House of Commons
Justice Committee

Mesothelioma Claims: Government Response to the Committee’s Third Report of Session 2014–15

First Special Report of Session 2014–15

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General’s Office, the Treasury Solicitor’s Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Publication

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Committee staff

The current staff of the Committee are Nick Walker (Clerk), Edward Beale (Second Clerk), Daniel Whitford (Second Clerk), Gemma Buckland (Senior Committee Specialist), Hannah Stewart (Committee Legal Specialist), Ana Ferreira (Senior Committee Assistant), Ellen Bloss (Committee Support Assistant), Conor Johnson, (Sandwich Student) and Liz Parratt (Media Officer).

Contacts

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First Special Report

We have received the Government’s Response to our Third Report of Session 2014–15, *Mesothelioma Claims*, HC 308. The response came in a letter dated 4 December 2014 to the Chair of the Committee from Lord Faulks QC, Minister of State at the Ministry of Justice. We had previously agreed with the Government an extension to the usual two months deadline for a response to be made, to enable the Government to consider the outcome of the judicial review into the matter, in which judgement was made on 2 October 2014. We publish Lord Faulks’ letter as an Appendix to this Special Report.

Appendix: Government response

Letter dated 4 December 2014 from Lord Faulks QC, Minister of State for Justice, to Rt Hon Sir Alan Beith MP, Chair, Justice Committee


I am grateful to the Justice Select Committee for their report on Mesothelioma Claims (Third report of Session 2014–15), which was published on 1 August 2014.

I am writing to set out the Government’s response to the recommendations made in the report. As agreed with the Committee, this response is later than the usual two months because of the need to consider how to respond to the court’s judgment on this issue, which was handed down on 2 October.

As you are aware, this Government made an early priority of controlling legal costs which had become unsustainably high. We made changes to the law on how ‘no win, no fee’ conditional fee agreements (CFAs) operate, following recommendations by Lord Justice Jackson. The CFA reforms in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the LASPO Act”) were delayed for mesothelioma cases pending the outcome of the section 48 review.

The LASPO Part 2 reforms came into force generally on 1 April 2013, and already apply to all other personal injury cases, in particular other serious claims which also have tragic consequences — such as catastrophic injuries involving a need for life long care, and a reduction in life expectancy.

On 24 July 2013, the Government published the ‘Reforming Mesothelioma Claims’ consultation paper, which considered specific proposals intended to improve the efficiency and, where necessary, the speed of the process for claimants to recover compensation in cases where a liable employer or insurer is traced. The consultation also covered the review by the Lord Chancellor required by section 48 of the LASPO Act regarding the likely effect of the application of the ‘no win no fee’ CFA reforms to mesothelioma claims. In assessing the information provided by respondents to the s.48 review, the Government concluded that: (i) no evidence was provided that the LASPO impacts would not be similar for
mesothelioma cases as for other personal injury cases; (ii) no evidence was provided to the
effect that mesothelioma cases are sufficiently different regarding costs and funding
matters to other personal injury cases such as to merit differential treatment; and (iii) no
evidence was provided to show that mesothelioma sufferers in particular are worse off with
LASPO being implemented.

The Government announced its decision following that consultation on 4 December 2013,
stating that it had decided to commence sections 44 (conditional fee agreement: success
fees) and 46 (recovery of insurance premiums by way of costs) of the LASPO Act for
mesothelioma claims. The Government’s substantive reasons were set out in the
consultation response on 6 March 2014, which included the report under section 48 of the
Act.

That decision was also subject to an adjournment debate held in Westminster Hall on 29
January 2014, called by Mr Andrew McDonald MP, a member of your Committee.

The Government’s decision was challenged by judicial review. It was also the subject of the
Justice Committee’s inquiry, to which I gave evidence on 17 June.

The judicial review was heard on 29 and 30 July. On 2 October, the High Court overturned
the decision to apply the LASPO reforms to mesothelioma cases. No win no fee agreements
in mesothelioma cases therefore continue for the time being to operate on a pre-LASPO
Act basis with any additional legal costs — success fees and after the event (ATE) insurance
premiums — remaining recoverable from the losing party. However, in line with its
overall policy, the Government will undertake a review under s.48 of the Act in due course
to identify the likely effects of the LASPO reforms on mesothelioma cases and will then
consider whether, in the light of that review, there is a case to maintain the exception of
these cases from those reforms. Details of the format and timing of the review will be set
out at a later date. We will of course take into account the Court’s judgment and your
Committee’s recommendations as part of that process.

The Committee’s recommendations are set out in bold text below, followed by the
response by the Government on each point.

1. We recommend that the Government commission an independent review of the
risks of success and failure of all mesothelioma cases to inform the setting of a
maximum level of success fee, expressed as a percentage of costs, for lawyers
representing claimants in such cases. We also recommend that the Government
commission research to evaluate trends in the ATE insurance market in relation to
personal injury claims since the provisions of Part 2 of LASPO came into force.

