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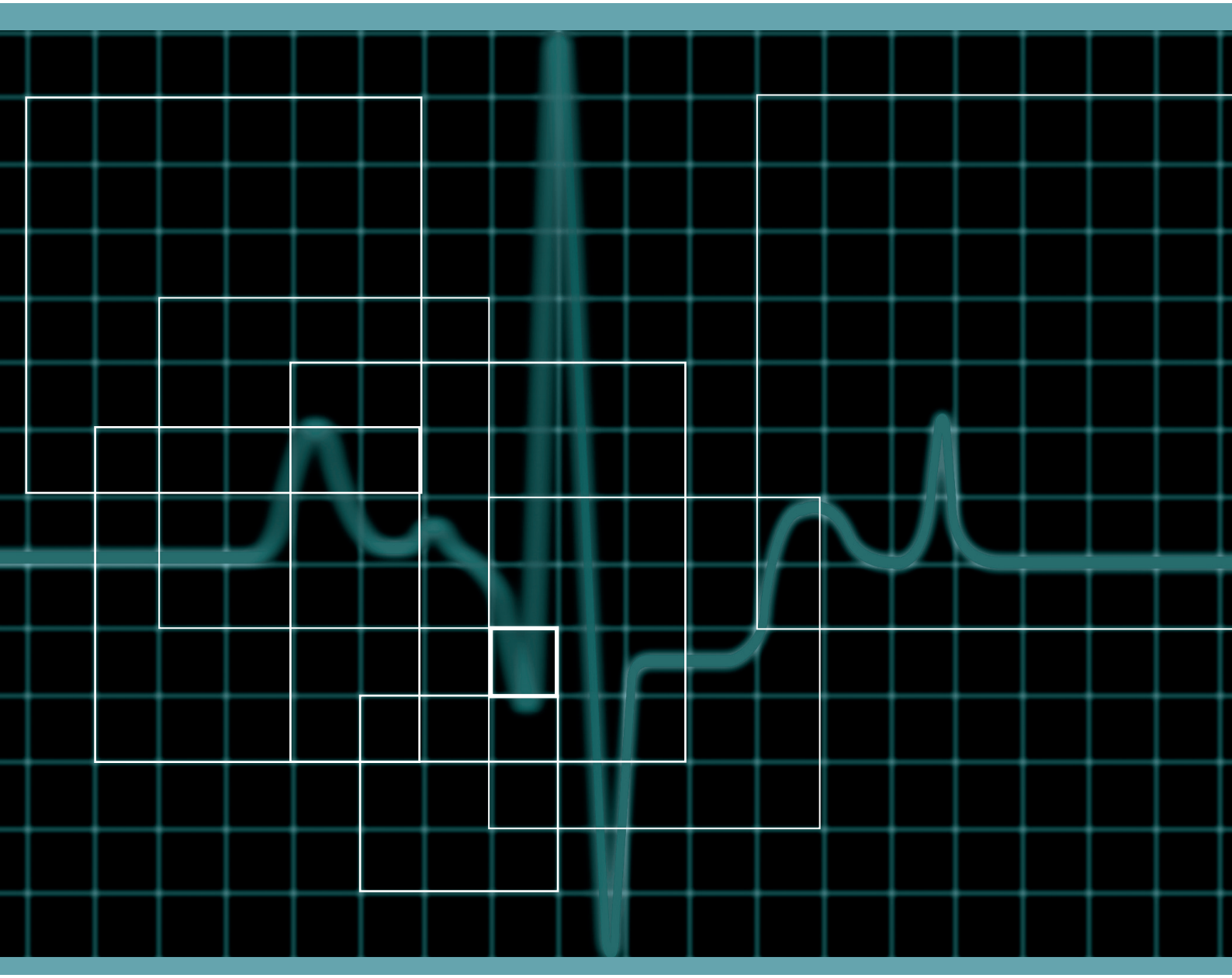
FFW Response

to the consultation on mesothelioma claims



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About Us

Field Fisher Waterhouse LLP has been acting for mesothelioma sufferers and their families for perhaps longer than any other UK law firm. For over 30 years we have been at the forefront of mesothelioma litigation. Over this period we have helped 2,000 claimants, sufferers and their families, to recover more than **£200 Million** in compensation for asbestos-related diseases.

We were involved in the **Fairchild** litigation in the House of Lords in 2001 which established the right of Claimants in multi-Defendant actions to sue one Defendant for the entirety of their loss.

We acted for the Claimant in **Gunner v Syndicate 992** which applied the **Fairchild** decision to insurance contracts in mesothelioma claims.

