Mesothelioma Bill [HL]

Bill Main Page

Committee (2nd Day)

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

3.30 pm

The Deputy Chairman of Committees (Lord Colwyn): My Lords, as usual, if there is a Division in the Chamber while we are here, we will adjourn for 10 minutes and resume after that time.

Clause 4 : Payments

Amendment 16

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

16: Clause 4, page 3, line 4, at end insert—

"( ) Regulations under subsection (1) shall require the periodic review of average civil compensation amounts in mesothelioma cases, such review to be conducted by an independent body.

( ) Regulations under subsection (1) shall require an annual report to both Houses of Parliament and a review of payments made under the scheme."

Lord McKenzie of Luton: My Lords, Amendment 16 requires an independent review of average civil compensation for mesothelioma cases, an annual reporting to Parliament and a review of the payments made under the scheme. We know very little of how the payment arrangements and levy amounts will work in practice and trust that a draft at least of the regulations for payments under Clause 4 and the levy under Clause 13 will be available in good time before Report. Can the Minister give us an assurance on this? We are grateful for the additional documents covering these matters that were circulated on Thursday, which do provide some additional analysis. It is a pity, frankly, that we did not have sight of them in time for the Committee session last week.

Although the Minister told us that his negotiation had been about the levy rate, it seems, inevitably, that payment amounts will be determined by the tariff. The levy rate will be set at a level that is presumably estimated to be sufficient to meet the projected numbers of those diagnosed and their age profile, together with admin and legal costs. If this is the case, the computation of average civil compensation is fundamental to payment levels and it is important that compilation of the tariff is current, hence the call for an independent, periodic review. The period between reviews might depend on an interim uprating—perhaps based on CPI—and maybe the Minister can tell us what is intended in that respect. Amounts payable under the statutory schemes are in practice uprated on an annual basis. We need to know more about the intent when the levy produces more, or less, than is required to cover scheme payments and administration. When it produces more, has the Minister's negotiation focused on this being used to

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enhance the percentage payout—to the extent that it is not already 100%—or on it being carried forward to reduce the levy in subsequent periods? What is the insurance industry's expectation of the position from the negotiations? Indeed, what is the Treasury's position?

Clearly, to the extent that it has not already been achieved, we would expect to see any surplus used to enhance payments. If levy shortfalls could be borne, in whole or

in part, by those diagnosed with mesothelioma, we will resist this. What consideration has been given to the possible avoidance of the levy by insurers, by bundling products and/or loading premiums on other business lines such as public liability? The additional information provided last week indicates a significant change to the estimated amount of legal fees which the scheme will fund. It reduces from £7,000 to £2,000, a benefit of £5,000 per case for the insurers. What is the reason for that reduction? It is also noted that the percentage of average civil compensation taken is calculated before any benefit recovery, which depresses the net amount received by claimants. Can the Minister let us have a note of the overall savings to government from these proposals—not only the estimated benefit recoveries but from not having to make payments under the 1979 scheme in the first instance? There is much we need to know about these matters before we sign off the Bill. As well as ensuring proper updating, will the Minister tell us why the proposed percentage of civil compensation amounts payable under the scheme has been reduced from the original impact assessment of, I think, 76% to 70%? Which of the various averages or means from the national institute's calculations has been used to drive the tariff in the new document, and why? The levy rate for the first four years is calculated in that document at 2.61% at the 70% payout rate. Is this consistent with an overall average of 2.24%, which is in the updated impact assessment? Further, the updated impact assessment puts overall cost as a percentage of GWP at 2.74% for the first four years. The current impact assessment, in a footnote, suggests that this was due to basing the average only on settled and withdrawn cases. Why is this, other than the fact that it is to the advantage of the insurers? Our concern is that even in the past few months the insurance sector has been chipping away at the scheme in order to reduce its obligations. That is why we need to strengthen the primary legislation. I beg to move.
The Parliamentary Under-Secretary of State, Department for Work and Pensions (Lord Freud): My Lords, before I address the noble Lord's amendment, I shall clarify a couple of points that were raised when we last met on Wednesday, to put noble Lords' minds at rest and to aid today's discussions. In the case of people who contracted mesothelioma from exposure to asbestos fibres that were on another person's clothes, or were brought into the household by other means, the question was raised whether these people, too, were covered by employer's liability. This is a complicated area and I will do my best to be succinct.
In cases of secondary exposure, the claim will be of negligence against the person who exposed the primary victim. Theoretically, that person could have public

liability insurance, employer's liability insurance, or both, or none. We have contacted the ABI on this matter and I understand that it is not aware of any cases where anyone other than the employee has been compensated under the employer's liability policy. Therefore, we return to the point that the scheme will raise funds from the employer liability market to cover those who would ordinarily have been covered by those insurers. In this case, it seems that, historically, instances of secondary exposure have not been covered by employer's liability insurance, so the scheme cannot provide for them.

Lord Howarth of Newport: I am extremely grateful to the Minister for responding to the Committee on this point, which was the subject of an amendment that I tabled. As I heard him just now, he said that because historically no cases had turned up, in future employer's liability insurance should not cover secondary exposure, even in a

case where the secondary exposure occurred—I hope he agrees with this; I think the Committee agrees—to someone who did the family laundry and washed the overalls of the employee who was exposed to asbestos fibres and who therefore found herself exposed to asbestos and contracted the disease. Surely we cannot simply extrapolate from the past on the basis that there do not happen to have been any such claims. It is entirely imaginable that there could be such claims, and it is not enough, if I may say so, for the Minister to say simply that because it has not happened, the Government will make no provision for it to happen in future. We still have a class of people whose predicament is just as grave as the predicament of someone who was a direct employee. I hope that the Minister will be prepared to look further at this.

Lord Moonie: To follow up on that, was the Minister referring to claims or successful claims?

Lord Freud: I am not sure whether they are claims or successful claims. My understanding is that there have been no cases where there has been compensation. My interest today is obviously not to re-run the debate that we have already had. We will have another chance to do this. I just wanted to get this on the record for the convenience of Members of the Committee at subsequent stages.

Lord Browne of Ladyton: The noble Lord is generous with his time. I listened carefully to his words. If they were a direct quotation from what the Association of British Insurers told his officials, and therefore him, it said that it had no record of any claim of that secondary nature having been settled through the employer's liability insurance, not no record of any claim having been settled. I ask the Minister to go back to the question: since the association clearly has comprehensive data, has it any record of claims having been settled? If so, through what form of insurance were they settled and—this is the important question—were the insurers and those who carried the risk the same companies that carried the risk for compulsory employer's liability insurance in respect of the circumstances of the cases?

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Lord German: Following that point, I will quote from a House of Commons document, *Mesothelioma: Civil Court Claims*, dated 22 March 2011. Under the section marked, "Claimants other than employees", it reads as follows:

"In a number of cases, claims have been made by those, including family members, who have contracted mesothelioma following secondary exposure to asbestos. Each case is determined on its own facts".

I dread to quote the following fact:

"For example, the Ministry of Defence admitted liability for the transmission of mesothelioma to Mrs Debbie Brewer, whose father died from small-cell lung cancer … after a career as a lagger at the Devonport Dockyard. He had greeted his daughter each evening whilst wearing dusty overalls from which she is believed to have inhaled the fibres that caused her disease".

It goes on to cite another case. There have obviously been some cases. The one I have quoted admittedly has the Government as the employer, but there is one involving another company further on.

Lord Freud: My Lords, I am grateful for those observations. I am sure that we will have a chance to discuss this in more detail later. I now move to—

Lord Wigley: Before the Minister moves on, is he not going to respond to the point made by his noble friend, who has shown that there were cases, which is totally at variance with the lead the Minister gave to the Committee?

Lord Freud: My Lords, we could spend all day on one point. I am just trying to get a response on the record. We will have another chance to go through this again. I was making a clarification.
I turn now to the query of the noble Baroness, Lady Sherlock. When discussing the proposed start date of eligibility for this scheme, we talked about insurers being able to reserve against that liability from that date. The noble Baroness drew attention to the fact that the levy will be an annual running cost, not a liability to reserve against. She is of course correct: the payment is not the same as a liability. However, the impact is much the same. The levy is an additional cost to insurers that needs to be factored into their business plans. To do this, they need to have confidence in the timing and amount of the cost to be incurred. Therefore, on 25 July 2012, when the intention to set up a payments scheme was announced, this provided a sufficient level of confidence for insurers to start to factor the levy into their business plans for 2014. I ask the noble Baroness's forgiveness for my incorrect use of terms, and for her recognition that this does not change the shape of things in this case.
3.45 pm
Baroness Sherlock: My Lords, I thank the noble Lord for taking the trouble to look into that and for the gracious way in which he has acknowledged his error. Of course I am happy to forgive him for this and for any similar offences. However, can he reflect for a moment on the consequences of the change? Although I confess to a tendency to pedantry, on that occasion I do not think I was simply being pedantic. I was trying
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to draw a distinction between whether the matter was a liability for which the insurance company would wish to reserve or a running cost for which it would have to plan, because I understood that the Minister had used the fact that an insurance company would not be permitted to reserve before a certain date as an argument for why the scheme could not start before 25 July. Had that been the case, I would imagine that no such restraint would exist in the case of planning for a payment. An insurance company can plan for a future level of running costs based on its own judgment, not on any auditing limitations. Will the Minister respond to that?

Lord Freud: In the interests of time, the best thing I can do today is to accept the fantastic offer of future forgiveness for anything I may say, and in return I promise to reflect on the consequences of the change.
Let me move on to all the other points that have been made. I promised to write to the noble Baroness, Lady Golding, about the Prison Service's work, to the noble Lord, Lord Browne, on Clause 2, and to the noble Lord, Lord McKenzie, on three counts. A letter is now being sent to Peers and a copy has been placed in the Library. Judging from some side conversations that I have overheard, I am sure there will be further discussion on one or two of those matters. Having dealt with those issues, let me turn to the subject under discussion as set out in Amendment 16.
I understand noble Lords' wish to ensure that if we are to express payment amounts in relation to civil damages, the data we hold on average civil damages in mesothelioma cases should be current. However, I must reject the proposal to require a yearly review on the grounds that it would not be fruitful due to the volume of mesothelioma cases. Reviewing civil cases on a yearly basis would be too frequent to show any trends or changes in the awards. Indeed, the data that we hold

on the initial trawl for the period 2007 to 2012 show this. In this case, it takes a bit longer for meaningful trends to appear.
It should also be said that gathering the data is pretty costly, and in the interests of value for money we need to make sure that they are gathered at intervals that allow us to identify change. One year is too short a period for this, so a review of the data every five years is more appropriate. If we were to accept the amendment, costs would be incurred from gathering data on an annual basis, and further costs would be involved through the requirement for these reviews to be carried out by an independent body. As part of the monitoring planned, civil compensation amounts in mesothelioma cases will be reviewed, but there is no need for a separate body or for annual reports. Furthermore, I can give my assurance that this area will not go ignored.
I also offer the reassurance that we shall not just assign a fixed tariff to this and then ignore it. Far from it. Along with the monitoring of data from civil cases that I have just mentioned, I can confirm for the noble Lord, Lord McKenzie, that we intend to uprate the tariff on an annual basis in line with the consumer prices index. The noble Lord went on to put a vast
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number of specific questions to me, and we shall touch on quite a few of them later. However, perhaps I may pick up the point about legal fees, although we will deal with them in due course. A figure of £7,000 was mentioned, and more recently £2,000 was mentioned. In practice, it will probably come in at something in between, but we will deal with fees in the fullness of time.

A set of questions was based on what will happen if we collect more or less than we expected. The DWP will underwrite any under levy after the first four years through smoothing. Any over levy will be paid to the Consolidated Fund, as required by HMT. Clearly, we will be setting a figure initially, then reviewing it. That is our best guess of the right kind of figure that we will be using. We moved the 76% figure to 70% on the basis of what the likely amount was that would minimise the risk of those costs being passed to British industry. This became clearer during the process of negotiation. Rather than go into the specifics about the 2.61% being consistent with the 2.24%, I will add that to a letter.
I hope with the commitments that I have made on how we are planning to set this levy, I reassure both the noble Lord, Lord McKenzie, and the noble Baroness, Lady Sherlock, on this matter, and I urge them not to press their amendment.
Lord McKenzie of Luton: My Lords, I thank the Minister for his clarifications on some of our earlier debates. I am sure we will return to each of the substantive issues about who should be entitled under this scheme and, indeed, about the start date. I am grateful for what he has said this afternoon.
Perhaps the purpose of the amendment was not as clear as it might have been and the Government did not anticipate or expect that there would be an annual updating of the civil compensation analysis. That would have to be done periodically, and how often that would be done might be driven in part by what is going to happen on annual uprating. The noble Lord has reassured us that there will be an annual uprating of the starting tariff by CPI. I think that is consistent with the statutory schemes at the moment. I took it that he was also supportive of a periodic updating of the data that underpin the tariff. I think that meets the purposes of the amendment. I note that any over levy will accrue to the Consolidated Fund and make the Treasury happy, I am sure. The noble Lord said that the move from 76% to 70% was driven by

the assessment of whether amounts were going to be passed on to the customers of the employer liability insurance providers. I take it from the impact assessment that it was to do with quite what cases were included in the analysis and those that were not. Perhaps I need to look at the record and go back on that analysis. It seemed that for no justifiable reason there has been a 6% reduction in the support that is going to be available for those availing themselves of this scheme, quite apart from the further loss, because of the change in the support for legal costs. We will come on to these things later this afternoon. Having said that, unless the noble Lord has anything further—

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Lord Freud: That is a good point. I should have made it in response. Just to make it absolutely clear, the legal costs, whether they are £7,000 or £2,000, will be on top of the levy that we are talking about.

Lord McKenzie of Luton: I am grateful for that, and I understood that position. I guess that the insurer in that respect have to pay £5,000 less per case than they otherwise would have done, so they are in pocket as a result of this change.

Lord Freud: There are two points there. We have not determined the £2,000. We are looking at those two figures and have not yet made a decision. There are two bits of clarification there.

Lord McKenzie of Luton: I look forward to the final figures when they do come out. Can the Minister assure us that we will get at least a draft of the levy regulations before we get to Report? Without carping too much, if we are going to do that, it would be really helpful to have it at least in time so that we can spend a few hours getting our minds round what it all means.

Lord Freud: With the smallest of caveats, I am most hopeful that I will get that information to the noble Lord before Report.

Lord McKenzie of Luton: I am most grateful to the Minister, and I beg leave to withdraw the amendment.

Amendment 16 withdrawn.

Amendment 17

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

17: Clause 4, page 3, line 10, at end insert—

"( ) must ensure that applicants to the scheme are reimbursed in full by the scheme for reasonable legal costs incurred by them in their pursuit of payment from an employer or an employer's liability insurer and from their application to the scheme, over and above any other payment from the scheme."

