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MESOTHELIOMA, ETC. BILL

Malignant Mesothelioma is a rare form of cancer of which there are two main types *Pleural Mesothelioma (in the chest)*, accounts for 70-80% of cases, and *Peritoneal Mesothelioma (in the abdomen)*. Exposure to asbestos is responsible for up to 9 out of 10 cases and those who have worked directly with asbestosis, or its products, are most at risk. The aim of the Bill, is to make corresponding provision for NI as is contained in the Westminster and Child Maintenance and Other Payments Bill by providing for a mesothelioma scheme to enable a lump sum payment to be made to those suffering from diffuse mesothelioma (or their dependants if the person is deceased), regardless of their employment status; and to amend the Social Security (Recovery of Benefits) (NI) Order 1997 to provide the Department for Social Development with the power to recover payments made under the Pneumoconiosis, etc., (Workers' Compensation) (NI) Order 1979, or under the new mesothelioma scheme, where a person goes on to receive compensation from a civil claim.

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SUMMARY OF KEY POINTS

Malignant Mesothelioma is a rare form of cancer that begins in the mesothelium, the membrane that covers and protects most of the body's internal organs. There are two main types of mesothelioma¹, *Pleural Mesothelioma (mesothelioma in the chest)* – the chest lining and *Peritoneal Mesothelioma (mesothelioma in the abdomen)*. Pleural Mesothelioma is the most common type and accounts for 70-80% of cases².

It is estimated that between 1968 and 2050 there will have been 90,000 deaths from mesothelioma in Great Britain. 65,000 of which will occur after 2001³.

There is currently no cure for mesothelioma. If caught very early it can sometimes be removed by surgery, however this is rare as early symptoms are often non-specific and can lead to a delay in diagnosis. Figures from Cancer Research UK indicate that “generally, of all those people diagnosed with mesothelioma only about 1 in 10 (10%) will be alive 3 years later and 1 in 20 (5%) will be alive 5 years later”⁴.

Exposure to asbestos is responsible for up to 9 out of 10 mesothelioma cases. There are thought to be other rare causes of the disease⁵ but none are fully understood at this time. As asbestos is generally only a risk to health if disturbed or damaged to cause fibres to be released into the air, those who have worked directly with asbestosis or its products are most at risk of developing mesothelioma. Some other people have a lower risk if they have come into contact with asbestos, but not directly in their work, for example, people working in places where people who have washed workers' overalls.

Figures from the Northern Ireland Cancer Registry⁶ show that an average of 44 males and 5 females were diagnosed with mesothelioma each year between 2000 and 2004. On average 41 males and 5 females died each year between 2000 and 2004 from mesothelioma. The pattern of age-standardised mortality ratios of pleural cancer throughout the District Councils of Northern Ireland, over the period 1989 to 1993, show a very distinctive pattern and “...is in keeping with the ship building industry”⁷.

The aim of the Mesothelioma, ETC., Bill, is to make the corresponding provision for Northern Ireland as is contained in Part 4 of the Westminster and Child Maintenance and Other Payments Bill (currently before Parliament) in line with the principle of parity between Great Britain and Northern Ireland in child support, pensions and social security matters by⁸:

- Making provision for a mesothelioma scheme to enable a lump sum payment to be made to those suffering from diffuse mesothelioma (or their

¹ British Lung Foundation, www.lunguk.org/you-and-your-lungs/conditions-and-diseases/mesothelioma.htm

² www.cancerhelp.org.uk/help/default.asp?page=4398

³ Hodgson, J. T. et. al. (2005), The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050, *British Journal of Cancer* (2005), **92**, 587-593

⁴ www.cancerhelp.org.uk/help/default.asp?page=4466

⁵ Other factors implicated may be a type of radiation called thorium dioxide, a mineral called Zeolite and a virus called SV40, www.cancerhelp.org.uk/help/default.asp?page=4395

⁶ Survival of Cancer Patients in Northern Ireland, 1993-2004, Northern Ireland Cancer Registry, Queen's University of Belfast, Section 15, Mesothelioma (C45) (October 2007)

⁷ Cancer of the Pleura (ICD-9 163), Cancer Deaths in Northern Ireland – An Analysis of Patterns and Trends, Northern Ireland Cancer Registry, *Death Rates*

⁸ Mesothelioma, ETC..., Bill, Explanatory and Financial Memorandum, paragraphs 3-5

dependants if the person is deceased), regardless of their employment status provided they have not already received a compensation payment through either a civil claim or a payment under the 1979 Order or the proposed scheme⁹; and

- Amending the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 to provide the Department for Social Development (DSD) with the power to recover the payments made under the Pneumoconiosis, etc., (Workers' Compensation) (Northern Ireland) Order 1979 or under the new mesothelioma scheme, where a person goes on to receive compensation from a civil claim, as the aim of the scheme is ultimately to be self-funding,

The proposals in the Bill mean that employers and their insurers will no longer be able to deduct the 1979 Order payments from their settlements of civil compensation, as the DSD will now be able to recover those payments from civil compensation, in line with the existing arrangements for the recovery of other benefits.

⁹ Provided they have not already received a compensation payment through a civil claim or under specified statutory provisions

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1. BACKGROUND AND OVERVIEW OF THE MESOTHELIOMA, ETC. BILL

In July 2006, the Secretary of State for Work and Pensions announced, after working with key stakeholders¹⁰, that *“the system for compensating sufferers of mesothelioma, the debilitating form of lung cancer caused by exposure to asbestos, would be improved and speeded up”*¹¹. Interim measures to speed up current claims would be followed by a longer term solution *“to ensure that, wherever possible, sufferers of mesothelioma can receive compensation so that they themselves can benefit from it, at the same time knowing that their families will be secure in the future”*¹².

