



RESEARCH PAPER 07/57  
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# ***Child Maintenance and Other Payments Bill***

**Bill No 118 of 2006-07**

The Bill focuses on two topics: child support maintenance and the provision of lump sum payments in connection with mesothelioma. The Bill is due to have its Second Reading on 4 July.

The child maintenance provisions are contained in Parts 1-3 and 5 of the Bill. They introduce changes to the child maintenance system which were proposed in the White Paper, *A new system of child maintenance*, published by the Department for Work and Pensions in December 2006.

Part 4 of the Bill includes powers to introduce a new scheme providing up-front lump sum payments for people diagnosed with diffuse mesothelioma and their dependants, and amends the *Social Security (Recovery of Benefits) Act 1997* in order to fund payments through a compensation recovery mechanism.

The Bill extends to England, Wales and Scotland. There are a limited number of measures relating to the disclosure of information and some general provisions which also apply to Northern Ireland.

Manjit Gheera and Steven Kennedy

SOCIAL POLICY SECTION

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## Summary of main points

The *Child Maintenance and Other Payments Bill* was published on 6 June 2007. It is divided into two sections dealing with child support maintenance reform and compensation for persons affected by mesothelioma.

### Child maintenance

The child maintenance provisions are contained in Parts 1 to 3 and 5 of the Bill. They would introduce changes to the current law on child support by amending the *Child Support Act 1991*.

The current system of child support maintenance has been administered by the Child Support Agency (CSA) since it was introduced in 1993. The system was established by the *Child Support Act 1991*, and then further reformed by the *Child Support Act 1995* and the *Child Support, Pensions and Social Security Act 2000*. Despite, substantial legislative reforms the CSA has failed to deliver an effective system of child support for parents and children.

The report by Sir David Henshaw, *Recovering child support: routes to responsibility* and the Government's White Paper, *A new system of child maintenance* have influenced the child maintenance provisions of the Bill.

The Bill proposes to establish a body corporate, the Child Maintenance and Enforcement Commission (C-MEC), to deliver child maintenance and replace the CSA. The current functions carried out by the CSA will be transferred to C-MEC.

The Bill proposes changes to the present system of maintenance collection by encouraging parents to make private child support arrangements and by removing the requirement that a parent with care on certain benefits must use the CSA for maintenance collection. It further proposes to make changes to the way maintenance payments are calculated by using a non-resident parent's gross weekly income instead of net income. Maintenance calculations would use financial information from HM Revenue and Customs (HMRC) instead of information provided by the non-resident parent. Further proposals would allow C-MEC to share child support information with credit reference agencies and other specified bodies.

The Bill proposes to increase the methods of collection and enforcement available to C-MEC by allowing greater use of Deduction from Earnings Orders; enabling deductions to be made directly from bank accounts; and allowing administrative liability orders to be issued. New powers of enforcement would be available to C-MEC, including curfew orders and the power to disqualify non-resident parents from holding or obtaining travel authorisation.

New powers to manage debt are also proposed in the Bill. They include the power to negotiate settlements for maintenance arrears; write off arrears in certain circumstances; apply to recover maintenance from the estate of a deceased non-resident parent; and sell debt to a third party in specified circumstances.

Many groups have welcomed the provisions in the Bill which would allow parents to make their own child support arrangements. Others have questioned whether C-MEC would deliver a better service than the CSA and be able to tackle the Government's aim of reducing child poverty.

### **Compensation for mesothelioma**

Mesothelioma is a cancer of the protective lining of the lungs or abdomen. People who develop the disease have usually worked in jobs where they inhaled asbestos particles, but exposure may have occurred in other ways such as by washing the clothes of a family member who worked with asbestos, living near a factory using asbestos or a contaminated site, at illegal dumps, or during renovation work where asbestos is present.

There is presently no known cure for mesothelioma and sufferers usually die within months of diagnosis. There are now around 1,800 mesothelioma cases a year in the United Kingdom. Asbestos has for many years been strictly controlled, but symptoms may not appear until 20 to 50 years after exposure and it is expected that the number of deaths each year will continue to increase, reaching a peak between 2011 and 2015.

At present a mesothelioma sufferer may be able to get compensation from one or more sources:

- A civil claim for damages against one or more of the companies responsible for exposing them to asbestos negligently and/or in breach of a statutory duty
- The Industrial Injuries Disablement Benefit scheme administered by the Department for Work and Pensions (DWP)
- For those unable to pursue a civil claim against an employer, a lump sum payment under the scheme set up by the *Pneumoconiosis etc (Workers' Compensation) Act 1979* (PWCA), which is also administered by the DWP

Making a civil claim can be difficult; for example, the employer may have ceased to exist and its insurer may be difficult to trace. Eligibility for Industrial Injuries Benefits, or a payment under the PWCA, is dependent upon asbestos exposure having occurred during the course of employment. Where a person can make a claim, it often takes time to be processed, particularly when it involves tracing relevant employment records. Poor life expectancy associated with disease often means that sufferers die before compensation is paid.

On 20 July 2006 the Secretary of State for Work and Pensions announced a series of interim measures to help speed up the claims process for mesothelioma sufferers, pending a long term solution. On 1 September 2006 further consultation began on what might be done to ensure that sufferers received compensation when they themselves could benefit from it, and on 13 March 2007 the Government announced its intention, subject to legislative approval, to ensure that everyone with mesothelioma could obtain early access to a substantial payment, normally within six weeks of diagnosis.

Part 4 of the Bill contains provisions to extend payment of compensation to all people suffering from diffuse mesothelioma - or their dependants, if they have died - regardless of the person's employment status and irrespective of how exposure occurred. The cost of the new scheme would be met by amending the *Social Security (Recovery of Benefits) Act 1997* to allow for payments under both the *Pneumoconiosis etc (Workers' Compensation) Act 1979* and the new scheme to be recovered if a subsequent civil compensation claim is successful. The level of payments under the new scheme would initially depend on the total amount recovered from compensation awards, but the Government's intention is to increase them, as and when funds allow, until they are equal to the level of payments made under the 1979 Act. The detail of the new arrangements is to be set out in regulations.

The DWP estimates that there will be around 1,400 additional claims under the new scheme in 2008/09, with around 600 additional claims in each subsequent year until 2015/16.

Trade unions and organisations representing mesothelioma sufferers and their families have welcomed the provisions in Part 4 of the Bill. The insurance industry accepts the new compensation recovery powers and recognises the principle underpinning them, but notes that they will put further upward pressure on insurance premiums.

The Bill extends to England, Wales and Scotland, except for clauses 39, 50, 52(2) and 57 and 58 and paragraphs 4 to 6 of Schedule 6, which also extend to Northern Ireland.

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# I Background

## A. A brief history of the Child Support Agency

In 1990, the then Conservative Government proposed to replace the discretionary court based system of child maintenance with a new standardised administrative formula. The court system had been widely criticised as being unreliable, inconsistent and slow. The Government also criticised the court system for being inadequate at dealing with child maintenance where parents lived apart. It proposed to introduce a new system which ensured that biological parents were financially responsible for their children regardless of whether they had ever lived together, whether the relationship between them had broken down, or whether new relationships had been formed.<sup>1</sup>

The *Child Support Act 1991* introduced two central changes to the child support system by:

- Replacing the old discretionary powers of the courts with the application of a precise formula, set out in legislation, for calculating the level of child maintenance.
- Setting up a Child Support Agency (CSA) for assessing, collecting and enforcing maintenance payments.

Almost as soon as it came into being the CSA was controversial. Non-resident parents objected to the formula for calculating how much they owed and parents with care complained of administrative delays, weak enforcement and other administrative problems. There were also complaints that the system did little to help those parents with care who were receiving income-related social security benefits. Despite policy and administrative changes in 1995,<sup>2</sup> the criticisms of the CSA continued to mount. On 2 November 1997, the Sunday Mirror carried an article typical of many, which began: 'Since the Child Support Agency was set up in April 1993, it has become one of the most hated institutions in Britain.'

An independent case examiner, appointed to deal with the large volume of complaints about the CSA, criticised the agency for being largely unresponsive to customers' complaints. Anne Parker, in her first annual report, said that delay in processing all aspects of the agency's work had been an endemic feature of almost all the cases examined. She blamed this partly on the complexity of the system that CSA staff had to work with and commended the CSA for those improvements that it had made.<sup>3</sup>

When the Labour Government came to power in 1997 it made a commitment to ensuring an effective system of child support but said that the CSA still had a long way to go

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<sup>1</sup> *Children Come First: the Government's proposals on the maintenance of children*, Cm 1264, October 1990

<sup>2</sup> *Child Support Act 1995*

<sup>3</sup> Independent Case Examiner for the Child Support Agency News Release ICE/001/98, *Child Support Agency: "Must Do Better"*, 2 September 1998

before it could provide a decent service.<sup>4</sup> In a Department of Social Security (DSS) Green Paper on welfare reform a year later, the Government said it would conduct a “root and branch” review of the CSA followed by fundamental reforms.<sup>5</sup>

In a new DSS Green Paper on child support entitled *Children First: a new approach to child support*, Tony Blair, the Prime Minister, explained why reform of the CSA was needed. In his foreword to the Green Paper he said that the Child Support Agency had “lost the confidence of the public”; the existing child support scheme was a “mess”; and it needed “urgent reform”.<sup>6</sup>

On the publication of the White Paper<sup>7</sup> in 1999, Alistair Darling, the Secretary of State for Social Security announced:

We are abolishing the complex formula and replacing it with a system of simple rates that is so easy to understand that parents can work out for themselves how much they should pay. We will publish these rates - indeed, they are in the White Paper - by putting leaflets in post offices, libraries and elsewhere.

To do this, we need also to reform the way in which the CSA operates and to improve significantly the service that it provides. This is not going to be easy. The CSA will never be popular - it will always be doing a difficult job at a difficult and emotional time. However, by replacing the complex formula with new, simple rates, we are laying the foundations for a far better service than would ever be possible under the current system.

[...]

We are also reforming the system to make sure that it does more for children in the poorest families. Under the current system, mothers lose their income support, pound for pound, whenever any maintenance is paid; because mothers lose out, their children lose out too. So, today, I can announce significant new help for children in the poorest families, worth up to £10 a week. More than 250,000 children will gain from that change alone. That is real help from the Government for children in the poorest families. For the first time ever, we are making sure that money goes to the poorest children, not to the Treasury. I can announce today that, to make work pay, from October, low-paid families in work and receiving the working families tax credit will keep every pound and every penny of child maintenance paid. All those measures are delivering on our commitment to do more for those who need it most, to end child poverty and to make sure that the Government, parents and the Child Support Agency together deliver for children.

Of course, we need to make sure that those changes are introduced smoothly and successfully. We want to introduce the new scheme as soon as possible, but it is vital to get it right. The present system collapsed under its own weight

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<sup>4</sup> HC Deb 20 June 1997 c 595 (Debate c 523-595)

<sup>5</sup> *New Ambitions For Our Country: A New Contract For Welfare*, presented to Parliament by the Secretary of State for Social Security and the Minister for Welfare Reform, Cm 3805, March 1998

<sup>6</sup> *Children First: a new approach to child support*, piii, July 1998

<sup>7</sup> *A New Contract for Welfare: Children's Rights And Parents' Responsibilities*, presented to Parliament by the Secretary of State for Social Security, Cm 4349, July 1999

because the previous Government tried to introduce reforms too quickly, and with too little thought. It is a massive task. Within a year of the millennium, the Child Support Agency will be dealing with more than 1 million cases - that is more than 2 million parents. Radical change on that scale will take time. The new system needs legislation and new computer systems, as well as a radical change of culture and working practices in the CSA itself.

We plan to introduce the new system for new cases towards the end of 2001, with existing cases coming on to the new system later, once it is up and running.<sup>8</sup>

The *Child Support, Pensions and Social Security Act 2000* legislated for a new scheme of child support to be administered by the Child Support Agency (CSA).<sup>9</sup> After several delays, due to problems with the IT system, the new scheme for calculating child support was introduced on 3 March 2003. However, teething problems continued, which affected the transfer of existing old scheme cases to the new scheme.<sup>10</sup>

To date there has not been a wholesale conversion of old scheme cases to the new scheme. As a result, two different schemes for calculating child maintenance are in operation.

Despite the reforms to child maintenance, a 2006 National Audit Office report concluded:

'The Child Support Reforms have failed to deliver the improvements in customer service and administrative efficiency, which might have been expected from the much-needed new rules, simplified calculation and a new IT system. The Reforms were a final, but in the event unsuccessful, attempt to deliver the policy that led to the establishment of the Child Support Agency in 1993. This policy required a complex administrative process with poor incentives for compliance on the part of many, perhaps most, customers. With hindsight, the Agency was never structured in a way that would enable the policy to be delivered cost effectively. ... While they have benefited a number of the poorest parents and children, overall the new scheme has performed no better than its predecessor, although there are signs of improvement.'<sup>11</sup>

## B. The Henshaw Review

On 9 February 2006, John Hutton, the Secretary of State for Work and Pensions, declared that neither the CSA nor the current child support policy was "fit for purpose".<sup>12</sup> He announced that he had asked Sir David Henshaw, the former Chief Executive of

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<sup>8</sup> HC Deb 1 July 1999 cc 432-434

<sup>9</sup> See Library Standard Note: Child Support Agency (CSA): An explanation of the new scheme of calculating child maintenance (SN/SP/2948)

<sup>10</sup> Further information on the delays in introducing the new child maintenance scheme are detailed in the following Library Standard Note: Child Support Agency (CSA): Delays in introducing the new child maintenance scheme (SN/SP/2898)

<sup>11</sup> National Audit Office, *Child Support Agency – Implementation of the Child Support Reforms*, HC 1174 Session 2005/6, 30 June 2006

<sup>12</sup> HC Deb 9 February 2006, cc1019-32 WS

Liverpool City Council, to completely redesign the child support system. Sir David's terms of reference were to consider the longer term policy and delivery arrangements for child support, including:

- How best to ensure that parents take financial responsibility for their children when they live apart;
- The best arrangements for delivering this outcome cost-effectively;
- The options for moving to new structures and policies recognising the need to protect the level of service offered to the current 1.5 million parents with care.

Sir David Henshaw reported his findings on redesigning child support on 24 July 2006. In his report *Recovering child support: routes to responsibility*,<sup>13</sup> Sir David acknowledged that the current system of child support fails to deliver effectively.<sup>14</sup>

Sir David Henshaw was of the opinion that given the CSA's "legacy of past failure", the organisation would not be capable of delivering the redesigned support model that he proposed.<sup>15</sup> He therefore recommended a clean break from the past with a new organisation set up to deliver child support:

'Lessons must be learnt to ensure that that previous mistakes are not repeated and that the service is not contaminated by past failings. Creating a new organisation would allow a clean break from the past and would separate the delivery of child support from having to deal with old debt. A clean break maximises the chances of a new organisation being able to create a new culture of climate of expectation.'<sup>16</sup>

The main recommendations for change were:

- the creation of a new system that allows parents to make their own arrangements for child support, with quick and effective involvement from the state where such arrangements are not possible;
- a new organisation to administer child support with a time limited residuary body to manage down and enforce old debt; and
- delivery of child support through a commissioning body drawing on expertise from the private, not for profit and wider public sectors.

More specifically, he proposed:

- the removal of the compulsion of parents with care on benefits to apply for child support;

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<sup>13</sup> Cm 6894, [http://www.dwp.gov.uk/childmaintenance/pdfs/Henshaw\\_complete22\\_7.pdf](http://www.dwp.gov.uk/childmaintenance/pdfs/Henshaw_complete22_7.pdf)

<sup>14</sup> *Ibid* p14

<sup>15</sup> Cm 6894, p33

<sup>16</sup> *Ibid*

- disregarding child maintenance in Income Support, Housing Benefit and Council Tax Benefit;
- reconfiguring advice services to ensure that child support information is properly integrated;
- the removal of the current 12 month break point, whereby consent orders obtained through the courts can be overturned by the CSA;
- the introduction of new sanctions, including the power to withdraw passports, and more use made of existing powers such as imposing financial penalties.

Sir David Henshaw further recommended that there should be no conversion of cases from the existing to the redesigned system:

'Parents moving between existing arrangements and the redesigned system would have to make a clear choice between the future options for settling child support. Clients would not have the option of remaining with the existing CSA. They would have to decide on the most appropriate route to settle child support.

Those who wish to make arrangements through the administrative route would have to re-apply to the new organisation.<sup>17</sup>

The Government's response, *A fresh start: child support redesign*,<sup>18</sup> endorsed the "clean break" approach recommended by Sir David Henshaw. On announcing the publication of the response, the Secretary of State for Work and Pensions, John Hutton stated:

'We need a fresh start that is not burdened by the failure of the past. So I propose to replace the CSA with a new organisation that is simpler but tougher on parents who do not pay up.'<sup>19</sup>

He outlined the key changes, in line with Sir David Henshaw's recommendations, that would underpin the new system:

- Allow more money to go to children by significantly increasing the amount of maintenance that parents with care on benefits can keep;
- Lighten the load on the new body by providing better advice and guidance to parents and encouraging them to make their own voluntary arrangements;
- Further reduce the caseload for the new organisation by ending the rule that means parents on benefit are forced to use the CSA - whether or not they have a voluntary arrangement in place;

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<sup>17</sup> *Ibid.* p35

<sup>18</sup> Cm 6895, Department of Work and Pensions, July 2006

<sup>19</sup> Department of Work and Pensions Press Notice CPHS 032, *More streamlined and tougher child support system to replace CSA*, 24 July 2006.

- Enforce tougher penalties on parents who do not meet their responsibilities to their children - powers would be sought to suspend passports and impose curfews on parents who persistently avoid their responsibilities;
- Explore all methods of publicising enforcement action, including the feasibility of naming those successfully prosecuted;
- Examine a range of options to ensure that more fathers take responsibility for their children, including changing the law on registration of births to encourage or require joint registration;
- Further strengthen parental responsibility by increasing the support given to help lone parents back to work.<sup>20</sup>

The Government's response also posed a series of questions concerning the principles on which the proposed system would be based. The questions were subject to public consultation with the answers helping to inform the design of the new system. The Government made a commitment to publish a White Paper later that year and to bring forward legislation in 2007.

