



Mesothelioma Bill [HL]

Bill No 100 of Session 2013-14

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Mesothelioma is a form of cancer caused almost exclusively by exposure to asbestos. It is a “long-tail” disease – symptoms may not appear until decades after exposure – but when symptoms do appear, it is often rapidly terminal.

The Bill provides the legislative framework for a new Diffuse Mesothelioma Payment Scheme to make payments to people with diffuse mesothelioma who were exposed to asbestos either negligently or in breach of statutory duty by an employer, and who are unable to bring a claim for damages against the employer or an Employers’ Liability (EL) insurer. The scheme is to be funded by a levy on insurance companies and, under current plans, would make payments to people first diagnosed on or after 25 July 2012. It is hoped to make the first payments in July 2014.

The original proposals for a scheme were set out in a consultation paper published by the Labour Government in February 2010. The incoming Government conducted detailed negotiations with the insurance industry before publishing its response to the consultation on 25 July 2012. Further discussions between the Government, the insurance industry and other interested parties took place before the Bill was introduced in the House of Lords on 9 May 2013. The Bill extends to England, Wales, Scotland and Northern Ireland.

This briefing has been prepared for the Second Reading debate on the Bill in the House of Commons.

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Summary

Mesothelioma is a form of cancer caused almost exclusively by exposure to asbestos. It is a “long-tail” disease – symptoms may not appear until decades after exposure – but when they do appear, it is often rapidly terminal. Measures limiting exposure to asbestos in the workplace have been in place for many years, but the number of deaths caused by past exposure is expected to peak over the next few years. Around 23,000 deaths from mesothelioma are predicted to occur between 2014 and 2024.

The *Mesothelioma Bill [HL]* provides the legislative framework for a new Diffuse Mesothelioma Payment Scheme to make payments to people with the disease who were exposed to asbestos either negligently or in breach of statutory duty by their employer, and who are unable to bring a claim for damages against the employer or that employer’s Employers’ Liability (EL) insurer. It is intended to address the problem where, by the time an individual has been diagnosed, the employer is no longer in business and it is not possible to trace the employer’s EL insurer because the relevant records have been lost or destroyed. The scheme is to be funded by a levy on insurance companies and, under current plans, would make payments to people first diagnosed on or after 25 July 2012. The Government hopes to make the first payments by July 2014. The scheme will be UK-wide.

Proposals for a scheme were set out in a consultation paper published by the Labour Government in February 2010. The incoming Government conducted detailed negotiations with the insurance industry before publishing its response on 25 July 2012. Further discussions took place with the insurance industry and other interested parties before the Bill was introduced in the House of Lords on 9 May 2013.

While the announcement of a new scheme was welcomed by organisations representing people suffering from asbestos-related diseases and their families, there are criticisms that the scheme is more limited in scope than many were led to expect, from the proposals floated in the original consultation paper. Criticisms include the fact that the scheme is to be limited to those suffering from mesothelioma, the cut-off date of 25 July 2012 is seen as arbitrary and unfair, the proposal to set payment rates at below average civil damages, and potential conflicts of interest if the insurance industry administers the scheme.

During the Lords Stages, the Minister for Welfare Reform, Lord Freud, admitted that the final proposals were a compromise, but said that attempting to extract further money and concessions from the insurance industry could lead to legal challenges that risked delaying payments to mesothelioma sufferers. No Opposition or backbench amendments were agreed in the Lords, but the Government announced a number of changes including:

- An increase in the compensation rate from 70% to 75% of civil compensation levels, following further negotiations with the insurance industry
- Agreement that details of the scheme would be brought in by regulations
- An undertaking that the scheme administrator would be selected through an open tender
- A pledge to set up an oversight committee to ensure the scheme would operate in an efficient and just way
- The announcement of a joint strategy with the Department of Health to encourage proposals for high quality research into mesothelioma

The Lords Third Reading was on 22 July 2013.

Introduction

Mesothelioma is a cancer strongly associated with asbestos exposure. It has been predicted that there will have been approximately 90,000 deaths¹ due to this disease over the period 1970 and 2050. Those with the highest risk for the development of mesothelioma include carpenters, plumbers, and other construction workers.

The main purpose of the *Mesothelioma Bill [HL]* is to provide the legislative framework for a new Diffuse Mesothelioma Payment Scheme to make payments to people with mesothelioma who were exposed to asbestos either negligently or in breach of statutory duty by an employer.

Successive Governments have recognised the particular needs of individuals with severe, disabling industrial diseases such as mesothelioma – introducing the *Pneumoconiosis etc. (Workers Compensation) Act 1979* to provide lump sum payments to workers with certain dust-related diseases, and the scheme set up under Part 4 of the *Child Maintenance and Other Payments Act 2008* paying lump sums to mesothelioma sufferers regardless of how the disease was contracted. The new scheme is intended however to address a particular problem of “market failure” whereby individuals diagnosed with diffuse mesothelioma because of exposure to asbestos in the workplace are unable to access compensation, because of the passage of time and a lack of effective record-keeping identifying the insurer responsible for covering the risk. The scheme is to be funded by a levy on insurance companies currently active in the Employers’ Liability (EL) insurance market.

Proposals for a “last resort” scheme were first set out in a DWP consultation paper, *Accessing Compensation: Supporting people who need to trace Employers’ Liability Insurance*, published in February 2010. In light of the responses, and following detailed negotiations with the insurance industry and other stakeholders, the current Government published its response to the consultation on 25 July 2012.²

The Bill was introduced in the House of Lords and the Second Reading debate was on 20 May 2013. The Lords Grand Committee Stage was taken over two days (5 and 10 June). Report Stage was on 17 July and the Lords Third Reading debate was on 22 July. Links to the proceedings can be found on the parliamentary website.³

Further background to the Bill can be found in the *Explanatory Notes* for the Bill as introduced in the Commons on 29 August,⁴ and in the Department’s *Mesothelioma Payment Scheme Impact Assessment* published on 7 May.⁵ The Department also published a number of statistical analyses to inform discussions during the Lords Stages of the Bill. These can be found in the lists of [DWP ad hoc statistical analyses](#) for the second and third quarters of 2013, available at GOV.UK.

Alongside the Bill, the Government has been consulting on proposals to speed up and improve the efficiency of the process for making civil compensation claims for mesothelioma. On 24 July the Ministry of Justice published a consultation paper, *Reforming mesothelioma claims*, which sought views on proposals including a new dedicated Mesothelioma Pre-Action Protocol (MPAP) aimed at settling more straightforward cases quickly, without litigation; supported by an industry-funded Secure Mesothelioma Claims Gateway (SMCG).

¹ Hodgson, J.T., McElvenny, D.M., Darnton, A.J., Price, M.J. & Peto, J. (2005). “The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050”, *Br J Cancer*, 92, 587-93.

² The original *Accessing Compensation* consultation paper, together with the *Government response*, can be found at [GOV.UK](#)

³ See [Bill stages — Mesothelioma Bill \[HL\] 2013-14](#)

⁴ [Bill 100-EN](#)

⁵ [DWP0032](#)

It also sought views on both the principle and structure of a “fixed recoverable costs” regime to reflect the greater speed and efficiency of the proposed new system. The consultation ended on 2 October.⁶

1 Background

1.1 Asbestos and mesothelioma

Asbestos is the generic name for a group of naturally occurring fibrous minerals, metallic silicates, which are mined from countries such as Canada, South Africa and Russia.⁷ It has been used for a variety of purposes; its characteristics of heat and chemical resistance have made it ideal for fireproofing and insulation.

There are several different types of asbestos which are divided into colour groups:

Most common is the serpentine group, which includes chrysotile (white asbestos) and which has been the most frequently mined. A second asbestos group known as the amphiboles includes crocidolite (blue asbestos) and amosite (brown asbestos).⁸

Asbestos was extensively used as a building material in the UK from the 1950s through to the mid-1980s. Any building built before 2000 (houses, factories, offices, schools, hospitals etc) could contain asbestos. According to the Health and Safety Executive (HSE) Asbestos materials in good condition are safe unless asbestos fibres become airborne, which happens when materials are damaged.⁹

Mesothelioma is a cancer that is strongly associated with asbestos exposure. It mostly affects the lining of the lungs but can also occur in the abdomen and heart. The disease has a long latency period which means symptoms can present up to fifty years after exposure, and prognosis at the time of diagnosis tends to be poor. Those with the highest risk for the development of mesothelioma include carpenters, plumbers, and other construction workers¹⁰.

Section 5 gives further information and statistics on mesothelioma, and details of measures taken to control asbestos.

1.2 Compensation for sufferers

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

⁶ Ministry of Justice website, [Reforming mesothelioma claims](#)

⁷ LexisNexis, Tolley's *Health and Safety at Work Handbook 2011*, 23rd Edition, A5001

⁸ Health and Safety Executive website, [Asbestos related disease statistics: frequently asked questions and answers](#) [on 21 March 2011]

⁹ Health and Safety Executive website, [Asbestos basics](#) [on 16 March 2011]

¹⁰ [Mesothelioma Occupation Statistics, Male and Female deaths aged 16-74 in Great Britain 2002-2010](#), Health and Safety Executive

- The Mesothelioma Payments Scheme set up under Part 4 of the *Child Maintenance and Other Payments Act 2008*, again administered by DWP, which provides lump sum payments to people unable to claim under the 1979 Act, for example, those who were exposed to asbestos in the environment, rather than as a result of their work

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. Provisions in the *Compensation Act 2006* reverse the effect of a decision by the House of Lords in the case of *Barker v Corus UK Plc* and others. This means that where a mesothelioma sufferer has been negligently exposed to asbestos by more than one employer, and it cannot be established where and when they were exposed to the "fatal" fibre, then, in relevant circumstances, any one employer could be pursued for full compensation. In certain circumstances claimants other than employees are able to bring a successful claim.

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.

A new practice direction for mesothelioma claims took effect in April 2008, which was aimed, in part, at speeding up claims.¹¹ A Library Note, [Mesothelioma: civil court claims](#), provides further information on the civil claims process.

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).¹²

The list of approximately 70 prescribed diseases and their associated occupations is in Schedule 1 of the *Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985*.¹³ A number of asbestos-related conditions are included, including diffuse mesothelioma (Prescribed Disease D3). To be eligible for IIDB for diffuse mesothelioma, 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".¹⁴

It is possible to make a claim for IIDB in respect of a person who would have been entitled to benefit, but who died before making a claim. However, there are time limits for making "posthumous claims", and an award can only be backdated to three months before the date of death.

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,

¹¹ See: Ministry of Justice, *Civil Procedure Rules Committee: Annual Report 2008*, November 2008 (on 22 March 2011)

¹² A brief overview of Industrial Injuries Disablement Benefit is available at the [DWP website](#). The rules are set out in greater detail in DWP technical guide DB1, [A guide to Industrial Injuries Disablement Benefits](#), April 2013

¹³ *Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985*; [SI 1985/967 as amended](#). It is also available at the [DWP website](#).

¹⁴ Schedule 1 SI 1985/967

disablement is automatically assessed as being 100 per cent, if the employment conditions are satisfied.

Pneumoconiosis etc (Workers' Compensation) Act 1979

The *Pneumoconiosis etc (Workers' Compensation) Act 1979* (PWCA)¹⁵ provides lump sum compensation payments to people suffering from certain dust-related diseases or, if they have died, their dependants. Payments may be made where the disease was the result of exposure to dust in the course of employment, but where a claim for damages is not possible because the employer(s) is no longer in business. The diseases include diffuse mesothelioma, pneumoconiosis (including silicosis, asbestosis, kaolinosis), diffuse pleural thickening, primary carcinoma of the lung (if accompanied by asbestosis or diffuse pleural thickening), and byssinosis.

In the year from April 2011 to March 2012, 2,750 people received payments under the 1979 Act at a total cost of £37.7 million. Over 60% of payments made under the 1979 Act are in respect of mesothelioma.¹⁶

There are three main qualifying conditions for entitlement:¹⁷

- 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.