At present, in Northern Ireland, a mesothelioma sufferer may get compensation from one or more sources¹³:

- A civil claim for damages against one or more of the companies responsible for exposing them to asbestos negligently and/or in breach of statutory duty;
- The Industrial Injuries Disablement Benefit scheme;
- For those unable to pursue a civil claim, a lump sum payment under the scheme set up by the Pneumoconiosis etc. (Workers' Compensation) (Northern Ireland) Order 1979.

As part of the more immediate measures, in March 2007, the Secretary of State for Work and Pensions announced proposals for a scheme to provide faster compensation to all those diagnosed with diffuse mesothelioma¹⁴ providing up-front financial support within weeks. At that time only people who contracted the disease from exposure to asbestos at work were eligible to claim a lump sum from the state¹⁵, however the March 2007 proposals were to provide up-front financial support (within six weeks) to people who were not previously eligible i.e. breaking the occupational link to cover those who were¹⁶,

- Exposed to asbestos from a relative (e.g. from their overalls);
- Exposed to asbestos environmentally (e.g. living near a factory using asbestos);
- Self-employed; and
- Those who cannot trace their exposure to asbestos.

The intention is that the payment will then be recovered from any civil compensation subsequently paid.

The above proposals are contained in Part 4 of the Westminster and Child Maintenance and Other Payments Bill which is currently before Parliament. The aim

¹⁰ Department of Constitutional Affairs, The Association of British Insurers, the Association of Personal Injury Lawyers, the TUC and the Financial Services Compensation Scheme

¹¹ www.dwp.gov.uk/mediacentre/pressreleases/2006/jul/dcs031-200706.asp

¹² *Improving Claims Handling for Mesothelioma Cases – Your Views*, Consultation Letter from Steve Daly, Workplace Health Division, Dept. for Work and Pensions, 1 September 2006

¹³ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 4.6

¹⁴ Diffuse mesothelioma – a true mesothelial malignancy that is locally aggressive, invasive and almost universally fatal. The most common variety is diffuse malignant pleural mesothelioma, Sugarbaker, D.J. et. al. Current Therapy for Mesothelioma, H. Lee Moffitt cancer Centre and Research Institute, www.moffitt.org/moffittapps/ccj/v4n4/article4.htm

¹⁵ At the time, in Great Britain, only people who received Industrial Injuries Disablement Benefit were eligible for state compensation under the Pneumoconiosis etc. (Workers' Compensation) Act 1979

¹⁶ 13 March 2007 – John Hutton plans faster compensation to all people diagnosed with mesothelioma, www.dwp.gov.uk/mediacentre/pressreleases/2007/mar/hsc023-130307.asp

of the Mesothelioma, ETC., Bill, for Northern Ireland, is to make the corresponding provision for Northern Ireland in line with the long standing principle of parity between Great Britain and Northern Ireland in child support, pensions and social security matters by¹⁷:

- Making provision for a mesothelioma scheme to enable a lump sum payment to be made to those suffering from diffuse mesothelioma (or their dependants if the person is deceased), regardless of their employment status provided they have not already received a compensation payment through either a civil claim or a payment under the 1979 Order or the proposed scheme¹⁸; and
- Amending the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 to provide the Department for Social Development (DSD) with the power to recover the payments made under the Pneumoconiosis, etc., (Workers' Compensation) (Northern Ireland) Order 1979 (the 1979 Order) or under the new mesothelioma scheme, where a person goes on to receive compensation from a civil claim, as the aim of the scheme is ultimately to be self-funding,

The proposals in the Bill mean that employers and their insurers will no longer be able to deduct the 1979 Order payments from their settlements of civil compensation, as the DSD will now be able to recover those payments from civil compensation, in line with the existing arrangements for the recovery of other benefits. To employers and insurers across the UK, *"the present value of the cost of the proposal over 10 years at 2005 prices is around £100m, which is to be taken in the context of the Employers' Liability Compulsory Insurance Market of about £1 billion per year"*¹⁹.

2. UNDERSTANDING MESOTHELIOMA

MEDICAL DEFINITION, SYMPTOMS, DIAGNOSIS AND TREATMENT

Malignant Mesothelioma is a rare form of cancer that begins in the mesothelium. The mesothelium is the membrane that covers and protects most of the body's internal organs. It has two layers and a small amount of fluid is normally produced between the two layers. Mesothelioma occurs when the normal cells of the mesothelium spread rapidly out of control²⁰. There are two main types of mesothelioma²¹:

- *Pleural Mesothelioma (mesothelioma in the chest)* – the chest lining has two layers and the space between contains a small amount of fluid. When a tumour grows within the chest lining it causes the lining to thicken at first and then the tumour spreads within the space between the layers, often producing several litres of fluid. Due to proximity to the heart, Pleural Mesothelioma can also affect the pericardium²² (sheet of tissue covering the heart); and
- *Peritoneal Mesothelioma (mesothelioma in the abdomen)* – the abdominal cavity, below the diaphragm, and the bowel are also

¹⁷ Mesothelioma, ETC., Bill, Explanatory and Financial Memorandum, paragraphs 3-5

¹⁸ Provided they have not already received a compensation payment through a civil claim or under specified statutory provisions

¹⁹ Mesothelioma, ETC., Bill, Explanatory and Financial Memorandum, paragraphs 17-18

²⁰ www.mesotheliomainternational.org/info.htm

²¹ British Lung Foundation, www.lunguk.org/you-and-your-lungs/conditions-and-diseases/mesothelioma.htm

²² www.cancerhelp.org.uk/help/default.asp?page=4393

covered by a lining with two layers. A tumour can start within this lining causing the lining around the abdominal organs to thicken and producing fluid which causes swelling of the abdomen.