### C. The White Paper

The White Paper, *A new system of child maintenance*,<sup>21</sup> was published by the Department for Work and Pensions on 13 December 2006.<sup>22</sup> John Hutton MP made an oral statement at the same time in which he stated:

Today's White Paper makes proposals in five key areas. First, we will remove the barriers that prevent parents from reaching private settlements. Secondly, we will create a simpler and more efficient system for assessing and processing child maintenance liability. Thirdly, we will replace the existing Child Support Agency with a new non-departmental public body—the child maintenance and enforcement commission. Fourthly, we will significantly strengthen the enforcement regime. Finally, we intend to do more to promote joint parental responsibilities.

[...]

[F]rom 2010—when we expect a new system of assessment to be in place—we will introduce a significantly higher maintenance disregard for all benefit claimants, so that more children benefit from the maintenance that parents pay. I believe that those changes will help encourage more parents to reach their own maintenance agreements.

[...]

Existing cases will either be able to make private arrangements or, if they prefer, move to the new system over a three-year period or take advantage of a simple

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<sup>20</sup> *Ibid.*

<sup>21</sup> Cm 6979 [http://www.dwp.gov.uk/childmaintenance/csa\\_report.pdf](http://www.dwp.gov.uk/childmaintenance/csa_report.pdf)

<sup>22</sup> Further details of the proposals in the White Paper are contained in the Library standard note, *The child support white paper* SN/SP 4240 [http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY\\_OTHER\\_PAPERS/STANDARD\\_NOTE/snsp-04240.pdf](http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/STANDARD_NOTE/snsp-04240.pdf)

cash transfer service. The cash transfer service will, where both parents agree, minimise disruption by continuing to move maintenance payments between parents based on their current maintenance award.

The White Paper sets out a fundamental redesign of the system of child maintenance. I am confident that it provides a proper foundation for a much more effective and efficient system. It will realign policy in this area with the reality on the ground. It will help address child poverty much more directly.<sup>23</sup>

The Government's principles for reform were based on Sir David Henshaw's recommendations and were:

- **help tackle child poverty** by ensuring that more parents take responsibility for paying for their children and that more children benefit from this;
- **promote parental responsibility** by encouraging and empowering parents to make their own maintenance arrangements wherever possible, but taking firm action - **through a tough and effective enforcement regime** - to enforce payment where necessary;
- **provide a cost-effective and professional service** that gets money flowing between parents in the most efficient way for the taxpayer; and
- **be simple and transparent**, providing an accessible, reliable and responsive service that is understood and accepted by parents and their advisers and is capable of being administered by staff.

The proposals for reform included:

- Replacing the CSA with a new a Non-Departmental Public Body, the Child Maintenance and Enforcement Commission (C-MEC).
- Encouraging parents, including those on benefits, to make their own arrangements.
- Introducing a more streamlined child maintenance assessment process by using:
  - historical information from the latest tax-year information from HM Revenue and Customs; and
  - using gross income, rather than net income to calculate the maintenance payable.
- Tougher enforcement where non-resident parents evade their responsibilities by:
  - increased use of Deduction from Earnings Orders, including as an automatic means of maintenance collection;
  - exploring the use of administrative liability and charging orders; and
  - introducing new sanctions.

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<sup>23</sup> HC Deb 13 December 2006, cc873-5

- Increasing efforts to collect and reduce debts, including powers to sell debts.
- Joint birth registration to encourage parents' sense of responsibility for the welfare of their children. The Government has stated that it will first consult on the issue and will only legislate once robust safeguards can be put in place to protect the welfare of children and vulnerable mothers.

The proposals in the White Paper were subject to a 13 week consultation period from 13 December to 13 March 2006.

## 1. Reactions to the White Paper

In May 2007, the Government published a report<sup>24</sup> summarising some of the responses it received to the White Paper consultation. The Government received nearly 200 responses from stakeholders, parents and staff at the CSA. The table below sets out the volume of responses:<sup>25</sup>

	Telephone	Letter	E mail
<b>Interest group</b>		<b>1</b>	<b>32</b>
<b>Parent with care</b>	<b>5</b>	<b>5</b>	<b>20</b>
<b>Non-resident parent</b>	<b>8</b>	<b>7</b>	<b>46</b>
<b>Non-resident parents new</b>			<b>10</b>
<b>Client (not known)</b>			<b>1</b>
<b>Child Support Agency</b>			<b>15</b>
<b>Public</b>		<b>5</b>	<b>25</b>
<b>Other</b>		<b>2</b>	<b>9</b>

### a. *Private arrangements*

The consultation responses revealed that many stakeholders welcomed the proposal to give parents more choice over their child maintenance arrangements by ending the requirement that parents with care claiming benefit be treated as applying for child maintenance. Organisations that supported the proposal included One Parent Families, Resolution, Families Need Fathers and Barnardo's. There was, however, some concern that, by ending this requirement, many parents would be unable to make a consensual and stable maintenance arrangement, or that parents with care would be pressured into an outcome that was unsatisfactory to them. One Parent Families, who supported the proposal in principle, stated:

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<sup>24</sup> Department for Work and Pensions, *A new system of child maintenance – Summary of responses to the consultation*. Cm 7061, May 2007

<sup>25</sup> *Ibid*, table 1.1

Parents with care must have a clear choice to go to C-MEC if they want, without being pushed into making voluntary arrangements that are unsatisfactory. The losers in this situation would be poor children.<sup>26</sup>

Rights of Women warned:

...where domestic violence has occurred, this emphasis on reaching voluntary agreements could result in women being pressured into reaching agreements which they are not sure about, for fear of being labelled 'unreasonable'<sup>27</sup>

End Child Poverty Network Cymru, the Justices' Clerks' Society and Resolution were among those that stressed the need for information and guidance services to be in place for parents making their own arrangements.<sup>28</sup> End Child Poverty Network Cymru submitted:

It is clearly questionable as to whether existing services would have the capacity to undertake additional tasks of the potential magnitude proposed here within their existing structures.<sup>29</sup>

Some stakeholders supported the introduction of a register of private arrangements.<sup>30</sup> Rights of Women submitted:

...it is vital that a register of agreements is in place, so that in the event of breakdown the specifics of the arrangements can be examined.<sup>31</sup>

#### **b. The role of the courts**

Sir David Henshaw recommended the removal of the current 12 month break point, after which consent orders<sup>32</sup> obtained through the courts can be overturned by the CSA. In the White Paper, the Government decided to retain the rule so that parents could continue to apply to the CSA (and then its replacement) to overturn a consent order after 12 months. A number of organisations disagreed with the Government's decision. The Law Society of England and Wales remarked:

...if either private maintenance agreements or Court Orders can be moved to the administrative system after twelve months this is not going to help parties reach agreement or be cost effective.<sup>33</sup>

Resolution believed that the courts should have a role in determining child support in some cases:

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<sup>26</sup> *Ibid*, para 2.2

<sup>27</sup> *Ibid*, para 2.2

<sup>28</sup> Summary of responses, para 2.13

<sup>29</sup> *Ibid*, para 2.14

<sup>30</sup> Law Centre (NI) and Rights of Women. See *Summary of responses* para 2.15

<sup>31</sup> Summary of responses, para 2.15

<sup>32</sup> An order made by the court with the written consent of both parties

<sup>33</sup> Para 2.35

In cases where the courts are dealing with making other financial orders, there has to be an investigation of the parties' income. In these cases, why can't the Court adjudicate on the issue of child support, when it has all of the necessary information before it.<sup>34</sup>

**c. Joint birth registration**

The White Paper proposed changing the current birth registration system to require both parents' names to be registered following the birth of their child, unless it was unreasonable to do so.<sup>35</sup> Although the Government made it clear that it would only legislate on the issue of joint birth registration once it was sure that robust safeguards were in place to protect mothers and children, a number of organisations were not supportive of the proposal. One Parent Families did not believe that the promotion of responsible fatherhood would be met "by passing a law, where failure to comply punishes not the father, but the new mother."<sup>36</sup>

Refuge and the Rights of Women were also concerned about the proposals:

Whilst the principle of joint registration of the birth of a child seems positive, Refuge is concerned about the proposal that it should become a legal requirement, with penalties facing mothers who do not comply.<sup>37</sup>

Forcing women to justify why they do not want to name a father on a birth certificate is not acceptable. Such an approach, rather than encouraging responsible fatherhood, would in fact penalise and potentially humiliate women. rights of woman.<sup>38</sup>

Although strongly supporting the rights of children to know their parents, Families Need Fathers did not agree with the joint birth registration proposal being brought forward in the context of the CSA.<sup>39</sup>

The Government confirmed that it would not be taking the proposal forward as part of the *Child Maintenance and Other Payments Bill*.<sup>40</sup> Shortly after the publication of the Bill, the Government published a Green Paper, *Joint birth registration: promoting parental responsibility*.<sup>41</sup> The Paper states that the work on joint birth registration has been taken forward by a cross departmental group, chaired by the Cabinet Office.<sup>42</sup> The proposals are open to consultation until 25<sup>th</sup> September 2007.

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<sup>34</sup> *Ibid*

<sup>35</sup> White Paper, paras 2.43-2.48

<sup>36</sup> Para 2.39

<sup>37</sup> Summary of responses, para 2.39 (Refuge)

<sup>38</sup> *Ibid*, (Rights of Women)

<sup>39</sup> *Ibid*, para 2.40

<sup>40</sup> HC Deb 26 June 2007, c25-6WS (John Hutton)

<sup>41</sup> Department of Work and Pensions, Cm 7160, June 2007

<http://www.dwp.gov.uk/publications/dwp/2007/joint-registration-of-births-gp.pdf>

<sup>42</sup> *Ibid*, para 29

**d. The Child Maintenance and Enforcement Commission**

While a number of stakeholders welcomed the Government's intention to create a new organisation to administer child support, others questioned whether such a move would mark a clean break with the past. The Jewish Unity for Multiple Parenting was of the opinion that:

The C-MEC will in fact just be a re-hash of the CSA with minimal chance of improving an existing failing organisation...<sup>43</sup>

The National Association for Child Support Action (NACSA) stated:

If C-MEC are to manage existing cases, and operates with existing CSA staff and IT systems, it is difficult to understand how this can be considered a 'radical reform'.<sup>44</sup>

The Government's aims for C-MEC - to help parents meet their responsibilities as a means of tackling child poverty; to encourage, empower and, where necessary, require parents to meet their obligations; and to ensure the delivery of a high-quality and efficient service, were generally well received by stakeholders. End Child Poverty Network Cymru provided:

We are encouraged by the focus on the need to help reduce child poverty through an effective child maintenance system and feel there is a healthy balance struck between the desire to help, encourage and empower parents alongside underlining their responsibilities and obligations in respect of their children present welfare and future prospects.<sup>45</sup>

Some organisations were however concerned about the transition to the new system.<sup>46</sup> The Centre for Separated Families believed that:

...the principles guiding the approach to transition are correct. However, we are concerned that there is too little detail about how these objectives will be achieved.<sup>47</sup>

A number of respondents noted the importance of ensuring that effective information and support services were available in the run-up to and during the transition process. Resolution submitted:

In advance of the transitional process, parents will need to be given the necessary advice and guidance, so they can determine whether or not to make a private agreement, or alternatively, to transfer to C-MEC.<sup>48</sup> para 3.13

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<sup>43</sup> *Ibid*, para 3.1

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*, para 3.7

<sup>46</sup> Law Centre (NI)

<sup>47</sup> Summary of responses, para 3.11

<sup>48</sup> *Ibid*, para 3.13

**e. Simplifying the maintenance process**

Stakeholders were generally in favour of the Government's proposals to simplify the way in which maintenance is assessed. The Magistrates' Association, Parentline Plus, Rights of Women and Law Centre (NI) were amongst those that welcomed the proposal.

Many stakeholders also supported the use of information held by HM Revenue and Customs (HMRC) for assessment purposes. However, some groups were concerned that using a parent's previous year's gross income information from HMRC and fixing assessments for one year could mean that information was out of date.<sup>49</sup> One Parent Families warned:

Children in separated families may end up getting less under the new formula, because the non-resident parent would be making payments based on his income up to two years previously.<sup>50</sup>

The Government's intention behind the proposal is to obtain more accurate financial information from self-employed parents. However, Rights of Women doubted whether the Government's proposal would improve matters:

Rights of Women has some concerns about calculating maintenance solely on the basis of latest tax returns, particularly in relation to self-employed non-resident parents as tax returns do not always reflect the reality of the father's income.<sup>51</sup>

Some respondents did not support the proposal to set the tolerance level for situations where current income differs from the relevant tax year by 25 per cent.<sup>52</sup> Families Need Fathers submitted:

We think the proposal only to allow reduced payments if income in the current year is 25% below the previous tax year is far too draconian.<sup>53</sup>

NACSA stated:

Whilst the system undoubtedly has to protect itself from being swamped with continual reviews with little change, it also has to be considered that even a difference of a few pounds per week can be 'a significant change' to a low income family.<sup>54</sup>

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<sup>49</sup> Resolution, NACSA, End Child Poverty Cymru and One Parent Families. See para 4.4

<sup>50</sup> Para 4.4

<sup>51</sup> *Ibid*

<sup>52</sup> The Magistrates Association, Law Centre (NI), Justices' Clerks' Society and Families Need Fathers. See para 4.5

<sup>53</sup> *Ibid*

<sup>54</sup> *Ibid*

Resolution pointed out that:

In the case of a self-employed person, income can change considerably from one year to the next.<sup>55</sup>

BT, Resolution and Families Need Fathers were critical of the proposal to base maintenance calculations on gross instead of net weekly income. BT stated:

Gross pay does not take into account a person's day to day tax position. If tax was underpaid in the previous year then in the following year the Government would take more tax from the parent; they would have less take home pay.<sup>56</sup>

**f. *Split care, shared care and children outside the scheme***

Shared care is used to describe a situation where separated parents living in different households share the care for a particular child for at least 52 nights a year.<sup>57</sup> Under the current system the CSA calculates the amount of shared care by looking at regular weekly patterns, exceptional weeks and other occasional nights.

In the White Paper the Government stated that during the consultation following Sir David Henshaw's report, there was some scepticism about changing the shared care regime.<sup>58</sup> At that stage, the Law Society of Scotland stated:

The provisions for shared care, while imperfect, should not be altered.<sup>59</sup>

The response to the White Paper consultation failed to reveal a consensus for fundamental change in the current regime. Some groups believed that shared care arrangements should continue to be taken into account in maintenance assessments;<sup>60</sup> others called for its abolition.<sup>61</sup> On the basis of the lack of consensus on the issue, the Government has decided that the regime for shared care should remain largely unchanged.<sup>62</sup>

The decision prompted Resolution to warn that continuing with the current system of day counting in shared care cases would perpetuate the number of appeals on the issue:

There are cases where considerable sums hinge on one night's stay in the year. In other cases, children are caught in the cross-fire whilst their parents endeavour to nose ahead on the count. These numbers are increasing and so the problem is likely to proliferate. Where there is a disparity of income one parent may need financial assistance from the other in order to provide for the child. What is needed is a system that allows the application of common sense.<sup>63</sup>

<sup>55</sup> *Ibid*

<sup>56</sup> *Ibid*, para 4.13

<sup>57</sup> *Child Support (Maintenance Calculation and Special Cases) Regulations 2000* (No. 155), reg 8(1)

<sup>58</sup> White paper p100

<sup>59</sup> *Ibid*.

<sup>60</sup> Law Centre (NI) and End Child Poverty Network Cymru

<sup>61</sup> Families Need Fathers and Resolution

<sup>62</sup> Para 4.24

<sup>63</sup> Resolution, *Reforming Child Support – from bad to worse? Briefing for MPs*. June 18 2007

Stakeholders were “largely silent”<sup>64</sup> on the Government’s proposals for off-setting liabilities in cases of split care.<sup>65</sup> As a result the Government confirmed that the proposals in the White Paper on split care would be taken forward.<sup>66</sup>

On the subject of child maintenance liabilities outside the new scheme, such as when a non-resident parent has a private arrangement for another child or has children living with him from a new relationship, most stakeholders thought there should be an arrangement where all children supported by the non-resident parent should be recognised. The Government decided that all children of a non-resident parent, whether the subject of a child maintenance scheme calculation or under private arrangements, would be counted under an overall assessment.

**g. Tougher enforcement**

The Government received mixed reactions to its proposals to introduce tougher enforcement measures. Although One Parent Families and End Child Poverty Network Cymru welcomed a more vigorous approach to enforcement, some groups argued that the current powers should be better utilized.<sup>67</sup> The comments made by NACSA were typical of the groups that believed new sanctions were unnecessary:

[The] CSA currently have more than sufficient enforcement powers in which to target the non compliant, and CMEC will no doubt inherit all of these. We therefore do not feel there is any requirement to extend powers further. We do however call for a more appropriate and streamlined use of the powers when necessary.<sup>68</sup>

Many stakeholders who supported tougher enforcement were in favour of Deduction from Earnings Orders (DEOs) or wage deduction, in particular. The Law Society of England and Wales believed that DEOs should be the norm. Resolution and One Parent Families welcomed the Government’s proposals to pilot wage withholding as an automatic means of maintenance collection.<sup>69</sup> However, the Institute of Payroll Professionals expressed concern over the plans:

Piloting of withholding wages – this would be a massive step and unknown territory for most employers.<sup>70</sup>

There were also concerns expressed by both mothers’ and fathers’ groups about the human rights implications of moving to a system of administrative orders. Families Need Fathers stated:

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<sup>64</sup> Para 4.23

<sup>65</sup> Where two parents of the same children each have care for one or more of those children, and so each parent is both a parent with care and a non-resident parent

<sup>66</sup> Para 4.24

<sup>67</sup> Resolution, Barnado’s, NACSA, Law Centre (NI), Justices’ Clerks’ Society and the Magistrates’ Association.