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

The amounts that can be paid under the scheme are now updated annually by Regulations made under the Act.¹⁸ The *Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2013* set out the rates payable from April 2013. The amount payable depends on the person's age and their level of disablement. Payments in respect of mesothelioma are made at the 100% rate of disablement (from April 2013, this varies from £83,330 for people aged 37 and under to £12,945 for people aged 77 and over).

2008 Mesothelioma Payments Scheme

The *Mesothelioma Payments Scheme* came into force on 1 October 2008 as a result of the *Child Maintenance and Other Payments Act 2008*.¹⁹ The Scheme provides lump sum payments for people suffering from diffuse mesothelioma, if they were exposed to asbestos in the UK. It operates alongside the *Pneumoconiosis etc. (Workers' Compensation) Act 1979* (PWCA).

¹⁵ The *Pneumoconiosis etc (Workers' Compensation) (Northern Ireland) Order 1979* makes corresponding provision in Northern Ireland

¹⁶ HL Deb 7 March 2013 cc307-8GC

¹⁷ Further information on how to apply for assistance under the scheme is available at the [GOV.UK website](http://gov.uk)

¹⁸ 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

¹⁹ In Northern Ireland, the *Mesothelioma, etc., Act (Northern Ireland) 2008* makes corresponding provision

The scheme provides lump sum payments for people suffering from diffuse mesothelioma who were exposed to asbestos in the UK but are unable to claim compensation from other sources, such as women who washed their husband's contaminated clothes, or the self-employed.

People who are unable to make a claim under the PWCA, have not received payment in respect of the disease from an employer, a civil claim or elsewhere, and are not entitled to compensation from a Ministry of Defence scheme, can claim a lump sum payment under the scheme. Claims can be made by people suffering from diffuse mesothelioma, or a dependant of a deceased person who, immediately before their death, was suffering from diffuse mesothelioma. Claims should be made within one year of diagnosis or, in the case of dependants, within a year of the date of death.

The amount of the lump sum depends on the person's age when they were diagnosed with the disease. From April 2013, the amounts vary from £83,330 for people aged 37 and under to £12,945 for people aged 77 and over (equivalent to payments under the 1979 Act for those assessed as 100% disabled). The rates for dependants will range from £43,366 where the person was aged 37 or under when they died, to £7,180 where the person was 67 or over when they died.²⁰ In 2011-12, 480 people received payments under the scheme at a total cost of £9.3 million.²¹

The Diffuse Mesothelioma Scheme is intended to be "cost neutral" over the long term. The scheme is being financed from amounts recovered from later awards of civil compensation made to people who have already received a payment under either the scheme or the *Pneumoconiosis Etc (Workers' Compensation) Act 1979*.²²

1.3 Consultation on "Accessing Compensation"

Civil liability can be insured against and since 1972 most employers have had to take out suitable insurance as a result of *The Employers' Liability (Compulsory Insurance) Act 1969*. However, claimants can encounter problems accessing this money when it is difficult to trace old insurance policies.

In February 2010 the previous Government published a consultation document, [Accessing Compensation: Supporting people who need to trace employers' liability insurance](#), which set out proposals for people who need to find their employers' liability insurance policies in order to claim compensation. The consultation was launched because in cases of employer negligence, a number of individuals have had difficulties in tracing the Employers' Liability (EL) Insurance policy. This has been a problem particularly for individuals with an occupational disease where they were exposed to the agent that caused the disease some time ago, as is often the case with asbestos-related diseases.

The *Employers' Liability (Compulsory Insurance) Act 1969*, which came into effect in 1 January 1972, requires most employers carrying on business in Great Britain to insure their liability to their employees for injury or disease caused in the course of their employment. Employers' Liability Compulsory Insurance (ELCI) provides security to firms against compensation costs even where firms become insolvent. Although prior to that EL insurance

²⁰ [Mesothelioma Lump Sum Payments \(Conditions and Amounts\) \(Amendment\) Regulations 2013](#); SI 2013/670

²¹ HL Deb 7 March 2013 c307GC

²² Previously, where a person received a lump sum under the 1979 Act, employers and their insurers could deduct an amount equal to that lump sum from a subsequent settlement of civil compensation, and the state could not recover that amount from the employer or insurer. The *Child Maintenance and Other Payments Act 2008* amended the rules on compensation recovery to enable the Government to claw back these sums. For further background see pp60-65 of Library Research Paper 07/57, [Child Maintenance and Other Payments Bill](#)

was not compulsory, the Government's consultation notes that in practice many employers arranged the appropriate cover.

In cases of employer negligence, most individuals are able to make a claim for injury or disease directly against their current or former employer. Some, however, have difficulties in tracing the relevant EL insurance policy. By the time of diagnosis in long tail diseases the relevant EL records may have been lost or destroyed.

To help with this problem, the Association of British Insurers (ABI) and the Lloyds Market Association committed, since 1999, to a voluntary Code of Practice for tracing EL Insurance Policies (ELCOP). While the Tracing Service has led to some improvements, there are still some individuals who are left without help – 3,210 of them in 2008. The 2010 consultation set out that of some 800 mesothelioma claimants trying to access employer's liability insurance details via the Employers' Liability Code of Practice (ELCOP),²³ 390 claimants (48%) had been unable to trace an insurer.²⁴

To assist with access to compensation money, the consultation proposed two things. Firstly that to ensure that more people with mesothelioma are able to get compensation, an Employers' Liability Insurance Bureau (ELIB) would be set up. An ELIB would be a compensation fund of last resort and would ensure that some individuals who are unable to trace EL insurance records would receive compensation.²⁵ The consultation considered the scope of an ELIB and proposed options for it to cover different diseases:

- All claims
- Long-tail disease claims
- Mesothelioma claims only

And various timing options:

- Claims where an employer/insurer cannot be traced
- Claims brought from the start of the scheme
- Claims where diagnosis is made after the start of the scheme

The consultation also proposed an Employers' Liability Tracing Office (ELTO). An ELTO would manage an electronic database of employer's liability policies and also operate the existing tracing service.²⁶

The consultation ran from 10 February 2010 to 5 May 2010.

Responses to the proposals

The proposals drew different responses from most of the insurance industry and from sufferers and their campaigners. The Association of British Insurers considered that ELCOP was sufficient in addressing the problem and thought the proposals unfair:

²³ The Employers' Liability Code of Practice (ELCOP) is a voluntary code of practice for tracing employer's liability Insurance Policies backed by the Association of British Insurers (ABI) and the Lloyds Market Association

²⁴ Department for Work and Pensions, [Supporting people who need to trace Employers' Liability Insurance – public consultation](#), February 2010, p17

²⁵ Department for Work and Pensions, [Supporting people who need to trace Employers' Liability Insurance – public consultation](#), February 2010, p5 and 17

²⁶ Department for Work and Pensions, [Supporting people who need to trace Employers' Liability Insurance – public consultation](#), February 2010, p5

It cannot be right that today's law-abiding employers should have to pay for their potentially uninsured competitors or firms that now no longer exist, and who may not have had insurance. Such a fund could also encourage some employers not to bother with insurance, or to take the health and safety of their employees less seriously, knowing that a fund of last resort would pay out.²⁷

Contrary to this, David Neave, director of general insurance at Co-operative Financial Services said that “on a balance of probability we believe that the majority of ceased businesses probably did have adequate insurance” and therefore “it is only fair and equitable that these claims should be honoured.”²⁸

Other organisations – especially those campaigning on behalf of sufferers – called for the scope of the scheme to be operated at the fullest extent. The British Lung Foundation, for example, recommended the scheme be open to mesothelioma and other long tail diseases, that claims should be made to dependants after the death of a sufferer and that there should be no limitation as to when a person could bring forth a claim to the ELIB.²⁹

Government response

Following the change of Government, information became available from the consultation process in February 2011 when a Parliamentary Question was answered about whether the proposed ELIB and ELTO would now be established. The Government said that it was working with stakeholders on the proposals and that there would be an announcement in due course:

Chris Grayling: In February 2010 the previous Government published their consultation document, "Accessing Compensation-Supporting people who need to trace employers' liability insurance", which set out proposals for people who need to find their employers' liability insurance policies in order to claim compensation. The consultation closed on 5 May 2010. There were two proposals; firstly an Employers' Liability Tracing Office, that would manage a database of employers' liability policies. Secondly, an Employers' Liability Insurance Bureau which would be a compensation fund of last resort for those individuals who are unable to trace employers' liability insurance records, ensuring they are able to receive compensation for injuries or diseases sustained during the course of their employment. We are in active discussions with all stakeholders on how this situation can be addressed and we will bring forward our proposals in due course.³⁰

Some time later, in July 2012, the Government's response to the consultation was published. At the end of the consultation the Department had received 57 responses from individuals, firms or representative bodies from the insurance, employer and legal communities and support groups. The response notes that the claimant group overwhelmingly supported the establishment of an ELTO and database. They also supported the inclusion of historic policies in order to ensure the database is useful to people with long-tail diseases. Business representatives were also in favour of an ELTO.³¹

²⁷ <https://www.abi.org.uk/News/News-releases/2010/02/ABI-voices-concern-over-Government-proposals-for-an-Employers-Liability-Insurance-Bureau>

²⁸ <http://www.postonline.co.uk/post/news/1602732/co-operative-insurance-calls-elib>

²⁹ www.blf.org.uk/.../Accessing-compensation---employers-liability-insurance.doc

³⁰ HC Deb 14 Feb 2011 *c621W*

³¹ DWP, Accessing compensation – Supporting people who need to trace Employers' Liability Insurance; Government Response, July 2012

Insurer representatives supported the introduction of a database including all new and renewed EL policies and possibly some historic records, such as details of previous successful traces, but were opposed to any mandatory requirement because of its disproportionate cost.³²

Claimant groups favoured a universal ELIB, as a fund of last resort for all those injured or made ill at work who cannot trace a relevant EL insurer to claim against. Insurer groups largely opposed a universal ELIB of that kind, commenting that it would be disproportionate and potentially unfair, putting costs on today's insurers and businesses for past multiple societal failures. Some insurers agreed there may be a case for action on mesothelioma claims, but felt including other diseases or accidents would be "a step too far". Business respondents were concerned about the potential costs to business of an ELIB.³³

Employers' Liability Insurance Bureau (ELIB)

It was clear from the responses to the consultation that opinion, on the introduction of an ELIB was divided and the issues involved were complex. The Government stated in the response:

Following our discussions with stakeholders we are not persuaded that a universal ELIB should be set up, however we propose setting up a support scheme for those people with mesothelioma who were exposed to asbestos through their employer's negligence and who remain unable to trace a liable insurer or employer.

The proposed scheme will be funded by a levy on insurers currently writing EL policies. Payments from the scheme will be at a level set such that the overall amount received by the claimant will be somewhere between that offered by state benefits and average payouts from civil action. This will ensure that those who are able to trace an insurer remain incentivised to do so in order to claim full compensation.

The Government explained that there was a "unique case" for helping people with mesothelioma because it is almost exclusively caused through exposure to asbestos, which distinguishes it from other asbestos-related diseases, and that exposure to asbestos in the UK largely results from negligent business practices.

A levy was considered to be the most practical option. Alternative funding models, such as attempting to retrospectively allocate historic exposure to individual insurers, would be disproportionately expensive or legally too complex, according to the Government.

The level of payment to sufferers would be based upon a percentage of civil damages. This aimed to provide financial incentive to trace an insurer so claims will only be brought to the scheme as a last resort.

