Grand Committee

Wednesday, 5 June 2013.

Mesothelioma Bill [HL]

Bill Main Page

Committee (1st Day)

3.38 pm

Relevant documents: 1st and 2nd Reports from the Delegated Powers Committee.

The Deputy Chairman of Committees (Lord Faulkner of Worcester): My Lords, I apologise for being late. If there is a Division in the Chamber while we are sitting, the Committee will adjourn as soon as the Division Bells are rung and resume after 10 minutes.

Clause 1 : Power to establish the scheme

Amendment 1

Moved by ***Lord Avebury***

1: Clause 1, page 1, line 3, after "may" insert "by statutory instrument"

Lord Avebury: My Lords, I am glad that these things happen to other people as well as to me. The Deputy Chairman need not apologise because everyone, however careful they are with their diaries, makes these mistakes from time to time. I missed an appointment myself this morning and I am still smarting from it.

On Second Reading, the Minister said that the Bill would establish a payment scheme to make lump sum payments to eligible sufferers from mesothelioma and their eligible dependants but he later amended that and said that it was a means to create such a scheme. Clause 1 gives the Secretary of State power to create, amend, replace or abolish the scheme within the certain broad parameters referred to in Clauses 4, 5, 6 and 10. Parliament has no say in the details of the scheme or in any variations made to the scheme, although of course it does on the regulations that are made under the Bill.

My noble friend Lord German and I both commented on this at Second Reading but the Minister evidently did not consider it important enough to pick the matter up in his winding-up speech, nor is there any explanation of the drafting in the Explanatory Memorandum. We are merely told that the clause confers these wide-ranging powers on the Secretary of State without saying why Parliament is excluded from all these processes.

If the Government consider it necessary to make changes in the system of employer's liability insurance under the 1969 Act, obviously they have to come before Parliament and seek approval, as they did for the Act itself. Under this Bill the amount of any payment is determined by regulations, but in Clause 4 there is provision for the payments to be made

subject to conditions, or for the payments to be repaid in whole or in part in specified circumstances. Again, these decisions are the sole prerogative of the Secretary

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of State. Similarly under Clause 5, the procedure for the making and deciding of applications is part of the scheme issued by the Secretary of State without having to obtain parliamentary approval.

There are further provisions relating to the scheme in Clauses 6 and 10 which are left to the unfettered discretion of the Secretary of State. These may not be in the best interests of claimants—we simply do not know—and it would be helpful if my noble friend could say whether, before any of these decisions, drafts will be published for consultation with the stakeholders. In the period leading up to the publication of the Bill, the Minister told us at Second Reading, there were 15 meetings with the insurance industry and 11 with representatives of victims' groups, lawyers and members of the APPG. If the Government had to come back to Parliament they would have some incentive to continue with these consultations on the scheme and on the amendments to it which may be made in the future.

I hope that my noble friend can assure us that there will be no private consultation with the insurance industry excluding organisations representing the victims of mesothelioma. According to the *Guardian*, firms with insurance interests have given the Tories nearly £5 million since Mr Cameron became leader of the party. I am sure that the Government would not like it to be suspected that the industry's largesse entitled it to any special favours. Your Lordships will bear in mind that all firms providing employer's liability insurance have a vested interest in ensuring that, as far as possible, the details of the scheme create as light a burden for them as they can achieve. If, however, the industry passes on the costs to customers, as the Data Monitor survey quoted in paragraph 97 of the 2013 impact assessment suggests, it might be more impartial if it is asked to comment on a draft before the scheme is published.

The Delegated Powers and Regulatory Reform Committee says that this scheme is comparable in structure and content with the one governing a discrete, targeted social security benefit. It concludes that,

> "only a most compelling explanation could justify the establishment of a scheme that is to determine rights to statutory payments, yet is not to be subject to any form of Parliamentary scrutiny".

That says it all. I beg to move.

Lord Freud: My Lords, before there are any other contributions on this topic, it might save time if I respond rapidly to the last point mentioned by the noble Lord, around Amendments 1, 2, 4 and 5, about establishing the scheme on a statutory basis. Clearly that is the recommendation of the Delegated Powers and Regulatory Reform Committee. We acknowledge the concerns behind it. In the time between the recess and the Committee stage it has not been possible to do more than consider the proposed changes to the Bill. I am sure that noble Lords understand exactly what I am saying. I understand their concerns about the means by which the scheme is established and we are giving the matter due attention. I hope that those remarks might save a little time today.

Lord Howarth of Newport: My Lords, I hope the Committee will allow me to speak. I apologise for arriving late. My excuse is that the document issued by

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the government Whips' Office informed us that business was to begin at 3.45. I am obviously lagging behind everyone else. I apologise particularly to the noble Lord, Lord Avebury, for missing the beginning of his remarks.

Obviously what the Minister has told us is strongly encouraging. It points us in the direction we all want to go—and certainly in the direction that the Delegated Powers and Regulatory Reform Committee wants the Government to go—and the noble Lord, Lord Avebury, was quite right to quote from that paragraph. As he says, it is very powerful on this point.

I am sure that Parliament will welcome it if the Government decide that this scheme is after all to be introduced under a statutory instrument. We received this morning the draft rules of the new scheme and while I congratulate the Minister on enabling us to have them, as he undertook to do, by the time we reached Committee, at the same time I grumble a little that we only had them during the course of this morning. We will want time to study them and no doubt revert to the issues contained within the draft proposals.

3.45 pm

After having taken only a brief glance at the draft rules, I believe that they are well capable of being embodied in a statutory instrument and achieving the force of law on that basis. That must be right because the authority to create the scheme is vested in the Secretary of State by statute. Parliament will have a continuing close concern as to the way the scheme operates and Members of Parliament in another place, in particular, will want to be able to hold the Government to account on the specifics of the scheme in the interests of those of their constituents who, most unhappily, have contracted this disease or are dependants of people who have contracted mesothelioma. We are happy that the Minister should negotiate the scheme, but the Secretary of State will take responsibility and Parliament needs to be satisfied as to the specifics. All of this is hugely important to mesothelioma victims.

As the Bill is drafted it is curiously inconsistent; it dips in and out. At a number of points it stipulates that the details of the scheme are to be determined by statutory instruments but in other important respects it does not. The rules of the scheme at the moment, and the manner in which the technical committee is to be established, are also to be made by so-called arrangements. Yet these arrangements would create a jurisdiction, in the language of the Bill, and it cannot be satisfactory that matters of this importance should be established under either negotiation or so-called arrangements. Accountability to Parliament, by way of statutory instruments, is weak enough, and it would evaporate entirely if these matters were established merely on the basis of arrangements.

Amendment 3 says that in the absence of a requirement for a procedure by way of statutory instruments, the Secretary of State should at least publish his proposals for a scheme and arrangements, together with a rationale and statement. However, we now have the draft rules, so he seems to have started on that process and I draw some encouragement from that.

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Amendment 6 is a little different because it does not say anything about statutory instruments or parliamentary procedure. It requires that the Secretary of State should publish an annual report about the performance and progress of the scheme. The reason why I thought that it was appropriate to put it in this scheme is that it is another device to achieve accountability to Parliament. This would be ex post facto accountability; it would not remedy a failure to enable Parliament to scrutinise the details of the proposals in advance and to make a decision as to whether to accept, amend or reject them, but it would enable Parliament to review the scheme annually.

The format in which an annual report should be published and the procedures whereby Parliament would examine that annual report and hold the Government to account on it are for consideration. However, I would suggest that its content should include details on the body that is administering the scheme, the levy, the volume of cases, the proportion of mesothelioma sufferers who are assisted by way of this scheme, the speed and ease of the procedures for claimants, information on how the portal is working, the activities of the technical committee, how many cases have gone to arbitration, the range of payments that are made under the scheme and their relation to court awards, what the legal outlays for the scheme have been, the number of appeals and of cases that go to the tribunal, the amounts recovered by the Department for Work and Pensions in different categories, the administrative costs of the scheme, and any modifications or reforms that the Secretary of State might be minded to propose. No doubt there are other matters that could usefully be included. I hope that Parliament would also make it a practice to debate the annual report each year.

Lord McKenzie of Luton: My Lords, we have added our Front Bench names to Amendments 1 and 4 and concur with the two amendments of my noble friend Lord Howarth. I think that the arguments have been fully and effectively made and I do not think that I need to add anything. I take the Minister's reply to be, "Yes, but not quite yet", and that is comforting. It is a good way to start our deliberations today.

We are all grateful that we have now seen a draft of the scheme. It arrived this morning at 11.55 am, according to my machine. I wish to make the point that should there arise, after we have had a chance to study it, issues that we might otherwise have parsed today as these amendments go through, we could perhaps use our next opportunity to revisit them. This is not to slow up the overall process but to ensure that we make best use of the draft that we have.

We have also added our names to Amendment 6, about the annual report to Parliament. I concur with my noble friend's list of issues to be covered. I would add that later in our deliberations we will consider our broader amendment which refers to the possibility of an oversight committee to oversee very much the same type of issues as my noble friend raised, in particular to deal with the issue that the noble Lord, Lord Avebury, raised. One of the concerns that we have throughout the Bill is the extensive engagement and powers that the insurance industry has—the administrator, the technical committee, ELTO setting up the portal.

The oversight committee would be one way of at least addressing that scope in the interests of the sufferers. I think that that is for debate on Monday.

My noble friend's Amendment 3 requires the Secretary of State to publish proposals and make a Statement to Parliament before establishing the scheme. Clause 1(3) currently requires the Secretary of State to,

> "publish the scheme as amended from time to time".

Does the Minister take this requirement as covering my noble friend's aspiration in Amendment 3? If so, will he put that on the record?

Lord Avebury: My Lords—

Lord Freud: Is the noble Lord—

Lord Avebury: I was going to withdraw.

Lord Freud: Ah, I might say a few words. I hope that in my earlier intervention in the interests of saving a little time I effectively dealt with our approach on Amendments 1, 2, 4 and 5. I will turn to Amendments 3 and 6 in the name of the noble Lord, Lord Howarth.

Amendment 3 requires that before the scheme is established,

> "the Secretary of State shall publish his proposals and make a statement to Parliament about them".

This falls into the area of the recommendations from the Delegated Powers and Regulatory Reform Committee to make the scheme rules subject to negative resolution. The result of those considerations may serve to enhance in practice the level of parliamentary scrutiny, which would make this amendment unnecessary.

One or two questions were raised. I apologise for the late arrival of the scheme rules—everything seems to be just in time today—but I was keen to get them to Committee Members before we started. Of course, we will have another day of Committee, and further stages. They are a draft at this stage and a work in progress and we will be continuing to refine them during the passage of the Bill and indeed afterwards.

I ought to deal with the question from my noble friend Lord Avebury on the meeting with the insurance industry. Bluntly, this was a negotiation with the insurance industry and you have to meet people to negotiate with them. To get a working scheme going, that was an essential job. I would have liked to have done it with rather fewer meetings, but that is what it took.

Amendment 6 requires that:

"The Secretary of State must report annually to Parliament on the performance and progress of the scheme".

I argue that it is not necessary to include this in the Bill. Scrutiny and reviews are already planned for the scheme without the need to include those in legislation. Indeed, we cannot know at this stage whether it is necessary or appropriate to report annually. We are aiming to determine the details of the reviews at a later stage. I am happy to commit to making a Statement to the House on the scheme's performance. We will keep this under review as,

over time, we expect the volume of scheme cases to reduce and for further information on the schemes to be readily available. The kind of information that the noble

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Lord, Lord Howarth, was talking about may become transparent effectively on a daily basis. I urge the noble Lord, Lord Avebury, to withdraw his amendment.

Lord Alton of Liverpool: Before the Minister sits down, perhaps he could put on the record a bit more about the imbalance of the meetings that he held with the industry and the victim support groups. He may recall that I raised this issue at Second Reading. I heard from the victim support groups afterwards and they said, quite categorically:

"We met the Minister three times, however at no time were we involved in any discussions about the scheme which was unveiled on 25 July 2012. The detail and architecture of the scheme was devised by the insurers and DWP".

That has been a source of some discontent among those who represent the victims of this awful disease.

4 pm

Lord Freud: My Lords, the difficulty in doing such a negotiation is that this was pretty price-sensitive stuff in the marketplace. We had to keep it tight. I did, however, explore the angles without being specific or laying it out by saying, "Here is the architecture". I explored the elements of what we were aiming to do with, as I say, not just the victims' groups but the lawyers and the APPG. Keeping a balance between a commercially complicated deal and ensuring that the other side is well informed is always difficult, but that is the balance that I tried to strike.

Lord Avebury: My Lords, I certainly was not objecting to the meetings that were held with the insurance industry in the lead-up to the Bill. I mentioned that at Second Reading the Minister told us how many meetings there had been not just with the victims support group but with various other stakeholders, such as the lawyers representing the victims. I had hoped that those consultations would have been extended into the period when the details of the scheme are being formulated. We would hope that there would be equality of arms between the insurance industry and the representatives of the victims in designing the details of the scheme and in looking at any amendments that may be necessary later on. However, we have to be content with what the Minister has said this afternoon and hope that, at least by Report, we will be looking at something a little more concrete than the Minister was able to say to us. In the meanwhile, I withdraw the amendment.

Amendment 1 withdrawn.

Amendments 2 to 6 not moved.

Clause 1 agreed.

Clause 2 : Eligible people with diffuse mesothelioma

Amendment 7

Moved by ***Lord Howarth of Newport***

7: Clause 2, page 1, line 16, at end insert—

"( ) the person was self-employed at the time of exposure to asbestos,"

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Lord Howarth of Newport: My Lords, the two amendments in this group, Amendments 7 and 8, would extend eligibility under the scheme to two classes of people who, as I understand it, are not eligible under the Bill as drafted and the scheme as proposed. The two classes of people are those who are self-employed and were exposed to asbestos and in the course of time contracted mesothelioma,and family members who have contracted this appalling and fatal disease as a result of doing the laundry of an employed person who came back home with asbestos fibres on his workwear. There will have been many people who were self-employed in the building trades and the construction industry over the years. I do not know whether the department has any information as to the numbers. It would be helpful to the Committee if the Minister were in due course able to give us an idea of the scale of this problem.

The Minister may take a severe view of the case of a self-employed person who did not insure. He may argue that it is unfair to insurers that they should pay a levy into a scheme to compensate someone who failed to insure when it was his own responsibility as a self-employed person to do so. To that, I would say that the whole Bill is based on rough justice; competent, respectable insurers are required to pay for the dereliction of their colleagues in the insurance industry who lost or even wilfully destroyed documents. There is also rough justice for the recipients, who are invited to be content with 70% of the amount that they might receive in an award from a court. On the other hand, the self-employed and their dependants suffer exactly the same as employed people and their dependants. There seems to me to be a strong moral case for treating them alike.

The Minister may pleasantly surprise me, but if he does not take that severe view of the case of those who did not insure on their own behalf, what of self-employed people who died insured but whose documents have gone missing? The insurance company no longer has them and, although there is tentative evidence that a self-employed person was insured, it is not substantial and the case cannot be proved. Why should not a person in that predicament be covered by the scheme? They and their dependants are in exactly the same boat in terms of suffering and loss as employed people.

Let us also consider the predicament of wives, partners, daughters—family members, people in the same household—who contracted the disease because they were doing the washing. I am personally aware of the cases of three people where that has occurred. It is entirely possible that someone could catch mesothelioma through washing the workwear of their partner or parent where the employed person has not, although they may contract it later. The dependant, the family member, the person caught in that situation, is equally the victim of an employer's neglect. It seems morally wrong not to include such people in the scheme on the technicality that the person who was the employee has himself not been diagnosed. Insurers ought to be willing to embrace those people within the scheme.

People in that predicament are eligible for compensation under the 2008 statutory scheme, I believe, but the difficulty is that payments under the scheme are very

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small by comparison with payments that would be made under the scheme that we are now considering. Again, it would be helpful if the Minister or his officials could give us any idea of the number of people in that second category to which Amendment 8 is addressed.

If the Minister says that the insurers should not be obliged to extend the scheme to support people in either of those groups, I should be grateful if he will tell us what the Government will do to create justice for them. I beg to move.

Lord James of Blackheath: My Lords, before I comment on what the noble Lord, Lord Howarth, said, I declare my interests. I was an elected member of the council of Lloyd's throughout its entire rescue period; I was chairman of the audit committee of Lloyd's of London; and I was chairman of the committee that created Equitas, which effectively brought about a solution. I am afraid that I have lived and slept with this thing for rather too long in my life.

The noble Lord, Lord Howarth, is quite correct, but he opens up a much bigger issue, which I do not think that he has spotted. That is that in the realm of self-employed people, the Navy did not necessarily re-equip its own boiler rooms on the three vessels which have had the biggest ever death rates: HMS "Britannia", HMS "Albion" and HMS "Furious". Therefore, all those people who were self-employed and contracted in would come entirely within the compass of the noble Lord's concern, and I support that.

I pre-warned the Minister that I have now set the Admiralty on the issue of the effects of the Bill for it and its former members. The noble Lord, Lord West, who was here just now, asked me to pass on the message that he is going to be very upset if he is allowed to die without being given his handout. He was one of only two commanding officers ever to be given a permit to sit in the boiler room during a major reconstruction, so he is almost certainly at high risk. The other one, who was the commander of the "Britannia", has already died.