Pleural Mesothelioma is the most common type and accounts for 70-80% of cases²³.

There is currently no cure for mesothelioma. If caught very early it can sometimes be removed by surgery, however this is rare as early symptoms are often non-specific and can lead to a delay in diagnosis. Figures from Cancer Research UK indicate that *“generally, of all those people diagnosed with mesothelioma only about 1 in 10 (10%) will be alive 3 years later and 1 in 20 (5%) will be alive 5 years later”*²⁴.

Early symptoms of Pleural Mesothelioma include shortness of breath, chest pain and a persistent cough. As the disease progresses fluid builds up (pleural effusion) between the two pleural layers and it is this symptom which often leads people to visit their GP. In Peritoneal Mesothelioma, abdominal pain and swelling, nausea or vomiting, bowel obstruction and weight loss are the most common symptoms²⁵.

The diagnosis of mesothelioma can be difficult and is most often obtained by a careful assessment of clinical and radiological findings. The tests involved in the diagnosis include Computed Tomography (CT scan) to define, for example, pleural thickening and possible chest wall invasion; Magnetic Resonance Imaging (MRI scan) to determine the extent of a tumour; Positron Emission Tomography (PET imaging) important for determining the stage of the disease; pleural fluid analysis and tissue analysis via biopsy often yields a confirmed diagnosis of mesothelioma²⁶.

The usual treatment for mesothelioma is based on ‘active symptom control’²⁷ which directs treatment specifically at the symptoms of breathlessness, pain, lack of energy, lack of appetite, constipation due to pain killers and anxiety and depression. Treatment with steroids, painkillers, drugs to improve appetite, laxatives and drugs to improve breathing may all help. Fluid on the chest can be removed on a regular basis but this becomes more difficult as the disease progresses.

²³ www.cancerhelp.org.uk/help/default.asp?page=4398

²⁴ www.cancerhelp.org.uk/help/default.asp?page=4466

²⁵ www.mesotheliomainternational.org/symptoms.htm

²⁶ www.mesotheliomainternational.org/symptoms.htm

²⁷ British Lung Foundation, www.lunguk.org/you-and-your-lungs/conditions-and-diseases/mesothelioma.htm

MESOTHELIOMA AND THE LINKS TO ASBESTOS EXPOSURE

Asbestos is a naturally occurring fibrous mineral widely distributed in nature. Its ability to withstand heat and fire led to its widespread use in industry, particularly during and after World War II. Exposure to asbestos is responsible for up to 9 out of 10 mesothelioma cases. There are thought to be other rare causes of the disease²⁸ but none are fully understood at this time. The first suspected link in the UK between mesothelioma and asbestos occurred in 1935, however a definite link was not reported until 1960 and it was not until the mid 1970's that the dangers became generally recognised and action taken to phase out its use in industry and update Health and Safety Regulations²⁹. There are three types of asbestos, blue, brown and white. Blue and brown are the most hazardous to health and have not been imported into the UK since 1985. White asbestos was also banned in the UK in 1999. The Health and Safety Executive note,

“The typically long delay between first exposure to asbestos and death from mesothelioma (seldom less than 15 years, but possibly as long as 60 years) means that deaths occurring now and most of those expected to occur in the future reflect industrial conditions of the past rather than current work practices. This latency period means that the effectiveness of current controls cannot yet be assessed from the mesothelioma mortality figures”³⁰.

Generally asbestos is only a risk to health if disturbed or damaged to cause fibres to be released into the air, *“the majority of people who have been exposed to asbestos so not suffer ill health as a result. There is no way of knowing who or why some people go on to suffer and others remain unaffected”³¹*. Asbestos fibres are very fine and if breathed in,

“they can reach the smallest areas of the lung where they cannot be breathed or coughed out. Once they have lodged in the lung the body's defence mechanism tries to break them down and remove them which leads to swelling and inflammation...The fibres can also penetrate the edge of the lung and settle in the pleural lining. The fibres can also be swallowed and in a similar way can lodge in the abdomen and work their way to the peritoneum that lines the abdomen where the same swelling and inflammation can occur”³².

Those who have worked directly with asbestosis or its products are most at risk of developing mesothelioma. Some other people have a lower risk of mesothelioma if they have come into contact with asbestos, but not directly in their work, for example, people working in places where others are handling asbestos; people who have washed workers' overalls (often family members); and people who lived and played near asbestos factories when they were children³³. Trades at high risk include³⁴:

²⁸ Other factors implicated may be a type of radiation called thorium dioxide, a mineral called Zeolite and a virus called SV40, www.cancerhelp.org.uk/help/default.asp?page=4395

²⁹ British Lung Foundation, www.lunguk.org/you-and-your-lungs/conditions-and-diseases/mesothelioma.htm

³⁰ Health and Safety Executive online, www.hse.gov.uk/statistics/causdis/mesothelioma/index.htm

³¹ www.mesotheliomauk.com/index.php?pageno=127&sub=18

³² www.mesotheliomauk.com/index.php?pageno=127&sub=18

³³ British Lung Foundation, www.lunguk.org/you-and-your-lungs/conditions-and-diseases/mesothelioma.htm

³⁴ www.mesotheliomainternational.org/info.htm

- Metal Plate workers (including shipbuilding);
- Vehicle body builders;
- Plumbers;
- Gas fitters;
- Carpenters;
- Electricians;
- Construction workers;
- Plasterers;
- Builders;
- Handymen;
- Steel erectors; and
- Painters;
- Sheet metal workers; and
- Welders.