Campaign groups welcomed the scheme in part but criticised its scope. A number of organisations saw a shortcoming in its restriction to mesothelioma and not other long tail diseases, like asbestosis and lung cancer. Tony Whitston, the Chair of the Asbestos Victims Supports Group Forum UK, argued that the cost of including other diseases would not be significantly more: "less than 20% more to provide cover for all asbestos victims."³⁴

³² Ibid

³³ Ibid

³⁴ [Press Release - Asbestos Victims Support Groups Forum UK, July 2012](#)

Employers' Liability Tracing Office (ELTO)

Ahead of the Government's response to the consultation, the insurance industry set up an ELTO which began operation in April 2011, and replaced the voluntary ELCOP tracing service.

The ELTO is a not-for-profit company limited by guarantee and funded by a levy. ELTO's members are organisations owning EL liabilities for UK employers, including active and run-off EL insurers. Interim directors have been appointed to its board. ELTO manages a central on-line EL database (ELD) containing all new and renewed EL insurance policies from April 2011, policies from before April 2011 that have new claims made against them and policies that were identified through the previous tracing service.³⁵

The Government's consultation response welcomed the ELTO being set up and expected it to deliver significant results. However, it also noted that membership of the ELTO was voluntary and announced that legislation would be introduced to ensure all EL insurers would be required to become members of the ELTO.³⁶

In October 2012 the FSA launched a [consultation](#) to help potential claimants access the information they needed through the ELTO. This followed on directly from the Government's announcements in the consultation response.

Other initiatives to support mesothelioma sufferers

The Ministry of Justice announced in December 2012 that it planned to launch a [consultation on a package of reforms](#) to improve and speed up the procedures governing mesothelioma claims. The consultation opened on 24 July and closed on 2 October 2013. The aim is to speed up the process so that in as many cases as possible the amount of compensation should be settled before the victim dies.

2 The Bill

The Bill consists of 21 clauses and two Schedules.

The main purpose of the Bill is the establishment of a new **Diffuse Mesothelioma Payment Scheme** to make payments to people diagnosed with diffuse mesothelioma, and to eligible dependants of people who had not made an application for a payment when they died of the disease. First diagnosis must have been on or after 25 July 2012, and the disease must have been as a result of negligent exposure to asbestos at work. The scheme will only be open to people who have not brought an action against a relevant employer or Employers' Liability (EL) insurer because they are unable to do so. In addition, they must not have received damages or a "specified payment" in respect of mesothelioma, and must not be eligible for a specified payment from another source.

The Bill also amends existing legislation on "compensation recovery" to allow the Secretary of State to claw back from scheme payments amounts already paid to individuals by way of social security benefits and "lump sum payments" (that is, awards made under the *Pneumoconiosis etc. (Workers Compensation) Act 1979* or the 2008 Mesothelioma Scheme). It also allows the DWP to recover payments made under the new scheme from any subsequent award of civil compensation.³⁷

³⁵ www.elto.org.uk

³⁶ DWP, *Accessing compensation – Supporting people who need to trace Employers' Liability Insurance; Government Response*, July 2012

³⁷ The rationale for "compensation recovery" is explained in more detail below

The scheme is to be funded by a levy on insurance companies currently active in the Employers' Liability (EL) insurance market. The Bill includes provisions relating to the calculation of the total levy and to its apportionment, which is to be determined by reference to each insurer's market share.

While the Bill provides a legislative framework for the new scheme, the details are to be set out in regulations, the first version of which will be subject to the affirmative procedure. Any subsequent regulations will be subject to the negative procedure.

As well as provisions relating to the scheme, the Bill also provides for the establishment of a "Technical Committee" to adjudicate in disputes between potential insurance claimants and EL insurance companies. The role of the Committee will be to make decisions in cases where, for example, a person with diffuse mesothelioma has some evidence that an insurer was providing cover for the employer when they were negligently exposed to asbestos but the insurer disputes this.

The Bill extends to England, Wales, Scotland and Northern Ireland.

The Bill relates to non-devolved matters in Wales and does not affect the powers of Welsh Ministers.

The Bill as introduced in the Commons does not cover any devolved matters in Scotland. The consent of the Scottish Parliament would however be needed if there are any amendments relating to devolved matters which trigger the Sewel Convention.³⁸

Most of the provisions in the Bill refer to transferred matters in Northern Ireland. A Legislative Consent Motion endorsing the principle of the extension of the *Mesothelioma Bill* to Northern Ireland was debated in the Northern Ireland Assembly on 1 July 2013 and the motion was passed.

2.1 The scheme

Clause 1 enables the Secretary of State to establish, by regulations, a scheme for making payments to eligible persons with diffuse mesothelioma and to eligible dependants of people who have died with the disease.

Clause 2 sets out the conditions a person needs to satisfy to be eligible for a payment. The criteria are:

- The person was first diagnosed with diffuse mesothelioma on, or after, 25 July 2012 (the date on which the Government announced its intention to legislate to set up a scheme, following the public consultation);
- The person was employed at the time of exposure to asbestos and that exposure was due to negligence or breach of statutory duty on the part of a relevant employer;
- The person has not brought a claim for civil damages against an employer, or the employer's insurer, at the time of their exposure and they are unable to do so; and
- The person has not received damages or a "specified payment" in respect of the disease and is not eligible to receive a specified payment.

³⁸ For further background see Library briefing SN02084, [The Sewel Convention](#)

A “relevant employer” is an employer who, at the time of the person’s exposure, was required by legislation to have insurance covering any liability arising because of exposure to asbestos or, if exposure occurred before EL insurance became compulsory, would have been required to have cover in place had the legislation been in force at that time.³⁹

Regulations will set out the meaning of “specified payments” but these will include payments under the War Pensions and Armed Forces Compensation Schemes and payments made by the UK Asbestos Trust or EL Scheme Trust (the “Turner and Newall Trusts”). Lump sum awards under the *Pneumoconiosis etc. (Workers Compensation) Act 1979* or the 2008 Mesothelioma Scheme will not be specified payments.⁴⁰

Clause 3 provides that dependants of persons who have died of diffuse mesothelioma are eligible for a payment, where the deceased would have been eligible for a payment but did not apply for one, no one has brought an action for damages and no one is able to bring an action, and no one is has received, or is eligible, for a specified payment. “Dependant” has the same meaning as in the *Pneumoconiosis etc. (Workers Compensation) Act 1979*.

Clauses 4-7 cover payments, the procedure for making applications, and reviews and appeals; although again the detail will be set out in regulations.

Clause 4(2)(a) provides that the amount payable may vary according to the age of the person with mesothelioma. The Government intends to set payments at a particular percentage of average civil claims. The average amount awarded in civil compensation reduces as age increases, reflecting the shorter life expectancy older mesothelioma sufferers would have had anyway, had they not contracted the disease; and the fact that older mesothelioma sufferers are more likely to be retired (and therefore earning less) than younger sufferers.⁴¹

On 7 May, the DWP published a statistical note summarising the key findings from an analysis undertaken by the National Institute for Economic and Social Research of average levels of compensation by age of claimant.⁴²

2.2 Administration

Clauses 7-9 cover administration of the scheme. The Secretary of State may administer the scheme himself or appoint another body to act as “scheme administrator.”

Further information on the Government’s intentions with regard to the administration of the scheme is given in section 4.4 below.

Clause 10 allows the scheme administrator to help a person (either a sufferer, or a dependant or representative where the person with mesothelioma has died) who has received a payment under the scheme to bring a claim for compensation against an employer or insurer. Help may include conducting the proceedings, or giving advice or financial help. The provisions would enable the administrator to help people in situations where they satisfied the eligibility criteria (ie the employer no longer existed and the EL insurer could not be tracked down), but new information came to light subsequently, making

³⁹ EL insurance became compulsory in Great Britain from 1 January 1972 and from 29 December 1975 in Northern Ireland. However, the fact that the EL insurance market did not expand significantly when the legislation came into force is taken as evidence that the vast majority of employers already held EL insurance. See para 3 of the [Explanatory Notes](#) for the Bill as introduced in the Commons, and para 3 of the [Impact Assessment](#) of 7 May 2013.

⁴⁰ Letter dated 7 June 2013 from Lord Freud to Peers regarding the Mesothelioma Bill; [HDEP2013-0938](#)

⁴¹ Para 76 of the [Impact Assessment](#) of 7 May 2013

⁴² NIESR, [Study into average civil compensation in mesothelioma cases: statistical note](#), 23 April 2013

a claim possible. If civil damages are awarded, an amount equal to the scheme payment would be recovered from the award.

2.3 Recovery of benefits

Clause 11 and Schedule 1 provide for recovery of benefits and lumps sums from payments under the scheme. They also provide for scheme payments to be recovered from any subsequent award of compensation.

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 and other payments already made to them. The current rules on “compensation recovery” were introduced in 1997 but such provisions are a longstanding feature of the social security system. It is a long established principle that a person should not be compensated twice over in respect of the same accident, injury or disease. A further principle underpinning compensation recovery is that taxpayers should not be expected to subsidise a liable third party in their obligation to fully compensate a person for their injury or disease they have contracted.⁴³

Amounts recovered from awards are paid direct to the DWP's Compensation Recovery Unit (CRU) by whoever pays the compensation (usually an insurance company). The deduction is made before compensation is paid to the individual.⁴⁴

As noted above, people diagnosed with mesothelioma may be entitled to Industrial Injuries Disablement Benefit and a lump sum payment under either the *Pneumoconiosis etc (Workers' Compensation) Act 1979* or the 2008 Mesothelioma Payments Scheme. In a normal civil case where a person is awarded civil compensation from an employer, or insurer, the Government would, via the CRU, recover social security benefit and lump sum payments already paid to the individual. The provisions in the Bill ensure that payments made under the new scheme will be treated in the same way as ordinary compensation awards in this respect.

The Government estimates that, over ten years, recoveries of benefits and lump sum payments from scheme payments could total £71 million. However, “to assist with the early costs of the scheme”, the Government proposes to contribute to the scheme fund an amount equal to recoveries in the first year of the scheme, which it estimates at £17 million. With additional administrative costs associated with compensation recovery estimated at £2 million, the total net benefit to the Exchequer is expected to be around £52 million over ten years.⁴⁵

While compensation recovery will reduce the amounts payable to individuals under the scheme, the Government points out that awards are likely to be substantially higher than any amounts already paid to individuals in respect of benefits and lump sums. Average awards (before compensation recovery) are likely to be in excess of £90,000.⁴⁶ Based on existing

⁴³ For further information on compensation recovery see Library briefing SN00168, [Recovery of social security benefits from compensation awards](#); see also Library Research Paper 07/57, [Child Maintenance and Other Payments Bill](#), pp60-66

⁴⁴ Further information on the [Compensation Recovery Unit](#) can be found at the DWP website

⁴⁵ [Explanatory Notes Bill 100-EN](#), para 108. See also paras 90-91 of the [Impact Assessment](#) of 7 May 2013

⁴⁶ The [Impact Assessment](#) of 7 May 2013 estimated that average payments, based on the projected age profile of individuals and assuming awards set at 70% of average civil compensation awards, would be around £87,000 (para 81). The Government announced subsequently that scheme payments would be based on 75% of average civil compensation.

CRU data, the Government expects that the average amount to be recovered will be around £20,000.⁴⁷

2.4 The levy

Clauses 13-14 are concerned with the levy on insurers in order to fund the scheme. Regulations (subject to the negative procedure) will require active insurers to pay a levy with a view of meeting the costs of the scheme. “Active insurers” will be those who were authorised Employers’ Liability (EL) insurers at any point during the “reference period” (a twelve month period to be determined in accordance with the regulations). The regulations may require individual insurers to pay a levy based on their relative market share. The scheme is to be open to people first diagnosed with mesothelioma on or after 25 July 2012 and to cope with the expected backlog of applications on commencement of the scheme, the Bill would allow the Secretary of State to fix the total levy at the same amount each year for the first four years (to spread the cost to insurers more evenly).

In a letter to Member of the House of Lords dated 4 July, the Minister for Welfare Reform, Lord Freud, explained:

We expect the Levy to be set on an annual basis on a simple formula: Total forecast scheme payments + scheme administration costs = total levy.

