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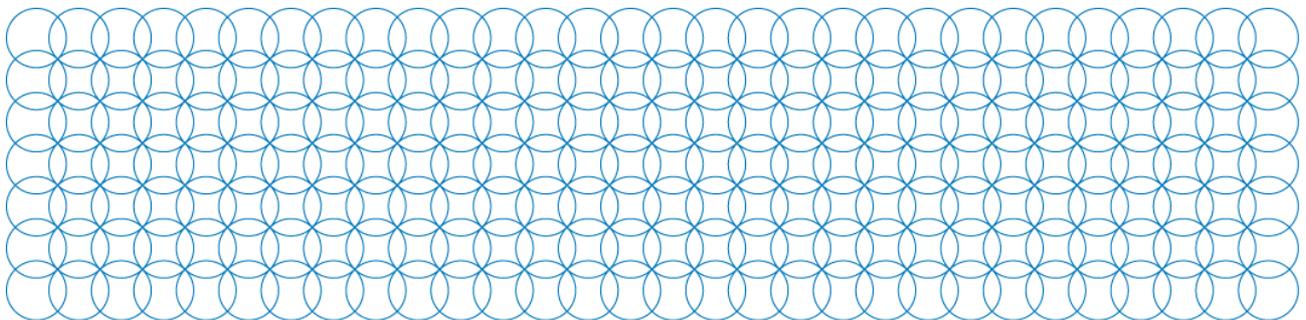
# Reforming mesothelioma claims

A consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales

Consultation Paper

This consultation begins on 24 July 2013

This consultation ends on 2 October 2013







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of Justice

## **Reforming mesothelioma claims**

A consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales

**A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at [www.justice.gov.uk](http://www.justice.gov.uk)**

## About this consultation

**To:** All stakeholders with an interest in mesothelioma claims.

**Duration:** From 24 July 2013 to 2 October 2013

**Enquiries (including requests for the paper in an alternative format) to:** Alpa Parmar  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ  
Tel: 020 3334 2987  
Fax: 020 3334 2233  
Email: mesotheliomamojpolicyteam@justice.gsi.gov.uk

**How to respond:** Please send your response by 2 October 2013 to:  
Alpa Parmar  
Ministry of Justice  
4<sup>th</sup> Floor, Point 4:37  
102 Petty France  
London SW1H 9AJ  
Tel: 020 3334 2987  
Fax: 020 3334 2233  
Email: mesotheliomamojpolicyteam@justice.gsi.gov.uk

Or visit <https://consult.justice.gov.uk/> where you can respond to the consultation online

**Additional ways to feed in your views:** You can contact the MoJ mesothelioma policy team by email at mesotheliomamojpolicyteam@justice.gsi.gov.uk or visit <https://consult.justice.gov.uk/> where you can respond to the consultation online

**Response paper:** A response to this consultation exercise is due to be published in Winter 2013 at: <http://www.justice.gov.uk>

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## Ministerial Foreword



Mesothelioma is an aggressive and, sadly, terminal occupational disease. Approximately 2,200 people currently die in England and Wales each year from this terrible condition, with sufferers having a median life expectancy of only 7 to 9 months from diagnosis. Despite this, around 50% of claims for compensation for mesothelioma take over 12 months to settle, which means that sufferers may die before their claims are paid out.

The Government recognises that there is a special and urgent case for reforming the way mesothelioma claims are dealt with to ensure that claims are settled as quickly and efficiently as possible for sufferers and their dependents. In this consultation paper, the Government outlines its proposals to achieve this.

To speed up claims, we propose the introduction of a dedicated pre-action protocol for mesothelioma (MPAP), which would seek to encourage more claims to be resolved quickly and efficiently without the need for litigation through the courts. We are also seeking views on the insurance industry's plan to set up a secure electronic information gateway to support quicker and more transparent information gathering and management in all mesothelioma claims, including those cases which do not go through the MPAP or for which a liable employer cannot be traced.

Alongside these proposals, to reflect the lower underlying legal costs which we expect as a result, we are also consulting on the principle and structure of setting constraints, in the form of Fixed Recoverable Costs (FRCs), on the legal fees which successful claimants may recover from defendants under the new standard stages of the MPAP.

Taken together, these proposals aim to build on the significant action this Government is already taking on untraced mesothelioma cases in the Mesothelioma Bill. Introduced in Parliament in May 2013 by the Department for Work and Pensions (DWP), the Bill will create a compulsory payment scheme for victims of mesothelioma who are unable to trace a liable employer, or liable employer liability insurer, from which to claim the damages they are rightfully due. Subject to Royal Assent, this untraced scheme is planned to come into force in July 2014.

Mesothelioma sufferers will also be helped by being able to make their claim direct against an insolvent defendant's insurer under the Third Parties (Rights against Insurers) Act 2010 thereby removing the need to sue the insolvent defendant first. The 2010 Act is to be brought into force as soon as practicable after it has been amended to ensure it covers at least the same types of insolvency as the 1930 legislation it is intended to replace. Legislation to effect the amendments is to be introduced as soon as parliamentary time permits.<sup>1</sup>

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<sup>1</sup> Written Ministerial Statement Hansard HoC 25 April 2013 col 71 WS

Finally, this consultation also covers the review, in accordance with section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), of the likely impact on mesothelioma claims of the conditional fee agreement (CFA) reforms which came into effect on 1 April 2013 if those provisions are now commenced for these types of case.

Our priority is to ensure that mesothelioma claims are settled quickly and fairly so that early payment of compensation is made to ease the suffering of the victims and to give some assurance that their dependents will be financially secure after their death.

We believe that our proposals will help to achieve this. We fully recognise nonetheless that mesothelioma is a complex and sensitive issue. The proposals in this paper may not be the only ones. We are keen to hear your views on our proposals and any further ideas you might have to help the victims of this dreadful disease and their dependents.

A handwritten signature in black ink, appearing to read 'Helen Grant', written in a cursive style.

**Helen Grant**

**Parliamentary Under Secretary of State for Justice**

# 1. Executive Summary

- 1 This paper presents for consultation a package of reforms to the procedures governing mesothelioma claims. It meets the Government's commitment to consult on the proposals announced in a Written Ministerial Statement on 18 December 2012.<sup>2</sup>
- 2 The consultation is aimed at people and organisations with an interest in the mesothelioma claims process in England and Wales. Copies of the consultation paper are being sent to the people and organisations listed at **Annex A**. The list is not meant to be exhaustive and responses to this paper will be welcomed from anyone with an interest in or views on the subject.
- 3 The Government would welcome responses to the questions set out in this consultation paper. The fifteen individual consultation questions are posed in the relevant chapters of the paper and repeated together in the 'Questionnaire' chapter towards the end.
- 4 The deadline for responses is midnight on 2 October 2013. After the consultation closes we will consider the responses we have received. We plan to publish a consultation response document in Winter 2013.
- 5 A Welsh language summary of the Executive Summary and Questionnaire is available at [www.justice.gov.uk](http://www.justice.gov.uk).

