

## Forum Statement

### The Mesothelioma Bill: An irrational and perverse ground for bringing into force Sections 44 and 46 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

#### **Background to S 48**

In Part 2 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 LASPO) there is a requirement for personal injury claimants to pay certain legal costs associated with Conditional Fee Agreements (CFA), which hitherto were paid for by defendants in the event a case failed: success fees and after the event insurance (ATE).

At the same time as the LASPO Bill was being debated the Government were negotiating a scheme with insurers to fund payments to those who are unable to trace their employers' liability insurers, which resulted in the current Mesothelioma Bill. The Mesothelioma Bill provides for a levy to pay into a public fund to pay average age-related payments to mesothelioma sufferers who are unable to trace an insurer.

To lessen the impact of the change to the framework for funding litigation, general damages were increased by 10%. However, success fees charged by solicitors were permitted to be 25% of general damages which far outweighed the increase in general damages. Qualified one way cost shifting (QOCS) was introduced which avoided the necessity to take out ATE insurance. But necessity to take out insurance to protect against penalties for claimant behaviour and for disbursements not covered by ATE insurance negated the apparent beneficial effect of QOCS.

For these reasons, Peers, led by Lord Alton, objected to asbestos victims paying for legal costs associated with CFAs required under LASPO and forced the Government to concede a temporary exemption for mesothelioma sufferers pending a review. The terms of the review are found in S 48 below

#### **Section 48**

Sections 44 and 46 and diffuse mesothelioma proceedings

(1) Sections 44 and 46 may not be brought into force in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma until the Lord Chancellor has—

(a) carried out a review of the likely effect of those sections in relation to such proceedings, and

(b) published a report of the conclusions of the review.

(2) In this section “diffuse mesothelioma” has the same meaning as in the pneumoconiosis etc (Workers' Compensation) Act 197

#### **The Review Consultation: *Reforming mesothelioma claims***

The Government determined that the consultation, *Reforming mesothelioma claims*, which closed on 2 October 2012, would stand as the review required under S 48. The consultation included two reforms put forward by the Association of British Insurers

(ABI): a mesothelioma pre-action protocol and fixed costs. The Forum and all other claimant representatives objected to these ABI reforms which would have a deleterious effect on claimants. The Government recommended that Section 44 and 46 should be brought into force, saying:

*The Government believes that other changes set out in this consultation, and the changes to the statutory framework for funding of litigation described above, together with the changes being introduced in the Mesothelioma Bill should make it possible, and appropriate, for sections 44 and 46 of the LASPO Act to be brought into force for mesothelioma claims at the same time as those other changes. The Mesothelioma Bill was introduced in Parliament on 9 May 2013, and it is hoped that it will receive Royal Assent this year, with the relevant provisions coming into effect in 2014.*

Clearly, the first two grounds above for bringing into force sections 44 and 46 are arguably consistent with the Section 48 (1). The third ground, the Mesothelioma Bill, is not. Section 48, is concerned with civil proceedings. Proceedings are not issued in respect of applications for payment under the Diffuse Mesothelioma Payments Scheme. Scheme payments are paid from Government money from a levy on active insurers, which Government describes as a 'hypothecated tax'.

**Parliamentary questions were put down by Lord Alton including:**

*In what way does the Mesothelioma Bill, which is cited in the consultation on the Review required under Section 48 Legal Aid Sentencing and Punishment of Offenders Act 2012, have any bearing on the effect of bringing into force sections 44 and 46 when the Mesothelioma Bill concerns a scheme for those who are unable to trace their insurer and are not in any way affected by sections 44 and 46, or have any effect on sections 44 and 46?*

The replies did not answer the question but stated that it is the Government's intention to apply the LASPO reforms to all personal injury claims and that it would synchronise this with the enactment of the Mesothelioma Bill in 2014.

On 4 December 2013, the Government announced that it would not bring in the consultation reforms but that it would bring into force Sections 44 and 46 LASPO.

**An Irrational and Perverse Decision**

The decision to abandon the consultation reforms deprives the Government one of two arguably relevant grounds for lifting the mesothelioma exemption. The remaining relevant ground, the CFA LASPO reforms, were rejected by the House of Lords, in the first instance, as sufficient reason to impose CFA costs on mesothelioma sufferers.

The third ground, the Mesothelioma Bill, is not, and never was a reason for lifting the mesothelioma exemption. As argued, the Mesothelioma Bill has no effect on the impact of Sections 44 and 46 and is not a relevant to the review required under Section 48.

**It is wholly irrational and perverse to cite the Mesothelioma Bill as one of the grounds for bring into force sections 44 and 46 LASPO.**