There is a very serious concern here regarding the naval forces. As the Minister knows as a result of our meeting the other day, there was a discussion in the House on 24 November 2008 led by the noble Baroness, Lady Taylor of Bolton, on behalf of the armed services at that time. She responded to my concern about the repeal of Section 10 of the Crown Proceedings Act 1947 and its replacement by the Crown Proceedings (Armed Forces) Act 1987, which had the effect of precluding any claim for asbestosis against any single person of the Armed Forces from anyone who had failed to put in a claim for an identifiable disease at that time. There were only 10 years in which such a disease could be identified, but we are talking here of a 30-year incubation period. In the region of 200 members of the Armed Forces are currently still at huge risk—it is virtually an inevitability—of suffering from this terrible disease and absolutely nil provision or obligation rests on the armed services to look after them or their dependants. I think that somewhere down the line we need to alter this Bill to allow a once-and-for-all, final opportunity

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for justice on their behalf. I shall return with an amendment to this effect once I have had my discussions with the Admiralty, but for the moment I just want to put down a marker.

Lord Wills: My Lords, I support my noble friend's amendments on this issue. I first became aware of this terrible disease shortly after I was elected as the Member of Parliament for Swindon North. A man came to my surgery in the exact circumstances that my noble friend has described. He was absolutely distraught because his wife had just died from this terrible disease, which she had contracted from washing his clothes. Every day, he came back from the railway works in Swindon and gave his work clothes to his wife. She washed them and, as a result, she died from this disease. It seems completely wrong, as a matter of natural justice, that people in these circumstances should be denied any access to justice under the terms of this Bill.

Like my noble friend, I hope that the Minister will surprise us pleasantly by accepting these amendments, although I fear that we may be disappointed. If we are disappointed and the Minister relies—as I understand he may well be advised to do—on the dangers of creating a precedent by accepting these amendments, I hope that he will be able to say in exactly what circumstances he thinks such a precedent will be created. Given the very particular nature of this disease, its particular virulence and the very particular way in which it is contracted, can he say precisely what precedents he thinks will be created by accepting my noble friend's amendments?

In the mean time, I hope that the Minister will at least agree to look again at these amendments, which seem to be absolutely consistent with the basic principles of natural justice, and I very much hope that they will find their way into this Bill in one way or another.

Lord Walton of Detchant: My Lords, I rise to support Amendment 8. I spent the greater part of my professional life practising medicine in the north-east of England. Even though I practised largely as a neurologist, I saw many patients with mesothelioma, many of whom had worked in the shipyards on the Tyne and the Wear, and who had been exposed to asbestos. However, I also saw, not under my direct care but under the care of colleagues, some women who developed mesothelioma because they had been involved in washing the clothes of their husbands, who had been exposed to asbestos—clothes which were deeply impregnated with asbestos fibre. For that reason, I would say that this issue does not rest just on the balance of probabilities; in my view, it is beyond all reasonable doubt that they developed mesothelioma because of that activity.

Lord Alton of Liverpool: My Lords, like my noble friend Lord Walton of Detchant, in my time as a Liverpool Member of Parliament I also came across shipyard workers from the River Mersey who, sadly, had contracted mesothelioma. I also saw tunnellers, masons and others who had come to surgeries to talk about what compensation schemes might be available.

I vividly recall meeting a man and his wife, and she came back to see me just weeks later when she was a widow, he having died. The rapidity with which people can die after prognosis is alarming, and of course it is a fatal disease. It is suspected that another 56,000 people will die of mesothelioma before this terrible curse is ended.

4.15 pm

In the mean time we have to do what we can to provide as much justice as we can, and the compensation schemes that are being put forward are a step in that direction. That is why at Second Reading so many of us applauded the fact that the Minister had brought the Bill forward. However, the Bill is not the last word on the subject. The points made by the noble Lord, Lord Howarth, in moving the amendment, and those made by the noble Lord, Lord James, about the Armed Forces and by the noble Lord, Lord Wills, are points that the Minister ought to take into account. He should be willing to look at this question again.

As long ago as 1965, the report that was issued by the London School of Hygiene and Tropical Medicine on mesothelioma identified a particular case where someone's dungarees had been washed by his wife when he had returned from work. She washed them day after day, and it was the dust from those clothes that had led him to bring mesothelioma into their home for her to contract.

The point is well made that this is about natural justice. If the Minister is unable to accept the amendments today, I hope that at least he will go away and reflect between now and Report, because I am sure that the noble Lord, Lord Howarth, and others will want to bring this back.

Lord Martin of Springburn: My Lords, I am very interested in the question of families being exposed to asbestos. I draw on my own experience as an apprentice metalworker in the mid-1960s. Sometimes there would be a rush job to manufacture electric heaters. Asbestos board was used to hold the elements in those heaters. It was therefore required to drill dozens of holes in that board. As young apprentices, we were not trained in the dangers of asbestos. Strangely enough we quite liked it when there was a rush job, as we got some overtime. The metal was covered in oil and it used to go on our clothes. Meanwhile, you just blew the dust off the nice white board and you did not realise that any harm was being done.

The point that I am raising is that in the factory where I worked there were dozens of young ladies, in the same age group as myself, who assembled the electric heaters. They were usually given the same job to do every day. Two of my female colleagues, two sisters, spent all day drilling the asbestos board, regardless of whether there was overtime. There was what was called stack drilling: there were maybe five or six boards packed together in what was known as a jig, and 24 or 25 holes were drilled. When the drill went through, the asbestos went all over.

It was those sisters' mum who did the washing in their household. In the communities that I lived in, in the mid-1960s, washing machines were a luxury; they

were not in every home. Later, I had the good fortune to represent the constituency where I had served my apprenticeship. At that time I spoke to one of these young ladies and asked her how she was getting on and how her mum was keeping. She never mentioned asbestos but she said, "Mum's getting breathless". I did not have the heart to say directly, "Have you checked out whether it's asbestos-related?", but I said that she had best make sure that her mum got to the doctor. It was a worry of mine that her mum may well have contracted a condition because she had two hard-working daughters who worked every day with white asbestos boards.

Lord Wigley: My Lords, I rise to speak very briefly in support of the amendments put forward by the noble Lord, Lord Howarth of Newport, and particularly to address the question of the self-employed which is covered by Amendment 7.

Many people working as jobbers in industries who may undertake patching work in schools or in other buildings where asbestos was involved—perhaps electricians who need to drill into the walls—will have had this exposure. As a consequence, many of them will have suffered, and many will have died. Their need for recognition and for help by way of compensation is as great as that of those who are not self-employed. I understand from where the Government have come on this—this is an agreement with the insurance industry, of course—but that in no way lessens the need and the suffering of those who are self-employed, who might not be the people who the insurance industry would choose to recompense in this way. If that is the case, does it not behove the Government to step in to fill the breach for those who cannot be covered by such a scheme? I simply ask the Government and the Minister to think about that between now and Report.

Lord Browne of Ladyton: My Lords, I rise briefly to support both of my noble friend Lord Howarth's amendments, and I do so—relatively unusually, I think—by referring the Minister to the briefing from the Association of British Insurers which I received about one of my noble friend's amendments, but not about the other. It is the omission of the other amendment that interests me. However, let me deal with the first one first.

The briefing contains an argument against Amendment 7 which is summarised essentially in one sentence of this short briefing:

"As employers' liability insurers will be funding the untraced scheme, payments from the scheme will only be made to those who would have been covered by employers' liability insurance".

That is the argument that the insurers make and I understand why they make it. The association then goes on to imagine that most people who worked in this industry may have been employed at one time and self-employed at others, and that is probably right—there will have been people who were exposed to these fibres both in an employed and in a self-employed capacity. Because of the way in which these cases are dealt with in the courts, that will not disqualify these people from being included in the payment scheme. However, the

association goes on to make a point which I think it believes is crucial to its argument but which actually grossly undermines it. In the last sentence it says:

"There will only be a very small category of people who have been solely self-employed and therefore not eligible for a payment from the untraced scheme".

Let us assume that the phrase "very small category" is the equivalent of "a very small number". I am not quite sure why the association used the word category; I think that it means a very small number of people. If indeed that is right, and if indeed we are doing an injustice by excluding a very small number of people from this scheme, that is an argument for extending the scheme to that very small number of people, because it would be grossly—disproportionately—unfair to exclude them.

The second point relates to Amendment 8, which essentially proposes extending the scheme to those who have been exposed in a secondary way to asbestos but through exactly the same route as those who are employed and covered by compulsory employer's liability insurance, or who would have been covered had it been in existence prior to 1972. That is the way in which the payment scheme is constructed. It strikes me as very odd that the Association of British Insurers does not deal with this issue at all in the brief. As I have listened to the debate unfold in the Grand Committee this afternoon, I have wondered why that was the case. I can certainly figure a set of circumstances where there is a traceable employer and where there is a secondary infection. If a man comes home from the shipyard with fibres on his clothes it does not matter whether they are washed—if the fibres get into the air of the environment in which his children or other relatives live and they breathe them in, they are at risk of developing mesothelioma eventually if these fibres are trapped in the fibres of their lungs.

There must be cases where that negligent act has caused secondary infection and mesothelioma and there has been a successful litigation against the employer of the person who carried the fibres. So there is a chain—a direct link—and the person who would be sued would be the employer.

I do not know the answer to this, because I do not know the details of the employer's liability compulsory insurance scheme well enough. However, I ask the Minister, if he can tell us at some stage during the course of our deliberations, whether the insurers pick up the payment for the successful litigation because they were the insurers in the employer's liability policy, or because of public liability insurance, which is a separate and different but compulsory insurance for people who are in workplaces. Either way, this is likely to be the same group of insurers. I suspect that it may be through the route of the employer's liability compulsory insurance, and if that is correct, may it be the case that this payment scheme already applies to their efforts? I am not sure whether it does or not, but if it definitely does not, it definitely ought to. Since these general insurers, who carried or presently carry the risk of employer's liability compulsory insurance, are likely to be the same people who are carrying the risk of public liability insurance, I am sure that the Minister can persuade them that it should.

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Baroness Golding: My Lords, I have been discussing this Bill with a number of people in my former constituency. I was told by a former employer that, 10 years ago, his firm was employed to do some work in the boiler house of a prison. He was told that there was no asbestos on the site and the men started work. On visiting the site himself, he was not convinced that this was correct, so he got samples and paid for a scientific analysis of the work on the site. The site was dangerous and contained asbestos. The Health and Safety Executive was called in and immediately closed down the site. The employer was told that he could not prosecute the Crown but that he may be able to prosecute the governor of the prison. Needless to say, he did not bother to do that. He did, however, keep a file of all the details of what had happened in the firm's papers. He sold the firm on, and it has been sold again since. I hope that the papers are still there. What will happen in a case like that, where the liable employer was the Crown, which the contracted employer was told could not be sued? The contracting employer was not to blame but the Crown certainly was. Will this section of the Bill cover this?

Lord Moonie: I am sure that the Minister will be grateful to know that I shall be brief. Unlike the many lawyers that I see round about, my background is in medicine. I trained in

the 1960s, and I further trained in epidemiology in the early 1980s. I had friends who died from this disease.

I want to make a very brief point. The first formal recognition of this disease in Britain came in 1932, when the first regulations were introduced. Since then, it has been very clearly established that this is an occupational disease—that it is virtually impossible to acquire the disease other than in a situation where the fibres are present. Therefore I am speaking specifically in support of the wives and families who may have been affected. There must surely be a case for accepting, after 80 years, that the bringing home of clothes with asbestos fibres upon them was a negligence on the part of the employer.

Lord Empey: My Lords, like many Members, I have the honour to have represented a shipyards constituency for over 25 years. I have seen this disease at relatively close quarters over that time.

There is one category of person that we have not yet mentioned in discussing these amendments. We have discussed people who perhaps washed clothes, but we have not discussed the children. When I was Minister for Enterprise, Trade and Investment in Belfast 11 years ago, we set aside £180 million, if my memory serves me correctly. I saw a graph which showed that we had put money aside up to 2050 to take care of the victims that we anticipated would still be emerging because they were young children when the material was imported into their homes.

4.30 pm

I am glad that we have moved on to the point where this Bill has been introduced, but I want to ask the Minister a question in the context of these amendments before they are finally determined. The territorial extent

of the Bill is all of the United Kingdom. However, if my memory serves me correctly, the nature of the schemes available to people in Northern Ireland is somewhat different—I believe that they are additional schemes. I moved to another department shortly after that and I am not familiar with the current position, but can the Minister tell the Committee whether the schemes in Northern Ireland are additional and different and, if so, can he also tell us whether we will at least have equality with those schemes?

We had a concentration of the disease in the area that I was in. When Harland & Wolff was a nationalised company, the department took on its legacy responsibilities. It was privatised by the time I became involved but we were left with the legacies. To give your Lordships some sense of the situation, I recall being told by a neighbour who subsequently died of mesothelioma—and he was not the only one—that they used to play snowballs with the asbestos in the vessels. That is how ignorant people were of what they were confronted with.

I can see where the insurers are coming from. They may argue, "We insure people who pay us to insure them, and we don't insure people who don't pay us to insure them". We understand that, but over the years dealing with this process has been like playing with a series of dominoes. First, you had to prove that X employer was responsible for mesothelioma. Then that wall was knocked down and you did not have to do that any more—

you did not have to nail down a specific employer. The insurers had a point but that point has now been overruled. We have moved on and there have been court cases and so on.

However, a point is going to have to come when we get out in front of this matter and get to the end of it. I am not sure whether this is the right mechanism and I suppose that that is what Report stage will determine. All I can say is that I had a graph in my department—I do not know whether the Minister or the Government have one somewhere—that rolled out victims right up to 2050 and we put money aside for them. I do not know what has happened to that money. I do not know whether it is in the block grant or in AME or where it is, but I do remember making a statement to the Assembly at that time dealing with this matter.

We have a very high concentration of mesothelioma in Northern Ireland—maybe 40 or 50 cases a year. This disease is not confined to what are described as "working people"; it goes right across the board. If you were a senior manager, you walked through the workshop. If you were an inspector, you went into the vessel or a confined space. It did not matter whether you were working with asbestos every single day or whether you worked with it once or went through a space where the fibres were present. Some, although not all, people have a susceptibility and, once you have it, one fibre is enough to do the business. I can say that it is an awful death. I have seen two of my neighbours suffer from it and I have seen it at first-hand.

Therefore, I ask the Minister to clarify: first, whether the territorial extent of the Bill means that other schemes are available in Northern Ireland; and, secondly, whether there will be consistency in this matter. I also say to the Minister that, while I understand the point

about the insurers—and they have a fair point—at the end of the day we have been pushing and shoving this issue for years. Let us settle it; let us finish it; and let us do whatever we have to do. I urge that upon the Minister.

Lord McKenzie of Luton: My Lords, I would like to add a few points to the very extensive and knowledgeable debate that has taken place. It seems that some very telling points have been made and pressed upon the Minister about the scope of the scheme before us, which it seems reasonable to address. I would just say that we would want to be doing so in a way which does not hold up the core of this scheme. I hope that we have common ground on that issue.

In relation to the self-employed, can the Minister clarify quite what definitions we are using here? Over the years in various circumstances, the differentiation between somebody who is employed and somebody who is self-employed is quite narrow. We know that in some industries—the construction industry in particular—self-employment arrangements were, in a sense, manufactured when the reality was that there was an employment. That might have been done for tax reasons or for other reasons, so clarification of the definition of "employee" and "employer" for the purposes of the Bill would be helpful.

The issues raised by my noble friend Lord Browne are of particular interest in relation to those who were not necessarily formally employed but for whom the negligence of an employer might have caused them to contract mesothelioma. That is important because through the Child Maintenance and Other Payments Act 2008—it was the other payments

that related to mesothelioma—the last Government introduced a support scheme for those who contracted mesothelioma but not directly because of employment. If those employers or their insurers can now or could in the future be reached, it seems that the Government themselves have an interest in recouping some of the compensation paid, which I hope can be redeployed to improve those schemes for others.

In relation to Northern Ireland, as I understand it this provision in the Act does apply there. I also understand that the two statutory schemes which we have, in the 1979 Act and the 2008 Act, are in fact replicated by legislation in Northern Ireland. Certainly, that was negotiated at the time. There have been some very important issues raised, which I know will create some challenges for the Minister. In doing so, I hope that we will keep our eye on ensuring that we make progress on the scheme that is before us.

Lord Freud: I thank the noble Lord, Lord Howarth, for these amendments. Clearly, their intention is to make the payments under this scheme available to a wider group. The two groups, specifically, are the self-employed and those who caught it on a secondary basis by living in the same household as a person exposed to asbestos.

The way in which Clause 2(1)(a) works is that it requires the person with diffuse mesothelioma to have been an employee of an employer who was required,

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at the time of the person's exposure to asbestos, by the compulsory insurance legislation to maintain insurance covering any liability arising because of exposure to asbestos, or who would have been had that legislation been in force at the time. I hear my noble friend Lord Empey saying, "Solve the whole thing once and for all", but this Bill is, regrettably, designed to fix a 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 disproportionate burden on the employer liability insurers who will fund the scheme through a levy.

Lord Wills: When the Minister talks about a disproportionate burden, does he accept that for years and years, those insurers—quite properly, because of judicial decisions—avoided making payments which we all now agree that they should have been making and which the Bill is designed to ensure that they will make in future? When he talks about a disproportionate burden, has his department made any estimate of how much money those insurers saved for all those years?

Lord Freud: My Lords, there is a deep and difficult history to this of which, I suspect, everyone in this room is aware. We are trying to ensure that we can get money to that group who have missed out. I am as dismayed as many of your Lordships that that has not happened earlier, but we are where we are. We are doing it now in a way to ensure that we can get those payments flowing rapidly. I apologise if I seem to be making a Second Reading speech. The problem is that this is such an emotive issue—the disease is so horrible—that it is very hard not to do so.

We have to come back to what is a specific deliverable. It is awful to sound so legally defensive, as I know that I am sounding here, but I am trying to get a deliverable, to get as

much money as possible to people. I shall answer the specific questions. I know that I will not have the noble Lord, Lord Howarth, resounding with pleasure, as he wanted to be, but that is the underlying reason. My motivation is to get as much money as I possibly can safely, without risk—legal risk, in particular—to people.

