

MESOTHELIOMA BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Mesothelioma Bill [HL] as brought from the House of Lords on 25 July 2013. They have been prepared by the Department for Work and Pensions (“DWP”) in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND TO THE BILL

3. The Employers’ Liability (Compulsory Insurance) Act 1969 (“the ELCI Act”) requires most employers carrying on business in Great Britain to insure their liability to their employees for bodily injury or disease sustained in the course of their employment. Corresponding provision is made for Northern Ireland by the Employer’s Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972 (“the Northern Ireland Order”). The ELCI Act came into effect on 1 January 1972 and the Northern Ireland Order on 29 December 1975. Although prior to that Employers’ Liability (EL) insurance was not compulsory, in practice EL cover was widespread in the relevant industries. There is evidence that the EL insurance market did not significantly increase post commencement of the ELCI Act and Northern Ireland Order, indicating that there was already a substantial amount of cover in place.
4. EL insurance enables employees to be compensated for injuries or illnesses arising through their employment and ensures that employers are able to cover the costs of their negligence.
5. In cases of employer negligence, the majority of individuals are able to make a claim for injury or disease directly against their current or former employer, or where their employer no longer exists they can claim against the employer’s EL insurer. A number, however, have difficulty in tracing the EL insurance policy where they need to claim directly against their former employer’s insurer. This is partly because some diseases caused by employer negligence or breach of statutory duty, including in particular diffuse mesothelioma, do not manifest themselves until several years after the employment has ceased. This can be decades in some instances. An employee in this situation is unlikely to have known who the EL insurer was. By the time they are diagnosed with the disease many years later, the relevant insurance records may have already been lost or destroyed. Employers also may not retain out-of-date EL insurance details, especially once their business has ceased trading.

6. To help with this problem, in 1999, the Association of British Insurers (ABI) and the Lloyds Market Association committed to a voluntary Code of Practice for tracing EL Insurance Policies (ELCOP). Under the code insurers committed to retain EL policies for 60 years in a readily searchable format. While ELCOP led to some improvements, some individuals were left without help (3,210 of them in 2008). This is because insurers' databases are not always a complete record of all the policies they issued, as it has not always been possible for them to capture data on policies which had already lapsed and some records had already been destroyed prior to the introduction of ELCOP, so some searches are ultimately unsuccessful.
7. To develop a long term solution, in February 2010 the Department for Work and Pensions published the consultation document, *Accessing Compensation - Supporting people who need to trace Employers' Liability Insurance*¹, which sought stakeholders views on proposals for improving the process for tracing employment and insurance records, as well as providing greater support to individuals who are unable to trace such records.
8. The Government's response to the consultation was published on 25 July 2012².

Current position

9. Existing state schemes already ensure early support for people with severe, disabling industrial diseases. The Pneumoconiosis etc. (Workers' Compensation) Act 1979 provides a lump sum to workers with certain dust related diseases (including mesothelioma), under certain conditions. Part 4 of the Child Maintenance and Other Payments Act 2008 provides lump sums for all mesothelioma sufferers, regardless of whether the disease was caused through employment, again under certain conditions. Corresponding provision is made for Northern Ireland by the Pneumoconiosis, etc., (Workers' Compensation) (Northern Ireland) Order 1979 and the Mesothelioma, etc., Act (Northern Ireland) 2008.
10. In addition, Industrial Injuries Disablement Benefit is a non-contributory benefit paid to employees who become disabled through an accident at work or as a result of an occupational disease.

SUMMARY OF MEASURES IN THE BILL

11. The Bill is intended to address a particular issue in relation to those diagnosed with diffuse mesothelioma who were negligently exposed by their employer to asbestos. Diffuse mesothelioma is a "long-tail disease": it materialises decades after the exposure to asbestos which caused it. It is a disease which, once diagnosed, is rapidly terminal and is caused almost exclusively by exposure to asbestos.
12. Although such employees would in principle have a good claim in negligence against their employer, they are often in practice unable to recover compensation: by virtue of the passage of time no solvent employer remains to be sued, and the employee is often unable to trace any insurer who was providing EL insurance to their employer at the material time, despite the fact that (as explained above) from 1 January 1972 the employer would have

¹ For consultation document see: <http://www.dwp.gov.uk/docs/elci-compensation-consultation.pdf>

² For Government response to consultation see: <http://www.dwp.gov.uk/docs/elci-compensation-consultation-response.pdf>

been required to have such EL insurance pursuant to the ELCI Act (or from 29 December 1975 pursuant to the Northern Ireland Order), and that even before that date the vast majority of such employers are thought to have held EL insurance. Thus although it may be highly likely that premiums were paid by the employer to insure against the risk of the employee's health being damaged by virtue of the employer's negligence, and although that risk subsequently materialises, the employee remains uncompensated because of the lack of effective record-keeping identifying the insurer responsible for covering the risk.

13. The Bill provides that the Secretary of State may by regulations establish a scheme, which will make payments to eligible people with diffuse mesothelioma and eligible dependants of people who have died from diffuse mesothelioma before making an application to the scheme. People will be eligible for a scheme payment if they were first diagnosed with diffuse mesothelioma on or after 25 July 2012 (which was the date when Government responded to the consultation and made its intentions clear), as a result of negligent exposure to asbestos at work in the United Kingdom. The scheme will only be open to people who have not brought an action against a relevant employer or employer's EL insurer because they are unable to do so. In addition, in order to be eligible to claim from the scheme, applicants must not have received damages or a specified payment³ in respect of diffuse mesothelioma or must not be eligible to receive a specified payment from another source.
14. The Bill amends existing recovery of benefits legislation to permit the Secretary of State to recover social security benefits paid to persons with diffuse mesothelioma in respect of whom a payment under the scheme has been made. It also amends that legislation to enable the Secretary of State to make regulations relating to the recovery of lump sum payments (described at paragraph 9 above). The regulations will also provide for the Secretary of State to recover scheme payments from civil compensation paid in respect of the diffuse mesothelioma, to either the person with the disease, their personal representatives or to another person who received or who could have been eligible for a payment under the scheme.
15. The scheme is to be funded by a levy on insurance companies that are currently active in the EL insurance market. The amount of the levy to be paid by each insurer will be determined by reference to each insurer's market share in a recent 12 month period (to be determined in accordance with regulations made by the Secretary of State).
16. The Bill also provides for the establishment of a Technical Committee which will decide disputed questions arising between EL insurance companies and a defined list of people who have an interest, in any given case, as to whether an employer maintained EL insurance with a particular insurer at a particular time.
17. The scheme provided for by the Bill does not allow for payments to be made to persons with long-tail industrial diseases other than diffuse mesothelioma. The Government considers this condition to be unique, in particular because of its near universal fatality, its speed of death following diagnosis and its causation arising exclusively from exposure to asbestos.

³ Such payments will be specified in regulations to be made under clause 1.

