Mesothelioma Bill [HL]

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Report

Relevant documents: 1st, 2nd and 6th Reports from the Delegated Powers Committee.

3.39 pm

Clause 1 : Power to establish the scheme

Amendment 1

Moved by ***Lord Freud***

1: Clause 1, page 1, line 3, after "may" insert "by regulations"

The Parliamentary Under-Secretary of State, Department for Work and Pensions (Lord Freud): My Lords, I thank noble Lords once again for their commitment to this Bill and for their amendments. Before dealing with this group of government amendments, I will make some general remarks and explain some of the work that has gone on since we last met in Committee.

In Committee, many noble Lords expressed concern at the close working with the insurance industry that this Bill has necessitated. The noble Baroness, Lady Masham, expressed particular concern that the appointment of a scheme administrator was already a done deal with insurers. I offer my assurance that this is not the case and that we intend to run an open competition for the contract of scheme administrator, which will be chosen through the open tender process according to our commercial criteria. I hope this reassures noble Lords.

Turning to the issue of poor record-keeping practice in the industry, I think we all agree that we must work not only to support those who have fallen foul of poor record-keeping and tracing in the insurance industry but to correct it and stop it happening in the future. The creation of the Employers' Liability Tracing Office—ELTO—was a step in the right direction, but there are still insurers that are not tracing as they should be. Since we last met, I have had a very positive meeting with the Financial Conduct Authority. I have since received a very informative letter from the FCA. I found the following extract particularly positive:

"We are further strengthening our existing rules with new requirements for firms to have effective processes for conducting tracing searches for historical policies upon receipt of a request from a consumer or a consumer's representative. These new rules will become effective from 4 December 2013. We therefore expect any firms that do not currently have adequate tracing mechanisms in place to develop them in advance of that date".

In brief, if an insurer is expelled from ELTO for not tracing as it should or the FCA receives other intelligence suggesting poor or non-existent tracing, this will serve as an immediate red flag to the FCA. It will then put into place its enforcement action, which can include a supervision visit from the FCA.

One further step that the FCA is taking, which was detailed in the letter, gave me particular confidence that the appropriate mechanisms are in place to ensure compliance. The letter states:

"We also look to gather market intelligence to assist us in taking a risk-based view. We are exploring the possibility of a memorandum of understanding with ELTO that, subject to the legalities of this, would allow the FCA to access the data from ELTO's own auditing process. This would allow us to concentrate our supervision resources on higher-risk categories of firms".

I hope that noble Lords who have been following this so intently can agree that this represents very positive progress.
Another issue that we discussed in Committee was the establishment of an oversight committee. We welcome this proposal and have been exploring with stakeholders how it might operate. As ever, there is a range of options that we need to consider, and we continue to do so. We would prefer a non-legislative solution if possible but we are aware that noble Lords may wish to see something on a more statutory footing. I ask noble Lords to consider the issues associated with trying to establish a new non-departmental public body as we discuss oversight further.
3.45 pm
Another issue that rightly received significant attention in Committee was that of the rate of payments to be made. Perhaps it will help if I outline how we have arrived at where we are on this matter. Insurers have made it clear that paying an amount equal to 3% of employer's liability gross written premiums is affordable, to the extent that they should not then need to pass these costs on to employers. The costs of the scheme in the first few years will be higher because all eligible people diagnosed between 25 July 2012 and the start of the scheme will be paid alongside people diagnosed at the time— contemporaneously—so we have introduced a four-year smoothing period to ease that initial spike in cost.
The ABI's analysts advised it that paying people 70% of average civil compensation equates to the 3% of employer's liability gross written premiums which they maintain it can absorb, whereas our analysis shows that the 70% tariff equates to less than 3% of written premiums. This is because the ABI's analysts and our own forecasts on numbers of applicants coming to the scheme also differ, and we have been unable to reconcile these discrepancies. I should mention at this point that when we refer to a percentage of average civil damages, the figures we are using are those published by the National Institute of Economic and Social Research. We have already published an ad hoc statistical report, setting these figures out.
In Committee, the Government proposed that the scheme should start paying people at the rate of 70% of average civil compensation. I stated previously that our intention was that the figures obtained from this equation will be uprated annually, in line with CPI. In addition, I have agreed that the amounts of civil compensation in mesothelioma cases must be current if we are expressing scheme payments as a percentage of civil compensation. I suggested that a review of the data every five years would enable meaningful trends to appear, given the relatively low volume of such cases.

