



House of Commons Justice Committee

Mesothelioma Claims

Third Report of Session 2014–15

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Report, together with formal minutes relating to the report

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The Justice Committee

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Summary

This report contains an assessment of the appropriateness of the Government's decision to apply sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to mesothelioma compensation claims. These sections prevent winning claimants recovering from defendants success fees charged by their lawyers or premiums for insurance against having to meet defendants' costs (after the event, or ATE, insurance). They have applied to all other personal injury claims since April 2013, but section 48 of LASPO required Ministers to undertake a review before they could be brought into effect for claims relating to mesothelioma, a cancer of the lining of the lung arising from exposure to asbestos.

Evidence received by the Committee revealed that there were starkly opposing views on most aspects of this matter. Representatives of mesothelioma victims, claimant lawyers and trades unions argued that the special characteristics of mesothelioma claims made it necessary to maintain their exemption from sections 44 and 46 LASPO. On the other hand, the Government, defendant lawyers and insurers considered that there was no strong justification for the continuation of the exemption. The cost-benefit analysis published by the Government estimated that, taking into account other factors, particularly a 10% uplift in general damages in personal injury cases, there would be a net overall benefit to claimants. This was hotly contested by claimant representatives. We conclude that the reliability of the Government's cost-benefit analysis is central to any assessment of the financial impact on mesothelioma victims. We recommend that the Government commission an independent review of the risks of success and failure of mesothelioma claims to inform the setting of a maximum level of success fee.

In this inquiry we considered the process of the review carried out by the Government under section 48 of LASPO. We conclude that the timing and nature of the review had meant that respondents to the Government consultation on the mesothelioma claims process did not have available to them much relevant information, and we say that the shoehorning of part of the review into a wider consultation on the claims process was a maladroit way of proceeding.

During the course of our inquiry the Association of British Insurers provided us with a copy of a 2012 "Heads of Agreement" document between them and the Government on mesothelioma claims. This document was not a binding contract: not all the proposals in it have been implemented. We nevertheless express concern that the Government has not been transparent or open about the fact that its policy on mesothelioma has been shaped by an agreement, however informal and elastic, with insurers.

On some issues there is greater consensus on steps which need to be taken to expedite and improve the mesothelioma claims process. One such matter is the enactment of further primary legislation to enable the Third Party (Rights Against Insurers) Act 2010 to be commenced effectively, and we recommend that steps be taken to expedite the necessary

legislation.

Our overall conclusion is that the Government did not prepare the ground for its section 48 review in a thorough and even-handed way, and we recommend that the Government undertake a further review by means of a consultation framed unambiguously and centrally on the question of whether the LASPO provisions should be brought into effect for mesothelioma. We consider that this consultation should not be undertaken until sufficient time has elapsed for the effects of the LASPO changes in non-mesothelioma cases to have been assessed.

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1 The Committee's inquiry and its background

1. Mesothelioma, a cancer of the lining of the lung, is one of several very serious diseases caused by exposure to asbestos. The short inquiry which we have carried out into the mesothelioma claims process was prompted by the Government's decision to apply sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012¹ to mesothelioma claims as well as to other personal injury claims. The effect of these sections is to remove the capacity of a successful claimant to recover certain costs from the losing party. We sought evidence on the appropriateness of that decision, taking into account:

- the potential impact of the provisions on mesothelioma claims;
- features which distinguish mesothelioma claims from other personal injury claims; and
- the process of the review under section 48 of the Act.

We received 28 written submissions, which are published on our webpages², and we held two oral evidence sessions. At the first of these we heard from panels of witnesses opposing and supporting the Government's decision, and at the second we took evidence from the responsible Minister, Lord Faulks QC, Minister of State for Civil Justice and Legal Policy.³ We are grateful to all those who provided evidence to us.

2. Part 2 of LASPO implemented recommendations made in a review by Lord Justice Jackson,⁴ which changed the funding arrangements for civil litigation, including for personal injury cases. Prior to the entry into force of LASPO, personal injury claims were brought under conditional fee agreements (CFAs), the most common type of which were "no win, no fee" agreements, under which, if the case was lost, the lawyer was not paid. If the case was successful, the lawyer was paid the ordinary legal fees plus an uplift, the "success fee", comprising a percentage of the ordinary legal fees. A personal injury claimant could also purchase after the event (ATE) insurance against the risk of having to pay the defendant's costs if they lose. The losing party could be required to pay the winning party's ordinary legal fees, as well as any success fees and any ATE insurance premium.

3. Sections 44 and 46 of LASPO provide that the winning party is no longer able to recover the success fee or the ATE insurance premium from the losing party. These provisions came into effect for all personal injury cases other than mesothelioma claims in April 2013.

¹ Henceforth "LASPO".