BILL OVERVIEW

18. The Bill consists of 21 clauses and two Schedules:

Clause 1 confers a power on the Secretary of State to establish by regulations the Diffuse Mesothelioma Payment Scheme (“the scheme”) for making payments to eligible persons and eligible dependants.

Clauses 2 and 3 specify who is eligible for a payment under the scheme.

Clauses 4 to 6 concern the amount of a payment under the scheme, the procedure for dealing with making and deciding applications for payments, and for reviews of and appeals against decisions made under the scheme.

Clause 7 allows the Secretary of State to administer the scheme himself or alternatively to make arrangements for a body to administer it.

Clauses 8 and 9 prohibit the unauthorised disclosure of information about individuals acquired in connection with the administration of the scheme and make it a criminal offence, punishable by imprisonment or a fine, to breach that prohibition.

Clause 10 allows for the scheme administrator to help a person with diffuse mesothelioma, a dependant or personal representatives to bring proceedings against an employer or an employer’s EL insurer in connection with the disease or the death of the person with mesothelioma from the disease.

Clause 11 and Schedule 1 amend other legislation. The amendments: (a) allow benefits and lump sums to be recovered from scheme payments; (b) permit scheme payments to be recovered from compensation; and (c) impose information-sharing duties on the scheme administrator in connection with recovery of benefits legislation.

Clause 12 and Schedule 2 amend other legislation to ensure that, where an application is made under the scheme, a person does not receive certain other payments (made in accordance with the Pneumoconiosis etc. (Workers’ Compensation) Act 1979 or Part 4 of the Child Maintenance and Other Payments Act 2008) and equivalent legislation in Northern Ireland (see paragraph 9 above).

Clause 13 imposes a duty on the Secretary of State to make regulations under which certain insurers will have to pay a levy with a view to meeting the costs of the scheme.

Clause 14 allows the Secretary of State to require insurers to provide him with information so that he can calculate how much different insurers should pay towards the levy.

Clauses 15 and 16 provide for the setting-up of a Technical Committee to resolve disputes as to whether an employer maintained EL insurance with an insurer at a particular time, and allow a person who is bound by a decision of the Committee, if still dissatisfied with it after exhausting review processes, to refer the question to arbitration.

Clauses 17 to 21 deal with (a) the procedure for making regulations under the Bill, (b) the interpretation of terms used in the Bill, (c) commencement of the Bill’s provisions, (d) the territorial extent of the Bill, and (e) its short title.

TERRITORIAL EXTENT

19. The Bill extends to England and Wales, Scotland and Northern Ireland. Any amendment or repeal made by this Act has the same extent as the enactment to which it relates (see clause 20).

Scotland

20. This Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

Northern Ireland

21. The Government will not normally legislate with regard to devolved matters in Northern Ireland without the consent of the Northern Ireland Assembly. Some provisions of the Bill deal with devolved matters and the consent of the Northern Ireland Assembly through a legislative consent motion (LCM) has been sought. If there are amendments to the Bill which deal with devolved matters, the agreement of the Northern Ireland Assembly will be sought for them.
22. Clause 13 (the levy) and clause 14 (collecting information for purposes of levy) relate to excepted matters or reserved matters (see Schedules 2 and 3 of the Northern Ireland Act 1998). Clause 8 (Unauthorised disclosure of information: offence) relates to reserved matters. The other provisions of the Bill relate to transferred matters (see section 4 of the Northern Ireland Act 1998) and will therefore require the consent of the Northern Ireland Assembly through a legislative consent motion. The LCM for the Mesothelioma Bill was debated in the Northern Ireland Assembly on 1 July 2013 and the motion was passed. The Assembly agreed that it, *'endorses the principle of the extension to Northern Ireland of the Mesothelioma Bill'*.

Wales

23. The provisions in the Bill relate to non-devolved matters in Wales. The Bill does not affect the powers of Welsh Ministers and does not make different provision in relation to England and Wales respectively.

COMMENTARY ON CLAUSES

Diffuse Mesothelioma Payment Scheme

Clause 1: Power to establish the scheme

24. This clause enables the Secretary of State to establish by regulations a scheme for making payments to eligible people with diffuse mesothelioma, and to eligible dependants of people who have died with that disease. It will be known as the Diffuse Mesothelioma Payment Scheme. The first regulations under this provision will be subject to the affirmative resolution Parliamentary procedure (see Clause 17).

Eligibility

Clause 2: Eligible people with diffuse mesothelioma

25. Clause 2 sets out the criteria which must be satisfied by a person with diffuse mesothelioma in order to be eligible for a payment under the scheme. The conditions are at *subsection (1)*:
- (a) A “relevant employer” (defined in *subsection (2)* – see below) negligently or in breach of statutory duty caused or permitted the person to be exposed to asbestos.
 - (b) The person was first diagnosed with diffuse mesothelioma on or after 25 July 2012. The scheme rules will set out the meaning of “first diagnosed” (see *subsection (2)*). This is likely to be the date on which the person with diffuse mesothelioma was notified of the diagnosis as recorded in the medical records.
 - (c) The person has not brought an action for damages in respect of diffuse mesothelioma against the relevant employer or any insurer with whom that employer maintained EL insurance at the time of his exposure to asbestos.
 - (d) The person is unable to bring an action against any employer of the person or any EL insurer of such an employer because they cannot be found or no longer exist or for any other reason.
 - (e) The person has not received damages (defined in clause 18 as including payments in settlement of a claim for damages) or a “specified payment” in respect of the disease and is not eligible to receive such a payment. Under *subsection (2)*, regulations (subject to the negative resolution Parliamentary procedure) will set out the meaning of “specified payment”. It is envisaged that the regulations under clause 1 will define the term to include payments under specified compensation schemes. It follows that, if the person with diffuse mesothelioma is entitled to a payment from any specified scheme, he or she will not be able to apply for a payment from the Diffuse Mesothelioma Payment Scheme. This provides a means of keeping up-to-date a list of payments which disqualify a person from receiving a payment under the scheme. There currently exist a range of schemes that have been set up to compensate victims of asbestos related conditions, including mesothelioma. Over time if new compensation schemes come into existence they can then be specified in regulations.
26. *Subsection (2)* defines a number of terms including in particular “*relevant employer*”. This means an employer who was required by the ELCI Act or Northern Ireland Order to maintain EL insurance at the time of the person’s exposure to asbestos which covered liability arising from such exposure. Where the person’s exposure to asbestos occurred prior to EL insurance becoming compulsory, a relevant employer is one who would have been required to maintain insurance covering liability arising because of the exposure to asbestos, had the legislation been in force at that time. See the definition of compulsory insurance legislation discussed below under clause 18 (defined terms). As the ELCI Act and the Northern Ireland Order apply only to employers carrying on any business in Great Britain and Northern Ireland respectively, a “relevant employer” does not include an employer carrying on any business exclusively outside the United Kingdom. It follows that a person with diffuse mesothelioma who was exposed to asbestos during the course of employment with an employer outside the UK will not qualify for payments under the

scheme. Nor will a person employed by an employer in the UK but who is ordinarily employed abroad unless (in broad terms) the exposure occurred during periods working for that employer in Great Britain or Northern Ireland or on or from certain offshore installations.