## The issue

- 6 Mesothelioma is a cancer of the thin membrane that lines the chest and abdomen. It is a "long-tail disease": symptoms often develop 30-40 years after exposure and in most cases sufferers are not diagnosed until they become ill. It is a disease which, once diagnosed, is rapidly terminal. The Health and Safety Executive states that "most deaths occurring now are a legacy of past occupational exposures to asbestos when it was widely used in the building industry"<sup>3</sup>.
- 7 Approximately 2,200 people die each year from this disease in England and Wales<sup>4</sup> with around 23,000 deaths in total predicted to occur between 2014 and 2024 across the UK<sup>5</sup>. Sufferers have a median life expectancy ranging from only 7 to 9 months after diagnosis<sup>6</sup>.
- 8 Secondary analysis on the interim dataset supplied by the National Institute of Economic and Social Research (NIESR)<sup>7</sup> shows that around 50% of mesothelioma claims take over 12

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<sup>2</sup> Written Ministerial Statement, Hansard HoC 18 Dec 2012 : Column 96WS

<sup>3</sup> Health and Safety Executive <http://www.hse.gov.uk/statistics/causdis/mesothelioma/index.htm>

<sup>4</sup> Health and Safety Executive <http://www.hse.gov.uk/statistics/tables/meso01.xls>

<sup>5</sup> DWP Impact Assessment: Mesothelioma Payment Scheme  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/198388/mesothelioma-payment-scheme-impact-assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198388/mesothelioma-payment-scheme-impact-assessment.pdf)

<sup>6</sup> Lancet Journal 2008 May 1; 371(9625): 1685–1694 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2431123/>

months to settle from when a claim is first lodged. Given the aggressive nature of the disease, this means that sufferers may die before their claims are paid out. The Government is concerned about the length of time it currently takes to pay out compensation to mesothelioma sufferers.

### Proposals for reform

- 9 The proposals in this consultation look to increase the pace and improve the efficiency of the claims process so that early payment of compensation is made.
- 10 Chapter 2 sets out proposals which aim to speed up mesothelioma claims; to enable more cases where there is a traced employer or insurer to be resolved within 6 months, with relatively straightforward cases reaching a resolution in 3 months.
  - **A new dedicated Mesothelioma Pre-Action Protocol (MPAP)** to establish a quicker standard process to set timescales for more straightforward mesothelioma claims. This aims to encourage the early settlement of claims without litigation where possible, helping the courts to focus on the more complex mesothelioma cases.
  - An industry-funded electronic **Secure Mesothelioma Claims Gateway (SMCG)** which aims to support the MPAP by providing a secure method for claimants to register necessary information such as medical records. The SMCG will also handle untraced mesothelioma claims. It will be linked to a mesothelioma support website which aims to provide guidance to all sufferers on the courses of action open to them.
- 11 Chapter 3 looks at developing a **fixed recoverable costs (FRC) regime** which will seek to reflect the greater speed and efficiency of the more straightforward mesothelioma claims which go through the MPAP under the new system. This regime would help to emphasise and encourage proportionality in the amount of legal work undertaken and provide greater certainty about the legal costs incurred on behalf of claimants. We would like your views both on the principle and structure of a fixed recoverable cost regime, and on the levels at which a possible fixed cost regime might be set.
- 12 Chapter 4 addresses our review of the impact on mesothelioma claims of the conditional fee agreement (CFA), as required by section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). While the Government has implemented, from 1 April 2013, reforms to the 'no win no fee' system for personal injury cases, mesothelioma cases are currently exempt from these reforms until the issue is reviewed.
- 13 Our package of reforms seeks to complement DWP's Diffuse Mesothelioma Payment Scheme proposals for compensating mesothelioma claimants whose past employers and insurers cannot be traced.<sup>8</sup> The measures, set out in the Mesothelioma Bill, establish a payment

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<sup>7</sup> Secondary analysis on the interim dataset supplied by NIESR (England and Wales). The survey covered settled employer liability claims in the private sector between 2007 and 2012.

<sup>8</sup> DWP consultation: Accessing compensation: supporting people who need to trace Employers' Liability Insurance <http://www.dwp.gov.uk/consultations/2010/accessing-compensation-elci.shtml>

scheme so that anyone who is diagnosed with mesothelioma as a result of occupational asbestos exposure and who, given the time lag, is unable to trace their liable employer or their employer's insurer will be eligible to claim under this scheme if they were diagnosed with mesothelioma on or after 25 July 2012.

- 14 The Mesothelioma Bill will ensure that all active Employers' Liability (EL) insurers contribute to the levy. This will be supported by the Employers' Liability Tracing Office (ELTO) established in April 2011. ELTO is an electronic database of EL policies to which 99% of the EL insurers provide data; and this should substantially increase the numbers of traced EL policies so that more people can get the compensation they deserve.
- 15 The Mesothelioma Bill is planned to extend to Scotland and Northern Ireland, ensuring that victims who are unable to trace a liable employer from which to claim damages are able to benefit from the compulsory payment scheme.
- 16 This consultation, however, does not extend to Scotland or Northern Ireland. The Scottish Government and Northern Ireland Executive are not aware of any issues, such as delays, arising from the processing of mesothelioma cases in their systems. Both administrations are keeping matters under review to ensure that claims for mesothelioma are processed and settled quickly and fairly.

### **Impact Assessment**

- 17 The Government's Impact Assessment is being published separately. Quicker case settlement which achieves equivalent outcomes using fewer resources would be associated with improved overall economic efficiency.
- 18 The Government has assessed the potential impacts of the proposed reforms in accordance with our obligations under the Equality Act 2010. The Equality Statement is being published separately. The proposed reforms are not expected to be directly or indirectly discriminatory in their operation.

## 2 Resolving mesothelioma claims quickly

*“Fifty percent of responders reported a delay in the claims process, the main reason being problems tracing the employer. At the point the settlement amount was agreed, nearly half of responders were satisfied but 43% were deeply distressed or unhappy about the experience”<sup>9</sup>*

- 19 Where sufferers are diagnosed with mesothelioma, they and their family can rightly receive financial support for their condition. In addition to specific state benefits, currently sufferers can also claim compensation from employers who negligently or in breach of statutory duty exposed them. The overall total estimated number of registered cases in England and Wales which arose between 2007 and 2010 is 8,200<sup>10</sup>. Secondary analysis on the interim dataset supplied by NIESR found that the mean compensation level for settled employer liability claims in the private sector was £156,600, and the maximum reported was £5,573,700<sup>11</sup>. These payments can provide much-needed support and assurance for sufferers and their families.
- 20 Despite the pressing need for compensation, getting it is not always straightforward. Exposure to asbestos may have taken place in the workplace decades previously - data from the DWP Compensation Recovery Unit indicated that 59% of claimants are at least 70 years old<sup>12</sup>. There can be particular problems in claims where during the time between contracting the disease and diagnosis the employer has gone out of business and the insurer is difficult to identify. Nor is the claims process for compensation quick - around 50% of claims take over 12 months to settle after a claim is lodged<sup>13</sup>. All too often people with mesothelioma have died or are in the advanced stages of the disease before compensation is paid. Sufferers and their carers have relayed the distress of having to deal with the claim whilst trying to cope with the effects of the disease<sup>14</sup>.
- 21 For those who are unable to bring a claim for damages against a relevant employer or that employer’s EL insurer, the Government’s Mesothelioma Bill is already providing for the introduction of a ‘Diffuse Mesothelioma Payment Scheme’ to make payments to eligible people (or their dependents) who were exposed to asbestos either negligently or in breach of statutory

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<sup>9</sup>British Lung Foundation-Mesothelioma Compensation Survey, May 2013 (unpublished)

<sup>10</sup> Individuals with diffuse mesothelioma living in England and Wales with Employers’ Liability cases registered with the Compensation Recovery Unit (DWP) (June 2013).

