

The Review of the mesothelioma exemption from paying legal costs Section 48 Legal Aid Sentencing and Prosecution of Offenders Act 2012

MPs Briefing: Why the Section 48 Review is Fatally Flawed

The Mesothelioma Exemption and S 48 LASPO 2012

The House of Lords insisted on an amendment to Part 2 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), exempting asbestos victims from paying the costs of success fees and After the Event insurance (ATE) associated with Conditional Fee Agreements (CFAs) reforms. Peers were not persuaded that CFA reforms lifting damages for pain and suffering (General Damages) by 10% would compensate for the deduction of 25% of those same damages in success fees. Nor were they persuaded that protection from the other side's costs through Qualified One Way Cost Shifting would suffice because the costs of disbursements still fell to claimants and they would still have to take out ATE insurance to cover this cost and the potential penalty for adverse claimant behaviour in a case (the 'qualification').

More importantly, Peers would not countenance dying mesothelioma victims enduring the stress of shopping around for the best legal deal on costs to lessen the loss of compensation.

On the House of Lords insistence, Government reluctantly conceded an exemption for mesothelioma sufferers from paying legal costs pending a review and a report to the Lord Chancellor. Section 48 of LASPO prevents the bringing into force Section 44 (success fees) and Section 46 (After the Event Insurance) until a review has been carried out into the effect of these sections on mesothelioma claims and a report on the conclusions of the review has been published.

The S 48 Review

The Government incorporated the S 48 Review into the Part 4 of the consultation, *Reforming Mesothelioma Claims*, which closed on 2 October 2013.

In Part 2 of the consultation, the Government recommended two reforms put forward by the ABI: a mesothelioma pre-action protocol and fixed costs for mesothelioma claims.

In Part 4 of the consultation dealing with the S 48 Review, the Government recommended bringing S 44 and 46 into force in light of: (i) the consultation reforms (ii) the LASPO CFA reforms (iii) the Mesothelioma Bill. Respondents to the consultation were asked the following question:

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?

The asbestos victim claimant community opposed the consultation reforms, which would slow down mesothelioma claims rather than expedite them, and the Forum complained that the Mesothelioma Bill, a fund levied on insurers, has nothing whatsoever to do with the S 48 Review, which is solely concerned with civil claims.

The Government response to S 48 Review

On the 4 December 2013, the Government issued a ministerial statement abandoning the consultation reforms (mesothelioma pre-action protocol and fixed costs) in the face of overwhelming opposition from the claimant community.

But, the Government insisted that Sections 44 and 46 would be brought into force for mesothelioma sufferers saying: *“The Government does not believe that the case has been made for mesothelioma cases to continue to be treated differently.....”*

Why the Review is fatally flawed

The review is fatally flawed for the following reasons.

Firstly, the Government has abandoned the consultation reforms which were relevant to Sections 44 and 46 and, in the latest response to the Forum complaint, the Government has conceded that the Mesothelioma Bill has nothing to do with the effects of Sections 44 and 46, but said that it was always Government’s intention to “synchronise” the S 48 Review and the Mesothelioma Bill.

This leaves the LASPO CFA reforms, lifting damages for pain and suffering by 10% and qualified one way cost shifting, as the only ground for imposing legal costs on mesothelioma sufferers. This brings us full circle to the House of Lords’ rejection of the LASPO CFA reforms as the basis on which to impose legal costs on mesothelioma sufferers. The Government is restating its original argument as the only basis upon which to review Sections 44 and 46.

Secondly, the S 48 Review did not ask respondents to make the case for the mesothelioma exemption. The S 48 review asked if respondents agreed with Government that the exemption should be lifted in light of the consultation reforms, plus the CFA reforms and the Mesothelioma Bill.

Had the Government asked for the case to be made, the recent Legal Ombudsman’s report on no-win-no-fee agreements would have been most pertinent. The report states that CFA agreements are not simple to understand, contain unclear terms and conditions, that there is evidence of some lawyers failing to make clear the financial risks of CFA agreements and try to pass on the risk to customers. This is precisely the situation the Lords feared and would not tolerate dying mesothelioma sufferers facing.

Conclusion

As it stands, the S 48 review is not based on a review of the effects of Sections 44 and 46 on mesothelioma claims. It is based on a reiteration of the Government’s intention to apply the CFA LASPO reforms to mesothelioma claims. That is not a review.

We are asking MPs to ensure that the Government abandons the current so-called S 48 Review and instigates a proper and thorough review of the effects of Sections 44 and 46 on mesothelioma claims.

Furthermore, we are calling on MPs to ensure that the outcome of a proper S 48 Review is brought before Parliament and not introduced via a Commencement Order, which is Government’s intention.