

## Briefing for MPs

# **The Mesothelioma Bill [HL]**

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**The Asbestos Victims Support Groups Forum is a national organisation representing asbestos victims support groups throughout the UK.**

### **The Mesothelioma Bill**

The Mesothelioma Bill seeks to remedy a gross injustice resulting from insurers' wanton destruction of employers' liability insurance records over many decades. Nearly 6,000 innocent mesothelioma sufferers, negligently exposed to asbestos, whose employers were no longer trading, and who were unable to trace their insurers, were denied justice.

Unmoved by the suffering and incalculable loss of life, insurers persistently refused to accept responsibility for their failure and turned their backs on dying asbestos victims, who searched in vain for evidence of insurance which might provide some security for the families they would leave behind.

**Much as we welcome this long-overdue Bill, which compels insurers to face up to their liabilities, we think that the Bill does not go far enough and that it can, and must, be improved to provide the support that asbestos victims and their families need, and truly deserve. Insurers profited handsomely from the untraced insurance they sold, and profited again, saving over £800 million in unpaid compensation. At this late stage, approaching the peak of the mesothelioma epidemic, insurers should now pay full compensation as the number of mesothelioma sufferers may at last begin to decline.**

### **Asbestos Victims' Expectations for a Bill**

This Bill is the culmination of two years Government negotiation with insurers having inherited the Labour government consultation, *Accessing Compensation: Supporting people who need to trace Employers' Liability Insurance*, launched in February 2010.

The main consultation proposals were for an Employers Liability Tracing Office to improve insurance tracing and, for an Employers' Liability Insurance Bureau (ELIB), which, like the Motor Insurance Bureau (MIB), would provide an insurance fund of last resort to pay **full**

compensation for **all** those who could not trace their insurers and who could prove negligence to the standard required in law.

### **What the Bill Actually Provides**

The Bill does not provide an insurance fund of last resort paying full compensation to all asbestos victims who cannot trace an insurer. Instead, the Bill provides for an administrative 'tariff' scheme which pays 75% (increased from 70% by amendment in the HoL) of average compensation, based upon age, to mesothelioma sufferers who can prove negligence. Only those mesothelioma sufferers diagnosed after 25 July 2012, the date the scheme was announced, are eligible to apply for a payment.

### **What the Bill Should Provide**

#### **The Bill should provide a commitment to set up a scheme to pay all asbestos victims**

The Bill excludes 50% of all asbestos victims; those suffering from asbestos-related lung cancer, asbestosis and pleural thickening. Including them in the scheme would represent just 20% of the total cost. The government justifies this exclusion, saying causation is simpler for mesothelioma as there is only one known cause of this disease, unlike other asbestos diseases. Yet, a long-standing, successful, administrative scheme pays compensation to all asbestos victims who can prove negligent exposure at the Turner & Newall asbestos factories.

#### **The Bill should provide for eligibility from the date of the initial consultation 10 Feb. 2010.**

The Bill excludes all those diagnosed prior to 25 July 2012 the date the Minister announced the scheme, which is an arbitrary date.

The Minister argues that insurers have not had the opportunity to reserve for payments until the announcement on the 25 July 2012. We do not accept this argument as insurers were put on notice in February 2010 that the then Minister intended to set up a payment scheme. Furthermore, insurers were well aware of the long latency of mesothelioma in 1965 on the publication of the Newhouse Thompson Report and should have prepared to meet future liability from that date onwards.

#### **The Bill should provide 100% of average compensation paid to mesothelioma sufferers.**

The Bill provides for reduced compensation – 75% of average damages. The ABI argues that reduced compensation is necessary because mesothelioma claimants may not try hard enough to trace an insurer and reduced compensation will act as an incentive to do so. This argument

was rejected by Lord Freud who said: "We have not made that argument.....We have not made it. It is not relevant to this particular scheme." (HoL Report 17 July 2013: Column 820)

However, the Government argues that we must be fair to the insurance industry as it is not possible to fix liability for untraced insurance accurately on each insurance company: some companies may pay more than their 'fair' share. If this is 'rough justice', insurers have brought it on themselves. Negligent employers have 'got away with murder'. Insurers have got away with nearly a £billion in unpaid compensation. It is time innocent asbestos victims were put first: that is fair.