To calculate how much each insurer will have to pay in levy we will use the Financial Conduct Authority annual returns to calculate the total employers’ liability gross written premium (EL GWP) in a given year and each insurer’s percentage share is this total. Each insurer will be notified of their share of the levy based on their total employers’ liability market share as a percentage of the overall EL GWP. We cannot put this information in the public domain as it is market sensitive. The regulations will therefore contain the formula with the relevant figures attached. In addition they will contain details of when the levy is to be collected and which accounts it is to be paid into, at the moment this is expected to be the consolidated fund in HMT.

A Written Ministerial Statement will be produced each year to set out the amounts as it is not possible to include these in the Budget. We also intend to include in this WMS a table that will show the tariff payments by age for the corresponding year.⁴⁸

As noted above, the Government intends to make an initial contribution to the scheme equal to the amount that would be recovered from awards in respect of social security benefits and lump sum payments in year one. This is estimated at £17 million. Clause 15(3) enables this to be taken into account when calculating the total amount of the first levy.

2.5 Technical Committee

Clauses 15-16 provide for the setting up of a “Technical Committee” to resolve disputes about whether an employer had EL insurance in place at a particular time. Decisions of the Committee are binding, but a party that is dissatisfied with a decision may, after exhausting review processes, refer the matter to arbitration.

The Technical Committee is not part of the Diffuse Mesothelioma Payment Scheme. Its role will be to deal with disputes between potential insurance claimants and insurers about whether a particular employer had EL insurance in place at a particular time.

⁴⁷ Para 129 of the *Impact Assessment* of 7 May 2013

⁴⁸ DEP 2013-1160. The [Financial Conduct Authority](#) is a UK financial regulator. Working alongside the Prudential Regulation Authority (PRA), it replaced the Financial Services Authority from 1 April 2013

People diagnosed with diffuse mesothelioma who were exposed to asbestos at work (and their dependants, representatives or relatives) have, since April 2011, been able to use the Employers' Liability Tracing Office (ELTO) to trace EL insurers, in order to bring a claim for compensation. ELTO replaced the voluntary Employers' Liability Code of Practice (ELCOP) tracing service, which was set up in 1999.

The Technical Committee's role will be limited to situations where a search of the ELTO database has not revealed an EL insurer, but there is some other information that an employer may have had EL insurance in place. Lord Freud explained the Technical Committee's role in a memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee in June:

We envisage that a person will only seek a Technical Committee decision when an ELTO search does not provide any information about a potential EL insurer, but some information about EL insurance is available by other means. For example, the individual with mesothelioma may have worked for a small employer and may recall seeing a certificate of insurance on their employer's wall with the name of an insurer. Where this information is disputed by the alleged insurer then an individual may ask the Technical Committee to make a decision.

The Association of British Insurers has advised the Department that there is a lack of consistency across the industry regarding what is classed as sufficient evidence of EL insurance cover in this regard. This has led to some insurers accepting claims and others not accepting claims, thus producing an inconsistent and unsatisfactory pattern of decision making. The Technical Committee is designed to address this problem so as to encourage a consistent approach for determining questions of cover when ELTO cannot assist but other information is available. It is hoped that this will lead to more individuals with mesothelioma or their dependants, personal representatives (or relatives in Scotland) having access to the civil compensation that they are entitled to in the future. It is also hoped that this will lead to the parties who are actually liable to pay damages actually doing so (rather than the insurance industry as a whole having to pay by means of the levy to fund the scheme). The Technical Committee process can therefore be seen as an extension of the ELTO tracing mechanism in a discrete set of circumstances.⁴⁹

Lord Freud added:

The Technical Committee will therefore operate separately from the Diffuse Mesothelioma Payment Scheme and will not determine whether someone receives a payment, but it may inform an individual's decision to pursue a civil claim or apply for a scheme payment depending on the specific circumstances, as outlined above.⁵⁰

2.6 Impact

Headline figures on the expected financial effects of the Bill are given in the *Explanatory Notes* accompanying the Bill as introduced in the House of Commons.⁵¹ More detailed figures are given in the Impact Assessment published on 7 May, although changes to the parameters of the scheme announced before the Lords Report Stage mean that some of the estimates in the Impact Assessment will need to be revised. Additional analyses of volumes, payment rates and scheme costs reflecting the changed parameters, and of the effects of varying the scope of the scheme in other ways, are given in a series of [DWP ad hoc statistical analyses](#) released to inform discussions during the Lords Stages of the Bill.

⁴⁹ [HL 14 2013-14](#), 5 June 2013, Appendix 1

⁵⁰ Ibid

⁵¹ [Bill 100-EN](#)

The DWP forecasts that, over the ten year period covered by the Impact Assessment (that is, up to March 2024), there will be around 28,000 deaths from diffuse mesothelioma in the United Kingdom.

It is expected that 10% of deaths (about 2,800) will be as a result of exposure to asbestos other than as an employed earner (for example, the person was self-employed, or was exposed while washing the work clothes of a family member).

In just over 60% of cases (around 17,200), it is expected that a claim for compensation will be made via the occupational civil case route. In around 4,100 cases (15% of the total) where exposure to asbestos has an occupational link, the DWP expects that the person (or their dependants) will either decide not to make a civil compensation claim and will make no attempt to trace an EL insurer, or will have insufficient evidence to prove employer negligence and/or a breach of statutory duty.

This leaves around 3,900 cases where there is evidence of an occupational link, but where an attempt to trace an EL insurer is unsuccessful.⁵² This is the number expected to apply for a payment under the scheme.

The DWP assumes that 90% of applications to the scheme will be successful, and that around 3,500 people will receive a payment from the scheme over the ten year period covered by the Impact Assessment. The Government now proposes to set payments at 75% of average civil compensations. Payment rates by 1-year age bands for 100% and for 75% of average civil compensation are given in a table in an ad hoc statistical analysis published by DWP on 16 July.⁵³ If set at 75% of civil compensation, payments would vary from £61,495 for those aged 89 and over, to £196,778 for those aged 40 and under (100% of civil compensation would be £81,993 and £262,370 respectively). Taking into account the expected age profile of applicants, the Impact Assessment estimated that payments over the period up to 2024 would average £87,000, if set at 70% of civil compensation. Following the announcement of an increase to 75% of civil compensation, the average payment may now be around £93,000 (assuming no further changes to the parameters).

Scheme payment rates by one-year age bands assuming tariffs based on 75% and 100% of average civil compensation are given in the Appendix to this paper.

The total amount of the levy on insurers over the period up to 2024 is now estimated at £343 million. The additional amount individuals are expected to receive as a result of the scheme (including contributions to legal fees for successful applicants, but minus amounts recovered by DWP in respect of social security benefits and lump sum payments) is £260 million.⁵⁴ The Impact Assessment assumed that legal fees would be £7,000 per applicant. The actual fixed fee will be set out in the regulations, but the Government's current working assumption is that legal fees will be significantly lower (£2,000 per individual), "based on a relatively straightforward process we expect to operate of individuals making applications to the Scheme."⁵⁵

As noted earlier, the Government expects to recover £71 million in social security benefits and lump sum payments from scheme payments. However, this needs to be set against an

⁵² See Annex A of the [Impact Assessment](#) published on 7 May 2013

⁵³ [Additional estimates of volumes and costs of expanding the scope of the proposed Diffuse Mesothelioma Payment Scheme](#), Table 1

⁵⁴ [Bill 100-EN](#), paras 107-109

⁵⁵ [Additional estimates of volumes and costs of expanding the scope of the proposed Diffuse Mesothelioma Payment Scheme](#), 16 July 2013, para 6

estimated £2 million in additional administration costs for compensation recovery, and the proposed £17 million initial Government contribution to the scheme (see section 3.4 above).

3 The Lords Stages

While the announcement of a new scheme was welcomed by organisations representing people suffering from asbestos-related diseases and their families, there was also disappointment that the proposals were more limited in scope than many were led to expect, from the proposals floated in the original consultation paper.

In a briefing prepared for the Lords Second reading debate, the Asbestos Victims Support Groups Forum UK, an umbrella group for independent, not-for-profit organisations or registered charities working on behalf of asbestos victims, welcomed the attempt to remedy the “historic failure of insurance companies to maintain records of employers’ liability insurance” but argued that the Bill could be much improved to provide the support that asbestos victims need and truly deserve.” The Forum criticised the proposal to pay compensation at 70% of civil awards, the exclusion from the scheme of those suffering from asbestos-related diseases other than mesothelioma, and the cut-off date of 25 July 2012. It added:

Although this is not the Bill we wanted, we accept that this Bill is a major step forward: at last payments are to be made where none were paid before. But, it must be remembered that for decades it was asbestos victims who bore the burden of untraced insurance and insurers have saved hundreds of millions avoiding liability for insurance they wrote. For decades, the tax payer has funded the government lump sum payments for those who could not trace their insurer, and they have only recovered those payments when an insurer was found since 2008. Prior to that, insurers recovered all government lump payments which offset the compensation they paid, which amounted to hundreds of millions.

The insurers have negotiated a scheme which excludes 50% of asbestos victims, they are excused liability for all claims prior to 25 July 2012, their costs are reduced because average compensation means they do not have to engage in negotiations about individually assessed payments, and fault must be proved. And, the Government is giving insurers £17 million to help set up the scheme.

On top of all that they want to reduce average compensation by 30%. That is simply not acceptable.

100% Justice for Mesothelioma Sufferers

We believe that the Bill should provide for 100% payment of the age-based tariff payments. We believe that the date for claiming should be at least three years prior to February 2010.⁵⁶

In the Lords Second Reading debate, the Government was criticised – not just by Opposition Members – for having watered down the original proposals set out in the 2010 consultation paper. The Minister for Welfare Reform, Lord Freud, admitted that the final proposals were a compromise, but said that attempting to extract further money and concessions from the insurance industry could lead to legal challenges which could delay payments to mesothelioma sufferers. He explained:

⁵⁶ Asbestos Victims Support Groups Forum, *The Mesothelioma Bill – Briefing for Peers*, May 2013, original emphasis

This is not the Bill I wanted to bring to the House. I will explain why that is the case because it is very important that noble Lords should understand that. I wanted to find a way of allocating responsibility to the companies that had engaged in the relevant business in the year in question so that we could levy a specific charge on those companies for the business for which they were responsible over the relevant period. We would thus have allocated the responsibility where it should lie. I spent a lot of time and, indeed, some of the DWP's money, researching that proposition. However, I came to the conclusion that such a course of action was legally too risky in a most litigious environment. Therefore, we have moved to a second-best position, the implications of which are driving many of the shortfalls that noble Lords have pointed out vigorously tonight, because it is one thing to say that there is a moral imperative to look after the individuals suffering from this terrible disease and their dependants but it is another to pin the responsibility on companies which, frankly, had nothing to do with it. We are looking to insurers in the employers' liability market to fund this provision through the levy and we are looking at the appropriate level of levy in that marketplace when direct blame cannot necessarily be attributed. That is why the scheme is designed in the way that it is and why various constraints are in place.⁵⁷

In Committee and at Report Stage, the Government did however, in response to the pressure brought to bear by Members from all sides of the House, agree a number of concessions, including:

- An increase in the compensation rate from 70% to 75% of civil compensation levels, following further negotiations with the insurance industry⁵⁸
- Agreement that details of the scheme would be brought in by regulations⁵⁹
- An undertaking that the scheme administrator would be selected through an open-tender process⁶⁰
- A pledge to set up an oversight committee to ensure the scheme would operate in a efficient and just way⁶¹
- The announcement of a joint strategy with the Department of Health on how to encourage proposals for high quality research into mesothelioma⁶²

Issues that are likely to be of continuing concern are covered below.⁶³

3.1 Coverage of the scheme

The February 2010 *Assessing Compensation* consultation paper sought views on whether a “last resort” compensation scheme should cover all claims for industrial diseases, “long-tail” disease claims only, or just those with mesothelioma. It did not indicate a preferred option.