<sup>68</sup> Summary of responses, para 5.2

<sup>69</sup> *Ibid*, para 5.5

<sup>70</sup> *Ibid*

Because of the civil liberties aspects and the likelihood of C-MEC errors, the increased emphasis on administrative sanctions is wrong.<sup>71</sup>

Rights of Women were unconvinced by the proposals:

...Rights of Women is cautious about suggested reforms over Liability Orders and Charge Orders. We do recognise that there can be delays in seeking these orders from the courts; however, we are not convinced that the solution to this is to make such orders an administrative process within the power of the C-MEC.<sup>72</sup>

Resolution pointed out that the proposals to require financial institutions to deduct maintenance owed directly from a non-resident parent's account also raised serious human rights issues. Other groups, such as One Parent Families, however, supported the proposal.

Mixed reactions were also received to the proposals to allow financial institutions and credit reference agencies to share information held about the non-resident parent. One Parent Families welcomed the proposal but NACSA feared that the information would be misused.<sup>73</sup>

The new sanctions proposed in the White Paper included enforcing the surrender of a non-resident parent's passport and the imposition of curfews. Many of the stakeholders that responded to the Government's consultation were concerned that the provisions would affect children as well as the non-resident parent. Barnado's submitted:

The introduction of curfews could have an effect on contact visits with the child for example...<sup>74</sup>

The Law Society was not convinced that the provisions would be effective methods of enforcement.<sup>75</sup>

#### ***h. Naming and shaming***

Even before the publication of the White Paper, proposals to publish the names of non-resident parents who were successfully prosecuted for failing to pay child maintenance attracted substantial press attention. The *Times* headline stated, 'Like it or not, errant fathers will be named on birth certificates.'<sup>76</sup>

The *Telegraph* reported that absent fathers would be "named and shamed".<sup>77</sup> The article quoted Frank Field, the former welfare minister, as having described proposals to publicise offending parents as "brilliant." However, David Laws MP disagreed:

<sup>71</sup> *Ibid*, para 5.8

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

<sup>74</sup> Summary of responses, para 5.25

<sup>75</sup> *Ibid*

<sup>76</sup> *Times*, 11 December 2006, p8

<sup>77</sup> "Absent fathers to be named and shamed", *Telegraph*, 11 December 2006, p1

Earlier this year, the Secretary of State promised the House that his policy on the CSA would not be driven simply by gimmicks. In that case, why is he announcing a website to name and shame parents who are not paying, when he intends only to use that measure against people who have been prosecuted in any case? Does he acknowledge that that is likely to make almost no difference and will simply be seen as a gimmick.<sup>78</sup>

One Parent Families remarked on its website:

Naming and shaming 'dead-beat dads' may grab the headlines, but will make little difference to hard-core non-payers and could cause real distress to the children involved, who could face bullying at school as a result. It's no substitute for concerted and systematic action to chase up missed payments and to pursue those who lie about their finances to reduce their liabilities for their children. And we have to get the message across, that those who refuse to meet their responsibilities are cheating, not a faceless Government agency, but their own children.<sup>79</sup>

Stakeholders responding to the Government's consultation also focused on this proposal and, in particular, warned of the potential impact of the proposals on the welfare of children. Barnado's submitted:

...being able to view their parent on a website list of successfully prosecuted parents could risk exposing the child to unnecessary bullying and stigma.<sup>80</sup>

Others that expressed concern were Refuge, Parentline Plus, the Magistrates' Association, the Justices' Clerks' Society and One Parent Families Scotland.

Despite the criticisms, the Government indicated that it would take forward the proposal:

The ideas put forward in the White Paper around publicising successful enforcement need to be seen alongside the wider package of changes we plan to introduce in this area. We genuinely wish to give non-resident parents the opportunity to comply with their responsibilities before any enforcement action is taken and to ensure that they understand the consequences of failing to do so. We therefore hope that even those who are most determined to avoid their legal responsibilities will respond positively, such that this measure is not required. We plan to start publicising names during the summer. However, in taking this work forward we will look to ensure that processes are in place to identify those cases where a child's welfare is likely to be at risk.<sup>81</sup>

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<sup>78</sup> HC Deb 13 December 2006, c879

<sup>79</sup> <http://www.oneparentfamilies.org.uk/1/lx3x1olx85x1oix9217x1/0/0/070607/0/0/Child-maintenance-must-work-for-children.htm>

<sup>80</sup> Summary of responses, para 5.30

<sup>81</sup> Summary of responses, para 5.31

From 26 June 2007, the CSA website began listing the names of non-resident parents successfully prosecuted for either failing to provide information, or providing false information to the Agency.<sup>82</sup>

***i. Writing off debt***

The White Paper proposed to write off debts or revalue some overstated debts in limited circumstances. The proposal to write off debts was viewed by respondents to the White Paper consultation as a sensible measure.<sup>83</sup> However, the press reaction to the proposal was less welcoming. The *Times* newspaper headline read: 'Anger greets news that the law is to be changed to deny mothers owed average of £14,000'<sup>84</sup>

The *Guardian* reported:

Campaigners ... urged the government to compensate families who would otherwise lose out when debt is written off, and called for a special claims unit to investigate such cases.<sup>85</sup>

During the debate on the White Paper, David Laws MP also questioned the proposals:

I understand entirely his concerns about whether he will collect all that money, but why is he writing it off before he has even struck agreements based on the actual incomes of the non-resident parents? Surely that will be the right time to write off arrears. Will not people be suspicious that this is simply about massaging down the overall figures?<sup>86</sup>

During the debate, the Secretary of State confirmed that the powers to write-off debt would be limited in scope:

We are not taking a general power to write-off. Any settlement of an outstanding debt must be subject to agreement by the parent with care.<sup>87</sup>

There was a mixed reaction to the proposal to revalue overstated debts, where Interim Maintenance Assessments were imposed because the full details of a non-resident parent's income were not available. Families Need Fathers (West Midlands) supported the revaluation proposal but Resolution questioned how the revaluation would be possible when income details had never been given.<sup>88</sup>

Opinions were divided on the proposals to factor (sell) debt. One Parent Families agreed that there was scope to sell debt in limited circumstances but Families Need Fathers stated:

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<sup>82</sup> <http://csa.gov.uk/en/about/recent-prosecutions/latest.asp>

<sup>83</sup> See para 5.32

<sup>84</sup> *CSA to be allowed to write off £1bn owed by fathers* – *Times*, 20 October 2006, p36

<sup>85</sup> Child agency may write off £1.2bn debt – *Guardian*, 12 December 2006, p4

<sup>86</sup> HC Deb 13 December 2006, c879

<sup>87</sup> HC Deb 13 December 2006, c883 (John Hutton MP)

<sup>88</sup> See Summary of responses, para 5.35

The C-MEC clientele is likely to contain many who are financially excluded. The idea that they will fully understand the nature of factoring is unlikely, frankly.<sup>89</sup>

Mixed responses were also received to the proposal to recover maintenance from the estates of deceased non-resident parents. Resolution supported the proposal but Families Need Fathers queried the need for the provision.<sup>90</sup>

**j. Charging for the use of C-MEC**

Limited support was given to the Government's proposal to charge non-resident parents to use C-MEC services, with only the Institute of Payroll Professionals supporting the proposal in limited circumstances when other avenues had been exhausted.<sup>91</sup> Refuge, the Child Poverty Action Group (CPAG) and Barnardo's were amongst those that expressed concerns about the impact of the charges on families.<sup>92</sup>

## **D. Work and Pensions Select Committee report**

The House of Commons Work and Pensions Committee announced its intention to conduct an inquiry into the White Paper soon after the Government published its proposals. As well as seeking written submissions the Committee held three oral evidence sessions. The Committee's inquiry report, *Child Support Reform*<sup>93</sup> was published on 15 March 2007.

Although the Committee commended the Government's decision to wind up the CSA it criticised the proposals for failing to deliver the clean break from the past that the Government had earlier proposed. The report states:

The Secretary of State has described the reforms as a clean break but it is not the clean break envisaged by Sir David Henshaw. The Committee is not convinced about C-MEC's ability to run what could ultimately amount to three systems of child support – the old old (1993-2003), the old new (2003-2008) and the new C-MEC assessment (expected post 2008). The difficulty of the task for the new body could be complicated further if the transition arrangements are not well thought through.<sup>94</sup>

The Committee put forward a total of 35 recommendations in its report. Some of the key recommendations are listed below.

The Government should:

- Explain how the problems associated with the child maintenance system before the *Child Support Act 1991* would not simply recur with the increased emphasis on private arrangements.<sup>95</sup>

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<sup>89</sup> *Ibid*, para 5.33

<sup>90</sup> *Ibid*, para 5.34

<sup>91</sup> *Ibid*, para 5.41

<sup>92</sup> *Ibid*

<sup>93</sup> Work and Pensions Committee, *Child Support Reform*, 15 March 2007 HC 219-I

<sup>94</sup> *Ibid*, p 3-4

<sup>95</sup> *Ibid*, para 23

- Finds ways of reaching other groups, such as low income separating parents in paid employment, to ensure that they are not at risk of being left without adequate child maintenance arrangements.<sup>96</sup>
- Set out when and where it would “test” Deduction from Earnings Orders as a first means of receiving payments and what steps it would take to avoid antagonising non-resident parents with good payment records who were asked to participate.<sup>97</sup>
- Make it clear how the process of data sharing between HMRC and C-MEC would work in practice and report the evidence from any pilots that had taken place testing the systems to exchange information.<sup>98</sup>
- Ensure that in shared care cases there would be an initial agreement between the parents and C-MEC on the approximate amount of time the children spend between the two households. This should govern the assessment for the remainder of the year and not be adjusted unless there were major contact changes. For arrangements with close to 50:50 shared care the Government should consider the case put by Sir David Henshaw for having no child support liability at all between parents.<sup>99</sup>
- Not introduce a charging scheme for applications to C-MEC.<sup>100</sup>
- Pilot the removal of the requirement for parents with care on benefit to use C-MEC, in order to analyse the effect it would have on them and on C-MEC’s caseload and resources.<sup>101</sup>
- Ensure that, if C-MEC is granted powers to make administrative orders, these should be accompanied by safeguards to ensure against inaccuracy and to provide a swift, effective and independent process for a right of appeal. The Government should therefore set out what appeal methods it intends to introduce for C-MEC customers.<sup>102</sup>
- State what the expected life of a C-MEC order would be and under what conditions the case would be closed or moved onto a private maintenance direct agreement.<sup>103</sup>
- Publish a detailed explanation of its plans for C-MEC’s IT system in an attempt to win public confidence before the work begins.<sup>104</sup>

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<sup>96</sup> *Ibid*, para 31

<sup>97</sup> *Ibid*, para 107

<sup>98</sup> *Ibid*, para 139

<sup>99</sup> *Ibid*, para 162

<sup>100</sup> *Ibid*, para 174

<sup>101</sup> *Ibid*, para 179

<sup>102</sup> *Ibid*, para 225

<sup>103</sup> *Ibid*, para 250

<sup>104</sup> *Ibid*, para 261

The Government's response to the Select Committee<sup>105</sup> was published alongside its summary of the response to the White Paper consultation.

## II Parts 1 to 3 and 5 of the Bill

The Bill closely follows the proposals introduced in the White Paper. This research paper provides an overview of the Bill together with reactions to the proposals. A detailed clause by clause explanation is available in the Explanatory Notes to the Bill which is available on the DWP website together with a Regulatory Impact Assessment (RIA) and documents which informed the proposals in the Bill.<sup>106</sup>

*The Child Maintenance and Other Payments Bill*<sup>107</sup> was published on 6 June 2007. Announcing the legislation, John Hutton, Secretary of State for Work and Pensions said:

We know that putting parents in control of their own arrangements is key to them being responsible and taking responsibility for their children.

However there are a small number of parents who seem to think that paying for their kids is something they can simply choose not to do. It isn't. And these new powers would mean that non-payment brings real and lasting penalties.

The new rules would be simpler and more transparent, making it harder to hide income and giving us the power to deduct money direct from bank accounts as well as from earnings.

This legislation would provide a strong framework to enable the new child maintenance body to deliver a system that puts the needs of the children who depend on it first, and ensures that families and children do not slide into poverty when parents split up.<sup>108</sup>

### A. An Overview of the child maintenance provisions

#### 1. The Child Maintenance and Enforcement Commission

The Bill would establish a body corporate to be known as the Child Maintenance and Enforcement Commission (the Commission).<sup>109</sup> The Explanatory Notes to the Bill provide:

The Commission will have a role in the process of the national Government but will not be a Government Department or part of one. It will operate at arms length

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<sup>105</sup> Department of Work and Pensions, *Report on the child maintenance White Paper A new system of child maintenance – Reply by the Government to the Fourth Report of the Work and Pensions Select Committee: Child Support Reform: Session 2006 [HC 219-I]* May 2007

<sup>106</sup> <http://www.dwp.gov.uk/childmaintenance/index.asp>

<sup>107</sup> Bill 118 of 2007

<sup>108</sup> Department of Work and Pensions Press Release, *Hutton: Child Maintenance reforms to get more money to more children*, 6 June 2007. [www.dwp.gov.uk/mediacentre/pressreleases/2007/jun/hsc326-060607.asp](http://www.dwp.gov.uk/mediacentre/pressreleases/2007/jun/hsc326-060607.asp)

<sup>109</sup> Clause 1 (The White Paper referred to the Commission as C-MEC)

from Ministers in its day to day decision making. Although Ministers will set high level principles, the Commission will have full autonomy to run the child support maintenance system.<sup>110</sup>

The Commission's main objective would be to maximise the number of effective maintenance arrangements in place for children living apart from one or both parents.<sup>111</sup> This objective would be supported by the following subsidiary objectives:

- to encourage and support the making and keeping by parents of appropriate voluntary maintenance arrangements for their children; and
- to support the making of applications for child support maintenance under the *Child Support Act 1991* and to secure compliance when appropriate with parental obligations under the Act.

Most functions of the Secretary of State under the *Child Support Act 1991* (the 1991 Act) would be transferred to the Commission.<sup>112</sup> Under the current system, the CSA carries out the functions under the 1991 Act with the authority of the Secretary of State. The CSA itself is not mentioned in the legislation.

The Bill would also make provision for the transfer of other statutory functions to the Commission and allow the Secretary of State to provide the Commission with additional functions in relation to its objectives. The Commission would have further responsibilities for raising awareness among parents of the importance of taking responsibility for the maintenance of their children and making appropriate arrangements for the maintenance of their children who live apart from them.<sup>113</sup> The Commission would also be required to provide information and guidance to both parents for the purpose of helping to secure the existence of effective maintenance arrangements.<sup>114</sup>

The Bill would provide a regulation-making power for the Secretary of State to enable the Commission to charge fees in connection with the exercise of its functions.<sup>115</sup> The power would be subject to the draft affirmative resolution procedure.<sup>116</sup>

In the White Paper the Government proposed to explore the option of charging fees to encourage compliance.<sup>117</sup> Respondents to the White Paper consultation expressed concern at the proposal<sup>118</sup> and the Work and Pensions Select Committee recommended against introducing a charging scheme for applications to the C-MEC.<sup>119</sup>

<sup>110</sup> Explanatory Notes, Bill 118-EN, p3

<sup>111</sup> Clause 12

<sup>112</sup> Clauses 3 and 12

<sup>113</sup> Clause 4

<sup>114</sup> Clause 5

<sup>115</sup> Clause 6

<sup>116</sup> Clause 50(5)

<sup>117</sup> White Paper, p 81

<sup>118</sup> Summary of response, para 5.41

<sup>119</sup> *Report of the Work and Pensions Select Committee: Child Support Reform: Session 2006 [HC 219-I]*, para 174

Despite this opposition, a provision to allow the Commission to charge has been included in the Bill. The decision led the National Council for One Parent Families to state:

Parents.... must have a clear choice to go to C-MEC if they want, without being pushed into making voluntary arrangements which are unsatisfactory. The losers in this situation would be poor children.<sup>120</sup>

Further provisions in the Bill would allow the Commission to make arrangements with other relevant authorities for functions to be exercised on the Commission's behalf.<sup>121</sup> In addition, the Commission would be able to contract out any of its functions.<sup>122</sup>

## **2. Transfer of functions to the Commission.**

In addition to making provision for the transfer of child support functions from the Secretary of State to the Commission, the Bill also provides that CSA employees carrying out those functions would be transferred to the Commission, and that their terms and conditions would be protected by *the Transfer of Undertakings (Protection of Employment) Regulations 2006* (SI 2006/246). Further provision is made for the Secretary of State to transfer to the Commission property, rights and liabilities which he is entitled or subject to.

## **3. Child support calculations**

Currently, under section 6 of the 1991 Act, when a parent with care makes a claim for income support or income based job-seekers allowance, or if it is claimed in respect of them, they are also treated as applying for child maintenance via the CSA.<sup>123</sup> Parents with care who do not wish to be treated as applying for child support need to demonstrate good cause, for example, that maintenance could put them, or their children at the risk of harm or undue stress. If they do not demonstrate good cause, section 46 of the 1991 Act enables their benefit to be reduced.<sup>124</sup>

The Bill would repeal sections 6 and 46 of the 1991 Act.<sup>125</sup> As a result, parents with care applying for or in receipt of prescribed benefits would no longer be automatically treated as applying for maintenance, and therefore they could not be subject to a reduced benefit decision.