Clause 3: Eligible dependants

27. *Subsection (1)* provides for a “dependant” (as defined in clause 18) of someone who died with diffuse mesothelioma to be eligible to receive a payment under the scheme if: (a) the deceased was eligible for a payment but did not him or herself apply for a payment in accordance with the scheme, (b) no one has brought an action for damages either under the “fatal accidents legislation” (defined in clause 18) or on behalf of the estate of the person with the disease, against the relevant employer or any insurer who maintained employers liability insurance with that employer, (c) no one is able to bring an action against any employer of the person with the disease or any EL insurer of such an employer because they cannot be found, no longer exist or for any other reason, and (d) no one has received damages or a “specified payment” in respect of the disease and no one is eligible to receive a specified payment. Under *subsection (5)*, regulations under clause 1 will set out the meaning of “specified payment”.
28. *Subsection (2)* provides that a dependant will be treated as eligible for a payment under the scheme if the person with diffuse mesothelioma was first diagnosed after his or her death, and the deceased would have been eligible for a payment if the diagnosis had been made immediately before death, and the other conditions in *subsection (1)* are met. The scheme rules will set out the meaning of “first diagnosed” in this context (see *subsection (5)*).
29. *Subsection (3)* permits an eligible person who does not want to receive a payment for whatever reason, to cease to be an eligible dependant by giving notice that they do not want a payment. Where there are two or more eligible dependants, this may result in increased amounts payable to the other eligible dependants. Or, where there is a single eligible dependant who has priority over all other dependants, the payment may pass down to the next dependant(s) who can demonstrate their eligibility.
30. Where the person with diffuse mesothelioma died on or after 25 July 2012 but before this Bill comes into force, *subsection (4)* provides that it should be assumed for the purposes of *subsections (1) and (2)* that the Bill has been in force since immediately before their death. This provision enables dependants of people who died between 25 July 2012 and the coming into force of the Bill to be eligible for a payment under the scheme.

Payments and procedure

Clause 4: Payments

31. Clause 4(1) and (2) allow for the amount of a payment under the scheme to be determined in accordance with the scheme, that is in accordance with the regulations establishing the scheme made under clause 1. In addition, the scheme must ensure that where there are two or more eligible dependants the payment they receive will be the amount for a single eligible dependant divided equally between them. Broadly speaking payments are expected to be set at a percentage of average civil damages.

32. *Subsection (3)* allows the scheme to make provision for payments to be made subject to conditions, including conditions as to how a payment may be used. This subsection also provides for the scheme to give the scheme administrator power to decide when to impose conditions or what conditions to impose when making payments. For example, this would enable the scheme administrator to place a payment into a trust where the payment was to be made to a minor or a person who lacks capacity.
33. *Subsection (4)* enables the scheme to set out the circumstances in which payments are to be repaid (in full or in part), for example when there has been a fraudulent application or misrepresentation. Where payments fall to be repaid, *subsection (5)* provides for them to be recoverable by the scheme administrator as a debt, for example in civil proceedings brought in the county court (in England and Wales or Northern Ireland) or the Sheriff Court (in Scotland).
34. *Subsection (6)* requires the scheme to provide that where an eligible person has made an application for a payment in accordance with the scheme during their lifetime but died before the payment was made, the payment must be made to their personal representative (i.e. the executor or person granted letters of administration in respect of the deceased's estate).

Clause 5: Applications and procedure

35. Clause 5 allows for the scheme to contain rules about the procedure for making and deciding of applications. The scheme can in particular include rules imposing time limits for making applications and about the evidence required to support applications. It can also enable the scheme administrator to require a person to produce documents to help decide an application. Under *subsection (2)* the scheme may make provision under which the scheme administrator could apply for a court order requiring a person who may be a third party to produce documents where they are required to support an application.

Clause 6: Reviews and appeals

36. Clause 6 sets out the things that the scheme must contain and some of the things it may contain in connection with reviews and appeals.
37. Under *subsection (1)* the scheme must provide applicants with the right to request a review of decisions taken under the scheme. Somebody might ask for a review, for example where new information comes to light after the decision has been made. The scheme could also provide for a review of a decision where the scheme administrator becomes aware that it based a decision on an error of some kind.
38. *Subsection (2)* provides that the scheme may contain provision for how reviews are initiated and decided upon, which may include provision imposing time limits.
39. *Subsection (3)* requires the scheme to confer rights of appeal to the First-tier Tribunal against decisions taken on a review. Such appeals would go to the Social Entitlement Chamber. Decisions of this Chamber of the Tribunal can be appealed to the Upper Tribunal (with permission) on any point of law⁴.

⁴ Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that an appeal can be made on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

40. *Subsection (4)* makes it clear that where someone makes an application and dies the reference to the right to seek a review of a decision and therefore to appeal can be exercised by his or her personal representatives.

Scheme administration

Clause 7: Scheme administration

41. *Clause 7* allows the Secretary of State either to administer the scheme himself (*subsection (1)(a)*), or to make arrangements for another body (or legal person) to administer the scheme (*subsection (1)(b)*). If the Secretary of State makes such arrangements, the body concerned will be the “scheme administrator” and will exercise the functions conferred on the scheme administrator by and under the Bill.
42. *Subsection (3)* allows the Secretary of State to make arrangements: (a) with a company he or she sets up himself under the Companies Act 2006; (b) with a body corporate he establishes under regulations (which will be subject to the affirmative resolution Parliamentary procedure, see clause 17(2)(b)); or (c) any other body, for example an existing organisation in the public or private sector. *Subsection (2)* allows the Secretary of State to make payments to the body (including in respect of the costs of administering the scheme) and allows that body to enter into a contract under which a third party may administer all or part of the scheme.
43. Under *subsection (4)*, a body administering the scheme under arrangements made by the Secretary of State is not to be regarded as exercising functions of the Secretary of State or as acting on behalf of the Secretary of State. It follows that the Secretary of State would not be liable in law for acts or omissions of that body. This does not affect accounting for public monies or the setting of the rules under which the scheme will operate which remain the responsibility of the Secretary of State.
44. *Subsection (5)* allows the Secretary of State to make regulations containing transitional provisions in the event of a change in the scheme administrator. These regulations are not subject to a parliamentary procedure (see clause 17(3)).
45. Under clause 13, the Secretary of State can impose a levy on insurers to meet the costs of the scheme which (see clause 13(7)) include payments made under the scheme, “the costs of administering the scheme” and any costs incurred by the Secretary of State to establish a body with whom to make arrangements under clause 7(1)(b). *Subsection (6)* explains that a reference to “administering the scheme” in the Bill includes carrying out any functions conferred by or under any legislation on the scheme administrator. For example, the scheme administrator will determine applications made for payments under the scheme (see clause 6); and clause 10 allows the scheme administrator to help a person to bring civil proceedings for damages in respect of the disease or death against an employer or EL insurer. Costs incurred in doing so can thus be taken into account in deciding the total amount of the levy.