<https://www.gov.uk/government/publications/individuals-with-diffuse-mesothelioma-living-in-england-and-wales-with-employers-liability-cases-registered-with-the-compensation-recovery-unit>

<sup>11</sup> Secondary analysis on the interim dataset supplied by NIESR (unweighted, England and Wales). The survey covered settled employer liability claims in the private sector between 2007 and 2012.

<sup>12</sup> Study into average civil compensation in mesothelioma cases: statistical note

[http://statistics.dwp.gov.uk/asd/asd1/adhoc\\_analysis/2013/20130501\\_NIESR\\_Meso\\_Statistical\\_Report\\_FINAL.pdf](http://statistics.dwp.gov.uk/asd/asd1/adhoc_analysis/2013/20130501_NIESR_Meso_Statistical_Report_FINAL.pdf)

<sup>13</sup> Secondary analysis on the interim dataset supplied by NIESR (England and Wales)

<sup>14</sup> British Lung Foundation Mesothelioma Compensation Survey 2013 (unpublished)

duty by their employer. This will be funded by an annual levy on EL insurers, of around £339m.<sup>15</sup>

- 22 This Scheme is a matter of last resort. Where a person is able to bring action against a relevant employer or insurer for damages in respect of mesothelioma, they should do so.
- 23 However, even where the employer or their insurer is known, the legal process for obtaining compensation can be slow and frustrating. There are perceptions that it presents unnecessary hurdles. Mesothelioma sufferers and their dependants have pointed to some uncertainty over what is involved in the process and what information is required for a claim; and from the defendants' perspective, the process does not always work to provide them and their representatives with sufficiently early notice of a claim so that they can begin to conduct investigations and prepare a response quickly.
- 24 The Government's policy intention is to help rectify these flaws to deliver a speedier and more efficient mesothelioma claims process for sufferers and their dependants. The two key elements of this proposed new approach are a dedicated MPAP and a central SMCG. We wish to hear your views on both these proposals.

### **Mesothelioma Pre-Action Protocol**

- 25 Claims for mesothelioma compensation are currently subject to the Pre-Action Protocol for Disease and Illness (DPAP) which can be found at [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_dis](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_dis). In the interests of openness and timeliness, the DPAP sets out a code of good practice which all parties to a claim should follow. The DPAP contains specific guidance relating to mesothelioma claims and includes, in its annex C, a template for an early notification letter to give defendants and their insurers early warning and to impress upon them the need for urgency in locating relevant information where the claimant has severely limited life expectancy.
- 26 The DPAP aims to resolve as many disputes as possible without litigation or, where a claim cannot be resolved, to identify the relevant issues which remain in dispute. However, in the case of mesothelioma it is not achieving its purpose of enabling claims to be resolved quickly and easily. Anecdotal information suggests that the DPAP might currently be under-utilised for mesothelioma, even in the relatively straightforward cases where liability is not at issue.
- 27 One reason may be that the maximum timescales set in the DPAP for stages in the claims process do not support the need for specific urgency in settling mesothelioma claims. For example to provide a "reasoned answer" to a letter of claim, the defendant or their representative is given up to 90 days from the date of their acknowledgement, which itself is required within 21 days of the posting of the original letter of claim. The DPAP does acknowledge this difficulty in making clear at paragraph 2.7 that compliance with the DPAP may not be appropriate in many mesothelioma cases:

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<sup>15</sup> Mesothelioma Payment Scheme impact assessment: updated 7 May 2013  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/198388/mesothelioma-payment-scheme-impact-assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198388/mesothelioma-payment-scheme-impact-assessment.pdf)

*“In a terminal disease claim with short life expectancy, for instance where a claimant has a disease such as mesothelioma, the time scale of the protocol is likely to be too long. In such a claim the claimant may not be able to follow the protocol and the defendant would be expected to treat the claim with urgency including any request for an interim payment”*

- 28 The result is understood to be that the majority of mesothelioma cases are either dropping out of the DPAP procedure or by-passing it altogether and proceeding straight to litigation via the Royal Courts of Justice specialist mesothelioma procedure (set out in Practice Direction 3D supporting the Civil Procedure Rules, which can be found at [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/pd\\_part03d](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/pd_part03d) ) under the management of Senior Master Whitaker.
- 29 Secondary analysis on case duration from the NIESR dataset and research from the British Lung Foundation reflects that the system currently might not operate to provide any clear incentive in terms of better timescales for seeking to settle a mesothelioma claim outside of court.
- 30 The figures below illustrate the wider problem of delay in settling claims highlighted above. Around 14% of non-litigated cases take over two years to reach settlement.

**Table1: Case duration from when the claimant first lodges a claim with a defendant to the date when a settlement is agreed (secondary analysis on an interim dataset supplied by NIESR)**

	0-6 months	7-12 months	13-18 months	19-24 months	Greater than 24 Months
Non-litigated Claims	21%	31%	20%	14%	14%
Litigated Claims	19%	30%	18%	12%	21%

- 31 **The Government is concerned over the length of time it currently takes to pay compensation to mesothelioma sufferers. We wish to seek the views of respondents on how we might better achieve the objective of securing the settlement of mesothelioma claims quickly and fairly. In particular, we seek views on what measures and incentives are needed so that the more relatively straightforward cases, where the question of liability is not at issue, can be dealt with without the need for litigation.** The aim would be to complement and support the mesothelioma fast track in Practice Direction 3D, and ensure that the courts are free to handle the more complex mesothelioma cases.
- 32 To help in this aim, the Association of British Insurers (ABI) is proposing a new, tailored, pre-action protocol for mesothelioma, the purpose of which would be to help mesothelioma

sufferers settle their cases quicker and more easily, without the need to go to court and with shorter set timescales. The ABI's proposed MPAP is at **Annex B**.

33 The MPAP would replace the existing DPAP for mesothelioma claims. It would:

- encourage the provision of early and full information about the claim, notably through an early intimation letter;
- tighten timescales and improve information-sharing structures to enable the parties to avoid litigation by agreeing a resolution of the claim before proceedings are commenced, with a requirement for the defendant, in cases where breach of duty is admitted and causation established, to make an interim payment on account of damages; and it would
- support the efficient management of proceedings in accordance with Practice Direction 3D where litigation cannot be avoided.

34 The proposed MPAP could ultimately help to modify behaviours on both the defendant and claimant sides to ensure reasonable and early settlements are made during a sufferer's lifetime.

35 Any new MPAP would need to form part of an end-to-end structure including amendments to Rules of Court.

36 The Government proposes that the legal costs in the MPAP process would be fixed. This is addressed in chapter 3 of this consultation paper.

### **Consultation Questions:**

**Question 1:** What in your view are the benefits and disadvantages of the current DPAP for resolving mesothelioma claims quickly and fairly?

**Question 2:** How far do you think that a new dedicated MPAP would address the problems and meet the objectives set out above?

**Question 3:** What are your detailed views on the ABI's proposed MPAP at Annex B? What further issues might it address? Do you think the criteria for entering the MPAP are the appropriate ones? If not, what criteria would you suggest and why? In what circumstances, if any, should a case fall out of the MPAP?