Once the provisions are repealed, parents with care who would have fallen into the section 6 category will have the same choices as other parents of using the Commission (C-MEC) or withdrawing from the statutory scheme.<sup>126</sup> The Government estimates that this would affect approximately 250,000 parents with care each year.<sup>127</sup>

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<sup>120</sup> Quoted in *At Odds parents face child payments fee*, Guardian, 6 June 2007 p 4

<sup>121</sup> Clause 7

<sup>122</sup> Clause 8

<sup>123</sup> *Child Support Act 1991*, s 6

<sup>124</sup> *Ibid*, s 46

<sup>125</sup> Clause 15

<sup>126</sup> See clause 18 and Schedule 5

<sup>127</sup> Regulatory Impact Assessment to the Bill, June 2007, para 35

Further changes to the maintenance calculation would be brought into effect by amending Schedule 1 of the 1991 Act. The changes would involve:

- using a non-resident parent's gross weekly income to calculate maintenance liability instead of net weekly income; and
- amending the child maintenance rates.<sup>128</sup>

The proposed changes and current calculation rules are summarised in the table below:<sup>129</sup>

	<b>Old Scheme <i>Child Support Act 1991</i></b>	<b>New Scheme <i>Child Support, Pensions and Social Security Act 2000</i></b>	<b>New arrangements under the <i>Child Maintenance Enforcement Commission</i></b>
<b>Income to calculate maintenance</b>	Net income	Net weekly income	Gross weekly income
	Obtained from child's parents or their employer	Obtained from the non-resident parent or their employer	Obtained from information supplied by HMRC
	Current income	Current income	Income from past periods
<b>Existing private arrangements</b>	Not taken into account for arrangements, but taken into account where CSA is not empowered to act	Not taken into account for private arrangements, but taken into account where CSA is not empowered to act	Certain types of private arrangements will be taken into account for calculating maintenance liability
<b>Basic rate levels</b>	Not part of formula	15% 1 child	Non-resident parents earning between £200 and £800 per week (and first £800 per week for non-resident parents earning over that amount):  12% 1 child 16 % 2 children 19% 3 or more children  Non-resident parents earning over £800 per week (rate applies to

<sup>128</sup> See Schedule 4 of the Bill

<sup>129</sup> Source: Explanatory Notes Bill 118-EN, p73-4

			any amount over £800 per week):  9% 1 child 12% 2 children 15% 3 or more children
<b>Flat rate maintenance</b>	Not part of formula	£5 per week	£7 per week

#### 4. Collection and enforcement

##### ***Deduction orders***

Under the current rules the CSA can make Deduction from Earnings Orders (DEOs) instructing a non-resident parent's employer to make deductions from his/her earnings to pay the CSA. The CSA can make a DEO if:

- the non-resident parent chooses it; or
- a child maintenance account is in arrears and the non-resident parent does not respond to enquiries, refuses to make an arrears agreement or persistently defaults on an agreement.<sup>130</sup>

The Bill would amend the 1991 Act to make it clear that regulations on child maintenance payments can include DEOs as an initial method of collection.<sup>131</sup> The regulations must also include provision that DEOs should not be used where there is good reason not to use them.<sup>132</sup>

The use of DEOs as a first means of collection is used in other jurisdictions, such as the United States, Australia and New Zealand. The Government has stated that the collection method will first be piloted before a decision is made about whether it is suitable for the UK.<sup>133</sup> The RIA for the Bill provides:

The pilot to use deduction from earnings orders as the first means of collecting maintenance would impact on a relatively small number of non-resident parents. It would take into account of the impact on those who are prepared to pay by other means and consider grounds for exempting individual non-resident parents.<sup>134</sup>

The Bill would allow the Commission to make regular deductions from a non-resident parent's current accounts where the non-resident parent had failed make payments (deduction orders).<sup>135</sup> Both arrears and maintenance payments could be collected through deduction orders. A further type of deduction order - a lump sum deduction order - is introduced in the Bill. The order would allow the Commission to collect lump

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<sup>130</sup> CSA Operational Improvement Plan 2006-9

<sup>131</sup> Clause 19

<sup>132</sup> Clause 19 (section 29(5))

<sup>133</sup> White paper, para 5.15

<sup>134</sup> Regulatory Impact Assessment, June 2007, para 76

<sup>135</sup> Clause 21

sum payments from the accounts of non-resident parents who have failed to pay an amount of child support maintenance. Lump sum deduction orders would only be used to collect arrears and not regular maintenance and would be applicable to accounts other than a current account, a joint account or a business or trade account.

Deposit-takers, for example banks, would be under a duty to comply with the deduction orders and it would be an offence for a person to fail to comply.<sup>136</sup> The Bill also provides a power for the Secretary of State to make regulations relating to current account and lump sum deduction orders.<sup>137</sup>

### ***Liability and charging orders***

The CSA can currently enforce payments through the courts where other means of collecting child support have proved ineffective. A court-ordered liability order provides the CSA with legal recognition of the debt and allows it to take further enforcement measures, such as the seizure and sale of goods. In order to obtain a liability order, the CSA must apply to a magistrates' court in England and Wales or the sheriff's court in Scotland. In the White Paper the Government stated:

The Child Support Agency obtained nearly 12,000 Liability Orders in the year to September 2006, an increase of 6,000 on 2004-05. This is, however, a slow process that takes on average more than 100 days to complete.<sup>138</sup>

The Bill would amend the 1991 Act to remove the requirement that the CSA must first apply to the courts for a liability order. Instead the Commission would be able to issue an administrative liability order against a non-resident parent who has failed to pay child support maintenance.<sup>139</sup> A non-resident parent subject to a liability order would have a right of appeal to an appeal tribunal against the making of the order.<sup>140</sup>

The Bill would also amend the 1991 Act by removing the requirement to obtain an order from the county court before an application for a charging order or a third part debt order could be made.<sup>141</sup> The amendment would allow the Commission to apply to the courts for an order for the sale of assets on the basis of an administrative liability order.<sup>142</sup>

### ***Disqualification from travelling***

The Bill would introduce new provisions into the 1991 Act allowing the Commission to disqualify a non-resident parent from holding or obtaining travel authorisation for a period not exceeding 12 months.<sup>143</sup> The Commission would be able to use this power where:

<sup>136</sup> Clause 21 and 22 (sections 32C and 32H)

<sup>137</sup> Clause 21 and 22 (sections 32B and 32G)

<sup>138</sup> White Paper, para 5.15

<sup>139</sup> Clause 23

<sup>140</sup> clause 21 (section 32K)

<sup>141</sup> Clause 24

<sup>142</sup> Section 36 of the *Child Support Act 1991*

<sup>143</sup> Clause 25

- it has sought to recover arrears by enforcing a liability order, or by means of a third party debt order or charging order;
- arrears remain unpaid; and
- it is of the opinion that the non-resident parent has wilfully refused or culpably neglected to pay maintenance.

Travel authorisation means:

- a UK passport within the meaning of the *Immigration Act 1971*
- an ID card issued under the *Identity Cards Act 2006* that records that the person to whom it is issued is a British citizen.<sup>144</sup>

The Bill contains a regulation power for the Secretary of State to make further provision in respect of the disqualification for holding or obtaining travel authorisation.

### **Curfew orders**

New powers would allow the Commission to apply to the court for a curfew order to be made against a non-resident parent if the same conditions as required for a travel authorisation disqualification are satisfied (see above).<sup>145</sup> A curfew would last from 2 to 12 hours in any one day but the total duration of a curfew order could not exceed 6 months.<sup>146</sup> A breach of a curfew order could result in the court issuing a warrant to commit the non-resident parent to prison.<sup>147</sup>

Regulations would allow the Secretary of State to make further provisions about curfew orders.<sup>148</sup>

### **Extension of current enforcement powers**

There are provisions in the 1991 Act which allow the CSA, as a last resort, to take action to disqualify a non-resident parent from driving or commit him/her to prison.<sup>149</sup> The Bill would amend the 1991 Act to allow the Commission to apply to the courts for an order to disqualify a person from holding or obtaining a driving licence,<sup>150</sup> or a warrant to commit a person to prison<sup>151</sup> at an earlier stage where:

- it has sought to recover arrears by enforcing a liability order, or by means of a third party debt order or charging order;
- arrears remain unpaid; and

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<sup>144</sup> Clause 25 (section 39B(7))

<sup>145</sup> Clause 26 (section 39J)

<sup>146</sup> Clause 26 (section 39K)

<sup>147</sup> Clause 26 (section 39P)

<sup>148</sup> Clause 26 (sections 39R and S)

<sup>149</sup> Section 40, 40A and B of the *Child Support Act 1991*

<sup>150</sup> Clause 28

<sup>151</sup> Clause 27

- it is of the opinion that the non-resident parent has wilfully refused or culpably neglected to pay maintenance.

The RIA to the Bill provides an assessment of the impact of the enforcement changes on individuals:

Measures set out in the Bill will increase the powers available to the courts; convert the highest volume court process to an administrative one and streamline the process leading to enforcement through the courts; and introduce new administrative measures. The combined effect of this is to make enforcement a quicker and more efficient process. More effective enforcement would mean that parents with care would be more likely to receive maintenance owed to them and to receive it more quickly.<sup>152</sup>

## 5. Debt management power

### *Off-setting*

The Bill would introduce new powers to allow the Secretary of State to make regulations allowing the Commission to set off liabilities to pay child support.<sup>153</sup> The Explanatory Notes to the Bill state:

It is envisaged that offsetting will occur mainly where a child moves from the care of one parent to the other, and therefore the non-resident parent becomes the parent with care and vice versa. If the non-resident parent who becomes the parent with care has built up arrears, some or all of the maintenance liability of the new non-resident parent may be offset against those arrears.

Offsetting may also apply where liability switches from one parent to the other for other reasons, for example, where each parent is caring for one or more children and there is a change in income. Where both parents have arrears these may also be offset against each other.<sup>154</sup>

### *Treatment of arrears*

Several new provisions would amend the 1991 Act to allow the Commission to manage and settle arrears. The Commission would be able to accept part payment of arrears in full and final settlement, and write off arrears in prescribed circumstances. A further regulation making power which would allow the Commission to enter into arrangements with other organisations under which liability in respect of child maintenance arrears would be transferred.<sup>155</sup>

## 6. Additional changes

### *Split care cases*

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<sup>152</sup> Regulatory Impact Assessment, June 2007. para 75

<sup>153</sup> Clause 29 (section 41C)

<sup>154</sup> Bill 118 – EN, paras 318-9

<sup>155</sup> Clause 32 (section 49)

The Bill would add an additional category of case to the current special cases section in the 1991 Act.<sup>156</sup> The additional special case would relate to split care circumstances, where two parents of the same children each have care for one or more of those children, and so each parent is both a parent with care and a non-resident parent.<sup>157</sup>

Under current arrangements, full maintenance calculations are made in respect of each child and maintenance schedules are set up for both non-resident parents. The Bill would allow for the offset of maintenance liabilities between the two parents, so that only the parent with the highest liability will actually make a payment.

### ***Recovery of arrears from deceased's estate***

The Bill would provide the Secretary of State with power to make regulations to recover child maintenance arrears from the estate of a deceased non-resident parent.<sup>158</sup>

### ***Disclosure of information***

The insertion of a new section into the 1991 Act by the Bill would allow the Commission to supply certain information to credit reference agencies. The disclosure would be limited to information held by the Commission about a non-resident parent liable to pay child maintenance, where that person has either given consent to the disclosure or is subject to a liability order.<sup>159</sup> Further provisions would allow the disclosure of specified information between the Commission and HMRC, the Secretary of State, the Northern Ireland Department and other persons providing child support functions.<sup>160</sup>

## **7. Regulation making powers**

The regulation making provision for the Secretary of State to enable the Commission to charge fees would be subject to the draft affirmative resolution procedure. All other regulations would be subject to the negative resolution procedure.

## **8. Human rights compatibility**

The proposals to strengthen enforcement powers led a number of respondents to the White Paper consultation to raise concerns on human rights grounds. On the Bill's publication, these concerns were reiterated. NASCA remarked:

The rights of parents will be further eroded under CMEC, with its proposals to remove the court process of gaining a Liability Order which is to be replaced with an administrative process. Even the common criminal is afforded the benefit of a fair trial, but this right is not to be extended to separated parents who could now face stringent debt recovery procedures.<sup>161</sup>

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<sup>156</sup> Section 42(2) of the *Child Support Act 1991*. Special cases allow for a variation of the child support rules.

<sup>157</sup> Clause 33

<sup>158</sup> Clause 34 (section 43A)

<sup>159</sup> Clause 35 (section 49B)

<sup>160</sup> Clause 39 and schedule 6

<sup>161</sup> Press release on the *Child Maintenance and Other Payments Bill*

The *Human Rights Act 1998*<sup>162</sup> requires the Minister in charge of a Bill to make a statement of compatibility declaring that the provisions in the Bill comply with the rights under the *European Convention on Human Rights*.<sup>163</sup> The enforcement provisions would engage a number of Convention rights under Articles 6, 8 and Article 1 of the First Protocol to the Convention. These are set out below:

**Article 6**

**Right to a fair trial**

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**Article 8**

**Right to respect for private and family life**

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 1 of the First Protocol**  
**Protection of Property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Secretary of State has declared the Bill compatible with the Convention. Further analysis of the human rights implications of the Bill is set out in the Explanatory Notes. On the question of whether the use of DEOs as an initial method of collection breaches a

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<sup>162</sup> Section 19

<sup>163</sup> Set out in Schedule 1 of the *Human Rights Act 1998*

non-resident parent's right to family life under Article 8 of the Convention, the Government has concluded:

Appropriate safeguards have been included: the Commission must consider whether there is good reason not to make a deduction of earnings order, and the Secretary of State has the power to specify the circumstances in which good reason must be regarded as existing. In addition, the proposals will be piloted to test whether they will improve compliance rates and the speed of maintenance payments before being introduced.<sup>164</sup>

The powers to make regular maintenance deductions from current accounts and lump sum deductions from savings accounts have also been deemed to be "justified and proportionate" and compliant with Article 8.<sup>165</sup>

The Commission's powers to make administrative liability orders against a non-resident parent would engage the right to a fair hearing under Article 6 of the Convention. The Government has concluded that the provision would not breach Article 6 as the making of a liability order would be subject to an appeal to an independent tribunal, and where there was an appeal, the order would be suspended until the outcome was known.<sup>166</sup>

The administrative disqualification of a non-resident parent from holding a travel authorisation would engage Articles 6, 8 and Article 1 of the First Protocol. Insofar as Article 6 is concerned, the Government has stated that there would not be a breach because of the appeal procedure, and because the order would be suspended until the outcome of the appeal was known. Insofar as Article 8 and Article 1 of the first Protocol would be engaged, the Government considers any interference to be justified and proportionate. It states:

The measure will only be implemented where the non-resident parent has shown wilful neglect regarding the payment of child support maintenance, and it is intended that the lesser measures to ensure compliance will be used first. In addition, the Commission must give consideration to whether exercising the power in a case will impede the ability of the non-resident parent to pay by affecting means of making a living.<sup>167</sup>

The powers to apply for a curfew order and to disclose information to credit reference agencies would engage Article 8. In both cases the Government has determined that the interference with the right to a private and family life would be justified. In relation to the curfew orders, the Government states:

The provision is intended to be used where there has been persistent or serious non-compliance. Powers are already available to commit a non-resident parent to prison for non-payment. A curfew order should be seen as a less severe and intermediate measure.<sup>168</sup>

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<sup>164</sup> Bill 118-EN, p 88

<sup>165</sup> Bill 118-EN, p 88

<sup>166</sup> *Ibid*

<sup>167</sup> *Ibid*

<sup>168</sup> *Ibid*

And in respect of the power to disclose information to credit reference agencies, the Explanatory Notes state:

The measure is aimed at increasing compliance with child maintenance responsibilities. Information will only be disclosed where consent if the non-resident parent has been sought, unless they are subject to a liability order. Credit reference agencies will only be able to use the information disclosed to them to inform the financial standing of an individual, they will not be able to sell it on for marketing purpose.<sup>169</sup>

## B. Reaction to the child maintenance provisions in the Bill

Despite criticisms in the press of the White Paper's proposals, many groups welcomed the publication of the Bill. The Child Poverty Action Group stated:

Behind the gimmicks to name-and-shame on the web, the Bill provides an important opportunity to improve the lives of children and families. Ministers and MPs must now focus on making sure enforcement plans in the Bill are effective at getting money to children, rather than just hitting the headlines.<sup>170</sup>

However, a number of groups were sceptical about whether the Bill would deliver the Government's aim of tackling child poverty. The Chief Executive of One Parent Families, Chris Pond, stated:

This is the third attempt under successive governments since 1991 and this time the Government has to get it right. We need a strong and competent new organisation, which will intervene immediately if lone parents request it; swiftly and efficiently collect child maintenance on their behalf; and pursue arrears vigorously if needs be. Only in this way, will the proportion of families receiving child maintenance be increased from their present shocking levels.<sup>171</sup>

NACSA had little faith in the ability of C-MEC to deliver a better service than the CSA:

In the past the CSA failed our children and failed parents. The Child Maintenance Bill is being sold to parents as a radical new approach to child support. As CMEC will operate under the same staff, with the same IT system, and very little new content by way of calculating maintenance, it is likely that CMEC stands to inherit all of the problems of its predecessor - but with Government now conveniently distancing themselves from them by what is referred to as 'arm's length management'.