We worked closely with Senior Master Whitaker when he set up the **Mesothelioma Fast Track** in the Royal Courts of Justice in 2003. This, together with the Mesothelioma Practice Direction, enables mesothelioma sufferers to expedite their claims, obtain early judgments and interim compensation payments, and to obtain an early trial date if that is what the client wishes.

For many years we have campaigned for the establishment of an Employers' Liability Insurance Bureau to ensure funds are available to meet mesothelioma and other disease claims when the employer had no insurer or when insurance records have been lost or destroyed.

The core of our work is in mesothelioma claims. Our work includes complex and high value mesothelioma claims, often with an international element. We are highly regarded by our peers, by counsel, by the legal directories and by our opponents' representatives.

Our three partners who focus on this area, Peter Williams, Andrew Morgan, and Caroline Pinfold have a combined experience of over 70 years in dealing exclusively with mesothelioma and asbestos claims. We are proud of dealing with cases quickly, with the minimum of fuss and disruption to our clients.

The Chambers Directory places us in the **top tier** of solicitors dealing with industrial disease claims. Legal 500 has said we are **"Head and shoulders above the rest in terms of skills, experience and quality"** and this year, 2013, Legal 500 says **"there is none better in the field of asbestos litigation".**

We bring a unique level of experience and insight in acting for Claimants suffering from mesothelioma.

The Consultation Paper

General Comments

These proposals touch on and affect individual citizens whose lives and livelihoods are being lost as a result of culpable asbestos exposure. A decent society acts to provide mesothelioma sufferers with justice, fair treatment and dignity. Instead these proposals put our clients at the beck and call of insurance companies: rather than placing the mesothelioma sufferer at the centre of the process they relegate him to the sidelines; they show disdain and contempt for the very people who should be the focus of our collective attention.

But just as a mesothelioma sufferer, like any citizen, has the right to bring his claim before the court, so too does the defendant have the right to defend that claim. The Defendant is entitled to argue that there is no liability, and frequently does so. The Defendant can also dispute the value of the claim. That can and does cause substantial delay, and costs for both sides. Only the insurers, acting for Defendants, can elect to do this. It is disingenuous for insurers to complain about delay and cost when they are the principle architects.

These proposals will not speed up the straightforward claims at which they are aimed.

They are not aimed at the more complex contested claims which experience the greatest delays and incur the greatest costs.

They deprive the client of the right to choose whether and when to conclude his claim.

Speeding up the process?

The MOJ's Executives Summary suggests that mesothelioma claims are resolved too slowly.

The figures on page 14 of the consultation document suggest that 21% of non-litigated claims are settled within six months (31% within a further six months) and 19% of litigated claims are settled within six months (30% within a further six months). So 52% and 49% respectively are concluded within 1 year of a claim being notified to a defendant

These figures relate to **straight forward mesothelioma claims** brought by sufferers who worked in power stations or worked in roles where there is clear evidence of exposure during a period when the employers knew it was dangerous and should have taken precautions and where there is an obvious Defendant with assets to pay or a clear insurance history.

Straightforward claims **are already** dealt with quickly by experienced Claimant solicitors when insurers (and their representatives) adopt the correct mind set. Following disclosure of witness, medical and quantum evidence such cases are usually resolved within four weeks.

If we cannot reach agreement in that period then the speedy Mesothelioma Fast Track ("MFT") is available in the RCJ. Within weeks of issuing proceedings the Defendants must show the court why judgment should not be entered. Much more often than not judgment is entered for the Claimant by the Senior Master or his fellow Masters and an interim payment of £50,000 ordered. This avoids the substantial costs and delay that would be involved in a liability trial. The MFT **already limits costs and reduces delay**.

We doubt that insurers would settle claims as quickly in non-litigated cases as they currently do were it not for the Claimant's recourse to the MFT. In effect the presence of **the MFT encourages insurers** to adopt the pro-active mind set and to respond to claims promptly (whether to admit or deny).

The MFT is a flexible system that is followed by experienced solicitors by both sides and that is supervised by the Senior Master and two dedicated Masters. Professionals on both sides have developed a collaborative system which **already significantly reduces the costs and delays** inherent in making any claim.

The MFT has the flexibility to evolve and develop as needs and experience dictate because it is not governed by a fixed set of rules or statutory provisions. As a result Senior Master Whitaker was at an early stage able to introduce the Mesothelioma Practice Direction. This **already places pre-action obligations** on the Claimant (in particular) and his advisors to disclose statements and other evidence.

The proposals seek to replace a rich and flexible dialogue between the judiciary, the Claimants and the Defendants with a rigid layer of bureaucratic red tape that is designed by one side only, and only for a specific sub-set of simple claims.