**Question 4:** To what extent do you think the proposed MPAP will result in reduced legal costs in mesothelioma claims?

## Secure Mesothelioma Claims Gateway

- 37 Currently, there is no standard universal, co-ordinated and efficient method for communicating between claimant representatives and defendants the sensitive information involved in mesothelioma claims, such as medical records, GP notes and HMRC Employment Schedules. The information reported and the format used can be variable.
- 38 The ABI is proposing to fund - to complement and form part of a package with the MPAP - the construction of a new online Secure Mesothelioma Claims Gateway (SMCG). This would provide an integrated means of conveying advice for those with mesothelioma, registering and resolving claims associated with employment-related incidences of the disease, and would generate valuable statistics which would help in planning the continued support of those developing the condition.
- 39 As envisaged by the ABI, the SMCG should:
- Provide solicitors with a common means of submitting claims in respect of mesothelioma attributable to employment, whether the claim is a “traced” claim against solvent defendants/insurers or is under the untraced scheme;
  - Enable solicitors to raise subsequent claims in respect of a sufferer without needing to rekey or reload information – such as key personal data, medical records/reports and the HMRC schedule;
  - Provide a single point of entry for making a claim to the untraced mesothelioma scheme;
  - Provide a solution for traced claims which caters for claim submission to all defendants and their insurers, whether they have registered to use the gateway or not;
  - Through widespread use of the gateway for claims, enable industry-wide statistics on the incidence of mesothelioma to be captured for actuarial use and reporting to the relevant authorities; and
  - Through requesting the agreement of sufferers (or their personal representatives) on the gateway, provide a repository of information which could be made available for clinical research.
- 40 Although this new gateway would complement the proposed MPAP, the ABI propose that the SMCG should handle all mesothelioma claims, including those subject to litigation. Use of the SMCG, however, is not intended to be compulsory. There would be no penalties if it is not used since the ABI consider that the benefits will encourage usage. Involvement from sufferers, their dependants and mesothelioma support groups will be needed to ensure the SMCG and website are beneficial and to create incentives for its use.

**Consultation Questions:**

- Question 5:** To what extent do you think a SMCG will help achieve the Government's objective of ensuring that claims are settled quickly and fairly?
- Question 6:** How should the SMCG work (if at all) with the MPAP and procedure in traced mesothelioma cases generally, and what features should the SMCG have in order to complement those procedures effectively and efficiently?
- Question 7:** What do you see as the risks of a SMCG and what safeguards might be required?

### 3. A more efficient costs system

#### Fixed costs regime

- 41 The Government wishes to consult on the principles of and structure for introducing Fixed Recoverable Costs (FRCs) for mesothelioma claims. It is the Government's provisional view that it would be reasonable and proportionate to introduce a structure of FRCs to act as a constraint on the legal costs incurred on behalf of claimants in relation to particular mesothelioma claims. We also wish to hear views on whether we should introduce the same, a similar or a different structure or approach for defendants' costs, to help maintain balance in the settlement process.
- 42 The Government's provisional view is based on the principles that FRCs:
- a. should support the proposals set out in this consultation document to speed up the settlement of mesothelioma claims;
  - b. would primarily be suitable for application in mesothelioma claims subject to the MPAP. This implies that for these claims:
    - i. the claims process is sufficiently defined and sufficiently predictable; and
    - ii. liability for damages is not at issue.
  - c. should be set at a level which accurately reflects the amount and nature of the legal work involved in managing the mesothelioma claim efficiently;
  - d. should not compromise access to justice for sufferers and their dependents, and should allow legal representatives to provide their clients with the required legal work to professional standards; and
  - e. should operate overall so as to not discourage parties from using the MPAP to reach settlement without the need for litigation.
- 43 Taking these principles into account, we propose that FRCs should apply only to cases entering the MPAP. These would be the cases where a solvent compensator has been identified and where liability is confirmed. A FRC regime could support the MPAP by indicating how much work is envisaged and by encouraging no more work than that to be undertaken, thereby helping to manage costs and to promote quick and efficient settlement of claims.
- 44 We believe that FRCs would bring more transparency and certainty over the legal costs incurred on behalf of claimants. FRCs may also reduce the costs to claimants of 'shopping around' to find the best deal in legal representation. FRCs could enable claimant representatives to build more predictability into their business models for managing claims and may provide defendants with more certainty about the cost of the claims process which they could factor into their reserves models. FRCs may also reduce the costs of determining at the

end of a case how much of the claimants' legal costs may be recovered from the defendant, i.e. might reduce the level of resource involved in current 'costs of costs' activity.

- 45 Cases conducted outside the MPAP would still go through the Royal Courts of Justice fast track procedure where costs and settlements will be decided separately. Where cases do not use the MPAP, legal costs would be subject to the current Guideline Hourly Rates. However the settlement of legal costs for cases which do not use the MPAP might take into consideration whether those cases might reasonably have been resolved in accordance with the MPAP.
- 46 Finally, we propose that the FRC structure would apply in relation to claimant lawyer costs only, as defendant costs are not recoverable for claims which settle under the MPAP. **However, we are interested in hearing from those who consider that a FRC structure or some other form of constraint might apply also to defendants' costs.**
- 47 Any new FRC scheme would require provision in rules of court for its introduction.

### Options for a fixed cost regime

- 48 We wish to consult on the following options for the structure of a potential FRC regime for mesothelioma claims:
- A. **A single flat fee** – under which one fixed sum would be recoverable to cover all cases settled within the MPAP, irrespective of variations such as the level of damages awarded;
  - B. **Separate flat fees for different stages of the MPAP** – under which the total single flat fee could be broken down by the stages of the MPAP, with individual staged fees only being recoverable once the relevant stages of the MPAP have been undertaken; and
  - C. **Multiple flat fees or variable fees** – under which there would be a set of flat fees (i.e. multiple FRC schemes, under either A or B above) for different groups of mesothelioma claims, or alternatively a FRC scheme with variable element(s) on top of a lower base flat fee or staged fee. In relation to the latter, we would need to consider what might drive any variable element, e.g. the level of damages, and the relative size of the fixed and variable elements.
- 49 We sketch out below the outline of how these options might work using the emerging NIESR survey data. **The figures derived from this initial analysis should be regarded as purely illustrative at this stage.** They also do not indicate any predetermined Government decision on the proposals in this consultation paper. More information on the data can be found in the note at the end of the chapter.

### Option A – A single flat fee

- 50 A single flat fee for mesothelioma claims would be the simplest option. It could be based around the median base legal cost for all claims (where the defendant has been traced) that

settle before court proceedings are issued. The median figure might be a more appropriate average figure than the mean, which might be distorted by a small number of extreme cases.

- 51 Emerging data from the NIESR survey, which may be subject to further revision, indicates that the current median base legal cost for all non-litigated cases is around £8,300 (excluding VAT, rounded to the nearest £100). This estimation has been derived by deducting disbursements, success fees, and ATE premiums from total legal costs, in relation to those non-litigated cases where figures for each of these elements were provided.
- 52 This sample of cases would not necessarily completely reflect all cases which in future would use the new MPAP. For example not all currently non-litigated cases might use the MPAP in future. We would also need to consider how any flat fee, if introduced, might reflect the efficiencies associated with the MPAP and hence might be lower than current median costs. Nevertheless this figure provides an initial indication of some existing cost figures for the purposes of informing the consultation exercise.