NACSA are in no doubt that the interests of the parents (and many children) will once again be trampled upon, and who will pay the price if the new commission fails.<sup>172</sup>

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<sup>169</sup> *Ibid*, p 89

<sup>170</sup> <http://www.cpag.org.uk/>

<sup>171</sup> [www.oneparentfamilies.org.uk/1/lx3x1olx85x1oix9217x1/0/0/070607/0/0/Child-maintenance-must-work-for-children.htm](http://www.oneparentfamilies.org.uk/1/lx3x1olx85x1oix9217x1/0/0/070607/0/0/Child-maintenance-must-work-for-children.htm)

<sup>172</sup> NACSA, *Press release on the Child Maintenance and Other Payments Bill*, June 2007

Resolution summed up the views of many stakeholders:

Although the Government consulted widely on its proposals, it has failed to take on board any of the concerns raised by a number of different agencies and risks creating a new system which is even more unfair and ineffective than the current discredited system.<sup>173</sup>

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<sup>173</sup> Resolution, *Reforming Child Support – from bad to worse? Briefing for MPs*. June 18 2007

### III Part 4: Lump Sum Payments: Mesothelioma etc

#### A. Introduction

People with mesothelioma (a cancer of the protective lining of the lungs or abdomen, linked to exposure to asbestos, that almost always proves fatal) will usually die within months of diagnosis; receiving compensation whilst they can still benefit from it is therefore important to them and their dependants.

At present a mesothelioma sufferer may be able to get compensation from one or more sources:

- A civil claim for damages against one or more of the companies responsible for exposing them to asbestos negligently and/or in breach of a statutory duty
- The Industrial Injuries Disablement Benefit scheme administered by the Department for Work and Pensions (DWP)
- For those unable to pursue a civil claim against an employer, a lump sum payment under the scheme set up by the *Pneumoconiosis etc (Workers' Compensation) Act 1979* (PWCA), which is also administered by the DWP

Making a civil claim can be difficult; for example, the employer may have ceased to exist and its insurer may be difficult to trace. Eligibility for Industrial Injuries Disablement Benefit, or a payment under the PWCA, is dependent upon asbestos exposure having occurred during the course of employment. Those who contract mesothelioma from any other type of exposure are therefore ineligible for such payments. Where a person can make a claim, it can often take time to be processed, particularly when it involves tracing relevant employment records. Poor life expectancy associated with disease often means that sufferers die before compensation is paid.

Part 4 of the *Child Maintenance and Other Payments Bill* would give powers to introduce an extended mesothelioma lump sum payment scheme for all people diagnosed with mesothelioma and their dependants, and amend the *Social Security (Recovery of Benefits) Act 1997* in order to fund payments through a compensation recovery mechanism.

The Government hopes that the measures will allow anyone suffering from mesothelioma, irrespective of its cause, to receive compensation speedily (within 6 weeks of diagnosis) when it is most needed.

#### 1. Mesothelioma

##### a. *What is mesothelioma?*

Mesothelioma is cancer of the mesothelium, a protective lining surrounding the body's internal organs. It most commonly affects the pleura (the outer lining of the lungs and chest cavity), but it may also occur in the peritoneum (the lining of the abdominal cavity)

or the pericardium (a sac that surrounds the heart). Progress of the disease is usually rapid once diagnosed; death typically occurs within twelve to eighteen months.

Mesothelioma is almost always caused by exposure to asbestos but symptoms may not appear until 20 to 50 years after exposure. The main symptoms of pleural mesothelioma include: shortness of breath, a cough, and pain in the chest due to an accumulation of fluid in the pleural space. Peritoneal mesothelioma is usually accompanied by weight loss and abdominal pain and swelling due to a build-up of fluid in the abdomen. Other symptoms may include bowel obstruction, blood clotting abnormalities, anaemia, and fever. If the cancer spreads beyond the mesothelium to other parts of the body, symptoms may include pain, trouble swallowing, or swelling of the neck or face.<sup>174</sup>

Diagnosis is not always straightforward because the symptoms have similarities to other conditions. Usually, the patient's medical history will be reviewed, including any history of asbestos exposure. Physical examinations and X-rays of the chest and abdomen may also be performed. Occasionally, a tissue sample will be taken for microscopic analysis (biopsy). Once diagnosed, a doctor will determine the stage (extent) of the disease, to determine whether the cancer has spread, and to determine a treatment plan.

Due to the long latency period and aggressive nature of the cancer, long-term survival cannot usually be expected. Presently, there is no known cure. Treatment depends on the location of the cancer, the stage of the disease, and the patient's age and general health. Options include surgery, radiation therapy, and chemotherapy, or a combination of the three. NICE (National Institute for Health and Clinical Excellence) guidance on the prescribing of Alimta (Pemetrexed Disodium) for treatment of mesothelioma is expected in September 2007.<sup>175</sup> Pain relief and the draining of fluids from affected areas to make the person comfortable also feature in the care plans.

**b. How is it contracted?**

People who develop mesothelioma have usually worked on jobs where they routinely inhaled asbestos particles, mainly from lagging and insulating materials. This includes work in shipyards, asbestos mines and mills, work for producers of asbestos products, jobs in the heating and construction industries, and other trades. Others may have been exposed to asbestos dust and fibres in other ways such as by washing the clothes of a family member who worked with asbestos ('para-occupational' exposure<sup>176</sup>), children playing close to contaminated sites near factories where it was used, at illegal dumps, or during renovation work where asbestos is present or where asbestos cement products have been used. In some cases, inhalation of fibres may occur through breathing in fibres from ventilated air, or the accidental dislodging of particles during routine work activity.

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<sup>174</sup> British Lung Foundation: Mesothelioma [Site visited 21 June 2007] <http://www.lunguk.org/mesothelioma.asp> ; Mesothelioma: Wikipedia [Site visited 7 June 2007] <http://en.wikipedia.org/wiki/Mesothelioma>

<sup>175</sup> NICE website [Visited 13 June 2007] <http://www.nice.org.uk/page.aspx?o=207007>

<sup>176</sup> Para-occupational: disease not caused by employment

According to the US National Cancer Institute, smoking does not appear to increase the risk of mesothelioma but the combination of smoking and asbestos exposure significantly increases a person's risk of developing cancer of the air passageways in the lung.<sup>177</sup>

**c. When were the risks from asbestos exposure first known?**

Awareness of the risks from exposure to asbestos was made during the early decades of the twentieth century and led to the introduction of the *Asbestos Industry Regulations 1931*.<sup>178</sup> The risks were initially thought to be limited to the textile industry and these regulations were therefore limited, applying only to asbestos factories handling and processing raw fibre. The *Asbestos Regulations 1969*, which applied to a wider range of factories, remedied the situation.<sup>179</sup> It was not until the enactment of the *Health and Safety at Work etc Act 1974* (HSWA) and associated regulations that employees in all workplaces were protected.

General medical recognition of mesothelioma as an asbestos related disease was reported in the late 1960s<sup>180</sup> although a possible link between the disease and the hazards of insulation work was suspected as early as 1931.<sup>181</sup>

In the UK, 1969 is taken to be the 'Date of Knowledge': the date before which employers could not be reasonably expected to know that such a hazard or activity posed a risk that should be guarded against for the purposes of negligence. Many current sufferers of mesothelioma, including some who worked for the MOD in defence establishments during the 1950s and 1960s involved in the cladding of naval vessels, would have been exposed to asbestos before the date of knowledge, when understanding of the risks would have been limited. This means they may be unable to pursue a civil claim for negligence.

Asbestos is no longer used, except in very limited circumstances.<sup>182</sup> Removal from premises and sites is tightly controlled by regulation. Workers must be trained, wear protective clothing and breathing apparatus and receive regular health checks. Therefore removal of this exposure should ultimately prevent new cases occurring in future.

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<sup>177</sup> Mesothelioma: Questions & Answers, US National Cancer Institute [site visited 7 June 2007] <http://www.cancer.gov/cancertopics/factsheet/sites-types/mesothelioma>

<sup>178</sup> SI 1931/1140

<sup>179</sup> SI 1969/690

<sup>180</sup> Selikoff IJ, Hammond EC, Churg J. 'Relation between exposure to asbestos and mesothelioma' *N Engl J Med* 1965;272:560–5; Willis RA. *Pathology of tumours*. London: Butterworths, 1967:181–2; Anonymous. 'Cancer and asbestos'. *BMJ* 1968;iii:448–9.

<sup>181</sup> See PWJ Bartrip, 'History of asbestos related disease', *Postgraduate Medical Journal* 2004;80:72-76; 'Asbestos case law round up', *Health and Safety Bulletin* 337 April 2005 <http://pmj.bmjournals.com/cgi/content/full/80/940/72>

<sup>182</sup> Importation, supply and use of brown and blue asbestos have been banned in the UK since 1985. Regulations banning the use of white asbestos came into effect on 24 November 1999. These implement a European Directive relating to restrictions on the marketing and use of certain dangerous substances and preparations (asbestos). [OJL 207, 6 August.1999, Directive 1999/77/EC]

**d. How many people are affected?**

The Trades Union Congress (TUC) has estimated that over 4,500 people die every year from asbestos-related diseases.<sup>183</sup> By 2020, it is estimated that past exposures to asbestos will be responsible for at least 10,000 deaths a year.<sup>184</sup> Independent industrial hygienist Robin Howie has reported that the total number of UK asbestos-induced deaths for the period 1929-2020 could reach 663,000 - 820,000.<sup>185</sup> Actuarial estimates predict that by 2034 there will be between 80,000 and 200,000 claims and the total of UK compensation awards could be between £8 and 20 billion.<sup>186</sup>

Once considered a rare disease, there are now around 1,800 mesothelioma cases a year in the UK. A Department for Work and Pensions news release notes:

However, the long latency means that despite far better controls on asbestos exposure and the elimination of asbestos imports, the rate is still rising. It could reach 2400 deaths a year by around 2013 and then fall away to perhaps 500 cases per year by 2050. These projections are unstable and highly sensitive to assumptions on life expectancy, residual exposure levels and latency.

3. Most sufferers are men (85%). Most deaths (about two-thirds) occur between the ages of 60 and 80, with only 18% before the age of 60. The age profile of deaths is rising and many cases still involve exposure during the 1960s. About 80% of cases can be associated with occupations where there was a greater likelihood of asbestos exposure, such as shipbuilding and construction, and although all areas of the country show some level of asbestos-linked mesothelioma, there are strong geographical concentrations around shipbuilding areas, centres of railway engineering, and asbestos plants.<sup>187</sup>

Mortality statistics relating to mesothelioma and asbestosis are published annually by the Health and Safety Executive's Epidemiology & Medical Statistics Unit.

The number of mesothelioma deaths in Great Britain rose from 153 in 1968<sup>188</sup> to 1,969 in 2004.<sup>189</sup> The large majority of deaths each year occur in men; in 2004, there were 1,674 male deaths in Great Britain, 85 percent of the total.<sup>190</sup> The cumulative number of deaths since 1968 in Great Britain totals 31,444. Mesothelioma mainly affects those above 40 years of age; death rates are highest in the oldest age groups (55-64, 65-74 and 75 & over), although rates are declining among those under 65.<sup>191</sup>

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<sup>183</sup> *Workers' Memorial Day 2001 - Mapping the Misery of Asbestos*, TUC 2001

<sup>184</sup> BECTU asbestos register <http://www.bectu.org.uk/asbestos/index.html>

<sup>185</sup> *British Asbestos Newsletter* 61 Winter 2005-06 <http://www.lkaz.demon.co.uk/ban61.htm>

<sup>186</sup> *UK Asbestos the definitive guide* <http://www.actuaries.org.uk/files/pdf/proceedings/giro2004/Lowe.pdf>

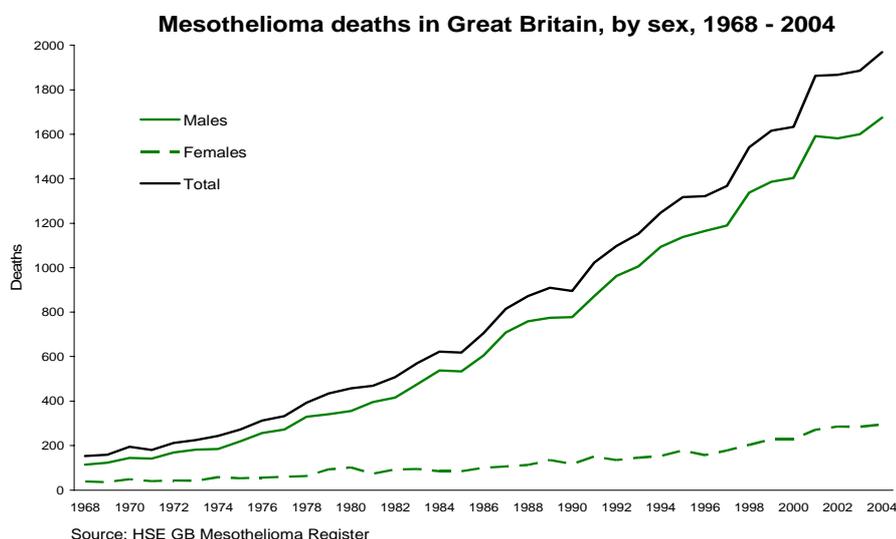
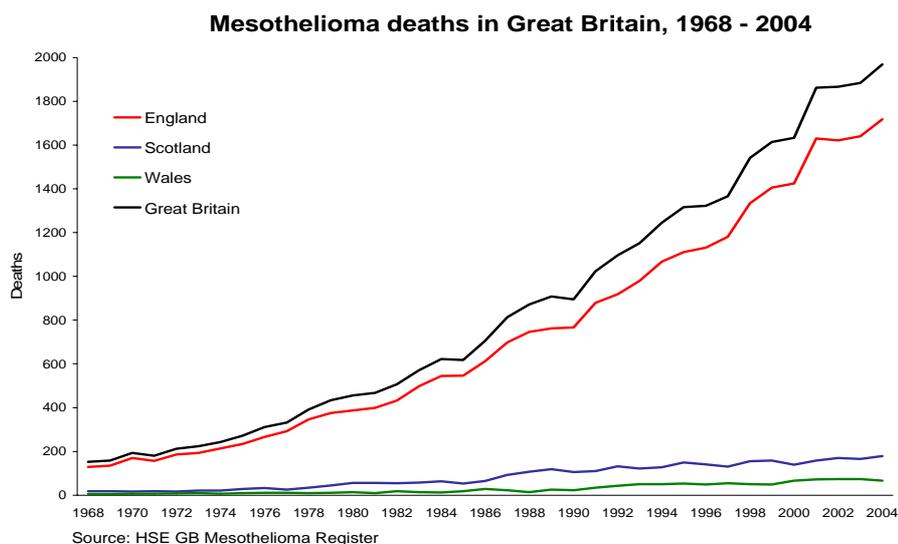
<sup>187</sup> Department for Work and Pensions News Release, *Details announced of improvements to mesothelioma compensation system*, 20 July 2006

<sup>188</sup> The first complete year for which data are available following the introduction of the mesothelioma register in 1967.

<sup>189</sup> The long latency period between exposure to asbestos and the manifestation of mesothelioma means that recent mesothelioma deaths relate to asbestos exposure in the 1970s or earlier.

<sup>190</sup> <http://www.hse.gov.uk/statistics/tables/meso01.htm>

<sup>191</sup> <http://www.hse.gov.uk/statistics/tables/meso04.htm>



The latest projections suggest that the annual total number of mesothelioma deaths in Great Britain will peak around 1,950 to 2,450 deaths between 2011 and 2015.<sup>192</sup>

Trends in mesothelioma death rates for Great Britain show a rise over time, from 32.1 and 4.7 deaths per million in 1990-92 for males and females respectively to 52.7 and 9.7 deaths per million in 2002-04. For males, death rates increased throughout the period in all regions. The geographical areas with the highest mesothelioma mortality rates are those associated with industries involved with high exposure to asbestos in the past.

<sup>192</sup> Although projections are inherently uncertain, the timing and scale of the maximum annual death toll is not highly sensitive to the assumptions used. What is more uncertain is the rate at which numbers will fall in the future. For information on the methodology for predicting future numbers of mesothelioma deaths, see HSE 'Mesothelioma mortality in Great Britain: estimating the future burden'  
<http://www.hse.gov.uk/statistics/causdis/proj6801.pdf>

The North East of England and Scotland<sup>193</sup> are traditionally associated with relatively high mesothelioma death rates, and more recently the South East of England. At local/unitary authority level, Barrow-In-Furness and West Dunbartonshire show the highest death rates. Other areas with relatively high death rates include industrial areas, ports and dockyards such as North and South Tyneside, Plymouth, Portsmouth and Southampton.<sup>194 195</sup>

**Mesothelioma age standardised death rates per million by region, time period and sex**

<b>Males</b>	1990-92	1993-95	1996-98	1999-01	2002-04*
North East	54.9	71.5	75.0	84.9	78.8
North West	33.7	36.8	42.0	53.1	53.9
Yorkshire and the Humber	27.7	39.7	41.8	50.6	55.1
East Midlands	23.1	29.3	32.7	37.9	42.5
West Midlands	18.0	27.4	32.4	35.5	40.7
East of England	30.8	35.8	44.1	50.1	56.8
London	31.4	40.2	43.5	46.9	47.8
South East	38.3	47.2	46.8	57.4	61.8
South West	35.3	33.0	42.9	48.5	48.7
England	31.9	38.9	43.2	50.4	53.2
Wales	18.3	29.1	30.5	33.7	37.9
Scotland	43.0	47.3	51.6	51.6	56.6
Great Britain**	32.1	39.0	43.2	49.6	52.7

<b>Females</b>	1990-92	1993-95	1996-98	1999-01	2002-04*
North East	6.6	8.3	9.0	13.3	11.1
North West	4.1	4.4	5.4	8.8	10.0
Yorkshire and the Humber	5.5	5.4	8.8	9.2	11.3
East Midlands	4.6	4.4	5.1	8.3	7.2
West Midlands	1.7	3.4	4.8	5.7	6.6
East of England	5.0	6.3	6.5	8.2	14.0
London	6.6	6.6	6.8	9.2	12.6
South East	4.3	6.2	7.7	9.5	10.7
South West	4.3	3.8	4.4	6.1	8.0
England	4.6	5.3	6.4	8.5	10.2
Wales	3.8	4.6	2.5	5.0	4.3
Scotland	6.0	8.1	6.2	8.2	8.2
Great Britain**	4.7	5.5	6.2	8.3	9.7

Source: HSE GB Mesothelioma Register

Notes:

\* Data remain provisional until the completeness of the register has been checked against details recorded by national cancer registries. The latest year for which cancer registrations are complete is 2002.