² Mesothelioma claims written evidence, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/mesothelioma-claims/>

³ *Ibid.*

⁴ Review of Civil Litigation Costs: Final Report, Lord Justice Jackson, December 2009

In recognition of the fact that claimants would now bear the burden of success fees and ATE premiums, three additional measures were introduced:

- a cap on the success fee: the Conditional Fee Agreements Order 2013 imposes a cap of 25% of the damages awarded (excluding damages for future loss and care);
- a 10% increase in awards: a 10% increase in damages for non-pecuniary loss, in part to compensate claimants for having to pay the success fee, was recommended by the Jackson Review and effectively implemented by the Court of Appeal decision in the case of *Simmons v Castle*.⁵
- a system of Qualified One Way Costs Shifting (QOCS), a form of costs protection for claimants, under which an unsuccessful claimant is protected from liability to pay the defendant's costs, except in cases where the claimant has behaved unreasonably or has failed to accept an appropriate offer.

4. Debate in both Houses on the Legal Aid, Sentencing and Punishment of Offenders Bill showed that this package of reforms was controversial, and especially so in relation to mesothelioma cases. An amendment to the Bill was made in the House of Lords to exempt claims arising from occupationally-related respiratory illness or disease from the new arrangements. In an episode of parliamentary “ping-pong” this amendment was initially disagreed to by the House of Commons but, following a Lords insistence, a compromise solution was effected by addition in the Commons of a Government New Clause (now section 48 of the Act) as an amendment in lieu of the Lords Amendment. This provided an exemption for mesothelioma cases alone until a review of the likely effect of sections 44 and 46 on mesothelioma proceedings had been undertaken and published by the Government.⁶

5. Between July and October 2013 the Government conducted a consultation on the mesothelioma claims process.⁷ The three main proposals for change included in this consultation, which formed a package supported by—indeed to a large extent constructed by—defendant lawyers and insurers were—

- introduction of a dedicated Mesothelioma Pre-Action Protocol (MPAP) to be used instead of the Pre-Action Protocol for Disease and Illness (DPAP), which many argue has not proved suitable for enabling mesothelioma claims to be dealt with swiftly enough;
- establishment of an online Secure Mesothelioma Claims Gateway, acting in support of the MPAP to facilitate exchange of information relating to claims;
- introduction of a fixed recoverable costs regime.

⁵ [2012] EWCA Civ 1039

⁶ HL Deb 14 March 2012 cols 309–333; HC Deb 17 April 2012 cols 264–285; HL Deb 23 April 2012 cols 1606–1625; HC Deb 24 April 2012 cols 830–854

⁷ *Reforming mesothelioma claims: a consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales*, Ministry of Justice, July 2013.

6. In parallel the Government introduced legislation to set up a Diffuse Mesothelioma Payment Scheme, funded by employers' liability insurers, to provide compensation to mesothelioma sufferers unable to trace a liable employer or insurer. This legislation received Royal Assent on 30 January 2014 as the Mesothelioma Act 2014, with the first payments expected to be made under the scheme in July 2014.

7. The second part of the Government's consultation paper of July 2013 explained that the Government was conducting a review under section 48 of LASPO of the likely effects of the application of sections 44 and 46 on mesothelioma proceedings. Question 15 in the consultation paper asked:

Do you agree that sections 44 and 46 of the LASPO Act 2012 should be brought into force in relation to mesothelioma claims, in the light of the proposed reforms described in this consultation, the increase in general damages and costs protection, and the Mesothelioma Bill?⁸

8. In a Written Statement dated 4 December 2013, the Government announced that it had decided to apply sections 44 and 46 of LASPO to mesothelioma cases with effect from July 2014.⁹ In its formal response to the consultation, published on 6 March 2014,¹⁰ the Government confirmed this position. In the letter he sent us following the oral evidence session, however, Lord Faulks said it would no longer be possible to commence the provisions in July and the Government's intention was to proceed with implementation in autumn 2014.¹¹ In its consultation response the Government also stated that it would not take forward any of the other main proposals set out in the consultation paper: the MPAP, the Secure Gateway and the fixed recoverable costs regime. In our inquiry we have not considered in any detail the merits of these proposals: we have confined ourselves to consideration of the case for the Government's decision in the context of the claims process as it is currently operating. At the same time, we should make clear that our inquiry is conducted independently of the process of review which the Government has conducted under section 48 of LASPO. Our inquiry is also separate from the judicial review which is being brought against the Government's decision.¹² The House's *sub judice* resolution, which precludes reference in parliamentary proceedings to most cases which are before UK courts, does not apply to judicial reviews of ministerial decisions.

⁸ *Reforming mesothelioma claims: a consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales*, Ministry of Justice, July 2013, paragraph 76.

⁹ HC Deb 4 December 2013 cols 55–56 WS

¹⁰ *Reforming mesothelioma claims: The Government response to consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales*, Ministry of Justice, 6 March 2014.