We will certainly be reviewing the level of civil compensation in mesothelioma cases on a regular basis and amending scheme payments accordingly. Nevertheless, I understand noble Lords' desire to pay people at a rate higher than 70% of civil compensation.

Following the debate in Committee, I have been in further discussions with insurers and have been able to secure an agreement to pay 75% of average civil compensation. This is more than the industry wanted to pay but, using the government analysts' figures, it halves the gap in the percentage of employer's liability gross written premiums between what was originally offered and the full 3%. I take this opportunity to thank noble Lords and to acknowledge that the pressure in this House on this matter has been a key driving force in achieving the increased rate. I know that noble Lords would like the scheme to pay even more than the 75%

we have now achieved. However, we need to be certain that the industry can afford to pay more without passing disproportionate costs on to employers. The insurance industry guaranteed to us that if we keep the levy within proportionate limits, it will not increase premiums. We would need more clarity on the numbers of applications to and costs of the scheme as a percentage of gross written premiums.

Since we last met, we have been working on a proposed review process for the scheme, which I know noble Lords will welcome. I expect to be able to present firm details of such a process when we take this Bill to the other place but, for the time being, I will outline my ideas. We intend to look at the actual number of applications and real costs once the scheme has been running for long enough to give us reliable data. As I indicated when we previously discussed increases in average compensation payments, looking at numbers too soon would not provide us with stable data, nor would it show us much by way of trends.

The initial four-year costs-smoothing period would give use an ideal opportunity to collect actual numbers and costs. We would then be able to see what the real cost of the scheme is, compared to the current expectations about the percentage of gross written premium it will take up. We would also be able to assess whether or not costs had been passed on to industry and to what extent. That would put us in much better position to carefully consider whether we have set scheme payments at the right level and how far current actuarial assumptions have been borne out in practice. We have to be prepared for the fact that the ABI's analysts may be nearer the mark here, as we are dealing with behaviours in making applications to the scheme which are not easy to predict. We also need to bear in mind that costs to insurers will eventually reduce anyway as the numbers coming to the scheme will fall as time passes and fewer people are diagnosed with mesothelioma.

To summarise, we intend that scheme payments will rise in line with CPI each year. In addition, if the level of civil compensation also changes, we need to look again at the amount of the scheme payment to see if it should be changed in line with that of civil compensation. The initial four-year costs-smoothing period gives us an ideal opportunity to collect actual numbers and costs and to look at the level of scheme payments in a much clearer light. It will also give us an opportunity

to assess any reaction by the insurance industry that there might have been over the first four-year period. These proposals show that the current level of scheme payments strikes the right balance between paying people with mesothelioma and levying an amount from insurers that will not inevitably be passed on to employers. I also trust that I have reassured noble Lords that the Government are committed to considering necessary changes when an increase is justified.

I reiterate that the Government's intention is to support eligible people suffering from this terrible disease and to start making payments as soon as humanly possible. Indeed, timing is paramount. Mesothelioma deaths are expected to peak in 2015 and we aim to have a scheme in place by April next year. I ask noble Lords to keep this in mind during today's debate. Any delays will affect the very people we are trying to help. I hope noble Lords will forgive me for taking up time on these issues but they are critical as we consider the detail of the Bill.