Given the success of the MFT and the support that it has from the judiciary and the representatives of the parties that use it, it is not surprising that only defendant and insurance organizations are asking for the Government to undertake reform. The Government itself (as a major employer in its own right, and the defendant for MOD and shipbuilding claims etc.) is not a neutral disinterested party

We are deeply concerned that mesothelioma sufferers' gains that have been hard won over the last 10 years will be lost if the Government introduces any reform along the lines of these proposals.

Difficult claims – causes of delay

The MPAM is directed at straightforward cases where liability is not likely to be in dispute and where the value of the claim is modest and the complexity low. It cannot address the 50% of claims that are not concluded within 1 year.

Such claims can face many difficulties:

- Tracing insurance or other assets is the largest single cause of delay for our clients. Non-specialists would not take on a claim where there is no clear paymaster, meaning such claims are "resolved" (i.e. closed) very swiftly. Specialist firms, though, will expend great efforts tracing directors, parent companies, group companies, and interrogating Companies House and other historic records, searching for evidence that will identify an insurer or other paymaster.
- The Client's recollection of events which happened over 40 years previously can be poor.
- Witnesses have to be traced and interviewed to test the case on liability. This can take some months.
- Many Clients, being elderly, suffer from co-morbidities which require further medical evidence regarding life expectancy.
- Many Clients have difficulty giving instructions or understanding advice. There are often questions as to the client's mental capacity. Those questions have to be investigated, whatever the answer.
- There can be difficulties regarding quantum. For instance, we act for many Claimants who are self-employed. To prove the loss of income that they will suffer in the future we need to get extensive documentary evidence about their business and then get a report from a forensic accountant.
- There are often dependents who lack capacity such as minors, widows or even parents who are under mental disability. Terms of settlement require approval by the Court. Additional procedures, designed to protect the vulnerable, must be invoked, at additional cost and occasioning some additional work and therefore time.
- There are very often disputes about the level of insurance cover, dates of cover and especially whether the Claimant was employed or self-employed.
- It is often the widow who first instructs us, so that there is no opportunity to obtain any statement or other evidence from the main witness. Obtaining similar evidence from other sources can take considerable time.
- Even in cases that are straightforward on liability it can take many months before an insurer is identified who accepts the risk, even before they begin considering liability.
- The insurers can and do mount spirited defences on liability, on causation and on other issues. They are often successful (**Fairchild** at First instance and Court of Appeal, **Barker v St Gobain** at House of Lords, **Abramson v Filtrona, Williams v Birmingham University**) but not always (**Fairchild** at House of Lords, **Sienkiewicz** at Supreme Court, **The Trigger Litigation** at Supreme Court). These cases are important for determining fundamental legal questions affecting mesothelioma claims, disease litigation, insurance principles and personal injury claims more generally. Whilst each such case is costly and can be slow to conclude, the effect of each decision is to reduce uncertainty in a wide raft of cases, so that the overall effect is to reduce the cost and settlement time or time to trial in subsequent cases. These proposals do not engage in the public interest of judicial pronouncement upon such contested legal principles.

The consultation paper suggests that most mesothelioma claims are "straightforward". This is not the case. Claims often involve complex issues of liability, quantum and evidence and require specialist solicitors. These cases cannot be treated under a portal or protocol as if they were simple whiplash claims. We agree that some mesothelioma claims are less complex than others, but it is only the specialist solicitor, with a wealth of experience, who can conduct these often complex cases efficiently and effectively.

Tracing insurers

At the beginning of Section 2 the consultation document quotes an unpublished survey carried out by the British Lung Foundation stating "Fifty percent of responders reported a delay in the claims process, the main reason being problems tracing the employer ..."

The Mesothelioma Act is to be introduced to provide payments to eligible people (or their dependents) that were exposed to asbestos by their employer, provided they can prove fault.

The consultation document implies that the Act will resolve this problem. But we are sceptical. In addition, the proposed scheme does not provide full levels of compensation, so there will still be a need for investigation and for litigation.

The Government says that perhaps 50% of claims currently take more than one year to resolve. We believe that the delayed cases are probably all claims where the insurers have taken issue with liability or where quantum is complex. The proposed MPAM does not even purport to concern itself with such claims and even within its own terms of reference will not speed up such claims.

Procedural Perceptions

The Government, relying on untrustworthy evidence, says that other problems will be rectified by a dedicated pre-action protocol for mesothelioma (MPAP) and a central secure mesothelioma claims gateway (SMCG). These are apparently intended to rectify "perceptions that [the legal process for obtaining compensation for mesothelioma] presents unnecessary hurdles". They say that mesothelioma sufferers and their dependents have pointed to some uncertainty over what is involved in the process and what information is required for a claim.