Clause 8: Unauthorised disclosure of information: offence

46. In order to protect personal information about an identifiable individual (whether living or dead) provided to the scheme administrator under the Bill against further disclosure, *subsections (1) to (3)* make it an offence for certain persons to disclose such information

without “lawful authority”. The offence may be committed by “a person involved in the administration of the scheme” as defined in *subsection (5)*.

47. The meaning of “lawful authority” is given in *subsection (2)*. A disclosure is made with lawful authority if (but only if) it is made:
- for the purposes of the administration of the scheme,
 - for the purpose of preventing or detecting a crime,
 - in accordance with any enactment or an order of a court or tribunal,
 - for the purposes of court or tribunal proceedings,
 - with consent given by, or on behalf of the person to whom the information relates or by their personal representatives.
48. *Subsection (4)* provides a defence for persons charged with an offence under this clause, if they can prove that, even though in fact the disclosure was made without lawful authority, they reasonably believed disclosure was made in accordance with one of the conditions in *subsection (2)*, or that someone had, with lawful authority, already disclosed the information to the public. In principle, this reverses the burden of proof in this respect. In criminal matters it is usually up to the prosecution to prove the case beyond all reasonable doubt, but here the defendant must prove the matters that go to make up the defence. The standard of proof is the balance of probabilities.

Clause 9: Unauthorised disclosure of information: penalties etc

49. *Clause 9* provides the penalties applicable when a person is convicted of an offence under clause 8. These are the same as those for a comparable offence under section 123 of the Social Security Administration Act 1992. A person found guilty is liable:
- on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both,
 - on summary conviction, to imprisonment for a term not exceeding 12 months in England, Wales and Scotland and 6 months in Northern Ireland, or a fine (not exceeding the statutory maximum in Scotland or Northern Ireland) or both.

However, *subsection (7)* provides that for offences committed in England and Wales before section 154(1) of the Criminal Justice Act 2003 comes into force, the maximum term of imprisonment on summary conviction is 6 months. (Section 154(1) provides that a magistrates court cannot impose a term of imprisonment for more than 12 months for any one offence - until this section is in force the maximum sentence a magistrates court can impose for any one sentence is 6 months⁵). And *subsection (8)* provides that for offences committed in England and Wales before section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force, the reference to a fine for someone found guilty on summary conviction is to be read as a reference to a fine not exceeding the statutory maximum. (Section 85 removes the statutory maximum).

50. *Subsection (3)* allows a court, where a person is convicted of an offence under clause 8, to order the destruction of a document which contains the information unlawfully disclosed or if the information is stored in some other format (e.g. on a computer hard drive), for the information to be erased.

⁵ Powers of Criminal Courts (Sentencing) Act 2000

51. Where an offence is committed under clause 8 by a body corporate with the consent or connivance or neglect of an officer of the body corporate, *subsection (4)* provides for both that officer as well as the body corporate to be guilty of the offence. The offences of unlawful disclosure created by clause 8 can in principle be committed by a body corporate, for example company literature might reveal such information. By virtue of *subsection (4)*, where such a body commits an offence under clause 8, an officer of that body can personally be convicted of a criminal offence alongside the company. For example, if an officer neglects to make sure that staff are aware of the need to maintain the confidentiality of information, or neglects to take steps to control movements of information, with the result that there is a release of such information, he may face prosecution. An individual so convicted is liable to the penalties set out in *subsections (1) and (2)*.
52. *Subsection (6)* gives a broad definition of an officer, which means a director, manager, secretary or other similar officer of the body. (For the purposes of this clause a director in relation to a body corporate whose affairs are managed by its members, means a member of the body). It also encompasses a person purporting to act in any such capacity, so a person who in fact gives orders in a company and is part of its management team might not escape liability by simply saying that technically (e.g. because of the terms of his job description) he or she does not fall into one of the categories of person mentioned. This broad definition ensures that *subsection (4)* is apt to apply to many forms of corporate organisation.
53. *Subsection (5)* makes similar provision as in *subsection (4)* for Scottish partnerships and partners (including any person purporting to act as a partner in the partnership).

Recovery of payments etc

Clause 10: Power of scheme administrator to help people bring proceedings

54. Clause 10 allows the scheme administrator to help a person bring “relevant proceedings”. The help that can be given includes conducting the proceedings or giving advice or financial help.
55. “Relevant proceedings” are defined in *subsection (2)* as:
- (a) proceedings in negligence or breach of statutory duty by the person with diffuse mesothelioma (or where he or she has died, his or her personal representatives) against the employer who caused or permitted him or her to be exposed to asbestos, or against an insurer with whom the employer maintained EL insurance against that liability;
 - (b) proceedings by any other person against the employer or insurer for damages under the “fatal accidents legislation” in respect of the death of the person with diffuse mesothelioma. (“Fatal accidents legislation” is defined in clause 18(1) as the Fatal Accidents Act 1976; the Fatal Accidents (Northern Ireland) Order 1977 (S.I. 1977/1251 (N.I. 18)), or section 4 of the Damages (Scotland) Act 2011);
 - (c) any appeal arising out of such proceedings.
56. Where the person with diffuse mesothelioma has died, help can be provided to his or her dependants or personal representatives to bring such proceedings (see *subsection (2)*). In England and Wales, they are entitled to do so under the Law Reform Miscellaneous Provisions Act 1934 for the benefit of the estate, or under the Fatal Accidents Act 1976,

for the benefit of a dependant. In Scotland the Damages (Scotland) Act 2011 applies and in Northern Ireland the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 and the Fatal Accidents (Northern Ireland) Order 1977 (S.I. 1977/1251 (N.I. 18) apply.

57. The scheme administrator will be able help a person under this clause where a payment has been made under the scheme and at the time of the application for the payment the eligibility criteria were satisfied (i.e. the employer no longer existed and the EL insurer could not be found) but information comes to light later, making a claim against the EL insurer possible. If any civil damages are awarded the scheme payment will be recovered under the Social Security (Recovery of Benefits) Act 1997 or the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 (S.I. 1997/1183 (N.I. 12) (see the discussion at Schedule 1 to the Bill below).
58. *Subsection (4)* allows for the scheme to include provision about the circumstances in which the scheme administrator may help a person to bring proceedings, including for example, the criteria to be applied in assessing whether relevant proceedings should be pursued, or any steps to be taken before doing so.
59. *Subsection (5)* allows the Secretary of State to make regulations under which he may add other civil proceedings to the list in subsection (2) of "relevant proceedings". This provides the Secretary of State with the ability to extend the assistance to be given by the scheme administrator to claims for damages in respect of the mesothelioma against persons other than the employer and EL insurer. The exercise of this power will only be considered in the future, once the scheme is operational, a need can be shown and any necessary safeguards are in place. For example, there would need to be a change of scheme rules making provision for the circumstances in which such new assistance would be given.