Lord Avebury: I am sorry to interrupt my noble friend, but was it always clear whether a person was covered by the employer's liability insurance? In the industries which have been mentioned, such as the construction industry, where the boundaries between the employed and the self-employed were not always clear, and a person comes forward and claims that he worked for such and such a firm and was employed at the time, but the employer's liability insurance has been lost, how can the scheme be satisfied that he was qualified within the terms of the Bill?

Lord Freud: That is a very important point. As the noble Lord, Lord McKenzie, was querying, some people will appear to be self-employed where the reality is

that that was an artificial, tax-driven construct. In that case, if they can demonstrate that in practice they were acting like an employee, they would be eligible for a payment under the scheme. That is specifically allowed for.

The noble Lord, Lord Howarth, asked about estimates of exposure to people who have been washing laundry—secondary exposure in the household. We do not have those data, I fear. We have data on general environmental exposure, which would include that, and I can give that information to the noble Lord. Clearly, people who catch asbestos outside the employer liability framework can get payments under the 2008 Act. Various noble Lords thought that they were inadequate, but they are state payments established since then.

My noble friend Lord James asked about the MoD and the Admiralty in particular. The state does not have employer's liability—

Lord James of Blackheath: If the noble Lord will forgive me, the state does not have a liability because it pulled the dirtiest trick of all time when it repealed the 1947 Act and effectively put people in a Catch-22 situation where they could only claim if they had already been identified with the disease at that time. It was only 10 years into the period. It was ridiculous.

4.45 pm

Lord Freud: My Lords, clearly I speak for the whole Government generally. The specifics of this are really for the MoD to pursue. There will be lots of issues around this but we need to get this Bill through. If we start going into these areas within this Bill, we risk endangering the start times and the processes. But I hear my noble friend and I know the depth of his feeling on this.

Lord Wigley: Before we move on, perhaps I can pick the Minister up on the words that he used a moment ago, that the Government do not have a liability. Is there not a plethora of cases where no liability exists? In most of the cases under the Pneumoconiosis etc. (Workers' Compensation) Act 1979, despite the fact that there was not a liability, the Government

accepted their responsibility to help these people. The Minister may not be able to do it in the context of this Bill, but can he give me an assurance that he will look at this again in the future?

Lord Freud: I am sorry; if I said that, I truncated some words. What I meant to say is that the Government do not take out employer's liability insurance, so effectively they self-insure, and different departments have different arrangements to pay compensation. Clearly, my noble friend Lord James feels that the ones at the Admiralty are not adequate.

The noble Lord, Lord Howarth, asked about the self-employed. We do not have any data on that area. Again, the core reason that we are not including the self-employed here is that, for obvious reasons, they were not required to have employer's liability insurance.

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Lord Alton of Liverpool: On that point, has the Minister seen the ABI briefing, where it says:

"There will only be a very small category of people who have been solely self-employed and therefore not eligible for a payment from the untraced scheme"?

Clearly the ABI has the data. Before we come back to this issue on Report, perhaps the Minister will discuss with the ABI what it based that statement on and what the numbers are.

Lord Freud: Well, my Lords, if I am cleared to speak to the insurance industry again by this Committee, I will ask it for those data, and supply them to your Lordships.

The noble Lord, Lord Moonie, made the point about those who had washed the clothes. Again, that is not covered by employer's liability. It could be a case of public liability, so there may be something to pursue. I will look into that before the next Committee day to see if I can get a little bit more information. I do not have very much information on the legal differentiation and what actually happens there. The same question was asked by the noble Lord, Lord Browne.

On the Northern Ireland question asked by my noble friend Lord Empey, the Northern Ireland legislation mirrors the legislation in the rest of the UK, with the 1979-2008 legislation prevailing, and the plan is to run this there as well.

I think that I have dealt with all the questions, but possibly not to everyone's satisfaction.

Baroness Golding: Before the Minister sits down, I ask him to define what the present circumstances are.

Lord Freud: I really will have to come back on that. It sounds to me like quite a complicated legal position. The whole point of this scheme is to try to drive through a very rapid response. In this case, of course, these things are known. There should not be a problem of not knowing who is liable for what. That is what the Bill is trying to do. I will try to get an answer to the noble Baroness's question, but it is by way of academic interest rather than core to what we are trying to do here. I ask the noble Lord to withdraw the amendment

Lord Howarth of Newport: My Lords, I thank all noble Lords who have contributed to what we knew would be an important debate but has also turned out to be a very impressive one. The debate has revealed complexities as well as possibilities that I hope we can all reflect on and look for ways to explore constructively.

No fewer than 11 noble Lords apart from the Minister contributed, and they came from all around the United Kingdom. My noble friends Lord Wills and Lady Golding gave us case studies from their own constituency experience that were significant and revealing. The noble Lord, Lord Martin of Springburn, told us about his own industrial experience, which was illuminating; the case of the mum who did the washing was particularly poignant. My noble friend Lord Wigley from Wales and the noble Lord, Lord Empey—whom I shall also call my noble friend, if I may—from Northern Ireland illustrated the range of this issue, as of course did my noble friends Lord Moonie and Lord Browne of Ladyton. The debate benefited very much

from the medical experience and expertise of the noble Lord, Lord Walton of Detchant, and my noble friend Lord Moonie.

We have had a very valuable debate, with many issues raised. My noble friend Lord Browne of Ladyton probed most determinedly and effectively as to who exactly is covered. It may be that the Minister is fortified with legal advice that enables him to declare confidently, definitively and with the utmost clarity who is covered and who is not, but we suggest that there is more to look at here, particularly in the case of family members. It seems to contravene common sense to suppose that there is no liability where someone contracts the disease as a direct consequence of the predicament of the person who was employed and was, or should have been, covered by employer's liability insurance. It is hard to believe that such people are not covered.

My noble friend Lord McKenzie raised a question that has become increasingly pertinent over the decades in which this whole problem has been gestating: the shifting nature of self-employment. With the increase not only in contracting-out by public departments but in subcontracting by major firms, and with the rise of such practices as zero-hours employment, it becomes very difficult to say with confidence who is employed and who is not, although no doubt there is case law on this. I hope that the Minister will want to satisfy himself that the definition of self-employment sufficiently overlaps with the definition of employment in a great range of relevant situations, such that we can appropriately bring self-employed people within the compass of this scheme. I think that it is worth investigating further.

Issues arose as to public liability. My noble friend Lady Golding's case study raised it, and the noble Lord, Lord James, talked about what the responsibility of the Lords of the Admiralty may be. I was encouraged to a degree that the Minister seemed to be saying to us that the question of the liability of the Crown and of public departments does warrant further investigation. It may be that, in the interests of getting this scheme up and running as quickly as possible—which we all want—it may not be appropriate to try to redefine the scope of the scheme or the compass of this particular Bill to take account of everyone who was in a situation of being employed by the Crown or by some other public agency when they were exposed to asbestos negligently. However, if a parallel scheme can be created, I think that that would only be right and proper.

While I would never suggest that the Minister is meagre or defensive and I completely respect and applaud his motivation in bringing this Bill before us, I hope that he will not stand pat on the deal that he has negotiated. However, we can come back to that. It seems to me that, as legislators, it is our responsibility to take a view as to what the public interest is and to amend the scheme that he is proposing to us, which he has negotiated with the industry, so that it better satisfies justice and the requirements of the public interest. In the mean time, I beg leave to withdraw the amendment.

Amendment 7 withdrawn.

Amendment 8 not moved.

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Amendment 9

Moved by ***Lord Howarth of Newport***

9: Clause 2, page 1, line 17, leave out paragraph (b)

Lord Howarth of Newport: My Lords, we need alternates. I am looking forward to an imminent group where I shall have nothing to say. I am sure that the Committee is looking forward to it even more.

This is one amendment in a group that deal with the start date or, as it might also be described, the cut-off date. Amendment 9 is the most radical amendment in the group. It would simply abolish the start date of 25 July 2012, which is written into the Bill, so that the scheme would then encompass anyone who is still alive and contracts mesothelioma in consequence of employer's negligence and their dependants, as well as the dependants of people who have already died.

The noble Lord, Lord Freud, explained to us at Second Reading that the case for disqualifying anybody who was diagnosed with the disease before 25 July 2012 was that it was only at that moment, when he made a Statement to Parliament in which he declared the Government's intention to introduce this scheme, that the insurers could start to reserve to meet the costs of the scheme. I would certainly take the view that at the very least, we should go back to the date at which my noble friend Lord McKenzie of Luton, the Minister's predecessor, announced his consultation with a view to introducing the scheme on 10 February 2010. From that moment onwards, the contingency was clearly foreseeable by the employer's liability insurers. I would go further even than my noble friend Lord McKenzie goes in his amendment. I would simply say that the insurers should always have reserved. That is what insurance is about.

5 pm

Insurers take the premiums and invest them, distribute dividends to their shareholders and profits to the members of their syndicates, but it is their duty, as it always has been, to reserve adequately to meet claims. If, instead, they decide that they will shred the policies—I speak a little melodramatically but if, as is all too convenient to them, they lose the policies—they make even more money.

The Minister said in response to my intervention on Second Reading that if there were to be an amendment such as I have now tabled, it would cost a huge amount. It would be helpful if he were able to tell the Committee his best estimate of how much that would be. I contend that, although it will undoubtedly be a substantial sum, the industry can afford it. It would hate to have to pay it, but it can afford it. My noble friend Lord Wills made this point in the preceding debate. For decades, they coined money. They made a very great deal of money, particularly in insuring against long-latency diseases, because they did not have to pay out for such a long period.

Of course, there were insurers who made a mess of their business and got themselves into terrible trouble with long-term insurance, but the opportunity was

there for them to make money on an heroic scale, if we consider the effect of compound interest. I do not have the figures to hand, but DWP officials are adept at making computations and one of the officials sitting behind the Minister may be able to do this sum before the Minister responds. Supposing, illustratively, a premium of £100 was paid and was invested at 5% compound annual interest over 30 years, that will have turned into a very substantial sum indeed. If it was invested over 40 years, which can be the period of incubation of the disease, it will be a very much greater sum still. It would be interesting to know what the cash figure would be and what the percentage increase would have been in those cases.

I make that point because I think that the figures would be startling and illustrate that, provided that the insurers have not simply squandered all that premium income or invested it disastrously badly, they could not but have made substantial sums of money. I think that they are better placed than they have let on to the Minister in his strenuous negotiations with them to pay decent amounts of money towards the scheme and to extend the range of beneficiaries.

It seems desperately arbitrary and unjust to exclude victims who were diagnosed before 25 July 2012. All of us have received briefing that is distressing to read about the hardship that families have experienced, such as bereaved people losing their homes. The Minister has a heart; we know that. He has toiled long and hard to achieve agreement with the industry on the scheme before us. I do not doubt that he has battled with the Treasury, which was no doubt less than enthusiastic about it. I am sure that he is susceptible to the emotional force of the case. If he fears that the insurance industry will revert to its default posture of litigating against any attempt to extract money from it, I hope that he will be fortified by two considerations. First, if he accepts my amendment, or any of the others, he will have statute on his side. Secondly, if he fears that the employer's liability insurers will take legal action against him, he might also fear that the families, the claimants, might take legal action on the basis that they have been most unjustly discriminated against by the cut-off date.

The principle is there and the practicalities ought to be thought about. On a rough calculation, if 1,200 people were to be added to the number of beneficiaries by extending back eligibility by a year—people who were diagnosed with mesothelioma before then will, sadly, be dead—and if the average payments under the scheme is expected to be £87,000, it might cost an additional £100 million to allow for full back-dating. Of course, £100 million, in my view, is not a trivial sum, but it just happens to be the same sum as the saving that my right honourable friend Ed Balls has just proposed to be made by not paying the winter fuel

allowance to richer pensioners. Downing Street dismissed that and said that £100 million in public expenditure is a trivial sum. Therefore, if the Minister thinks it is unreasonable to require the industry to pay, and if it is the stated view of this Government that £100 million of public expenditure is trivial, then they should pay for the inclusion of all mesothelioma sufferers and their dependants and get on with it. I beg to move.

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Lord Alton of Liverpool: My Lords, with his characteristic courtesy, earlier this week the Minister gave Members of the Committee the opportunity to meet him to raise concerns about issues that arise out of the Bill. I went to see him and raised two questions, one of which was the issue of eligibility. Therefore, I am very happy to support the remarks that the noble Lord, Lord Howarth of Newport, has made and to support this group of amendments.

The additional cost of back-dating eligibility to February 2010 pales, as the noble Lord said, into insignificance compared with the hundreds of millions that the insurers received from the taxpayer prior to the Government recovering lump-sum payments under the Pneumoconiosis etc. (Workers' Compensation) Act 1979.

Because it was an issue that he raised during our discussion on Monday, the Minister may also say that the insurers may be concerned about their right to property—that is, to compensation—under the Human Rights Act. However, asbestos victims lost not only their compensation, or right to property, but their right to life, and two years' back-dating seems a very small concession to make in that context. The noble Lord, Lord Howarth of Newport, is right: surely there would be a case for some of those affected by the Bill to challenge the Government in the courts. I should be grateful if the Minister would tell us what legal advice he has received on that issue.

The Committee should perhaps especially consider that the commencement of the consultation in February 2010 is a seminal date. For those affected, it represented a promise waiting to be fulfilled. At the very least, the eligibility date for a payment should be the commencement of the consultation—a point that I shall return to in a moment.

I also want to refer to a point that the noble Lord, Lord Howarth, mentioned concerning reserves. The Minister says that he cannot set an earlier date because only at the date of the announcement could insurers have begun to reserve against making payments. However, for two years the ABI discussed the detail of a payment scheme with the Minister, and it can hardly have woken up on 25 July 2012, shocked that it would have to reserve against making scheme payments. Just as importantly, surely it should have been reserving against asbestos claims 50 or more years ago, as the noble Lord, Lord Freud, himself implied when prefacing his speech at Second Reading. He did so with a reference to the Newhouse Thompson report, to which I have already alluded and which was published in 1965.

First, I think that the Government should be held to account for this date of February 2010 rather than July of last year, because that is when they issued their consultation paper, *Accessing Compensation: Supporting People who Need to Trace Employers' Liability Insurance*. I have a quotation from that report which underlines why it is not unreasonable for mesothelioma victims to reference that date as a day when they think this scheme should commence. The Government said that they,

> "are also persuaded that an Employers' Liability Insurance Bureau (ELIB) should form part of the package of measures to improve the lives of those who are unable to trace an old employer or their

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insurer. 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".

Commenting in the consultation paper on the low success rate of the employer's liability code of practice in tracing insurers, the Government said:

"The Government are keen to support everyone who needs to trace EL Insurance and cannot accept that 40% of the people who need to use the ELCOP should be left without compensation. The Government are determined to do more. To achieve this, the Government propose the actions considered in the next chapter".

Those two clear statements of intent left no one in any doubt of the Government's intention to act to provide protection for those who could not trace an insurer. Mesothelioma sufferers diagnosed on 10 February or later would have had every expectation that the Government's commitment to set up a fund of last resort would be honoured at least from the date of the publication of the consultation. The date of the publication of the consultation set alight that expectation and it has flamed ever since that time. It took more than two years for Ministers to respond to the consultation on 25 July 2012, on the last day before the Recess last year. Surely it is unacceptable now to throw a bucket of cold water in the face of mesothelioma sufferers and their families and to douse the hopes that they have rightly had at least since February 2010.

In law, a mesothelioma sufferer has three years from diagnosis to claim compensation. It would therefore be reasonable and consistent with current legal practice to take into account that limitation period. Applying the date 10 February is consistent with legal rules on the time allowed to make a claim and provides a more credible reason than the arbitrary date of 25 July 2012.

The Asbestos Victims Support Groups Forum responded to the questions concerning the date of eligibility. Question 15 asks:

"How should an ELIB start to meet claims to ensure fairness to claimants and funding at the start of the scheme?".

The forum said:

"Claimants should present their claims and they should be dealt with in accordance with the civil law, including issues such as limitation. Sufficient funding should be made available to meet any successful claims".

It is therefore imperative that the few cases where judgment has already been obtained and compensation awarded, but not satisfied because the insurer could not be traced, are paid under a newly established ELIB.

Whatever eligibility date is applied, many mesothelioma sufferers and their families will be bitterly disappointed and feel that the door has been closed in their face. Applying the date of 10 February 2010 will inevitably disappoint many, but it will at least apply a date that has credibility and which also allows for the long period between commencement of the consultation and the Government's response. It would be just to capture all those who in the past were unable to trace their insurer and who could prove negligent exposure to asbestos. That is, regrettably, not possible. The very least we can do is to go back to the date of the consultation. I do not think that that is asking too much.

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Lord Wills: My Lords, I support these amendments. I am particularly attracted by the one tabled by my noble friend Lord Howarth. At the very least the Committee needs to know the figures that he has asked for and I hope that in his reply the Minister will undertake to provide them.

Equally, if the insurers are claiming that they might have a case of action under the Human Rights Act were an earlier date to be instituted, I would be grateful if the Government could make available their legal advice on the likelihood of such a claim succeeding. I know that the Government usually hate making legal advice available but there are precedents for it in exceptional circumstances. I am sure the Minister will agree that this is an exceptional circumstance and I hope that he will at least look at making such advice available. It bears very much on these amendments.

I am sure that the Committee understands the constraints under which the Minister is operating. Quite rightly, he is trying to get a deal agreed with the insurers and to get it through as soon as possible so that those who are suffering from this disease can get some support as quickly as possible. We all have great sympathy with the efforts that he has put in to achieve that.