¹¹ Ministry of Justice (MSC0029)

¹² *R on the application of Tony Whitston (for and on behalf of the Asbestos Victims Support Groups Forum UK) v Secretary of State for Justice*

2 Mesothelioma: a special case?

9. Mesothelioma is a debilitating, painful and inexorable disease, and the life expectancy of sufferers following diagnosis is short, usually between 10 and 24 months.¹³ In 2011 there were 2,291 deaths in Great Britain from mesothelioma, and the number of cases each year is expected to rise before peaking towards the end of this decade.¹⁴ In their evidence to us the Asbestos Victims Support Groups Forum UK (AVSGF UK) argued that mesothelioma was “the worst ever occupational-related health disaster: A Very Special Case”.¹⁵ The Government, while acknowledging the tragic nature of the disease, put forward in its consultation response the counter-argument that the LASPO reforms already applied to other very serious and life-changing cases.¹⁶ In oral evidence Lord Faulks said that mesothelioma cases were special because of the short life expectancy involved and the consequent need to avoid delay in dealing with them, but he otherwise saw no conceptual difference between mesothelioma cases and other serious personal injury cases.¹⁷

10. Mesothelioma compensation claims are subject to a number of specific legislative provisions or litigation processes, including of course the initial exemption from Part 2 of LASPO. AVSGF UK in their written evidence enumerated a number of ways in which the treatment of mesothelioma cases differs from other personal injury cases, and they also highlighted statements by the Government and others recognizing the uniqueness of mesothelioma.¹⁸ Mesothelioma claims are notably subject to a fast-track process in the courts, involving a specific Practice Direction and a Royal Courts of Justice specialist fast track list, described by Unison as “highly successful and efficient”.¹⁹ In addition, under the Compensation Act 2006, claimants in mesothelioma cases who have had more than one potentially liable employer are not required to trace them all: a claim for the full amount of damages need only be brought against one employer, who is then responsible for tracing other liable employers to obtain contributions from them. These arrangements do not apply in relation to other personal injury cases, including those involving other asbestos-induced diseases.

11. There is little dispute about the factual position in relation to existing statutory and non-statutory distinctions between mesothelioma claims and other cases. However, the two sides of the argument over the commencement of sections 44 and 46 draw different conclusions from this pattern of distinction. Opponents of the Government’s decision, broadly comprising claimant lawyers and victims’ representatives, including trades unions, conclude that the special treatment accorded to mesothelioma claims in various other

¹³ Association of Personal Injury Lawyers (MSC0001)

¹⁴ *Mesothelioma in Great Britain 2013*, Health and Safety Executive.

¹⁵ Asbestos Victims Support Groups Forum UK (MSC0008)

¹⁶ *Reforming mesothelioma claims: The Government response to consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales*, Ministry of Justice, 6 March 2014.

¹⁷ Qq 79–81.

¹⁸ Asbestos Victims Support Groups Forum UK (MSC0008), paras 9–18.

¹⁹ Unison (MSC0018)

respects strengthens the case for the LASPO exemption to be maintained. Supporters of the Government's decision, defendant lawyers and insurers, argue that the various ways in which mesothelioma claims are already subject to different treatment reduce the force of the case for maintaining another difference in the form of the LASPO exemption. Lord Faulks summarised this argument:

most of the hurdles, legally speaking, have been eroded, quite rightly in most people's view, such as the difficulties in causation, which were substantial. The recent legislation has helped in terms of untraced employers. So, sadly, I am afraid I am still not satisfied that these cases are in a separate category.²⁰

We note, however, that the issue of difficulties in causation is distinct from the issue of untraced employers.

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3 The financial implications of the Government's decision

12. The Government's consultation response contains, at Annex B, a cost-benefit analysis of the application of sections 44 and 46 LASPO to mesothelioma cases. Based on research and data from the Department for Work and Pensions and the National Institute of Economic and Social Research (NIESR), and taking into account Judicial College Guidelines for the level of general damages for non-pecuniary loss such as pain, suffering and loss of amenity in mesothelioma cases, which set a range of £51,500 to £92,500, this analysis concludes that "the annual net benefit for claimants from the changes might be around £3.6 million".²¹ The components of this calculation are set out in the following table, reproduced from the Government's cost-benefit analysis:

	Benefits	Costs	Summary
Claimants	Receive 10% uplift on general damages (£6.3 to 11.4 million)	Pay success fees (£4.7 to 5.9 million)	Benefit (£1.7 to 5.5 million, with a central estimate of £3.6 million)
Defendants	No longer pay CFA success fees (£4.7 to 5.9 million). No longer pay ATE insurance premiums (£2.3–3 million)	Pay 10% uplift on general damages (£6.3 to 11.4 million) Pay own costs if claim is unsuccessful (£2.3–3 million)	Cost (£1.7m to 5.5 million, with a central estimate of £3.6 million)
ATE Insurers	No longer pay defendant costs if claim is unsuccessful (£2.3 to 3 million)	Receive no ATE premium income (£2.3 to 3 million)	Assume ATE insurance no longer provided

13. The Government's cost-benefit analysis was hotly disputed by claimant lawyers and victims' representatives. Ian McFall of Thompsons Solicitors said:

The underlying assumptions in the cost-benefit analysis are unreliable, because it is simply too soon to tell what the likely effects of LASPO will be. I believe that, once LASPO has been given adequate time to bed in, the likely effect on mesothelioma claims will be that the success fee deducted from mesothelioma claimants' compensation will exceed the 10% uplift in general damages, and that most mesothelioma claimants, properly advised, would take out after-the-event insurance so that the net effect, or the likely net effect, of LASPO on mesothelioma claims would be to leave claimants significantly worse off. Ultimately, the cost-benefit analysis is an exercise in premature conjecture, because insufficient time has yet to elapse to assess what the likely effects will be.²²

²¹ *Reforming mesothelioma claims: The Government response to consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales*, Ministry of Justice, 6 March 2014, Annex B, para 1.4.

²² Q 2

14. The Asbestos Victims Support Groups Forum UK expressed concern that post-LASPO it could be “open house” for solicitors:

solicitors may charge 100% of basic costs, capped at 25% of General Damages. The mid-point between mean and median General Damages is £72,000. NIESR estimate average legal base costs to be about £20,000. At average base costs, solicitors could charge a success fee of 25% of £72,000 which is £18,000, i.e. 91% of their base costs.”²³

Ian McFall made a similar point in a different way when he told us:

There are a lot of personal injury practices on the high street under a huge degree of pressure, and there is great uncertainty about how LASPO and the Jackson reforms will impact on their business models. I feel sure that some of those small to medium-sized firms struggling for survival will look to take the maximum success fees, ultimately to the disadvantage of claimants, simply to protect the fragile edifice of their business models.²⁴

15. The ABI, on the other hand, agreed with the Government that the 10% uplift in general damages would more than offset claimants’ inability to recover success fees. Their own research produced a very similar figure to the Government’s on the average level of success fee in mesothelioma cases: £4,905.²⁵ The ABI argued that this average amount, reflecting the fact that for asbestos-related diseases the maximum success fee is set at 27.5% of costs, was too high in any event, for two main reasons: it was set in relation to all asbestos-related diseases, although the risks of failure for claimants in mesothelioma cases were lower than for asbestosis and asbestos-induced lung cancer, and the Mesothelioma Act 2014 had significantly reduced the risks in bringing a mesothelioma claim. With about 90% of mesothelioma claims being successful, according to the Compensation Recovery Unit’s (CRU’s) figures cited in the Government’s cost-benefit analysis, the ABI said that 11% of costs at most would be an appropriate level for a success fee.²⁶

16. Much hinges on the reliability of the CRU’s 90% success rate figure for mesothelioma claims. On this question, as on many others in this inquiry, we were confronted by a stark and vehement conflict of evidence and opinion. Doug Jewell of the AVSGF UK said the CRU figure did not take account of cases which were dropped before they got to court,²⁷ and Ian McFall supported him by claiming that the CRU figure was a “statistical fallacy”²⁸: he said the success rate in mesothelioma cases “in aggregate” was “in the region of 50%”.²⁹ But Lord Faulks defended the 90% figure:

²³ Asbestos Victims Support Groups Forum UK (MSC0008)

²⁴ Q 7

²⁵ Association of British Insurers (MSC0016). The NIESR research cited in the Government’s cost-benefit analysis gives a mean success fee of £4,800.

²⁶ *Ibid*, paras 5 and 6.

²⁷ Q 6

²⁸ Q 7

²⁹ Q 18

We think that the 90% success rate seems to be right because they have to be, as a matter of law, registered with the Compensation Recovery Unit. Of course, there may be a few cases that people turn down at an early stage for one reason or another in this field as in any other field, but, no, I was not convinced about the 50% and I was not satisfied the 90% was wrong, from what I had seen.³⁰

17. Nick Pargeter of defendant lawyers Berrymans Lace Mawer LLP proposed that an exercise should be undertaken to look at the risk of failure of mesothelioma claims, following the model of a consultation undertaken in 2005 in relation to all asbestos-related claims, including those which failed at the pre-claim stage, which led to the setting of the current maximum success fee of 27.5%. He argued that this would avoid claimants having to worry about negotiating a success fee with solicitors.³¹

18. Another feature of the Government's cost-benefit analysis which came under challenge was the assumption that claimants would no longer feel the need to take out ATE insurance because of the introduction of QOCS which protects them from liability to meet defendants' costs. The NIESR statistics cited in the cost-benefit analysis give the mean cost of ATE premiums as £2,500. There does remain a risk for claimants under Part 36 of the Civil Procedure Rules, which is not covered under QOCS, if a claimant does not accept a reasonable offer to settle. But insurers argued that the Part 36 risk was a minimal one and no higher than in non-mesothelioma cases.³²

19. We asked witnesses if there was relevant evidence about this from the way the ATE market had developed in relation to personal injury claims already subject to the LASPO provisions, but there was general caution about drawing definitive conclusions at this early stage. Derek Adamson of defendant lawyers DWF LLP said