Clause 11: Recovery of benefits etc from payments and recovery of payments

60. This clause introduces Schedule 1, the provisions of which are explained below.

Relationship with other legislation

Clause 12: Exclusion of payments under other legislation

61. This clause introduces Schedule 2, the provisions of which are explained below.

Levy on insurers

Clause 13: The levy

62. This clause requires the Secretary of State to make regulations under which "active insurers" will have to pay a levy with a view to meeting "the costs of the Diffuse Mesothelioma Scheme". Both terms are defined in *subsection (7)*. "Active insurer" means a person who, at any time during the reference period, was an authorised insurer within the meaning of the ELCI Act or the Northern Ireland Order. The negative resolution Parliamentary procedure will apply to the regulations.
63. In deciding the total amount of the levy the Secretary of State may take account of estimated as well as actual costs, and may deduct the sums recovered, or expected to be

recovered under “recovery of benefits legislation” during the period (in respect of scheme payments made during the period or before it): *subsection (2)*. In deciding the total amount of the first levy, the Secretary of State may reduce it to reflect any amount of costs that he or she will meet: *subsection (3)*.

64. On commencement of the scheme, applications for payments will be accepted from eligible people who were first diagnosed with diffuse mesothelioma on or after 25 July 2012, or where they have died before the scheme comes into force, from eligible dependants. This will inevitably result in a backlog of applications on commencement, which in turn could lead to a very high levy in the first four years of the scheme’s operation in order to fund the higher volume of payments expected to be made in this period. To avoid any difficulties arising from a very high levy for the first period, *subsection (4)* requires the Secretary of State to have regard to the desirability of fixing the total levy at the same amount (pro rata) during the first four periods of the scheme’s operation so as to spread the cost to insurers more evenly. This may mean that during the first four periods of the scheme’s operation the levy for a particular period does not match the costs for that period. So in the first year of operation the amount of levy may be less than payments made but in the subsequent three years, the levy may exceed payments made.
65. Under *subsection (5)*, the regulations may require different active insurers to pay a different amount towards the levy, based on their relative market share in a “reference period”, which is a 12 month period to be determined in accordance with the regulations: see *subsection (7)*.
66. The regulations will contain provision about the information to be published by the Secretary of State about the levy and the information to be given to individual insurers about the amount they must pay and by when. They will also make provision about recovering unpaid levy that has become due: *subsection (6)*.
67. *Subsection (7)* contains definitions including “recovery of benefits legislation” which means the Social Security (Recovery of Benefits) Act 1997 (“the 1997 Act”) or the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 (S.I. 1997/1183 (N.I. 12)) (“the 1997 Order”).

Clause 14: Collecting information for purposes of levy

68. This clause enables the Secretary of State to require active insurers to provide information for the purposes of working out an insurer’s contribution towards the levy.
69. Where an active insurer fails to comply with this requirement without reasonable excuse the Secretary of State may apply to the High Court (in England and Wales or Northern Ireland) or the Court of Session (in Scotland) for an order requiring the insurer to provide the information: *subsection (2)*. Such applications will be made in accordance with the relevant court rules and procedures in each jurisdiction.
70. In addition to requiring the active insurer to provide the information requested by the Secretary of State, the court may require the insurer to provide additional information: *subsection (3)*.

Insurance disputes

Clause 15: Technical Committee to decide certain insurance disputes

71. Clause 15 allows the Secretary of State to make arrangements with a body to establish a Technical Committee. The Technical Committee will make decisions on questions arising between a potential insurance claimant and an insurer as to whether an employer maintained EL insurance with the insurer at a particular time. For example, a potential insurance claimant may have some evidence suggesting a particular insurer was on cover for an employer at a particular time but the insurer may dispute this. The Technical Committee will be able to decide such questions and its decisions will be binding on the insurer and any potential insurance claimant who was given the opportunity to make representations on a particular question, unless the matter is referred to arbitration under clause 16.

72. For the purposes of this clause a “potential insurance claimant” is defined (in *subsection (8)*) as:

- a person with diffuse mesothelioma who alleges that the employer is liable for damages in respect of the disease;
- a person who alleges that the employer is liable for damages under the fatal accidents legislation in respect of the death of a person with diffuse mesothelioma, or
- an employer alleged by a person (within the meaning of the first two bullet points) to be liable for damages in respect of the disease or death.

A reference to a person in this subsection includes reference to his or her personal representatives: see *subsection (9)*.

73. *Subsection (5)* provides that a certificate by the Secretary of State is conclusive evidence (for the period in which the certificate is in force) that a specified committee has been established in accordance with the arrangements made under *subsection (1)*. This means that people will not have to go behind the certificate to check the committee has been properly established.

74. *Subsection (6)* describes the type of requirements that the Secretary of State may include in the arrangements made with a body to establish the Technical Committee. For example, the arrangements may include requirements about the composition of the committee or the appointment of its members, the committee’s procedure or how its procedure is to be determined and arrangements for the Technical Committee to review its own decisions.

75. *Subsection (7)* makes it clear that the Technical Committee’s procedure may include time limits for applying to the Committee for a decision or the taking of other steps.

Clause 16: Challenging decisions of the Technical Committee

76. Clause 16 allows an insurer or any potential insurance claimant who is bound by a decision of the Committee, if still dissatisfied with it after exhausting review processes, to refer the question to arbitration under sections 94 to 98 of the Arbitration Act 1996 (in relation to England and Wales or Northern Ireland) (“the 1996 Act”) or sections 16 and 17 of the

Arbitration (Scotland) Act 2010 (in relation to Scotland) (“the 2010 Act”). Those sections contain provisions about statutory arbitrations.

77. Until the 2010 Act comes into force in relation to arbitrations under this clause, *subsection (4)* provides that it will apply as if it were in force in relations to such arbitrations.
78. *Subsection (5)* provides that the Secretary of State may by regulations (made under the negative resolution procedure) adapt or exclude any provisions of the 2010 Act in relation to arbitrations under clause 16. Any such regulations will be made at the same time as regulations made under section 98 of the 1996 Act to adapt or exclude provisions of that Act in relation to arbitrations under this Bill. For example, the regulations will adapt section 34 of the 1996 Act and rule 28 of Part 4 Schedule 1 of the 2010 Act to ensure that the arbitral proceedings are always held in public.

General

Clause 17: Regulations under this Act

79. This clause provides for regulations under this Act, which are all to be made by the Secretary of State, to be made by statutory instrument.
80. *Subsection (2)* provides for the affirmative resolution procedure to apply to the first regulations made under clause 1, which establish the scheme, and the affirmative resolution procedure to apply to any regulations made under clauses 7(3)(b) and 10.
81. *Subsection (3)* provides for subsequent regulations made under clause 1, and regulations made under clauses 13, 16 to be subject to the negative resolution procedure or for any purely transitional regulations under clause 7(5) only, to be subject to no Parliamentary procedure.
82. *Subsection (4)* allows for regulations made under the Bill to include incidental, supplementary, consequential, transitional, transitory or saving provision.