Lord Howarth of Newport: My Lords, when the Minister introduced the Bill on Second Reading, he rather gave us to understand that the Department for Work and Pensions and the Ministry of Justice were on separate planets, and I think used the phrase that one was not beholden to the other. Indeed, it appears that, within government, the left hand is not at all clear what the right hand is doing and vice versa. It should not be like that, of course. There is a principle of collective responsibility in government. More importantly, it matters very much that there should be coherent policy-making in the interests of mesothelioma victims and their dependants. The way in which policy is developed should not be for the convenience of Whitehall but should have an unwavering focus on producing a scheme as soon as possible that will in every dimension benefit mesothelioma sufferers.

The legal, and possibly other, costs associated with getting to the point of making an application and then pursuing it are significant. The impact assessment issued on 7 May—only last month—indicated that legal costs associated with the scheme overall would

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be of the order of £24 million to £27 million. We were told that the legal costs incurred by an applicant to the scheme, in the event that he was successful, would be of the order of £7,000. However, in the previous debate, my noble friend Lord McKenzie drew to the Committee's attention the new document issued by the department on 4 June—less than a month after the original impact assessment—which says that the published impact assessment,

> "used a figure of £7,000 per individual for legal fees; here we have moved that assumption to £2,000 per individual (unless otherwise stated)".

We have just talked about that, and I heard the Minister say that neither the £7,000 figure nor the new £2,000 figure had much solidity, and that it might end up somewhere in between. I would be grateful if he could explain to us what is going on, because it seems extraordinary that the assessment for an applicant making a successful application to the scheme should be £7,000 in legal costs one month and £2,000 the next. That shift is of a remarkable order of magnitude and leaves one a little anxious about impact assessments. I appreciate that they involve a whole mass of judgments and are very difficult to achieve with any precision, but there is extraordinary latitude here. Does the figure of £9,000 legal costs for an unsuccessful application still stand? As I say, does the overall figure that was given on 7 May still stand? As we go forward to Report, it would help the Committee to be given much more detail about how these figures are arrived at.

What costs will a claimant incur and what legal costs will he or she be able to recoup? I would be interested to know what happens about the preliminary legal costs that a claimant will incur before he reaches the door of the scheme. Following diagnosis, the claimant presumably has to make an appointment to see a solicitor. I do not know how this would work, but perhaps he would then be referred to a specialist personal injury solicitor. A lot of work must be done to determine whether a claim can be made against an employer or employer's insurer, and to test whether that claim is strong enough to proceed in court. All these hoops must be gone through before the claimant is able to embark upon a claim against the scheme. Could the Minister in his response kindly escort the Committee along the path a claimant must take in legal consultation and legal process on his way to the scheme and to the completion of an application to it? We would then know much more about what the reality will be for claimants.

4 pm

Amendment 17 is intended to provide the Committee with an opportunity to probe this whole area. I have some specific questions, too. What will be covered by the fixed legal fees envisaged by the Minister at the Ministry of Justice, Mrs Helen Grant, in her Written Ministerial Statement on 18 December last year? It would be helpful to know exactly what that scheme of fixed fees will cover and what the foreseeable amounts might be. I would like to know—maybe the Minister has told us this, but it would be helpful if he put it clearly on record—whether the scheme will pay the lawyers directly, in the same sort of way in which the scheme will pay any social security recoveries to

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the compensation recovery unit; or will the scheme pay the claimant, who then has to pay out legal costs from the sum he receives and himself make payment to the lawyers whose bills have to be met? However the legal costs are paid, whether they are paid by the scheme directly or by the claimant to the lawyers, will they be over and above the scheme award, or will the scheme award, already massively discounted at 70%, be further discounted by legal costs on top of the DWP recoveries? If the legal costs also have to be met out of the sum paid at typically 70% of what a court award might have been, this scheme begins to look pretty threadbare.

Amendment 28 refers to the situation in which someone appeals to the First-tier Tribunal against an award made by the scheme. The cost of advice associated with taking that step would not necessarily be only legal costs, but there could be legal costs. I know that the Government's position is that they do not provide legal aid to support appellants to the First-tier Tribunal, but it is fanciful to suppose that tribunal procedures are simple, user friendly, easily accessible or easy to handle for people who want to refer their case to one, as if it were some simple matter of dispensing justice under the spreading oak tree. If the Minister doubts this, I recommend he looks at the Sir Henry Hodge memorial lecture given in 2011 by the noble and learned Baroness, Lady Hale, Justice of the Supreme Court, in which she explained very clearly and compellingly, in the context of the proposals put forward by the Ministry of Justice in the LASPO Act, that if you remove legal aid from people seeking to bring their case to a tribunal you expose them to procedures that are complex, difficult and daunting.
I do not expect the Government to unravel everything that was legislated in the LASPO Act in the last Session, but we are talking here about the very specific circumstances of a very specific and narrowly defined group of people who will be eligible for payments under the diffuse mesothelioma payment scheme. Given, as we have already noted, that payments under that scheme may be of the order of 70% of what claimants might have got in the courts, different considerations apply. I hope it would be possible, out of the scheme's resources, to be able, if necessary, to provide some financial support to assist claimants who find that they need to appeal against a decision of the scheme.
Why are the Department of Work and Pensions and the Ministry of Justice out of sync, as they are? When the Minister told Parliament in his Statement on 25 July 2012 that the insurers had already set up ELTO and had agreed to introduce an electronic portal for registering mesothelioma claims, we were also given to understand that Mr Djanogly, the then Minister at the Ministry of Justice, was already discussing a new mesothelioma pre-action protocol. By that stage, the DWP had already been on the case for two years; it is now three years since the noble Lord rightly, following the impetus already established when my noble friend Lord McKenzie was in government, negotiated with the insurance industry. Even in July 2012, the MoJ was creaking into action. It had no excuse for being so slow off the mark even then. During the passage of the LASPO Act, the predicament of mesothelioma sufferers had been clearly stated and brilliantly articulated
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by the noble Lord, Lord Alton, during the debate on important amendments. The LASPO Act reached the statute book in the summer of 2012, yet it was not until 18

December last year that Mrs Helen Grant made her Statement. I will remind the Committee of some of the things she said:

"Today I am announcing the Government's intention to consult publicly on proposals to reform the way that mesothelioma cases are dealt with, including; introducing fixed legal fees for mesothelioma claims, a dedicated pre-action protocol for those claims and an electronic portal on which the claims will be registered".

However, the noble Lord had himself six months earlier told us that they were at work on the electronic portal. The Statement from the MoJ continues:

"The consultation will be issued in spring 2013. The aim is to ensure that these claims are processed and settled as quickly as possible given the nature of this disease. As part of that consultation, we will carry out the review required under section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the effect of the changes to the recoverability of conditional fee agreement success fees and after the event insurance premiums".

That was six months or so after the LASPO Act had reached the statute book, yet it was not until December that the Minister said that they were now going to set about that review. The Minister said:

"We intend to publish the outcome of that review next autumn … The Government consider that it is imperative that these claims are settled quickly and that early payment of compensation is made so as to ease the sufferings of victims of this dreadful disease and give some assurance that their dependants will be financially secure when they are no longer around. However, this cannot be achieved without a speedy pre-litigation process which is why the Government have decided to consult on how best to reduce delays in these cases".—[*Official Report*, Commons, 18/12/2012; col. 95WS.]

The Minister promised that the process would be completed by the following autumn, in 2013: that is, 10 whole months in which to conduct the review. That does not seem ambitiously rapid. Even that timetable slipped, however. The MoJ, presumably too embarrassed to make another Statement to Parliament, tweaked its website shortly after the Queen's Speech last month to tell us that the issuance of the consultation had slipped from the spring of 2013. It now said:

"We will bring forward a set of practical proposals in the summer of 2013".

I know that we have not had much summer yet, but it is mid-June. The last time I asked, which admittedly was as long ago as last Wednesday, the consultation still was not out. The website continues to shed crocodile tears:

"We want to make sure that people with this dreadful disease, which is always fatal, get the compensation they are entitled to quickly and fairly".

If we were not intent on being as consensual as we possibly can in this Committee, I would be tempted to say that the Secretary of State for Justice is presumably too busy undermining the justice system by privatising the courts and demolishing another great swathe of legal aid to have the time to consider the predicament of mesothelioma sufferers. However, I think these delays are shameful. I am sorry to press the Minister, who is a DWP Minister and who personally has done everything he can to advance this process as rapidly as he can. His frustration with the MoJ must be at least as great as ours. I look forward to his response to these points, and I beg to move.

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Lord German: My Lords, I am grateful to the noble Lord, Lord Howarth, for raising these issues, because it gives me an opportunity to raise some of the questions

around legal costs and about the work that has to go into preparing a case under the proposed scheme.

My first question concerns civil cases and the information that has been provided to us in the tariff about the awards. Is it net or gross, and does it include the legal costs? Have they been excluded from the awards or do they come on top? If they are on top, we need to know what kind of money has been paid to lawyers when a claimant has been awarded in order to be able to judge whether the figures in the documentation before us are accurate. I had always assumed that the impact assessment would provide accurate information, so I was rather stunned to realise that the figures of £7,000 for a successful applicant, £9,000 for an unsuccessful applicant downgraded to £2,000, is something of a leap. If you are a sufferer or the relative of a sufferer, engaging a lawyer to do the preliminary work that is necessary to undertake this sort of action presents some sort of risk if the application fails. I want to explore that area as well.

The impact assessment gives an estimate of unsuccessful legal fees as £3 million out of a total of £24 million. A rough division shows that one case in every eight is unsuccessful, so if you are the one person out of the eight, presumably in a civil case action you are going to have to find those fees, unless of course you can find a no-win no-fee lawyer. I raised this issue at Second Reading. It seems that if you were about to embark upon this legal route, unless there is some form of support guaranteed at the end of it it would be the no-win no-fee lawyer to whom you would have to turn. I would be grateful if my noble friend could confirm that or tell us what alternatives there are.

The issue of evidence that requires a lawyer is quite substantial. Having now had the benefit of seeing the draft rules for the scheme, Part 1 paragraph 2 lists the evidence that an applicant may be required to provide. It is quite substantial and includes the history of employment and the companies to which the applicant is referring. In civil cases the courts have made it clear that you have to prove negligence, and three tests are given in the Appeal Court judgment. Three measures have to be satisfied in order to prove negligence. My second question, therefore, is: does the applicant have to prove negligence? That would be far more difficult to do in a case where the company or insurer is not present, unless the word of the applicant is determined to be acceptable.

4.15 pm

My third question relates to the balance that the applicant will have in this scheme. If there is no tracing fee, which is the implication in the Bill, that clearly saves a considerable amount of money for the applicant in unsuccessful cases. However, paragraph 83 in the impact assessment of May says:

"Applicants for payments under the scheme will incur legal costs in making their application … it is assumed that the scheme payment will include an amount to cover this".

Does that mean that this will be taken from the amount which the scheme payment makes? If that is the case, the actual payment will be even further

reduced. I hope my noble friend can answer that question as well. There are some very grey areas about the information that we have been given and some very substantive questions that need to be answered. I hope my noble friend will be able to do that.

Lord McKenzie of Luton: My Lords, we have Amendment 42 in this group, about which I can be brief. Before speaking to it, I will say that I support the thrust of the amendments moved by my noble friend Lord Howarth and the questions posed by the noble Lord, Lord German. Specifically, the amendment seeks to ensure that the definition of the costs of the diffuse mesothelioma payment scheme includes legal costs incurred by a person bringing proceedings, including appeal costs, and in particular that it covers the costs of proceedings brought as a consequence of Clause 10. Where Clause 10 proceedings are facilitated, can the Minister confirm that the financial help referred to will cover the legal costs of proceedings, including appeal costs? How is the funding for this to be organised? Presumably it will come from the levy but, like other amounts in respect of legal costs, not in a way that reduces the tariff amount. I will not probe further the issue of the reduction in estimated legal costs as the Minister has enough queries about that already. However, I look forward to the answer.

Lord Freud: My Lords, these amendments look to allow for legal fees to be paid by the scheme without limit. Amendment 17, tabled by the noble Lord, Lord Howarth, looks to reimburse in full all legal costs incurred either through applying to the scheme or through bringing proceedings against an employer or insurer. The noble Lord, Lord Howarth, has also tabled Amendment 28 to cover the cost of legal advice obtained in respect of appeals to the First-tier Tribunal. Amendment 42, in the name of the noble Lord, Lord McKenzie, and the noble Baroness, Lady Sherlock, also seeks to cover any legal costs, including the cost of appeals.

The introduction of the scheme is aimed at making the receipt of payment as quick and simple as possible. The amount that a successful scheme applicant is paid will include an amount for legal costs. This will be a fixed amount and will be included as part of the scheme payment received by an applicant and specified in the regulations. In the impact assessment, we used the working assumption of roughly £7,000 to go towards legal fees for each successful application. Since then, we have revised the numbers, using the working assumption of £2,000. The final amount will likely fall somewhere between the two. For clarity, the schedule will show the amount of the actual payment and the amount of legal fees, which will be on top of the 70% figure, to be absolutely clear in response to the question from my noble friend Lord German and the noble Lord, Lord Howarth.

I reassure the noble Lord, Lord Howarth, that the MoJ and the DWP are at least on the same planetary system—some of the time, anyway. The specific regulations will be laid after the Bill receives Royal Assent. The MoJ will conduct elaborate, complicated consultation. To update the noble Lord, Lord Howarth, on timing—I hear his strength of feeling on this—the consultation

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will be launched in July 2013, next month, and will contain specific options. Clearly, it is recognised that this is a complex issue. The consultation period will last 12 weeks as it will go through the summer, and the response will be published in the winter of 2013. Some of the issues around the right kind of fixed costs will be dealt with in that consultation.

The aim of the scheme is to make the receipt of payment as quick and simple as possible. In response to my noble friend Lord German's question about the level of information that is required, the eligibility criteria are specified in Clauses 2 and 3 of the Bill. The scheme is not a no-fault scheme, so the applicant will be required to establish the eligibility criteria. However, they are in practice much simpler and more

straightforward than in a civil claim. Rather than go through all the specifics of that, in the interests of time I would prefer to set it out in writing.
The reasons for wanting to set a fixed amount of legal costs that can be recovered by lawyers are threefold. First, it is important that applicants are not charged unreasonable or disproportionate legal costs by their lawyers, as we have seen happen in other instances. Any legal work would be in respect of an application to a statutory scheme, which is non-contentious and much quicker and simpler than civil litigation. Secondly, we hope that fixed costs will deter scheme applicants being pressured into entering no-win no-fee agreements, potentially reducing the amount of scheme payment paid in respect of their disease. Thirdly, it is important that the scheme is not overburdened with high legal costs, which would raise the levy and jeopardise the scheme in its entirety.
In respect of any legal costs associated with appealing to the First-tier Tribunal, if these were to be paid in every case that could act as incentive for anyone who was unsuccessful in receiving a scheme payment launching an appeal, even if the appeal was without merit. This would significantly increase the amount of money needed to fund legal fees, requiring the levy to be set higher. Any significant increase in costs could prevent the scheme being set up. It could also overburden the tribunals system with unnecessary appeals.
Lord Avebury: That takes care of the disincentive to bring claims to the First-tier Tribunal that have no merit, but what about the claims that do?
Lord Freud: It is important to highlight that higher rights are not required in the First-tier Tribunal or the Upper Tribunal as they are in civil courts. That means that scheme applicants could represent themselves, or that their solicitor could conduct any advocacy on their behalf; they would not need to instruct expensive legal counsel. There will be no legal aid for appeals to the First-tier Tribunal following the review scheme decision unless exceptionally it is necessary to make legal aid available to avoid a breach of an individual's rights under the ECHR or under European Union law relating to the provision of legal services. This will keep costs to a manageable level.
Picking up on the point about the tribunal system, it is traditionally an inquisitorial rather than adversarial system and is designed to make things easier for those

representing themselves. For those who do wish to obtain legal representation, it is hoped that lawyers will charge a fair and proportionate rate. The work will be non-contentious and there will be no defendant as there is in a civil case. The tribunal system is there to assist appellants. There is therefore every incentive for lawyers to carry out work on scheme appeals required efficiently and in a way that keeps costs proportionate.