But there is no analysis of the way in which mesothelioma claims are currently conducted under the Pre Action Protocol for Disease and Illness (DPAP) and the Mesothelioma Practice Direction (Practice Direction 3D) and the Civil Procedure Rules and the Mesothelioma Fast Track under the Management of Senior Master Whitaker.

The Government says that the current procedures for redress are themselves the cause of the reported "deep distress and unhappiness". But the specialist lawyers (on **both** sides) who conduct mesothelioma cases see that the current flexible procedures have revolutionised the way in which these cases are progressed and resolved: the Government should put more resources into strengthening the benefits of the MFT rather than throwing it out with the bathwater.

Summary

Much effort has been put into improving the lot of mesothelioma victims since the decision of the House of Lords in Fairchild in 2002.

The Asbestos Sub-Committee of the All Party Parliamentary Group on Safety and Health has spearheaded a number of changes to speed up the award of state benefits through the introduction of forms DS1500 and BI100PN; it campaigned successfully for the introduction of the 2008 Mesothelioma Scheme; the Government of the day amended the CRU Regulations to recoup from defendants payments that had been made under the Pneumoconiosis etc. (Workers Compensation) Act 1979 (ending a subsidy to EL insurers); it introduced S.3 Compensation Act 2006 to protect mesothelioma claimants' rights to full compensation; many cases have been fought to protect these and other rights, with some successes and some failures.

Perhaps most importantly the Senior Master has introduced the Mesothelioma Fast Track and the Mesothelioma Practice Direction to weed out "straw man" defences and put pressure on insurers, employers and their representatives to address issues early and to commit resources to mesothelioma claims. This has changed the behaviour of some insurers, at least in some cases, and has led to a co-operative and knowledgeable group of solicitors, barristers and Masters who can and do run mesothelioma claims effectively and efficiently.

Against that background the Government's proposals are bitterly disappointing. In practical terms these proposals will undo a great deal of the work that has been done, on both sides, to support mesothelioma claimants. These proposals strip mesothelioma sufferers of their unimpeded right to issue court proceedings: no other class of litigant suffers such ignominy.

It does this Government no credit to place such proposals before the public for consultation. They must think again.

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Consultation Questions:

Question 1: **What in your view are the benefits and disadvantages of the current DPAP for resolving mesothelioma claims quickly and fairly?**

In our experience the pre-action protocol for disease and illness (MPAP) is not followed slavishly.

Instead it is flexible and allows the Claimant to start proceedings quickly if necessary at the same time as conducting meaningful negotiations with Defendants in what can be difficult cases.

In straightforward cases, claims are notified to Defendants and/or their insurers almost immediately after first seeing the client. Medical, witness and quantum evidence along with a Schedule of Loss are then sent to the Defendant, usually within a six to eight week period depending on how long it takes to access the medical records. Then the Defendants have a choice. The can admit liability and pay an interim payment to avoid the issue of proceedings or they can do nothing (the latter is often the case).

This flexibility allows the claimant to issue proceedings if insurers and defendants do not deal with their claim in a timely manner so that (in straightforward cases) he gets an interim payment, even where there is a minor breach of the DPAP or MPD (for instance, if up to date pension details have not been received).

Proceedings are then issued in the MFT within weeks of evidence being sent to the Defendants. A Case Management Conference is arranged within a further three or four weeks. The Defendants have to admit liability or tell the Master why the case should be defended. The Master then gives a strict timetable either to an assessment on quantum or a further hearing or directions to a trial on liability or split trial.

In straightforward cases this process means that:

- In about 20% of cases the Defendants and insurers will make early full value offers, so avoiding the issue of proceedings
- If the Defendants do not make early full value offers, or if they deny liability, the Court compels them to explain themselves (by email or telephone) and the Court gives swift dates for disposing of the matter.
- The Claimant's Solicitor makes the running. It is the Claimant's Solicitor who gathers the evidence and issues proceedings if there is no response or no adequate response from the Defendants.

