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The Lord Chancellor

Dear Lord Chancellor

Section 48 LASPO Act 2012

We are instructed by Tony Whitston on behalf of the Asbestos Victims Support Group Forum UK in relation to the above.

On 4th December 2013, by way of Written Ministerial Statement of the Parliamentary Under-Secretary of State for Justice Shailesh Vara it was announced that the Government "*has concluded that it intends to apply sections 44 and 46 of the LASPO Act to mesothelioma cases*".

By way of explanation for this decision it was stated:- "*the Government does not believe that the case has been made for mesothelioma cases to continue to be treated differently, in particular by comparison to other personal injuries, which can also have profound consequences for the sufferer*".

This statement was made in a context where the Ministry of Justice also announced that it had declined to take forward a dedicated Mesothelioma Pre-Action Protocol supported by a fixed recoverable costs regime on the grounds that there is not a strong enough case that they will meet the Government's declared aim of ensuring that mesothelioma compensation claims are settled quickly – where necessary – and fairly.

The Ministerial Statement asserts that the consultation which closed on 2nd October 2013 and elicited over 100 responses incorporated the review required by s.48 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 regarding the application to mesothelioma claims of conditional fee agreement reforms contained in Part 2 of that Act. In fact the consultation document was structured in a way which made clear that each of the matters consulted on was a 'package' of reforms designed to complement DWP's Diffuse Mesothelioma Payment Scheme

proposals. The Consultation document was structured into 4 chapters. Chapter 2 set out proposals which were designed to speed up mesothelioma claims. These proposals, in particular the Pre-Action Protocol (MPAP) have now been rejected on the grounds that there is no strong evidence base to justify taking them forward. Chapter 3, set out proposals for developing a Fixed Costs Regime. Again, these proposals have been rejected for like reasons to the Mesothelioma Pre-Action Protocol. Chapter 4 was asserted to 'address' the review of the impact on mesothelioma claims of the CFA as required by s.48 of LASPO. The Consultation document in fact consisted of just 11 paragraphs explaining the nature of the asserted 'review' and at paragraph 72 underlined the Government's intention that the proposals contained in the document were a 'package' of reforms to be considered together. In particular it was stated as follows:

"The Government believes that the other changes set out in this consultation, and the changes to the statutory framework for funding the litigation described above, together with the changes being introduced by the Mesothelioma 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"
(underlining added)

Indeed the consultation document contained only the following question in relation to the asserted 'review'

Consultation Question:

Question 15: Do you agree that sections 44 and 46 of the LASPO Act 2012 should be brought into force in relation to mesothelioma claims, in the light of the proposed reforms described in this consultation, the increase in general damages and costs protection described above, and the Mesothelioma Bill?

(again, underlining added)

The Ministerial Statement of 4th December 2013 seeks now to assert that after 'careful consideration' of the responses to the consultation, 'the Government does not believe that the case has been made for mesothelioma cases to continue to be treated differently'

Not only is this not the statutory test required by s.48 of LASPO, but it appears to be based on the mistaken assumption that the Consultation process invited responses as to whether a case was made out, regardless of the package of reforms contained in the consultation going ahead, that sections 44 and 46 of LASPO should not be introduced for mesothelioma cases. This was self-evidently not the question posed by the consultation or was the review that the Government was required to carry out by primary legislation.

In particular we note that

Section 48 of the LASPO Act provides:

- (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.

This section had been implemented for reasons summarised in Chapter 4 of the Consultation Paper at paragraph 70: viz.

70 During the passage of the LASPO Act through Parliament, there was a particular concern about the impact of the reforms on the funding of mesothelioma claims. As a result, the government accepted that sections 44 and 46 of the LASPO Act should not be brought into force in relation to mesothelioma claims until a review of the likely effect of those sections in relation to such claims had been undertaken and published (as provided for in accordance with section 48 of the Act).

This was a clear and express commitment to a review on the impact of reforms on funding of mesothelioma claims. That review has not been carried out and it cannot be claimed that the reference in Chapter 4 to this issue, which was expressly put forward as part of a package of reforms which have now been rejected amounts to the necessary review to which Parliament committed itself in primary legislation.

The Ministerial Statement is the more curious because, although it makes clear that none of the 'changes set out in [the Consultation Paper]' or 'the changes to the statutory framework for funding of litigation' are to be implemented at this time, it seems to refer to the Mesothelioma Bill as the justification for bringing sections 44 and 46 into force. This is simply perverse.

As the Government well knows, the provisions of the Mesothelioma Bill have no bearing whatever on mesothelioma claims which would be affected by the introduction of sections 44 and 46 of LASPO. Indeed the terms of the Scheme specifically exclude claims that have been or might be litigated. This could not be more clearly articulated than from the Explanatory Notes to the Bill at paragraph 13:

The Scheme will only be open to people who have not brought an action against a relevant employer or employer's EL insurer because they are unable to do so. In addition, in order to be eligible to claim from the scheme, applicants must not have received damages or a specified payment in respect of diffuse mesothelioma or must not be eligible to receive a specified payment from another source'

In short, it is quite plain that there has in fact been no 'review' as required by s.48 of LASPO, and that the decision which appears to have already been made in relation to sections 44 and 46 is unlawful and *ultra vires*. Moreover, no reasons whatever have been given by the Government to explain the rationale for this apparent 'decision', still less has a 'report' been produced which would seek to justify it.

In the circumstances we have advised our client that any reliance on section 48 to bring sections 44 and 46 into force for mesothelioma claims would be unlawful and *ultra vires* the power given by parliament to the Lord Chancellor.

Clearly, we have not seen "the report under section 48 referred to at the end of the Statement which apparently the Government will publish "shortly". Please let us have this document without delay, which, given it was the basis for the 4 December decision should have been published on that day.

Yours faithfully,

Leigh Day & Co