Products that commonly contained asbestos include³⁵:

- Moulded/preformed lagging used in thermal insulation of pipes/boilers;
- Sprayed asbestos used as fire protection in firebreaks, ceiling panels, around steelwork etc.;
- Insulation boards;
- Asbestos packing for firebreaks;
- Paper products used for insulation of electrical equipment;
- Asbestos cement products used as roofing or wall cladding, gutters, pipes and water tanks;
- Textured coatings such as Artex;
- Bitumen roofing material; and
- Vinyl or thermoplastic floor tiles.

3. MESOTHELIOMA – STATISTICS AND TRENDS FOR NORTHERN IRELAND

Figures from the Northern Ireland Cancer Registry³⁶ show that an average of 44 males and 5 females were diagnosed with mesothelioma each year between 2000 and 2004, making up 1% of all male cancers and 0.1% of all female cancers. On average 41 males and 5 females died each year between 2000 and 2004 from mesothelioma. There was no statistically significant change in male or female incidence or mortality rates between 1993 and 2004.

The NI Cancer Registry states that the relative survival from mesothelioma is very poor with 27.0% of patients diagnosed in 2001-2003 surviving one year and 9.6% of patients diagnosed between 1997 and 2000 surviving three years. Less than 10 patients diagnosed between 1997 and 2000 survived five years. Most Cancer Registries do not regularly produce survival rates for mesothelioma as it is a rare cancer, however, for comparison five-year survival in the USA was 9.2% for all persons diagnosed between 1993 and 1996 which is only slightly higher than the 8.0% five-year survival for persons in Northern Ireland diagnosed over the same time period.

³⁵ www.mesotheliomainternational.org/info.htm

³⁶ Survival of Cancer Patients in Northern Ireland, 1993-2004, Northern Ireland Cancer Registry, Queen's University of Belfast, Section 15, Mesothelioma (C45) (October 2007)

The NI Cancer Registry also provides further information specifically on the main form of mesothelioma, pleural mesothelioma (cancer of the pleura, ICD-9 163)³⁷, as the other asbestos related cancers, peritoneal mesothelioma and asbestosis were recorded as responsible for 33 and 27 deaths respectively over the 1989-1993 period compared to 176 deaths from cancer of the pleura over the same time period. Due to a change in the practice of coding cause of death in Northern Ireland, introduced in 1985, there has been a great increase in the recorded deaths from pleural cancer in males over the past two decades. Analysis of pleural cancer in males from 1986 onwards showed an upward trend of 12.0% per year for those aged over 65 years.

The pattern of age-standardised mortality ratios of pleural cancer throughout the District Councils of NI over the period 1989 to 1993 show a very distinctive pattern and “...is in keeping with the ship building industry. The raised death rates in District Councils a little further from Belfast such as Banbridge...probably is a result of the net outward migration of people from Belfast to the surrounding areas over the last 20-30 years”. Mortality ratios for males (under 75) are raised in Belfast, Castlereagh, North Down, Newtownabbey and Banbridge, “though only those of Belfast and North Down obtain the level of conventional statistical significance. The ratios in Belfast are more than twice the background N. Ireland average”. The pattern for women is very similar, “while for women none of the District Council levels reached statistical significance the pattern probably represents a real phenomenon and is worth recording”. The pattern for women has been explained by “non-occupational exposed wives of asbestos workers who clean their husband’s dusty and asbestos laden clothes”³⁸.

4. MESOTHELIOMA, ETC., BILL – THE CLAUSES

The Bill contains 13 clauses in three sections as follows:

- Clauses 1-7, *Mesothelioma lump sum payments*:
 - i. Lump sum payments;
 - ii. Conditions of entitlements;
 - iii. Determination of claims;
 - iv. Reconsideration;
 - v. Appeal to Tribunal;
 - vi. Appeal to Social Security Commissioner; and
 - vii. Minors and persons who are incapable.
- Clause 8, *Recovery of mesothelioma and other lump sum payments*
 - i. Amendment of Social Security (Recovery of Benefits) (Northern Ireland) Order 1997);
- Clauses 9-13, *General*;
 - i. Regulations;
 - ii. Assembly Control;
 - iii. Interpretation;
 - iv. Commencement;
 - v. Short title

³⁷ Cancer of the Pleura (ICD-9 163), Cancer Deaths in Northern Ireland – An Analysis of Patterns and Trends, Northern Ireland Cancer Registry

³⁸ Cancer of the Pleura (ICD-9 163), Cancer Deaths in Northern Ireland – An Analysis of Patterns and Trends, Northern Ireland Cancer Registry, *Death Rates*

This section of the paper first outlines the main Clauses of the Bill as extracted from the Explanatory and Financial Memorandum³⁹ with relevant issues for consideration, and secondly looks at the issue of the regulations as many of the detailed provisions of the Bill in various Clauses will be set out in subsequent regulations made by DSD. Overall, the DSD believes that the proposals will *“not create additional administrative costs for the Social Security Agency as the work can be subsumed within existing resources”*⁴⁰.