**As a very minimum, insurers should pay up to the 3% of Gross Written Premium (GWP) they say can be paid without burdening business.**

Insurers say that if the levy is greater than 3% of the money they receive from insurance premiums each year, i.e. Gross Written Premium (GWP), they will pass on the cost to business and that payment of around 70% of average damages reaches the 3% threshold.

The Government disagrees with this calculation (see Notes below) and says that, over 10 years, the levy based on 100% compensation would reach a maximum of 2.9% GWP. The Government thinks insurers could, and should, pay more, but they have deferred to the ABI.

At the very least, insurers should be held to their 3% GWP threshold so that if the annual payment is less than 3% of GWP they would have to make up the difference. If not, they will 'short change', mesothelioma sufferers by paying less than they say they can afford.

**Lump sum payments should be recovered at the same percentage as compensation**

We think it wrong to recover Government lump sum payments at 100% and pay compensation at 70% or 75%.

**In the face of an obdurate, litigious and self-serving insurance industry, Lord Freud has negotiated a scheme at too great a cost to mesothelioma sufferers.**

**For decades, mesothelioma sufferers not only lost their lives, they lost financial security for their family and any semblance of justice due to the failure of the insurance industry. Compensation and justice are lost to them forever. In the name of fairness and equity we call on Parliament to improve the Mesothelioma Bill for sufferers now and in the future.**

## NOTES

### Analysis to support the passage of the Mesothelioma Bill July 2013

Table 3: Levy to be paid by insurers	Levy (in millions) (over the first four years of the scheme)	% of GWP for employer liability insurance (over the first four years of the scheme)	Levy (in millions) (over the first ten years of the scheme)	% of GWP for employer liability insurance (over the first ten years of the scheme)
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%

### Background

Since 1972, employers' liability insurance has been compulsory, providing a captive market for the insurance industry, very much like the motor insurance market. Prior to 1972, almost all employers held insurance. Yet, insurers avoided liability for much of the insurance they wrote because many insurance records were routinely destroyed or lost. .

In 1999, many insurers signed up to a voluntary code of practice, Employers Liability Code of Practice (ELCOP) to assist in tracing insurance, but the tracing success rate never exceeded 50%, and the tracing rate for mesothelioma in 2010 was just 34%. The ABI opposed calls for an employers' liability database to prevent the problem of untraced insurance arising again in the future and to capture as many historical records as possible.

In 2008 the government commenced recovery of DWP lump sum payments to those who were successful in tracing their insurer and who received compensation. Prior to that date, insurers recovered the lump sum payments, which gave them a 'windfall' resulting from government failure to recover the payments. In 2011, the government recovered over £23 million which would have gone to insurers had not the 2008 change been made. Over decades, insurers have received well over £100 million in tax payers' money.

In February 2010, the government launched a consultation, *Accessing Compensation: Supporting people who need to trace Employers' Liability Insurance*. The main consultation proposals included the establishment of an Employers Liability Tracing Office and an Employers Liability Insurance Fund, which, like the Motor Insurance Bureau would provide an insurance fund of last resort to pay full compensation for all those who could not trace the relevant insurer. The ABI opposed the establishment of any fund paid for by the insurance industry.

In April 2011, the Employers Liability Tracing Office (ELTO) was established which set up an employers liability database to record all EL insurance which at last provided a secure record of all insurance going forward. The success rate for mesothelioma searches for 2012 was 60.1%.

On 25 July 2012 Lord Freud announced the results of his two-year negotiation with insurers and his intention to bring forward a Bill. The then FSA (now FCA) characterised the long-standing problem of untraced insurance as: '*.. a situation where **insurers/other policyholders are inappropriately subsidised by claimants** that are unable to trace the relevant insurance company and/or are not aware of the existence of a potential coverage.*'