At the very least we should be looking at the earlier date. My reasons for saying that are exactly those put forward by the noble Lord, Lord Alton. If nothing else, we should be doing so because that was the wholly reasonable expectation that those suffering from this disease and their families had when the previous Government brought forward their measures. I hope that the Minister will agree to look at this again and to think about bringing forward the date in the way proposed in the amendments.

Baroness Masham of Ilton: My Lords, are people with mesothelioma covered by the Disability Discrimination Act? If not, they should be.

5.15 pm

Baroness Sherlock: My Lords, I shall speak to Amendments 11 and 14 in my name and that of my noble friend Lord McKenzie of Luton, and to the other amendment in this group. Since we are in Grand Committee, I think that we may take all these amendments that have the same purpose to probe whether—and, if so, to what extent and why—it is reasonable to limit access to the scheme from the date of diagnosis.

I had intended to spend a bit of time trying to understand what the first point of diagnosis meant but, just before we came in, I glanced at the draft scheme rules and realise that this

question is covered there in some detail. Where will we have the opportunity to discuss that in more detail? I would be happy to return to it at that point.

On the main issue underpinning these amendments, I, too, have had representations from those supporting people with mesothelioma concerned about their exclusion or potential exclusion from the scope of the scheme. Imposing a limitation to people diagnosed on or after 25 July 2012, which of course is more than two years after the close of the consultation, means that, as my

noble friend Lord McKenzie noted at Second Reading, probably some 600 people will have died from mesothelioma during that time. As those representations have said, it seems very unfair that they should be excluded from the scheme. This is a point very well made by the noble Lord, Lord Alton, and others: the date of consultation would be a natural point. It falls to the Minister to persuade the Committee and then the House of any other date, which so far I do not think we have had.

The Minister said at Second Reading that the reason for not keeping the scheme totally open-ended is that the costs would be prohibitive. The reason for picking the particular date of 25 July, we learnt from a subsequent briefing, was that that was the point at which there would be a reasonable expectation that sufferers could get a payment and therefore relevant insurance companies could provide in their accounts for the liability that would ensue.

I wonder if the Minister could help me to understand this a bit more. What is the regulatory or legal framework under which insurers either may or may not provide for a liability at a particular date? I would also be grateful if he could explain whether he actually means reserving for a liability. If so, how is this a liability? Unlike for people who claim under the courts in the normal way, for which there clearly is a liability for which an insurer will provide in the normal way, based on the premiums and the exposure that they have had for business written, is the payment that will be made in the levy not simply in fact an annual payment rather than a liability? If so, how is it in any way covered by rules on provisioning or reserving in the accounts? I would be grateful if the Minister could explain that to me. If not, maybe he could explain where it comes from.

Whether or not the industry has to reserve, it clearly would have to plan to face a change in its cost base as a result of any decision taken at the end of the Bill, so it is worth revisiting how we got here. The noble Lord, Lord Alton, has made reference to the *Accessing Compensation* document issued in February 2010. He quoted the most apposite point, where the Government of the day, in the person of my noble friend Lord McKenzie, made clear that their intention was to take some action in this area. In terms of funding for the ELIB to which he referred, though, the document was brief. It said:

"One option would be for the insurance industry to provide the funding. The argument for this is that the industry has, in most cases, taken the premiums for policies that are now not being traced. The industry should therefore fund the full costs of an ELIB, including the set up and running costs".

Well put. No other funding source, at least that I have found, was proposed in that document. In other words, if I am right, there was no option two. An impact assessment produced with

that document showed that there was an assumption of an implementation date of April 2011. The document also looked at the scope of the fund and therefore the potential scale of the cost that insurers could reasonably expect to have to face, having read that document.

The impact assessment assessed costs along two axes: whether or not to include all relevant diseases or just mesothelioma, and whether simply to take people

from the start of the scheme or all claims brought in the past three years. It is clear that, whether or not the extent of the liability was certain, the Government's intention was clear at the point of going out to consultation. Furthermore, the proposals in the Bill are very much at the modest end of the spectrum of options explored within that consultation document, so it does not seem unreasonable that the insurers might well have foreseen the liability, or the cost, that they are now going to face.

Given the speeches today from my noble friend Lord Howarth of Newport, who made a very persuasive case, as did the noble Lord, Lord Alton, and the questions from the noble Baroness, Lady Masham, and my noble friend Lord Wills, not to mention the widespread concern about this point right across the House at Second Reading, if the noble Lord wishes to persuade the Committee and ultimately the House that he is to have a cut-off date for people coming in, I think that he has his work cut out to make that anything later than 10 February.

Perhaps the Minister can try to clear up a few other questions for me. First, in letting us know the source of this constraint or requirement to reserve or not reserve, can he explain how that affects the date at which an insurer could reserve and, if so, whose decision is it? Secondly, do the Government have any evidence that insurers have in fact been reserving since July 2012, the point at which the Minister is confident they were clear as to the liabilities? Finally, if the Minister is not willing to share legal advice—and I may yet be surprised on that front—can he tell us if the Government have a concern that they could be exposed to legal action were they to impose a requirement other than a July 2012 date? That would be helpful.

I remain pleased that the Government are acting on this matter and I appreciate the Minister's commitment to it. However, as my noble friend Lord Howarth of Newport said clearly, that does not take away our responsibility in this House to ensure that the legislation is the best it possibly can be.

Lord James of Blackheath: Perhaps the Minister will allow me to make one last entry into this debate. I believe that I can answer part of the question asked by the noble Baroness, Lady Sherlock. I am probably the only person in this Room who has ever made a financial provision for asbestosis. I did so on the last day of December in 1998 when I signed off the creation of Equitas; £12.8 billion of assets were locked in an investment fund put together by Warburg's, with the countersignature of the Bank of England on it, so it was pretty good. The £12.8 billion has been sitting there and can be used only for each category of settlement of claim. One category is labelled asbestosis. I left £6 billion in there, but it is £6 billion with an annual growth rate of 6%.

When Equitas was sold for a knock-down price to Warren Buffett's Berkshire Hathaway in 2009—I hasten to add, not with my approval—he took over all the asset reserves that were

left. So even after Equitas had traded for 13 years, he got a residual balance of £8 billion of my original £12.8 billion—still growing at 6% per annum. My calculation at that time was that he

was left with £5 billion for asbestosis. But the £5 billion effectively included a great deal of unidentified claims, because it was largely rolling up the reinsurance claims around the world. It is very incestuous, this claiming business: everybody insures each other and they come up with these collective figures.

At the moment, my estimate is that the global reserves for asbestosis of all the insurance companies in the world are £65 billion, including all the reinsurance markets around the world as well. But they do not expect that that £65 billion will be paid out. Let us suppose that you settled Turner & Newall for £1 billion—you will not, but let us suppose you did. You would take £1 billion out of the Lloyd's of London reserve of £5 billion and you would have £4 billion left. But immediately you would have wiped out the consequential reinsurance demands down the chain, so the whole industry would write back as profit something in the region of £15 billion to £20 billion of released reserves.

We have a huge potential gift to the insurance industry here and we must not give it away too cheaply. We can screw this insurance industry into paying what it long since has deserved to pay. Why has it not settled so far? Right through the six years of the collapse and rescue of Lloyd's of London, the great myth was that there was a massive amount of claims arising in the USA that we had insured and that those claims were largely spurious because they had used television advertising to get people to join up. You did not have to have any illness or even to have been in an asbestos building; you were just told, "Sign up, join in, it is a free lottery ticket"—that was the advertising in America.

We were expecting, having worked at government level and failed, to get the American President to impose strict standards on the American industry to force it to have only legitimate claims. If that had happened, we would have taken billions out of our liability and saved Lloyd's of London without the need of Equitas. It never happened, but then up comes Warren Buffett and buys it for a knockdown couple of billion. I would put a very substantial sum of money on him having a letter in his back pocket from the President, agreeing to write off those claims or to curtail them. He is going to rip out the whole of that profit. We should not sell cheap on this; there is a huge amount out there, which we can get, and we need very much to play hardball.

Lord Howarth of Newport: Given the noble Lord's deep knowledge of this, since Equitas was set up to rescue Lloyd's from the chaos caused by its exposure to asbestosis claims, Equitas must presumably have a great deal of documentation in its files. The missing documents that would enable claimants to validate their claims before the courts might conceivably, in some cases, be within those files. Are they now in the custody of the "Sage of Omaha"?

Lord James of Blackheath: In the main, they are in the custody of what was the Department of Trade and Industry, because it oversaw and supervised this. It should be the port of first call for that.

Your Lordships must understand that, on Lloyd's of London and its reserves, it still has not closed the file on the "Titanic" because it was not the "Titanic" that sank. Perhaps you know that story. It was the "Olympic", which was substituted at the last minute because it was not finished and ready to sail. On those grounds alone, Lloyd's of London has refused to settle most of the claims on the "Titanic" ever since, because the claims were all on the wrong ship.

Noble Lords: Oh!

Lord James of Blackheath: I am sorry, but that is a true story.

We are worrying about whether we have the files on these, but Turner & Newall, which is the great case—the biggest of them all in this country—did not keep the records. We just had a general claim from Turner & Newall for everything. It was a blanket cover, which ensured that we would take any claims that came against them and sort them out according to their own merit at that time. The records that the DTI had are the best that still exist and should be taken on as part of this review. Some of them will have gone to Warren Buffett and he will be using them as part of his negotiations, probably against us. The records are not as bad as your Lordships think. They are meticulous in going back, but they are mostly blanket covers, not specific to individuals. That is the problem.

Lord Freud: My Lords, we could spend a lot of time on this. I was at Warburg when it helped to sort out Equitas, although I was not on that particular transaction—and I am grateful for that.

Amendment 9 would have the effect of ensuring that the scheme paid not only everyone with diffuse mesothelioma but any living dependant of a person who had died with diffuse mesothelioma at any time. Amendments 11 and 14 would have the effect that, once the scheme came into force, all living people who were diagnosed with diffuse mesothelioma on or after 10 February 2010 would be eligible for a payment from the scheme. They also provide that any living dependant of a person with diffuse mesothelioma who had died on or after that date would be eligible.

I think that the February 2010 date mentioned in these amendments is meant to be closely linked to the date when the last Government published their consultation paper *Accessing Compensation: Supporting People Who Need to Trace Employers' Liability Insurance*. That was 11 February 2010, as the noble Lord, Lord McKenzie, will vividly remember. I remind noble Lords that on that date the Government were consulting on the best way forward. 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.

5.30 pm

Baroness Sherlock: The Minister is again speaking of reserving for the liabilities. I am grateful to the noble Lord, Lord James, both for sharing his considerable expertise and experience and for helping me to understand that I clearly phrased my previous question poorly. I was trying to ask the Minister whether, when he refers to insurance companies reserving for the liabilities, he makes any distinction between the fact that an insurance company would in the ordinary run of things reserve against a future liability that would crystallise if and when somebody whose employer had been insured by that insurer were to develop mesothelioma, and the fact that what an insurance company will have now is arguably not a liability but a requirement to pay something that is more like a tax. Here, I declare an interest as a member of the board of the Financial Ombudsman Service. Is this situation not more like some aspects of the levy applied by the FCA on relevant financial services companies, which requires them to contribute, for example, to the cost of the Financial Services Compensation Scheme? In other words, it is an annual cost that is fixed by the body imposing the levy and not a liability that arises directly from activities of the company. Therefore, does the question of reserving not apply at all?

Lord Freud: What happens is that insurers have to provide that they have sufficient funds to meet their liabilities. The levy is a hypothecated tax that they have to pay so that their ability to meet their liabilities is monitored by the Financial Conduct Authority, the FCA—or the FSA, to those of us using old money. The insurer could not pre-empt the outcome of the consultation. That was something that they could not do and did not do, as I understand it.

Lord McKenzie of Luton: Can the Minister expand on that point? I understand the need to provide for liabilities, but is that not separate from the scheme payment? We only get a scheme payment if in fact the insurer is not liable, or only liable in respect of paying the levy. I do not understand the analysis that he has just made.

Lord Freud: What the insurer has to do, as I understand it, is to provide for future liabilities. Through an elaborate process with its accountants and the FCA, it has to provide the appropriate amount on reasonable assumptions. It is quite a formalised process. That is the process that we are looking at here.

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Lord Wills: I am sure that shortly the Minister will give us an assurance that he will provide the figures that my noble friend Lord Howarth asked for in proposing his amendments. I also ask, in relation to this particular point, whether he can provide the Committee with any assessment that his department has made of the effect on insurers' balance sheets of either of

these two amendments—in other words, the one that has the start date in February 2010 and my noble friend Lord Howarth's amendment, which would not set a date at all.

Baroness Sherlock: I would like to offer the Minister a way of reassuring us on this because we may be talking at cross-purposes.

Obviously, if an insurance company finds that its annual costs of doing business by staying in the market and providing active employer's liability insurance are going to be higher, it will need to make sure in its usual planning that it has the resources available to enable it to pay the annual costs of doing business to stay in that market. That is not the same thing as saying it must reserve formally against liabilities that it has. That, as I understand it, is the Minister's main argument as to why they could not have begun this process earlier. If it were about reserving for liabilities, there are clear regulatory requirements and negotiations with auditors that would constrain the point at which the insurance company could start doing this.

However, if we are simply looking at a higher annual cost—and I am not suggesting that that is not a relevant or material consideration to the company—of remaining in the market which is unrelated to the nature of the specific policies that were written, there is presumably no reason why the insurance company could not have planned for that by reading carefully, as I am sure it did, the document published by my noble friend Lord McKenzie. This showed clearly that the Government wished to intervene in this area and the options on which they were consulting, all of which would clearly have required the industry to pay out. It was clear that that was coming down the track.

A way for the Minister to solve this would be to answer my other question. Could he provide—either now or by the next sitting—some evidence of an insurance company that has reserved since the announcement was made in 2012? There must be companies that have a 2012 financial-year end date. If the Minister is right, insurance companies will presumably have reserved. Perhaps he could share that with us.

Lord Freud: I will double-check, my Lords, but my understanding is that a reserve from an insurance company is not specified out. There would be a general sum overall and we would not be able to extract those elements. I have made clear that we are not talking about a general level of doing business but about a specific reserve created because of this particular liability. That is what we are talking about.

Lord Browne of Belmont: If I understand correctly the background papers to this scheme, particularly the impact assessment, the Government have agreed effectively to fund this scheme from the period July 2012 until

February 2015 by a process of using what will be paid to them in recovered benefits. The wording in the impact assessment is that the Government have agreed to do this. However, is not all of this argument utterly irrelevant if the insurers pass this on in the premium? Paragraph 97 of the impact assessment comes to the wrong conclusion. The argument clearly comes to the conclusion that that is what they intend to do.

Lord Freud: That is one of the central issues with imposing a levy based on the existing market share. There is a risk that that will happen if we push up the levy too much,

particularly if there is a sharp increase. As noble Lords are aware, the way in which these matters normally work is through a sharing of the levy. The likelihood is that some of the levy may be passed on in the marketplace. However, the levels at which we have established the levy—and the smoothing mechanism to which the noble Lord, Lord Browne, referred was part of it—were achieved by taking some of those other payments and circulating them in the first year to give us the best possible chance that the insurance industry will absorb the bulk of the levy.

I shall now provide the figures that noble Lords have been waiting for so incredibly patiently. If this scheme started on 20 or 21 February 2010, the extra costs would be £119 million. As to the undated amendment of the noble Lord, Lord Howarth, our best estimate is that if we went back to 1968, the figure would be £747 million. Clearly, a large number of assumptions were made in reaching that figure.

I would just like to finish off the figures. I am not going to spend too much time going over the noble Lord's "cornucopia" argument. I just want to make this simple point: one of the things that the insurance industry does, at least when it is in a competitive position, is look to build in what the returns on its reserves and its income may be when it sets rates. It is not just a kind of a surprise—"We got all this extra money out of those returns!"—but is built into the marketplace. Otherwise, everyone in the whole world would become an insurance operator, and we would all have been wasting our time because it would have been a free lunch. There is some competition in the market. Clearly it is a very interesting and complicated market, and it depends on how much capital goes in and out of it. Let us not go into that. We have had a lot of debate about the more general issues, but I just thought that I would touch on that.

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

Clearly, any date will mean that some people miss out. Choosing the dates in the amendments would mean that more people received the payment, but there would still be people who did not. On balance,

I believe that pinning eligibility to a date when people with diffuse mesothelioma had a reasonable expectation of payment and insurers knew when they needed to start to reserve the levy, represents the best that we can do. I am not in a position to provide or mention anything on legal advice that we may or may not have received by convention, which noble Lords will be fully aware of.

I need to make the point that social security benefits and existing lump-sum schemes will continue to provide early support for people with the disease who were diagnosed from before the 25 July date. I therefore urge the noble Lord—

Lord McKenzie of Luton: Will the Minister confirm whether the £119 million is gross or net of benefit recovery?

Lord Freud: I think that it is net, but I will have to write with the right answer to that. I urge the noble Lords and the noble Baroness to withdraw the amendment.

5.45 pm

Lord Howarth of Newport: My Lords, this has been a valuable opportunity for us to begin to explore one of the most important issues arising from the Bill, as well as one of the most technically complex. The noble Lord, Lord Alton, made the important point, in addition to the observations that I had made, that for many years insurers pocketed the state payments of lump-sum compensation. Again, that needs to be taken into account in evaluating where justice lies.

I am particularly grateful to my noble friend Lord Wills for supporting my amendment, but the majority of noble Lords who have participated in the debate have preferred to focus on whether the start date for the scheme should be February 2010. I do not doubt that that is where the focus will remain when we revert to this matter.

My noble friend Lady Sherlock asked the most beautifully expressed and forensic questions, about which she was too modest, but there is no question but that the interventions of the noble Lord, Lord James of Blackheath, were like flashes of sheet lightning across the proceedings of the Committee. He gave us some remarkable figures about the sheer scale of mismanagement, before he came to the rescue through Equitas, but also the sheer scale of loss, I fear, to the interests of this country in many important respects, because of the sale of the assets of Equitas at a huge discount to Berkshire Hathaway.