Lord Justice Jackson found that the pre-LASPO CFA and ATE arrangements were ‘the
major contributor to disproportionate costs in civil litigation in England and Wales’; that is
why the LASPO Act reforms were introduced. In the Government’s view, it is preferable to
control legal costs through market competition where possible. For the time being, while
the pre-LASPO arrangements continue to apply in mesothelioma cases, the maximum
success fee that can be charged in mesothelioma cases is 27.5% (of base costs) in cases that
settle and 100% in cases that go to trial.
The size of the success fee that a lawyer may charge is capped at 100% of base costs in all cases. In all other personal injury cases (apart from mesothelioma cases) the success fee is further controlled by an additional rule, that it may be no more than 25% of the damages (excluding any damages for future care and loss which are protected for claimants in their entirety).

In relation to Committee’s recommendations regarding the risks of the success and failure of mesothelioma cases and trends in the ATE insurance market, the Government will bear those recommendations in mind when considering what evidence and research may be necessary for the conduct of the s.48 review.

2. We recommend that progress on drawing up this legislation be expedited with a view to its inclusion by means of amendment in a suitable Government bill this Session. The Small Business, Enterprise and Employment Bill, Part 10 of which contains a range of provisions concerning insolvency, would seem to be a suitable vehicle.

The legislation to which the Committee refers is the Third Parties (Rights against Insurers) Act 2010, which is yet to be implemented. The Government considers that the 2010 Act needs certain technical amendments so that it can be implemented. It has introduced the necessary provisions in the Insurance Bill, which was introduced in the House of Lords on 17 July. The Bill has passed its Second Reading and is to be considered by a Special Public Bill Committee. I hope the Committee will be reassured that this is now in hand and good progress is being made.

3. We welcome the amendment which has been made to the Deregulation Bill to facilitate production by HM Revenue and Customs of employment histories of mesothelioma victims seeking compensation under the Diffuse Mesothelioma Payments Scheme. We recommend that the Ministry of Justice pursue in tandem with the Department of Health the provision of guidance to NHS trusts to expedite their production of medical records in mesothelioma cases.

The Ministry of Justice is working closely with stakeholders to see how we can improve the claims process for these compensation cases. We have included provisions in the Deregulation Bill, currently before Parliament, which will enable HM Revenue and Customs to disclose the work records of deceased victims to their legal representatives and dependants without — as now — the need for a court order.

We are also working with the National Cancer Registration Service, Public Health England and others to secure resources to expedite receipt of hospital medical notes (pathology records and imaging reports) to reduce delays in the claims process.

We believe these changes will benefit mesothelioma sufferers and their families by providing them with simpler and quicker access to vital evidence necessary to resolve their claim.

4. We conclude that the Government, perhaps as a consequence of being forced into the concession of including an exemption for mesothelioma in the LASPO Act pending a review, did not prepare the ground for its section 48 review in a thorough and even handed way. We recommend that the Government defer the introduction of the change it has announced until it has undertaken a further consultation, which should be
framed unambiguously and centrally on the question of whether the LASPO provisions should be brought into effect for mesothelioma. This consultation should be informed by an updated cost-benefit analysis, on which respondents should be asked to comment. We consider that such a consultation should not be undertaken until sufficient time has elapsed for the effects of the LASPO changes in non-mesothelioma cases to be assessed.

The Government’s decision to commence the LASPO reforms for mesothelioma cases has now been overturned by the High Court. As a result of the Court’s decision, CFAs in mesothelioma cases continue to operate on a pre-LASPO Act basis, which means that any additional legal costs — CFA success fees and ATE insurance premiums — remain payable by the losing party for the time being. As a consequence, claimants will of course not receive the 10% general damages uplift either, since this relates to application of the LASPO reforms.

As stated above, the Government will undertake a review under s.48 of the Act in due course. These issues will be considered as part of that process. Further details on the format and timing of that review will be set out in due course.

Following the ‘Big Tent’ meeting the Ministry of Justice held on 30 June — which was attended by Mr McDonald on behalf of the Committee, as well as a wide range of stakeholders, including victims’ groups, claimant lawyers, insurers, trade unions and members of the judiciary (the latter as observers) — we continue to work with stakeholders to see how we can improve the claims process for these tragic cases.

The Government has introduced a significant reform in the Mesothelioma Act 2014. This created a payment scheme for victims of mesothelioma who are unable to trace a liable employer, or liable employer liability insurer, from which to claim the damages they are rightfully due. This is an important milestone in ensuring that those who were previously unable to claim are now able to do so. The untraced scheme started making payments from July 2014; to date over £13 million has been paid under the scheme to over 230 sufferers or their families.

I would like to thank the Committee for their work on this important issue.