Clause 1: Lump sum payments – provides for the DHSSPS to make a lump sum payment to either a person with diffuse mesothelioma or to their dependent if the person with diffuse mesothelioma is deceased.

Payments under the new scheme will be charged to the Departmental Expenditure Limit Budget and it is anticipated that the total for claim payments will be £824K for the initial year and increase to approximately £1,034K over the following six years. It is envisaged that some of the initial costs will be offset by recoveries from compensation awards (see Clause 8) and in the longer term would be cost neutral⁴¹. The Department for Work and Pensions (DWP) have admitted that there are issues surrounding introductory costs and propose to *“initially pay at a rate commensurate with what can be afforded out of projected compensation recovery amounts and increase payments to match those paid to others under the 1979 Act”*⁴² as funds allow⁴³.

Clause 2: Conditions of entitlement – sets out the conditions that must be satisfied by persons with diffuse mesothelioma, and by a dependent of a person who, immediately before their death suffered from diffuse mesothelioma in order for a lump sum payment to be made.

Clause 2, the conditions of entitlement include that such requirement, if any, as may be prescribed by regulations as to the person’s connection (Subsection 1(c)) or the deceased person’s (Subsection 2(c)) connection with the United Kingdom is satisfied. These particular aspects were queried at the Committee Stage of the corresponding Westminster Bill and the DWP noted that the purpose was⁴⁴,

“to prevent people who have developed mesothelioma abroad travelling to the UK to access payments from the new scheme... we think it is unlikely that large numbers of people with mesothelioma will do so. But because we do not know the precise circumstances in which people from abroad will seek to access the new scheme, we do not intend to commence this power until we know in practice the precise ways we will need to specify the link to the UK to avoid benefit tourism”.

³⁹ Mesothelioma, ETC., Bill, Explanatory and Financial Memorandum, pages 3-8

⁴⁰ Mesothelioma, ETC., Bill, Explanatory and Financial Memorandum, paragraph 10

⁴¹ Mesothelioma, ETC., Bill, Explanatory and Financial Memorandum, paragraph 11

⁴² The Pneumoconiosis, Etc., (Workers’ Compensation) Act 1979 provides one-off lump sum compensation for sufferers (or their dependents if they have died) of certain dust-related diseases, namely Diffuse Mesothelioma, Pneumoconiosis, Diffuse Pleural Thickening, Primary Carcinoma of the Lung (if accompanied by asbestosis or diffuse pleural thickening) and Byssinosis. Sufferers should normally be in receipt of Industrial Injuries Disability Benefit in respect of one of the diseases.

⁴³ DWP Mesothelioma Summit – Working in Partnership, Improving Claims for Handling Mesothelioma Cases, Annex B, Stage Two – Immediate Financial Support

⁴⁴ Child Maintenance and Other Payments Bill Committee Stage Report, Bill No 118 of 2006-07, Research Paper 07/73, 02 November 2007, page 17

In addition the Parliamentary Under-Secretary of State for Work and Pensions confirmed that *“foreign civilians who had worked overseas for UK firms would not be entitled to compensation unless they had some other link to the UK such as residence. People who retire abroad would be covered by the scheme, if exposure occurred in the UK”*⁴⁵.

Clause 3: Determination of Claims - sets out how a claim for a lump sum payment is to be decided.

There is little detail in the actual Bill regarding how a claim is to be decided as Subsection 1 refers to the subsequent regulations that will prescribe how and within what period a claim is to be made. Currently Subsection 2 of the Bill states that regulations may prescribe *“different periods for different cases or classes of cases or for different circumstances”*, however the Explanatory and Financial Memorandum, describes Subsection 2 as setting out that the lump sum payment can be set at *different levels* for different people based on different factors and does not mention *“different periods”* as stated in the Bill.

Clause 4: Reconsideration – this clause enables the DSD to reconsider a decision to make or not to make a lump sum payment where there is a change in circumstances that may affect the claim since the decision was taken or if the original decision was made in ignorance of/based on error about a material fact of the case.

As referred to in Section 2 of this paper mesothelioma is rarely caught very early it as early symptoms are often non-specific and can lead to a delay in diagnosis. Often it is only as the disease progresses and fluid builds up (pleural effusion) between the two pleural layers causing pain that people first visit their GP. As also stated previously, the diagnosis of mesothelioma can be difficult and is most often obtained by a careful assessment of both clinical and radiological findings and involves a battery of tests. It may be necessary to consider if or how these clinical issues will impact on the operation of this Clause in practice.

Clause 5: Appeal to appeal tribunal – provides that a person who has made a claim for a payment under clause 1 will have a right of appeal to an appeal tribunal against a decision made by the DSD on the claim, or a decision made following a reconsideration under clause 4.

The practical operation of the reconsideration stage (Clause 4) and the appeal procedures outlined in Clauses 5 and 6 should be considered in the light of the relevant stark survival figures for sufferers of mesothelioma. As cited above in Section 2, figures from Cancer Research UK indicate that *“generally, of all those people diagnosed with mesothelioma only about 1 in 10 (10%) will be alive 3 years later”*⁴⁶.

Clause 6 : Appeal to Social Security Commissioner - provides for a right of appeal to a Social Security Commissioner against any decision of an appeal tribunal under clause 5, on the ground that the decision was wrong in law. An appeal to a Commissioner may be made by the DSD or by the person who brought the appeal.