Picking up the question from the noble Lord, Lord Howarth, on the level of fixed fees, clearly the MoJ consultation will consult on both the principle and the structure of such a regime to support a dedicated pre-action protocol. I hope noble Lords can see the need for pragmatism here—the need to keep costs at a proportionate amount and to protect the money that an applicant receives in respect of the disease from high legal costs, as far as possible. I urge the noble Lords and the noble Baroness not to press the amendments.
Lord McKenzie of Luton: Could the Minister deal with the point about proceedings that could arise under Clause 10? These are proceedings which the scheme administrator may help a person to undertake,

"for example, by conducting proceedings or by giving advice or financial help".

Presumably the costs of that help would be outside the fixed fee arrangements. Would the levy make some sort of provision for those costs? Otherwise that would come off the tariff announcement.
Lord Freud: We will deal with this issue in some detail in debate on a later amendment. In practice, where the scheme decides that it is a sensible thing to do, it will of course by definition take on the costs of pursuing that application.
Lord Howarth of Newport: My Lords, I am very grateful to the noble Lord, Lord German, and to my noble friend Lord McKenzie for their precisely focused and apposite questions. I am also grateful to the Minister for what he has said in response to this debate, although I wish he had not set up an Aunt Sally in misrepresenting both my amendments, because I was very careful to include in the wording of each amendment that it was only reasonable legal costs that I contemplated should be met in these ways.
Lord Freud: Let me apologise for any misrepresentation that I may have inadvertently made.
Lord Howarth of Newport: The Minister is so engaging as he apologises that of course it would be churlish if I did not immediately say yes. I think it would be helpful if at some stage he would also elaborate on the circumstances in which the ECHR exception to the disqualification for legal aid might apply. Should we anticipate that people taking cases to tribunals would do so in pursuit of justiciable rights under the European Convention on Human Rights, because that could make a significant practical difference? I simply do not know the answer, but it would be interesting and helpful to have some advice.
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The Minister did his best to defend his colleagues over the way at the Ministry of Justice, but when I inquired on Wednesday of last week when they expected to issue the consultation, I was told that it was going to be this week. He has just told us that it has slipped yet again to July. There would then be the consultation, and it is proper to allow a reasonable amount time for people to respond to that. Finally, the Government's response and determination of what they are going to do is not expected until the winter. That is a fairly elastic target.
I am worried that the MoJ might be holding things up so that mesothelioma sufferers and their families will be prevented from getting the benefits of the scheme as soon as they might. While we as parliamentarians seek to scrutinise this legislation properly, we are anxious to give it the speediest possible passage through Parliament. It would be rather sad and ironic if, because of the lumbering pace at which another department moves, it was not possible to get the whole scheme up and running as early as it otherwise might be. I hope the Minister will convey these thoughts to his colleagues in the Ministry of Justice.
The Minister brought us the good news that legal costs will be paid on top of the 70% payment under the scheme. That makes me very happy, and on that basis I beg leave to withdraw the amendment.
Amendment 17 withdrawn.
Amendment 18 not moved.
4.30 pm

Amendment 19
*Moved by **Lord McKenzie of Luton***

19: Clause 4, page 3, line 11, leave out subsection (3)

Lord McKenzie of Luton: My Lords, I should explain that this amendment was tabled before we had a chance to peruse a draft of the scheme rules, but there are some issues still worth pursuing. It is a probing amendment and is, I hope, precisely focused for the benefit of my noble friend. Clause 4(3)(a) states that the scheme may make payments "subject to conditions", and paragraph (b) gives,

> "the scheme administrator power to decide when to impose conditions or what conditions to impose".

To the extent that these conditions are to be covered in the scheme rules and that those scheme rules are to be subject to some parliamentary process, we are perhaps more relaxed about the position. However, paragraph (b) appears to give a wide discretion to the administrator, which is likely to be an arm of the insurance industry. The draft scheme rules throw some light on this by identifying that the conditions that might be imposed include requiring that a trust be established and that a deputy or guardian be appointed. The draft rules also authorise the meeting of costs to this end by the administrator. The thrust of this seems

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to be a concern in situations relating to the capacity or legal competency of the claimant or a dependant. However, there is nothing that requires the imposition of conditions to be for the benefit of the applicant or dependants rather than that of the levy payers.

A key point in the draft rules is that conditions can be imposed to ensure that that payment is used for the benefit of the applicant. That requirement does not appear in primary legislation. There would be merit in it doing so to tie down this potentially wide discretion. I await the Minister's response on that. We might return to this quite narrow point on Report to embed the concept that is in the draft rules, which we have now seen, into primary legislation. I beg to move.

Lord Browne of Ladyton: My Lords, I rise to reinforce the points made by my noble friend Lord McKenzie. It is easier to understand what lies behind Clause 4(3) now that we have the draft scheme rules. To understand the Government's thinking one has to read that subsection along with Rules 15 and 16(3)(e)—I think—and presumably also the review provisions and the appeal provisions that will apply all the way back to any conditions that may be imposed, set out in Rule 19 and those following it. It is by no stretch of the imagination straightforward to determine what exactly the combination of this provision and the rules will mean in practice. I have just a couple of specific questions, which I hope are relatively simple.

The primary legislation, if enacted, will allow conditions to be imposed on any payment. There appears to be no limit to the conditions that can be imposed. The rules, to some degree, limit them. Rule 15, in particular, says that this rule—that is, the decision to impose conditions on making a payment—applies when the scheme administrator first decides to make a payment under the scheme but considers that there is good reason to impose one or more conditions in making a payment in order to ensure that the payment is used for the benefit of the applicant.

The next paragraph, paragraph 2, says that the scheme administrator may impose such conditions as it considers appropriate. We appear to go back into a very broad power immediately after a limiting power. It is not clear to me that the limitation in the first part of that rule applies to the second part of that rule. If it is intended to do so, clarification from the Minister might be of some assistance.

I reinforce the point made by my noble friend Lord McKenzie that if that restriction on making conditions is to apply to all conditions, it would be better for that restriction to be reflected in the primary legislation rather than in the rules. There is at least one possible interpretation of this at the moment—I have not had time to work out all the possible interpretations—that is, that the power to make the rules requires the scheme administrator to come to the view that rules are necessary to ensure that the payment is used for the benefit of the applicant. Once they pass that hurdle, the administrator can make any rule that it considers appropriate. It is not clear that all rules have to pass the test of being rules made to ensure that the payment is used for the benefit of the applicant. That is intended, but it would be helpful if that was clear.

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Lord Freud: My Lords, I fully recognise that Amendment 19 is a probing amendment that would remove the possibility of the scheme making payments subject to conditions. It would therefore have the consequence that the recipient of a scheme payment would have full control over the use of the scheme payment.

Let me make the purpose of this part of the clause absolutely clear. In general, we fully expect that most scheme payments will be made to the applicant. This is for vulnerable people who might be mentally incapable of handling their own finances or who are unable to look after their own welfare by attending to basic financial transactions that adults normally carry out for themselves. It is important, therefore, that in those sorts of cases the scheme administrator is able to subject some payments to certain safeguards, such as how a scheme payment is to be used, and to decide when such conditions should be imposed.

We expect the scheme administrator to use this power to ensure that, where appropriate, payment is made to an appropriate person or fund to safeguard the beneficiaries' interests. I am sure that the one thing on which we are all agreed in this Committee is that we want to avoid the recipient of a scheme payment having unsupervised control over the use of a large sum of money if they are incapable of managing such a sum. However, a number of valuable points are being made about the interplay between primary legislation and regulations, which we will take away and consider. Clearly, the rules are in draft and we will take the points made today as we look over them. With that assurance, I urge the noble Lord, Lord McKenzie, and the noble Baroness, Lady Sherlock, not to press their amendment.

Lord Avebury: Perhaps I may ask my noble friend why, if the only circumstances in which conditions are to be imposed are those that he has just outlined, where the recipient of the compensation is incapable of handling his own financial affairs, Clause 15 does not specify those circumstances and thereby reduce the breadth of the wording, which according to him is completely unnecessary.

Lord Freud: I take on board my noble friend's point. As I said, I shall look at this and the other points made by this Committee. The rules are only in draft form, and we may look at them to lock that down.

Lord Browne of Ladyton: I am sure that the Minister will do this, but perhaps I may check that he will consider whether it would be better to reflect that restriction in primary legislation rather than allowing it to appear for the first time in the rules.

Lord Freud: I will look at that, but I remind noble Lords that primary legislation sets a framework, and what matters here is how the rules work. In this case, the rules that we have agreed will go before Parliament in the form of regulations, so there will be a chance for oversight of that issue. Therefore, it does not matter too much where we make sure that the matter is under control.

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Lord McKenzie of Luton: My Lords, I thank the Minister for his response and his consideration of this matter. I am not sure that we had formally heard that the rules will go before Parliament by way of regulations. We had anticipated that from our debate last week, but I am grateful for the assurance.

Lord Freud: My Lords, I must withdraw that completely. I meant to say that we are considering very deeply the suggestion made by the Committee that the rules will go into regulations.

Lord McKenzie of Luton: I am most grateful to the Minister for his further clarification. Of course, this was a probing amendment, and we have common cause in seeking to make sure that vulnerable people are safeguarded in relation to these payments. I thank my noble friend Lord Browne for his support—he made a very telling point about the interpretation of things as they stand—and the noble Lord, Lord Avebury. I am grateful for the fact that the Minister will take this away and give it further thought. I hope he will consider putting a provision into primary legislation that will make clear the intent of this decision-making power and the conditions that could be imposed by the administrator. Even if the rules are to be dealt with by regulations, they are likely to be dealt with by the negative procedure, which is what the Delegated Powers Committee recommended. Obviously, that is a less satisfactory forum in which to address these details. Having said that, I beg leave to withdraw the amendment.

Amendment 19 withdrawn.

4.45 pm

Amendment 20

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

20: Clause 4, page 3, line 17, at end insert—

"( ) The Secretary of State may not seek repayment of that portion of any compensation or scheme payment made in respect of pain and suffering."

Lord Howarth of Newport: My Lords, the amendments in this relatively large group are intended to enable us to probe the Government on their intentions behind the recovery of social security benefits and lump-sum payments made by the scheme. I also offer some suggestions as to how a relatively lenient recovery regime might reasonably be applied to payments from the scheme.

Schedule 1 deals with these matters, but it is a prime candidate for the plain English prize for legislative opacity. It was beyond my wit to amend it for the purposes I had in mind. Therefore, I tabled the amendments to Clause 4 to establish some principles to constrain and guide the Secretary of State—and, in the case of Amendment 26, to provide him with an opportunity not to take away too much with one hand while he, or rather the insurance industry, gives with the other. I emphasise, as is the nature of amendments to the Bill, that we are talking only of the application of these proposed measures to the diffuse mesothelioma payments scheme or other schemes that might be set

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up under this legislation. I am not, needless to say, seeking to rewrite social security law; the Minister need not fear that that the ground will give way under his feet if he is willing to take an accommodating view of some of these amendments. It is an opportunity for the Minister to explain—relatively fully, I hope—what the spirit and practice will be of his department's approach to recovery of benefits and lump-sum payments in these circumstances.

There is one principle, at any rate, that we all—I believe I can include the Minister—want to apply: the rules and the practice where the social security benefit arrangements and the scheme interact ought to be as generous as possible. That is more particularly the case in the situation in which the full, insured entitlements which a claimant ought to have have proved impossible to obtain because the documents are not there: a situation in which claimants have had to fight and wait for financial relief; and in which, when that relief then comes, it is discounted by 30% from the payments they might have secured from a civil court action. Of course, that discount of 30% might become less if Parliament in due course agrees with every noble Lord who spoke in our debate last week on Amendments 15 and 18 on whether the 70% measure should be raised.
The Minister might say that there is a deficit. He will not quite put it like this: that the further the Chancellor's financial strategy goes astray, the more imperative it is that no opportunity is lost to reduce the deficit between what the Government raise and what they spend. In response, I say that, of all members of society, mesothelioma sufferers and their families should least be required to shoulder the burden of deficit reduction. On any reasonable scale of values, they surely should have priority for relatively generous treatment—before, for example, affluent individuals who can still get top-rate tax relief at 40% on their pension contributions.
However, the Minister might say that we must have regard for the interests of the generality of taxpayers. To that, I say that the British people are kindly and sympathetic. I believe that 99.9% would be positively glad to think that some minuscule part of the taxes they pay was going to help their exceptionally unfortunate fellow citizens who are mesothelioma sufferers or their dependants.
The principle that should govern the specifics of benefits recovery that are provided in the Bill should be that the DWP should be as generous and lenient as it can be.
What, in particular, ought the Bill to provide? Amendments 20 to 22 and 27A offer alternative ways in which we might exempt recovery payments from the scheme made on account of pain and suffering. This goes with the grain of DWP practice; indeed, it might even be in the law that the compensation recovery unit does not recover the element of an award made by a court that is in respect of pain and suffering, in contrast to the elements of a court award that are made on account of loss of earnings or costs of care where recovery occurs.
If it is going with the grain of existing DWP practice, the Minister might say that these amendments are unnecessary. To me, however, it is not clear that the
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rules that the DWP and the compensation recovery unit apply where court cases are concerned can simply be transposed to the scheme. The Minister at Second Reading was at pains to say with the utmost clarity:

"The scheme is not intended to be an alternative to civil damages, nor is it a compensation scheme".—[*Official Report*, 20/5/12; col. 689.]
However, he then went on blithely to say that,

> "an eligible applicant will receive a scheme payment after the deduction of relevant social security benefits and lump-sum payments, which the scheme administrator will repay to my department through its compensation recovery unit".—[

Official Report

, 20/5/13; cols. 691-92.]

Setting aside the palpable contradiction there, the Committee ought to probe the significance of the Minister's insistence that payments from the scheme are not compensation. I wonder whether what is going on here is that the DWP wants to be able to decree that no part of a payment from the scheme should be taken as compensation for pain and suffering, and therefore that the capital will, or should, apply to the whole of the payment, and that the compensation recovery unit, which henceforth should be better known as the MPR—the Mesothelioma Payments Raider—would be able to help itself to a vastly larger proportion of a payment made by the scheme.