ATE cover, if needed, is needed for a very limited range of liability for costs, and the costs should not be anything like the costs prior to the introduction of LASPO.³³

Ian McFall of Thompsons Solicitors took a contrary view, arguing that most mesothelioma claimants, if properly advised, should continue to take out ATE insurance in the future.³⁴ Lord Faulks said the ATE market:

is still in existence and it is covering various things. I don't think I can give a very clear view as to how it is doing overall and how it is responding, but those who felt that the market would disappear have been wrong.³⁵

³⁰ Q 65

³¹ Q 36

³² See e.g. AXA Liabilities Managers (MSC0013)

³³ Q 31

³⁴ Q 2

³⁵ Q 63

20. Assessment of the impact of the LASPO reforms on mesothelioma claimants will encompass a range of factors—emotional, psychological, moral, political—which can never be wholly resolved through financial remedies. We were heartened that the evidence we took in this inquiry demonstrated that this was understood by stakeholders on both sides of the argument. Nevertheless the financial impact on mesothelioma sufferers is a key issue, the reliability of the Government's cost-benefit analysis is central to any assessment of that impact, and it is clear that the Government's figures are viewed with suspicion and concern. It is striking that representatives of mesothelioma claimants reject the Government's contention that the reforms will result in a net financial benefit to claimants.

21. *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.*

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4 The section 48 review

22. Section 48 of LASPO says that sections 44 and 46 of the Act may not be brought into force in relation to claims for damages in diffuse mesothelioma cases “until the Lord Chancellor has—

- i) carried out a review of the likely effect of those sections in relation to those proceedings, and
- ii) published a report of the conclusions of the review.”³⁶

The Lord Chancellor’s review has been criticised for failing to comply with these statutory requirements. It has also been criticised on other grounds. In particular, amongst the main criticisms it has been argued that:

- the review was premature, and it will not be possible to evaluate the LASPO reforms until they have been in operation for a much longer period, probably three to five years after implementation—we note that Lord Justice Jackson himself, in a paper submitted to the Civil Justice Council conference on 21 March 2014, said it was too early to reach “balanced conclusions” on the overall package of reforms to civil litigation costs;³⁷
- the question posed in the consultation paper (see paragraph 7 above) was predicated on the adoption of consultation proposals which were subsequently abandoned;
- the process followed did not comply with section 48 of LASPO as the Government announced its decision, in December 2013, before publication of a report.

A number of witnesses argued that it was not even clear to them that the consultation formed part of a section 48 review.³⁸

23. For its part, in its consultation response the Government said that it was clear from the opening paragraph of section 4 of the consultation document, headed “Review under section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012”, that the consultation was part of the review.³⁹ This line was supported by insurers and defendant lawyers, who were unanimous that the review had been conducted properly and in accordance with requirements.

24. It is not our function to adjudicate on whether the Government’s review complies with the statutory requirements laid down in section 48 of LASPO. Our judgment on the

³⁶ Section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

³⁷ Lord Justice Jackson’s paper for the Civil Justice Council conference on 21 March 2014, paragraph 10.8.

³⁸ See e.g. Qq 22–23

³⁹ *Reforming mesothelioma claims: The Government response to consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales*, Ministry of Justice, 6 March 2014, paragraph 107.

process of the review is a political one. In that context Lord Faulks's comments on the background to the review are highly relevant. He explained:

The Government always intended to bring in these changes, which included all personal injury claims not excluding mesothelioma. That was their intention. During the passage of the Bill a great deal of amendments were put forward to Part 1 of the Bill, which was legal aid, and very few to Part 2. The focus in Part 2 was on mesothelioma, which, of course, is a very emotive issue. There were arguments that this was a special case. I have dealt with that in answer to various questions about why it was not a special case, and that was, indeed, what the Ministers said in the Commons and the Lords. Facing various defeats, in due course Lord McNally in the House of Lords, and in the House of Commons I think it was Jonathan Djanogly decided to consult in the way that they did. Nothing from the consultation caused any rethink by the Government, but the consultation took place. There was nothing in any of the responses that would come as a surprise to the Government, and nothing, I would suggest, had it been available to Sir Rupert Jackson, that would have caused him to think differently. Of course, that was what the Ministers agreed—to have the consultation. They set up the consultation and the Government responded to the consultation.⁴⁰

25. The evidence which we have received leads us to the following conclusions on the section 48 review:

- the Government always intended to bring in the changes to personal injury claims, including for mesothelioma, and was not reconciled to the exemption of mesothelioma claims from the provisions of Part 2 of LASPO; it therefore decided to hold a section 48 review as swiftly as it could in order to reverse a concession which it was forced to make in Parliament during the passage of the Bill;
- as a result of this decision on timing, much relevant information which could have informed the review was not available to respondents—it is unsatisfactory, for example that respondents did not have the benefit of being able to comment on the Government's cost-benefit analysis;
- the shoehorning of part of the section 48 review into a wider consultation was a maladroit way of proceeding: partly as a consequence the sole question in the consultation document which respondents were asked in relation to the section 48 review sought views in the light of certain changes to the claims process which were not proceeded with.