Clause 18: Defined terms used in more than one section of this Act

83. *Subsection (1)* defines terms that are used more than once in the Bill, in particular:
- “the compulsory insurance legislation” which means the Employers’ Liability Compulsory Insurance Act 1969, or the Employers’ Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972;
 - “dependant”, which is defined by reference to the list in section 3(1) of the Pneumoconiosis etc. (Workers’ Compensation) Act 1979 which establishes an order of priority in which dependants may apply for a payment under the scheme. For example, a spouse or civil partner would be first, but if he or she did not want to apply for a scheme payment and gave notice saying so under clause 3(3), then the ability to apply for a payment would pass to any children (as defined by the 1979 Act) who are next in line under the 1979 Act definition;
 - “employers’ liability insurance”, which means in relation to an employer and a particular time, insurance that the employer was either required by the compulsory insurance legislation to maintain at that time, or would have been required by the

compulsory insurance legislation to maintain if that legislation had been in force at the that time.

84. *Subsection (2)* provides that when determining for the purposes of this Act whether an employer would have been required to maintain insurance if the compulsory insurance legislation had been in force at any time, any exemptions from the requirement to hold insurance that were introduced after the compulsory insurance legislation came into force, should be assumed to apply at the time in question. For example, in 2004 regulations were made to exempt very small businesses (i.e. any employer which is an incorporated company run by its owner who is also the sole employee from the requirement to maintain EL insurance) (the Employers' Liability (Compulsory Insurance) (Amendment) Regulations 2004 (S.I. 2004/2882)). Although this regulation did not come into force until 2005, *subsection (2)* means that it will be applied as if it were in force at the time of the person's exposure to asbestos where the exposure to asbestos took place before the coming into force of the ELCI Act.
85. *Subsection (3)* allows the scheme to specify the circumstances in which a person is or is not to be treated as able to bring an action for the purposes of the eligibility conditions at clause 2(1)(d) or clause 3(1)(c). Those conditions are set out in general terms because there are a number of different reasons why a person may be unable to bring proceedings against a former employer or that employers' EL insurer for example where the employer has ceased trading, or where the identity of his EL insurer is unknown or the policy document cannot be traced, but it is very difficult to predict in advance what all those reasons may be. If it should prove to be necessary, for example if unforeseen difficulties arise because those conditions are set out in general terms, the Secretary of State will make regulations under clause 1.

Clause 19: Commencement

86. This clause provides when and how the provisions of the Bill are to come into force.
87. Clauses 19, 20 and 21 will come in to force on Royal Assent. The remaining provisions of the Bill will come into force on such days as the Secretary of State may appoint by order made by statutory instrument.

Schedule 1: Recovery of benefits etc from payments and recovery of payments

Part 1: Recovery of benefits etc from scheme payments

88. **Part 1** makes amendments to the Social Security (Recovery of Benefits) Act 1997 ("the 1997 Act") and the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 (S.I. 1997/1183 (N.I. 12)) ("the 1997 Order"), which are necessary to allow for the recovery of social security benefits and "lump sum payments" (i.e. payments made in accordance with the Pneumoconiosis etc. (Workers Compensation) Act 1979 and Child Maintenance and Other Payments Act 2008, and the Pneumoconiosis etc. (Workers' Compensation) (Northern Ireland) Order 1979 and Mesothelioma, etc. (Northern Ireland) Act 2008) from payments made under the scheme.

Recovery of benefits etc from scheme payments; England and Wales and Scotland

89. *Paragraph 2* amends section 1 of the 1997 Act in order to make it clear that payments made under the scheme are payments of a type to which the Act applies.
90. *Paragraph 3* inserts section 8A into the 1997 Act, which applies instead of section 8 of that Act to payments made under the scheme. This section requires that scheme payments are reduced by the amount of recoverable benefit that the scheme administrator is required to repay to the Secretary of State. This may reduce the scheme payment to nil in cases where the amount of recoverable benefit is equal to or greater than the gross amount of the scheme payment.
91. In the same way as section 8 works, where compensation is reduced to take into account any social security benefits that are to be repaid to the Secretary of State, section 8A also provides that an application for a scheme payment is to be treated as discharged if the applicant is paid the gross amount of scheme payment less the amount of recoverable benefit; or, where the amount of payment is reduced to nil, the scheme administrator gives the applicant a statement saying that the payment has been reduced to nil.
92. The 1997 Act currently provides for compensators to be able to request a review of the amount of recoverable benefits to be repaid or (where there are grounds) to be able to appeal against the amount to be repaid. This may result in a reduction in the amount to be recovered, which would be a benefit to the compensator, as they are able to retain refunded benefits following a successful appeal. However in the case of the scheme, where both social security benefits and scheme payments are sums of public money, ultimately controlled by the Department for Work and Pensions, there would be no benefit in allowing the scheme administrator to request a review of, or an appeal against, a certificate of recoverable benefits. For these reasons the provisions in the 1997 Act around reviews and appeal will not apply to the scheme administrator. *Paragraph 4* therefore inserts new subsection (4) into section 10 of the 1997 Act, which prevents the scheme administrator from requesting a review of a certificate of recoverable benefits. *Paragraph 5* amends subsection (2) of section 11 of the 1997 Act, preventing the scheme administrator from appealing against a certificate of recoverable benefits. *Paragraph 6* amends subsection (2) of section 13 of the 1997 Act, preventing the scheme administrator from appealing against decisions of the First Tier Tribunal to the Upper Tribunal.
93. *Paragraph 7* inserts the definition of *scheme administrator* into section 29 of the 1997 Act (general interpretation).
94. *Paragraph 8* amends the provisions of the 1997 Act which refer to section 8 of the Act to include new section 8A. Apart from section 18 of the 1997 Act (Lump sum and periodical payments) which is not relevant to scheme payments.

Recovery of benefits etc from scheme payments: Northern Ireland

95. *Paragraphs 9 to 16* makes amendments to the 1997 Order in the same way as paragraphs 1 to 8 amend the 1997 Act so as to ensure that social security benefits paid in Northern Ireland are recoverable from payments made under the scheme.

Part 2: Recovery of scheme payments from compensation

96. Section 1A of the 1997 Act and Article 3A of the 1997 Order contain regulation-making powers which have been exercised to provide for the recovery of lump sum payments (made in accordance with the legislation mentioned in paragraph 9 above) from compensation payments, as defined in section 1 of the 1997 Act and article 3(2) of the 1997 Order. Part 2 makes amendments to section 1A of the 1997 Act and article 3A of the 1997 Order so as to allow regulations to be made that will provide for the recovery of such lump sum payments from scheme payments and also for the recovery of scheme payments from later paid compensation payments: *paragraphs 17 and 18*.
97. The amendments make it clear that the type of compensation payment from which a scheme payment can be recovered does not include the scheme payment itself.