Under new Section 8A(2)(b), in paragraph 3 of Schedule 1, it is contemplated that the gross amount of the compensation payment—that is, the payment that the Minister said, in terms, on Second Reading, was not a compensation payment—

> "is to be reduced to nil in any case where the amount of the recoverable benefit is equal to or greater than the gross amount of the compensation payment".

There we have it. We need to amend the Bill to protect mesothelioma sufferers and their families from the compensation recovery unit predators. The law should not enable the Government to take away from an award made by the scheme that element of the award that, if it were a court award, would be designated as being made on account of pain and suffering and which the CRU therefore could not touch. The scheme is already unfair, with payments 30% less than they would be from the court. If the compensation recovery unit is to be let loose untrammelled on scheme payments, it will be even more unfair. The draft rules of the scheme, with which the Minister has provided us, make no mention of any of this. They say nothing about whether any part of payments from the scheme would be on account of pain and suffering, loss of earnings or costs of care. The rules say simply that payment must be made in a lump sum.

Amendments 20 and 21 would provide that the whole payment by the scheme would be regarded as being made on account of pain and suffering, and that the Secretary of State could not recover payment made on account of pain and suffering. In that way, the whole payment would be secured from the grasping fingers of the CRU. If the Committee thinks that is going too far, Amendment 22 would limit the protection on account of pain and suffering to the first £75,000 of a payment made by the scheme. Amendment 27A is more moderate still, and would provide that:

"The first £50,000 or 50% of any payment by the scheme, whichever is the larger amount",

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should be protected. I hope the Committee will look seriously at that proposition.

I will be brief on the other amendments, which are intended to probe the Minister's intentions with regard to the recovery of means-tested benefits and non-means-tested benefits, recovery from the person diagnosed, carers and dependants, and of social security benefits paid before the grant of an award by the scheme and of benefits or lump sums paid after such an award has been granted.

The May 2013 impact assessment dealt with these matters on page 18, and anticipated that over 10 years the department would recover £71 million in social security benefits and lump sum payments. It would be helpful if the Minister would break down that £71 million as between social security benefits and lump sum payments. The £71 million would be reduced by £2 million of administrative costs and another £17 million for the smoothing costs over the first four years of the scheme, leaving a net £52 million going back to the department.

Paragraph 90 on page 23 of the impact assessment states that,

> "under the Universal Credit … rules being developed, if a person suffering from mesothelioma received civil compensation or a payment from the scheme, it would not affect their means-tested benefits for at least a year (and would be ignored indefinitely for Pension Credit). If they put the compensation or scheme payment into a trust within that year, the value of the trust and any income from it would continue to be ignored".

The paragraph goes on to note that bereaved relatives would not be so protected. Amendment 25 would extend that period of ignoring from one to two years. Tragically, at the end of two years it may be anticipated that nobody who has been diagnosed with mesothelioma will still be alive, so they will not see benefits or lump sums taken from them.

Amendment 27B suggests an alternative route to protecting these payments via trust law. It would be extremely good if the Minister could look at this, having regard to the situation of the terribly vulnerable households, one of whose members has been diagnosed with mesothelioma. In effect, the amendment would protect social security benefits and lump-sum payments beyond that first year by deeming that the payments from the scheme had been made as payments from trust and should therefore be ignored. Of course, it deems that the money held by the scheme is held in trust for claimants.

An alternative way to approach this might be to have another amendment stating that the scheme should make all payments into trust on behalf of its beneficiaries. I am well aware that trust law is immensely complex, but I suggest that there might be a route that could reasonably be pursued by the Committee and by the Government through the use of trusts to protect recipients of payments in that second year.

Amendment 27 would protect lump sums altogether from recovery. In the normal course of events, I would endorse the principle that nobody should be compensated twice for the same thing. Indeed, my amendment is still consistent with that principle for two reasons. First, the Minister said that these payments were not compensation, so he cannot argue that people would

be compensated twice. Secondly, as the payments are to be discounted by 30% from what the court would award, we can very properly take it that the lump-sum payments will fall into the 30% that will not be paid and therefore cannot be reclaimed.

I hope the Minister will explain very precisely his intentions in regard to the recovery of social security payments and lump-sum payments, and that he will seize some practical hints that I have offered as a way forward, so that he can protect mesothelioma sufferers from his own compensation recovery unit. I beg to move.

5 pm

Lord Browne of Ladyton: My Lords, I am strongly in favour of the principle that informs the amendments in this group, which has been set out in such detail by my noble friend Lord Howarth of Newport. At Second Reading, the Minister in explaining—and, I dare say, in justifying—the part of the Bill that allows for the recovery of benefits, relied on the principle, with which we all agree, that nobody should be compensated twice. However, until then he had explained in some detail, in order to explain the 70% of average as a payment to mesothelioma sufferers and to defend it against the argument that it was insufficient, that we were dealing not

with a compensation scheme at all but with a payments scheme. As I pointed out strongly in my contribution at Second Reading, it is inconsistent to have the same two arguments in relation to the same legislation. Either this is a compensation scheme or it is a payment scheme.
My noble friend Lord Howarth of Newport, in trying to devise a justification or a reason for this, was being generous to the Government. He has observed from a sedentary position that he did not mean to be; I know that, but he was. This is a payment scheme until we come to compensation recovery, because if it were a compensation scheme, all the justifications for averaging and for taking percentages of averages would fall away. They would be intellectually incapable of being defended. However, one comes to the point at which it is clear that the Treasury wants to try to recover some of this money as if it was compensation, so it has to become compensation or quasi-compensation to justify that. One can then deploy the high-minded principle that no one should be compensated twice for the same loss. I have some sympathy for the Minister in having to ride these two horses, and I hope that he is not torn apart by them. However, as I said at Second Reading and as someone once said to me when I was a Minister, if you cannot ride two horses at once, you should not be in the circus.
The truth is that that is what lies at the heart of this issue. The justification for recovering benefits paid to people through the compensation recovery process is not because people cannot be compensated twice, it is just because the money is there and it can be recovered. It is because it can be done. To some degree, given that the Treasury has inadvertently been subsidising the insurance industry through a genuine compensation scheme in the past, perhaps there is some justification for trying to get some of the money back, and of course we are living in difficult financial times. I understand
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that, but I would like the Minister to explain in simple terms why this is being done rather than by seeking some justification in the principle that informs compensation recovery.

The compensation recovery system is set out in quite complicated law called the Social Security (Recovery of Benefits) Act 1997, as now amended, and in a variety of subsequent Acts of Parliament. It applies throughout the United Kingdom. I was not present for the earlier debate about the calculation of the average that would inform the payment, but there are substantial differences between awards for mesothelioma in Scotland as opposed to the rest of the United Kingdom. The Scottish courts are much more generous to mesothelioma sufferers than are the English courts and award substantially more in damages. However, compensation recovery law is consistent throughout the United Kingdom.
If Amendments 20 and 21 were to be accepted, my noble friend Lord Howarth would have created a device to defeat the Government’s ability to recover compensation at all by designating all payments as being for pain and suffering, and through the second of the two amendments would discount all payments for pain and suffering from recovery. He is wise to do this because that is the way the Act operates at the moment. However, thanks to some of my colleagues in the legal profession in Scotland, I have a pretty exhaustive list of all the heads of damages litigation that are not offsetable in relation to benefits. The list is the best part of half a page long. I will spare noble Lords the whole list, but it moves from pain and suffering to loss of future earnings, and it goes into some detail. All of them are component elements

that one would look at if one were calculating the level of compensation payment due to a mesothelioma sufferer as a possible head of damages.
The thing about this list is that it lies behind all the settlements that form the history of the settlements that in turn have informed the average, from which the Government will take the 70%. They are not irrelevant to the calculation of the payment that will be made; they are at the heart of it. If the payments were made through a court process of compensation, a very small number would allow for benefit recovery: substantially, they would not allow it. There is a lot to be said for treating these payments, which are informed in that way, in the same way as one would treat compensation. Not the least that can be said in favour of that proposition is the fact that the Government cannot justify recovering any benefits unless they can use the word "compensation" against the payments.
I will make a final point to the Minister that is not reflected in an amendment. I would like to know his justification for this situation. If, having gone through a process of looking at historical settlements and averaging them one is then justified in making a payment that is 70% of that average, why is one justified in taking 100% of the benefits of that 70% settlement? Why do we not at least restrict the recovery of the benefits to the same percentage that we apply to the calculation of the payment?
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Lord McKenzie of Luton: My Lords, my noble friend Lord Howarth opened up an important area for consideration, and was strongly supported by my noble friend Lord Browne. I start by asking the Minister about the computation of the benefit recovery amounts in the impact assessment. Does he have an analysis that distinguishes between the recovery of lump sums and the recovery of a benefit, and, if so, what is included in the second list?
In principle, we should seek from the Bill a scheme that will place claimants in the same position as they would have been had they received compensation in the normal manner, notwithstanding the fact, as my noble friend outlined, that it is a payments scheme. This position is fettered in two key respects. First, average compensation in age bands is used as a proxy for actual compensation. We accept this as a practical matter. Secondly, only a percentage—70% is the figure that is currently suggested—of relevant average compensation will be used. We strenuously reject this and will continue to press for 100% payment.
On benefit recovery, we do not challenge the current broad approach in the benefits system, although there is always scope for a review to see how it is working in practice. However, I suggest that any change should not be fundamentally a matter for the Bill. However, neither should we see it as a mechanism to redress any shortfall in the payments scheme. That should be addressed by paying at 100%. To do otherwise would relieve insurers of their obligations and impose a cost on the state. However, it is absolutely right, if our benchmark is normal compensation arrangements, to ensure that a scheme payment should attract no greater benefit recovery than a payment received as compensation. If our benchmark is 100% payment, we would not want to see any compensation recovery that was greater than it would be with a formal compensation scheme.
One key difference is that a scheme payment, absent my noble friend's amendments, is not allocated over various heads. We received a helpful note on this from the Bill team with some illustrative examples, and were grateful for a further meeting this morning that helped to clarify some issues. As for lump sums recoverable in respect of the 1979 and 2008 Acts, it is understood that there is no difference between the payment scheme and normal compensation, although if paid

at less than 100% there might in extremis be a shortfall for a scheme payment. The recovery of other benefits is more convoluted, and a whole range of benefits are potentially recoverable. The rules were helpfully summarised in the briefing note, which says:
"The compensator may reduce the amount of payment he makes to the injured person to take into account … any amounts he is required to pay the SoS. The injured person is never required to repay the SoS recoverable benefits or lump sums. If the compensator cannot reduce the compensation he is still required to repay the SoS".
Two things are happening here: there is an amount that has to be paid by the compensator to the Secretary of State, and there is a second question about the extent to which any of that can be recovered from claimants. The note continues:
"Compensation can only be reduced to offset amounts to be repaid to the SoS where the compensation and the benefit are both paid to meet the same need".
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So,

> "compensation paid for loss of earnings can only be reduced to offset benefits paid for loss of earnings",

such as IIDB, while,

> "compensation paid for cost of care can only be reduced to offset benefits paid for cost of care".

Further, compensation paid for general damages such as pain and suffering—the thrust of a number of my noble friend's amendments—cannot,

> "be reduced to offset any recoverable benefits".

On principle, since what is being paid here is not allocable over any of those amounts, it would seem difficult to justify any benefit recovery as a result. I think it was suggested in our meeting this morning that this is a practical matter and that these things are somehow fixed by the insurers in how they allocate payments. I am bound to say that I struggle to see how that might happen.
There is a further issue. Again, I am grateful for a note from the officials on this. I just want to press a point of principle to clarify the situation. If the scheme payment was 100% for pain and suffering, would the compensation recovery work as follows? If the scheme payment was £100,000, the claimant received IIDB of £10,000, and a 2008 scheme payment £10,000, the benefits of IIDB could not be recovered from payments for pain and suffering but the 2008 scheme lumps could be, so the outcome would be that the claimant received £90,000—that is, the £100,000 scheme payment minus the £10,000 deduction for the lump sum—but the cost to the scheme administrator would be £110,000: the £20,000 to DWP and the £90,000 to the claimant. In those circumstances, the claimant actually meets more than the gross cost of the scheme payment. I do not know the extent to which that is factored into the noble Lord's calculations. It seems that we need clarity about how this will all work. We would be reluctant to go down the path of tweaking the benefit recovery as a means of letting insurers off the hook. It is their obligation to pay 100% compensation. If we do otherwise, we in effect ask the state to meet that shortfall, when insurers should be doing that.
Lord Freud: My Lords, I thank the noble Lord for these amendments. Clearly, the general intention behind them is to place restrictions on the ability of the Secretary of State to recover both social security benefits and existing lump-sum payments made

in accordance with the 1979 and 2008 Acts. This would then prevent the scheme administrator from reducing scheme payments to offset the cost of repaying recoverable benefits and lump sums to the Secretary of State. Actually, it may be the case that two of the amendments would restrict the scheme administrator from seeking repayment where sums were paid incorrectly due to error, mistake, misrepresentation or fraud. Clearly, where a scheme payment is falsely claimed it is only right that it should be repaid. Broadly, we think—as the noble Lord pointed out in his cogent remarks—that the amendments are aimed at restricting the recovery of benefits from scheme payments.

5.15 pm

Can I just deal with the issue of compensation, which reminds me of my classes in Wittgenstein and the meaning of words? The payments scheme is not a

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compensation scheme in the sense that the Government are not accepting any liability for the damage caused and it is not replacing civil litigation. However, one uses the expression that one gets something for or in compensation, in a non-legal sense, for having had this dreadful disease. So I do not think it is helpful to play with the words under the recovery of benefits legislation. Where a person makes any payment to or in respect of another in consequence of any accident, injury or disease, he is required to pay the Secretary of State any recoverable social benefit and lump-sum payments. That recovery would apply if the person made a goodwill payment to another after an accident.

The other clarification that it might be worth making upfront concerns the point touched on by the noble Lord, Lord McKenzie. Treating a payment as being made on account of pain and suffering will not have the effect that I believe the noble Lord, Lord Howarth, looked to achieve. Payments determined as such are still subject to recovery of the 1979 and 2008 schemes. That payment would be exempt from the recovery of other benefits such as CSA but, bluntly, these payments are generally much smaller. The relatively larger proportion of the payments to be recovered—in other words, the scheme payments—would still be recoverable. So I do not think this is a particularly fruitful route for the noble Lord to pursue.

I will have to write to him on the relative sizes of the schemes. Clearly, it is by much the larger amount and, given the regrettably short life expectancy of victims, it becomes even more the case that the amount received by the actual victim is likely to be predominantly in that category, but I will write with better figures.

I am not making here a point about the position of the country and the deficit and all that. That is not relevant here. The point about this is that a person should not receive money twice in respect of the same injury or disease, for example once by the benefits system and secondly through civil compensation. That is a long-standing point. It dates back at least as far as the pre-1948 workers' compensation system, where injured workers had to elect either to sue their employer in tort or claim workers' compensation: they could not receive both. That principle was carried forward and evolved into legislation after 1948, creating a benefit recovery mechanism which is the basis for what we have today in the 1997 Act.