Lord Browne of Ladyton: If your Lordships' House will permit me to intervene, I do not intend to engage in debate with the Minister at this stage on any aspects of his commendable "pre-statement", for which I thank him. It is consistent with the attitude that he has shown to this legislation and his handling of it in the course of our

consideration. However, there is another matter which, as he knows, I have been discussing with the Bill team, which is not reflected in the proposed amendments on Report and which, therefore, will not be directly raised.
My concern is about the clarity of the drafting of Clause 2 and the interaction of parts of it. Without going into the detail of that, I have been in discussion and correspondence with the Bill team, and I am grateful to the Minister for allowing that to happen. We did not bottom-out our discussions about the fundamental issue but we revealed a number of things about the interaction between the draft rules and Clause 2. Before I came into the Chamber this afternoon, I got an e-mail saying that there was a recognised tension in relation to the issue of limitation between the draft rules and the current drafting of Clause 2. If the Minister is not in a position to say anything about this now, perhaps he will make time to say something on Report so that it will be on the record and will go to the other place to be considered.
Lord Freud: My Lords, I know that the noble Lord does not want me to go into detail, but I can commit to going on working with him on this issue, which is very technical. If we work out that something needs to be adjusted, we will have time to do it in the other place.
Lord Wigley: I express my appreciation for the increase from 70% to 75%, although a lot of us would have liked to see 100%. I would like clarification on the new matter that the noble Lord introduced with regard to the review. The mechanism for this might be introduced in another place. Will he shed some light on the means by which any changes could be implemented? Will order-making procedures be available, or will it be a matter of going back to primary legislation whenever such changes are needed in the light of developments?
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Lord Freud: My Lords, I think that how we do this will go into secondary legislation. We are well covered. If we need to make an adjustment at primary level, clearly we will have an opportunity in the other place. However, my desire here, for reasons that noble Lords will understand, is not to have ping-pong between the two Houses, because I do not want to lose the extra weeks that could be taken up. If I am wrong in saying that this does not need primary legislation, I will write to the noble Lord. However, that is my view, without checking.
I turn to Amendments 1, 3, 7, 9, 10, 14, 31 and 33.
Lord Wills: I, too, thank the Minister for the work that he has done so far on the Bill. It represents an enormous step forward, for which the House is extremely grateful. The noble Lord, Lord Wigley, raised a very important point. It is infinitely preferable not to have to resort to primary legislation in future should changes be necessary under the review process. If the Minister feels that the Bill is not adequate in giving powers to the then Secretary of State to introduce any changes by secondary legislation, will such provisions be introduced at Third Reading or in the other place?
Lord Freud: Perhaps noble Lords will indulge me and allow me to reply to that question a little later this afternoon. It is a very technical question and I will double-check that my answer was reliable. I will come back to it. We will have another chance.
If there are no further interventions, I will turn to the rather drier amendments in this group. A number of noble Lords present today tabled amendments in Committee to require the rules establishing the payment scheme to be made by statutory instrument rather than having them simply published by the Secretary of State. The amendments in this group are aligned with a recommendation of the Delegated Powers and Regulatory Reform Committee. Again, I acknowledged the concerns

behind these approaches. Today I am pleased to announce that this set of amendments aims to establish the diffuse mesothelioma payment scheme by statutory instrument rather than by publication by the Secretary of State.
Having made this change, a number of consequential amendments fall to be made to other clauses, so that previous references to “regulations” will now refer to “the scheme”. Before noble Lords suggest that I am taking a backward step by amending the Bill so that it refers to “the scheme” instead of “regulations”, I should add that the combined effect of the amendments will be that where “regulations” has been changed to “scheme”, it will mean the scheme as set up by regulations.
We have also removed the ability of the Secretary of State to amend, replace or abolish the scheme, or publish the scheme as amended from time to time, as these matters will now be dealt with in regulations—as will the definition of a “specified payment” in Clauses 2 and 3. In addition, provisions for the amount of a scheme payment, for payment amounts to be dependent on age, and for the division of scheme payments between dependants are all now to be determined in accordance with scheme regulations. The same applies to the circumstances in which a person is or is not to

be treated as able to bring an action against the relevant employer or any relevant insurer for civil damages. These will now be dealt with in scheme regulations.

Amendment 31 provides for the first regulations setting up the scheme under Clause 1 to be subject to the affirmative resolution procedure, where the regulations must be approved by a resolution of both Houses of Parliament and for subsequent regulations to be subject to the negative resolution procedure. This approach follows a recommendation from the Delegated Powers and Regulatory Reform Committee. I thank noble Lords for their well informed views when we addressed this matter. I beg to move.