Question 2: **How far do you think that a new dedicated MPAP would address the problem and meet the objectives set out above?**

The new MPAP will **not speed up straightforward claims, it will slow them down.**

- Under these proposals the Defendants do not have to make a decision about liability until almost **three months after** disclosure of **all** the Claimant's evidence. All the Claimant can do during this period is sit on his hands. He is denied access to the Court. He cannot issue proceedings. He cannot force the Defendants to make an admission or an interim payment within that time.
- If the Defendant does admit liability and make an interim payment within three months it has a further two months to make offers in settlement. Therefore in straightforward cases, where the protocol is "working", the Claimant is prevented from issuing proceedings at Court until almost **five months after** he has disclosed his evidence.
- Without recourse to the Court and the MFT, we doubt that many insurers will follow the protocol. At present nothing compels the insurer to admit liability and make early full value offers so much as the fact that the Claimant, like any citizen, has the right to issue proceedings and obtain an early hearing date. At that hearing the Defendants must "show cause" and the court will set an aggressive timetable to trial.
- The proposed MPAP removes the threat of Court action provided the Defendants reply to the "information letter" within 21 days. The present reality is that we can settle a case and even receive agreed damages and costs within that period. The MPAM is simply an invitation to inaction.
- These proposals allow insurers to delay longer than they do at present.
- These proposals take the control of proceedings out of the Claimant's hands and put control into the hands of the insurers – **this is no better than asking the fox to guard the chickens.**
- Where the Claimant has limited life expectancy (that is, in a living mesothelioma claim) the proposals amount to a denial of right of access to the courts in breach of the Government's Human Rights obligations under the European Convention on Human Rights.It is a bizarre proposal that seeks to support people suffering from mesothelioma by stripping them of their human and civil rights.

Question 3: **What are your detailed views on the ABI's proposed MPAP at Annex B? What further issues might it address? Do you think the criteria for entering the MPAP are the appropriate ones? If not, what criteria would you suggest and why? In what circumstances, if any, should a case fall out of the MPAP?**

If the insurer is known to be on risk then it is unnecessary to have a formal two stage process. The purpose of the 'intimation letter' is to ensure that the defendant has opened up a correspondence file and that an insurer who can respond to the claim has been identified even before full details of the claim are available.

In practice, information is almost always provided to the insurers and defendants as soon as it is available, so sending an early letter of claim to the employer which complies with the current DPAP is better practice.

3.1 It is best practice to send the letter of claim to an active defendant. If the relevant insurer is known a copy can be sent simultaneously.

3.1.2 It would delay rather than speed up the process if the letter of claim was required to include the name and address of each employer/third party since it may not be possible to trace all of them at the outset.

3.1.3 In cases where there have been numerous employers it is impractical for a terminally ill and usually elderly mesothelioma sufferer to be expected to remember the details of his occupational history accurately. The chronology of employment will often not be known with certainty before the HMRC has supplied the Employment History Schedule.

4.1 Where the case is not straightforward the Claimant cannot always provide an accurate employment and asbestos history exposure statement certified by a statement of truth within 21 days.

It is in any event inappropriate to provide for unilateral disclosure of witness evidence by the Claimant pre-proceedings. That process significantly prejudices the Claimant and allows the Defendant to tailor its evidence.

4.4 It is rarely the case that medical records can be obtained within 21 days.

4.4 It is likely to take several weeks if not months to obtain the documentation proposed.

The information relating to quantum is not required to enable an investigation into liability and it is an investigation into liability leading to an early admission or detailed denial that is essential in speeding up the process.

Cases should fall out of the MPAP if within four weeks the Defendants raise queries or require further information regarding liability, quantum or medical evidence. Judge-led supervision of mesothelioma cases works. Insurance industry time limits will not.

5. There is no reason in straightforward cases for insurers to delay more than four weeks from receipt of medical, quantum and witness evidence before admitting liability and making a full value offer.

If the case is not straightforward then, as at present, it should be for the Court to decide appropriate directions leading to an assessment hearing or trial.

Question 4: **To what extent do you think the proposed MPAP will result in reduced legal costs in mesothelioma claims?**

The Claimant is entitled to know where he stands on liability. Only then can he make decisions about the speed at which the claim can proceed, whether he should seek to settle in his lifetime or decide to let his widow pursue a larger sum after he has gone. So the MPAM should be directed not at settling the case as soon as possible but at determining liability as soon as possible.

It is wrong to say that issuing proceedings in the MFT results in high costs. Issue of a Claim Form costs less than £1,800. Case Management Conferences are held on the telephone and usually last no longer than 20 to 30 minutes. But the MFT forces Defendants to look closely at these claims.

The proposed MPAP does not presuppose that there will be a co-ordinating lead insurer; it requires that the claim will need to comply with a timetable separately in respect of each and every defendant. This would delay the process and increase costs very considerably. It would lead to the duplication of effort in proceedings against up to 20 Defendants (or sometimes even more).

The currently widespread practice of dealing with a lead insurer on behalf of all defendants on a "pay and be paid" basis would be lost

Insurers are concerned with their own legal costs as well as with the Claimant's costs, since at present they must instruct solicitors to defend claims once proceedings are issued. This is an important factor in the thinking of the ABI and the insurers.