I was, however, particularly struck by what the noble Lord had to say about the documentation. If the DTI has somewhere in its vaults great crates of documentation dating back decades concerning employers' liability insurance, the Minister may well have to go back to the drawing board to start again. We do not want him to do that, because we want the scheme, in a significantly improved version, to hasten to the statute book.

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Lord Freud: I remind the noble Lord that Equitas and Lloyd's were dealing with reinsurance, not primary insurance. There may be some information there, and it may be of great interest to the insurance industry—I am sure that it is looking at that—but, regrettably, I can assure him that there is no reason to pause the Bill because of that information.

Lord Howarth of Newport: I certainly accept that point, but I also noted what the noble Lord, Lord James of Blackheath, said about the incestuous character of the industry, how involuted it is and how they all insure and reinsure with each other. If we are to unravel what has happened—a later amendment to the Bill points us towards a further effort to unravel the past, the most deeply regrettable and scandalous past—in this area, the DTI archives may be an early port of call. I hope that the noble Lord, Lord Freud, will not dismiss the possibility that the documentation associated with Equitas which reposes in the DTI archives may enable more people to be able to make a claim for employer's liability if they have access to those files.

The Minister told us that he fought to get his Statement out by 25 July 2012, and I can well believe that. We praise him and thank him for getting it out even at the last moment before Parliament rose for the Summer Recess.

On the question of reserving, I venture the observation that, whatever the rules and regulations may be, they do not prevent insurers from reserving prudently against liabilities that they can reasonably foresee. I am not impressed by the Minister's argument that the scheme's eligibility should run only for people diagnosed after the date on which he made the formal announcement that the Government would bring in a scheme, and that it is only from then that insurers could begin to reserve against that liability. I just do not accept that. We will need to think much more carefully about the obligations on reserving, but 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.

As for the noble Lord's fears that if the levy were increased to pay for a more expensive scheme, the insurers would simply pass on the extra costs to employers—well, they will pass on whatever they can to employers just as soon as they can. As I understand it, that is how insurers operate. They pitch their premiums at a level that they believe the market can afford. There is some downward pressure because of their need to compete with fellow insurers but collectively they will all rejoice in market conditions that make it possible to raise their premiums. Of course, they will use any excuse they can to raise their premiums because they want to maximise their profits. I do not see that holding down the levy is going to stop employer's liability insurers raising their premiums just as soon as they can. Any additional costs from extending eligibility for this scheme to different categories of people or people who were diagnosed at an earlier date are not likely to make a material difference to the premiums that are sought in the market because there is a host of

factors in the market that shape the level of premiums that insurers seek to be able to sell. This is only one and far from the most substantial among them.

We will return to these issues. In the mean time, I withdraw the amendment.

Amendment 9 withdrawn.

Amendment 10

Moved by ***Lord Alton of Liverpool***

10: Clause 2, page 1, line 17, leave out "25 July 2012" and insert "1 February 2010"

Lord Alton of Liverpool: My Lords, Amendment 10 has already been dealt with in the debate we have just had, so my remarks will concentrate entirely on Amendment 31, which is grouped with it.

Earlier in our proceedings, I recalled that in 1965 the *Sunday Times* reported on how an epidemiological investigation by Newhouse and Thompson, undertaken for the London School of Hygiene and Tropical Medicine, had shed light on the origins and nature of this

terrible disease, finally laying to rest the scepticism of some pathologists who had until that time disputed its existence and its long period of hibernation.

More than three decades earlier in 1930, the Merewether report had warned of a latency for asbestosis of some 25 years. No one can reasonably claim, therefore, that the industry, Government or employers did not understand the risks that workers faced. Yet, staggeringly, this vicious disease has had Cinderella status when it comes to research spending. It is not hyperbole or overstatement to assert that it is nothing short of a national scandal that a disease predicted to kill a further 56,000 British citizens between 2014 and 2044 receives not a penny of state funding for medical and scientific research into understanding its nature and identifying cures. What other disease that kills 2,400 British people every year has to rely entirely on what money can be scraped together from voluntary organisations such as the admirable British Lung Foundation?

In 2011, the British Lung Foundation invested £1 million in research. Here I must pay tribute to those four insurance companies that voluntarily supported that scheme and provided that money. The rest of the voluntary sector invested £400,000. By contrast, the Government invested nothing at all. This is scandalous when we are dealing with a disease that kills so many people and when we compare it with the fabulous sums of money that the noble Lord, Lord James, referred to in the previous group of amendments—billions of pounds being invested compared with £1.4 million given voluntarily, without a penny piece of state funding, for research into this shocking disease.

Back in 1965, the *Sunday Times* also reported, on the back of stories emerging from London, Belfast, Newcastle, Leeds and Liverpool, some of which have been referred to in our earlier debates, that research would be conducted to examine causes and find cures. That was 50 years ago and we are still waiting for a research base that matches the scale of the problem. Fifty years later there is still no cure, and most people

die within two years of diagnosis. The UK mesothelioma mortality rate is the highest in the world. The number of deaths is roughly double the number due to cervical cancer, for example.

My amendment seeks simply to open a debate about the lack of funding for mesothelioma research. Paradoxically, if we could find a cure, it would not only eliminate horrendous human suffering, it would also eliminate the need for the millions of pounds of compensation that we are debating during these Committee proceedings. So there are humane and altruistic reasons for supporting funding of mesothelioma research, but for the Government and the insurance industry there are straightforward financial considerations too. As well as adequate compensation, we should be prioritising much more of our time and money to finding a cure to prevent the ravages of this fatal disease. Of course it would be impossible to eradicate all asbestos from our homes, schools, hospitals, factories and offices, and it is welcome that there is a general desire to act justly to those who have been afflicted with mesothelioma. But the one certain way to prevent deaths from mesothelioma will be to find a cure. That will not happen without adequate resources and that, in turn, requires political will.

I said that mesothelioma has a Cinderella status. Let me illustrate what I mean. Contrast £1.4 million spent on mesothelioma research with the £22 million for bowel cancer, the £41

million for breast cancer, the £11.5 million for lung cancer, the £32 million for leukaemia. Indeed, there are 17 other forms of cancer for which far more research resources are reserved than for mesothelioma. Mesothelioma is quite literally at the bottom of that list.

In 2011 the voluntary sector invested £5 million in myeloma research and £5.6 million on malignant melanoma, the cancers immediately above and below mesothelioma in the table of mortality figures. Yet, even with such limited funds, there have been some exciting developments. I think that some of my noble friends will refer to these. They include the creation of the world's first mesothelioma tissue bank for researchers, a transatlantic collaborative study of the genetic make-up of mesothelioma and work on overcoming resistance to drugs used to treat the disease. It shows what can be done with the right investment. We have an opportunity in the course of the proceedings of this Committee 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.

At Second Reading, I gave the Minister a letter, which was then circulated in your Lordships' House, and has been signed by 20 noble Lords and Baronesses from right across your Lordships' House. Subsequently a letter supporting the same points was published in the *Times*. This letter underlines the breadth of support throughout the House for the principles that underpin this amendment. Not necessarily the detail—I fully accept that this could be rewritten between now and Report stage, that it can be modified and changed. It is the principle that I am primarily interested in at this Committee stage and that is the point that I will be most pressing the Minister on.

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This proposal enjoys the support of many Members of your Lordships' House, the British Lung Foundation and the victim support groups. The proposal involves a small administrative or membership fee to those companies in the scheme and would raise £1.5 million a year. It would have no implications for the public purse, although I hope that the Government will consider providing at least match funding—it is, after all, receiving millions of pounds from the new scheme. I hope that the Minister, when he comes to reply, will tell us what money his Government will pledge for research and what progress he is making with the Department of Health, the Medical Research Council and the Treasury in putting together a scheme that will address this issue. Such an initiative will bring justice and hope to those who are blighted by a disease that was none of their making.

The Minister met with me on Monday, as I said earlier, and again I am grateful to him for the patience and courtesy that he always shows in dealing with this and the proceedings of the Committee. We discussed the detail of this amendment. One aspect that I know that the Minister does not like is the £10,000 levy that would be paid by all insurance companies. The Minister feels that if there were such a scheme it would better if it were tied to market share or turnover, rather as the levy for compensation is, in the context of the Bill as a whole. I accept that this approach would be in line with the way in which the compensation clauses of the Bill work and I would be very happy to modify the amendment to accommodate that point. A proportionate levy would be equitable and wholly acceptable to me. When the Minister comes to reply, will he indicate whether he would like to bring forward a modified amendment on Report to reflect that kind of change on that kind of basis?

6 pm

There is then the vexed question of hypothecation. I have drawn to the Minister's attention, and I also draw it to the attention of the Committee, the precedent of Section 123 of the Gambling Act 2005. It contains a provision for a hypothecated industry levy. That counters the suggestion that I have heard that it is somehow impossible to hypothecate in legislation. That the Section 123 power may not yet have been exercised is entirely irrelevant. The fact that the levy provided for in the Gambling Act has not so far been used is neither here nor there. In that case, the idea was to have a back-up in case voluntary systems proved inadequate. It may simply be that it has therefore not been necessary to impose a formal levy so far, and that, too, is a very helpful precedent when considering what we want to do in this amendment. It is a power that Parliament has, rightly, chosen to place on the face of legislation, and in this instance we should do precisely the same. Ultimately, it will then be a question of political will.

Then there is the much invoked Human Rights Act. The Minister in charge of the Gambling Act 2005—the late Lord McIntosh of Haringey—felt able to make a statement under Section 19(1)(a) of the Human Rights Act 1998 that the Bill was compatible with the convention rights, despite it containing a clause, which eventually became Section 123, providing for the imposition of a

hypothetical industry levy very similar in nature to the proposal in my amendment. It would be very helpful if the Minister could explain how the human rights situation might differ between Section 123 of the Gambling Act and my own amendment.

The Minister has also said that a government department cannot raise funds for activities outwith the department's remit. I should be grateful if he could explain in rather greater detail to the Committee why that is the case. I have sought the opinion of a barrister—one who specialises in drafting legislation—and he says that that is simply not the case because there is no such thing as a single government department in law and, anyway, anyone can do anything that Parliament says they can do. After quite a long time in either this place or the other place, I hope that that is the purpose of Committees precisely such as this. Provided that the clause is clear about who can do what there is no bar on any Minister doing, anything to raise money for a statutory purpose may be permitted.

Finally, there is the question of joined-up government. Perhaps the noble Lord can tell us about the conversations that he has rightly had with his noble friend Lord Howe about the possibility of the Department of Health being included in the legislation as the agency through which funds could be channelled for research. What were the grounds on which that department declined to participate in such a partnership? I understand that that was the subject of a meeting between the Minister and his noble friend Lord Howe earlier this year.

Given that there is a valid precedent in law in the form of the Gambling Act, a solution to any human rights objection—that is, a proportionate levy—and a clear power for government departments to raise money outwith their remits, what exactly are the outstanding objections to the proposal? Surely it is the principle contained in this amendment, with which I know the noble Lord will have some sympathy. Surely, if he does have sympathy with that principle, he should now help us all to overcome any of these objections, rather than raising objections. Accepting this amendment or something like it—the principle of it—would finally remove

mesothelioma's Cinderella status and offer hope to some of those 56,000 British citizens who will die of this disease if no cure is found. I beg to move.

Lord Walton of Detchant: My Lords, it is a pleasure to follow the noble Lord, Lord Alton, particularly in the light of the lucid and forceful way in which he has proposed this amendment. I have added my name to the amendment because I believe very strongly that, as he has pointed out, the amount of funding in this country that has been devoted to research into mesothelioma, its causation, its development and its treatment has been miniscule. I join him in paying tribute to the contribution over the years made by the voluntary organisation, the British Lung Foundation, in examining ways in which research into this wretched disease can be conducted. However, the Government's contribution to this research—for instance, through the Medical Research Council, of which I was once a member—has been minimal. Therefore, I am very much in favour of the principle underlying this amendment.

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I used to teach my medical students that while there are plenty of incurable diseases in medicine, there are none that may not have their effects modified by pharmacological, physical or psychological means. Mesothelioma is almost an exception to that rule, although it is clear that in the early stages of the disease certain physical mechanisms can alleviate some of its worst effects. The tragedy of mesothelioma is that the deposits of this cancerous process are laid down in the pleural cavity, between the surface of the lung and the internal surface of the chest wall. Gradually, as those deposits increase, the actual flexibility of the movement of the chest wall—in the muscular contractions which are responsible for our involuntary taking in and expiring of air—is slowly but progressively lessened, so that in the end the patient is almost subject to the feeling of having a straitjacket around their chest that prevents them from respiring. Eventually, it is fatal. Happily, there are mechanisms with drugs, sedatives and many other things that can help to ease the terminal phases. Nevertheless, the end result is tragic and appalling for anyone who has witnessed it.

A colleague of mine who was a consultant neurologist developed mesothelioma—the result, it appears, of being as a youth a keen club cricketer in villages in County Durham. It turned out that the changing room in which he regularly changed before appearing on the cricket field was lined with asbestos. That was eventually thought to have been the source from which he acquired this disease. It is a tragic condition and it deserves close and careful attention.

I also used to teach my medical students that today's discovery in basic medical science brings tomorrow's practical development in patient care. As yet, there has been no such basic discovery in the science underlying the causation and development of mesothelioma and, as yet, no drug has been discovered that is capable of reducing that progressive, cancerous deposit and the progressive process of strangulation. That is not to say that there have not been some limited discoveries that have benefited individual patients, but much more is needed.

I know what the Minister will say: that an amendment such as this has no place in a Bill or a statutory instrument because it is, in a sense, permissive. I can understand fully the view that he is going to take in that regard. However, I do not believe that it is beyond the wit of man, and certainly not beyond the wit of the Minister, to achieve some kind of Machiavellian

political intervention or manipulation enabling the principles underlying this amendment to be fulfilled in law.

Although I have given my name to Amendment 31, I must say that I disagree with its last phrase. It says that,

> "the funds raised through this charge shall be remitted to a competent research institution to fund research to find new treatments for mesothelioma".

It should say "a competent research-granting organisation". What could be better than the Government's own research arm, the National Institute for Health Research, which is chaired by the Government's Chief Medical Officer, Sally Davies? It could be the perfect example. I hope very much that the Government

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will find the means to fulfil the principle underlying this crucial amendment in managing to persuade these insurance companies— perhaps "persuasion" is not exactly the right word; it might need something a bit firmer to get the money out of those bodies—to enable the National Institute for Health Research to fund crucial research on this devastating disease. It deserves everything that we can put into it and a great more than we are already doing.

Baroness Butler-Sloss: My Lords, I, too, have put my name to Amendment 31. It is with some hesitation that I rise to speak after the two formidable speeches that we have just heard. Having put my name to the amendment, though, I want to say something to support it. It is indeed a modest amendment but it has enormous potential advantages for important research seeking new treatment and a possible cure. We have already heard from the noble Lord, Lord Walton of Detchant, what he thinks could be done and why it needs to be done. Of course, I defer to him.

As one of three judges in the Court of Appeal, I heard a number of these cases, and each story was tragic. Although I was a judge for 35 years, these stories have remained with me. We know that currently there is no cure. We know that currently the treatment is poor compared with that for other forms of cancer. It is crucial and urgent that we have proper research. As the noble Lord, Lord Alton of Liverpool, has said, it is a scandal that this is so poorly supported, when it is a killer but other forms of cancer can be treated and people can live for a long time. Sufferers die two years after the diagnosis—it is like motor neurone disease, and even that, as I understand it, gets more research funding than this does. It is extraordinary that the people who suffer from it are not properly regarded by the state or indeed by insurers. It is high time that the lack of financial support should be remedied with this Bill, at least to some extent.

I very much support the principle of the amendment. Like the noble Lord, Lord Walton of Detchant, I do not entirely support the wording. I do not think that matters because we are not going to vote on it today, and if the Government can come up with better wording and be supportive, that is exactly as it should be. The amount of money that would be raised under the present scheme is a modest £1.5 million. It would be much better if the Government felt able to match it; that would be valuable.

I was entertained by the reference by the noble Lord, Lord Alton of Liverpool, to the Gambling Act, which shows a very useful precedent. It is just possible that if some law were passed in this Bill, we could then to go the insurers on a voluntary basis and say, "If you don't, it will be backed up by primary legislation". So we want it there as a spur. If that can be done in gambling, I really do not see why it cannot be done in mesothelioma.

Lord Wigley: My Lords, I, too, have added my name to Amendment 31. I thank the noble Lord, Lord Alton, for the diligent commitment that he has shown to these issues, which I know is appreciated by all

concerned. He deserves to succeed with this amendment. Following on from what the noble and learned Baroness said a moment ago with regard to the potential leverage that an amendment such as this could carry, it reminded me of the term used in chess that the threat is always more dangerous than the execution. Having this in the armoury, I suspect, would be very useful indeed.

Under the proposed new clause, the scheme administrators would be permitted to charge an additional annual administration fee of some £10,000 from each insurer. One can argue, certainly, that there could be a sliding scale there. That is detail; it is the principle that we are after here. The clause sets out that all funds raised from this fee would be invested into research for treatments for this awful disease. Listening to the noble Lord, Lord Walton, speak from his own experience of the medical world, we see the pressing need for these funds to be made available. They should be available already. They should be coming from the normal course of research funding. But as they are not, we need to do something and there is an opportunity to do so here.