\*\* Rates for Great Britain exclude a small number of cases with an overseas address.

1990-92 taken as base for standardisation over time; GB for standardisation over region.

<sup>193</sup> Please refer to SPICe Briefing Paper SB 06/94, *The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill* 9 November 2006 for a detailed breakdown of mesothelioma statistics relating to Scotland.

<sup>194</sup> For detailed geographical breakdowns, see HSE 'Mesothelioma mortality in Great Britain: Updated analyses of the British mesothelioma register, incorporating analysis by geographical area 1985-2004' <http://www.hse.gov.uk/statistics/pdf/mesomortality6804.pdf>

<sup>195</sup> Standardised Mortality Ratios (SMRs) allow comparison of mesothelioma mortality among different local areas by taking into account the age structure of the local population. SMRs summarise the relative mortality among areas – they do not provide an indication of overall mortality.

**20 local or unitary authorities with the highest levels of mortality: Great Britain, 1985-2004**

Rank	Area	Deaths	SMR	95% Confidence	
				Interval: Lower	Interval: Higher
1	Barrow-in-Furness	158	534	454	624
2	West Dunbartonshire UA	181	527	453	609
3	North Tyneside	268	332	294	375
4	Plymouth UA	308	328	292	367
5	South Tyneside	208	320	278	367
6	Portsmouth UA	221	316	276	361
7	Southampton UA	217	276	241	316
8	Medway UA	221	276	240	314
9	Barking and Dagenham	155	260	221	305
10	Inverclyde UA	90	268	216	330
11	Eastleigh	106	261	214	316
12	Sunderland	245	226	199	257
13	Gosport	69	252	196	319
14	Newcastle-upon-Tyne	229	222	194	253
15	Havant	118	235	194	281
16	Crewe and Nantwich	103	237	194	288
17	Hartlepool UA	83	238	190	296
18	Renfrewshire UA	142	223	188	263
19	Newham	141	222	187	262
20	Glasgow City UA	432	196	178	215

Source: HSE, Mesothelioma mortality in Great Britain 1968-2004: Updated analyses of the British mesothelioma register, incorporating analysis by geographical area 1985-2004

Note: A local/unitary authority with SMR greater than 100 indicates that the level of mesothelioma mortality is higher than the average for all areas. However, there may be substantial statistical uncertainty associated with the SMR - particularly for areas with a small number of deaths. 95% Confidence Intervals give an indication of this uncertainty.

Occupations with the highest risk of mesothelioma for males can generally be associated with three broad areas of asbestos use: shipbuilding, railway carriage and locomotive building, and the installation and maintenance of lagging or other insulation materials in buildings or industrial plant.

The table below shows the number of deaths and proportional mortality ratios for males aged 16-74 in Great Britain in 1980-2000 in the 10 most high risk occupations.<sup>196</sup> The highest risk occupations are metal plate workers (including shipyard workers) and vehicle body builders (including railway carriage and locomotive building). Other high-risk occupations are associated with the construction industry, such as plumbers and gas fitters, carpenters and electricians.

Although the number of male mesothelioma deaths has been increasing over time, proportions across occupational groups have remained stable throughout the period.

<sup>196</sup> Proportional Mortality Ratios (PMRs) allow comparison of mesothelioma mortality among different occupational groups. PMRs summarise the relative mortality among groups – they do not provide an indication of overall mortality.

High-risk occupations for females include metal plate workers, chemical workers, plastics workers and other supervisors/labourers (including factory workers).<sup>197</sup>

The industrial sectors with the highest rates of new assessments for disablement benefit cases in 2003-05 for mesothelioma were the construction industry (including insulation and asbestos removal workers - 32 cases per 100,000 employees per year), the extraction, energy and water supply industry (9.4 cases per 100,000 employees per year), and the manufacturing industry (7.3 cases per 100,000 employees per year).<sup>198</sup>

#### 10 highest risk occupations for males aged 16-74, Great Britain, 1980-2004

Rank	Area	Deaths	Expected deaths	PMR	95% Confidence Interval: Lower	95% Confidence Interval: Higher
1	Metal plate workers	265	52.7	502.5	444	565
2	Vehicle body builders	83	15.8	525.6	419	652
3	Plumbers and gas fitters	619	149.9	413.0	381	446
4	Carpenters	887	228.9	387.5	362	413
5	Electricians	496	177.8	279.0	255	304
6	Sheet metal workers	144	61.3	234.8	198	275
7	Electrical plant operators	54	20.6	262.6	197	343
8	Production fitters	850	405.9	209.4	196	224
9	Construction workers	486	228.1	213.1	195	232
10	Electrical engineers	140	64.9	215.7	181	253

Source: HSE, Mesothelioma occupation statistics for males and females aged 16-74 in Great Britain, 1980-2000

Note: An occupation group with a PMR greater than 100 indicates that the level of mesothelioma mortality is higher than the average for all occupations. However, there may be substantial statistical uncertainty associated with the PMR - particularly for groups with a small number of deaths. 95% Confidence Intervals give an indication of this uncertainty.

Around 80 percent of mesothelioma cases are caused by occupational exposure to asbestos. However, as many as 50 to 100 deaths per year occur in people with no history of exposure.<sup>199</sup>

## 2. Compensation for sufferers

### a. Civil claims

A mesothelioma sufferer may be able to make a claim for damages (compensation) in the civil courts based on the employer's negligence or breach of statutory duty. Civil liability can be insured against, and most employers must take out suitable insurance.<sup>200</sup> There are time limits for bringing claims; this is a complex area of law and individual claimants would need to seek specific legal advice to determine the time limits which would apply in particular circumstances.

<sup>197</sup> For detailed mesothelioma death statistics for males and females and relative mortality for different occupational groups, see HSE 'Mesothelioma occupation statistics for males and females aged 16-74 in Great Britain, 1980-2000'. <http://www.hse.gov.uk/statistics/causdis/occ8000.pdf>

<sup>198</sup> <http://www.hse.gov.uk/statistics/tables/iis10.htm>

<sup>199</sup> <http://www.hse.gov.uk/statistics/causdis/meso.htm>

<sup>200</sup> *Employers' Liability (Compulsory Insurance) Act 1969*

## Negligence

For a successful claim in negligence, three elements must generally be present:

- There must be a duty to take care. A duty of care is decided in relation to the facts at issue in a particular case, or in other words, did this defendant owe a duty of care to this claimant? It has been held that, in addition to the foreseeability of damage, in any situation giving rise to a duty of care it is also necessary that there should be sufficient 'proximity' between the parties, and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.<sup>201</sup>
- There must be a breach of that duty. It has been held that negligence is the omission to do something which a reasonable person, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do.<sup>202</sup>
- There must be actual damage caused as a result of the breach of the duty to take care. The damage must not be too remote a consequence of the breach of duty.

A recent Court of Appeal decision has confirmed that workers making a civil claim for compensation for mesothelioma must first prove employer negligence.<sup>203</sup> In that case, the claim failed because there was no proof that the defendant employer had negligently failed to take precautions to prevent the employee from inhaling asbestos fibres. Although the employee in that case died from mesothelioma, on the particular facts this was not sufficient proof of negligence by the defendant because, for most of his working life, the employee had been in jobs which were equally capable of bringing him into contact with airborne asbestos.

## Liability of more than one employer and apportionment

The usual rule in proving liability in civil cases is that the claimant must show that, on the balance of probabilities, the defendant's conduct caused the damage. Medical opinion has not yet established whether mesothelioma is caused by exposure to a single fibre, a few fibres or many fibres. Once the condition is caused, it is not aggravated by further exposure. There is apparently no way of identifying, even on the balance of probabilities, the source of the fibre or fibres that caused the condition to develop. This means that if a person is exposed on more than one occasion, and by more than one employer, it may not be possible to determine which exposure caused the disease.

In *Fairchild v Glenhaven Funeral Services Limited*, the House of Lords ruled that, in cases where the claimant had been negligently exposed to asbestos by more than one employer and subsequently developed mesothelioma, and it could not be established where and when they had become exposed to the 'fatal' fibre, then all the relevant

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<sup>201</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605

<sup>202</sup> *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex 781 at 784

<sup>203</sup> *Brett v University of Reading* [2007] EWCA Civ 88

employers could be liable and any one could be pursued for compensation.<sup>204</sup> This, therefore, created an exception to the rule that, on the balance of probabilities, the defendant's conduct must have caused the damage. The House of Lords decided that, in these circumstances, the causing of a material increase in the risk of injury would suffice.

This case did not, however, establish whether, and if so, how, liability should be divided between relevant employers. According to the then Department for Constitutional Affairs (DCA), it was presumed by insurers that employers would be jointly and severally liable.<sup>205</sup> This meant that full damages could be recovered from any one or more of them.

The precise nature of an employer's liability was considered in a subsequent case, *Barker v Corus UK Plc and others*.<sup>206</sup> The House of Lords held that damages should be apportioned among the persons responsible for the exposure according to their relative degree of contribution to the chance of the worker contracting the disease.<sup>207</sup> Lord Hoffmann held that "when liability is exceptionally imposed because you *may* have caused harm ... fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm".

The *Barker* decision provoked considerable reaction because it was perceived that it diminished the chances of a claimant recovering full damages. The DCA explained the consequence of the *Barker* decision as being that the claimant would have to trace all relevant defendants (as far possible) before liability could be apportioned and compensation paid, or issue multiple claims, and that the risk of any of them being insolvent and unable to pay the appropriate share would fall on the claimant. This could make claims much more difficult and time-consuming for claimants to bring and in some cases they would not receive full compensation.<sup>208</sup>

Provisions in the *Compensation Act 2006* now reverse the effect of the *Barker* decision. The Act establishes joint and several liability in cases where a person has contracted mesothelioma as a result of being negligently exposed to asbestos. Therefore, a claimant may claim full compensation from any relevant employer and that employer may then claim back contributions from other responsible employers.

The Financial Services Compensation Scheme was established by the Financial Services Authority by virtue of s212 of the *Financial Services and Markets Act 2000*. The FSCS is the UK's statutory fund of last resort for customers of authorised financial services firms. This means that FSCS can pay compensation if a firm is unable, or likely to be unable, to pay claims against it. Amendments have now been made to the FSCS

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<sup>204</sup> *Fairchild v Glenhaven Funeral Services Limited* [2002] UKHL 22; [2003] AC 32

<sup>205</sup> Department for Constitutional Affairs press release 147/06, *Government to act on mesothelioma claims*, 20 June 2006, <http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=209056&NewsAreaID=2>

<sup>206</sup> [2006] 2 WLR 1027

<sup>207</sup> [2006] UKHL 20

<sup>208</sup> Department for Constitutional Affairs press release 147/06, *Government to act on mesothelioma claims*, 20 June 2006, <http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=209056&NewsAreaID=2>

to ensure that, in relevant circumstances, an employer or insurer, which has paid full mesothelioma compensation, can recover a contribution from the FSCS (previously, the FSCS was prevented from contributing to claims already paid in full and this could cause delays in paying compensation while the liability of all parties was established and a process of 'parallel payment' set up, whereby a lead insurer and the FSCS (on behalf of any insolvent insurer) paid the claimant at the same time.)<sup>209</sup>

### Claimants other than employees

In a number of cases claims have been made by those, including family members, who have contracted mesothelioma following secondary exposure to asbestos. Each case is determined on its own facts. For example, the Ministry of Defence admitted liability for the transmission of mesothelioma to Mrs Debbie Brewer, whose father died from small-cell lung cancer, linked to asbestos, after a career as a logger at the Devonport Dockyard. He had greeted his daughter each evening whilst wearing dusty overalls from which, she is believed to have inhaled the fibres that caused her disease.<sup>210</sup> In a similar case, the widow of Barry Welch received compensation after he contracted mesothelioma after childhood exposure to asbestos from the work clothes of his step-father after his employer admitted negligence.<sup>211</sup> Conversely, in another case, the Court of Appeal held that it was not reasonably foreseeable between 1960 and 1965, and ahead of contemporary understanding, that a wife washing her husband's dust covered work clothes would herself be likely to suffer mesothelioma and allowed the employer's appeal against an earlier award of damages to her.<sup>212</sup>

### Consultation

On 4 May 2007 the Government published a consultation paper on the law on damages which includes a section on mesothelioma claims. It seeks views on ways to resolve the difficulty experienced by claimants in deciding whether to pursue a claim to secure compensation before their death, or to postpone the claim to enable their dependants to bring a claim under the *Fatal Accidents Act 1976*.<sup>213</sup> The consultation period ends on 27 July 2007.

#### **b. Civil claims in Scotland**

A different regime for claiming compensation applies in Scotland from that which applies in England and Wales. A briefing by the Scottish Parliament's research service explains the relevant law.<sup>214</sup> The Bill referred to in this briefing is now the *Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007*. The Act allows defined relatives of a deceased person to claim certain damages even if the deceased, while still alive, had already made a successful claim.

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<sup>209</sup> [http://www.fsa.gov.uk/pubs/handbook/hb\\_notice61.pdf](http://www.fsa.gov.uk/pubs/handbook/hb_notice61.pdf)

<sup>210</sup> BBC News 20 February 2007 <http://news.bbc.co.uk/1/hi/england/devon/6378975.stm>

<sup>211</sup> BBC News 13 December <http://news.bbc.co.uk/1/hi/england/6176641.stm>

<sup>212</sup> *Maguire v Harland & Wolff plc* [2005] All ER (D) 242 (Jan)

<sup>213</sup> CP 9/07, *The Law on Damages*, <http://www.justice.gov.uk/docs/cp0907.pdf>

<sup>214</sup> *The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill*, SPICe Briefing 06/94, 9 November 2006 <http://www.scottish.parliament.uk/business/research/briefings-06/SB06-94.pdf>

**c. Industrial Injuries Disablement Benefit**

The Industrial Injuries Disablement Benefit (IIDB) Scheme provides for the payment of benefits to employed earners who suffer disablement as a result of an accident at work, or who contracted a prescribed disease in the course of their work. The benefit is 'no-fault', tax-free, non-contributory and is administered by the Department for Work and Pensions (DWP).<sup>215</sup>

The list of prescribed diseases and their associated occupations is in Schedule 1 of the *Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985*.<sup>216</sup> The Schedule is also available at the Industrial Injuries Advisory Committee's website.<sup>217 218</sup> There are approximately 70 prescribed diseases on the list. Diffuse mesothelioma (meaning the cancer is spread out rather than concentrated at one point in the body) is prescribed disease D3. To be eligible for IIDB for prescribed disease D3, a person must have been employed in a job involving 'exposure to asbestos, asbestos dust or any admixture of asbestos at a level above that commonly found in the environment at large'.<sup>219</sup>

The weekly rate of IIDB depends on the degree of the disability caused by the injury or disease in each case. This is expressed as a percentage. For diffuse mesothelioma, disablement is automatically assessed as being 100 per cent, if the employment conditions are satisfied.

In 2005, there were 1,550 new claims for IIDB for prescribed disease D3, of which 1,535 resulted in payment of benefit. The IIDB 'caseload' for prescribed disease D3 as of March 2005 was 1,010.<sup>220</sup>

**d. Pneumoconiosis etc (Workers' Compensation) Act 1979**

The *Pneumoconiosis etc (Workers' Compensation) Act 1979* (PWCA) provides lump sum compensation payments to people suffering from certain dust-related diseases, or if they have died, their dependants, where the disease was the result of exposure to dust in the course of their employment, but they are unable to claim damages from their employers because the employers have ceased business. The diseases include:

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<sup>215</sup> A brief overview of Industrial Injuries Disablement Benefit is available at the DWP website here [accessed 20 June 2006:

<http://www.dwp.gov.uk/medical/background-to-the-industrial-injuries-scheme.pdf>

The rules are set out in greater detail in DWP technical guide DB1, *A guide to Industrial Injuries Disablement Benefits*, April 2006 [accessed 20 June 2006]: <http://www.dwp.gov.uk/advisers/db1/>

<sup>216</sup> SI 1985/967 as amended

<sup>217</sup> [http://www.iiac.org.uk/prescribed\\_diseases/index.asp](http://www.iiac.org.uk/prescribed_diseases/index.asp) [accessed 20 June 2006]

<sup>218</sup> The Industrial Injuries Advisory Council (IIAC) is an independent statutory body established in 1946 to advise the Secretary of State for Social Security on matters relating to the IIDB Scheme including, *inter alia*, the prescription of occupational diseases.

<sup>219</sup> Schedule 1 SI 1985/1967

<sup>220</sup> IIAC, *Department for Work and Pensions Social Security Administration Act 1992: Completion of the review of the scheduled list of prescribed diseases*, Cm 7003, January 2007, Appendix, p21 [accessed 20 June 2006]: [http://www.iiac.org.uk/pdf/command\\_papers/Cm7003.pdf](http://www.iiac.org.uk/pdf/command_papers/Cm7003.pdf)

- diffuse mesothelioma
- pneumoconiosis (including silicosis, asbestosis, kaolinosis)
- diffuse pleural thickening
- primary carcinoma of the lung (only if accompanied by asbestosis or diffuse pleural thickening)
- byssinosis

There are three main qualifying conditions for entitlement:

- Industrial Injuries Disablement Benefit should normally be, or have been, payable to the sufferer in respect of the disease;
- every relevant employer has ceased to carry on business (or, if they are still trading, there is no realistic chance of claiming damages from them); and
- the sufferer, or their dependants, must not have taken any court action or received any compensation.

Further information on how to apply for assistance under the scheme is available at the Jobcentre Plus website.<sup>221</sup>

The scheme was formerly administered by the Department of the Environment, Transport and the Regions, but the Department for Work and Pensions took over responsibility in 2002.