Insurers have already begun to address this internal cost by forming close relations with Defendant Solicitor firms and by applying for ABS status which will allow them to conduct litigation on behalf of their insureds without instructing solicitors at all

Costs will increase if the MPAM is imposed in its current form

Question 5: **To what extent do you think the SMCG will help achieve the Government's objective of ensuring claims are settled quickly and fairly?**

Not at all

There is no value to the Claimant in the SMCG

The only value to insurers of an SMCG is that it would give them the ability to share information about claims. They would wish to do this so as to make Part 20 claims against other potential tortfeasors or so as to defend claims more aggressively.

The SMCG is no more than a means by which the insurance industry can gather evidence about claims, and can share Claimant witness statements and information about awards amongst themselves. It is not in the interests of Claimants to cooperate with SMCG and so their solicitors would have professional difficulty doing so.

Further, it seems to us that Claimant solicitors will not be able to provide SMCG with any personal data, including sensitive personal data, without breaching their obligations under the Data Protection Act.

Question 6: **How should the SMCG work (if at all) with the MPAP and procedure in traced mesothelioma cases generally, and what features should the SMCG have in order to complement those procedures effectively and efficiently?**

The SMCG simply cannot work. It is dead in the water.

Question 7: **What do you see as the risks of a SMCG and what safeguards might be required?**

The SMCG as currently envisaged cannot meet Data Protection Act concerns. Further, by definition it is not in the Claimant's interests to submit to SMCG.

Question 8: **Do you agree that a fixed recoverable costs regime should be introduced to support a dedicated MPAP? If so should this apply primarily to claimant costs? Should any measures also apply to defendant costs? If so what form might they take?**

We oppose the proposed MPAM for the reasons stated above.

We do not believe the MPAM will achieve the Government's stated policy of achieving speedier closure of claims at reduced cost.

We believe the MPAM will likely encourage unregulated and non-specialist claims managers to run these complex and important cases to a cut price settlement so that the Claimant acts in haste and his family repents at leisure. These proposals do not put the Claimant at the centre of the process but instead tends to drive quality and choice out of the system in a way that, taken as a whole, does a real disserve to mesothelioma sufferers.

If MPAM is introduced then we do not support a fixed costs regime for MPAM claims.

Fixed costs in MPAM claims will inevitably drive behaviour towards litigation rather than away from it, because MPAM claims will offer lower margins in the more difficult cases where skillful and experienced representation is essential.

There will come a point in every case where a law firm cannot undertake the work that is necessary to prove the case. The consequence is that Claimant lawyers will avoid cases that appear complex or costly, where there are issues as to liability, causation or jurisdiction, for instance, or where quantum is not straightforward. That might well be one of the intended (sic) consequences of these proposals – to reduce the number of challenging test cases that insurers must defend.

The effect on the market will be to encourage unregulated profiteers to take a fixed percentage cut of a reduced award under a damages based agreement (DBA) - the client will lose the benefit of professional advice on the claim itself and on related issues (e.g. advice on state benefits, wills and probate, tax, marriage etc.). This advice is given routinely at present, and for free; he will lose the protection that those acting for him must act with "reasonable care and skill"; the client will lose the benefit of Professional Indemnity insurance; instead the representatives will do no more than is required by the MPAM – that is a recipe for secondary litigation for professional negligence.

If there is a real desire to offer the claimant a proper resolution process without the need to issue proceedings then that process must at least be cost neutral or it must be structured so as to make settlement prior to litigation more attractive than settlement after litigation. We remind the Government that solicitors' remuneration is already regulated by the Senior Court Costs Office ("SCCO") and the SRA. We will not here descend into detail but a low friction costs model that does not favour litigation should be readily attainable.

It is the Defendants more than the Claimants who have control over the likely course and costs of a case: we see a stark difference between some solicitors/ insurers and others in their behaviour - those who bend over backwards to concede liability and offer proper damages as against those who fight tooth and nail before conceding only days before trial, and who then fight again on quantum.

From our perspective we see insurers exhibiting different behaviours and the consequences as to cost and delay are obvious.

We opposed fixed costs because there must be some link between the work that needs to be done and the cost of doing it. But there is no clear and strict association (as the Government recognises) between costs and quantum. A Fixed Fee system cannot achieve this. A Fixed Fee with a tiered element likewise would not deliver - the variables are too many and varied to allow any statistically meaningful model to be built.

There are numerous relevant factors. They are set out below under Question 10. It is clear that the mere value of the claim has limited effect upon the work that needs to be done on the claim and therefore on the Claimant's legal costs.

There will always be cases where liability is a genuine issue for which a trial by a judge is the proper remedy. In those cases the MPAM is wholly irrelevant.