Part 3: Information sharing

98. *Paragraph 19* inserts new subsection (6A) into section 23 (provision of information) of the 1997 Act. This will require the scheme administrator (or any person providing services to it) to provide information to the Secretary of State as prescribed for the purposes of the 1997 Act. The information required will be prescribed by amending regulations made under the 1997 Act⁶. Compensators are currently required by these regulations to provide the following information in relation to the recovery of benefits:

- the full name and address of the injured person,
- where known, the date of birth and national insurance number of the injured person,
- where the liability arises, or is alleged to arise, in respect of an accident or injury, the date of the accident or injury,
- the nature of the accident, injury or disease, and
- where known and where the relevant period (as defined in section 3 of the 1997 Act) may include a period prior to 6 April 1994, whether at the time of the accident or injury or diagnosis of the disease, the person was employed under a contract of service, and if he was, the name and address of his employer at that time and the persons payroll number.

Similar provisions apply in relation to the recovery of lump sums from compensation.⁷

99. The regulations will be amended to require the scheme administrator to provide similar information and to provide details of the amount of scheme payment, where that payment is to be recovered from compensation.
100. *Paragraph 20* inserts new paragraph 6A into Article 25 (provision of information) of the 1997 Order, requiring the scheme administrator (or any person providing services to the scheme administrator) to provide information to the Northern Ireland Department as prescribed for the purposes of the 1997 Order.
101. *Paragraph 21* amends section 3 of the Social Security Act 1998 to include information relating to the scheme in the list of matters specified at subsection (1A) of that section. Information held in relation to these matters by the Secretary of State or “the Northern

⁶ The Social Security (Recovery of Benefits) Regulations 1997 (S.I. 1997/2205).

⁷ The Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008 (S.I. 2008/1596).

Ireland Department” or any person providing services to them may be used for the purposes of, or connected with, the exercise of functions in relation to any of the matters specified in section 1A. For example, the information may be used for activities connected to those purposes (such as policy development, analysis, statistics and process design). Such information may likewise be passed to the Secretary of State or Northern Ireland Department or a service provider, for those purposes. “Northern Ireland Department” means the Department of Health and Social Services for Northern Ireland or the Department for Employment and Learning in Northern Ireland.

Schedule 2: Exclusion of payments under other legislation

102. There are two existing Government schemes that provide lump sum payments to sufferers of diffuse mesothelioma. The Pneumoconiosis etc. (Workers’ Compensation) Act 1979 and the Pneumoconiosis etc. (Workers’ Compensation) (Northern Ireland) Order 1979, subject to conditions, provide for a lump sum payment to be made to workers with certain dust related diseases (including mesothelioma). Part 4 of the Child Maintenance and Other Payments Act 2008 and the Mesothelioma, etc (Northern Ireland) Act 2008, subject to conditions, provides lump sums for all mesothelioma sufferers, regardless of whether the disease was caused through employment. Where a person receives a lump sum payment from one of these state schemes and goes on to make a successful claim to civil compensation for the same disease, the amount of lump sum can be recovered from the award of civil damages.
103. It is a condition of entitlement for a payment under the 2008 lump sum schemes that the person has not received any other damages or a payment in settlement for a claim for damages in respect of the diffuse mesothelioma. Under the 1979 legislation it is a condition that no action has been brought, or claim compromised, for damages in respect of the disablement. The combined effect of these conditions and the recovery of lump sums provisions is that a person is not doubly compensated by way of receiving a lump sum from one of the Government schemes and through civil damages.
104. As applicants to the Diffuse Mesothelioma Payment Scheme may also qualify for a payment under one of the existing Government schemes, Schedule 2 makes amendments to the Pneumoconiosis etc. (Workers Compensation) Act 1979 and the Pneumoconiosis etc. (Workers’ Compensation) (Northern Ireland) Order 1979 to ensure a person is not doubly compensated. These amendments prevent a person from receiving a payment under the 1979 Act and 1979 Order where they have applied for a payment under the scheme.
105. Schedule 2 also amends the Child Maintenance and Other Payments Act 2008 and the Mesothelioma, etc. (Northern Ireland) Act 2008, preventing a person from receiving a payment under those Acts where they have already received a payment under the scheme.
106. It is expected that payments made under the Diffuse Mesothelioma Payment Scheme will be significantly higher than lump sum payments made in accordance with the existing legislation.

FINANCIAL EFFECTS OF THE BILL

Individuals

107. The Government estimate that over 10 years, 3,500 people with mesothelioma who have been exposed to asbestos by their employer, either negligently or in breach of their statutory duty will receive an extra £260 million in overall scheme payments. Scheme payments includes a contribution towards legal fees for successful applicants of £2,000.

Government

108. The proposal is expected to have a net benefit to the Exchequer of £52million, because social security benefits and Government lump sum payments will be recovered from scheme payments, which total £71million. The costs of recovery are estimated at £2million. The Government plans to provide funding to the scheme of an amount equivalent to the amount it will recover through compensation recovery of social security benefits and lump sum payments from scheme payments in the first year of the scheme. This is estimated at £17million.

Business

109. The total that insurers are expected to pay into the levy is £343million. This amount is net of government funding equivalent to the amount it will recover through compensation recovery of social security benefits and lump sum payments from scheme payments in the first year of the scheme. This is estimated at £17million.

The economy

110. The costs to the economy are the additional costs created by transferring money between the groups outlined above. These are made up of the administrative costs of the scheme (£6million), which include some ad hoc legal costs (£1million). There are scheme legal case costs of £23million. They also include the legal costs to individuals of successful and unsuccessful scheme applications and the savings in that these people no longer need to go through and unsuccessful tracing attempts (£25million). Overall there is a net cost to the economy.

EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

111. Applications to the scheme as well as individuals encouraged to make civil claims by the creation of the scheme will result in an increased number of cases registered with the Compensation Recovery Unit (CRU), which is the part of the DWP which deals with the recovery of benefits and lump sum payments under the related legislation. However, it is estimated that the effect on CRU workloads and staffing requirements will be negligible. The overall effect of the Bill on public sector manpower would be negligible. Therefore, there are no public service manpower commitments arising from the Bill which would give rise to additional requirements.

SUMMARY OF THE IMPACT ASSESSMENT

112. A full Impact Assessment is published alongside the Bill. Copies are available from the Vote Office as well as from the Department for Work and Pensions Website (www.dwp.gov.uk). In addition to the financial impacts outlined above there is also a key

non-financial benefit, in the reassurances the scheme offers to these individuals at a very stressful time in their life. The key benefit to the insurance industry is in terms of its reputation and showing that it is willing to support people with mesothelioma.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

113. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Secretary of State for Work and Pensions has made the following statement:

“In my view the provisions of the Mesothelioma Bill are compatible with the Convention rights”.