⁵⁷ HL Deb 20 May 2013 c728

⁵⁸ HL Deb 17 July 2013 cc763-4

⁵⁹ HL Deb 17 July 2012 c767

⁶⁰ HL Deb 17 July 2013 c762

⁶¹ HL Deb 17 July 2013 c763

⁶² HL Deb 17 July 2013 c786

⁶³ For a discussion of the impact on the insurance industry of the scheme, and of further changes to the scheme parameters, see also Sam Barrett, “[Mesothelioma: Bearing the burden](#)”, *Postline*, 13 August 2013

The *Explanatory Notes* accompanying the Bill state:

The scheme provided for by the Bill does not allow for payments to be made to persons with long-tail industrial diseases other than diffuse mesothelioma. The Government considers this condition to be unique, in particular because of its near universal fatality, its speed of death following diagnosis and its causation arising exclusively from exposure to asbestos.⁶⁴

Responding to criticisms that the proposals would mean that some people with other asbestos-related diseases would remain unable to access compensation, Lord Freud said at Second Reading:

The Bill does not - and cannot - look to respond to all asbestos-related disease. The issue of individuals who have developed other asbestos-related diseases through negligence or breach of statutory duty and are unable to bring a civil claim for damages of course needs to be addressed. However, this Bill is not the appropriate instrument to do that. Mesothelioma is distinctive, and its link to asbestos exposure is undeniable. This allows for the fast processing of cases because there is no doubt that asbestos exposure caused the disease. The Bill supports the administration of a simple and streamlined scheme. It could not cover other diseases, where there could ever be a question as to the cause, because the lengthy investigations required in order to prove these cases would choke the scheme, preventing the comparatively simpler mesothelioma cases being administered with the necessary speed. Again, I ask noble Lords to look at this emotive issue from a pragmatic perspective and focus not on what is impossible but on what can be achieved. This legislation is a huge step forward and should be recognised as such.⁶⁵

On 11 June DWP published estimates of the impact of extending the scheme to cover other asbestos-related diseases, and other non-asbestos work-related diseases. The results from the analysis are in the table below (note however that the figure of £322 million for the total levy was based on the assumption that payment rates would be set at 70% of civil compensation. The Government subsequently announced that rates would be set at 75%, increasing the total levy to £343 million).

⁶⁴ [Bill 100-EN](#), para 17

⁶⁵ *Ibid.* c690

Estimated impacts of expanding the payment scheme to cover other diseases over the 10 years covered by the Impact Assessment (April 2014 to March 2024)

	Number of successful applicants		Total Levy on insurers [1]	
	Each category	Cumulative total	Each category	Cumulative total
			(£ million, 2012 values)	(£ million, 2012 values)
Mesothelioma Bill scheme	3,500	3,500	322	322
Other asbestos related diseases	5,100	8,600	478	800
Other non-asbestos work related diseases	6,100	14,700	564	1,364

Notes

1. Assuming payments set at 70% of civil compensation, and a contribution of £2,000 towards applicant legal fees.

Source: DWP, [Estimates of the impact of extending the scope of the payment scheme in the Mesothelioma Bill to include other asbestos related diseases and other non-asbestos work related diseases](#), 11 June 2013, Table 2

Attempts to amend the Bill in Grand Committee to enable the Secretary of State to establish by regulations further schemes to make payments in respect of other asbestos-related diseases, and to require the Secretary of State to set out plans within a year for “analogous” schemes for people suffering from other diseases, were resisted by the Government. While expressing sympathy with the desire to help other groups affected by poor record keeping on the part of the insurance industry, and a hope that other schemes might be established in the future for them, Lord Freud said that the Bill was intended to deal exclusively with mesothelioma and was not an appropriate vehicle for addressing these concerns.⁶⁶

The Government also resisted calls to expand the scheme to include the self-employed and people suffering from mesothelioma due to “secondary exposure” to asbestos (for example, family members exposed to asbestos fibres when doing the laundry of an employed person). Responding to amendments tabled in Grand Committee by the Labour Member Lord Howarth of Newport, Lord Freud said that the Bill was intended to address a specific “market failure”:

There is a failure of insurers and employers to retain adequate records of the employer’s liability insurance, and to make sure that those employees who cannot trace through in order to bring a civil claim actually get a payment. So, widening the list of people who receive payments beyond the legal position would impose a

⁶⁶ HL Deb 10 June 2013 cc307-316GC

disproportionate burden on the employer liability insurers who will fund the scheme through a levy.⁶⁷

3.2 Level of payments

The February 2010 *Assessing Compensation* consultation paper set out alternative ways of calculating compensation awards, but did not indicate a preferred approach. However, the calculations in the accompanying Impact Assessment assumed that, among other things, “compensation amounts are similar to civil cases.”⁶⁸

The Government’s July 2012 response to the consultation proposed that payments be set at a rate “somewhere between that offered by state benefits and average payments from civil action”, to “ensure that those who are able to trace an insurer remain incentivised to do so in order to claim full compensation.”⁶⁹ It later conceded however that the “behavioural incentives” argument could not be used to justify setting payments at below civil damages, emphasising instead the need to avoid placing an excessive burden on the insurance industry, which risked delaying the scheme and/or insurers passing on the costs to employers.⁷⁰

The Government initially proposed setting payments at 70% of average civil damages by age group, but this received widespread criticism at Second Reading and in Grand Committee in the Lords. At Report Stage, Lord Freud said that the insurance industry had made it clear that while paying an amount equal to 3% of Employers’ Liability gross written premiums was affordable, anything more would require them to pass on the costs to employers. He continued:

Following the debate in Committee, I have been in further discussions with insurers and have been able to secure an agreement to pay 75% of average civil compensation. This is more than the industry wanted to pay but, using the government analysts’ figures, it halves the gap in the percentage of employer’s liability gross written premiums between what was originally offered and the full 3%. I take this opportunity to thank noble Lords and to acknowledge that the pressure in this House on this matter has been a key driving force in achieving the increased rate. I know that noble Lords would like the scheme to pay even more than the 75% we have now achieved. However, we need to be certain that the industry can afford to pay more without passing disproportionate costs on to employers. The insurance industry guaranteed to us that if we keep the levy within proportionate limits, it will not increase premiums.⁷¹

The Government intends to set payments initially at a percentage of average civil damages, and to uprate the amounts annually in line with the Consumer Price index (CPI), but will also review the amounts regularly to ensure that they maintain their value in relation to civil compensation awards.⁷² In addition, Lord Freud announced that the Government would monitor the scheme over the course of its existence, to gauge the extent to which assumptions had been borne out in practice and the impact on the insurance industry, and to make changes if necessary in the light of experience, including to the payment rate. He explained:

⁶⁷ HL Deb 5 June 2013 c220GC

⁶⁸ *Assessing Compensation: Supporting people who need to trace Employers’ Liability Insurance – public consultation*, February 2010, para 31, p37

⁶⁹ *Assessing compensation – Supporting people who need to trace Employers’ Liability Insurance Government response to consultation: Government response*, July 2012, p8

⁷⁰ HL Deb 20 May 2013 c729

⁷¹ HL Deb 17 July 2013 c764

⁷² HL Deb 17 July 2013 c763

I expect to be able to present firm details of such a process when we take this Bill to the other place but, for the time being, I will outline my ideas. We intend to look at the actual number of applications and real costs once the scheme has been running for long enough to give us reliable data. As I indicated when we previously discussed increases in average compensation payments, looking at numbers too soon would not provide us with stable data, nor would it show us much by way of trends.

The initial four-year costs-smoothing period would give use an ideal opportunity to collect actual numbers and costs. We would then be able to see what the real cost of the scheme is, compared to the current expectations about the percentage of gross written premium it will take up. We would also be able to assess whether or not costs had been passed on to industry and to what extent. That would put us in much better position to carefully consider whether we have set scheme payments at the right level and how far current actuarial assumptions have been borne out in practice. We have to be prepared for the fact that the ABI's analysts may be nearer the mark here, as we are dealing with behaviours in making applications to the scheme which are not easy to predict. We also need to bear in mind that costs to insurers will eventually reduce anyway as the numbers coming to the scheme will fall as time passes and fewer people are diagnosed with mesothelioma.

To summarise, we intend that scheme payments will rise in line with CPI each year. In addition, if the level of civil compensation also changes, we need to look again at the amount of the scheme payment to see if it should be changed in line with that of civil compensation. The initial four-year costs-smoothing period gives us an ideal opportunity to collect actual numbers and costs and to look at the level of scheme payments in a much clearer light. It will also give us an opportunity to assess any reaction by the insurance industry that there might have been over the first four-year period. These proposals show that the current level of scheme payments strikes the right balance between paying people with mesothelioma and levying an amount from insurers that will not inevitably be passed on to employers. I also trust that I have reassured noble Lords that the Government are committed to considering necessary changes when an increase is justified.⁷³

At Report Stage, Lord McKenzie of Luton moved an Opposition amendment requiring payments to be set at not less than 100% of civil damages. He also spoke to an amendment to require that the levy on insurers be set at the minimum of 3% or such lower rate as would provide for payments equal to 100% of civil compensation awards. The 3% cap was an attempt to address the insurance industry's concerns about affordability.⁷⁴

For the Government, Lord Freud emphasised that, in considering the amount of levy to be imposed, it was important to bear in mind that insurers currently active in the EL insurance market (who would be subject to the levy) would not necessarily be the same firms who were providing insurance at the time exposure to asbestos occurred and those that were might now have a quite different market share.⁷⁵ On the discussions which had resulted in an increase in the compensation rate to 75%, the Minister said:

This has been a tough negotiation and even those with whom the Government were negotiating have had a tough job persuading others in that industry that there is an affordable package here. We want more, but this is a significant move from the insurance industry. If we could pay people more, we would, but this is a balancing act.

⁷³ HL Deb 17 July 2013 cc764-5

⁷⁴ HL Deb 17 July 2013 cc810-2

⁷⁵ HL Deb 17 July 2013 c820

If we were to go up to 80% or 100%, we would be very concerned about the costs being passed straight on to British industry.⁷⁶

For the Opposition, Lord McKenzie acknowledged the improvement the Minister had secured, but added:

...we always come back to analysing this from a justice point of view: what is fair to insurers and what is fair to people who have contracted diffuse mesothelioma because of employers' negligence. We cannot get away from the fact that justice for them has to be 100% of the compensation that they would otherwise receive if there were formal compensation arrangements rather than the tariff. One hundred per cent of the tariff is justice; anything less is not.⁷⁷

With regard to the separate fall-back amendment limiting the levy to the minimum of 3% or such amount as required to fund payments at 100% of civil damages, Lord McKenzie said that he was "not sure that we heard a compelling argument" as to why it was not appropriate.⁷⁸

The amendment to require payments to be set at 100% of civil damages was put to the vote. It was defeated by 153 votes 119.⁷⁹

Estimates of the cost to the insurance industry of making payments at different percentages of average civil awards were published in an *ad hoc* DWP statistical analysis on 4 June (subsequently updated on 4 July).⁸⁰ The following table from the DWP analysis shows the estimated total contribution from the insurance industry – in monetary terms and as a percentage of gross written premiums for EL insurers – assuming payment rates set at different percentages of average civil compensation awards.