4 pm

Lord Avebury: My Lords, I thought it was best to defer my thanks until after the Minister had completed his remarks on this group of amendments. I express my warm appreciation for the considerable work that he has done on the Bill, resulting in his welcome announcement this afternoon that the payments will increase from 70% to 75% for civil compensation claims. Although that falls well short of what some of us had hoped for originally, I have to say it compares with the estimated £1 billion of cost that would have been paid by the insurance industry if the employers had not gone out of business and the employers’ liability insurance policies had not been lost or, in some cases, possibly deliberately destroyed. That £1 billion is estimated by the Asbestos Victims Support Groups Forum UK as the amount that has been forgone over the years by victims, who have not been able to formulate claims for the suffering that they endured. At this stage, however, we have to be grateful and I echo the thanks expressed by others to the Minister for achieving this improvement in his discussions that he had with the insurance industry.
I should also like to take the opportunity to ask the Minister about a discrepancy in the DWP’s July 2013 analysis, which has been circulated to noble Lords. Column 6 of table 5 relates to the total amount of the levy from the start of 2010 to 1 July this year. On the assumption that that is based on 100% of average civil compensation, the figure would have been £118.9 million. The amount that individuals would have received directly from the scheme over this period, according to column 5, is £98.5 million. Adding the £20,480 estimated cost per claimant—

The Countess of Mar: My Lords, I am sorry to interrupt the noble Lord, but we are debating Amendment 1, which the noble Lord, Lord Freud, has moved. Would the noble Lord, Lord Avebury, care to address that?
Lord Avebury: I thought that this was the appropriate opportunity to raise a point about the document that has been circulated and, if nobody objects, I shall continue with my remarks, which I can assure the noble Countess will be very short. This is the only opportunity that I will have to ask this question about the discrepancy in the figures that have been circulated by DWP. As I was saying, adding the £20,480 estimated cost—
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The Countess of Mar: I am sorry, but the noble Lord is not speaking appropriately to the amendment that the noble Lord, Lord Freud, has moved. Would he address that, or would he prefer to sit down and ask his questions when we have later amendments on the subject?
Lord Avebury: If the Minister is prepared to listen to my question, we shall come to an end in a few minutes.
The Countess of Mar: This is Report stage and we should be addressing the amendments of the noble Lord, Lord Freud.
Lord Ahmad of Wimbledon: Perhaps I may clarify matters. The noble Countess is quite correct. This is Report and we should be addressing the amendment. I would ask my noble friend to make his point when we reach the relevant amendment.
Lord McKenzie of Luton: My Lords, I start by thanking the noble Lord for the amendments, which we support. Putting the scheme on a statutory basis responds to the debate that we had in Committee and to the recommendations of the Delegated Powers Committee. I thank him for that.
Perhaps I may be allowed the opportunity to pick up a few points from the noble Lord's opening statement—again, the thrust of which we are very happy with and supportive of, particularly the open competition for the scheme administrator. That is a very positive move. In addition, the improvement to the record-keeping, the progress of ELTO and the engagement of the FCA are to be welcomed. We knew the Minister's view on the oversight committee and hoped that it would be possible for him to table amendments for today. However, as that has not proved possible, we hope that there will be a commitment to do so when the Bill goes to the House of Commons.
We support the 75% as an improvement on the opening position. I hope that the noble Lord will not misinterpret subsequent amendments that we have tabled as being ungrateful for the efforts that he has made but I think that we have an obligation to pursue the matter further. The noble Lord put an important issue on the record concerning the scheme, its uprating and the review. The CPI uprating is to be welcomed, as is the review based on the practice and outcomes of the smoothing period. The key issue here, certainly after the initial—
The Countess of Mar: Again, I am sorry to interrupt the noble Lord but I wonder whether he will address Amendment 1 moved by the noble Lord, Lord Freud.
Lord McKenzie of Luton: My Lords, I have addressed it and was simply taking the opportunity to pick up a few points from the Minister's opening statement, with which I think he was trying to be helpful in setting the scene for this. I was also trying to be helpful by saying what our position is on that. It seems to me that that is my responsibility at this Dispatch Box on
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behalf of the Opposition. We have tabled an amendment, so we can pick that up in due course. The key thing for us is whether the levy rate will be reduced at the end of that four-year period or whether it can be maintained at its opening level. Obviously that will have beneficial implications for the rate of payments in due course, but perhaps we will come to that on some of our later amendments. However, I support the amendment moved by the Government.