5 The Heads of Agreement between the Government and insurers

26. One further serious allegation was made in evidence to us about the Government's consultation. Ian McFall alleged that the consultation was in effect a mechanism to implement a policy objective which had been "agreed behind closed doors between the Government and the insurance industry".⁴¹ We asked James Dalton of the ABI whether in discussions between the Government and insurers there had been a link between the payment by insurers of a levy to fund the Diffuse Mesothelioma Payment Scheme and the lifting of the LASPO exemption. He said that the "legal framework for mesothelioma claimants in particular was discussed".⁴² In his evidence he also pointed out:

If this is some sort of dirty deal that the insurance industry did with the Government, those things have not been implemented, and we want them to be implemented. The Government consulted on them, and they were not implemented.⁴³

27. Following the oral evidence session, Mr Dalton wrote to us on 22 May 2014 appending a document entitled "Mesothelioma Heads of Agreement dated 13 July 2012: Her Majesty's Government and the Association of British Insurers".⁴⁴ This document described the proposals contained within it as an "indivisible package", which included a number of action points for delivery by the industry, and a number for delivery by the Government, including a "commitment to conduct the review of the applicability of provisions of the Legal Aid, Sentencing and Punishment of Offenders Act to mesothelioma claims as soon as appropriate and in line with the overall intention of the Mesothelioma package".⁴⁵ Mr Dalton said that there was no commitment from the Government to introduce any of the reforms to the process, and that, given the Ministry did not proceed with certain proposals in its consultation, "it cannot be argued, as some members of the Select Committee sought to do during the hearing, that the ABI and the insurance industry was provided any favourable treatment in relation to the consultation paper."⁴⁶

28. Asked about the Government's understanding of the status of this Heads of Agreement document, Lord Faulks conceded that the document was "somewhat unusual" and amplified his position as follows:

We have the Government agreeing to deliver certain things and the industry agreeing to deliver certain things. In fact, the Government did not deliver quite a few of the things in the bullet points in that section, so it is a slightly

⁴¹ Q 22

⁴² Q 59

⁴³ Q 27

⁴⁴ Association of British Insurers (MSC0028)

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

unusual agreement in the context of an agreement as one would normally regard it.⁴⁷

29. It is undeniably the case that although elements of this Heads of Agreement have been delivered by both sides, including the LASPO section 48 review, it has proved to be in no sense a binding contract: the “indivisible package” which it set out has proved to be eminently divisible. It might be better understood to be a memorandum of understanding or intent drawn up between the insurance industry and the Government. It is not however the precise status of the document, legal or otherwise, which is of primary concern to us. Nor are we surprised that the Government was discussing these matters in private with the insurance industry. **We are concerned that the Government has not been transparent or open, either with us or with other interested parties, about the fact that its overall policy in relation to mesothelioma has been shaped in accordance with an “agreement”, however informal and elastic, which it had reached with employers’ liability insurers.** It is hard to see how a balanced and informed public debate can take place when a prior agreement has been reached between two of the principal parties to that debate, and that agreement is not known to others participating in the debate, including victims.

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6 The mesothelioma claims process: other issues

Third Party (Rights Against Insurers) Act 2010

30. A rare issue on which there appeared to be widespread agreement amongst our witnesses was the desirability of bringing into force the Third Party (Rights Against Insurers) Act 2010. This would enable a claim to be issued against an insurer without a judgment first having had to be obtained against an insolvent insured party. In his 2 July 2014 letter Lord Faulks referred us to the Written Statement made in April 2013 by the then Minister Helen Grant MP to the effect that the scope of the Act had to be extended by further primary legislation to include certain insolvency situations before it could be brought into force.⁴⁸ It appears that no private Member successful in the ballot for private Member' bills in Session 2014–15 has adopted the Government's proposed bill, and Lord Faulks was unable to provide us with a copy of the text of such a bill as it had not been finalised. *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.*

Production of medical records and employment histories

31. There was disagreement between witnesses on whether mesothelioma cases were inherently more or less complicated than analogous non-mesothelioma personal injury cases. There was, however, agreement that unnecessary delay was particularly distressing in relation to mesothelioma claims. The aggressive nature of the disease means that many sufferers die or reach the advanced stages of the disease before their claims are paid out. According to the NIESR, around 50% of mesothelioma claims take over 12 months to settle from when a claim is first lodged.⁴⁹

32. Claimant lawyers said to us that hold-ups in production of medical records and HM Revenue and Customs employment histories were a major cause of frustration and delay in the process of making claims. On the latter point, Lord Faulks advised us that:

we have secured cross-Government clearance to add an amendment to the Deregulation Bill to enable Revenue & Customs to restore their previous practice of disclosing work records of deceased victims of mesothelioma to their dependants and personal representatives without the need for a court order, which had sometimes held things up.⁵⁰

⁴⁸ HC Deb 25 April 2013 col 71WS

⁴⁹ *Study into average civil compensation in mesothelioma cases*, Department for Work and Pensions, January 2014, Table 3.10.