There will always be cases where quantum is genuinely complex and there is genuinely at stake a sum so large that trial by a judge is the proper remedy. Again, in those cases the MPAM is wholly irrelevant.

Question 9: **Which proposed design of fixed recoverable costs structure do you support? Please explain your answer.**

We do not agree that FRC are appropriate.

If FRC are introduced we do not see that a "part-tiered" system adds anything of value

Question 10: **What are the key drivers of legal costs, both fixed and variable costs, and how strong are these drivers?**

See above

The main drivers are:

- the urgency of the case (there is a clear difference as to what needs to be done and how quickly between Claimants who are deceased are those who are still alive)
- number of lay witnesses
- whether a fatal or living case
- whether the client is retired or still working
- whether when exposed he was self-employed or employed
- in which industry he was exposed
- whether there is a clear or simply provisional diagnosis
- whether any intervening medical conditions need investigation
- whether there are any unusual care need or outgoings
- whether there is any subrogated claim (e.g. for medical insurance)
- whether there are jurisdictional issues - does client live in Scotland or overseas?
- whether the defendant or insurers are "known" to the solicitor
- the track record of claims of this kind against this employer?
- (importantly) which individual is likely to be dealing with it for the other side

Question 11: **Do you have any views on what the level of fixed recoverable costs should be, in relation to your favoured design? Please explain your answer.**

No.

As the Government recognizes, the variation between the work involved in proving a case is so wide that no one level would be right. That is a major difference between mesothelioma claims and e.g. simple RTAs, where the amount of work needed to complete a case falls within a narrow band.

If the fee is set too low then no cases will be taken on through the MPAP. If the fee is set too high then the objective of managing and controlling costs - an objective we share - is missed.

The only rational approach is to provide claimants costs commensurate with the work done. The costs of barristers and solicitors are already regulated by SCCO so no additional bureaucracy or administration is required. The success of the current approach is illustrated by the fact that so few litigated cases proceed to a detailed Assessment hearing.

There is a difficulty in awarding costs for unregulated representatives. One answer is to restrict awards of costs to properly regulated businesses i.e. solicitors, barristers and ABSs. Unprofessional businesses including those regulated by the MOJ would still be able to offer services on a DBA approach and may find some traction in the market. It is not clear how that would be in the public interest.

Question 12: **Do you agree that the fixed recoverable costs regime should apply only to cases which fall under the MPAP?**

Fixed fees in non MPAP cases would simply bring an end to complex cases, high cost (including high value) cases or risky cases.

If fixed costs are introduced then it is inevitable that some lawyers will eat into their client's damages to protect their businesses, and that is objectionable.

We have little faith in market mechanisms to ensure mesothelioma sufferers would find and engage solicitors who make no such deduction.

Conversely we are unconvinced that the best quality representation is necessarily to be provided by those who cut their margins to the bone.

There are steps that could be taken to reduce frictional costs and to encourage behaviour from defendants that leads to a reduction in claimant's costs and their own costs. Fixed fees would not have that effect.

Question 13: **To what extent do you think the reforms apply to small and micro businesses**

Mesothelioma litigation is by and large conducted by a relatively small group of specialist solicitors who do little other work, but some non-specialist solicitors do conduct such work.

Mesothelioma practices tend to take the form of small groups operating independently or within larger firms.

So there are a number of notable sole practitioners who operate alone or with small support teams; there are small firms of less than (say) 6 partners who do little other then mesothelioma; there are large firms who have mesothelioma teams spread across a number of offices.

It is clear that some businesses are "small" or "micro" businesses by any definition. It is clear that other businesses can be viewed as if they are "small" or "micro" businesses operating within a larger firm. Their fortunes might best be considered as if they were independent "small" or "micro" businesses.

These reforms will apply fully to such businesses

It is obvious for the reasons set out above that such businesses will be adversely affected by these proposals

Question 14: **To what extent do you think the reforms might generate differential impacts (both benefits and costs) for small and micro businesses? How might any differential be mitigated?**

It seems clear that these proposals will affect smaller businesses more severely than larger businesses. We cannot offer any mitigating proposals.

Question 15: **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 described above, and the Mesothelioma Bill?**

Because of the exceptional nature of mesothelioma claims the government excluded such claims from the provisions of sections 44 and 46 of LASPO pending consultation on the likely effects of the removal of recoverability of success fees form the defendants and on the cap on the level of success fees.