#### **Option B – Separate flat fees for different stages of the MPAP**

- 53 This may provide a sharper focus on the relative cost of the various stages of the MPAP. It would in principle provide greater clarity, by disaggregating a single flat fee into its specific elements, and would need to be transparent in operation. We would welcome views not only on this overall approach but also on which constituent parts of the MPAP process would best lend themselves to such staged FRCs. For example, it might be reasonable and simplest to divide the MPAP process into two parts for the purpose of applying staged FRCs, with the first part ending with the issue of the letter of claim (paragraph 4.1 of the MPAP). This would still enable FRCs to be applied to part of the MPAP process even for those claims which fall out of the MPAP due to the defendant denying liability following the letter of claim.

#### **Option C – Multiple flat fees or variable fees**

- 54 We wish to hear views on whether, instead of having a single flat fee for all mesothelioma cases in the MPAP, (which might or might not be comprised of underlying staged flat fees as above), we might adopt a structure in which FRCs vary in relation to particular factors or characteristics. For example, this variable element might be something which captures the degree of complexity of the case, if this indeed drives legal costs.
- 55 If a variable element was favoured, evidence would be needed on what this driver might be, on its strength, and on how this design of FRC might be applied in practice (for example, how might 'complexity' be captured accurately and objectively). Variable element(s) might apply in addition to an underlying fixed element.
- 56 As an example, if legal costs were strongly driven by damages, FRCs could take the form of a fixed base rate plus a percentage of damages. For illustrative purposes, we can explore the association between base legal costs and damages using the interim NIESR dataset. A regime of this design might have a fixed element of £5,700 (rounded to the nearest £100) plus a

variable increment of 2% of damages<sup>16</sup>. There is, however, a wide range of legal costs for any given level of damages. This implies that a number of other factors drive legal costs in addition to the size of damages. Nevertheless, a slight positive correlation between damages and legal costs seems to exist. As above, this sample might not completely capture all cases which might use the MPAP in future, and we would need to consider how future FRCs should reflect the efficiencies associated with the MPAP. Applying this formula generates the following total base legal costs in the following three illustrative examples in Table 2 below.

**Table 2: Example FRCs based on final settlement**

Example Compensation levels	£50,000	£100,000	£150,000
Fixed element + 2% of compensation (ex VAT)	£6,700	£7,700	£8,700

- 57 Compared to a single flat fee, this structure would provide slightly more reward (i.e. higher legal costs) for higher levels of damages. This could reflect more legal work being required to settle cases which have higher damages. However this FRC structure might generate more of an incentive compared to a flat FRC for claimant lawyers to undertake additional work in order to secure slightly higher damages for their client. This might have the unwelcome effect of slowing down the resolution of cases to the detriment of mesothelioma sufferers.
- 58 It is unclear how well final settlement levels capture the degree of complexity and hence whether any variable element should relate to the level of damages or to a different factor. The wide spread of legal costs either side of the best fit line implies that in addition a number of factors drive legal costs. Respondents may have views on how what might drive any variable element in an FRC scheme of this structure, and on the strength of this driver.
- 59 Alternatively if a flat fee was favoured by design (either Option A or Option B), different flat FRCs might apply to different groups of mesothelioma claims rather than a single FRC applying to all claims. If so we would wish to consider what those groupings might be.
- 60 One possibility is that different flat FRCs might apply to different groups of case according to the level of damages awarded. Secondary analysis of the interim NIESR dataset indicates that for non-litigated cases:
- around a third of the total number of cases settle for compensation below £107,000;
  - around another third settle for compensation between £107,000 and £153,000; and

<sup>16</sup> These figures are generated from secondary analysis on the interim dataset supplied by NIESR (unweighted, England and Wales). A straight best fit line using simple Ordinary Least Squares regression including only non litigated cases with one explanatory variable (damages). Outliers, cases with base legal costs over £100,000, were excluded. ( $R^2$  of 0.095).

- the final third settle for compensation above £153,000.

61 On this basis, for illustrative purposes, a three-tiered FRC scheme related to settlement levels based on these bandings (as rounded) might have one flat FRC for settlements below £100,000, a higher flat FRC for settlements between £100,000 and £150,000, and a higher flat FRC for settlements above £150,000. Interim data from the NIESR survey indicates that the current median base costs for non-litigated cases within these purely illustrative settlement bands are as follows (rounded to the nearest £100). As above, this sample might not completely capture all cases which might use the MPAP in future, and we would need to consider how future FRCs should reflect the efficiencies associated with the MPAP.

**Table 3: Possible FRC bandings based on final settlement**

Compensation band	Up to £100,000	£100,000 to £150,000	£150,000+
Median base costs (ex VAT)	£7,200	£8,100	£9,300

- 62 Compared to the option above of a fixed FRC element plus a variable FRC element, a (three) tiered system of flat FRCs would introduce a series of boundaries. For cases at the upper end of a boundary there might be an incentive for claimant lawyers to secure damages just over the boundary, and hence to receive higher FRCs. The opposite incentive might apply to defendants, who may wish to keep damages just below the boundary.
- 63 If legal costs, and hence the amount of legal work involved, currently varies with the level of damages then flat FRCs might possibly generate an incentive for less legal work to be undertaken than now in relation to cases with higher damages. This effect might apply less strongly, if it applies at all, if there is a tiered system of flat FRCs instead of a single flat FRC. It might also apply less strongly, if it applies at all, if FRCs by design had a fixed plus a variable element as above, instead of FRCs by design taking the form of a single or multiple flat fees.

### Consultation Questions:

**Question 8:** Do you agree that a fixed recoverable costs regime should be introduced to support a dedicated MPAP? If so should this apply primarily to claimant costs? Should any measures also apply to defendant costs? If so what form might they take?

**Question 9:** Which proposed design of fixed recoverable costs structure do you support? Please explain your answer.

- Question 10:** What are the key drivers of legal costs, both fixed and variable costs, and how strong are these drivers?
- Question 11:** Do you have any views on what the level of fixed recoverable costs should be, in relation to your favoured design? Please explain your answer.
- Question 12:** Do you agree that the fixed recoverable costs regime should apply only to cases which fall under the MPAP?

### **Impact of MPAP and FRCs on Small and Micro Businesses**

64 The Impact Assessment accompanying this consultation paper includes an initial assessment of the possibly differential impact of the proposals on small businesses (up to 49 employees) and micro businesses (up to 10 employees). It is possible that the reforms will affect small and micro businesses, in particular legal services providers. We would welcome views on this. In particular:

- The reforms generate increased business certainty for legal services providers in terms of the amount of work required and the associated income. It is possible that these portfolio management benefits might be valued more highly by small and micro businesses. These changes might lead to more small and micro businesses entering this field.
- For existing legal services providers, the reforms might involve less work being undertaken than now as a result of the efficiencies associated with the MPAP, with associated reductions in income from such cases. Legal services providers might adjust by diverting the resources saved to other cases, possibly in different areas of business. It is not clear whether these adjustment costs, which again relate to portfolio management, might disproportionately affect small and micro businesses.
- Whilst small and micro legal services providers might pursue mesothelioma cases these reforms apply to the subset of non-litigated mesothelioma cases which are subject to the MPAP. Furthermore some cases might be subject to initial stages of the MPAP but not to later stages. This also affects the extent to which the proposals affect small and micro legal services providers working in the mesothelioma field. Legal services providers are able to choose which cases to take on.
- Any differential impact of the reforms on small and micro business might also be mitigated by the production of guidance and other information which supports implementation.