⁵⁰ Q 73. The provision is in clause 67 of the Deregulation Bill as sent to the House of Lords.

This amendment relates solely to claimants seeking compensation under the Diffuse Mesothelioma Payments Scheme. In relation to the production of medical records, Lord Faulks appeared receptive to a proposal that further steps should be taken, perhaps through a Ministerial letter, to draw to the attention of acute trusts the need for urgency in dealing with mesothelioma cases.⁵¹ **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.**

Non-occupational claims

33. The Joint Union Asbestos Committee, in their written evidence, drew attention to the position of people who did not contract asbestos-related diseases from exposure in an occupational setting, such as those who may have been exposed at their schools when pupils.⁵² Such cases, in which public liability insurance rather than employer's liability insurance is involved, are in the minority, but they may present additional difficulties in identifying the source of exposure. Helen Buczynsky of Unison told us that:

We have seen the number of teachers exposed to asbestos diseases go up by 300% in 20 years, and the number of pupil claims coming through is obviously increasing as well. These are much more difficult claims, because they are to do with low exposure, and it is much more difficult to trace the history of that exposure and to gather witness evidence.⁵³

Lord Faulks told us:

We do not think, although these are concerning, that this justifies any change to our approach in relation to mesothelioma claims generally. The fact is that, in all sorts of fields of personal injury litigation, there are some cases which are a little more problematic than others, and these are obviously potentially slightly more difficult than the more traditional mesothelioma claims.⁵⁴

It is essential that the distinctive features of non-occupational mesothelioma cases are taken into account in policy formulation, and their incidence is monitored. We accept, however, that these cases do not present sufficiently different problems to occupationally-related mesothelioma cases to justify different arrangements applying to them.

⁵¹ Q 82

⁵² Joint Union Asbestos Committee (MSC0012)

⁵³ Q 17

⁵⁴ Q 76

Further work

34. The Government's decision not to proceed with proposals for a Mesothelioma Pre-Action Protocol, a Mesothelioma Secure Claims Gateway and a fixed recoverable costs regime does not mean that beneficial change which could expedite the mesothelioma claims process is stymied. A "big tent" meeting held at the Ministry of Justice on 30 June 2014 brought together practitioners from all sides of the debate to explore ways in which the pre-action process could be streamlined and improved, as well as potential refinements of the Royal Courts of Justice specialist fast-track procedure. A member of this Committee attended the meeting as an observer.

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7 Conclusion

35. We set ourselves the task of examining whether the Government's decision to apply sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to mesothelioma claims was appropriate. The claims process for mesothelioma must take account of the principal factor which distinguishes the disease from others: the short life span which can be expected by those diagnosed with the invariably fatal disease. To a large extent, as we heard, legislation and court practices already seek to accommodate this feature of mesothelioma. The question is whether a further specific distinction should continue to be drawn in relation to the system of funding claims.

36. All who are involved in formulating policy on mesothelioma claims, and in handling them within the legal process, are acutely aware of the profoundly distressing circumstances in which mesothelioma sufferers find themselves, in most cases as a result of the negligence of a past employer or employers. That shared awareness plainly does not translate into practical consensus on the best mechanisms to apply to ensure that claims are dealt with swiftly and fairly. Indeed, we cannot recall any subject into which we have inquired on which there has been such a pronounced binary division of opinion and approach.

37. This is also an issue on which it is not easy to disentangle questions of process and substance. There are telling criticisms which can be levelled at the way the Government has handled this matter, some of which we have spelt out in this Report. The existence of an undisclosed "agreement" between the Government and the insurance industry is not conducive to the creation of trust among victims' representatives, claimant lawyers and others that an opposing viewpoint will be heard. The haste with which the Government embarked on a review and consultation, and the way in which it presented them, left those who favoured retention of the LASPO exemption for mesothelioma potentially disadvantaged in terms of marshalling a persuasive case.

38. **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.**

Formal Minutes

Tuesday 15 July 2015

Sir Alan Beith, in the Chair

Steve Brine	Mr Elfyn Llwyd
Mr Robert Buckland	Andy McDonald
Rehman Chishti	John McDonnell
Jeremy Corbyn	

Andy McDonald declared an interest as a former member of Thompsons Solicitors.

Draft Report (*Mesothelioma Claims*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 38 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Written evidence was reported to the House for publication.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 16 July at 9.15am.]