Clause 7 Minors and persons who are incapable – concerns how lump sum payments are to be made to persons under the age of 18 or incapable of managing

⁴⁵ Child Maintenance and Other Payments Bill Committee Stage Report, Bill No 118 of 2006-07, Research Paper 07/73, 02 November 2007, page 18

⁴⁶ www.cancerhelp.org.uk/help/default.asp?page=4466

their own affairs by providing for the sum to be paid to trustees appointed by the DSD.

At the Committee Stage of the corresponding Westminster Bill it was noted that there may be issues in relation to how the powers of this Clause related to provisions in the *Mental Capacity Act 2005*, in particular, how they might apply in the situation where a person recovers mental capacity. The Parliamentary Under-Secretary of State for Work and Pensions undertook to consider further *“whether there were any implications for the legislation as it stood”*⁴⁷. Similar issues may require further consideration by DSD for this parity legislation.

Clause 8 – Amendment of Social Security (Recover of Benefits) (Northern Ireland) Order 1997 – this clause inserts a new Article 3A into the Recovery of Benefits Order, which provides the DSD with the power to make regulations providing for the recovery of the lump sum payments set out in paragraph (2) of Article 3A.

This provides the DSD with a power to recover payments made under the 1979 Order⁴⁸ or the new mesothelioma scheme, where a person then goes on to receive compensation from a civil claim. Payments recovered under the 1997 Order will be used to fund future compensation payments made under the proposed scheme. With the ultimate aim that the scheme will eventually be self-funding. Currently the 1997 Order provides for the recovery of social security benefits which have been paid in respect of any accident, injury or disease to claimants who go on to receive compensation from a civil claim in respect of the accident, injury or disease⁴⁹.

Given that the DSD acknowledge that⁵⁰ *“making a civil claim can be difficult, for example, the employer may have ceased to exist and its insurer may be difficult to trace”* it may be necessary to consider the impact this will have on the ultimate aim of a self-funding scheme.

In explanation for the development of this power of recovery, the DWP noted *“some customers currently receive both civil compensation and payments under the 1979 Act which was never originally intended to happen and can result in over-compensation. Introducing compensation recovery would mean that...the compensation received would accurately reflect the loss and would be consistent with Government Policy...some liability holders successfully reduce the amount they pay in civil compensation by the amount of any award under the 1979 Act without having to reimburse DWP, which they would no longer be able to do”*⁵¹.

Further explanation of this power of recovery was given in Westminster debate *“these lump sum payments are not intended to meet a specific need rather they are a payment made instead of, or in advance of, civil damages. It is therefore right to recover them from any part of a later award of civil damages...given the limited funds available, the Government’s current priority is to pay as much as possible to sufferers in life rather than increase awards to dependants. We also*

⁴⁷ Child Maintenance and Other Payments Bill Committee Stage Report, Bill No 118 of 2006-07, Research Paper 07/73, 02 November 2007, page 18

⁴⁸ The 1979 Order provides compensation to sufferers of certain dust-related diseases (if they receive Industrial Injuries Disability Benefit), or their dependents, who are unable to pursue a civil claim because their former employers have ceased to carry on business

⁴⁹ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraphs 5.1-5.5

⁵⁰ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 4.7

⁵¹ DWP Mesothelioma Summit – Working in Partnership, Improving Claims for Handling Mesothelioma Cases, Annex B, Stage Two – Immediate Financial Support

*need to maximise the amount that we receive in compensation recovery. As sufferers or their families will not lose out if we recover from all heads of damages*⁵².

Clause 9 – Regulations – provides the DSD with the power to make regulations, which includes the power to make incidental, supplementary, consequential or transitional provision as the DSD thinks fit. Regulations made under Clause 1 and 2 are subject to the confirmatory procedure and any other are subject to the negative resolution procedure.

It should be noted that numerous detailed provisions of the Bill will be laid down in regulations including, for example:

- Clause 1 – setting the amount of the lump sum and setting different amounts for different cases and classes of cases;
- Clause 2 – the requirement for persons or their dependants (in the case of a deceased mesothelioma sufferer) to have links with the United Kingdom, where the links will be prescribed by regulations;
- Clause 3 – any claim must be made in the manner and within the period prescribed by regulations;
- Clause 4 – prescribing how and within what timescale a person may apply to DSD for a ‘reconsideration’ or for the DSD to ‘reconsider’ its decision;
- Clause 5 – the manner of and time within which an appeal may be brought, the procedure to be followed and for the purpose of enabling an appeal to be treated as a ‘reconsideration’; and
- Clause 8 – providing for the recovery of the lump sum payments.

5. EQUALITY IMPACT ASSESSMENT OF THE BILL

The DSD has concluded that *“there is evidence of some differential impact in respect of religious belief, age and gender. Those impacts have been considered in light of available data*⁵³ *and policy intention to determine whether their effect is adverse*⁵⁴.

With respect to religious belief and political opinion, data to permit assessment of religion is not available, however, it is expected that most of the beneficiaries of the new mesothelioma scheme will be from the protestant community given the employment history in the relevant industries, for example, shipbuilding⁵⁵.

With respect to age, because of the long latency of mesothelioma, people mainly being diagnosed now will mainly be in the 50+ age group⁵⁶.

With respect to gender, *“over the years cases diagnosed as mesothelioma show that more men are affected than women...the relevant industries...employed men rather than women. However without this proposal to extend payment to anyone suffering from mesothelioma a significant number of women would be unlikely to get any form of compensation unless they successfully sued a former employer*⁵⁷.