**Consultation Questions:**

**Question 13: To what extent do you think the reforms apply to small and micro businesses?**

**Question 14: To what extent do you think the reforms might generate differential impacts (both benefits and costs) for small and micro businesses? How might any differential costs be mitigated?**

**Note on the dataset used in this chapter**

The data used in this chapter is based on secondary analysis of an interim dataset supplied by the National Institute of Economic and Social Research.

The NIESR study covered a sample of over 3,000 settled employer liability claims in the private sector between 2007 and 2012 from the Compensation Recovery Unit. Secondary analysis was conducted for the fixed cost regime on the subset of cases settled before court proceedings are issued (“non-litigated cases”), as a proxy for cases that could be covered by the MPAP. However, it may be the case that some currently litigated cases could in future be settled in the MPAP, and also that some currently non-litigated cases might not be settled in the MPAP in future. To mitigate against average figures being swayed by a small number of extreme cases, median figures have been used rather than the mean. The sample of cases used to estimate base legal costs, which excludes ‘After The Event’ (ATE) premiums, disbursements and success fees, uses a subset of these cases where all costs are known. There may be attrition bias in these cases, although initial analysis on the unweighted data suggests the bias may not be large.

The NIESR data set is likely to be updated and the analysis currently does not apply weights to make the findings more representative of all claims. Therefore, as mentioned earlier, the figures derived from this initial analysis should be regarded as purely illustrative at this stage.

## 4. Review under section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

65 This part of the consultation paper explains the review to be carried out in accordance with section 48 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. The review is looking at the likely effects of sections 44 (conditional fee agreements: success fees) and 46 (recovery of insurance premiums by way of costs) of the LASPO Act in relation to mesothelioma proceedings. The Government will consider the likely effects, and determine the outcome of the review – that is, whether sections 44 and 46 should be brought into force in relation to mesothelioma claims – in the light of this consultation and the information provided as a result.

### The funding of mesothelioma claims

66 Many mesothelioma claims are funded under a conditional fee agreement (CFA). Legal aid has not been available for such claims for some time: the Access to Justice Act 1999 removed legal aid for the majority of personal injury cases, including mesothelioma cases, where alternative forms of funding such as CFAs are available.

67 CFAs are a type of ‘no win no fee’ agreement under which lawyers do not receive a fee from their client if they lose a case, but can charge an uplift (known as a ‘success fee’) on top of their ordinary, or “base” costs if they win. Claimants can also take out after the event (ATE) insurance - which insures them against the risk of having to pay the defendant’s legal costs if the claim fails. The statutory framework which the LASPO reforms replace allowed for the winning party’s success fee and ATE insurance premium to be payable by the losing party in addition to the ordinary legal costs of the winning party. This added substantially to costs for defendants, particularly since the maximum success fee that a lawyer may charge is 100% of the ordinary legal costs.

### Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

68 Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduces reforms in relation to CFA funding, in particular abolishing in all areas of civil litigation the ability of a winning party to recover (i) CFA success fees (s. 44) and (ii) after the event (ATE) insurance premiums (s. 46) from the losing side.

69 These reforms took forward recommendations made by Lord Justice Jackson, who had been asked by the Master of the Rolls to investigate the high costs of civil litigation and to make recommendations for reform. He found that the CFA arrangements which then existed were ‘the major contributor to disproportionate costs in civil litigation in England and Wales’, and recommended that the recovery of success fees and ATE premiums from the losing party be abolished, which he considered would lead to ‘significant costs savings, whilst still enabling

those who need access to justice to obtain it.’ The Government accepted the recommendation, which has been implemented in sections 44 and 46 of the LASPO Act. These changes came into force on 1 April 2013 generally, but not in relation to mesothelioma claims, as explained below.

- 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). Mesothelioma claims accordingly continue to come under the statutory framework for CFAs and ATE insurance now otherwise replaced as from April 2013,<sup>17</sup> so successful claimants funded by a CFA can still recover the success fee and ATE insurance premiums from the losing defendants.
- 71 The Government continues to believe that it is important that, in time, the reforms to the CFA framework should apply to all areas of civil litigation, including mesothelioma claims. That is what Lord Justice Jackson recommended in his report which led to the changes in the LASPO Act 2012. The Government agrees. That is why the LASPO Act does not exclude mesothelioma cases permanently from the scope of the CFA reforms.
- 72 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.
- 73 The Government is committed to ensuring that all the changes – set out in this consultation paper and in the Mesothelioma Bill - are considered in a synchronised manner, and that mesothelioma sufferers benefit from the changes and receive compensation in a speedy and efficient way. Views on the likely effects of sections 44 and 46 of the LASPO Act in relation to mesothelioma claims in the light of the other changes would therefore be welcomed.

### **The success fee**

- 74 If the Government concludes, as a result of this review, that sections 44 and 46 should be brought into force in relation to mesothelioma claims, lawyers acting for claimants under a CFA will need to consider whether they wish to charge a success fee. A success fee would be payable by the claimant out of damages, and not by the defendant. In this context it should be noted that (pursuant to another recommendation made by Lord Justice Jackson) general

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<sup>17</sup> In addition to mesothelioma claims, the implementation of sections 44 and 46 of the LASPO Act has been delayed beyond 1 April 2013 for publication and privacy proceedings, and proceedings in respect of, and relating to, insolvency proceedings.

damages for non-pecuniary loss such as pain, suffering and loss of amenity are being increased by 10%, in part to compensate for claimants having to pay the success fee. Judicial Guidelines currently set these damages in mesothelioma cases at between £50k-£90k.

- 75 The Government is keen to protect claimants' damages in personal injury cases. Regulations under the powers introduced by section 44 of the LASPO Act accordingly provide in relation to personal injury cases for the success fee that a lawyer may charge to be capped at 25% of the damages recovered, excluding damages for future care and loss (It may be noted that the success fee is 'capped' at that level: there is no requirement for any success fee to be charged). This provision would apply equally to mesothelioma claims, should sections 44 and 46 be brought into force in relation to such claims.

#### **After the event (ATE) insurance premiums**

- 76 The ability to recover the premium for ATE insurance from the losing party has, as Lord Justice Jackson found, increased the costs of civil litigation. For personal injury cases, a system of 'qualified one way costs shifting' (QOCS) has been introduced via rules of court (again pursuant to a recommendation of Lord Justice Jackson) as a cost effective alternative. QOCS is a form of costs protection under which the claimant will be protected from paying the other side's costs if the case is lost; and this should reduce the need for ATE insurance. However, a losing defendant remains liable for the claimant's costs in the usual way. This general protection is subject to qualifications relating to the claimant's behaviour in the conduct of the litigation, and failure to accept an appropriate offer to settle the claim. The QOCS regime has been implemented in personal injury cases from 1 April 2013. The same QOCS protection would apply in relation to mesothelioma claims should sections 44 and 46 be brought into force in relation to such claims.