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Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/mesothelioma-claims/>

Tuesday 13 May 2014

Question number

Doug Jewell, Vice-Chair, Asbestos Victims Support Groups Forum UK,
Helen Buczynsky, Legal Officer, Unison, **Ian McFall**, Thompsons Solicitors,
and **Adrian Budgen**, Partner and Head of Workplace Illness, Irwin Mitchell
LLP

Q 1-25

James Dalton, Head of Motor and Liability Insurance, Association of British
Insurers, **Mike Klaiber**, UK Disease Claims Manager, Zurich Insurance PLC,
Nick Pargeter, Partner, Berrymans Lace Mawer, LLP, and **Derek Adamson**,
Partner, DWF LLP

Q 26-59

Tuesday 17 June 2014

Lord Faulks, Minister of State for Civil Justice and Legal Policy, Ministry of
Justice

Q 60-102

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Published written evidence

The following written evidence was received and can be viewed on the Committee's inquiry web page at www.parliament.uk/justicecttee. INQ numbers are generated by the evidence processing system and so may not be complete.

- 1 Asbestos Victims Support Groups Forum UK (MSC0008)
- 2 Association of British Insurers (MSC0016)
- 3 Association of Personal Injury Lawyers (MSC0001)
- 4 Aviva (MSC0004)
- 5 Axa Liabilities Managers (MSC0013)
- 6 BLM (MSC0009)
- 7 Clyde & Co LLP (MSC0014)
- 8 Dac Beachcroft LLP (MSC0017)
- 9 DWF LLP (MSC0019)
- 10 Irwin Mitchell LLP (MSC0003)
- 11 Joint Union Asbestos Committee (MSC0012)
- 12 Kennedys Solicitors (MSC0024)
- 13 Keoghs (MSC0020)
- 14 Mesothelioma UK (MSC0015)
- 15 Ministry of Justice (MSC0027)
- 16 Ministry of Justice (MSC0029)
- 17 Pattinson & Brewer (MSC0011)
- 18 Plexus Law (MSC0010)
- 19 RSA Group (MSC0002)
- 20 Slater & Gordon (MSC0021)
- 21 Supplementary written evidence from James Dalton, Head of Motor and Liability, Association of British Insurers (MSC0028)
- 22 Law Society (MSC0026)
- 23 Thompsons Solicitors (MSC0007)
- 24 TUC (MSC0005)
- 25 UCATT (MSC0023)
- 26 Unison (MSC0018)
- 27 Unite the Union (MSC0022)
- 28 Zurich Insurance PLC (MSC0006)

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List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the Committee's website at www.parliament.uk/justicecommittee.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681-I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518-I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519-I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901

Session 2012–13

First Report	Post-legislative scrutiny of the Freedom of Information Act 2000	HC 96-I (Cm 8505)
Second Report	The budget and structure of the Ministry of Justice	HC 97-I (Cm 8433)
Third Report	The Committee's opinion on the European Union Data Protection framework proposals	HC 572 (Cm 8530)
Fourth Report	Pre-legislative scrutiny of the Children and Families Bill	HC 739 (Cm 8540)
Fifth Report	Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 927
Sixth Report	Interpreting and translation services and the Applied Language Solutions contract	HC 645 (Cm 8600)
Seventh Report	Youth Justice	HC 339 (Cm 8615)
Eighth Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 965 (HC 1119)
Ninth Report	The functions, powers and resources of the Information Commissioner	HC 962 (HC 560, Session 2013–14)

First Special Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013: Government Response to the Committee's Eighth Report of Session 2012–13	HC 1119
Session 2013–14		
First Report	Sexual Offences Guidelines: Consultation	HC 93
Second Report	Women offenders: after the Corston Report	HC 92 (Cm 8279)
Third Report	Transforming Legal Aid: evidence taken by the Committee	HC 91
Fourth Report	Environmental Offences Guideline: Consultation	HC 604
Fifth Report	Older prisoners	HC 89 (Cm 8739)
Sixth Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007	HC 639 (HC 918)
Seventh Report	Appointment of HM Chief Inspector of Probation	HC 640
Eighth Report	Ministry of Justice measures in the JHA block opt-out	HC 605 (HC 972)
Ninth Report	Fraud, Bribery and Money Laundering Guideline: Consultation	HC 804
Tenth Report	Crown Dependencies: developments since 2010	HC 726
Eleventh Report	Appointment of the Chair of the Office for Legal Complaints	HC 916
Twelfth Report	Crime reduction policies: a co-ordinated approach? Interim report on the Government's Transforming Rehabilitation programme	HC 1004
Thirteenth Report	Serious Fraud Office Supplementary Estimate 2013–14	HC 1005
Fourteenth Report	First Joint Report from the European Scrutiny, Home Affairs and Justice Committees of Session 2013–14: The Government's response to the Committees' Reports on the 2014 block opt-out decision	HC 1177
First Special Report	The functions, powers and resources of the Information Commissioner: Government Response to the Committee's Ninth Report of Session 2012–13	HC 560
Second Special Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007: Government Response to the Committee's Sixth Report of Session 2013–14	HC 918
Third Special Report	Ministry of Justice measures in the JHA block-opt: Government Response to the Committee's Eighth Report of Session 2013–14	HC 972
Session 2014–15		
First Report	Crime reduction policies: a co-ordinated approach?	HC 307
Second Report	Theft Offences Guideline: Consultation	HC 554