⁵² House of Commons Hansard Debates for 03 Dec 2007 (pt 0014), Column 642

⁵³ Robust data on the section 75 categories on which the policy will have an impact are not available. Statisticians have advised that, because the numbers involved are so low, statistically valid forecasts from which to draw inferences could not be produced.

⁵⁴ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 7.2 and 7.9

⁵⁵ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 8.1.2

⁵⁶ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 8.3.1

⁵⁷ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 8.6.1

DSD note that there is no information available on the marital status, sexual orientation or number of persons with dependents of people with mesothelioma. If the person with mesothelioma is deceased the scheme will provide for a payment to be made to their dependent⁵⁸.

Regarding persons with a disability and persons without, “all persons diagnosed with mesothelioma will either be or become disabled... as a result of the disease. The average life expectancy from diagnosis is about 9 months”⁵⁹.

6. OTHER RELEVANT LEGISLATION

COMPENSATION ACT 2006

With regard to speeding up the handling of claims for people suffering from mesothelioma, the Government has acted to make it easier for those with mesothelioma to receive full compensation as quickly as possible by reversing the effects of the House of Lords judgement in *Barker v Corus UK Ltd (and conjoined cases)* [2006] UKHL 20 and the required provisions to do this are included in Part 1, Section 3, *Mesothelioma: damages* of the Compensation Act 2006, which also apply to Northern Ireland. In reversing the effects of the *Barker* judgement it establishes joint and several liability and enables claimants, or their estate or dependants, to recover full compensation from any liable person and it will be up to the person who has paid the compensation to seek a contribution from other negligent persons⁶⁰.

In the case of *Barker v Corus*, the House of Lords decided that the damages awarded should be apportioned among those responsible for the wrongful exposure (if more than one negligent person was responsible for the wrongful exposure to asbestos) according to their relative contribution to the chance of the person contracting the disease. In practice this meant that the claimant would have to trace all relevant defendants, as far as this was possible, before liability could be apportioned and full compensation paid, or alternatively to issue multiple claims to recover damages on a piecemeal basis⁶¹.

THE LAW ON DAMAGES

The Government is currently taking forward work, led by the DWP, to identify ways to improve the handling of claims in cases of mesothelioma. Responses to a consultation by DWP indicated that one problem area was the difficulty experienced by claimants in deciding whether to pursue a claim to secure compensation before their death, or to postpone the claim to enable their dependants to bring a claim under the Fatal Accidents Act 1976 (FAA),

“it is often the case that claims after death are greater in value than settlements concluded during the lifetime of the claimant. This is because of the ability of spouses to recover bereavement damages; the different approach taken to calculating loss of income; uncertainty regarding the ability

⁵⁸ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 8.8.1

⁵⁹ Mesothelioma Bill, Equality Impact Assessment, DSD, Feb 2008, paragraph 8.7.1

⁶⁰ Compensation Act 2006, Explanatory Notes, paragraph 14
www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060029_en_1

⁶¹ Compensation Act 2006, Explanatory Notes, paragraph 13
www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060029_en_1

*to recover funeral expenses in a claim during life; and uncertainty regarding the treatment of gratuitous services provided by the claimant*⁶².

In Northern Ireland the situation is much the same as in England and Wales. The Fatal Accidents (Northern Ireland) Order 1977 provides for damages to be recoverable on behalf of specified persons in their own right for loss of financial support, funeral expenses and the loss of the deceased's services to the family (as pleaded and proved). A fixed sum for bereavement (currently £10,000) is also payable to the husband, wife, civil partner of the deceased or the parents, if the deceased or the parents, if the deceased is a minor.

A number of options were put forward in responses to the DWP consultation to address the difficulties in this area and these are extracted from paragraph 29 of the Department of Constitutional Affairs 2007 Consultation Paper as follows⁶³:

- A statutory amendment similar to that contained in the Rights of Relatives to Damages (Mesothelioma) Scotland Act 2007 – The Act disapplies section 1(2) of the Damages (Scotland) Act 1976 which provided that there was no liability to relatives of a deceased person where that person's claim had been settled, or damages had been awarded, prior to death. This now allows the immediate family of a mesothelioma sufferer to claim damages for distress, grief and loss of society under section 1(4) of the 1976 Act after the sufferer's death irrespective of whether the deceased has already recovered damages or obtained a settlement⁶⁴;
- Amendment of the Civil Procedure Rules to allow a claimant with mesothelioma to make an application for an interim payment by way of the summary procedure under Part 8 of the Rules if they choose not to bring the claim to a full and final settlement during their lifetime. In this way the rights of others to pursue a claim of greater value after their death would be preserved;
- A special provision limited to mesothelioma claims to permit recovery of FAA damages in claims concluded in life; and
- Legislative removal of the different approaches to calculating damages for the 'lost years' in claims concluded during the lifetime of the terminally ill, as compared with calculating damages for loss of dependency in claims pursued after death.