#### **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?**

## Questionnaire

We would welcome responses to the following questions set out in this consultation paper:

- Question 1:** What in your view are the benefits and disadvantages of the current DPAP for resolving mesothelioma claims quickly and fairly?
- Question 2:** How far do you think that a new dedicated MPAP would address the problems and meet the objectives set out above?
- Question 3:** What are your detailed views on the ABI's proposed MPAP at Annex B? What further issues might it address? Do you think the criteria for entering the MPAP are the appropriate ones? If not, what criteria would you suggest and why? In what circumstances, if any, should a case fall out of the MPAP?
- Question 4:** To what extent do you think the proposed MPAP will result in reduced legal costs in mesothelioma claims?
- Question 5:** To what extent do you think a SMCG will help achieve the Government's objective of ensuring that claims are settled quickly and fairly?
- Question 6:** How should the SMCG work (if at all) with the MPAP and procedure in traced mesothelioma cases generally, and what features should the SMCG have in order to complement those procedures effectively and efficiently?
- Question 7:** What do you see as the risks of a SMCG and what safeguards might be required?
- Question 8:** Do you agree that a fixed recoverable costs regime should be introduced to support a dedicated MPAP? If so should this apply primarily to claimant costs? Should any measures also apply to defendant costs? If so what form might they take?
- Question 9:** Which proposed design of fixed recoverable costs structure do you support? Please explain your answer.
- Question 10:** What are the key drivers of legal costs, both fixed and variable costs, and how strong are these drivers?
- Question 11:** Do you have any views on what the level of fixed recoverable costs should be, in relation to your favoured design? Please explain your answer.

- Question 12:** Do you agree that the fixed recoverable costs regime should apply only to cases which fall under the MPAP?
- Question 13:** To what extent do you think the reforms apply to small and micro businesses?
- Question 14:** To what extent do you think the reforms might generate differential impacts (both benefits and costs) for small and micro businesses? How might any differential costs be mitigated?
- 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?

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

Please send your response by 2 October 2013 to:

**Alpa Parmar**  
**Ministry of Justice**  
**4:37, 102 Petty France**  
**London SW1H 9AJ**  
**Tel: 020 334 2987**  
**Fax: 020 3334 2233**  
**Email: mesotheliomamojpolicyteam@justice.gsi.gov.uk**

### Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

### Extra copies

Further paper copies of this consultation/ alternative format versions of this publication can also be requested from the above address.

The paper is also available on-line at <http://www.justice.gov.uk/index.htm>.

### Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months time. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## **Consultation principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

## **ANNEX A**

### **List of individuals and organisations who have been sent a copy of the consultation paper:**

Access to Justice Action Group

Asbestos Victims Support Group

Association of British Insurers (ABI)

Association of Her Majesty's District Judges

Association of Personal Injury Lawyers (APIL)

Association of Professional Claims Managers

Bar Association

Bar Council

Bar Council of Northern Ireland

Baroness Sherlock OBE

Barts Mesothelioma Research

British Lung Foundation

British Railways Board (Residuary) Ltd (BRB)

Cancer Research UK

Centre of Excellence for Dispute Resolution (CEDR)

Charles, Lucas, Marshall Solicitors

Cicero Group

Citizens Advice Bureau

Civil Court Users Association

Civil Justice Council

Civil Mediation Council

Civil Procedures Rules Committee

Claims Standard Council

Commercial Bar Association (COMBAR)

Consumer Justice Alliance  
Confederation of British Industry  
Council of Her Majesty's Circuit Judges  
DAC Beechcroft Solicitors  
Federation of Small Businesses  
Forum of Insurance Lawyers  
Forum of Private Businesses  
Insurance Medical Group  
Irwin Mitchell Solicitors  
Judicial Office for England & Wales  
Justices' Clerks Society  
Jim Sheridan MP  
Keogh Solicitors  
Law Commission  
The Law Society  
The Law Society of Northern Ireland  
Leigh Day & Co Solicitors  
Local Government Association  
Lord Alton of Liverpool  
The Rt Hon Lord Howarth  
Lord McKenzie of Luton  
Rt Hon Stephen Timms MP  
Macmillan Cancer Support  
Magistrates Association  
Marie Curie UK  
Master of the Rolls

Merseyside Asbestos Victim Support Group

Mesothelioma UK

Mick Knighton Mesothelioma Research Fund

National Institute of Economic and Social Research (NIESR)

National Mediation

Northern Ireland Office

Paul Goggins MP

Personal Injuries Bar Association (PIBA)

Scottish Government

Senior Master Whitaker and Queen's Remembrancer

Sir (Roger) John Laugharne Thomas (President of Queen's Bench Division)

Sir James Lawrence Munby (President of the Family Division and Head of Family Justice)

Sir Terence Michael Elkan Barnet Etherton (The Chancellor of the High Court)

Thompsons Solicitors

Trades Union Congress

Unite Trade Union

Unison Trade Union

Welsh Government

## ANNEX B



Association of British Insurers 51 Gresham Street, London EC2V 7HQ Tel: 020 7600 3333 Fax: 020 7696 8999

### **The Association of British Insurer's Draft Pre-Action Protocol for claims for damages for mesothelioma**

#### **Contents**

- 1. Introduction**
- 2. Overview of Protocol**
- 3. Intimation Letter**
- 4. Letter of Claim**
- 5. Defendant's Response**
- 6. Experts**
- 7. Resolution of Issues**
- 8. General Provisions**

#### **1 Introduction**

**1.1** This protocol applies to claims for mesothelioma. There is a separate protocol for other disease and illness cases.

**1.2** This protocol sets out conduct that the court would normally expect the parties to follow before commencement of proceedings. It establishes a reasonable process and timetable for the exchange of relevant information. The timescales reflect a need for particular urgency in mesothelioma claims brought on behalf of the sufferer while still alive ('living claims').

**1.3** Where the Court considers non-compliance, and the sanctions to impose where it has occurred, it will amongst other things be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with

minor or technical shortcomings (see paragraphs 4.3 to 4.5 of the Practice Direction on Pre-Action conduct).

## **2 Overview of Protocol General Aim**

**2.1** The protocol's objectives are:

- 2.1.1** To encourage the provision of early and full information about the claim;
- 2.1.2** To enable the parties to avoid litigation by agreeing a resolution of the claim before proceedings are commenced; and
- 2.1.3** To support the efficient management of proceedings in accordance with Practice Direction 3D where litigation cannot be avoided.

## **3 Intimation Letter**

**3.1** As soon as sufficient information is available to identify proposed Defendants the Claimant should send them two copies of a letter of intimation clearly marked 'MESOTHELIOMA'. Where the Defendants' insurers are known to the Claimant one copy should be sent directly to all identified insurers. The intimation letter should provide:-

- 3.1.1** Name, address, date of birth and national insurance number of the Claimant/deceased
- 3.1.2** Name and address of each employer/third party who is alleged to have exposed the Claimant/deceased to asbestos
- 3.1.3** Details of the circumstances of exposure to include the Claimant's/deceased's occupation and periods of exposure to include date of cessation of exposure.
- 3.1.4** Date of diagnosis
- 3.1.5** In a living claim details of the Claimant's net weekly income. In a deceased claim whether there are any dependants.
- 3.1.6** Direct email address of the Claimant's solicitor.

**3.2** The purpose of the letter of intimation is to allow the proposed Defendant/insurer to begin investigations. This should be done immediately. If the Claimant's solicitor already has sufficient information to send a letter of claim, this should be sent instead of a letter of intimation.

## **4. Letter of Claim**

**4.1** As soon as sufficient information is available the Claimant shall send a formal letter of claim to the proposed Defendants, or their insurers if known. To the extent not previously been notified the letter of claim should provide the information required in a letter of intimation together with:-

**4.1.1** A summary of the facts on which the claim is based including a chronology of all lifetime exposure to asbestos whether wrongful or otherwise with details of all employers/other third parties alleged to have been responsible for that exposure.