The amounts that can be paid under the scheme are now updated annually by regulations made under the Act<sup>222</sup> – most recently by *The Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2007*.<sup>223</sup> Speaking in the Delegated Legislation Committee which considered the above regulations on 22 February 2007, the Minister for Employment and Welfare Reform, Jim Murphy, gave some statistics on the scheme:

From the time the 1979 Act came into force until January 2007, more than 16,490 claims have been received. Of that number, 10,874 people have been paid, resulting in payments totalling £183 million. In the current financial year to January 2007, we have made 1,582 payments to individuals, amounting to £21 million, in compensation under the Act; 87 per cent. of claims made under the Act are successful. Following the increase set out in this order, the maximum amount payable—that for a person aged 37 or under with 100 per cent. assessment—is

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<sup>221</sup> [http://www.jobcentreplus.gov.uk/JCP/Customers/WorkingAgeBenefits/Dev\\_007983.xml.html](http://www.jobcentreplus.gov.uk/JCP/Customers/WorkingAgeBenefits/Dev_007983.xml.html)

<sup>222</sup> The Government made a commitment to increase the level of payments each year when the DWP took over the scheme in 2002; SC Deb (DL) 9 February 2006 c3

<sup>223</sup> SI 2007/716

£67,890, but such large payments are seldom made. On average, sufferers receive about £14,000 and dependants £6,000.<sup>224</sup>

More than 70 per cent of claims under the PWCA scheme are for mesothelioma.<sup>225</sup>

A payment under the PWCA is deductible from a subsequent award of damages made in a successful civil claim for personal injury.<sup>226</sup>

### 3. What has been done to speed up mesothelioma claims?

Poor life expectancy associated with the disease means many sufferers from mesothelioma receive compensation only after their death. Conscious of this, in 2006 the Secretary of State for Work and Pensions, John Hutton, stated his intention to work in partnership with insurance companies to ensure faster compensation for mesothelioma sufferers and their families.<sup>227</sup> This is in addition to fast track processes for mesothelioma claims that already exist in some courts.

On 20 July 2006, John Hutton issued a News Release, giving details of interim measures that would be put into place across the UK pending a long-term solution:

"There are a series of measures we will put into action straight away, such as clarifying with claims handlers best practice to ensure priority is given to those with mesothelioma. We will also work with Revenue and Customs so that employer records can be traced quicker.

"We will continue to work with our partners to ensure these short-term outcomes are just the first steps as we develop options for the future. I will provide a further update in the autumn."

Other short-term changes will include introducing a standard claim letter, which will identify the claim as one for mesothelioma so it will receive priority from the start. A new leaflet for explaining what help is available and where to find it will also be created.

The DWP has worked closely with a number of partners and stakeholders, including the Department for Constitutional Affairs (DCA), the Association of British Insurers (ABI), and the Association of Personal Injury Lawyers (APIL), as well as the TUC and the Financial Services Compensation Scheme (FSCS).

To support the Code of Practice for tracing Employers' Liability Compulsory Insurance (ELCI) policies, the ABI will introduce a phone helpline in the autumn and will also issue guidance on how to get the best out of the code.<sup>228</sup>

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<sup>224</sup> SC Deb (3rd DL) 22 February 2007 c5

<sup>225</sup> *ibid.*

<sup>226</sup> *Ballantine v Newalls Insulation Co Ltd* [2001] ICR 25, CA

<sup>227</sup> DWP Press Notice, *Hutton announces bid to speed up mesothelioma compensation*, 16 May 2006

<sup>228</sup> Department for Work and Pensions News Release, *Details announced of improvements to mesothelioma compensation system*, 20 July 2006

On 13 March 2007, Jim Murphy, Minister for Employment and Welfare Reform, made a written ministerial statement in which he announced a commitment, subject to legislative approval, to ensure that everyone with mesothelioma, irrespective of his or her employment history, could claim early access to a substantial payment, normally within six weeks of diagnosis, providing a claim was made immediately:

On 20 July 2006 the Secretary of State for Work and Pensions (John Hutton) announced interim measures to speed up current claims handling for mesothelioma sufferers. He also confirmed that we would put in place a long term solution.

We committed to having a full dialogue invited comments from all interested parties. Initial views were sought on ideas for improving support for those with mesothelioma, both by improving the systems for dealing with these claims, and the better focusing of Government support. This process has been very constructive, with many thoughtful responses and helpful ongoing dialogue.

A Summary of Responses to that consultation was published on 1 March and is available at:

<http://www.dwp.gov.uk/publications/dwp/2007/iidb/mesothelioma-cases-consultation-report.pdf/>

We know that nearly all mesotheliomas occur as a result of occupational or environmental exposure to asbestos—a legacy of our country's industrial past.

Today I announce that we are committing, subject to legislative approval, to ensure that everyone with mesothelioma—irrespective of their employment history—can claim a payment as those under the Pneumoconiosis etc (Workers' Compensation) Act 1979 ("the 1979 Act"). This will mean that once mesothelioma is diagnosed, every sufferer should have early access to a substantial payment, normally within six weeks of diagnosis, providing a claim is made immediately.

We intend to achieve this by:

- Continuing payments from the 1979 Act to all those who currently receive payments; these will remain at existing levels.
- Introducing a compensation recovery process so that payments under the 1979 Act are recovered if a civil compensation claim is subsequently successful, in order to prevent double provision and continue with the policy line that the "polluter pays".
- Introducing compensation payments similar to those from the 1979 Act to those people who do not currently receive payments from the 1979 Act. These will initially be at a rate commensurate with what can be afforded out of projected compensation recovery amounts.
- Increasing these latter amounts to match those paid to others under the 1979 Act as funds allow.

We are holding a Mesothelioma Summit today to begin to make these changes a reality.

We are also continuing the essential work that is ongoing to speed up the full compensation payments due to many sufferers and their families through the civil claims process, and I am confident that this, too, is already leading to improvements for sufferers. Furthermore, we will look at the state benefit scheme

so that the claims process is streamlined to provide an improved service to our customers.

We will continue to work with our partners to ensure that these outcomes are delivered as soon as possible.<sup>229</sup>

The *Child Maintenance and Other Payments Bill* provides the legislative vehicle to introduce these measures.

#### **4. Why single out mesothelioma for speedier lump sum payments?**

Unlike the other conditions currently eligible for payments under the 1979 Act, which are not always terminal, mesothelioma is almost always fatal within a short time of diagnosis. Equally, the RIA points out, other conditions cannot be acquired through contact with an exposed person who has the substance on his or her body or clothing. Financial matters frequently become a concern for sufferers and their families once the impact of the diagnosis is realised. The Government believes a lump sum payment will help allay worries.

The Industrial Injuries Advisory Council (IIAC) has a statutory duty to advise the Secretary of State for the Department for Work and Pensions and the Northern Ireland Department for Social Development on the prescription of industrial diseases, industrial accidents and any other matters relating to Industrial Injuries benefit. IIAC was consulted on the Government's proposals and said:

"IIAC considers mesothelioma to be an exceptional case, deserving of more generous consideration than other conditions currently eligible for IIDB. Therefore the approach we have recommended to a lump sum payment should not necessarily be considered as setting a precedent for payments for other conditions."

#### **5. How will the new scheme differ from the 1979 Act?**

Once the Bill is enacted, lump sum payments to those mesothelioma sufferers eligible under PWCA will continue. Streamlined administrative measures put in place since 2006 already fast-track these applications. Along with payments under the new scheme, these will be subject to a compensation recovery mechanism if a civil claim or out of court settlement is successful. Currently, there is an anomaly that means that lump sum payments under the 1979 Act are not recovered from subsequent settlements. However, it is the intention that a lump sum will be paid whether or not there is a civil claim for damages on the grounds of negligence in any particular case.

The new scheme will break the link with employment history; extending eligibility to those who through no fault of their own have contracted the disease, including those:

- Exposed to asbestos from a relative (e.g. from cleaning of their overalls)

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<sup>229</sup> HC Deb 13 March 2007 c12WS

- Exposed to asbestos environmentally (e.g. they lived in close proximity to an asbestos factory)
- Self-employed
- Those who cannot trace their exposure to asbestos

New payments will be funded from the recycling of compensation recovery payments. Initially, the payments will correspond to what can be afforded out of the projected compensation recovery amounts, although the intention is to increase them as funds allow until they equal payments made under the 1979 Act.<sup>230</sup>

## B. Part 4 of the Bill

### 1. Overview

Part 4 of the Bill contains provisions to extend payment of compensation to all people suffering from mesothelioma, or their dependants, if they have died, regardless of the person's employment status and irrespective of how exposure occurred. The cost of the new scheme would be met by amending the *Social Security (Recovery of Benefits) Act 1997* to allow for payments under both the *Pneumoconiosis etc (Workers' Compensation) Act 1979* and the new scheme to be recovered if a subsequent civil compensation claim is successful. The level of payments under the new scheme would initially depend on the monies available from compensation recovery, but the Government's intention is to increase them, as and when funds allow, until they are equal to the level of payments made under the 1979 Act.<sup>231</sup>

The detail of the new arrangements is to be set out in regulations. Regulations made under Part 4 of the Bill are to be subject the negative procedure, with the exception of those under clause 41, which are to be subject to the affirmative procedure.

Part 4 of the Bill extends to England, Wales and Scotland, but not to Northern Ireland. Equivalent legislation is however to be introduced for Northern Ireland.<sup>232</sup> Discussions are underway with the Northern Ireland Executive on how the arrangements in Northern Ireland will relate to those in Great Britain.<sup>233</sup>

### 2. Clauses 41-48: the new scheme

**Clause 41** provides for the Secretary of State to make a lump-sum payment to a person with diffuse mesothelioma, or to a dependant if the person has died. Subsection (3) provides for regulations to set out the amount to be paid, which may vary according to circumstances. The DWP *Delegated Powers Memorandum* on the Bill states that the amount may depend on such factors as, for example, 'whether they are a person with

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<sup>230</sup> *Child Maintenance and Other Payments Bill 2007: Delegated Powers Memorandum*

<sup>231</sup> *Child Maintenance and Other Payments Bill 2007: Regulatory Impact Assessment*, para 122

<sup>232</sup> Social security is a transferred matter in Northern Ireland, but there is a long-standing policy of parity between Great Britain and Northern Ireland in social security matters

<sup>233</sup> Personal communication from DWP official, 27 June 2006

mesothelioma, or a dependant of a person with mesothelioma, or based on their age at the date of the claim'.<sup>234</sup>

'Dependant' and 'diffuse mesothelioma' have the same meaning as in the *Pneumoconiosis Etc (Workers' Compensation) Act 1979* (subsection (4)). Section 3 of the 1979 Act defines a dependant as:

- a wife or husband or civil partner who was living with the person with mesothelioma;
- children under 16 years of age;
- children under 21 years of age who are not receiving wages from full time employment;
- children of any age who are permanently unable to support themselves;
- a person living with the person with mesothelioma as if they were husband and wife or as if they were civil partners;
- any other relatives who are completely or mostly dependent on the person with mesothelioma immediately before their death and who are also under the age of 16, under the age of 21 and not receiving wages from full time employment, or permanently unable to support themselves.

The *Explanatory Notes* state that 'payments are to be made to the dependant who is listed first in the above definition, taking the three categories of children together'.<sup>235</sup>

Subsection (5) provides that the Secretary of State may decide whether to make a payment to one person or to more than one person, where more than one dependant may make a claim. The *Explanatory Notes* explain:

This could happen, for example, when a person with mesothelioma does not have a wife or husband, or civil partner, who was living with them, but has three children under the age of 16.<sup>236</sup>

**Clause 42** sets out the conditions that must be satisfied in order for a mesothelioma sufferer, or a dependant, if the sufferer has died, to receive a lump sum. These are:

- No payment has been made under either the new scheme or under the 1979 Act (or their equivalents in Northern Ireland)
- No extra-statutory payment has been made
- No damages or payment in settlement of a claim for damages have been paid
- No payment 'of a description prescribed by regulations' has been made

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<sup>234</sup> *Child Maintenance and Other Payments Bill 2007 Delegated Powers Memorandum*, p30

<sup>235</sup> para 368

<sup>236</sup> para 369

The clause further provides that no lump sum is payable if either the sufferer or their dependant is *eligible* for a payment as a consequence of the disease ‘that is of a description prescribed by regulations’. The *Delegated Powers Memorandum* states that ‘it is envisaged that regulations will prescribe payments under schemes set up in lieu of civil damages that are made by a person liable to make such a payment’.<sup>237</sup> This is to cover special schemes which may be set up by or on behalf of certain employers to help meet asbestos-related liabilities.<sup>238</sup> A current example would be the trust funds set up to pay compensation to former Turner & Newall employees.<sup>239</sup>

Clause 42 further requires that the mesothelioma sufferer must have, or have had, ‘such connection with the United Kingdom as may be prescribed in regulations’. The *Delegated Powers Memorandum* states that the intention is to make lump sum payments under the new scheme ‘where there is nothing to suggest that [the person] was exposed to asbestos other than in the United Kingdom’.<sup>240</sup> The *Memorandum* further states that regulations are ‘likely to include provisions that are intended to prevent people from coming from outside the United Kingdom to claim compensation’.<sup>241</sup>

Subsection (4) provides that where a person has already received a payment of a type falling under one of the above bullet points, but is under an obligation to repay it because it was paid as a consequence of a ‘misrepresentation or failure to disclose a material fact’ (whether fraudulently or otherwise), they are not disqualified from making a subsequent claim under the new scheme.

**Clause 43** provides for regulations to set out how a claim for a lump sum is to be made and the timescale within which it must be made. Subsection (2) provides for alternative or extended timescales; the *Delegated Powers Memorandum* states that the intention is that the ‘decision maker’ will have the discretion to extend the timescale for claiming where there is ‘good cause’ to do so.<sup>242</sup> Similar provisions exist in social security legislation.

**Clause 44** is concerned with the circumstances in which a claim may be looked at again (‘reconsidered’) once a decision on entitlement has been made. It provides that the Secretary of State may reconsider a decision not to make a payment where there has been a ‘material change of circumstances’ since the decision was made, or where a decision to make or to refuse a payment was made in ignorance of or based on an error about the facts of the case.

Regulations must prescribe how applications for reconsiderations are to be made, and within what timescale (subsection (2)).

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<sup>237</sup> p31

<sup>238</sup> Personal communication from DWP official, 27 June 2006

<sup>239</sup> For further details of the Turner & Newall funds see Part E of Library Standard Note SN/SP/168, *Recovery of social security benefits from compensation awards*

<sup>240</sup> p31

<sup>241</sup> pp31-32

<sup>242</sup> p32

Subsections (4) and (5) provide that a person is liable to repay any lump sum where it was made in consequence of a misrepresentation of or a failure to disclose a material fact (whether fraudulently or otherwise), *unless* the person can show that the misrepresentation or failure to disclose occurred 'without that person's connivance or consent'.

Similar provisions govern the recoverability of overpayments of social security benefits, but the corresponding social security legislation does not explicitly provide an exception where a person had not given permission or had not been involved in the failure to disclose, or the provision of incorrect, information.<sup>243</sup>

**Clauses 45 and 46** are concerned with appeals against decisions on entitlement to a lump sum to appeal tribunals and to the Social Security Commissioners respectively. The appeals apparatus mirrors that which exists for social security appeals. Appeals are to be referred to appeal tribunals constituted under Chapter 1 of Part 1 of the *Social Security Act 1998* (although clause 45(4)(b) allows for regulations to specify particular procedures to be followed if an appeal is made). As with social security appeals, and appeal to the Social Security Commissioners against a decision of a tribunal must be on a point of law (clause 46(1)); a person cannot appeal to the Commissioners simply because they disagree with a tribunal's decision.

**Clause 47** provides that payments which fall to be made to a person under the age of 18, or a person who lacks financial capacity/capability<sup>244</sup> may be made for that person's benefit to trustees appointed by the Secretary of State, to be held for such purposes and on such conditions as the Secretary of State may declare.

### 3. Clause 49: compensation recovery

The provisions in the Bill amending the legislation on compensation recovery are crucial to the proposed new mesothelioma compensation scheme since, as noted above, over the long term the scheme is expected to be 'cost neutral'<sup>245</sup>; the new scheme is to be financed from amounts recovered from later awards of civil compensation made to people who have already received a payment under either the new scheme or the *Pneumoconiosis Etc (Workers' Compensation) Act 1979*. At present, where a person has received a lump sum under the 1979 Act, employers and their insurers can deduct an amount equal to that lump sum from a subsequent settlement of civil compensation, and the state cannot recover that amount from the employer or insurer. The *Regulatory Impact Assessment* estimates that the total amount 'foregone' by the state is about £12

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<sup>243</sup> see s71 *Social Security Administration Act 1992*

<sup>244</sup> There are references to separate definitions; in the *Mental Capacity Act 2005*, for England and Wales, and the *Adults with Incapacity (Scotland) Act 2000*, for Scotland

<sup>245</sup> The *Regulatory Impact Assessment* estimates however that the proposals would add approximately £95,000 to the DWP's administrative costs in 2008/09 and £40,000 annually from 2009/10 onwards (para 139).

million per year. The total present value over ten years is estimated at around £100 million (at 2005 prices).<sup>246</sup>

**a. Compensation recovery: the current rules**

Under the current DWP compensation recovery scheme, when a person is awarded compensation as a result of an accident, injury or disease, the amount of compensation they receive may be reduced to take account of social security benefits already paid to them. It is a long established principle that the benefits which are paid to the 'victim' do not serve as double compensation for the same loss but should simply meet their needs while a settlement is being reached.<sup>247</sup> The second principle underpinning the system is that 'taxpayers should not subsidise a liable third party in their obligation to fully compensate a person for their injury or disease they have contracted'.<sup>248</sup>

The current rules on recovery of social security benefits from compensation awards are now contained in the *Social Security (Recovery of Benefits) Act 1997*<sup>249</sup> and the *Social Security (Recovery of Benefits) Regulations 1997*.<sup>250</sup> Details are provided in DWP booklet Z1.<sup>251</sup> The scheme applies where recoverable benefits have been paid or are likely to be paid to an injured person in respect of an accident, injury or disease, and the compensator makes a payment which was agreed on or after 6 October 1997.