Lord Freud: My Lords, perhaps I may quickly touch on some of those issues. The point raised by my noble friend Lord Avebury will be dealt with in the third group of amendments, but, as he shrewdly spotted, the figure of 75% comes out at £75 million of costs.

The Countess of Mar: I am sorry to interrupt the Minister but would he please address his amendments and not the bits between?

Lord Freud: I have very little to say because very few points have been raised about the amendments, but I do want to make one point. I was asked whether the review needed primary legislation and I said that it did not. I confirm that it can be done in regulations, as I was fairly sure it could.

I would not call any Member of this House ungrateful. I have genuinely always gained an awful lot from noble Lords when we go through these really complicated matters, whether in relation to the Welfare Reform Bill or the Mesothelioma Bill. In this case, in Committee I gained an awful lot from what people were telling me and I did my very best to act on that. That said, and with the intention of satisfying the noble Countess, Lady Mar, I hope that noble Lords will agree the amendment.

Amendment 1 agreed.

4.15 pm

Amendment 2

Moved by ***Lord Alton of Liverpool***

2: Clause 1, page 1, line 6, at end insert ", and

"( ) fund research into mesothelioma (through the research supplement under section (Research supplement))"

Lord Alton of Liverpool: My Lords, in moving Amendments 2, 20, 21, 22, 23 and 24, I join other noble Lords who have expressed their thanks to the noble Lord, Lord Freud, the Minister, for doing an incredibly tough job over the last year or so. It has been very well done. I am very grateful for his remarks earlier.

The Minister said that if the Bill were delayed—none of us intended to do that—it could cause further problems in due course. Nevertheless, I just hope he accepts that that is no reason for curtailing due parliamentary process in any way. Of course, it is up to the Government to decide what to do in another place. If your Lordships decide to include amendments to the Bill here, it will not be Members of another place who precipitate the ping-pong; it will be the Government.

With those words, I refer the noble Lord to the all-party support for this group of amendments, and to the letter that was sent to him and other Members of your Lordships' House, signed by some 22 Members. They include some of the leading authorities on medical research and the law and others with first-hand knowledge of a fatal disease that claims 2,400 lives annually and is predicted to kill a further 56,000 British citizens between 2014 and 2044. Dr Mick Peake, the clinical lead at the National Cancer Intelligence Network, is right when he says, "We must make

every effort not to miss this opportunity to lead the world in this area and to finally make significant inroads into this dreadful disease for patients and their families".
The amendments before your Lordships seek to impose a levy of no more than 1% to raise funds to support research into the causes and treatment of mesothelioma, and have the wholehearted support of the British Lung Foundation. I thank it, and especially my noble friends Lord Walton of Detchant and Lord Pannick, and the noble Lord, Lord Avebury, who are co-sponsors of the amendments, and noble Lords who spoke in Committee and who through constraints of time might be unable to do so again today.
At the conclusion of Committee, it was the Minister who encouragingly said:
"Well, my Lords, I feel like adding my name to the amendment".
As recently as Monday, I met the Minister again—once again, I am grateful to him and his team of officials for the time and courtesy they have unfailingly given—to see whether we could find a way for him to translate that desire into a reality. I have offered to withdraw this amendment if the Government undertake to introduce their own at Third Reading, or indeed in the other place, and that offer still stands.
Although I feel that the noble Lord has been a victim of the Whitehall curse, I want to put on the record that he has been deeply committed to ensuring more support for research. However, as he told us in Committee:
"I have hit a brick wall at every turn".
It is Parliament's job to demolish such brick walls.
Although new figures published yesterday show that the MRC has made a helpful increase in funding for mesothelioma research, the sums are still very modest and should be seen in the context of years and years of virtually no state funding. When viewed alongside the two cancers of closest mortality in the UK—myeloma and melanoma—the funds for mesothelioma still lag considerably behind. Unlike many other forms of cancer, rates of mesothelioma are still rising. The United Kingdom already has the highest mesothelioma mortality rates in the entire world, yet there is little by way of effective treatments and at present no chance of a cure.
This shocking situation was underlined by the Minister himself, who candidly told us in Committee:
"Something very odd is happening here when so little money has gone into research in this area".
In Committee he agreed that,
"There needs to be a kick-start process to get research going".—[*Official Report*, 5/6/13; col. GC250.]
That is precisely what this amendment does. It is a kick-start.
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In a letter sent by his department to all Members of your Lordships' House on Monday, the Minister reiterated his support for increased support for research, but said that, "unfortunately, the mechanism proposed is just not viable".
With the assistance of the British Lung Foundation, I took the precaution of asking Daniel Greenberg QC to draft this amendment with me. I did so not simply because he is the editor of *Craies on Legislation*, *Stroud's Judicial Dictionary*, *Jowitt's Dictionary of English Law*, *Westlaw UK Annotated Statutes* and editor-in-chief of the *Statute Law Review*, but perhaps most importantly because he was parliamentary counsel from 1991 to 2010. Clearly, he knows a thing or two about drafting legislation, and presumably the Government would not cast doubt on the viability of the reams of legislation that he drafted for them.