We believe the same should apply to scheme payments because, if the scheme administrator was not required to repay recoverable social security benefits and lump sums when they made a scheme payment, this would mean that others, who paid compensation or made similar but perhaps lower payments in respect of personal injuries, were treated less favourably. Clearly that would be unjust.

Under compensation recovery legislation, a person who makes a payment, whether that is compensation or any other form of payment made in cash—for instance, goodwill—to or in respect of another, in consequence of any accident, injury or disease suffered by the other, is required to pay the Secretary of State any recoverable social benefits and lump-sum payments. He is required to pay the Secretary of State, whether or not he can deduct the full amount of the benefits

and lump-sum payments from the payment made to the injured party. It cannot matter how the scheme payment is defined, it is still a payment made by one person to another in respect of a disease suffered by the other so compensation recovery legislation applies. Similarly, if the payment was paid out of a trust then a payment would still have to be made and so compensation recovery legislation would apply.

Accordingly, in relation to scheme payments, if the scheme administrator does not have the opportunity to reduce the scheme payment to offset any amounts they are required to repay the Secretary of State, in the same way as others who make personal injury payments may do so, this would mean the costs to the scheme's funds would be increased correspondingly. This is because the scheme administrator would have to not only pay the full value of a scheme payment but also repay the Secretary of State an amount equivalent to any monies the applicant had received for their mesothelioma by way of recoverable state benefits and lump sums. Unlike compensation, scheme payments will not be made up of an amount for pain and suffering and an amount for pecuniary losses. The payments will be set according to a fixed tariff and paid at a flat rate based on the age of the person with mesothelioma. If scheme payments were to be made by calculating specific heads of damages in each individual case, it would add to the complexity of administering the scheme both for individual applicants, who would have to go to the trouble and expense of proving the extent of their actual loss, and for the scheme administrator. This would clearly delay payments to people when they are most needed. As the scheme payment is tariff based, the whole amount is available for compensation recovery.

Even if a proportion of the scheme payment was to be ring-fenced for pain and suffering, as suggested in Amendments 22 and 27A, the remaining portion could still be reduced to take into account the benefit recovery. I have already talked about the fact that various payments are not differentiated on the basis of whether they are made in respect of pain and suffering.

The noble Lord, Lord Howarth, asked whether a person's scheme payments could be completely wiped out by the recovery process. The average amount that a person is scheduled to receive under the scheme, on the initial estimates, is £87,000, according to the impact assessment, with the assumption of an average benefit recovery of £20,000. When we look at all the recoveries recorded between 2009 and 2012, for all payments, if people had received a scheme payment, it would have been at least £15,000 higher than the benefits and lump-sum payments actually recovered.

Lord Avebury: My Lords, would a person be advised not to submit a claim where it appears that the amount of the repayments would be greater than the £87,000 that he was likely to receive? Is that the effect of this particular section of the Clause? When he obtains initial legal advice, would the solicitor be bound to tell him that, as he has already received a sum approaching £87,000, it would not be worth his while submitting a claim?

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Lord Freud: That is clearly the theoretical position. The reality is that, of course, in practical terms, the payments in the scheme we are introducing dwarf any other payments that have already been made and any of the lump-sum and other benefit payments. They absolutely dwarf them, given that typical payments under the 2008 Act run at, I think, approximately £15,000. It would inevitably be worth anyone's while, in terms of money, to go after a promising claim.

On the trusts mechanism, we are using the existing mechanisms to protect these kinds of payments, or to isolate them and see what they are. As the years stretch out, it would be taking a sledgehammer to crack a nut to change all that legislation. As noble Lords know, I am trying to do my best to keep the benefits system coherent and as simple as possible.

With that, I hope that I have covered most of the ground there—

Lord McKenzie of Luton: I think that the Minister is about to wind up his remarks. Can he confirm that if one is dealing with benefits, not lump sums, a scheme payment can only be reduced to offset amounts to be repaid to the Secretary of State where the scheme payment and the benefit are both paid to meet the same need? As the scheme payment is not allocated to meet any particular needs to do with mobility, the cost of care, loss of earnings or pain and suffering, it would seem logically to follow that there can be no withholding from the scheme payment in respect of those benefits. Is that correct? It is a different issue for lump sums.

Lord Freud: I shall speak slightly off the cuff. We do not look backwards to those payments anyway, so only the payments in respect of mesothelioma would be offset. Looking ahead, there may be some payments, but they would have to be specifically for mesothelioma. I do not think that I have misrepresented the position, but I will write to get it precisely right for the noble Lord.

Lord McKenzie of Luton: I am most grateful.

Lord Freud: These amendments do not achieve their aim in many cases, and they could have some deeply unintended consequences. In particular, they would change the way in which the long-established benefit recovery system operates, and I therefore urge the noble Lord to withdraw them.

Lord Howarth of Newport: My Lords, I am grateful to my noble friends Lord Browne of Ladyton and Lord McKenzie of Luton, and the noble Lord, Lord Avebury, for participating in the debate and for the excellent points that they have made. I will study with great care what the Minister has said and see whether I can elicit from his words a clear and acceptable set of principles that the department will apply here. He seemed to say that nothing must shake or disturb the existing ways of doing things, and I am not in the least bit surprised that he has said, in his characteristically courteous way, that my amendments are variously defective, subversive or would create chaos. I am an

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amateur in these matters and I have simply sought to raise the pertinent issues. Merely because my amendments may not stand up to the rigorous scrutiny of this Committee does not mean to say that the issues are not very important and worthy of continuing consideration as we reach the later stages of this legislation.

I agree with the Minister that the term "compensation" is a pretty slippery and rather sloppy one. It becomes a fairly sickly euphemism, not least in the context in which it is often used, where it refers to bankers' compensation. Those are remuneration packages worth many millions of pounds, and one wonders what the bankers are

being compensated for, other than the opprobrium in which they are held in society. I am with him in being cautious about the use of the term “compensation”. However, as my noble friend Lord McKenzie indicated, there may be difficulties in the Government seeking to have it both ways. We should consider further whether the normal rules that apply to compensation recovery, which are entirely legitimate and we do not challenge, can actually be laid over this particular scheme with its very distinctive circumstances.

I detect between the lines of what the Minister has said and from his tone that he wants to be as flexible, constructive and generous as he can be. In that case, we should certainly look further at the use of the mechanism of trusts. I completely accept that we should not take a sledgehammer to crack a nut and that it would not be sensible or appropriate to drive a coach and horses through the existing provisions of trust law in relation to social security benefits. However, it may be possible to harness those provisions to provide slightly more extensive alleviation. Whether, for example, the scheme might be able to provide a hand-out package, which is a trust ready for use that it would be easy for people to pick up and use, I do not know.

5.30 pm

We are talking of people who will be very ill and of family members in extremely difficult circumstances. We are talking of people who have no background in their personal lives of using sophisticated financial and legal instruments. It would be not unreasonable, considering that the sums at issue are very small indeed in terms of the department’s budget but very significant for these households. I hope that the Minister would be willing to look a little more at that.

I am of course happy that people should not receive the same money twice in respect of the same injury or disease, which is the principle that the Minister put forward. However, we have to consider whether that is actually what would happen if we mitigated to some extent the recovery regime, given that it is very hard to determine what they are receiving the money for—these generalised, lump-sum payments—and that we know that they are receiving significantly less than they would receive from court awards. As my noble friend Lord Browne of Ladyton asked, why is it right to take 100% of 70%? It is not self-evidently right; indeed, I am strongly disposed to think that it is wrong. I tend to agree with my noble friend Lord McKenzie on two of his points. We should seek to place recipients in the

same situation as if they had received court awards. I also agree with him that we should not favour the insurers against the state.

The Minister told us that the assumption on which he is working is that the average recovery of benefits would be some £20,000 out of an average payment of £87,000. That is getting on for a quarter of the payment. It is a very significant factor for the sufferers and their families. We have more work to do on this but it has been a useful preliminary scouting of the issues. On that basis, I beg leave to withdraw my amendment.

Amendment 20 withdrawn.

Amendments 21 to 27B not moved.

Clause 4 agreed.

Clause 5 agreed.

Clause 6 : Reviews and appeals

Amendment 28 not moved.

Clause 6 agreed.

Clause 7 : Scheme administration

Amendment 29

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

29: Clause 7, page 4, line 11, after "may" insert ", subject to the consent of the Secretary of State,"

Lord McKenzie of Luton: My Lords, in moving Amendment 29, I will also speak to Amendment 30. Clause 7 provides for the Secretary of State to administer the payment scheme or to make arrangements for a body to administer the scheme. The arrangements can allow the body to arrange for somebody else to administer the scheme or any part of it. Amendment 29 would ensure that any further delegation which is permitted has the approval of the Secretary of State. This is a straightforward issue. Administering the scheme is an important undertaking, and the Secretary of State should be satisfied that those involved are fit for purpose.

It may be that the Minister will say that the Secretary of State should not have to be bothered if somebody is appointed to administer, say, a routine part of the scheme such as the processing of payments. However, as it stands, an appointed body would appear to be able to cause the whole of the operation practice to be transferred to somebody without any recourse to the Secretary of State. Our concerns in this matter might be negated if we knew what arrangements the Minister envisages for membership of any company or other body which it is expected will run the scheme. We know the insurance industry view but, by now, the Government must have arrangements in mind. Perhaps the Minister will share these.

This leads on to our Amendment 30, which requires the administering body to be constituted from members who are demonstrably independent of any active insurers. As levy payers, clearly they have an interest in the numbers and the profile of successful claims. The

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Minister may again say that they may also have an interest in helping people bring proceedings against individual insurers. That may be so, but it does not negate the fact that active insurers have a direct financial interest in the outcome of the scheme.

Of course, it is accepted that claimants have a right of appeal, but we have already touched on the costs and time of this, and it is not a sufficient answer. In the draft scheme rules it does not appear that there is a requirement for any specific insurance expertise to be brought to bear—or, if there is, it does not seem to be the driver of the scheme. What discussions have taken place with the insurance sector about administration? I beg to move.

Lord Wigley: My Lords—

The Deputy Chairman of Committees (Lord Geddes): If the noble Lord will curb his enthusiasm for just a moment, the amendment proposed states:

"Page 4, line 11, after 'may' insert ', subject to the consent of the Secretary of State,'".

Lord Wigley: I am grateful for being curbed. I support the amendment. It will lead on to Amendment 32, which also addresses these issues, so I may come back to them at a later stage. It is immensely important that this body is seen and respected by those outside the industry as being at the very least impartial with regard to the way things will be conducted. It must have the confidence of the beneficiaries, their families and everyone else involved. This amendment, together with Amendment 32, which we will consider in a moment, needs to be taken on board, if not in this form of

words then at least in a form of words that addresses what could be a weakness in the Bill.

Lord Freud: I thank the noble Lord and the noble Baroness for their amendments. I assure them that all diligence will be observed during the setting up and monitoring of the administrative body. Irrespective of the background of the scheme administrator, the body will have to administer the scheme in a way that satisfies the requirements of the legislation and apply scheme rules that will ensure that the administrator is sufficiently tied to a set of rules as determined by the Secretary of State and not by the insurance industry. What matters is not whether the body administering the scheme is formally independent of the insurance industry but whether it is controlled by the arrangements put in place by the Secretary of State and whether it is properly monitored. The arrangements will achieve that.

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

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I make it clear that we will undertake due diligence in ensuring that whoever ends up delivering the scheme does so in compliance with the rules that we set out. If any body does not meet our requirements, we will not make arrangements with it, and, if it fails to deliver, we will make arrangements with another one. I will respond to Amendment 32 when the noble Lord moves it. It may be relevant, and I will make a further statement at that point.

Lord McKenzie of Luton: My Lords, I thank the Minister for his response and am grateful to the noble Lord, Lord Wigley, for his support. He said it was important that the administrator was seen as, and respected for, being impartial and particularly important that he had the confidence of beneficiaries. I was less than satisfied with the Minister’s response. He said that it might be quicker to get things under way because the insurance industry was actively engaged in putting together a body now, but that does not cut much ice because it will be April 2014 before any payments are made, which gives ample time to set up all sorts of bodies in the interim.

Also, we still do not have a response as to who the members of the body are likely to be. I do not know whether the Minister can at least share his initial thoughts on that. We accept entirely that, ultimately, it is the Secretary of State who must be satisfied that the scheme is being run properly but that is quite different from having someone with overall responsibility and having confidence in the routine operation of the scheme. As the noble Lord, Lord Wigley, said, both the beneficiaries and the industry itself must have confidence in the way its routine operation is undertaken.

I think that this is outstanding business that may overlap in part with the next amendment but, for the time being, I shall withdraw the amendment after the noble Lord has dealt with the issue of the likely membership of the vehicle, whether it is set up by the insurance companies or someone else.

Lord Freud: Perhaps I may deal with it under the next amendment.

Lord McKenzie of Luton: That is fine. I beg leave to withdraw the amendment.

Amendment 29 withdrawn.

Amendments 30 and 31 not moved.

Clause 7 agreed.

Amendment 32

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

32: After Clause 7, insert the following new Clause—
“Oversight Committee
(1) The Secretary of State must establish, by statutory instrument, an Oversight Committee to monitor, review and report to the Secretary of State on the overall arrangements comprising—
(a) the scheme;

(b) scheme administration;

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(c) the Technical Committee;

(d) the Employers’ Liability Tracing Office; and

(e) the Electronic Information Gateway.

(2) The Oversight Committee must include representatives of—
(a) the Asbestos Victims Support Groups;

(b) trade unions;

(c) active insurers;

and must be chaired by an independent person.”

Lord McKenzie of Luton: My Lords, this amendment calls for the establishment of an oversight committee to monitor, review and report to the Secretary of State on the overall aspects of the scheme and related arrangements. Those arrangements cover not only the scheme, but its administration.
Lord Freud: My Lords, in the interests of time, I thought I might pre-empt the noble Lord on this, although I think that he must move the amendment first.
The Deputy Speaker: The noble Lord, Lord McKenzie, must beg to move the amendment, and I will then put the question. If that is in order, the noble Lord, Lord Freud, can then speak.
Lord McKenzie of Luton: I beg to move.
Lord Freud: I apologise to the noble Lord for cutting him off in full flow. I understand that the level of independence of the scheme administrator is of some concern and clearly it is one of the things that have prompted the amendment. I can reassure the noble Lord that whoever the Secretary of State makes arrangements with to administer the scheme will be bound by agreements to comply with the scheme rules and departmental standards of implementation and administration. However, I am attracted to the idea of having some oversight of the scheme set out more formally. We could, for example, put something about reviewing and monitoring the scheme in the scheme rules and set this out in more detail in the arrangements for the scheme administration. I am minded to do more work on this to consider further whether we should bring forward an amendment on oversight of the scheme. I am not able to agree to the amendment today because I need to do the work first, but I would be grateful if I could consult the noble Lord, Lord McKenzie, and get his wisdom on this. I shall then come back to noble Lords at a later stage. On that basis, I urge him to withdraw the amendment.