**4.1.2** Details of claims made or intended to be made against any other proposed Defendant/insurer together with contact details if known.

**4.1.3** In living claims details of the Claimant's present condition and prognosis.

**4.2** As soon as possible and in any event within 21 days of service of the letter of claim the Claimant should provide an employment and asbestos exposure history statement certified by a statement of truth. This should include:-

**4.2.1** Circumstances and dates of all asbestos exposure to include dates of cessation of exposure where appropriate. This must include episodes of exposure in relation to which no claim has been intimated, including exposure caused by the Claimant/deceased's own activities. Sufficient detail should be provided to permit a reasonable analysis of liability in relation to all exposures.

**4.2.2** The identity of all employers/third parties where exposure is alleged to have occurred.

**4.3** If the Claimant has other statements supporting his account of asbestos exposure these should also be provided.

**4.4** The letter of claim should be accompanied by the following documentation. If any of the documentation is unavailable this should be stated and should be provided to all proposed Defendants/identified insurers as soon as possible

**4.4.1** HMRC Schedule of Employment

**4.4.2** A schedule of loss with copies of any documents substantiating the financial claim. To the extent reasonably necessary this should include statements from witnesses of fact.

**4.4.3** A copy of any expert medical report in accordance with paragraph **6.1** below.

**4.4.4** Copies of complete and up to date medical records including all GP and Hospital notes and any post mortem report.

**4.4.5** Copies of all records from benefits applications made to the DWP.

**4.4.6** In claims made on a dependency basis the Claimant should also provide a death certificate, marriage certificate and letters of administration/grant of probate.

**4.5** Where the Defendant is unable to determine liability (including potential claims for contribution) or assess quantum on the basis of the information provided he may request clarification. This should be done as soon as possible. In living claims such request should be made within 21 days of receiving a protocol compliant employment and exposure statement for breach of duty requests or schedule of loss for quantum requests

**4.6** The documents listed above are not intended to be exhaustive. The Claimant may provide and the Defendant may request such documents as are reasonably necessary to prove the Claimant's case as to liability or quantum.

**4.7** Letters of intimation and letters of claim are not intended to have the same status as a statement of case in proceedings. Matters may come to light as a result of subsequent investigation particularly after the Defendant's response.

## **5 Defendant's Response**

**5.1** The Defendant should send an acknowledgement within 21 days of receiving the letter of claim, identifying who will be dealing with the claim and providing an email address. If no acknowledgement is sent within 21 days the Claimant will be entitled to issue proceedings without criticism as to conduct.

**5.2** Each Defendant shall within one calendar month of the letter of claim notify the Claimant of the identity of each insurer relevant to the claim and the periods of relevant cover.

**5.3** Within two calendar months of the protocol date of the letter of acknowledgement each Defendant shall provide a reasoned answer to the claim.

**5.3.1** If the claim is admitted the Defendant should say so in clear terms. Where paragraph **5.4** applies the Defendant will accompany the admission with an interim payment on account of damages, the amount of which will be set by reference to the Courts' current practice under Practice Direction 3D.

**5.3.2** If the claim is admitted in part the Defendant must make clear which parts are admitted and which remain in issue and why.

**5.3.3** If the claim is not admitted the Defendant must explain why.

**5.3.4** The Defendant must accompany both partial and total non admission responses with disclosure of all documents relevant to the dispute between the parties and which would be likely to be ordered to be disclosed by the Court in substantive proceedings.

**5.3.5** Where there is more than one Defendant the timetable will begin for each by reference to the date of the letter of claim to them.

**5.4** If breach of duty is admitted and the medical report and records establish causation the Defendant must make an interim payment on account of damages within 21 days of the date of the admission or the date of provision of the medical report and records whichever is the later.

**5.5** If the parties reach agreement on some elements of the Claim but time is needed to resolve other issues they should attempt to agree a reasonable deadline for the resolution of the remaining issues.

**5.6** Where it is not reasonably possible for the Defendant to complete enquiries within two months he should notify the Claimant as soon as that becomes apparent, giving reasons. Where a proper

explanation is provided the parties should attempt to agree an appropriate extension of time. The lapse of time since the asbestos exposure does not by itself constitute a proper explanation.

## **6 Experts**

**6.1** The Claimant must send a medical report to all Defendants. The report must address the mesothelioma diagnosis, life expectancy (both resulting from that diagnosis and in the absence of it) and any co-morbid conditions affecting either life expectancy or physical capacity.

**6.2** Any party to the claim may send questions directly to the Claimant's expert. Copies of the questions should be sent simultaneously to the other parties. The expert should reply to each party directly and separately.

**6.3** Defendants are encouraged to attempt to resolve issues by questioning the Claimant's expert but may seek its own expert evidence where appropriate.

**6.4** The cost of an expert's report will normally be borne by the instructing party. The expert's cost of answering questions will be borne by the party asking them.

**6.5** Defendants should give early consideration to a request for medical evidence as to a dependant's life expectancy. Where requested such evidence should be obtained by the Claimant's solicitor.

**6.6** Expert evidence on issues relating to breach of duty should not normally be obtained until after the time given for the relevant Defendant's response under **5.3**. Where the Claimant anticipates that such evidence may be necessary in any given claim he should notify the Defendant explaining the reasons for the instruction.

## **7 Resolution of Issues**

**7.1** All parties should consider before issue of proceedings whether to make a Part 36 offer. The offeror must always supply enough information and evidence to allow the offer to be properly considered.

**7.2** Where a claim is not resolved the parties should review matters in dispute to determine precise definitions of those issues and the evidence necessary for their determination before proceedings begin.

**7.3** Subject to **8.1** below the Claimant should delay issuing proceedings for 21 days after service of the statement of employment and exposure, schedule of loss, medical records or medical report whichever is the latest.

**7.4** The Defendant will normally be expected to nominate solicitors to act in the proceedings and accept service of those proceedings.

## **8 General Provisions**

**8.1** In living claims involving a severely limited life expectancy it may not always be possible to follow the protocol. All parties should still attempt to comply with the provisions and the spirit of the protocol so far as that is reasonably possible. In such cases all parties are under a duty to raise

and answer requests for information/disclosure as quickly as possible. Where the Claimant's life expectancy as anticipated by his expert is likely to permit this protocol to be followed it should be. All parties are under a duty to deal with living mesothelioma claims as quickly as possible and to regard the timetables in this protocol as minimum requirements rather than targets.

**8.2** If by reason of complying with any part of this protocol a Claimant's claim may be statute barred under the Limitation Act 1980 or any other legislation imposing a time limit for bringing an action the Claimant may commence proceedings without complying with the protocol. It is recognised that in such cases the Court may permit the Defendants additional time under subsequent directions and may expect the Claimant to make particular efforts to assist the Defendants with their proper enquiries. It is also recognised that to the extent such circumstances are caused or contributed by the conduct of the Claimant or his representatives the Court may make special provision for dealing with costs.

**8.3** If any Defendant does not admit liability and the Claimant is so unwell that there is a risk that he may die before trial proceedings may be commenced to take evidence on commission under P34 CPR. Proceedings may also be issued in other circumstances where the Court believes that this would be in the parties' interests and the interests of justice.

**8.4** Following receipt of the letter of intimation communication by instant means such as email, fax or telephone is encouraged.



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