scattergun approach. Where appropriate, regulators should adopt a "goals-based" approach, with enforcers and those being regulated being given flexibility in deciding how to meet clear, unambiguous targets. Guidance and support should be adapted to the to the needs of different groups. Enforcers should focus primarily on those whose activities give rise to the most serious risks. Regulations should be systematically reviewed to test whether they are still necessary and effective. If not, they should be modified or eliminated. |

A leaflet explaining our Principles of Good Regulation is on our website and available on request www.brtf.gov.uk

# Annex F
# Task Force publications

The Better Regulation Task Force has produced the following reports that are all available free on request by:

- writing to: Better Regulation Task Force secretariat, 5th Floor, 22 Whitehall, London SW1A 2WH
- telephoning: 020 7276 2142
- emailing: taskforce@cabinet-office.x.gsi.gov.uk
- visiting our website at www.brtf.gov.uk

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| The Regulation of Child Employment | February 04 |
| Alternatives to State Regulation leaflet | January 04 |
| Independent Regulators | October 03 |
| Imaginative Thinking for Better Regulation | Sepember 03 |
| Environmental Regulation: Getting the Message Across | July 03 |
| Government: Supporter and Customer? | May 03 |
| | |
| Annual Report 2001/02 | February 03 |
| Revised Principles of Good Regulation | February 03 |
| Scientific Research: Innovation with Controls | January 03 |
| Higher Education | July 02 |
| Local Delivery of Central Policy | July 02 |
| Employment Regulation: striking a balance | May 02 |
| | |
| Annual Report 2000/01 | October 01 |
| Housing Benefit: a case study of lone parents | September 01 |
| Economic Regulators | July 01 |
| Local Shops: a progress report on small firms regulation | July 01 |
| Regulating Cyberspace: Better Regulation for e-commerce | December 00 |
| Environmental Regulation and Farmers | Nov 00 |
| | |
| Annual Report 1999/00 | October 00 |
| Revised Principles of Better Regulation | October 00 |
| Protecting Vulnerable People | September 00 |
| Alternatives to State Regulation | July 00 |
| Tackling the Impact of Increasing Regulation - a case study of Hotels and Restaurants | June 00 |
| Helping Small Firms Cope with Regulations - Exemptions and other Approaches | April 00 |
| Red Tape Affecting Head Teachers | April 00 |
| Payroll Review | March 00 |
| Self-regulation interim report | October 99 |

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| Annual Report 1998/99 | September 99 |
| Regulation and Small Firms: a progress report | July 99 |
| Fit Person's Criteria: a review of the criteria used to judge people's suitability for certain occupations | May 99 |
| Anti-discrimination legislation | May 99 |
| Enforcement | April 99 |
| | |
| Annual Report 1997/98 | September 98 |
| Early Education and Day Care | July 98 |
| Access to Government Funding for the Voluntary Sector | July 98 |
| Licensing Legislation | July 98 |
| Packaging Waste | June 98 |
| Long-term care | May 98 |
| Consumer Affairs | May 98 |
| Principles of Good Regulation | December 97 |

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ISBN: 0 7115 0457 1



The material used in this publication is constituted from 75% post consumer waste and 25% virgin fibre.

Produced by the Cabinet Office Publications & Publicity Team. May 2004