⁷⁶ HL Deb 17 July 2013 c821

⁷⁷ HL Deb 17 July 2013 c821

⁷⁸ HL Deb 17 July 2013 c821

⁷⁹ HL Deb 17 July 2013 c821

⁸⁰ [Analysis to support the passage of the Mesothelioma Bill: Estimated costs of the proposed Diffuse Mesothelioma Payment Scheme](#), 4 July 2013

Levy to be paid by insurers if scheme payments set at various percentages of average civil compensation

Scheme payments as a percentage of average civil compensation	Over the first four years of the scheme:		Over the first ten years of the scheme:	
	Levy	% of GWP for employer liability insurance	Levy	% of GWP for employer liability insurance
		£ million		%
70%	157	2.61%	322	2.13%
75%	169	2.79%	343	2.27%
80%	180	2.98%	365	2.42%
85%	191	3.16%	386	2.56%
90%	202	3.34%	408	2.70%
95%	213	3.53%	430	2.84%
100%	224	3.71%	451	2.99%

Notes

Figures assume a contribution of £2,000 towards applicant legal fees, and take into account a Government contribution of £17 million towards initial costs of the scheme

Source: DWP, [Analysis to support the passage of the Mesothelioma Bill: Estimated costs of the proposed Diffuse Mesothelioma Payment Scheme](#), 4 July 2013, Table 3

The “baseline” figure for the levy – following the announcement of the increase in payments to 75% of civil awards – is £343 million over the first ten years of the scheme. This equates to 2.27% of gross written premiums over the period as a whole, but for the first four years of the scheme the levy rate would be 2.79%. If scheme payments were to be set at 100% of average civil compensation, the total levy over the first ten years would increase to £451 million. The levy required to fund payments set at 100% of civil compensation would not exceed 3% of total gross written premiums over the period as a whole, but for the first four years the levy would be 3.71% of gross written premiums.

Further estimates of the cost of setting payments at 100% of average civil compensation but only from 2018/19 onwards, and of setting the levy each year at 3% of gross written premiums or such lower percentage as is necessary of pay compensation at 100%, were published by DWP on 16 July.⁸¹ Setting payments at 100% of civil compensation from 2018/19 onwards would, it is estimated, require a total levy of £395 million over ten years (£52 million more than the current £343 million “baseline”). The total cost to the insurance industry of a levy set at 3% of gross written premiums, or such lower figure as necessary to fund scheme payments at 100% of civil compensation, is estimated at £408 million for the ten years from 2014/15 to 2023/24.

⁸¹ [Additional estimates of volumes and costs of expanding the scope of the proposed Diffuse Mesothelioma Payment Scheme](#)

3.3 Cut-off date

With regard to the proposed cut-off date for claims, Lord Freud said at Second Reading:

A sufferer must have been diagnosed on or after 25 July 2012 to be eligible under the scheme. A cut-off date will always be unfortunate for those whom it excludes. However, we must be pragmatic. The costs to the active insurers funding the scheme would be prohibitive if we were to make the scheme open-ended. It was on 25 July 2012 that the Government announced that they would set up a payment scheme and so created a reasonable expectation that eligible people diagnosed with mesothelioma on or after that date would receive a payment.⁸²

In Grand Committee the Labour Member Lord Howarth of Newport tabled an amendment to remove the cut-off date from the Bill, so that any living person with mesothelioma as a result of employer negligence could make a claim, as well as dependants of people who have already died. Other amendments were tabled to move the cut-off date to 10 February 2010 (when the original *Assessing Compensation* consultation paper was published). The Liberal Democrat Member Lord Alton of Liverpool argued that the cut-off date should be 10 February 2010 since statements made in the consultation paper “left no one in any doubt of the Government’s intention to act to provide protection for those who could not trace an insurer.”⁸³

For the Government, Lord Freud argued that when the previous Government published its consultation paper in February 2010, it was merely consulting on the best way forward. He continued:

They were not proposing a specific course of action, so no one had any expectation that they would be likely to get any sort of payment over and above those that the Government provide for people with diffuse mesothelioma.

I would have liked to have announced the Government’s intention on paying people with the disease much sooner than 25 July 2012, when we did announce it, but the issues involved were complex. To ensure that we have got it right, we have been working intensively with stakeholders, including the insurance industry, claimant groups and solicitors, since that consultation closed to get to this solution. This took longer than I had hoped. However, when we announced on 25 July of last year that a scheme would be set up, from that date people have had a reasonable expectation that, if they are diagnosed with the disease after that date, they will receive a payment.

In addition to creating an expectation among people with mesothelioma, the announcement put insurers on notice that we intended to bring forward the scheme, giving them legal certainty and allowing them to start to reserve against the liabilities that are created by the scheme and its associative levy that they will be responsible for paying.⁸⁴

He later added:

As insurers were able to start the reserve only from 25 July last year, any attempt to back-date eligibility further could jeopardise the scheme and bog it down in legal challenges from insurers on the costs. I know that noble Lords would like to do more, as indeed would the Government, but we need to consider the effect of an open-ended scheme against one that can be afforded whose costs can be absorbed as much as

⁸² HL Deb 20 May 2013 c690

⁸³ HL Deb 5 June 2013 c227GC

⁸⁴ HL Deb 5 June 2013 cc232-3GC

possible by the insurance industry without putting pressure on it to increase insurance premiums and transfer the extra costs on to current employers.⁸⁵

Lord Howarth said that he was “not impressed” by the Minister’s arguments for limiting the scheme to those diagnosed on or after 25 July 2012, adding:

...there was never anything to prevent insurers from reserving against something which they could and should have foreseen, not just from February 2010 but from the very first date at which they began to provide employer’s liability insurance.⁸⁶

The amendment was withdrawn.

At Report Stage, the Opposition tabled an amendment to change the cut-off date to 10 February 2010. The Opposition Work and Pensions Spokesman, Lord McKenzie of Luton, said that February 2010 was an “entirely appropriate” start date, given statements in the consultation document which, he said, were “clearly putting people on notice that the then Government were intent on introducing an ELIB broadly on the terms of the Motor Insurers’ Bureau.”⁸⁷

Lord Freud disagreed, arguing that the February 2010 document-

...was a consultation, not a decision in any particular direction, and did not create any expectation that people would be likely to get any sort of payment over and above what the Government provide for people with diffuse mesothelioma. I therefore cannot see that it is an appropriate start date for eligibility, and I fear that, were we to use it as such, it could be more reasonably criticised for being arbitrary than the existing start date.⁸⁸

The Minister also said that a cut-off date of 10 February 2010 would increase the total levy on insurers by £75 million and that, even with measures to spread the costs of the scheme in the initial period, the burden on insurers would increase considerably. He explained:

The real problem is the technical difficulty with the four-year smoothing period that we have to use. We are going to have much higher costs in the first year as it in effect bundles up two years already and one year of running costs, so we are going to have substantially elevated costs in the first year that we have to find a way of smoothing, and we are doing that over a four-year period. If we extended that smoothing back even further to work in another two years’ worth of money—that £75 million—into the scheme, that would open up the whole agreement not just with the insurers but within the Government. On our assumptions, that would in effect push the levy rate up to approximately 4% in that period. That in itself would undermine what we are trying to achieve, which is to ensure as much as we can that these costs are not just passed on to British industry through higher current employer liability rates. That is the core reason.⁸⁹

Lord McKenzie said that the Opposition did not accept the proposition that July 2012 should be the start date and pressed the amendment to a vote. The amendment was defeated by 187 votes to 152.⁹⁰

⁸⁵ HL Deb 5 June 2013 cc235GC

⁸⁶ HL Deb 5 June 2013 cc237GC

⁸⁷ HL Deb 17 July 2013 c794

⁸⁸ HL Deb 17 July 2013 c802

⁸⁹ HL Deb 17 July 2013 c803

⁹⁰ HL Deb 17 July 2013 c807

Estimates of the impact of varying the start date for the scheme were published by DWP on 16 July. Backdating the scheme to 1968 (the first year for which data on deaths from mesothelioma is available) would, it is estimated, result in an additional 5,951 successful claims, increasing the total levy on insurers by £788 million. A start date of April 2010 (the quarter closest to the date of publication of the original consultation paper) would result in a further 654 successful claims costing the insurance industry an additional £75 million. This would require an increase in the levy on insurers in the first four years of the scheme from 2.79% to 4.02%.⁹¹

3.4 Administration and oversight

Clause 7 allows the Secretary of State to administer the scheme himself, or alternatively to “make arrangements” for another body to administer it. In Grand Committee, Lord Freud said that the insurance industry was setting up a company to meet the requirements of the scheme rules. He added:

There would be time advantages to using such a body, with it potentially being able to make payments more quickly than if the Government had to establish a body. However, any body with which the Secretary of State makes arrangements will be subject to the standard call-off contract that gives us the power to change a supplier should it fail to operate as required.

I make it clear that we will undertake due diligence in ensuring that whoever ends up delivering the scheme does so in compliance with the rules that we set out. If any body does not meet our requirements, we will not make arrangements with it, and, if it fails to deliver, we will make arrangements with another one.⁹²

During the Lords stages, Members expressed concern about potential conflicts of interest, were the insurance industry to be given the task of administering the scheme. In response to suggestions that the appointment of an administrator was already a “done deal” with the insurance industry, Lord Freud said at Report stage:

I offer my assurance that this is not the case and that we intend to run an open competition for the contract of scheme administrator, which will be chosen through the open tender process according to our commercial criteria. I hope this reassures noble Lords.⁹³

Following discussions in Grand Committee,⁹⁴ the Minister also announced at Report that the Government would explore further the creation of an “oversight committee” to ensure that the scheme would operate in “the most efficient and just way.” He said:

We welcome this proposal and have been exploring with stakeholders how it might operate. As ever, there is a range of options that we need to consider, and we continue to do so. We would prefer a non-legislative solution if possible but we are aware that noble Lords may wish to see something on a more statutory footing. I ask noble Lords to consider the issues associated with trying to establish a new non-departmental public body as we discuss oversight further.⁹⁵

⁹¹ DWP, *Additional estimates of volumes and costs of expanding the scope of the proposed Diffuse Mesothelioma Payment Scheme*, 16 July 2013

⁹² HL Deb 10 June 2013 cc299-300GC

⁹³ HL Deb 17 July 2013 c762

⁹⁴ HL Deb 10 July 2013 cc300-305GC

⁹⁵ HL Deb 17 July 2013 c763

Asked by the Labour Work and Pensions Spokesman, Lord McKenzie of Luton, about the Government's thinking in relation to the oversight committee and when it might come to a conclusion on whether the solution should be legislative or non-legislative, Lord Freud said:

My Lords, my aim is to know where we are with the structure over this Recess. I think that I owe the noble Lord a letter at the end of the Recess setting out where we have got to on that so that he will be able to talk to his colleagues in the other place. If he thinks that a gap is developing, that is a way for me to handle that uncertainty.⁹⁶

3.5 Research on mesothelioma

In Grand Committee, Lord Alton of Liverpool moved an amendment – which was also in the name of Lord Walton of Detchant, Baroness Butler-Sloss and Lord Wigley – to include an amount in the levy on insurers to provide funding for research to find new treatments for mesothelioma. The amendment had the support of the British Lung Foundation and victim support groups. Speaking to the amendment, Lord Alton said that, compared with other types of cancer, mesothelioma had “Cinderella status” when it came to research funding. The Bill offered the opportunity “to create a sustainable fund for mesothelioma research to help ensure that future generations do not have to suffer in the same way that so many have in the past.”⁹⁷

Lord Freud said that while he was “enormously sympathetic” with what lay behind the amendment and had spent a considerable amount of time looking into the issue of research, his attempts to find a way forward had been frustrated. He agreed that the lack of funding for research into mesothelioma suggested that “something very odd” was happening, and said that he had explored whether it might be possible for the State to match funding for research from the insurance industry on a “one-for-one” basis but that he had “hit a brick wall at every turn.” Part of the problem, he explained, was that the funding and commissioning of research into mesothelioma was not within the remit of his Department. He had discussed at length with Ministers in the Department of Health how to “kick-start” further research and promised to work further in order to “get something going.”⁹⁸

The amendment was withdrawn, but at Report Stage Lord Alton moved a further series of amendments – signed also by Lord Pannick and by Lord Walton of Detchant – to provide that the levy on insurers include a “research supplement.” Speaking to the amendments, Lord Alton said that the arguments that the proposed mechanism was “not viable” amounted to “shadow-boxing” and added that, contrary to suggestions, there were a number of precedents in legislation for “hypothecated” levies.⁹⁹

The Parliamentary Under-Secretary of State at the Department of Health, Earl Howe, said that while the Government was sympathetic to the view that more money should be put into research on mesothelioma, the mechanism suggested was not the best way to achieve this. A hypothecated levy, he suggested, would be problematic given Treasury rules but the main problem was research policy and the lack of high-quality research applications. He explained:

In the case of mesothelioma, the real issue is not just the money; it is the quality of the research being proposed. How can we try to ensure that the research proposals in this field reach the quality threshold required to secure funding? If that threshold is reached, funding is much less of a difficulty; indeed there is no need to think about the forcible gathering of funds from insurers. If noble Lords agree, the goal is how we

⁹⁶ HL Deb 17 July 2013 c847

⁹⁷ HL Deb 5 June 2013 c239GC

⁹⁸ HL Deb 5 June 2013 cc250-3GC

⁹⁹ HL Deb 17 July 2013 cc770-3

stimulate high-quality research proposals without undermining the country's strategic research mechanisms.¹⁰⁰

The Minister continued:

This is an issue that we in the Department of Health, working with the National Institute for Health Research, have been seeking to address. I will now set out what we propose. There are four elements to it.