Deductions are paid direct to the DWP Compensation Recovery Unit by whoever pays the compensation (usually an insurance company). DWP booklet Z1 gives the following description of the procedures which are followed under the Compensation Recovery rules:

The main provisions of the CRU scheme are that:

- a person should not be compensated twice over in respect of the same accident, injury or disease;
- a compensator who is, or is alleged to be, liable to any extent for the accident, injury or disease makes a compensation payment, agreed on or after 6 October 1997 and recoverable benefits have been paid (or are likely to be paid); to, or for, the injured person in respect of an accident, injury or disease;

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<sup>246</sup> Para 142. This overstates the actual 'cost' to the state however, since some Government departments, the MoD and DTI in particular, themselves have asbestos-related liabilities arising from nationalisation or privatisation: see para 138 of the *Regulatory Impact Assessment*

<sup>247</sup> Paragraph 260 of the Beveridge Report, *Social Insurance and Allied Services*, Cmnd 6404 November 1942, stated that 'An injured person should not have the same need met twice over'.

<sup>248</sup> Department for Work and Pensions website, *The Compensation Recovery Scheme*, downloaded April 2004: [http://www.dwp.gov.uk/advisers/compensation\\_recovery.asp#aims](http://www.dwp.gov.uk/advisers/compensation_recovery.asp#aims)

<sup>249</sup> See Library Research Paper 97/13, *Social Security (Recovery of Benefits) Bill*, 30 January 1997: <http://hcl1.hclibrary.parliament.uk/rp97/rp97-013.pdf>

<sup>250</sup> SI 1997/2205

<sup>251</sup> *Recovery of Benefits and NHS Charges: Procedures for liaison with the Compensation Recovery Unit*, August 2005: <http://www.dwp.gov.uk/advisers/z1/>

- the scheme applies in the UK or elsewhere, regardless of where the compensator is based, or where the accident occurred.

However where a payment was made on or after 6 October 1997 in accordance with a Court Order or agreement made before that date, the provisions of the Social Security Administration Act 1992 and the Social Security (Recoupment) Regulations will continue to apply.

- No person shall make a compensation payment (other than an exempt payment) without first applying to CRU for a Certificate of Recoverable Benefits. The compensator will be liable to pay the DWP an amount equal to the total amount of the recoverable benefits on the Certificate.
- CRU must issue the Certificate within 28 days from the date of receipt of a request which contains all the information on which one may be issued.
- Under the provisions of the Social Security (Recovery of Benefits) Act 1997, the compensator – the person who caused the injury or, more commonly, his insurer – is liable both to pay damages to the injured person and to repay benefits to the Secretary of State for Work and Pensions. (Strictly speaking it is not the actual benefits which are recovered, but “an amount equivalent to” the total benefit payment). In certain circumstances it will be possible for the compensator to deduct some or all of the amount he has had to repay to the Secretary of State from the gross compensation award, a practice known as “offsetting” (see page 13 for explanation).
- Where the amount of compensation relating to a particular head of compensation is less than the amount of the corresponding benefit, the compensator is still liable to repay the full amount shown on the Certificate of recoverable benefits.
- When making a deduction the compensator must inform the injured person.
- The compensator, the injured person or his representative may ask at any time for the Certificate of Recoverable Benefits to be reviewed. It may only be changed if:
  - a mistake occurred in the preparation of the Certificate
  - the amount of recoverable benefit on the Certificate is more than the amount due to the Secretary of State for Work and Pensions
  - incorrect or insufficient information was provided by the person who applied for the Certificate and as a consequence the amount on the Certificate is less than the amount due to the Secretary of State

If after we have looked at the Certificate again we find that there is no recoverable benefit due to the Secretary of State then the Certificate may be revoked.

- A compensator has the right of appeal against the Certificate of Recoverable Benefits only when he has repaid the total amount of recoverable benefits shown on the Certificate to DWP. An injured person

has a similar right, but only where his compensation payment has been reduced to take account of benefit recovery under section 8 of the Act.

- An appeal may be made on the grounds that:
  - any amount, rate or period specified in the Certificate is incorrect; or
  - benefits listed in the Certificate have been paid other than because of the accident, injury or disease in question, and should not have been included; or
  - benefits listed which have not, and are not likely to be, paid to the injured person have been brought into account; or
  - the compensation payment was not made as a consequence of the accident, injury or disease.<sup>252</sup>

The three 'heads of compensation' are loss of earnings, loss of care and loss of mobility. Where compensation is awarded for one of these purposes, the award may be reduced if benefits have already been awarded for the same purpose and an amount equal to the reduction paid to the CRU. So, for example, where someone who has been in receipt of Incapacity Benefit is subsequently awarded compensation for loss of earnings, the compensation award is reduced to take account of the benefit already paid.

DWP booklet Z1 lists various reasons for paying compensation which do *not* fall within one of the three heads specified above and which cannot therefore be offset against any benefit paid. The list includes damages for pain and suffering, loss of leisure, loss of marriage prospects, and loss of pension rights.<sup>253</sup> The booklet emphasizes however that the list is not definitive and does not purport to be an interpretation of the law.

Some payments are exempt from recovery, including compensation to an injured person ordered by a criminal court against a convicted person, payments from certain trusts, Criminal Injuries Compensation payments, and compensation paid by British Coal under the NCB Pneumoconiosis Compensation Scheme set up following the agreement of 13 September 1974.<sup>254</sup>

Changes which came into effect on 12 March 2007 also exempt those receiving compensation for asbestos-related diseases under the schemes set up for former employees of Turner and Newall (and other associated companies of the US parent company Federal Mogul) from the usual rules on compensation recovery.<sup>255</sup>

Further information on the compensation recovery rules can be found in Library Standard Note SN/SP/168, *Recovery of social security benefits from compensation awards*.

<sup>252</sup> <http://www.dwp.gov.uk/advisers/z1/part1/thelaw.asp>

<sup>253</sup> <http://www.dwp.gov.uk/advisers/z1/part1/thelaw2.asp>

<sup>254</sup> Schedule 1 *Social Security (Recovery of Benefits) Act 1997*; regulation 2 *The Social Security (Recovery of Benefits) Regulations SI 1997/2205*

<sup>255</sup> *Social Security (Recovery of Benefits) (Amendment) Regulations 2007 SI 2007/357*

**b. Clause 49**

**Clause 49** inserts a new section 1A into the *Social Security (Recovery of Benefits) Act 1997*. Subsection (1) of the new section provides that the Secretary of State may by regulations make provision for the recovery of a lump sum payment, where compensation is paid, or is likely to be paid, in respect of the same disease as the lump sum payment. A 'lump sum payment' is a payment made under the 1979 Act, a payment under the new scheme, or an 'extra-statutory payment' made to a person following a rejection of a claim under the 1979 Act (new subsection (2); new subsection (5)).

New subsection (3) sets out that regulations made under the new section may:

- make provision for the recovery of a lump sum paid to, or in respect of a dependant of the sufferer;
- make provision enabling the recovery of a lump sum, including where recovery reduces the compensation payment to nil;
- enable lump sums made before commencement to be recovered from compensation made after commencement;
- make provision about certificates in respect of lump sum payments; and
- apply or modify any provision of the 1997 Act.

The *Delegated Powers Memorandum* explains:

The regulation making power allows substantial changes to be made to the 1997 Act. The reason for this is that recovery of lump sum payments is significantly different from the existing recovery of benefits scheme such that it would require major changes to, and modification of the 1997 Act. If these powers were not made we would need to have a whole new additional compensation recovery scheme in the primary legislation which would, to a large part, mirror the existing scheme, so it is preferable to apply or modify the primary provisions in regulations to deal with the changes to the scheme.

The regulation making powers enable the proposed recovery to be undertaken using much of the framework of the current scheme whilst also allowing for specific modifications required for this new area of recovery.<sup>256</sup>

The *Delegated Powers Memorandum* justifies the use of the negative resolution procedure for these regulations on the grounds that:

...the scope of the regulations is limited to circumstances where a lump sum payment and a compensation payment have been paid to, or in respect of, the same person for the same disease. The power is also based on the long established principle of avoiding double compensation and does not introduce

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<sup>256</sup> p34

any new principles. The regulations will just provide for the details and mechanisms of how this will be achieved. Furthermore, the current regulation making powers in the 1997 Act are predominantly subject to the negative resolution procedure including those which provide a power to modify the enabling Act. The only powers in the 1997 Act which require the affirmative resolution procedure are those which expand the categories of persons to whom the Act may apply by virtue of amending the lists in Schedule 2 of that Act. As these powers clearly define the category of persons in the primary provision it is considered that the negative resolution procedure is sufficient Parliamentary oversight for the matters subject to the prescribing powers in the new section 1A of the 1997 Act.<sup>257</sup>

**c. Effect of the new provisions**

As noted above, the DWP estimates that the amount currently deducted by employers and their insurers from settlements of civil compensation because lump sum payments have already been made under the *Pneumoconiosis Etc (Workers' Compensation) Act 1979* totals around £12 million a year, equivalent to around £100 million over ten years (present value, at 2005 prices). The *Regulatory Impact Assessment (RIA)* notes, by way of comparison, that the Employers' Liability Compulsory Insurance (ELCI) market is worth around £1 billion a year.<sup>258</sup> The RIA further states that the Association of British Insurers is aware of the Government's proposals and has indicated that the legislative timetable should give its members sufficient time to make the necessary adjustments to pricing. The RIA states that some large business who self-insure will also be affected (the Government has no records on how many firms self-insure), but notes that such firms should not have been benefiting from payments in any case.<sup>259</sup>

As far as the information requirements on firms is concerned, the RIA states that there would be no additional burden since businesses are already required to notify DWP of any claims and settlements for industrial accidents or diseases for the purposes of Industrial Injuries Disablement Benefit compensation recovery.<sup>260</sup>

The DWP estimates that there will be 1,400 additional claims under the new scheme in 2008/09, followed by 600 additional claims in each subsequent year until 2015/16.<sup>261</sup>

The following table, from the *Regulatory Impact Assessment*, summarises the estimated financial and social impact of the scheme, compared to the current situation.

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<sup>257</sup> p34  
<sup>258</sup> p40  
<sup>259</sup> p40  
<sup>260</sup> p40  
<sup>261</sup> p42

**Table 7: Summary of costs and benefits of introducing a Mesothelioma Lump-Sum payment scheme**

Option	Total benefit per annum: economic, environmental, social	Total cost per annum: -economic, environmental, social -policy and administrative
1 To do nothing.	<u>Economic</u> On business: amount paid from 1979 Act and not recovered £26m	<u>Economic</u> On Government: amount paid from 1979 Act and not recovered £26m  <u>Social</u> Those with mesothelioma wait an average of 12-24 months for settlements under civil law
2 To extend payments of compensation to all people suffering from mesothelioma. Government would pay for this by recovering payments made under the 1979 Act and the new scheme from later awards of civil compensation.	<u>Economic</u> On individuals: £37m from the 1979 Act and new scheme is paid to 2,700 people early but £15m is eventually recovered from civil compensation. 360 individuals would receive no civil compensation and keep the New scheme award of £6,000 (2008/09) £17,000 (2009/10) £19,500 (2010/11)  <u>Social</u> On individuals: those with mesothelioma receive compensation whilst they themselves can benefit from it.	<u>Economic</u> On business: £15m is paid from 1979 Act and new scheme and recovered  <u>Social</u> Those with mesothelioma wait an average of 12-24 months for settlements under civil law

The *Regulatory Impact Assessment* states that discussions are ongoing with Jobcentre Plus and the Compensation Recovery Unit about the resources required to implement the new arrangements. Discussions are also taking place with all 'stakeholders' and these would continue throughout implementation and delivery.<sup>262</sup>

The Department would conduct a review of the effectiveness of the legislation after three years.<sup>263</sup>

<sup>262</sup> p42

<sup>263</sup> RIA, p42

## C. Comment from interested parties

The Government consulted on its proposals for a mesothelioma claims handling scheme between September and December 2006 and engaged with key stakeholders.<sup>264</sup> A summary of responses to the consultation was published on 1 March 2007.<sup>265</sup> The findings shaped proposals contained in the current Bill. The response document notes:

### Conclusions and next steps

38. It is clear that there is no one solution that will incorporate all the suggestions made by stakeholders.

39. The majority of suggestions were for changes to improve the current civil and state schemes with civil compensation as the main thrust, with only about a third of respondents suggesting more radical approaches.

40. All respondents were keen to see changes to the state benefit in one form or another, the majority suggesting:

- Standardised claims forms
- Better links between claims for the various state benefits available
- Streamlined approach to evidence provision
- Improved provision of information
- Breaking with the occupational link – everyone with mesothelioma accesses money via the 1979 Act
- Payments of relevant benefits triggered on diagnosis
- Payments of both weekly amounts and lump sums recovered from any subsequent civil compensation
- Scheme pays within current budgets – benefit recovery releases funds
- Payments between sufferers and dependants equalised.

41. Most respondents suggested a customer-focused “end to end” prescribed claims handling process through the lifecycle of a claim for both state benefits and civil compensation.<sup>266</sup>

The proposals received further discussion at a Mesothelioma Summit hosted by DWP on 13 March 2007

A small number of organisations with an interest in mesothelioma compensation have provided comments on the provisions for this paper.

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<sup>264</sup> *Improving Claims Handling for Mesothelioma Cases: Your views*. DWP September 2006. <http://www.dwp.gov.uk/publications/dwp/2006/mesothelioma-cases.pdf>

<sup>265</sup> *Improving Claims Handling for Mesothelioma Cases: Consultation Report*, Department for Work and Pensions March 2007  
<http://www.workandpensions.gov.uk/publications/dwp/2007/iidb/mesothelioma-cases-consultation-report.pdf>

<sup>266</sup> *ibid.*

## 1. Asbestos Support Groups' Forum (England)

The Asbestos Support Groups Forum (England) works collectively to provide a voice for asbestos victims. The Chairperson of the Forum welcomed the Bill's provisions, saying:

The Forum of Asbestos Victims Support Groups welcomes the publication of the Child Maintenance & Other Payments Bill which includes the introduction of a new scheme to provide lump sum compensation payments to mesothelioma sufferers who were not exposed to asbestos at work. The new scheme, which will initially pay lower levels than payments under the Pneumoconiosis Etc. (Workers Compensation) Act 1979 (79 Act), will be funded from recovery of 79 Act payments. At last the invidious practice of crediting negligent employers and their insurers with 79 Act payments when damages are paid, in effect subsidising employers and insurers and offending the Government's "polluter Pays" principle, will be ended. Millions of pounds, for so long wrongly paid from the public purse, will now be used to help mesothelioma sufferers.<sup>267</sup>

## 2. Association of British Insurers

The Association of British Insurers (ABI) represents the collective interests of the UK's insurance industry. It recognises that introducing compensation recovery provisions for payments under the 1979 Act will bring it into line with other state benefits, but notes that it will further increase costs for the insurance industry. The ABI also has concerns about possible retrospective application of the rules:

The ABI has welcomed the opportunity to work with the Government to ensure that mesothelioma sufferers receive fast, fair and efficient compensation. We recognise that introducing a compensation recovery process so that payments under the 1979 Act are recovered if a civil compensation claim is subsequently successful, will bring this area into line with other state payments and benefits.

While accepting this provision, we note that it will further increase costs for the insurance industry. The Government has estimated that it will increase costs for defendants and their insurers (where applicable) by £12 million per year. Together with other legislative and similar changes that impact adversely on employers' liability insurers, this creates pressure to increase premiums for customers.

We would, however, oppose on principle any legislation that retrospectively impacts upon rights already accrued. We are seeking Government and Parliamentary confirmation that the compensation recovery process will only apply to relevant civil compensation claims that settle after the date that the relevant section comes into force.

The ABI will continue to work closely with the DWP and Compensation Recovery Unit to ensure smooth and efficient implementation of the new provisions.<sup>268</sup>

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<sup>267</sup> Personal communication Chair of Asbestos Forum 13 June 2007

<sup>268</sup> Personal communication 26 June 2007

### 3. Mesothelioma UK

Mesothelioma UK provides an impartial information service for patients diagnosed with mesothelioma and their carers. The Centre also supports the development of specialist nursing practice and research, and promotes the highest possible standards of care. The Nurse Consultant speaking on behalf of the Mesothelioma UK offered her support for the Bill:

Introducing a new scheme to make lump sum payments to all people suffering from mesothelioma, regardless of how they were exposed to it, within six weeks of them making a claim is excellent progress. Asbestos is the only known cause of Mesothelioma and I understand asbestos is not found naturally in our soil. Exposure in the UK has therefore occurred through imported asbestos whether you used it in your work or not. I am glad there will now be some equity with the lump sum payment.<sup>269</sup>

She ventured the opinion that in addition to the extension of the lump sum payments scheme, there should also be a review of Industrial Injuries Disablement Benefit; possibly extending this to victims who have not been occupationally exposed to asbestos.

### 4. Trades Union Congress

Over sixty unions are affiliated to the Trades Union Congress, representing over six million employees. It campaigns on workplace health and safety issues and has welcomed this Bill.

This Bill will put in place the mechanisms necessary to implement the proposed improvements in compensation for mesothelioma sufferers announced by the Secretary of State for Work and Pensions in March of this year.

These proposals will provide up-front financial support for all people who are diagnosed with this fatal disease, not only those who can prove occupational exposure. It will also allow the cost to be met through compensation recovery.

This is the latest of a number of positive initiatives from the Government on mesothelioma and is welcomed by the TUC. It helps rectify an anomaly and will help give some financial recompense to those victims who otherwise would be denied compensation.<sup>270</sup>

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<sup>269</sup> Personal communication 14 June 2007

<sup>270</sup> Personal communication 22 June 2007