Lord James of Blackheath: I will make one small comment about subsection (2) of the new clause proposed by Amendment 32: there are no longer any active insurers for asbestosis. You are really talking about the reinsurers. They are the people you should seek to have represented.
Lord Freud: I am most grateful for that point. We shall bear it in mind.
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Lord Wigley: They say in the world of chess, as I have quoted before, that a threat is more dangerous than the execution. Clearly the threat of the speeches coming in support of this amendment evoked the shooting of the fox before it got out of its hideaway. I am grateful to the Minister for his positive response. Obviously, it is in the hands of the noble Lord whether to now withdraw the amendment, but I hope that we will come back to this on Report.
5.45 pm
The Lord Bishop of Ripon and Leeds: I will just add my support for this, particularly for subsection 2(a) of the proposed new clause and the place in it of the Asbestos Victims Support Groups. We have talked lengthily in this discussion about the place of insurers, but one principle of legislation such as this needs to be that nothing that is for us may be done without us. It is crucial that the victim support groups are represented on any oversight group that is produced.
Lord Avebury: My Lords, I think the Minister said in replying to the previous amendment that when we came to this one he would give us some more information about the membership of the body that the industry proposes to establish. It would be very useful to know that, as it conditions the way we will think about monitoring and reviewing. Clearly, if the board established by the insurance industry contains people who have an association with that industry, the degree of intensity of monitoring and reviewing would have to be far higher than it would if the board were totally independent.
Lord Freud: To answer in just one minute: I will take the whole package and look at it. That is what I am committing to do.
Lord McKenzie of Luton: My Lords, just before I formally withdraw the amendment, I should say that I am grateful to the noble Lord for his offer to take this away and consider it. I am happy to engage with him in doing so, as I am sure are other noble Lords who have spoken in support of this: the noble Lords, Lord Wigley and Lord Avebury, and the right reverend Prelate the Bishop of Ripon and Leeds. To make the point clear: I see this as an oversight not only of the scheme but also the wider components of the ELTO technical committee. We know that the insurance industry sees all these arrangements as an integrated package. It is important that the oversight that we set in train covers all the components. I would certainly be keen to see those people involved in the victim support groups having some role in this, as well as the insurers.
Lord Freud: I can assure noble Lords that I will enter negotiations with them without any preconditions. Basically, we will have a look at this issue and then discuss it with noble Lords to determine the best way forward.
Lord McKenzie of Luton: I am grateful to the Minister and beg leave to withdraw the amendment.
Amendment 32 withdrawn.
Clauses 8 and 9 agreed.
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Clause 10 : Power of scheme administrator to help people bring proceedings

Amendment 33

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

33: Clause 10, page 6, line 13, leave out “Where a payment is made under the scheme,”

Lord McKenzie of Luton: My Lords, I will speak also to Amendments 34, 35 and 44 in this group. Clause 10 gives the power to the scheme administrator to help a person bring proceedings. However, this is only the case where a payment is first made under the scheme. Under Clause 2(1)(c), eligibility for the scheme depends on a person not bringing or being unable to bring an action against a negligent employer or insurer. Perhaps the Minister would expand on the circumstances envisaged where a payment has been made but proceedings may now be possible. Is it to do with the subsequent discovery of the possibility of proceedings in light of new information? Why is there the requirement that a payment be made before these provisions apply?

On Amendment 35, the Bill suggests an enabling power for the administrator to help a person bring proceedings. Our amendment requires the administrator to give this help, provided they have the agreement of the claimant. In pressing the point, we are mindful of the prospect of the insurance sector itself running the scheme, and thus of potential conflicts of interest. Where proceedings are possible that might garner a higher reward for the claimant, then, unless the claimant stipulates otherwise, that help must be provided. I accept that it may be necessary to stop any spurious or vexatious requirements by claimants, but that could be built into any amendments. The proceedings in question can be brought against an employer for negligence or breach of statutory duty, or against an insurance company. Amendment 34 includes those against whom proceedings might be taken, such as the Financial Services Compensation Scheme. I am bound to say that this is rather a tentative amendment, but it is understood that the FSCS compensates those covered by insolvent insurers. However, perhaps that is what the Minister has in mind in Clause 10(5).

Amendment 44 in this group addresses a different point. It requires the arrangements for establishing a technical committee to be in accordance with regulations; that is, that the committee should be subject to a parliamentary process. The Delegated Powers and Regulatory Reform Committee has addressed this point, but having seen the Government’s response to it, I am minded not to press the amendment. I beg to move.

Lord Freud: I thank the noble Lord and the noble Baroness, Lady Sherlock, for these amendments. Amendments 33 and 35 cover the scheme administrator’s ability to help a person bring relevant proceedings through the courts. The amendments allow the scheme administrator to help a person bring relevant proceedings against particular employers or insurers whether or not a scheme payment has been made. They also provide that the Secretary of State’s scheme rules may

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include the circumstances where the scheme administrator is required to help a person bring proceedings with that person’s consent.

Where bringing relevant proceedings will benefit both the applicant and the scheme by allowing a scheme payment to be recovered from an award of civil damages, it is right that the scheme should be allowed to help a person bring relevant proceedings. We want to allow flexibility in the scheme so that the scheme administrator can decide, based on an individual’s circumstances, whether it is in the interests both of that person and of the scheme to help that person bring proceedings. We want to avoid inflexibility where a scheme administrator is obliged to help a person bring

proceedings with that person's consent. It is also not appropriate for the scheme administrator to use scheme funds to bring proceedings where the scheme may not benefit from such action.
Amendment 34 allows the scheme administrator to help someone bring a claim against the Financial Services Compensation Scheme where they have already received a scheme payment. The Financial Services Compensation Scheme makes compensation payments when insurers are insolvent. In cases prior to 1972, the Financial Services Compensation Scheme will pay compensation only where both the employer and the employer's liability insurer are insolvent. Where both an employer and insurer are insolvent, a person may also be eligible for a payment under the Bill. So it is possible for a scheme payment to be made where a person may also be eligible for compensation from the Financial Services Compensation Scheme. If a scheme payment has already been made and it is subsequently established that a Financial Services Compensation Scheme payment can be made, it could be in the interests of the scheme to help a person make an application for an FSCS payment so that the scheme payment can be recovered from the FSCS payment.
This amendment is an interesting proposition. I am minded to do more work on it to consider further whether we should bring an amendment to allow the scheme administrator to help a person make a claim to the Financial Services Compensation Scheme. However, since I have not done the work, I am not able to agree to the amendment today.
Amendment 44 means that regulations will be needed for the Secretary of State's arrangements with a body to establish a technical committee. The committee will make decisions on questions arising between a potential claimant and an insurer as to whether an employer maintained employer's liability insurance with that insurer at a particular time. The technical committee is separate from the scheme and will decide an issue prior to any application being made for a scheme payment. The scheme may in fact never be involved with some cases, if insurance cover can be determined by the committee. The committee is therefore still essentially determining a private dispute between two parties, albeit facilitated by legislation, and is not directly making any decision about the allocation of public money to individuals. For that reason, it is appropriate that it will be outside government and that it should be set up under non-statutory arrangements.
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We also want the procedure of applying for a technical committee decision to be simple, straightforward and as flexible as the law will allow. We believe that the best way to achieve that is for the Secretary of State to make arrangements with a body that will have the expertise to decide questions on insurance, rather than to enshrine the technical committee's functions in statute. I therefore urge the noble Lord to withdraw the amendment and to not press the others.
Lord McKenzie of Luton: My Lords, I am grateful to the Minister. As I think I said in moving the amendment, I had already gone cold on Amendment 44. The exchanges with the Delegated Powers Committee have dealt with that. I am grateful to the Minister for taking away the point about the Financial Services Compensation Scheme and I hope that we will see an amendment on Report. On the other amendments, I am not totally convinced that there should be a "may" rather than a requirement but I am not minded to press the matter and beg leave to withdraw the amendment.
Amendment 33 withdrawn.

Amendments 34 and 35 not moved.
Clauses 10 and 11 agreed.
Schedule 1 agreed.
Clause 12 agreed.

Clause 2 : Exclusion of payments under other legislation

Amendment 36

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

36: Schedule 2, page 15, line 35, after "no" insert "successful"

Lord McKenzie of Luton: My Lords, I hope we can be brief with this. In moving Amendment 36, I will speak to the other amendments in this group; namely, Amendments 37, 38 and 39. I have raised the issue with the Bill team, so this is an opportunity to put something on the record.

Schedule 2 precludes an individual from claiming benefits under the 1979 and 2008 state compensation schemes if an application is made under the mesothelioma scheme provided for in the Bill. Equivalent exclusions are added to the parallel Northern Ireland legislation. This probing amendment simply adds the word "successful" to the reference to "application". As it stands, if somebody should apply to the mesothelioma payment scheme unsuccessfully, Schedule 2 would seemingly prevent access to the 1979 or 2008 statutory schemes. I cannot believe that that was intended and it would not be particularly fair. I beg to move.

Lord Wigley: My Lords, I will speak briefly in support of this amendment for the same reason: to try to get clarification with regard to the interplay with

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the 1979 scheme. I raised this matter at an earlier stage and would be very interested in some clarification from the Minister.

Lord Freud: I thank the noble Lord and the noble Baroness for these amendments, which I understand are probing amendments. I am hopeful that I can give complete satisfaction on the matter. The intention of these amendments is to enable a person to apply for a payment under the Pneumoconiosis etc. (Workers' Compensation) Act 1979, or under the corresponding legislation in Northern Ireland, after they have made an application for a scheme payment but before a scheme payment is made or where the application is unsuccessful.

One of the conditions of entitlement under the 1979 legislation is that a person has not brought any action or compromised any claim for damages in respect of a disablement, for example by issuing proceedings against a negligent employer or insurer, or by settling a potential claim out of court. The provisions of Schedule 2, which these proposals would amend, ensure that people who apply to the scheme and those who bring an action or claim for damages are treated equally under the 1979 Act. If a person is prevented from claiming under the 1979 legislation because they have made an application to the diffuse mesothelioma payments scheme, instead they may still be able to claim under the 2008 diffuse mesothelioma schemes established under Part 4 of the Child Maintenance and Other Payments Act 2008 and the corresponding Northern Ireland legislation.

6 pm

I remind noble Lords that the payments rates under the 1979 Act and the 2008 schemes are equal, so while a person could not use the 1979 Act, they could use the 2008 Act which would provide them with exactly the same financial outcome. They would not be prevented by the 1979 Act from using the 2008 Act because it is set up slightly differently. That may be a reflection of some of the ugliness of our legal

system but, in this case, it does not disadvantage claimants in the way the noble Lord is concerned about. I would ask him to withdraw the amendment.
Lord McKenzie of Luton: My Lords, I am again grateful to the Minister. I accept from what he has said that there is a route to at least the equivalent, even if the 1979 Act would be barred under these circumstances. I am a bit less clear as to why the 1979 provisions could not be amended in the way suggested in the amendment.
On the 2008 Act, I accept entirely that compensation under that scheme is currently paid at the same rate as the 1979 scheme, but that was not always the case—certainly not in the early years of the scheme. I do not think there is anything that technically links the two to require each to be paid at the same rate. Although people will currently be able to put themselves in the same position as if they could have claimed under the 1979 Act, I am not convinced that that would inevitably be the case if the route is to have to look at the 2008 Act. However, perhaps we can reflect on the Minister's
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response and return to this at a later stage; or maybe we could have some more detailed, technical discussions on this before the Report stage so as to make sure that we understand precisely why the 1979 scheme cannot be amended as suggested. In the mean time, however, I beg leave to withdraw the amendment.

Amendment 36 withdrawn.
Amendments 37 to 39 not moved.
Schedule 2 agreed.

Clause 13 : The levy

Amendment 40

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

40: Clause 13, page 7, line 10, after "Scheme" insert ", or any other scheme established under this legislation,"
Lord Howarth of Newport: My Lords, Amendments 40 and 45 in this group relate to the possibility of additional schemes being established. They would introduce that possibility into the Bill; perhaps I should say that they would clarify what has already been hinted at and may already be in the Bill. Amendment 40 would empower the Secretary of State to levy employers' liability insurers in order to fund additional schemes comparable to the diffuse mesothelioma payment scheme. Amendment 45 would empower the Secretary of State to establish by regulation other schemes in relation to long-latency, asbestos-related diseases.
The difficulties of establishing entitlement to insurance payments after many years, when the employer has gone and the documentation is missing, are not confined to the circumstances of mesothelioma. If sufferers from asbestos-related cancer or asbestosis face the same barriers to securing compensation, if we call it that—perhaps we had better say "financial relief"—is it not right that they should be supported by analogous schemes?
I spoke at Second Reading about those two particular diseases as well as diffuse pleural thickening, pleural plaques, pleural effusion and rounded atelectasis. All of these are diseases of the lung and the pleura caused by inhalation of asbestos fibres. The Minister spoke encouragingly in that debate, saying:
"The issue of individuals who have developed other asbestos-related diseases through negligence or breach of statutory duty and are unable to bring a civil claim for damages of course needs to be addressed".—[*Official Report*, 20/5/13; col. 690.]

Indeed, justice requires that where people have contracted one or another of these terrible diseases as a result of the negligence of their employer causing them to be exposed to asbestos fibres, surely they ought to be supported on a comparable basis.

Interestingly, the department has just produced a document entitled, *Estimates of the Impact of Extending the Scope of the Payment Scheme in the Mesothelioma Bill to Include Other Asbestos-Related Diseases and Other Non-Asbestos Work RelatedDiseases*. It expects that there will be some 2,000 asbestos-related lung

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cancer deaths yearly, 725 newly assessed cases of asbestosis and 821 cases of non-malignant pleural disease—around 3,500 cases a year of one sort or another. The department acknowledges that it may be more difficult to establish a causal occupational link where these other diseases are concerned and estimates that the levy on insurers to fund a scheme for asbestos-related diseases other than mesothelioma, if the new scheme were to be constituted on the same principle as the DMPS, would amount to £478 million compared with the £322 million cost of the levy for the mesothelioma scheme. That is a significantly larger cost than that of the mesothelioma scheme, but I think it is not impossible to contemplate at some point in the future. I certainly do not think that new schemes should be funded via the DMPS itself, nor do I think that anybody is in a position to create a new scheme immediately. However, it should be done in the fullness of time—indeed, as soon as possible. Therefore, while we are legislating to provide the basis for the diffuse mesothelioma payment scheme, it seems sensible that we should also be clear that we are legislating to make provision for further analogous schemes to be established on future occasions. I beg to move.

Lord James of Blackheath: My Lords, the problems of the Navy in this regard persist for that service. An MoD meeting has been called for 10 o'clock tomorrow morning. Will the Minister be present at that meeting? It would be helpful to know that.

Lord Freud: I regret that I am not invited.