In the Parliamentary debates in 2012 it was envisaged that a "comprehensive review" would be conducted before sections 44 and 46 were implemented. This consultation does not address the continuing need to protect mesothelioma victims from the adverse effects of LASPO: a terminally ill mesothelioma patient or his widow should not have to shop around for a solicitor offering the best deal on any deductions from his damages. Nor can he be certain that the solicitor who makes the least deduction is the one who can recover maximum damages or recover damages in the shortest time.

The proposals at the heart of this consultation together with the bringing into force of sections 44 and 46 of the LASPO Act 2012 would ensure that mesothelioma sufferers have less expert representation, recover less damages, pay deductions to their own solicitors and suffer longer periods before conclusion.

Mesothelioma and lung cancer claims are unique amongst personal injury claims in that they are complex and relatively costly; they are of the utmost severity, as they involve the death of the injured person, but they are usually of modest value i.e. less than £250,000 (though claims above £500,000 are not uncommon).

According to Professors Fenn and Rickman a proper reflection of the risk of a basket of cases warrants a success fee of 27.5% on base costs. Although there have been developments since that research was undertaken that make the basket of cases more risky, a success fee of 27.5% is in the right area overall. Of course, VAT must be added.

The limit on success fees to 25% of past losses and general damages will generally limit the success fee to less than £15,000 to £20,000.

The Court of Appeal in **Simmons v Castle** recognised that cases funded under sections 44-46 of LASPO warrant an uplift on

general damages of 10%, to compensate for the extra cost of litigation in the new regime.

But the **Simmons v Castle** uplift is only 10% of general damages i.e. about £7-8,000 in a typical case. In the typical case, therefore, the success fee that reflects the overall risk of a basket of cases is double the **Simmons v Castle** uplift. It is highly likely that many claimant solicitors will charge the full success fees to the client so that mesothelioma claimants are materially worse off. There will always be some doubt, too, that any negotiated settlement (as opposed to a court award) includes the Simmons v Castle uplift.

The mesothelioma sufferer in addition will have to fund a non-recoverable ATE premium out of his damages. The cost of the success fee and the ATE premium would outweigh the additional 10% "uplift" in damages.

In low value PI claims it has been accepted by this government that the client should have "skin in the game". With the introduction of sections 44-46 we have seen that in such cases solicitors have routinely chosen to deduct the full 25% success fee from their clients. Although we disagree with this arrangement, the government has accepted that this as a practical and reasonable arrangement, shifting the burden of risk away from insurers to claimants.

In the high end cases, where damages routinely exceed £1 million, we have seen the same pattern. Here it appears to some to be acceptable for claimants to pay success fees out of their damages because the success fee is such a small proportion of the whole. In a serious RTA for instance, the success fee might be 12.5% of costs of, say, £40,000 i.e.£5,000. That is a relatively insignificant amount when compared with damages of £1million, a sum that falls within the "negotiating margin".

In mesothelioma claim the success fee is not "insignificant" in the way that it is for serious RTA claims. Nor is it politically acceptable, in our view, for mesothelioma victims to bear this substantial deduction from their damages in the way that has evolved in low value PI claims. For these reasons mesothelioma claims should not be brought into the ambit of sections 44-46 LASPO. We add that lung cancer claims should also be excluded, and for the same reasons.

If recoverablity of success fee is limited or constrained in the manner that is proposed it will have a chilling effect on the conduct of important complex and risky claims, of the kind that are likely to progress to the Court of Appeal or Supreme Court.

At present such cases are funded by firms of solicitors. They rely on the successful cases covering the losses of unsuccessful cases. Unsuccessful cases tend to cost more than successful cases because they tend to conclude at trial or on appeal whereas successful cases conclude much earlier. Solicitors need to recover a success fee that is commensurate with the risk and the cost. At present a success fee of up to 100% (i.e. recovering double the hourly rate) allows solicitors to run test case litigation, though not without substantial risk to the viability of their business.

If that risk is to be borne by claimants (rather than the Defendants as at present) then the sums just do not add up: the cost of pursuing a case to trial, and certainly to appeal, can approach or sometimes exceed the compensation in a single case. But when the issues at stake affect hundreds of other cases (e.g. The Trigger Litigation) such a strategy is warranted.

Under the new arrangements such a case would be impossible to run: deducting the success fee in full would leave the claimant with very little of their damages but limiting the deduction would destroy the economies of the case, so that the client would find no solicitor to act for him.

Across the market the proposals would lead to a deduction of success fees and insurance premiums from damages in mesothelioma claims, leaving such claimants significantly worse off than at present. In addition solicitors would become increasingly risk averse so that fewer cases would be brought that test and develop the law in this important area. A proportion of cases that are risky but winnable will simply not be brought at all, leaving fewer mesothelioma claimants with full compensation, precisely the reverse of the government's stated intention.