6.15 pm

The Department for Work and Pensions has estimated that 150 insurance firms are active in the employer's liability insurance market. If a £10,000 annual fee were charged to each of those bodies it would raise, as has been suggested, £1.5 million every year towards mesothelioma research. That would be a tremendous sum. Funding of that order could make a difference. As has been said, with some 2,400 people a year dying in the UK from this debilitating disease—the highest rate in the world—something needs to be done. The British Lung Foundation estimates that over the next 30 years, as a number of colleagues have mentioned, some 50,000 people will die from it if the cure is not found. There is a need to put the resources in to find a cure and to act now, surely, for the sake of the people for whom the clock is already ticking.

To put this into context, according to the figures obtained by the National Cancer Research Institute, at present the British Lung Foundation provides the bulk of the research funding. My understanding is that in 2011 it was able to put in only some £850,000, but that was certainly worth while, while only £400,000 was invested in mesothelioma research by other charities. None of the funding came from the Government.

For the past three years, four leading insurance firms have invested about £1 million a year between them in mesothelioma research, following an agreement brokered by the British Lung Foundation, and we are indebted to the work that it has done. As a result of this,

Europe's first mesothelioma tissue bank has been created in order to collect and store biological tissue from mesothelioma patients, which can be used in research. I understand that research is currently ongoing to identify the genetic architecture of this disease but, as the agreement was only for a three-year period, that funding will soon come to an end. The small number of insurance firms that funded this initial research have indicated, as I understand it, that any long-term funding into treatments and possible cures for this disease should be funded by the industry more widely.

They have also argued that a voluntary agreement covering all the firms involved in the employer's liability insurance market would be unworkable and, as a result, legislative underpinning would be necessary. That is where we started and it is where I conclude. I hope that the Government will act.

Lord Kakkar: My Lords, I support Amendment 31. In doing so, I declare my interest as professor of surgery at University College London, an institution that is actively involved in cancer research. We have heard about the importance of mesothelioma and the impact that it is going to have in the next 30 years with regard to the deaths of many tens of thousands of our fellow citizens. However, I wish to build on the comments of my noble friend Lord Walton of Detchant, who has spoken with considerable eloquence about the importance of research. This is a disease that is going to afflict many of our fellow citizens but there is no strategic defined national research initiative for it. That is quite striking, and it is a serious deficiency in the otherwise hugely successful and important approach that successive Governments have taken towards having a national research effort, conducted either through the work of the Medical Research Council or through the National Institute for Health Research.

We have heard about the important role that four insurance companies have played to date, providing some £1 million a year between them to support research in this area, supplemented by important charitable contributions. We cannot underestimate the importance of even this small contribution to having kick-started research and academic interest in this area. The meso-bank that we have heard of is a very important national initiative that will have global significance, because collecting tissue from patients afflicted with mesothelioma provides the opportunity for fundamental and translational research on those tissue samples to ensure that there is better understanding of the disease.

As we have heard, there is no opportunity at all to develop either better diagnostics or indeed treatments and cures for this particular form of malignant disease unless we understand fundamentally its biology. Collecting tissue using tissue banks and bio-banks is the basis of modern medical research, and it would not have been possible without the contribution of insurance companies and the work of the British Lung Foundation in having facilitated that. However, this work—these bio-banks, the meso-bank—needs to continue in future.

On that basis, large academic groups have started to focus on the question of mesothelioma. That would not have happened without the funds currently available. Scientists, academics and clinicians have come together, now in reasonable numbers, to focus on the question of mesothelioma as a result of recognising that funds to support their research would be available. If the signal cannot be sent in future that funding for research in this area will be

available, regrettably, no research will be undertaken. That is the simple truth: without funding, research cannot be promoted and completed.

Interesting work is being undertaken at the Sanger Institute in Cambridge as a result of the limited funding currently available, which has allowed the first molecular

characterisation of mesothelioma, providing a better understanding of genetic mutation and signalling pathway defects which could offer targets for future drug development. A disease in a similar situation to mesothelioma some years ago was melanoma, the malignant skin cancer. As a result of research focus and a better understanding of the molecular biology of melanoma, we can now offer patients biological therapies targeted specifically at the genetic and signalling defects that characterise their cancers, improving the outlook for certain patients with certain types of melanoma. It is surely possible to conceive that, with appropriate research funding, the same might be achieved for mesothelioma.

In addition to those two important areas—the meso-bank and genetic and molecular research into the nature of mesothelioma—the limited funds available for only a three-year period have also stimulated important research into better palliative care for patients with mesothelioma. Again, that is vital, because the median survival for that disease is only 12 months. Those few who respond to current chemotherapy have only an additional two months—eight weeks—of added median survival. For the vast majority, the reality of modern care is palliation of their disease, so research into appropriate palliation is vital, again supported by those limited funds.

I had some hesitation about the implications of the amendment more broadly but, having listened to the important contributions so far in Committee, it is clear that there is a potential route forward to pass an amendment that would stimulate the national research effort in this area. It would ensure that we are able to provide important funds either through having available in statute but not using—as, we have heard, is the case with the Gambling Act 2005—or having a tool available to apply to members of the compensation scheme. There is an important discussion to be had about how those funds would then be distributed to research-active organisations to ensure appropriate peer review, and that mechanisms from the National Institute for Health Research or one of the research charities could be used to facilitate it.

Without the emphasis in the Bill, it is likely that the early progress being made towards better understanding of the disease and, ultimately, providing treatment for it will be lost. That would be a great shame for the tens of thousands of our fellow citizens who will suffer from that terrible condition.

Lord Pannick: My Lords, I, too, support Amendment 31, for all the reasons powerfully advanced by the noble Lord, Lord Alton of Liverpool, and other noble Lords this afternoon. I should be very surprised if the Minister were to suggest that there is something inappropriate about a statutory levy on an industry to promote a valuable public purpose. It is not only in the Gambling Act 2005, there are other statutory examples that one could refer to. As long ago as 1963, Parliament decided that, under Section 24 of the Betting, Gaming and Lotteries Act, the levy board has a power to charge on all bookmakers involved in horserace betting, the levy to be spent for the purposes of improving the breeds of horses, the

advancement or encouragement of veterinary science or education and the improvement of horseracing. So there is nothing novel about a statutory levy on a particular industry for a particular valuable purpose.

The noble Lord, Lord Alton, mentioned the Human Rights Act. The Minister has told us today that he cannot comment on whether he has had legal advice, but I would be astonished if his advice were that the Human Rights Act somehow stands in the way of a statutory levy on industry in this context. Parliament has a very broad discretion in the context of property rights, because that is what we are talking about, on the proper balance between individual interests and the public interest. It would be quite fanciful to suggest that there is a legal reason not to support an amendment such as Amendment 31, although I entirely accept that there may well be room for improvement in its drafting.

Lord Empey: Does the noble Lord also recall the statutory ability to charge levies through organisations such as the Construction Industry Training Board, where skills were provided to a number of industries? This used to apply not only to construction but to the textile and a range of other industries. The industrial training boards were a statutory levy on employers in particular sectors.

Lord Pannick: The noble Lord is right. As I mentioned, there are other examples. Parliament imposes levies when it thinks it is appropriate to do so in order to promote a valuable public purpose. There are many examples. I am grateful to the noble Lord.

Lord Howarth of Newport: My Lords, I add my thanks and congratulations to the noble Lord, Lord Alton of Liverpool, on tabling this amendment. He has been a consistent, determined, passionate and highly effective advocate for sufferers of mesothelioma and this is one more instance of his very good work. I was happy to sign the letter that he initiated to the *Times* but there was no room left for me to add my name to the amendment.

It is profoundly desirable that more funds should be invested in research in this field. It is good that the industry, spurred by the British Lung Foundation, has already contributed £3 million and even better that it has stated its willingness to contribute more, provided that the state provides what the industry would regard as an acceptable contribution, which I guess means more than match funding.

I would be grateful if the Minister or the noble Lord, Lord Alton, could cast some light on why we have not yet seen a greater volume of state-funded research in this field. The Department of Health and the NHS have very large budgets for research; the business department has a substantial budget enabling it to fund the Medical Research Council; and there is no lack of public funding available to be applied in this area.

The normal principle is that those to whom decisions on the use of state-provided funds for research are entrusted look to receive high quality research applications. Surely such high quality research applications must

have been coming. The noble Lord, Lord Kakkar, spoke, in some sense, on behalf of University College London, where there is an important programme of research in the field of cancer. He also alluded to the Sanger Institute at Cambridge. If we are talking about academic institutions of the highest quality willing to commit themselves to work in this field, it is a puzzle to me why they have not been able to obtain more of the funds that the state provides for research. It may be that not enough appropriate proposals for research have yet been formulated, but I am puzzled about that and I would be grateful if the Minister would cast some light on it.

Perhaps he is going to say that the DWP, which itself has a substantial research budget, will be willing to find additional money to earmark in this direction. However, even the DWP probably insists on quite high quality in its research, so the same constraints might apply. However, those constraints should not be meaningful in this area. We are talking about a subset of the broad field of cancer research. There is an abundant willingness to fund it. I really want to know why it has not happened. Of course, I hope that it will and I hope that this amendment, whether or not it is modified as the Bill proceeds, will be the means to opening up a greater flow of funding towards mesothelioma from the state as well as the industry and perhaps also the charitable sector.

6.30 pm

Baroness Masham of Ilton: My Lords, I, too, put my name to the letter and I, too, support my noble friend's amendment—at least, the spirit of it. Mesothelioma is an awful condition, as has been so well explained by my noble friend Lord Walton. It needs research. Many more people will be developing this terrible disease. Research is advancing in many ways. One only has to think of stem cells and transplants. One never knows what will happen. However, this condition needs continuing expert research to find a way of alleviating the suffering, as well as a cure to stop this condition developing. I am sure there will be a way to stop it developing. It is there in the body but it needs the experts. Research means hope for these unfortunate people. Surely the Minister can find a way of accepting this amendment.

Lord Avebury: My Lords, I, too, was one of the signatories of the letter that was drafted by the noble Lord, Lord Alton. I join in the congratulations that have been expressed to him on his assiduous work over very many years on behalf of the sufferers of mesothelioma. I am delighted to support him in this amendment, particularly now that the arguments that might have been advanced against a statutory levy have been so comprehensively demolished by none other than the noble Lord, Lord Pannick, and several other noble Lords who have spoken.

If we get this amendment into the Bill, it may not be perfect but, as several of your Lordships have said, it will act as a stimulus to the provision of more funding from a number of different sources, which we may not all have known. The noble Lord, Lord Howarth of Newport, mentioned the DWP. We should look

beyond the boundaries of the United Kingdom. Surely we are not concerned only with what has been called the national research effort. Mesothelioma is not confined within the boundaries of the United Kingdom. We might also look to the EU's International Rare Diseases Research Consortium, which has a responsibility for looking at the 6,000 rare

diseases that account for a surprisingly high proportion of the deaths and serious morbidity from cancerous diseases. I do not know whether mesothelioma is already on the consortium's list but, if not, it certainly should be.

I wholeheartedly support the spirit of the amendment of the noble Lord, Lord Alton, and I hope that the department might consider widening the scope of the research that is conducted on the disease by looking to Europe, particularly this rare diseases research consortium.

Lord Empey: My Lords, I hope that the Minister did not think that I was being flippant in my earlier intervention when I said that I hoped we could finish off all the related issues. I understand what the Minister is confronted with. It is a serious business. He has put a lot of work into it and there is no doubt that there is advancement here. With so many people here supporting this amendment and talking in favour of it, he might also feel that it is not necessarily for him alone, in that there are other departmental interests to be taken into account. Perhaps between now and Report he could consult with some of his colleagues, because the contributions that have been made by people who really know what they are talking about have been very impressive.

It is amazing that as a nation we have not taken this issue sufficiently seriously, but at least we have an opportunity to spark a change. The noble Lord, Lord Alton, with his track record on this, has been trying to achieve this for a long time. Perhaps we have a confluence of events here that might actually bring this about. The levy issue is not an issue. It can be dealt with. I am unclear whether this is the right mechanism, or even the right Bill, but there is something here to be achieved and I think it can be done without a huge drain on public resources. I accept that the Minister is trying hard. Perhaps this is not the moment for him to respond to us, but perhaps he will discuss it with his colleagues in the Government.

Lord McKenzie of Luton: My Lords, we support the concept of insurers contributing to fund research to find new treatments for mesothelioma. Indeed, three years ago we were involved in encouraging the industry in what was originally a £3 million commitment over three years. However, we do that principally because of the passionate, compelling and authoritative case that we have heard over the past hour, led by the noble Lord, Lord Alton, and stimulated by the comparison between the stark number that this dreadful disease kills and the funding that has gone to address and ameliorate it. The issue of stimulating a national research effort is hugely important.

Like other noble Lords, I do not know whether this is the appropriate mechanism and I shall be interested to hear the Minister's comments, but the noble Lord, Lord Alton, seems to have covered all the issues on

hypothecation, the Human Rights Act and a fee rather than a levy. That is a pretty impressive effort. Like the noble Lord, Lord Wigley, I support a variable approach rather than a fixed amount, but those are points of detail.

Will the Minister share with us his discussions with the Department of Health, which he has referred to before? In particular, have any of his extensive negotiations with the insurance industry about the payment scheme focused on ongoing contributions to research? What is the current attitude of the industry?

Lord Freud: Well, my Lords, I feel like adding my name to the amendment.

I have spent an enormous amount of time on this issue, for exactly the reason that noble Lords have all focused on. Something very odd is happening here when so little money has gone into research in this area. Bluntly, I was pursuing the concept of a one-for-one match, where the insurance industry and the state would come in. I will go into why I have hit a brick wall at every turn on that, which is why it is not in the Bill.

However, rather than being negative, I have talked to everyone but, in particular, tried to understand why we have not had state research on this. I have talked to Dame Sally Davies and the Department of Health, trying to work a way through. There is currently a bit of a chicken-and-egg situation as, before the Medical Research Council will accept research, it has to be of what the council calls "high-quality propositions". I buy the point made by the noble Lord, Lord Kakkar, on some of the quality research that is now on offer, so there is an opportunity to go forward there. The odd thing is that this is a Bill about the insurance industry and its contribution to that particular levy, when it is actually the insurance industry that has ponied up £3 million of its money and got this research going. What seems odd to me is the way that this is not happening on the other side.

I will now do what I do not want to do, which is to go into why that is so difficult with this Bill and why I have not been able to incorporate something like this. I was going to have a strap on the levy that we could just throw in and match up, but the limitation is that my department is allowed to raise funds only within its own remit, and medical research lies within the auspices of the Department of Health. We do not have the freedom to raise funds for research within a DWP-sponsored Bill. One of the issues with hypothecated research like this is that, from the point of view of the Department of Health, that cuts across its strategy of directing funds at quality research. This is how we have ended up in this odd chicken-and-egg position. I have simply not been able to find a way, in terms of the levy, to get this into the Bill.

So what is to be done? I have discussed this with my noble friend Lord Howe at considerable length. There needs to be a kick-start process to get research going here. We are proposing to get a conference going, which we will jointly host—and I would welcome as much support as possible from noble Lords—to try to get this on the agenda so that it gets the kind of support that it should.

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Lord Pannick: To clarify, is the noble Lord saying that the only impediment to including a provision of this sort in this Bill is that this is a DWP Bill and research is a Department of Health matter? If that is the point, I think it will come as a great surprise to this Committee that it is not possible for two departments to liaise and come up with an agreed position to place within a Bill—not least because, as he will well know, as a matter of constitutional propriety, when a Bill talks about a Secretary of State, it covers all Secretaries of State. There is no division of responsibilities between Secretaries of State. Can the Minister think about whether it is really not possible to talk to his colleagues on these matters?

Lord Freud: I have done quite a lot of work on this, as I have said, and talked to the department. I am saying that this would have to be a Department of Health levy, but the Department of Health is not minded to legislate in this way on this matter because that is not

how the structure of research provision in this country works. That is the position. I can get further clarification on this ready for Report.

Baroness Sherlock: The question of whether the Department of Health wishes to do this is a separate matter but, on whether the DWP can do this in its Bill, is the Minister saying that it cannot do it because it is not government policy that the DWP should create a levy that would be to the benefit of something that belongs to DoH, or is he saying that it is illegal for it to do so?

Lord Freud: I am not sure of the definition of illegality, but our powers are such that we cannot raise money for things that are not within our vote. Whether or not that makes it illegal, I am not sure. However, that is the position and we are held to it.

6.45 pm

Baroness Butler-Sloss: I hope that the Minister will forgive me for interrupting him again but is he saying that the department cannot raise money for itself, or that the department cannot approve of a levy that is being taken from the insurers? Is the Bill not broader than the department? Can Parliament not put it into the Bill even if the DWP says that it is not part of its remit? The two points are, first, whether you can support a levy even if you cannot raise the money yourselves, and, secondly, why can the Bill not go forward with it while we discuss whether another government department will be helpful? At the end of the day, if a government department is going to say that it will not help to raise money for mesothelioma, what on earth is the public going to think about the coalition?

Baroness Masham of Ilton: Is it not about time that we changed the policy, if it is policy, because surely now one wants to work together? Health and social care are trying to work together, so why not work together with pensions and health?

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Lord Kakkar: My Lords, the national research effort has been a great success in our country because it is strategic and, as the Minister has said, rightly targets areas to drive excellence and research. However, there are very good examples of collaborative research efforts between industry and Her Majesty's Government in certain targeted areas to ensure that the volume of funds is available to address specific research questions. Would it not be possible for the Department of Health to consider, as a result of the discussions in this Committee and the passage of this Bill, whether there should be a move towards a strategic research effort in the area of mesothelioma? This could go through the normal processes identified within the Department of Health, the National Institute for Health Research, the Medical Research Council, and the Office for Strategic Coordination of Health Research in the Cabinet Office. Having gone through those normal processes, funds could then be generated through this particular levy. Funds defined and voted on through the national research funds available in the Department of Health could then be combined in a strategic way and focused on institutions that were prepared to make a commitment in this area.