First, the National Institute for Health Research will ask the James Lind Alliance to establish one of its priority-setting partnerships. This will bring together patients, carers and clinicians to identify and prioritise unanswered questions about treatment for mesothelioma and related diseases. It will help target future research, and, incidentally, will be another good example of where patients, the public and professionals are brought into the decision-making process on health.

Secondly, the National Institute for Health Research will issue what is called a highlight notice to the research community, indicating its interest in encouraging applications for research funding into mesothelioma and related diseases. This would do exactly what the noble Lord, Lord Alton, wants, and what the noble Lord, Lord Empey, suggested. It would make mesothelioma a priority area.

Thirdly, the highlight notice would be accompanied by an offer to potential applicants to make use of the NIHR's research design service, which helps prospective applicants to develop competitive research proposals. Good applications will succeed.

Finally, the NIHR is currently in discussion with the MRC and Cancer Research UK about convening a meeting to bring together researchers to develop new research proposals in this area. The aim is for the event to act as a catalyst for new ideas that will further boost research into mesothelioma. I was very interested in what the noble Lord, Lord McKenzie, told us about the offer of matched funding from the ABI.¹⁰¹

These four steps, Earl Howe argued, offered a "better and more realistic way of achieving what we all want to see happen." He said that nothing in the arrangements he had outlined would preclude a joint arrangement for funding research, but that the Government did not believe a legislative route was necessary to kick-start research.¹⁰²

Lord Alton pressed the amendment to a vote. The amendment was defeated by 199 votes to 192.¹⁰³

3.6 Third Reading

At the Lords Third Reading on 22 July, the Minister, Lord Freud, said:

First, I thank noble Lords for their consistent and invaluable dedication to this important Bill. The Bill looks quite different now to how it did at Second Reading and it is certainly in better shape for its passage through this House. I never cease to be amazed by the attention to detail and rigour that noble Lords apply when examining a Bill and I admit that I have ruthlessly stolen as many noble Lords' ideas as I could over the past few weeks.

¹⁰⁰ HL Deb 17 July 2013 c785

¹⁰¹ HL Deb 17 July 2013 c786

¹⁰² HL Deb 17 July 2013 c787-790

¹⁰³ HL Deb 17 July 2013 c790

The Bill as it stands is a collaborative piece. I have listened with great interest to the concerns of noble Lords and responded to the pressure points.¹⁰⁴

Opposition Members and Members of other parties who had participated in the Lords proceedings and in behind-the-scenes discussions with Ministers and civil servants welcomed the concessions and undertakings announced by the Government, but some felt that there was still plenty of scope for the Bill to be improved further during its Commons Stages. The Labour Member Lord Howarth of Newport said:

The difficulty that the Minister has had, and one that we entirely understand, is that having conducted his negotiation with the industry and reached an agreement with it, he has found it very difficult to budge from the exact terms of that agreement. I do not think that Parliament is bound by the terms of an agreement negotiated between the Government and the industry. Indeed, it is the responsibility of Parliament to improve the scheme further if we can in the public interest. There is therefore a small number of issues which we should commend to our colleagues in the House of Commons for their further consideration. I hope that they will want to look again at the rate of payment and the date for eligibility. I very much hope that they will want to look at the plight of people who are at the moment excluded from the scope of the scheme, such as members of the households of people who were employed and exposed to asbestos, where the employee has not so far contracted the disease but the household member, perhaps someone who did the household laundry and washed the contaminated overalls brought back from the workplace, has contracted it. People in that situation are not covered by the scheme. The self-employed too, even if self-employment was something of a technicality, will not be eligible to benefit. I hope also that the Government will after all agree that there should be an annual report on the progress of the scheme to assist Parliament in its necessary further vigilance in the interests of mesothelioma victims.

I know the Minister has been fearful that if such refinements to the scheme were to be brought in by way of amendments to the Bill, the insurance industry would take away its bat and ball and revert to its customary position of taking legal action to prevent the Government from requiring it to do what in decency and justice it ought to do. Of course, we do not want to see any delays to the implementation of the Bill. I hope that Members of the House of Commons will take the view that a legal case by the employers against minor improvements of this kind to the Bill would be very weak indeed, given that they have accepted the principle that there ought to be a scheme of this kind which they should fund. My noble friend Lord McKenzie of Luton has demonstrated that the costs of such improvements would be affordable, and I do not believe that the employer's liability insurers would be so shameless as to go to court to try to prevent these modest further improvements and further advance of justice for mesothelioma victims.

In the course of our proceedings on this Bill in your Lordships' House we have defined the issues and laid out arguments and I very much hope that our colleagues in the elected House will wish to pursue these issues.¹⁰⁵

For the Opposition, Lord McKenzie of Luton welcomed the "co-operative approach" shown by the Minister and by the Bill team during the Lords proceedings, but added:

Of course, we would have hoped that the scheme would go further, especially in terms of the level of payment. However, we have something solid and substantial to build on in both another place and with a future Government.

¹⁰⁴ HL Deb 22 July 2013 c1049

¹⁰⁵ HL Deb 22 July 2013 cc1053-4

I have a final word for all those who have campaigned on behalf of people who are or will be affected by this terrible disease. They, too, can be justifiably proud of what has been achieved so far. It will be their efforts that continue to remind us of what we still have left to do.¹⁰⁶

4 Mesothelioma and the control of asbestos

4.1 Mesothelioma

Asbestos fibres are generally present in the environment in Great Britain, so many people are exposed to very low levels of fibres. The risk of developing an asbestos-related disease relates to the total number of fibres that are inhaled and which penetrate deep into the lungs. Working on or near damaged asbestos-containing materials or breathing in high levels of asbestos fibres could increase the chances of someone getting an asbestos-related disease. When these fibres are inhaled they can cause serious diseases which, according to the HSE, are responsible for around 4,000 deaths a year. There are four main diseases caused by asbestos: mesothelioma; lung cancer; asbestosis; and diffuse pleural thickening.

Mesothelioma is a cancer of the mesothelial cells, which are cells found in the lining of most of our internal organs. Approximately 75% of this disease occurs in the lining of the lungs (which is called 'pleural mesothelioma') but it can also affect the abdomen ('peritoneal mesothelioma') and the lining of the heart ('pericardial mesothelioma'). Diffuse mesothelioma describes tumours that arise in the pleura, peritoneum or pericardium and show a diffuse pattern of growth across the tissue surfaces. There are other localised mesothelial tumours that behave and are treated differently- they are not addressed by this Bill.

When asbestos is disturbed, tiny fibres are produced which can be inhaled. Once these fibres are in the lungs they can cause inflammation. Over a period of many years these fibres can cause cell change and cancer.¹⁰⁷ These fibres can also be swallowed, and cause peritoneal mesothelioma, the exact mechanism by which asbestos causes pericardial mesothelioma has not been fully established. This exposure to asbestos was commonly occupational but sufferers could also come into contact with the substance from a family member's clothing, living near asbestos factories and working in buildings where asbestos had been used. It is estimated that over 90% of men and 80% of women diagnosed with the condition have had contact with asbestos¹⁰⁸ although some sufferers deny any exposure. The link between asbestos and mesothelioma was first established in 1960 on the basis of data in South Africa¹⁰⁹.

There is usually a significant delay between asbestos exposure and diagnosis with the condition. This latency period can be up to 50-60 years. Symptoms are often non-specific and diagnosis is likely to occur later in the disease process. Diagnosis of mesothelioma can be difficult; a combination of imaging and pathological analysis of fluid or tissue is usually necessary.

The prognosis for most patients at diagnosis is poor. Treatment for mesothelioma seeks to control symptoms and improve quality of life. Chemotherapy, radiotherapy and surgery may be offered depending on the location and stage of the cancer.¹¹⁰

¹⁰⁶ HL Deb 22 July 2013 c1060

¹⁰⁷ Bruce W S, Robinson M D, Lake R, Advances in malignant mesothelioma, New England Journal of Medicine 2005; 353:1591-1603

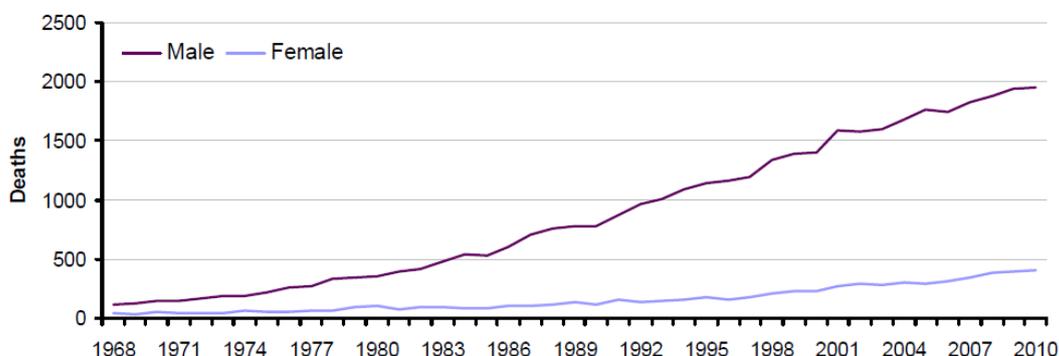
¹⁰⁸ Mesothelioma: Risks and causes, Cancer Research UK (accessed 11 October 2013)

¹⁰⁹ Wagner, JC, Sleggs CA, Marchand P, Diffuse pleural and asbestos exposure in the NorthWestern Cape province. BR J Ind Med 1960.

¹¹⁰ [Treating Mesothelioma](#), Cancer Research UK website (accessed 11 October 2013)

Of those diagnosed with mesothelioma, there is a clear gender and occupation bias due to the association with asbestos. According to the Health and Safety Executive there are five times as many deaths from mesothelioma in men than women each year. The death rate from mesothelioma is increasing in the UK and it is predicted it will continue to rise before peaking at the end of this decade.¹¹¹

Figure 1 Male and female mesothelioma deaths 1968-2010 (p)¹¹²



(p) Provisional.

Regional variation of mesothelioma rates

The Health and Safety Executive collect data on geographical variation in mesothelioma deaths in the British Mesothelioma Register. Scotland and the North East of England have been associated with some of the highest rates¹¹³. There has been an upward trend observed in all geographical regions.

Occupation and mesothelioma rates

Occupations representing the highest risk for mesothelioma include construction workers, plumbers, carpenters and joiners, and electricians.¹¹⁴ The latest statistical analysis on occupation from data collected for the British Mesothelioma Register was published in 2010.

