

# DWP ELIB consultation response: what are the implications for asbestos disease sufferers?

Thompsons' briefing

September 2012

## A consultation

The last Labour government published a consultation paper in 2010 on "Supporting people who need to trace Employers Liability Insurance". The paper came out of concerns that 39% of asbestos disease sufferers negligently exposed in the course of their work were unable to bring a claim because their former employers had gone out of business and their employers' liability insurers could not be traced.

The solution proposed in the paper was to establish an Employers' Liability Insurance Bureau (ELIB) as an insurance fund of last resort along similar lines to the fund of last resort for the only other compulsory insurance in the UK – motor insurance.

The Labour government sought views on how an ELIB would operate in practice:

What type of accident/disease should an ELIB cover?

- All claims?
- All long tail disease claims?
- Only mesothelioma claims?

And;

What time factor should determine whether a claim is met by an ELIB?

- All claims where an employer/insurer cannot be traced?
- All claims brought from the start of the scheme?
- Only those claims where diagnosis is made after the start of the claim?

## A delayed response

The coalition government didn't respond publicly to the consultation for over two years, despite numerous calls for them to do so. Finally, on 25 July 2012, the last day of the Parliamentary session, the DWP Minister Lord Freud announced a scheme that would be limited to supporting people with mesothelioma<sup>1</sup>.

The announcement was presented as a benefit to mesothelioma sufferers. In reality it is a shamefully wasted opportunity to protect working people injured through their employer's negligence. Unsurprisingly, given the Conservative Party's extensive and lucrative links with the insurance industry, the real benefactors from the proposed changes will be insurers.

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120725-wms0001.htm>

## **A missed opportunity**

The trade unions, claimant groups and Thompsons produced overwhelming evidence and gave unanimous support to introduce a comprehensive ELIB covering all work related injury claims, regardless of the nature of the disease or the date of diagnosis. The insurance industry lobby protested that a comprehensive ELIB would amount to “a fraudster’s charter” and suggested that any ELIB (which they opposed in principle) should be restricted to the narrowest possible category of claimants.

Predictably, given that published engagement diaries show government ministers have met extensively with representatives of the insurance industry about the consultation, the response has pandered to the insurers’ agenda and delivered what they sought. But further, it has failed to address specific issues raised in the consultation about time limits for making a claim, whether claims for dependants would be accepted in fatal cases and how claims should be investigated and paid by an ELIB.

## **The mesothelioma untraced insurers scheme**

- It will apply to mesothelioma claims only.
- Everyone diagnosed before 25 July 2012 will be excluded from the scheme.
- Many of those diagnosed after 25 July 2012 will die without receiving any payment because it will take years before legislation is passed to bring the scheme into effect.
- Working people suffering from every other type of industrial injury or disease are excluded from the scheme.

## **The insurers’ agenda**

- The insurance industry will establish and control an online “portal” for mesothelioma claims. A “portal” already exists for road traffic accident (RTA) personal injury claims. Thompsons’ experience is that the RTA portal is administratively inefficient for dealing with even the most straightforward type of accident claim and a “portal” is therefore, in our view, wholly unsuited to the complexity of mesothelioma claims.
- A pre action protocol (PAP) will be introduced to expedite the pre litigation process for dealing with mesothelioma compensation. This appears to be part of what the coalition has been calling an “integrated package of measures” to, among other things, “address...civil litigation costs” for all mesothelioma claims.
- We believe the combination of an online “portal” and PAP signal the intention to introduce a fixed costs regime for dealing with mesothelioma claims from which insurers are likely to benefit and claimants will suffer. Government data regarding the Coal Miners Compensation Schemes show that, contrary to delivering fair compensation, fixed costs in fact reduce average levels of compensation recovered by claimants<sup>2</sup>. This trend is confirmed in a leading academic report commissioned by the Ministry of Justice based on a study of the online RTA claims portal which concludes that it delivers significantly lower average compensation payments<sup>3</sup>.

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<sup>2</sup> <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090626/text/90626w0013.htm#09062662001966>

<sup>3</sup> Ministry of Justice Research Series report 13/12, July 2012, Professor Paul Fenn, Nottingham University Business School