Lord Moonie: Perhaps I may add a small point from my own field in medicine. One of the problems with mesothelioma is that it is diagnosed so late that it is generally considered a hopeless condition. That was certainly the case with friends of mine who died of it some years ago. Gradually things are beginning to look a little brighter. It is important to get

treatment early. We know largely who the potential case bodies are likely to comprise—those who have historically been exposed to asbestos—and the numbers should not really be added to at this stage. Therefore it ought to be possible to devise research, either through markers or through surveillance of the case load, to establish diagnosis of mesothelioma earlier and provide more hope to the patients who suffer from it. That might be a fruitful argument for the Minister to make to his colleagues in the Department of Health.

Lord Freud: I take from this a weight of feeling and, bluntly, the best thing that I can do is to take it back in to Government; my department is almost not relevant in this area. In a sense, I do not think that that is the issue. The irony is that those in the insurance industry are the only ones who have been paying anything of any substance in this area. This is, if you like, directed at the wrong area. As the noble Lord, Lord Kakkar, said, why is this not of some strategic importance?

My feedback from the Department of Health and Sally Davies is that they are aware that it is odd that so little is spent on this disease. However, I think that that is where the problem lies and that it is a kind of chicken-and-egg situation. In a way, the insurance industry is in the position of the gambling industry, which has a voluntary scheme and has been spending money voluntarily. It does not need this pressure. What we need to worry about is: how much, as a country, are we spending on this disease?

I hope that noble Lords can hear that I am enormously sympathetic to what lies behind the amendment, and I am not only sympathetic because I have had a hard

time this afternoon; I have been spending six months of the year running around on this issue, a bit like a mad mouse in a wheel, trying to find a way through.

This debate has been valuable. The next stage is to have a major event—my noble friend Lord Howe and I even have a date in the diary—where we start to do something about this and get something going. That is really what we are looking for, rather than something more mechanistic, such as what is proposed here, which I cannot do.

Lord McKenzie of Luton: I think that we all recognise the Minister's commitment to this issue. However, has any thought been given to whether this could be channelled through the HSE, which falls within the purview of the DWP?

Lord Freud: To be honest, I do not think that we have looked at that as an option. I will have another look around the wheel to see what there is, but where I have come out is that we need a mainstream effort with the people who are interested in this matter to push it up the agenda of the country. We need to say, "This needs research and it will take a decent share of the budget that is available for cancers in this country".

Lord Howarth of Newport: When the Minister goes round the wheel again and has conversations with the Minister in the Cabinet Office responsible for the Office for Strategic Coordination of Health Research, and when he meets Professor Dame Sally Davies again, will he try to find out why the money has not been forthcoming so far? Is it political, because the view is taken that there are not terribly many sufferers from mesothelioma as a proportion of the population as a whole and therefore they are not a priority, or is it because this field is

unfashionable among academics? We need an explanation because it is very puzzling. Given the existing structures, conventions and procedures, I cannot see any reason why the money should not already have been made available.

Lord Freud: I have actually got round to asking that question already, so I can answer it now. The reason is that it is an unfashionable area because it was believed that there was no hope. We caught it late, it was happening over a very short period and it was fatal. It was an unfashionable area to go into and therefore the people who wanted to make their careers in research turned to other cancers. As a result, good-quality research proposals were not coming in and therefore the research council did not feel that it could supply funds. That is the reason and it has been the reason for decades. With regard to breaking that cycle, the insurance industry and the voluntary groups working with the BLF have started rolling the stone down the hill, and I think that we are now in a position to get something moving. However, it is a bigger issue than just getting a little bit of money through this device.

Lord Alton of Liverpool: My Lords, the Minister said that he feels like a mad mouse going round in a wheel. Fortunately, we have some good medics on hand this evening, who, I am sure, will be happy to

diagnose the problem. Whether they can come up with a cure, I am not sure, but it is the job of parliamentarians to come up with a cure to help Ministers who are clearly committed to the underlying principles enunciated in the amendment actually to achieve them. He said that he has been banging his head against a brick wall and that he has been dismayed at the failure to provide adequate resources to deal with these things. The one thing we can do for a Minister in that situation is to provide him with an amendment to the Bill, which he can then take back to the other departments involved, to the Treasury and to everybody else, saying, "In Committee, they gave me a hard time over this. We need to find some way forward".

Although I am of course not pressing this to a Division today, the fact that 10 noble Lords participated in this debate and have spoken with such experience and conviction, all being in favour of the principles underlying the amendment, means that surely the Minister now has some ammunition in the locker to take away and use to try and promote this case.

I am indebted to everyone who has spoken in the debate. My noble friend Lord Walton of Detchant said that the amendment could be strengthened and suggested two ways of doing that. I particularly liked what he said about the National Institute for Health Research and the role that it might play. I will certainly consult him in redrafting this amendment between now and Report.

My noble and learned friend Lady Butler-Sloss said that if we could do it for gambling, why on earth can we not do it for this? The noble Lord, Lord Pannick, reminded us, as did the noble Lord, Lord Empey, that many other precedents can be invoked in such circumstances. Perhaps the Minister could ask his officials to look at the whole battery of precedents when going away to persuade those who, somewhere in the system, are clearly opposed to us putting these powers into the Bill.

My noble friend Lord Wigley reminded us of the scale and number of people affected by this horrible disease. He recognised, as did others, that a variable approach might be the right one to adopt as we recast the amendment.

My noble friend Lord Kakkar said there had there had been no strategic approach. He is right. He reminded us about the role of the meso-bank, which, as he says, will have global significance. He also referred to the possibilities that genetic research produces, but said that research has to be kick-started. In other words, there has to be some kind of seed funding—in the absence of state funding. Of course, austerity will inevitably be one of the reasons given when the Minister goes back to the Treasury or elsewhere. Other people will have their own priorities and projects, which they say that the money should be spent on. Again, we need to provide the Minister with something that overcomes those objections. The approach adopted in this amendment of a levy is one way of doing that. My noble friend Lord Kakkar also reminded us about something that I had not thought about previously: the importance of research into appropriate palliative medicines and palliative care, and the way in which we

care for people during the last months of their lives. That was an important point for us to consider.

The noble Lord, Lord McKenzie, reminded us of the stark numbers, and the noble Lord, Lord Howarth, who, along with others, signed a letter sent to the *Times*, told us about the importance of leverage and asked why a greater volume of resources was not made available for research. I was prompted to think about this issue by two Questions asked in another place by a Member of Parliament, Mr Bob Blackman. I was surprised when I saw on one of his Questions just three dotted lines where figures should have been, detailing the resources available for research into mesothelioma. When he tabled a further Question, the column simply showed three sets of zeros. I was absolutely staggered that that could be the case, given that 56,000 British people will die of this disease before it is over.

My noble friend Lady Masham said that research means hope, and she is absolutely right about that. Without research, we can offer no hope. My noble friend Lord Pannick said that there is nothing novel about this approach and that it would be quite fanciful to suggest that the Human Rights Act could in some way be invoked. That Act ought to be invoked against the state authorities in this country for not having done something about this problem for so long.

My noble friend Lord Avebury was very generous in his remarks, but in fact I am just an apprentice compared to my noble friend. He and I have been friends for a very long time. He published a pamphlet on the subject of mesothelioma in the 1970s and has campaigned on this issue throughout the whole of his parliamentary life. I stand in awe of him on this and many other matters.

The purpose of my amendment was to start the debate. There are moments when Parliament, rather than the Government, can shape policy, and this is one of them. The Minister said that there is a chicken-and-egg cycle. In that case, let us break that cycle. Although I beg leave to withdraw this amendment now, I am sure that noble Lords would expect me to bring it back on Report.

Amendment 10 withdrawn.

Amendment 11 not moved.

7 pm

Amendment 12

Moved by ***Lord McKenzie of Luton***

12: Clause 2, page 1, line 18, after "an" insert "successful"

Lord McKenzie of Luton: My Lords, this is, I hope, a brief and probing amendment. To be eligible for a payment under the scheme, Clause 2(1)(c) requires that a person has not brought an action against an employer or insurer and is unable to do so. The amendment requires that action to be successful. The implication is that an unsuccessful action would not preclude access to the payment scheme.

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I have had some contact with the Bill team on this, and I think that the government response will be that if an action cannot be successful, it would necessarily preclude access to the payment scheme, because the conditions could not be met. I wonder whether that is necessarily so. What if an action were against an employer found not to be the right one but when the right one had gone out of business and the insurer could not be identified? Similarly, if an insurer were pursued by an action but proved to be the wrong one, why should that then preclude access to the scheme? I beg to move.

Lord Browne of Ladyton: My Lords, I support my noble friend's amendment, although I think that there is a more elegant way of dealing with the issue. Frankly, and I hope that the Committee—particularly the Minister—will agree, I do not understand why Clause 2(1)(c) is there at all. It does not seem to make any sense.

The clause has two parts to it. The second part is that the person who is diagnosed with diffuse mesothelioma will be eligible for the payment only if he or she is unable to bring an action against an employer or insurer because the relevant employer or insurer cannot be found or no longer exists. I cannot envisage any circumstances in which anyone could have brought an action against some person who cannot be found or did not exist. I do not understand why that conditionality is there at all. I can envisage the sort of circumstances that my noble friend suggests, which are that an action was brought wrongfully against the wrong employer or the wrong insurer, but why should that disqualify someone from making a claim and receiving a payment from the scheme because they made a mistake in the past and thought that they had the right employer or insurer?

I urge the Minister to take that away and perhaps rephrase the clause to provide that a person who has been unable to bring an action against the relevant employer or any relevant insurer for damages in respect of the disease because the employer and insurer cannot be found or no longer exist, or for any other reason. That seems to be the answer. I do not understand why that part of the clause is there at all.

Lord Freud: My Lords, as I understand it, the purpose of the amendment is that a person may be eligible for a payment from the scheme if they have not brought a successful action against their relevant employer or insurer for damages. However, there is another condition attached: they must also not be able to bring an action for some reason, perhaps because the employer or insurer cannot be found or no longer exists.

A person should be eligible for a payment from the scheme if they have not brought an action against a relevant employer or insurer through the courts and there are very good reasons why they are unable to do so. It is a scheme of last resort. If a person can bring proceedings, they should do so. But a person should not be eligible for a payment from the scheme if they have brought an action against a relevant employer or insurer through the courts and they have not been successful in that action because they have not been

awarded civil damages. This may happen for a number of reasons. For example, the courts may consider that the employer did not expose the person to asbestos as a result of negligence or breach of statutory duty, or that the person was not an employee. It is not right in these circumstances that the person should be able to make an application to the scheme. It is a scheme of last resort, not a no-fault scheme. The scheme is correcting a market failure where employer's liability insurers failed to keep thorough records; it is not replacing the civil system.

Lord Browne of Ladyton: My Lords, I am reluctant to intervene on the Minister when he is reading a very carefully constructed argument but, with all due respect, what he has just read defies logic. Bearing in mind that the person must have been diagnosed with mesothelioma after July 2012 and, if the draft rules become the rules of the scheme, must have brought any claim within three years of that diagnosis. It is envisaged that in that period the person would have sued somebody despite the fact that they were unable to find the relevant employer or the relevant insurer. It cannot possibly have been the relevant employer or the relevant insurer that they sued so the determination of the case is an irrelevance. I do not understand how people can sue somebody they cannot find.

Lord Freud: My Lords, what the legislation aims to do, and does, is to say, "Go to your relevant employer or insurer, if you can find them, take them to court and go through the legal process. If that process finds that they were not liable, you cannot go to the scheme". If that was a mistake, you could find another employer. To answer the question of the noble Lord, Lord McKenzie, there is nothing to stop you finding the next employer, but if it was found in that case that the employer was not liable, clearly the scheme would not be liable either".

I am not sure that I understand the concern. This may be because of the way in which one reads the legal language. I think the best thing I can do is write a letter spelling out exactly how the language works.

Lord Browne of Ladyton: The reason we are able to deal with these cases in this way is because of the history of the way in which mesothelioma litigation has developed. In mesothelioma cases, one can sue any employer. So if one finds a relevant employer or insurer, one can sue that person—I think that is agreed. That is part of the reason why this

group of people are able to have access to this payment scheme whereas people suffering from other asbestos-related diseases cannot so easily do so. We agree on that.

Any person who has found a relevant employer or insurer to sue is disqualified from the payment scheme—full stop. It is not a question of finding one and then saying, "I cannot find the other, therefore I want to claim through the scheme", anybody who finds one and has somebody to sue is disqualified by the second half of the clause. The first half of the clause is unnecessary.

Lord Freud: As I said, let me write to noble Lords about the necessity or otherwise of the first half of the clause, because I suspect that we are in deep legal territory.

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Lord McKenzie of Luton: My Lords, I am grateful to my noble friend Lord Browne for his intervention and for challenging the subsection more substantially than my probing amendment. Given that the Minister has promised to write, the best thing that I can do in the circumstances is to beg leave to withdraw the amendment and look forward to reading the correspondence in due course. It seems that we may return to this.

Amendment 12 withdrawn.

Amendment 13

Moved by ***Lord McKenzie of Luton***

13: Clause 2, page 2, line 20, at end insert "but shall exclude payments made under the Pneumoconiosis etc. (Workers' Compensation) Act 1979 and the Child Maintenance and Other Payments Act 2008"

Lord McKenzie of Luton: My Lords, Amendment 13 is another probing amendment which addresses another aspect of eligibility. Under Clause 2(1)(d), it is a requirement that a person has not received damages or a specified payment in respect of diffuse mesothelioma, specified payments to be defined in regulations. This probing amendment is to clarify that any payments receivable under the Pneumoconiosis etc. (Workers' Compensation) Act 1979 and Section 47 of the Child Maintenance and Other Payments Act 2008 are not to be treated as specified payments. Such payments may be recoverable under benefit recovery provisions, but their receipt would not deny access to the scheme.

From a discussion with the Bill team a few days ago, I understand that that is the case, but it would be very helpful if the Minister could put that on the record and say something about what other types of arrangement—I think that term of renewal has been mentioned—will be included in specified payments.

Amendment 41 is grouped and is another probing amendment. Clause 13(2)(b) enables the Secretary of State in setting the levy to deduct the amount of any recovery of benefits. That would therefore reduce the amount borne by insurers. Clearly, the principle which should apply generally is that any benefit recovery accrues to the Government, not to insurers. However, it is understood that this provision is to apply only to the initial period of the scheme, where benefit recovery in respect of cases diagnosed from July 2012 to March 2015

will be used to fund the scheme. If that is the case, again, perhaps we can have that on the record. In any event, perhaps the Minister can explain the analysis behind the government contribution and why in the scheme of things any contribution should be made. I beg to move.

Lord Freud: I thank the noble Lord for the amendments. The intention of Amendment 13 is to ensure that a person who receives a state lump sum payment under the Pneumoconiosis etc. (Workers' Compensation) Act 1979 or the Section 47 of the Child Maintenance and Other Payments Act 2008 would not be excluded from receiving a scheme payment.

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One of the conditions for entitlement for a payment under the scheme was that a person has not received damages or a specified payment in respect of diffuse mesothelioma and is not eligible to receive a specified payment. The meaning of "a specified payment" will be given by regulation. Broadly speaking, specified payments are those which are not compensation but are paid in respect of the person's mesothelioma. That does not include government lump-sum payments. Therefore, the amendment has no effect on our intentions.

The amendment does not cover the equivalent Northern Ireland legislation, so it creates an imbalance between how applications in Northern Ireland will be dealt with compared to applications made elsewhere in the United Kingdom. To go through which payments will be specified, as the noble Lord requested—it may be easier for me to supply a letter—they are the naval, military and air forces, the Armed Forces and Reserve Forces, the UK Asbestos Trust and the EL Scheme Trust established in 2006. I will write to him to get that on the record.

7.15 pm

Amendment 41 is consequent upon benefits and state lump sum payments not being recovered from scheme payments. The Bill allows for the Secretary of State to make regulations under which insurers have to pay a levy with a view to meeting the costs of the scheme. In deciding the total amount of levy, the Secretary of State may deduct the sums recovered, or expected to be recovered, under the recovery of benefits legislation during the period in respect of scheme payments made during the period or before it. On the basis that social security benefits and government lump sums are recoverable from scheme payments, the effect of this amendment would be to prevent the recycling of money generated through recovery of benefits and state lump sum payments in order to reduce the amount of the levy in period one. To be clear, we only intend to recycle this money in year one of the scheme's operation in order reduce the risk that the costs associated with a higher levy are passed on to British industry.

Lord Wigley:I believe I am right in interpreting that there are cases that could get compensation for diffuse mesothelioma under the 1979 Act who might equally get compensation under this Act if they had not got it under the 1979 Act. That being so, I raised the question at Second Reading as to how the scales of compensation compared between the two. Is there any information that the Minister can give on that? If he has already included it in today's letter, which I believe has been sent to my home, I apologise as I have not yet seen it.

Lord Freud: The noble Lord is raising a slightly different question. What we are looking at here is the question of whether one can claim on the scheme even if one has received the 1979 payment. We will be dealing in later amendments with the offsetting issue. It may be easier to leave this question until those amendments.

I ask the noble Lord to withdraw these amendments.

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Lord McKenzie of Luton: I am grateful to the noble Lord for his explanation. It has confirmed the position, which was the reason for the probe. Could he say a little more about the imbalance with Northern Ireland? I am not sure that I altogether follow the point that he was making.

Lord Freud: We do not have the legislation to match. I am not sure that, off the top of my head, I can be precise about what the practical implications of that are. Let me come back in writing on that. Northern Ireland has its own schemes. I must be precise on how they interrelate in responding to the noble Lord.

Lord McKenzie of Luton: I am grateful to the noble Lord and happy to receive a letter in due course. I beg leave to withdraw the amendment.

