

## **Asbestos Victims Support Groups Forum Judicial Review S48 LASPO Act**

### **Background**

In 2012, during debates on Part 2 of the Legal Aid Sentencing and Punishment of Offenders Bill the House of Lords refused to accept that reforms to the CFA system including 10% increase in general damages and cost protection through Qualified One Way Cost Shifting (QOCS) would compensate for the cost of paying success fees up to 25% of general damages and paying after the event insurance in personal injury industrial disease claims, and that in particular it was abhorrent to impose such costs on dying mesothelioma sufferers, who could not 'shop around' for the best deal on legal costs.

On the House of Lords' insistence the Government conceded a temporary exemption to mesothelioma sufferers from paying those costs by including section 48 in the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO Act) which delays bringing into force section 44 payment of success fees and section 46 payment of after the event (ATE) insurance pending a review of the effects of these sections on mesothelioma claims, and the publication of a report of the findings of the review.

Part 4 of the MoJ consultation *Reforming Mesothelioma Claims* – 24 July 2013 - 02 October 2013 explained how the section 48 review was to be conducted taking into account: the consultation Part 2 reform, a Mesothelioma Pre-Action Protocol: the consultation Part 3 reform a Fixed Costs Regime, and: the Mesothelioma Bill.

Part 4, which consisted of eleven short paragraphs, asked the following question:

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

Question 15 incorporates a *package of reforms* which in the Government's view justified lifting the 'mesothelioma exemption'.

On the 4 December 2013 the minister announced that the consultation reforms (mesothelioma pre-action protocol and fixed costs) were to be abandoned but that sections 44 and 46 would be brought into force and that a report would be published.

On the 6 March 2014 the Government published the S48 report in the Government response to the consultation, *Reforming mesothelioma claims*, confirming the decisions of 4 December.

The Forum Judicial Review challenges the legitimacy of the S48 review and the findings of the Report of the review.

**A précis of the arguments supporting the Grounds for the Judicial Review are presented here. This is not the definitive statement of the grounds.**

The Report justifies, in italics, the decision to bring sections 44 and 46 into force for the following flawed reasons:

1. *The Government believes it is helpful to publish a cost benefit analysis of implementing the LASPO reforms – taking into account the final NIESR data at Annexe B of the Report.*

**This data was not available to consultation respondents and if it were the way that it has been presented at Annexe B to suggest that claimants would be better off would have been robustly challenged.**

2. *The case has not been made that claimants would generally be worse off' if sections 44 and 46 were brought into force.*  
**The Consultation did not invite respondents to make this case. The focus of the consultation was on the merits or demerits of the 'package' of reforms.**
3. *The Lord Chancellor has taken account of the general experience of the LASPO reforms so far.*

**The Report provides No evidence to support this proposition.**

4. *The Government has been given little indication at present that the reforms are resulting in difficulties in other cases to which they already apply. The position will be monitored as part of the intended post-implementation review of the LASPO Act within three to five years of implementation.*

**Neither the Government or claimants were in a position to present evidence since the review commenced three months after the LASPO Act came into force 1 April 2013.**

**In 'the same breath' the Government concedes that it will take up to three to five years to assess the impact of the LASPO reforms. How can it be possible to conduct the S48 review within three months?**

5. *The Government dos not believe that the case has been made for mesothelioma cases to be treated differently, in particular by comparison to other personal injuries, which can have profound consequences for the sufferer.*

**The consultation did not ask respondents to 'make the case'. In fact, the statutory exemption was founded on the arguments concerning the exceptionality of mesothelioma cases and re-stating the arguments would not constitute the review. Only a review providing evidence of the effects of the LASPO changes could challenge arguments on exceptionality and provide cogent reasons to remove the exception.**

6. The Government asserts that the CFA reforms and the consultation reforms are not part of a package but are separable and that the Mesothelioma Bill is relevant only in so far as it determines when the LASPO changes should be brought into force.

**The consultation question 15 incorporated three reforms which the Government argued would assist mesothelioma claimants and by implication would go a long way in mitigating the effects of sections 44 and 46, and asked if consultees agreed with the government that the package of three reforms would justify removal of the exception for mesothelioma. The government did not ask the question: *'if we do not implement the proposed package of reforms do you agree the exception for mesothelioma should be removed in any event?'* if they had done so there would have been a resounding *"no"*.**

**The consultation paper made it very clear that it was the 'changes' in the Mesothelioma Bill, i.e. introduction of the diffuse mesothelioma payment scheme that was part of the package of reforms. Having been successfully challenged on the relevance of the Mesothelioma Bill to the Review, the Government disingenuously asserts that the Mesothelioma Bill was relevant only to *'when'* the exception would be withdrawn.**

**Of the package of three reforms only the LASPO reforms remain. It is inconceivable that the reforms which were rejected as justification for imposing costs on mesothelioma sufferers should now, without a shred of evidence about their effect, be used to remove the mesothelioma exception.**

## **The Grounds**

### **Ground 1: Inadequate consultation**

The question posed in the review did not allow the Claimant to inform himself of the relevant information in relation to the decision, and to answer it correctly.

### **Ground 2: Requirement for re-consultation**

The fundamental change of position of the Government between that consulted on (i.e. the package of reforms for speeding up the compensation payments in litigated claims were going to be implemented at the same time as the removal of the exception for mesothelioma claims), and that on which the present decision was made, was such as to require re-consultation.

### **Ground 3: Disappointment of legitimate expectation of statutory review**

There has been no review of the effect of sections 44 and 46 on mesothelioma claims because (i) the package of reforms have been abandoned and (ii) the NIESR data and vague indications from early days of the LASPO changes do not provide a shred of evidence about the likely effects of sections 44 and 46.

### **Ground 4: decision irrational/reasons inadequate**

The only reason given by the Government for removing the exception is that it is not persuaded that there is justification for maintenance of the exception. This is not a conclusion which the Government is entitled to reach without carrying out the statutory review into the 'likely effect' on mesothelioma claims required by S48.