⁶² The Law on Damages, Department for Constitutional Affairs, Justice, Rights and Democracy, Consultation Paper, CP 9/07, 04/05/07, paragraph 28

⁶³ The Law on Damages, Department for Constitutional Affairs, Justice, Rights and Democracy, Consultation Paper, CP 9/07, 04/05/07, paragraph 29

⁶⁴ Explanatory Notes to Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007, www.opsi.gov.uk/legislation/scotland/acts2007/en/aspn_20070018_en_1

7. APPENDIX – MESOTHELIOMA STATISTICS AND TRENDS FOR GREAT BRITAIN, THE REPUBLIC OF IRELAND, WITH EUROPEAN COMPARISONS

GREAT BRITAIN (ENGLAND, SCOTLAND AND WALES)

The annual number of mesothelioma deaths in Great Britain (England, Scotland and Wales) has increased from 153 in 1968 to 2037 in 2005. Between 1970-1972 the death rate per million for males in Great Britain from mesothelioma was 5.75 and by 2003-2005 this had increased to 58.95. The equivalent death rates from females was 1.57 increasing to 9.76 per million⁶⁵. The following table illustrates the increases in deaths over that period and the information is extracted from the Health and Safety Executive Table *MESO01: Death certificates mentioning mesothelioma, 1968-2005 (a)(b)(c)(d)*⁶⁶:

| | Year of Death | | | | | | | | |
|----------------------|---------------|------|------|------|------|------|------|------|---------|
| | 1968 | 1973 | 1978 | 1982 | 1987 | 1992 | 1997 | 2002 | 2005(P) |
| Great Britain | 153 | 224 | 392 | 507 | 814 | 1097 | 1367 | 1868 | 2037 |
| <i>Males</i> | 114 | 182 | 329 | 415 | 708 | 962 | 1189 | 1582 | 1749 |
| <i>Females</i> | 39 | 42 | 63 | 92 | 106 | 135 | 178 | 286 | 288 |
| <i>England</i> | 130 | 193 | 347 | 433 | 698 | 919 | 1181 | 1622 | 1787 |
| <i>Scotland</i> | 18 | 22 | 35 | 55 | 93 | 133 | 131 | 170 | 176 |
| <i>Wales</i> | 5 | 9 | 10 | 19 | 23 | 43 | 55 | 75 | 73 |

P = provisional

EXPECTED BURDEN OF MESOTHELIOMA IN GREAT BRITAIN

Hodgson et. al. (2005) used the British mesothelioma register, which contains all the deaths from 1968 to 2001 where mesothelioma was mentioned on the death certificate, to predict the future burden of mesothelioma in Great Britain (England, Scotland and Wales). Using a mathematical model the number of deaths is predicted to peak at around 1950 to 2450 deaths per year between 2011 and 2015. Following this peak, the number of deaths is predicted to decline rapidly. It is proposed that the eventual death rate will depend on the background level and any residual asbestos exposure. It is estimated that between 1968 and 2050 there will have been 90,000 deaths from mesothelioma in Great Britain. 65,000 of which will occur after 2001⁶⁷.

⁶⁵ www.hse.gov.uk/statistics/tables/meso04.htm

⁶⁶ www.hse.gov.uk/statistics/tables/meso01.htm

⁶⁷ Hodgson, J. T. et. al. (2005), The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050, *British Journal of Cancer* (2005), **92**, 587-593

REPUBLIC OF IRELAND

The following table for the Republic of Ireland is extracted from figures published by the National Cancer Registry of Ireland (2005) for the years 1994-2001⁶⁸:

| Year | Mesothelioma Cases | |
|-----------------|--------------------|---------|
| | Males | Females |
| Total 1994-2001 | 113 | 22 |
| 1994 | 8 | 1 |
| 1995 | 15 | 2 |
| 1996 | 15 | 0 |
| 1997 | 21 | 4 |
| 1998 | 11 | 1 |
| 1999 | 11 | 7 |
| 2000 | 14 | 5 |
| 2001 | 18 | 2 |

EUROPEAN COMPARISONS

The following table illustrates that the death rate in Northern Ireland from cancer of the pleura in males is higher “than for most western countries” and for females “*is higher than the equivalent rates for the Republic of Ireland or for England and Wales*”⁶⁹:

Pleural Cancer Death Rates in Northern Ireland 1989-93 Compared to Other European Countries

| Country | Standardised Death Rate (30-74 years) per 100,000 population | |
|---------------------|--|---------|
| | Males | Females |
| Northern Ireland | 6.2 | 0.6 |
| England and Wales | 2.5 | 0.4 |
| France | 2.5 | 0.8 |
| Germany | 5.6 | 0.7 |
| Republic of Ireland | 0.3 | 0.2 |
| Italy | 2.2 | 0.9 |

⁶⁸ *Cancer in Ireland 1994-2001, Incidence, Mortality and Treatment*, National cancer Registry of Ireland, June 2005, Tables A1 and A3, pg.17-21

⁶⁹ Table extracted from Table 12, Cancer of the Pleura (ICD-9 163), Cancer Deaths in Northern Ireland – An Analysis of Patterns and Trends, Northern Ireland Cancer Registry

The following table is extracted from the website of Mesothelioma International and shows statistics on incidence of mesothelioma for several European countries from the Finnish Institute of Occupational Health⁷⁰:

Incidence of Mesothelioma

| Country | Cases per year | Cases per million per year |
|----------------|-----------------------|-----------------------------------|
| Finland | 75 (2002) | 18 |
| France | 870 (2000) | 18 |
| Germany | 1094 (2001) | 16 |
| Great Britain | 1862 (2002) | 39 |
| Italy | 1050 (2000) | 21 |
| Netherlands | 389 (2000) | 30 |
| Norway | 57 (2000) | 16 |
| Sweden | 149 (2003) | 20 |

⁷⁰ www.mesotheliomainternational.org/info.htm