Amendment 13 withdrawn.

Clause 2 agreed.

Clause 3 : Eligible dependants

Amendment 14 not moved.

Clause 3 agreed.

Clause 4 : Payments

Amendment 15

Moved by ***Lord McKenzie of Luton***

15: Clause 4, page 3, line 4, at end insert "but shall be not less than 100% of the average damages recovered by claimants in mesothelioma cases"

Lord McKenzie of Luton: My Lords, as the Minister will be aware, while I am supportive of the scheme that he brings forward, there is a need for key improvements. Foremost among these is the proposed level of scheme payments. We have seen nothing definitive, but the impact assessment suggests that it could be pitched at 70% of the tariff. The tariff will be set in age bands of one year and it is understood that it will be based on average compensation awards of claimants and dependants, in respect of those diagnosed with diffuse mesothelioma. The impact assessment also states that by linking payments to age, the overall cost of the scheme will be reduced because of the rise in age of those diagnosed.

The suggested likely level of payout of 70% is the component of the scheme which most noble Lords at Second Reading considered unacceptable. An increase in this level of payment is the most important change we can make to the Bill. It is difficult to pin this down in the primary legislation but we need to have something clear in the Bill. What levels of payment are actually made depends upon the computation of average compensation claims as well as the percentage award.

As to average compensation claims, we need to be assured that this is a fair basis for constructing the tariff and that it does not unfairly depress the amount of compensation claims which would have been payable to scheme beneficiaries had they been able to access compensation on an individual basis. There is no

inherent reason why the cohort of scheme claimants should not reflect the average of those accessing compensation in the usual way.

We have seen the national institute's statistical note, which merits more detailed scrutiny. However, we have not seen that translated into a tariff schedule which supports the impact assessment levy calculations. When might this be available? The national institute note sets out various measures of average compensation, including the arithmetic mean, the median and a variety of trimmed means. Which average is to be used?

Table 3.4 of the paper sets down some average compensation tabulations but it is unclear whether either of model 2 or model 4 will be adopted. Further, it would appear that in Scotland, for example, actual awards are on average some £60,000 higher than in the rest of the UK. Is this right and are there any other large regional disparities of which we should be aware?

At Second Reading the Minister referred to setting payment figures at 70% as a "real juggling act". The argument runs that if the levy is small, in a reasonably competitive market providers will absorb it and not seek to pass the cost on to British industry. The impact assessment points to research both ways on this matter, although it also suggests that it is worth noting that even if insurers did pass the costs on to employers the impact on employer customers is likely to be relatively low.

The argument being used to significantly depress payments to sufferers of mesothelioma is thin to say the least. Where is the evidence that at a 3% level they will absorb the costs but above that they will not? Is it not the case that there is a variety of issues and costs which will feature in employer's liability insurance pricing and that these policies might anyway be bundled with other insurance products? Even taking the Government's argument at face value, their position cannot be justified.

Taking into account the government contribution in year one, the levy on insurers is, on average, estimated to be 2.24% of a 70% level of payment. This would imply an average level of some 3.2% if the payment were set at a 100% level, an extra 1% of gross written premiums, or £15 million per year over the 10-year period. From the point of view of the insurance industry, this would not appear to be an unmanageable additional amount.

It should be borne in mind that the industry is still not bearing the costs of other asbestos-related and long-term diseases where employer's liability policies cannot be traced. The Minister has suggested that the diffused mesothelioma scheme covers 70% of the payment amount that would fall due if there were full coverage, so there is benefit still accruing to the sector just because old policies have been lost or destroyed.

However, this aside, we should not be looking at this only from the point of view of the insurance sector. We need to give full consideration to those affected by this terrible disease. If their condition is a result of negligent workplace practices, why should support for them be discounted by 30%? Indeed, on a matter that we have to pursue in the future, we remain to be convinced that the scheme payment could not be

subject to greater benefit recovery than a composite level of compensation payment. However, we will return to that issue.

If it is right—and it is—that payments should be made, they should be the full compensation equivalent. It has taken a long time for a scheme to be developed and we continue to pay tribute to the Minister for advancing this, but there is no excuse for now short-changing those who, we all agree, should get justice. I beg to move.

Lord Howarth of Newport: My Lords, my Amendment 18 is grouped with Amendment 15, just moved by my noble friend Lord McKenzie, and it drives at very much the same purpose. Both of us seek to ensure that the scheme payments will match the average of court awards for people in comparable circumstances, thereby lifting the figure from 70% of the tariff to 100%.

I have not been able to discern any principled basis for this figure of 70%. I think that it was the best deal that the Minister could secure. I do not underestimate his achievement in securing that deal against an insurance industry that for decades fought a rearguard action to try to escape from its proper liabilities. At Second Reading, the Minister told the House of the press investigations into the mesothelioma scandal in its various dimensions from 1965 onwards. As time went by, we understand that policies went missing wholesale. As the Minister also told us at Second Reading, it was not until 1999 that the industry created a code of practice for the better tracing of employer's liability policies.

As I said in an earlier debate, I do not think that Parliament needs to feel that it is bound by the deal that the Minister has secured with the industry. We respect the Minister's efforts in securing that deal but it is our duty to take a view on where the public interest lies, and I do not believe that it lies in palpable injustice or in the convenience of the insurance industry at the expense of mesothelioma victims. It is surely unacceptable that mesothelioma victims should be penalised because, through no fault of theirs, documents have gone missing, and it is unacceptable that the insurers, whose duty it was to keep proper files, should benefit to the tune of 30% in precisely those cases where they failed in their responsibilities.

The Minister will argue to us again, I think, that there needs to be a discount in order to incentivise claimants to go to the courts first. However, I am not persuaded by that argument because it seems to me that the procedures of the scheme—the portal and the remit of the technical committee—will all ensure that they do go to the courts first if they can and that

they pursue that avenue until they find that they cannot proceed satisfactorily or successfully along it. Be that as it may, in any case a 30% discount is simply too large. The Financial Services Compensation Scheme provides cover for 90% of the liabilities of insolvent insurers where insurance is compulsory. That 90% should be the very minimum and 100% would be right.

Lord Avebury: My Lords, I certainly agree with the noble Lord, Lord Howarth, about the incentive argument. I thought that that was comprehensively

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demolished at Second Reading and I hope that we are not going to hear it again from the Minister this afternoon.

I also think that my noble friend should pay attention to the fact that this was one of the subjects on which all the speakers at Second Reading were unanimous in saying that 70% was simply unacceptable. Whether it should be 100%, 90% or some other figure much higher than 70% could be a matter of argument between us. However, there are certainly very strong reasons for saying that the 30% deduction is totally unfair and unacceptable to the majority of your Lordships.

My noble friend said at Second Reading that he was keen to avoid the insurers passing all, or virtually all, of the levy on to existing insurers. As the noble Lord, Lord McKenzie, said, this would not require a very large increase in the premiums to be imposed. It is logical to assume that insurers would also be constrained by the effects of competition. Some might be inclined to pass the whole burden on to other insurers, but would be constrained from doing so by the thought that if others did not then they would obtain all the business. The threat of the insurers passing on the burden is a very slight one.

If there were an increase from 70% to some higher figure, that would not happen suddenly. Presumably, a proportion of the insurers might pass on some of the burden as we approach 100%. I do not think that the Minister has any objective evidence to show to what extent this would happen. I would be very glad to hear from him if he thinks that there is evidence of something that must be hypothetical and cannot intrinsically be tested without actually trying it.

7.30 pm

Lord Wigley: My Lords, the fact that we are at a late stage of the debate today should not stop us from speaking and pressing this most important of the amendments to the Bill that we are considering. If we get nowhere on it today, I suspect that we may need to come back to it on Report. As was rightly said a moment ago, this is something that was referred to by almost all the speakers at Second Reading, and it should not go by default at this point in time.

It strikes me that if someone is entitled to 100% of the compensation because of their condition, their suffering and what they have gone through, but they have not had that compensation because at some time in the past some insurer failed to deliver it, that does not in any shape or form justify a 30% abatement of what they will get. Their suffering should justify the 100% level. There may be an argument about 10% here or there, although I do not like even that, but I certainly do not like the idea of it being abated by 30%.

No doubt there has been some horse-trading on this. It would be interesting to know where the Minister started his argument. If 70% was the first offer made by the insurers, then I suspect that there is room to move up from that figure. If there is not, then this is something that Parliament should be addressing further. I do not recall with the 1979 Act that there was a reduction in the compensation on the basis that it was

going to be easy. The argument put forward at the time was that it was fair compensation for the suffering. If that is the case with other legislation, why on earth should there be less for people who have suffered so much? This really is something that should be pressed.

Lord Wills: My Lords, I, too, support the amendments. I very much agree with my noble friend on the Front Bench and the noble Lord, Lord Wigley, that these amendments go to perhaps the most important issue in the Bill. I agree with everything that has been said so far although, given the hour, I do not intend to rehearse all the arguments.

I assume that this particular issue must lie very near the heart of the deal that the Minister has done with insurers. I am confident, from everything that he has said today in Committee, that he has done the very best deal that he thinks possible, particularly given the need to get a resolution quickly so that those who are suffering from this terrible illness get the support that they deserve as quickly as possible. I am sure that that has been at the forefront of his mind. He has said already in Committee that he is going to return to his discussions with insurers, and I hope that he can assure the Committee that he will convey to those insurers the strength of feeling that he has heard, at this late hour in our proceedings, about this issue. He knows it already. He has heard it at Second Reading and this has been a consistent concern throughout.

I hope he will remind his interlocutors that there is a real risk that if they do not agree what is widely conceived of as being a just settlement—and this is not a just settlement, in my view and that of every other speaker so far this evening—and, worse still, if they threaten delays or legal action as a result of anything that the Minister goes back to them with, this Bill is most unlikely to be the last word on these issues, given the strength of feeling in both Houses of Parliament on this issue, which we have seen time and again in recent years and which is responsible for this Bill coming before us. I hope that he will remind them of the risk that any future legislation may well be tougher than this Bill.

Baroness Donaghy: My Lords, briefly, we are being presented with the alternatives of finding the paperwork, in which case the process is dealt with in one way, or not finding the paperwork, in which case this new levy will apply. As a fully paid-up administrator, I think there is a range in between about the effort that is put in to find the paperwork. If we are talking about incentivisation, I would argue for 130% instead of 70% because that might make some people try a little harder to find the paperwork. I really should have put an amendment in to make it 130%. I believe that there should be some incentivisation but I would turn the argument on its head: we should try to persuade the insurance companies to try a bit harder to find the paperwork.

Lord Freud: My Lords, the amendment seeks to set the rate of payment at 100% of the average civil award amounts. Many noble Lords expressed opinions about this at Second Reading as well as today. I know that I

have the support of all present today in wanting to guarantee the maximum payment possible for those people who, through no fault of their own, cannot bring a case against a specific employer or that employer's insurer.

To tidy up some of the questions asked by the noble Lord, Lord McKenzie, on the tariff tables, I think he caught that they were published in an ad hoc statistical report only today. I apologise that it is so late; we will circulate all of that to Peers tomorrow. It is based on a survey of civil compensation undertaken between 2007 and 2012 registered with the Compensation Recovery Unit, so it is a broad mix of cases. That is what the figures are based on.

To make a point that is really at the heart of this, and as many noble Lords have pointed out, if we were going after the people who should pay the money, it would be a very different proposition in terms of justice as opposed to our asking for money from a group of insurers that may or may not have been doing this business during the time. We are actually asking a group of active insurers to carry a particular burden when we know that of the industry as a whole, 40% are in run-off, including many of the biggest ones involved in mesothelomia. If one looks at insurance as one industry, all in one category, that is one way of thinking; if one starts to individualise what different insurers are doing, it becomes a different debate.

Lord Howarth of Newport: I understand that argument, but can I put two other considerations to the noble Lord? When the Lloyd's insurance market ran into very severe difficulty on account of asbestosis claims—I forget when that was—it had to act collectively to rescue the reputation of the London insurance market. I think we are in a similar situation here. I also put it to the Minister that the active insurers are advantaged by the fact that other run-off insurers have either failed or given up the business. They are the insurers who are now in the market and dominate it. Considering that they benefit from the absence of those erstwhile competitors, they are in a perfectly strong position to shoulder the moral and indeed the practical responsibilities left behind by those who have abandoned the field.

Lord Freud: It is always a dangerous thing to base it on a moral argument, particularly in this area. It is a differentiated industry. There is a group which we are now looking at to shoulder this. There was an enormous amount of negotiation in getting to this level of levy. That then feeds into the amount that we can pay eligible people. You could have an infinite amount of levy but if we went too high, the risk would be very clear. The genuine danger is that it would just go straight to British industry. Many of the insurers who will be paying it were not in business at the time or may have kept good records, so there is a differentiation within the industry.

If we could pay people more, of course we would. This is a balancing act and 70% is the compromise that we have arrived at after long negotiations. I hope that noble Lords can appreciate that there is a real achievement here in getting very substantial payments

to people who are eligible, if they are afflicted by this terrible disease. I urge the noble Lord to withdraw the amendment.

Lord McKenzie of Luton: My Lords, I thank the Minister for his reply, none of which comes as a surprise. I thank all noble Lords who have participated in this debate and supported the amendment. My noble friend Lord Wills urged that Minister to convey the strength of opinion about the level of payment. The noble Lord, Lord Wigley, referred to the fact that this sort of horse-trading did not go on when the 1979 Act scheme was being put in place. I think that my noble friend Lord Howarth dealt with the point about why it is not unreasonable for the insurers still in the market to bear the full costs of compensation. The noble Lord, Lord Avebury, reminded us that everybody who spoke at Second Reading opposed this 70% level. I was rather attracted to my noble friend Lady Donaghy's proposition of 130%; perhaps we might try that.

The Minister says that it is wrong to deal with this as a moral issue. I am not sure that that is right or something that I would agree with. I took it from what he said that the negotiation was around the rate of the levy, which then drove the compensation levels, rather than the rest. In that case, I am interested in a negotiation that would end up with a levy of 2.24%. How on earth was that arrived at? Why was it not 2.25% or 2.26%, or 3%? To have that driving the outcome seems a little strange, but in any event it is unacceptable.

I am grateful for the fact that it looks as though we will get the tariff tables tomorrow. That is obviously a key part of this. The percentage is key, but it depends what it is a percentage of. We will have to see how that all works out and which of those averages have been taken in compiling that schedule.

7.45 pm

The Minister again made the point that it is not totally fair that people currently in the market may not have been in the market at the time. However, the corollary to that is that those who are currently in the market could well have been those who were in the market previously and are still benefiting from the fact that many cases are not covered by this payment scheme. Therefore, we need to see it from that point of view. However, it seems to me that, fundamentally, we need to see it from the point of view of the sufferers and consider that just because the paperwork cannot be found—in my noble friend's terms—people will lose 30% of what their entitlement might otherwise have been.

I think that we are going to come on to some other debates about whether the nature of the scheme payment, in so far as it is different from compensation under various heads, means that there is a worse outcome on benefit recovery. That, too, needs to be factored into the bottom line that people will get. We continue to believe that 70% is inappropriate. It has to be increased and, if it is a question of driving up the levy rate, all that is needed is an increase from 2.24% to just over 3%. I am just trying to envisage the nature of the discussions and the things that would have been on the table when 2.24% was settled on after the initial smoothing.

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Lord Freud: Perhaps I may quickly clear up that matter. When you look at the totals, you have to take into account the effect of the extra two years, because we are starting with two years in hand. So the first year counts as three years, which we are going to smooth over the first four years. Therefore, in practice we start off with a much bigger amount of money. The

2.24% is a raw figure, if you like; it is not going to affect how much the levy will be when it is smoothed.

Lord McKenzie of Luton: I accept that point, but is not part of the smoothing in the early years being done by government contribution?

Lord Freud: It is a very small amount. We will actually do the smoothing over the years. Turning round the recoveries is only one year's work, so that is a small amount of it.

Lord McKenzie of Luton: I think that £17 million is the cost of the government contribution. I still do not think that we have had a definitive answer to the question of the impact on all this, if any, of what is happening in the pre-action protocol and all the negotiations that are going on there. From submissions that we have had from the ABI, it is clear that it sees that as part of a wider integrated package. I do not know whether the Minister can say anything about the extent, if any, to which the negotiations took account of what was happening there or was likely to happen and how that impacted on the negotiations.

However, ultimately we have heard nothing that convinces us that the 2.24% is where we stop in this calculation. We will continue to press for an increase. We will help the Minister in taking this back to the industry and making it understand how strongly we feel about it, and how it must not, and cannot, rest where it does.

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The Deputy Chairman of Committees (Lord Colwyn): Does the noble Lord wish to withdraw the amendment?

Lord McKenzie of Luton: I do not know whether the Minister has anything further to say.

Lord Freud: I simply urge the noble Lord to withdraw the amendment.

Lord McKenzie of Luton: Before I do, is the Minister going to say anything about the MoJ consultation?

Lord Freud: There is not much that I can add to what I said at Second Reading. Clearly, there is a consultation on the level of costs, on the pre-action protocol and on the portal, but I cannot pre-judge what that might come out with. It is clearly an extensive consultation and it will be starting in a matter of months.

Lord McKenzie of Luton: Can the Minister just say whether any of that featured in the discussions and negotiations that he had around the levy?

Lord Freud: Yes. It was important to the industry that the MoJ undertook to look at those issues. That was reinforced by the amendment of the noble Lord, Lord Alton, to the LASPO Bill, which was predicated on there being a consultation ahead of pulling the mesothelioma cases inside the LASPO framework.

Lord McKenzie of Luton: I shall read the record on that and I may return to the point in due course. However, given the hour, I beg leave to withdraw the amendment.

Amendment 15 withdrawn.

Committee adjourned at 7.50 pm.