The table below shows occupations associated with a high risk of death from mesothelioma among males. The risk is represented by the Proportional Mortality Ratio (PMR) associated with each occupation. PMRs over 100 show that a greater than expected number of deaths is associated with a particular occupation – ie an increased risk.

A PMR for a given occupation is the ratio of the observed number of deaths for that occupation to the expected number of deaths, expressed as a percentage (ie multiplied by 100). The expected number of deaths is calculated as the number of mesothelioma deaths that would have been recorded for that occupation if the proportion of mesothelioma deaths was equal to the proportion of total deaths from all causes in that occupation. Since mesothelioma incidence is also strongly related to age, the calculation also takes account of differences in the distribution of ages between occupational groups.

PMRs summarise mortality for occupational groups relative to the average level for Great Britain as a whole. They can be reliably used to allow comparisons of the relative frequency

¹¹¹ [Health and Safety Executive Website: Mesothelioma](#) (accessed 1 November 2013)

¹¹² Health and Safety Executive, Mesothelioma Mortality in Great Britain 1968-2010

¹¹³ Health and Safety Executive, Mesothelioma Mortality in Great Britain: Analyses by Geographical area and Occupation 2005

¹¹⁴ [Mesothelioma Occupation Statistics, Male and Female deaths aged 16-74in Great Britain 2002-2010](#), Health and Safety Executive

that different occupations are noted as the last occupation of the deceased on mesothelioma death certificates, but they do not represent absolute measures of risk. Hence there are confidence intervals associated with the estimates, as shown in the table.

Occupations with the highest PMRs (and where the lower limit of the associated confidence intervals are above 100) are those that can most reliably be said to have an excess of mesothelioma deaths compared to the average for all occupations. Hence these occupations are most likely to be reflecting an effect due to occupational asbestos exposure.¹¹⁵

Occupations with the highest risk of mesothelioma deaths among males, Great Britain 2002-2010

	Deaths	Expected deaths	Proportional Mortality Ratio (PMR)	95% confidence interval	
				Lower	Upper
Carpenters & joiners	857.0	210.2	407.7	380.9	435.9
Pipe fitters	64.0	17.8	360.4	277.5	460.2
Building inspectors	9.0	2.6	341.7	156.3	648.7
Metal plate workers, shipwrights, riveters	91.0	26.9	338.6	272.6	415.7
Plumbers, heating & ventilating engineers	414.0	125.8	329.1	298.1	362.4
Electricians, electrical fitters	670.0	217.1	308.6	285.7	332.9
Labourers in other construction trades n.e.c	55.0	18.5	297.1	223.8	386.7
Sheet metal workers	80.0	29.4	272.2	215.8	338.8
Energy plant operatives	52.0	19.7	263.6	196.9	345.7
Construction operatives n.e.c.	112.0	46.1	243.0	200.1	292.4
Managers in construction	128.0	56.7	225.9	188.4	268.6
Vehicle body builders & repairers	42.0	19.5	215.1	155.0	290.8
Planning & quality control engineers	25.0	12.3	203.0	131.4	299.7
Construction trades n.e.c.	390.0	200.4	194.7	175.8	215.0
Managers & proprietors in other services n.e.c	184.0	98.5	186.8	160.8	215.8
Chartered surveyors (not quantity surveyors)	47.0	26.0	180.8	132.9	240.4
Painters & decorators	320.0	181.8	176.0	157.2	196.4
Metal working production & maintenance fitters	399.0	234.0	170.5	154.2	188.1
Metal working machine operatives	347.0	241.7	143.6	128.9	159.5

Source: HSE, Mesothelioma Occupation Statistics, Male and female deaths aged 16-74 in Great Britain 2002-2010

A large UK based case control study in 2009, funded by Cancer Research UK and the Health and Safety Executive sought to examine UK rates of mesothelioma linked to different occupations. They found that carpentry was the occupation associated with the highest risk, with those who had worked in this field accounting for 21% of all male mesotheliomas. The researchers suggest that out of the 90,000 deaths predicted between 1970 and 2050, 15,000 are likely to be carpenters. They also advised that the higher rates of mesothelioma deaths in middle age in the UK compared with the United States may be due to the increased manufacture and use of brown asbestos (Amosite).¹¹⁶

¹¹⁵ Statistical analysis provided by Rachael Harker, House of Commons Library

¹¹⁶ [Peto J, Rake C, Occupational, Domestic and environmental mesothelioma risk in Britain: A case control study 2009](#)

Those who were not occupationally exposed to asbestos could also come into contact with the substance from a family member's clothing, living near asbestos factories and working in buildings where asbestos had been used. Female cases of mesothelioma are less likely to be associated with occupational exposure and more likely to be due to domestic or environmental exposure.

4.2 Control of asbestos

History

Employers' failure to protect their workers adequately before 1969 – the “Date of Knowledge” for asbestos related disease – has led to a significant rise in the number of people suffering from asbestos-related illnesses.¹¹⁷

The first death from work-related exposure to asbestos was reported to Parliament by Dr Montague Murray.¹¹⁸ The association between occupational exposure to asbestos and fibrosis of the lungs was made during the early decades of the twentieth century. Recognition of the need for environmental control is generally dated from the publication of the results of the survey by Merewether and Price in 1930.¹¹⁹ This led to the introduction of the *Asbestos Industry Regulations*; SI 1931/1140.

The risks were initially thought to be limited to the textile industry; the 1931 regulations were limited and applied only to asbestos factories handling and processing raw fibre. Subsequent research indicated the risks may be more widespread; some workers, notably those associated with the thermal insulation industry, where the most hazardous type of asbestos, crocidolite, was handled did not fall under its control. The position was remedied by the *Asbestos Regulations* SI 1969/690, which applied to a wider range of factories. 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.

Some commentators believe that evidence available prior to 1930 should have led to earlier effective control.¹²⁰ One states that: “the responsibility for this delay must be shared between manufacturers, workers' representatives, the Factory Inspectorate and Scientists involved in the relevant research.”¹²¹

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).¹²²

Current control

Asbestos is now principally regulated by the *Control of Asbestos Regulations 2012* (CAR) which came into force on 6 April 2012. These updated previous 2006

¹¹⁷ A judgement at Cardiff County Court ruled that employers should have eliminated asbestos dust in their factory within eight months of a “watershed” Sunday Times article of 31 October 1965. This now forms the basis for action against certain types of employers who failed to act to reduce the risks from asbestos from this date.

¹¹⁸ Parliamentary Departmental Committee on Compensation for Industrial Diseases 1906

¹¹⁹ Merewether ERA, Price CW. Report on effects of asbestos dust on the lungs and dust suppression in the asbestos industry. London: HMSO, 1930

¹²⁰ Knowledge of Asbestos Hazards by Companies in the Asbestos Industry
<http://www.hfmlegal.com/Knowledge.htm>

¹²¹ Social History of Medicine. 1994 Dec;7(3):493-516

¹²² OJL 207, 6 August.1999, Directive 1999/77/EC

asbestos regulations to take account of the European Commission's view that the UK had not fully implemented the EU Directive on exposure to asbestos (Directive 2009/148/EC).¹²³

CAR prohibits the importation, supply and use of all forms of asbestos. It continues the ban introduced for blue and brown asbestos in 1985 and for white asbestos in 1999. It also continues to ban the second-hand use of asbestos products such as asbestos cement sheets and asbestos boards and tiles; including panels which have been covered with paint or textured plaster containing asbestos.¹²⁴

CAR requires non-domestic building owners and occupiers to identify where asbestos is present in every building and have a documented plan to control the risks to health presented by that asbestos. It also requires employers and the self-employed to prevent exposure to asbestos fibres. Where this is not reasonably practicable, they must make sure that exposure is kept as low as reasonably practicable by measures other than the use of respiratory protective equipment.¹²⁵

Further information about these regulations and duties under them is available from the Health and Safety Executive website, [Control of Asbestos Regulations 2012](#).

In response to a PQ in March 2011 the government stated that prevention of exposure to asbestos at work will continue to be a priority for the HSE:

Bridget Phillipson: To ask the Secretary of State for Work and Pensions what plans his Department has for prevention of mesothelioma cases caused by exposure to asbestos.

Chris Grayling: The prevention of exposure to asbestos at work is and will continue to be a priority for HSE. The majority of work with asbestos can only be carried out by contractors licensed by HSE.

In addition, when visiting employers as part of any relevant intervention, HSE visiting staff actively explore compliance with the Control of Asbestos Regulations 2006, with non-domestic building owners and occupiers who have a duty to manage any asbestos in their premises.

HSE also works closely with stakeholders and partners to raise awareness of the dangers of asbestos and encourage trades people to access training.¹²⁶

¹²³ In February 2011 it was reported that the European Commission had requested that the UK amend its regulations on asbestos at work because they did not comply fully with EU Directive 2009/148/EC on the protection of workers from the risks to asbestos at work. The Commission considered that part of the Directive had not been correctly transposed into UK law which had widened the scope of the exemption, by neglecting to focus on the requirement to look at the material involved as well as exposure levels.

¹²⁴ Health and Safety Executive website, [Control of Asbestos Regulations 2006](#) [on 16 March 2011]

¹²⁵ Health and Safety Executive website, [Control of Asbestos Regulations 2006](#) [on 16 March 2011]

¹²⁶ HC Deb 1 March 2011 [c359W](#)

Appendix 1 – Scheme payment rates by 1-year age bands assuming tariff based on 75% and 100% of average civil compensation

% of Average Civil Compensation			% of Average Civil Compensation		
Age	75%	100%	Age	75%	100%
40	£ 196,778	£ 262,370	65	£ 127,756	£ 170,341
41	£ 194,017	£ 258,689	66	£ 124,995	£ 166,660
42	£ 191,256	£ 255,008	67	£ 122,234	£ 162,979
43	£ 188,495	£ 251,327	68	£ 119,473	£ 159,298
44	£ 185,734	£ 247,646	69	£ 116,712	£ 155,616
45	£ 182,973	£ 243,965	70	£ 113,951	£ 151,935
46	£ 180,213	£ 240,283	71	£ 111,191	£ 148,254
47	£ 177,452	£ 236,602	72	£ 108,430	£ 144,573
48	£ 174,691	£ 232,921	73	£ 105,669	£ 140,892
49	£ 171,930	£ 229,240	74	£ 102,908	£ 137,211
50	£ 169,169	£ 225,559	75	£ 100,147	£ 133,529
51	£ 166,408	£ 221,878	76	£ 97,386	£ 129,848
52	£ 163,647	£ 218,196	77	£ 94,625	£ 126,167
53	£ 160,886	£ 214,515	78	£ 91,864	£ 122,486
54	£ 158,126	£ 210,834	79	£ 89,103	£ 118,805
55	£ 155,365	£ 207,153	80	£ 86,343	£ 115,123
56	£ 152,604	£ 203,472	81	£ 83,582	£ 111,442
57	£ 149,843	£ 199,790	82	£ 80,821	£ 107,761
58	£ 147,082	£ 196,109	83	£ 78,060	£ 104,080
59	£ 144,321	£ 192,428	84	£ 75,299	£ 100,399
60	£ 141,560	£ 188,747	85	£ 72,538	£ 96,718
61	£ 138,799	£ 185,066	86	£ 69,777	£ 93,036
62	£ 136,038	£ 181,385	87	£ 67,016	£ 89,355
63	£ 133,278	£ 177,703	88	£ 64,256	£ 85,674
64	£ 130,517	£ 174,022	89	£ 61,495	£ 81,993

Source: DWP, *Additional estimates of volumes and costs of expanding the scope of the proposed Diffuse Mesothelioma Payment Scheme*, 16 July 2013, Table 1

Figures based on a study of mesothelioma compensation levels commissioned by the DWP and the Ministry of Justice – see National Institute of Economic and Social Research, *Study into average civil compensation in mesothelioma cases: statistical note*, 7 May 2013