Clauses 1 to 10 – the Diffuse Mesothelioma Payment Scheme

114. The Government does not consider that a payment under the scheme is a “possession” for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights (“ECHR”). However, in the event that such a payment is considered a “possession”, the scheme will fall within the ambit of that Article. This means that issues could be raised under Article 14 (non-discrimination) because clause 2 provides that only certain people who have been diagnosed with diffuse mesothelioma are eligible for the scheme. However the Government believes that this targeted approach has an objective and reasonable justification because of the very particular nature of diffuse mesothelioma (unlike other industrial diseases, including other asbestos-related diseases, it can be simply and directly attributed to asbestos exposure), the severity of its impact (once symptoms occur, death follows within eight months on average and usually within eighteen months to two years) and the urgent need to provide fast and effective compensation at a time when the number of the number of diffuse mesothelioma deaths is rising to a peak expected in 2016.
115. Clause 4 provides that the amount of a scheme payment be set out in the scheme (determined in accordance with regulations made by the Secretary of State under clause 1). The intention is that a scheme payment will be a single lump sum calculated in accordance with a tariff related to the sufferer’s age at date of diagnosis, or date of death if sooner. The younger the sufferer is at the relevant date, the higher the payment will be. This is justified by the need to compensate people according to the extent to which their life has been cut short by the disease, and to keep scheme payments consistent with the amounts awarded in civil mesothelioma cases.
116. In *Stec v United Kingdom* (2006) 43 EHRR 1017, the European Court of Human Rights (Grand Chamber) said:
“... A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’.”
117. The “not manifestly without reasonable justification” test adopted by the Grand Chamber in *Stec* has been applied by the domestic courts in Article 14 social security cases, notably by the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2008]

UKHL 63, [2009] 1 AC 311 and by the Supreme Court in *Humphreys v Revenue and Customs* [2012] UKSC 18. The Government consider that it is also the appropriate test to apply in considering whether clauses 2 to 4 of the Bill are compatible with Article 14. This is because (a) the scheme to be established under the Bill would clearly be a “general measure of economic or social strategy”, and (b) there would be no discrimination on the “suspect” grounds such as race and sex where a weighty justification is normally required by the Courts (see *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, paragraphs 55 to 60). The Government believes that the justifications referred to above are more than sufficient to meet the test laid down in *Stec*.

118. The Government accepts that decisions on payments by the scheme administrator are likely to constitute the determination of a “civil right” for the purposes of Article 6 ECHR, but that the measures in the Bill about reviews and (in particular) the right of appeal to the First-tier Tribunal (which is entirely independent of Government) ensure that Article 6 obligations will be complied with.

*Clause 11 and Schedule 1 - Recovery of benefits etc from payments and recovery of payments and
Clause 12 and Schedule 2 - Exclusion of payments under other Acts*

119. Clause 11 and Schedule 1 deal with the recovery of benefits and “lump sum payments” (described above in paragraph 9 and in the commentary on Schedule 1). Schedule 1 amends both the 1997 Act and the 1997 Order so as to enable the recovery of benefits from scheme payments and to allow regulations to make provision as to the recovery of lump sum payments from scheme payments. The regulations will allow for the recovery of scheme payments from compensation, paid later, to the person with diffuse mesothelioma (or their personal representatives) or to another person who received or who could have been eligible for a payment under the scheme, in respect of the disease or death.
120. Clause 12 introduces Schedule 2 that contains amendments to the relevant legislation to ensure that a person who has applied for or received a payment under the scheme does not receive lump sum payments from other DWP schemes.
121. In the event that a scheme payment is held to be a “possession” for the purposes of Article 1 of Protocol 1, then these provisions may engage that article. However the Government considers that any interference or deprivation of property is justified in relation to both Schedules by the need to prevent sufferers receiving double payment; and in relation to Schedule 1 to ensure a fair balance as between the needs of sufferers and the insurers who fund the scheme through the levy.

Clause 13 - the levy

122. The Government accepts that the imposition of a levy on insurers engages Article 1 of Protocol 1. The Government considers this to be justified in order to address a market failure, namely insurers not keeping adequate records. The Government consider that transferring the cost of remedying that failure to the insurance industry is justified and proportionate. The following factors are relevant:
- (a) due in part to the long tail nature of mesothelioma, it is estimated that only 52% of sufferers are successful in tracing their employers or insurers to make an occupational claim;

- (b) the improvements to the Employers' Liability Tracing Office should in future reduce the number of untraceable insurers;
 - (c) due to the delayed onset of mesothelioma many of the relevant employers are no longer solvent;
 - (d) mesothelioma liability is generally capable of being established against the insurer of an insolvent employee without undue difficulty if the employer can prove relevant exposure – but the most common barrier for claimants in recovering compensation from an employer is the fact that an employer's policy document is not available to them;
 - (e) EL insurers have failed to keep adequate records of historic EL insurance policies, hence claimants' inability to trace a such an insurer is often the result of 'market failure'; and
 - (f) by limiting compensation under the scheme to a percentage of average awards of civil compensation, applicants will not be encouraged to use the scheme before exhausting any other potential routes for compensation.
123. In the specific context of Article 1 of Protocol 1, it has been held that the elimination of social injustices identified by the legislature may constitute a legitimate aim: see *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

Clause 15 - Technical Committee to decide certain insurance disputes

124. Clause 15 provides for the establishment of a Technical Committee to determine disputed issues of insurance cover when a policy is traced but evidence of cover is disputed by an insurer and to make binding decisions. It is possible that in determining whether an insurer was on cover a "civil right" is being determined for the purposes of Article 6 of the Convention (right to a fair trial). The Government is satisfied that the Technical Committee proceedings combined with statutory arbitration (clause 16 - discussed below) along with the rights of appeal to the court provided for in the Arbitration Act 1996 and the Arbitration (Scotland) Act 2010 ensure that clause 15 is compatible with Article 6 of the Convention.

Clause 16 - arbitration

125. If the Technical Committee has decided a question under clause 15(2), any person on whom the decision is binding may, if still dissatisfied with it after exhausting review processes, refer the question to arbitration under clause 16(1). This engages Article 6 of the Convention because the arbitration will involve a determination of civil rights and obligations of the insurer and potential insurance claimant.
126. The arbitrators will be independent of both the Government and of the parties; it is intended that they will be members of the independent bar with particularly expertise in insurance matters. They can be expected to carry out their duties impartially.

*These notes refer to the Mesothelioma Bill [HL] as
brought from the House of Lords on 31 July 2013 [Bill 100]*

127. The parties to arbitration will also be protected by the requirements for fairness and impartiality in the Arbitration Act 1996 and the Arbitration (Scotland) Act 2010 and the rights of appeal to the courts contained therein.
128. The Government intends to put in place further procedural safeguards by way of regulations to be made under section 98 of the Arbitration Act 1996 and under clause 16(4) of the Bill, which will adapt or exclude provisions of the 1996 Act and 2010 Act to provide for example, for a public hearing and a public pronouncement of the arbitration decision.

COMMENCEMENT

129. Clauses 19 to 21 will come in to force on Royal Assent.
130. The remaining provisions of the Bill will come into force on such days as the Secretary of State may by order appoint.

MESOTHELIOMA BILL [HL]

EXPLANATORY NOTES

*These notes refer to the Mesothelioma Bill as brought from the Lords on
31 July 2013 [Bill 100]*

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