Lord James of Blackheath: I think it will be harder to make progress without the Minister. It seems to me that three very significant problems are emerging in any dialogue with the MoD at present, and they will not go away very easily. Each of them has been shadowed in the discussions this afternoon. For a start, of course, this is a compensation payment for a dying sailor. There is no argument about it. There is no way you can call it anything else. We are here talking of it not being a compensation payment and this gives rise to a total misunderstanding in the minds of the MoD people to whom I have been talking because they seem to think that what we have here is a great big government-funded handout that they can dip their hands in and have a share for their sailors.

Of course, the downside is that in saying no to them, we run the risk that this clever and inspired programme to force the compensation programme through for non-compensation payments will invite the dreadful comparison that the Government, who are concerned to prepare catch-up payments to all the sufferers of this disease for whom they can, should include responsibility for the Navy, which has deliberately discarded any responsibility for payments for people who are suffering similarly. I cannot imagine a more unfortunate juxtaposition.

The MoD has to understand that if it wants a solution to this problem, that must come out of its own resources. It cannot come from this scheme. When I first realised this,

simply on the grounds that I did not know the answer I tabled my strange Amendment

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47, which says that we have a problem for which we need an answer, and that we must find it when we get a sensible dialogue going with the MoD—which may or may not start tomorrow morning.

There are two other big problems with the MoD. First, it will have a hugely high percentage of what I call the household contamination problem. The sailors and workers will have gone home at night to their wives with their dirty washing from working in the boiler rooms of the intensely asbestos-lagged warships. We are going to have a huge problem of a different nature there.

Secondly, the MoD cannot run an insurance industry-based solution because it cannot insure its ships or people; that has to come from a different pot and a different source. It is absolutely unacceptable that we do not have a solution for the sailors in parallel with this, but it is not going to be compatible with this Bill. Forgive me for having put the clause in, which is completely wrong and irrelevant, but it really is a desperate call: we have got to have something instead. I want to put a marker down that the whole House must work towards this.

We must be totally intolerant of any fudge that does not give the Navy a fair deal. There are far too many affected persons out there. The way to get the MoD really interested in this is to threaten to write to the Queen and tell her how many of her crew of Royal Yacht "Britannia" have been killed by it. That will get the MoD's undivided attention. I will continue to run that one.

I will withdraw my amendment as it stands, quite clearly, because I cannot run it here. I just wanted to leave it there for the moment. It is a hole into which I have got to get something put before we are through with this.

Lord Alton of Liverpool: My Lords, briefly, I support the two speeches which have just been made, not least because I agree with the noble Lord, Lord James, that there are other groups of people outside the scope of this Bill who are clearly looking to the Minister, who has done such a good job for this group of people: the 300 or so of the 2,200 who have unmet claims. He has done such a good job in dealing with this that there is the raised hope and expectation that other groups, whether they are in our Armed Forces or other groups entirely—such as those who have suffered from asbestos-related diseases of the kind to which the noble Lord, Lord Howarth, referred in his remarks—who will also be hoping that the noble Lord will in due course be able to come forward with other measures that might to meet some of those hopes and expectations.

I feel some sympathy with the Minister in this situation. I think it was William Wilberforce who was criticised by William Hazlitt for not dealing with problems of children who were being sent down into the mines; it would take Lord Shaftesbury to do that in due course. One of those who was defending Wilberforce, I think it was Henry Thornton, said it was rather like criticising Christopher Columbus for discovering the United States but also for not going on to discover Australia and New Zealand as well. The Minister is in that slightly invidious position at the

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moment. People will unfairly criticise him for not solving all the problems of the whole of mankind. What he is doing in the context of this Bill is incredibly noteworthy and all of us pay tribute to him for that. However, he should not neglect the points made by

the two noble Lords, because they were well made and these amendments raise the point that there will be unfinished business even once this Bill has passed into law.

6.15 pm

Lord James of Blackheath: Perhaps I may ask the Minister if he will have a meeting with me after I have been to the MoD so that I can get his advice and guidance on what to do next?

Lord McKenzie of Luton: My Lords, our Amendment 46 is in this group. I will say at the start that I thoroughly support the amendments of my noble friend Lord Howarth. I agree with the noble Lord, Lord Alton, that the Minister has almost made a rod for his own back in raising hopes and expectations. Those are challenges that he will have to face, and I am sure he is well up to the task. The noble Lord, Lord James, should not apologise for having brought forward his amendment. He is right to say that what he seeks is not an insurance-based solution, but there are issues around inviting comparisons with the progress that has been made.

As we have discussed, the payments scheme relates to those diagnosed with diffuse mesothelioma. It therefore excludes other asbestos-related diseases such as asbestos-related lung cancer and asbestosis. It also excludes other work-related, non-asbestos diseases such as pneuomoconiosis. The DWP's June 2013 analysis quotes the HSE data on industrial diseases, which has an annual estimate of sufferers of asbestos-related diseases of some 3,500—that excludes those suffering from mesothelioma—and of non-asbestos-related industrial diseases of some 4,200. Many of these will face the same problem in identifying a negligent employer, or an employer liability insurer. The DWP's June note acknowledges that many of the diseases covered do not share the same characteristics as mesothelioma, and that their severity and progression may vary, depending on the heaviness of exposure to asbestos.

It also highlights the fact that, for example, only a small proportion of asbestos-related lung cancers are compensated through government schemes, because of the range of different causes of lung cancer that mask an asbestos cause. Notwithstanding this, and perhaps somewhat strangely, in computing the effect of extending the scheme, it has been assumed in the data that the same proportion of those with diffuse mesothelioma who can access the scheme proposed by the Bill will be able to access an extended scheme, that the same level of scheme payment will be received, and that the same amount of benefit will be recovered. Those are fairly broad-brush assumptions, to say the least. In resisting the amendment, the Minister will doubtless point to the costs of bringing forward an extension of the scheme. On the basis of their estimates over a 10-year period, they suggest that there will be 5,100 successful applicants for other asbestos-related

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diseases, and 6,100 non-asbestos work-related diseases. There will be an additional levy on insurers of £478 million and £564 million respectively.

At face value, the figures are shocking. It is not so much the amounts as the suggestion that over 10 years, some 11,200 people will miss out. By how much will depend on benefit recovery arrangements, but they could miss out to the tune of £1 billion. If the concentration were just on the other asbestos-related diseases, not expanding the scheme will deny 5,100 people, who will miss out just because an employer has gone out of business or cannot be located and a relevant insurer cannot be established.

The amendment requires the Secretary of State to bring forward proposals within a year to establish other schemes to cover these other diseases. On reflection, limiting this to diseases covered by the 1979 Act may not be the most appropriate approach, and we might seek a different definition on Report. We have been clear that we do not want the pursuit of broader coverage to hold up the scheme of diffuse mesothelioma, and there is no reason why acceptance of the amendment, or my noble friend’s variations, should cause this to happen. It is accepted that it will be difficult to graft on to the mesothelioma scheme the tariff approach, given the varying degrees of suffering that some of the other diseases entail, and that there may be convoluted issues around causation. Therefore, while continuing to acknowledge the merits of the mesothelioma scheme, we should no longer look aside from those people—many thousands on the Government’s own figures—who face terrible suffering because of the negligence or breach of statutory duty of an employer. This is all the more important where access to the state lump sum and social security support is more difficult, as it is for some.
The Minister has come thus far and we have supported and congratulated him on doing so. Indeed, he has expressed sympathy for a broader scheme. Accepting the thrust of these amendments would add to that journey, which I beg him to undertake.
Lord Freud: My Lords, I thank the noble Lord for these amendments, and clearly I am sympathetic to the desire to provide for as many people as possible. Let me deal with the amendments tabled by the noble Lords, Lord Howarth and Lord McKenzie, and the noble Baroness, Lady Sherlock, in the first instance, and then perhaps I may turn to the amendment tabled by my noble friend Lord James regarding members of the Armed Forces.
I recognise the wish to provide for other groups of people who fall foul of poor record-keeping by the insurance industry and so cannot bring a claim for civil damages. There could be another scheme for these people in the future, but as the noble Lord, Lord McKenzie, has just acknowledged, it cannot and will not be this particular scheme. It is neither possible nor realistic to extend it in this way, and that is the reason I must reject these amendments.
The remit of the Bill is strictly related to mesothelioma. However, like many noble Lords, I hope that the momentum generated by this legislation will not dissipate
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and that further work will be done in the future. Perhaps I may explain why we cannot be flexible on this. I should start by reminding noble Lords about the distinctive characteristics of mesothelioma. The Bill allows for a relatively straightforward and quick scheme to be established. The key points are mesothelioma’s undeniable link to asbestos exposure and lack of co-causality with other factors such as smoking. The unique elements of diffuse mesothelioma allow us to establish a tariff payment scheme of this nature. A streamlined scheme like this would not work for other long-tail diseases. The law of causation is favourable to mesothelioma victims in the sense that it is an indivisible injury. It does not matter who exposed the victim or how many people exposed him, they will all be jointly and severally liable for the same damage. This allows for simplicity when assessing whether someone is eligible for a payment. Assessing liability for other diseases where the causation rules are not the same would involve a degree of complexity that this scheme has not been designed to allow for.

I join noble Lords in their hope that, in the future, other people will be provided for. Until such time, there remain state payments that sufferers of other long-tail diseases

can apply for, such as payments made under the 1979 and 2008 Acts. I hope that I have explained and made it clear why this scheme will succeed only if it deals exclusively with mesothelioma, and I urge the noble Lord to withdraw his amendment.
Let me now turn my attention to the amendment tabled by my noble friend Lord James of Blackheath regarding the creation of a scheme to cover retired or current members of the Armed Forces who were exposed to asbestos and have since developed a related disease. I should clarify that, when I denied the 10 o'clock meeting, one of my representatives sitting behind me today will be at that meeting, and so I will be given good intelligence on what happens.
Lord James of Blackheath: Can we have an indication by paw of who will be attending the meeting?
Lord Freud: The paw has been raised. I am more than happy to hold a meeting with the noble Lord after that meeting if he so desires.
Lord James of Blackheath: The noble Lord is taking a big risk in sending the best looking member of his staff to the Navy.
Lord Freud: The noble Lord must be very careful about making remarks like that. I think that we should strike them from the record.
The noble Lord was clearly referring in particular to those working in the boiler rooms of those three ships—HMS "Britannia", HMS "Furious" and HMS "Albion"—a great many of whom would have been exposed to asbestos during the course of their service. We all in this Committee, I know, are deeply sympathetic to a tragic situation. However, as the noble Lord acknowledges, it is not possible for this Bill to be the solution for that, mainly because the MoD was not and is not covered by employer liability insurance.
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It would not be appropriate to raise finds for such a scheme from the employer liability insurance markets; they are entirely different issues. I know that the noble Lord has particular issues with the arrangements which the MoD has in place for compensation, so I will not go into those. They are dealt with by the MoD and I suspect that they will be the subject of conversation tomorrow.

Lord Alton of Liverpool: Before the Minister goes any further on that, would he accept that there is a parallel between people who slipped through the insurance arrangements for people with mesothelioma—and for whom there is therefore no known legal authority and so the Bill has been brought forward to plug that gap—and servicemen who have also fallen through a gap because there is no liability accepted by the Ministry of Defence and no insurance arrangements in place for them either? In parallel with this scheme, surely we should at least accept a moral responsibility for the obligations of the Government to people serving in our Armed Forces and risking their lives in the service of this nation, and therefore accept that it should in due course be met. Can the Minister at least tell us how many people are in those groups to which he has just alluded?
Lord Freud: My intelligence on this comes from my noble friend Lord James, who told me that the estimate was 300 people. However, I stand to be corrected by him.
Lord James of Blackheath: The provisional estimate is up to 300 dead already and 180 contaminated. However, the figure we need to be concerned about is the number of wives who have got it, too.
Lord Freud: The noble Lord has put that on the record. Clearly, there is a difference in the sense that the MoD as a public authority does not use employer liability; it

effectively self-insures. The noble Lord is concerned about the terms of when it pays compensation; I know that he is looking to address that issue with the MoD.
I share the concern of noble Lords in the Committee to help to provide for as many people as possible who have a terrible disease through absolutely no fault of their own. However, this scheme is addressed precisely at one part of that. It is not stretchable in that way.
Lord McKenzie of Luton: My Lords, I do not think that anybody is suggesting that we should stretch the scheme in the Bill to encompass other arrangements. Certainly, however, Amendment 46 would require a commitment from the Government that they will bring before Parliament within a period of time other arrangements to deal with these other situations. It is accepted that it cannot be readily grafted on to the existing diffuse mesothelioma scheme for the reasons that the Minister has advanced. We are looking for the commitment to saying, “Let us move on and bring forward a scheme or schemes to deal with these other issues”.
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Lord Freud: Regrettably, I am not in a position to make any kind of commitment along those lines. We responded to the consultation document which the noble Lord, Lord McKenzie, launched, and our considered view was that this was the most urgent thing to tackle. That is the only commitment that I am in a position to make today. Having urged other noble Lords to withdraw or not to press their amendments, I ask the noble Lord, Lord James, not to press his amendment either.
Lord James of Blackheath: For the sake of accuracy, I will just correct the figures to this extent. The Navy’s figures include subcontracted staff in naval ports.
6.30 pm
Lord Howarth of Newport: My Lords, I am very grateful to my noble friend Lord McKenzie for laying out the case in his customarily lucid and reasonable style. I strongly support Amendment 46, in his name, which wisely would require the Secretary of State to set out his plans to establish further analogous schemes within a year.
We will come back to the Minister’s refusal to contemplate doing that in a moment, but I will just comment on Amendment 47, concerning the Armed Forces, in the name of the noble Lord, Lord James of Blackheath. He has raised a massively important issue. Our concern has to be not only for sailors, for people doing highly skilled labouring jobs in naval dockyards and for other members of the armed services, but for people who could well have been directly employed by government in a whole host of other fields in publicly owned facilities of one kind or another, including of course civil servants. The Government self-insure, and there must be an employer’s liability in that situation. I cannot see how it could possibly be otherwise. Perfectly understandably, the Government do not go to the insurance market to take out employer’s liability insurance but absorb the risk themselves.
I can well understand that the Ministry of Defence has form and has sought, over many years, to resist what many very well informed people consider to be well founded claims for compensation against the Ministry of Defence. It digs in and goes into the trenches. However, there must be a strong case—not only a moral case, as the noble Lord, Lord Alton, very powerfully suggested, but, I would have thought, a strong legal case. The difficulty, presumably, is that potential claimants do not have the confidence to take on the MoD because it has infinite resources with which to defend itself in those trenches.
The noble Lord, Lord Alton, compared the Minister to William Wilberforce. The persuasive powers and techniques of the noble Lord, Lord Alton, are legendary, but I

would join him more prosaically in simply encouraging the Minister not only to receive a report on the important meeting that is due tomorrow but to pursue this matter strenuously. I do not know whether the Bill would permit an amendment to be incorporated that was designed to achieve the purposes of the noble Lord, Lord James of Blackheath, with this amendment. However, I hope the Minister will do his very best to ensure that some such amendment is included.

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This brings me back to my own amendments, which the Minister resisted despite saying that he was sympathetic to their purpose. How could he not be considering that he went so far at Second Reading? I assume that if the department was going to do the work to produce the estimates document to which I and others have drawn attention, it must be because it sees that there is a strong case for establishing other schemes in the future for other long-latency asbestos-related diseases.

I now know that this is his technique in debate, but the Minister has set up another Aunt Sally, as my noble friend Lord McKenzie spotted. He sought to interpret the purport of my amendments and my remarks as being that we have to stretch the mesothelioma scheme to encompass the payment of compensation in relation to these other diseases. That, of course, is not at all what I said. Amendment 40 would insert,

> "or any other scheme established under this legislation".

Amendment 45 says:

"The Secretary of State may by regulation establish other schemes in relation to other … diseases".

I am not at all saying that the mesothelioma scheme should be expanded, inflated or stretched to do what he said. I am saying that, to the extent that the Bill clearly does not confer the powers requisite, we ought to amend it so that it would be possible to establish other schemes analogous to the diffuse mesothelioma payment scheme in future. This does not cost the Treasury a penny, and I cannot see what the conceivable difficulty should be. The Minister has given no reason why this should not be done.

Lord Freud: I apologise if I abused the Aunt Sally—if I did so, I did so unintentionally. I want to make absolutely clear that we have had recommendations from the Delegated Powers Committee that we are obviously taking with great seriousness. One of the two big recommendations is resisting widening this Bill in the context of the technical committee. The noble Lord in this amendment goes directly against the thrust of the Delegated Powers Committee, which said we should keep this specific rather than giving wider, extra powers to the Secretary of State. I neglected to put my finger on that point, but it is a substantial one for that amendment.

Lord McKenzie of Luton: If my noble friend will allow, is that a fair representation of what the Delegated Powers Committee said? I thought its point was that, in the context of this Bill, the reference to other kinds of disease or bodily injury when it referred specifically to a definition of a potential insurance claimant was too broad and could be made more specific. Indeed, if the noble Lord felt able to adopt one or more of the amendments before him, that would tie nicely in with that. I did not think the committee's point was that a broader reference was inherently inconsistent with the Bill, simply that the specifics of this clause were not specific enough to identify the other kinds of disease that might be involved. If the problem is not being specific about the other types of disease that ought to be covered by the scheme, that could

be rectified quite readily by drafting. Would the Minister be more comfortable with that?
10 Jun 2013 : Column GC316
Lord Freud: Perhaps I have opened up a completely new front. I am reluctant to go into that specifically. The point is that we are trying to draw up a specific scheme in this legislation. We would be most reluctant about other schemes with other rules having powers in secondary legislation, whether or not the Delegated Powers Committee were on the same page. I will resist; I cannot do that.
Lord Howarth of Newport: I am grateful to the Minister for his explanation. I yield to no one in my respect for the Delegated Powers and Regulatory Reform Committee, which does extremely valuable work in ensuring that the Government do not take outsized powers of a rather generalised nature when they present legislation to Parliament. However, I am not sure that an argument put forward by the Delegated Powers Committee on the proposed technical committee would have a bearing on whether it would be appropriate to take the opportunity of this scheme to make provision in primary legislation to be able in due course by regulation to establish further schemes that would be on the same model as Parliament will have approved in the primary legislation for the diffuse mesothelioma payment scheme, and which would of course have to be legislated in their specifics by way of regulation—as is quite explicitly stipulated in my Amendment 45.
I do not know what the Minister had in mind when he addressed the House at Second Reading and said that schemes to deal with these other terrible diseases should be brought forward, and that there were situations that needed to be addressed. If he was saying that he hoped he would have the opportunity to bring forward a Bill of one sort, then another and then another after that to establish further schemes, he must have known that that was not realistic. To secure legislative time is always a considerable problem, and I am afraid it would be pretty improbable that we would have the opportunity to embark on fresh primary legislation to repeat the process that we are going through now to create the mesothelioma scheme. Therefore, I can see no difficulty of principle that ought to deter us from amending the Bill to provide a clear legal base for establishing other schemes, so that it could accommodate the principle that the Secretary of State could by regulation establish further analogous schemes. In the mean time, I beg leave to withdraw the amendment.
Amendment 40 withdrawn.
Amendments 41 and 42 not moved.
Clauses 13 and 14 agreed.

Amendment 43

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

43: After Clause 14, insert the following new Clause—
“Report on record keeping by insurers
The Secretary of State shall establish a commission to examine and report within one year of enactment on the history of record keeping by insurers who have provided cover against employers’ liability for mesothelioma and other long-latency asbestos-related diseases.”

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Lord Howarth of Newport: My Lords, the Committee will be relieved to know that this is the last amendment in my name, at least in Committee. It will introduce into the Bill a new clause to require that the Secretary of State commissions a report on

the history of record-keeping by liability insurers. We are legislating for the scheme precisely because the insurance records are missing in a significant proportion of mesothelioma cases. It would be helpful if the Minister were able to give us figures on that. What proportion of mesothelioma sufferers who contracted the disease as a consequence of employer negligence will have to have recourse to the scheme because the documentation for their insurance has gone missing?
In its publications, the department has taken a bland tone on the matter. It has talked of poor record-keeping. In his speech at Second Reading, the Minister was restrained in his language. In Committee, too, he has been studiedly non-judgmental. He has spoken a number of times of "market failure". He did so far unbutton himself at Second Reading as to speak of,

"a terribly damaging market failure".—[

Official Report

, 20/5/13; col. 692.]

In Committee, he has urged noble Lords not to allow emotion to cloud pragmatism, nor allow moral indignation to frustrate practicality. He may be wise in those admonitions. However, I will say—very quietly, not in a sermonising tone but recording what I believe to be a matter of fact—that we are dealing with a major scandal.
At Second Reading, the Minister said that he hoped that noble Lords would agree that,

"the principles driving the Bill are right and just".—[

Official Report

, 20/5/13; col. 692.]

He allowed himself to take a moral tone there. I put it to the Committee that justice entails not just making payments under the scheme that is proposed, but exposing wrongdoing and exacting punishment where there has been breach of contract or where criminality is in evidence.
6.45 pm
Lord James of Blackheath: I might be able to ease the noble Lord's concern on this. I believe that when the major reinsurances were written, they were limited as to the dates when an infection was identified and the reinsurance applied only to the names of those who had a registered claim at that time. That was all that was relevant for a claim; there is no question about that. Lloyd's of London did not buy its first computer until 1986. It has nothing that goes back to this period.
Lord Howarth of Newport: I am always disposed to defer to the noble Lord as he has a depth of knowledge on this matter that I do not think is matched by the rest of the Committee. However, if Lloyd's of London did not get a computer until a rather late date in the history of that august market, it none the less had brown cardboard files. It seems to me that strong procedural safeguards and impeccable record-keeping are always central to the upholding of property rights and the protection of people who enter into contracts.
10 Jun 2013 : Column GC318
I cannot see how employer's liability insurers at any phase of their history could ever have been justified in allowing the documents to disappear. There might have been a

fire in the warehouse but we have not been told that there has been such a fire at any of these insurers. Other than in an extraordinary circumstance of that kind, it must be normal and basic practice to keep the documentation and to pass it on to the successor insurers and reinsurers. I cannot see how anything else could have been appropriate.

We are looking here at a spectrum of wrongdoing that runs from inefficiency and muddle through negligence to, very possibly, deliberate criminality in some places. Indeed, the scale on which the documentation has gone missing suggests that there could have been widespread criminal intention on the part of some people in an earlier generation of insurers. I say "an earlier generation"; they may no longer be active in the market but many of them may still be extant as individuals.
Another recent major scandal has occurred in terms of record-keeping. I refer to the sub-prime lenders in their Gadarene rush towards 2008. The banks, in issuing huge numbers of mortgages and eagerly selling them on, took to neglecting procedural safeguards. The combination of disregard for procedural safeguards with fraudulence led to the catastrophe of 2008 and in the years following, from which we continue to suffer. It reached a point where, with millions of mortgages in default, the banks abandoned the attempt to examine individual documentation to certify that a particular person owed a certain amount of money on a mortgage, which was the asset being sold on, and took to what was known in the trade as "robo-signing". Instead of examining the individual records, they hired a person simply to sign masses of these documents without even examining the records.
The temptation for businesses not to keep full, accurate and proper records when it is convenient to do so clearly can be very great. We do not suppose—I do not think we do; I certainly do not—that the banks which were guilty of that systematic failure of proper record-keeping should be able to walk away from the scene of what they did and just get away with funding a token scheme. Equally, it seems to me that in the interests of justice and for exemplary purposes, there should be a proper investigation of what went wrong with the employer's liability insurers. Of course, ELTO has been created and that improves the methodology of tracing claims and liability. However, a disastrous failure has occurred in this regard for a great many people. As I say, it seems to me that this is a major scandal. That is the reason why I have tabled Amendment 43—to require the Secretary of State to establish a commission to investigate and report on what happened in this history of inadequate record-keeping, which I do not think anything can possibly have justified. I beg to move.
Lord Freud: My Lords, the noble Lord has tabled this amendment to require that investigations be made into the record-keeping practice in the insurance industry which, to put it no more brusquely, we know has been insufficient in the past. It would also require us to
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legislate to protect those who cannot bring a claim against an employer or insurer because the records have not been traced. I sympathise with the aim behind this amendment, which is to bring those culpable to account. Unfortunately, what we already know about record-keeping practices tells me that this simply will not be possible and that any investigation of this sort would be a costly addition to the scheme. One of the things of which the noble Lord may not have been aware, and inevitably would not have been aware of when he put down this amendment, is that on 4 June the FCA published details of its requirements for employer liability insurers

to undertake effective searches for historic policies. Moreover, the employer liability tracing office, ELTO, is currently undertaking an audit of the record keeping of its 150 or so members, including Equitas. The number affected by the issue of records that were destroyed is broadly 300 out of the 2,400 people with relevant mesothelioma per year, which implies that one in eight cases is untraced—that is the proportion of the problem.

I hope that noble Lords will understand that we want to ensure that the maximum amount of funds possible go to helping those eligible people who come to the scheme and therefore there is not the flexibility to put resources into potentially costly investigations such as these. I have already spoken to noble Lords about the exercise that I conducted into what was likely to be available on a historic basis, and we already have measures to improve tracing. On that basis, I urge the noble Lord to withdraw this amendment.

Lord Howarth of Newport: I am glad that the Minister sympathises with my aim in tabling this amendment. I am sorry, however, that he thinks an investigation of the kind that the amendment would require is not practical. I think it depends on how important people think it is to do the detective work. Of course, it is not within the resources of his own department and I think it would be difficult for the employer's liability insurers themselves to meet the full cost of this.

However, if we consider that an inexcusable series of abuses has occurred, I cannot see that it is right to allow those who perpetrated these abuses simply to get away with it. If as many as one in eight cases of insured people are untraceable, then something is going wrong on a very big scale indeed. It cannot be satisfactory to leave it at that. The noble Lord gives me a modicum of encouragement in telling me that from now on the FCA is going to intensify the requirements for effective search and that ELTO is going to audit its members. However, if we accept the position as stated by the Minister just now, we will be saying in effect that those generations of people in the insurance market who did not take the basic duty of care that they should have done in relation to the documentation of people who turned out to have contracted this most terrible of diseases, I think we should be ashamed of ourselves. I will not say any more about this today and I beg leave to withdraw the amendment.

Amendment 43 withdrawn.

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Clause 15 : Technical Committee to decide certain insurance disputes

Amendment 44 not moved.

Clauses 15 and 16 agreed.

Amendments 45 to 47 not moved.

Clause 17 agreed.

Clause 18 : Defined terms used in more than one section of this Act

Amendment 48

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

48*: Clause 18, page 10, line 17, leave out from "given" to end of line 20 and insert "to "relative" in section 14 of the Damages (Scotland) Act 2011;"

Lord McKenzie of Luton: My Lords, I wish to be brief and I am slightly hesitant about whether I should move the amendment. It was pressed on us by ACOR. It concerns the definition of dependants, and the suggestion is that rather than live with the definition we have, which I think is based on what is set out in the 1979 Act, we should pick up the definition used in the Damages (Scotland) Act 2011, which ACOR suggests is fairer, more flexible and less prescriptive. It includes, for example,

siblings, grandparents and grandchildren. It seems to me that this can cut both ways. The wider the group of dependants, the less each will get, although the wider the group, the more likely it is that a dependant will be spotted and available to benefit. On balance, living with the existing definition is probably the better route, but perhaps the Minister will give us the benefit of his wisdom. I beg to move.
Lord Freud: My Lords, I think I will treat this as an extremely probing amendment, and in that spirit I am happy to go through our thinking; indeed, there is some value in doing so. The amendment seeks to replace the definition from the Pneumoconiosis etc. (Workers' Compensation) Act 1979 that we have used in the Bill with the definition of "relative" set out in Section 14 of the Damages (Scotland) Act 2011.
The definition in the 1979 Act provides an order of priority and is not just a straightforward list. In other words, the first dependant on the list is a spouse or civil partner and it is that person, if they exist, who must make the application for a scheme payment. If there is no spouse, the next on the list is a child or children and they must make the application, and so on. The scheme payment would then be made to that applicant or applicants, and it would be up to those applicants if they wanted to share the scheme payment with any other relatives further down the list. The definition in the 2011 Act is a straightforward list. The effect of the amendment would be that anyone on the list may make an application for a scheme payment. The 2011 list includes some relatives who are not defined as dependants in the 1979 Act. They are uncles, aunts, nephews, nieces, cousins, and former
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spouses or civil partners. If all these people make an application for a scheme payment, the payment made in accordance with regulations under Clause 4 under the scheme must be divided equally between them. It is right that there is a hierarchy of those who can make an application for a scheme payment as it provides certainty to those who may want to make such an application, and certainty to those administering the scheme who would not be in a position to identify all the other relatives who might want to make an application.

Most applications for a scheme payment are likely to be made by a surviving spouse or civil partner. In these cases, the amendment would dilute the amount available to that spouse or civil partner by compelling the scheme payment to be divided up between other relatives who are less close, either legally or by blood, to the deceased person with mesothelioma. That could mean that a former spouse or cousin, for example, would receive the same amount as the current spouse. Without the amendment, the current spouse would receive the whole payment. I do not think that it is right that a scheme payment should be divided up in this way so that those closer to the
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deceased person with mesothelioma would receive less in order that a proportion could be paid to more distant relatives.

I can tell that the noble Lord was already concerned about the effects of the amendment. With this explanation, I hope that he will be encouraged to withdraw it and that we will perhaps not see it again.
Lord McKenzie of Luton: My Lords, I thank the Minister for his explanation of and response to the amendment. I beg leave to withdraw it, and I can assure him that he will not see it again; not from us, anyway.

Amendment 48 withdrawn.
Clause 18 agreed.
Clauses 19 to 21 agreed.
Bill reported without amendment.
Committee adjourned at 7.01 pm.