The Minister will forgive me but in the nearly 35 years since I entered Parliament, I have heard the phrases “not viable” or “technically defective” as the refuge of last resort whenever we run out of good arguments. If the argument for a levy lacked viability, it would cast doubt on the whole principle that underpins this Bill, which is based on the imposition of a levy.
The Minister will recall that before Committee he was briefed to oppose the amendment on the grounds that there was no precedent for hypothecation and to raise that other old bogey of “legal obstacles”, the Human Rights Act. To answer those objections, noble Lords gave the noble Lord the precedent of Section 123 of the Gambling Act 2005, Sections 24 and 27 of the Betting, Gaming and Lotteries Act 1963, the HGV Road User Levy Act 2013, and other industry levies, including the fossil fuel levy, the levy on the pig industry to eradicate Aujeszky’s disease and the Gas Levy Act 1981. As my noble and learned friend Lady Butler-Sloss and my noble friend Lord Pannick made abundantly clear, the idea that such a levy was an infringement on the Human Rights Act is, frankly, risible. Indeed, my noble friend Lord Pannick said:
“It would be quite fanciful to suggest that there is a legal reason not to support an amendment”.—[*Official Report*, 5/6/13; col. GC 247.]
None of those shadow-boxing parliamentary arguments will do. They are simply not worthy of an issue that has lethal consequences for so many of our countrymen. Why has mesothelioma research had this Cinderella status? Why does it require Parliament to put it right? Why has it for so many years received little or no state funding? In Committee, the Minister provided clues. He said that mesothelioma,

> “was an unfashionable area to go into and therefore the people who wanted to make their careers in research turned to other cancers. As a result, good-quality research proposals were not coming in and therefore the research council did not feel that it could supply funds. That is the reason and it has been the reason for decades”.—[

Official Report

, 5/6/13; col. GC 253.]

The advisers to the Minister at the DWP have written that there is no lack of necessary skills for research into asbestos-related diseases but that there are perverse incentives to tackle what are perceived as more tractable research questions or tumour types that are considered easier to study and, where possible, to build on past progress. They said that research bids that were seen as likely to fail were not being presented.
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Therefore, it is not a lack of capacity in the field that is the problem; as my noble friend Lord Kakkar outlined in Committee, many eminent researchers are interested in mesothelioma research. High-quality bids have been in short supply in the past decade precisely because leading academics knew that it was pointless putting time and effort into preparing a bid that was unlikely to succeed.

Dr Robert Rintoul, consultant respiratory physician at Papworth Hospital and chief investigator of the recently launched mesothelioma tissue bank, told me that if more funding is made available, big labs will suddenly get interested in mesothelioma, which will increase the quality of research grants. Dr John Maher, honorary consultant immunologist at King’s College Hospital, said, “As I write, we have a

clinical-grade viral vector ready for use, an optimised and patentable manufacturing process and a recently licensed GNP manufacturing facility available to generate cell products. However, there are no realistic prospects of obtaining funds to undertake such work in mesothelioma in the near future". There clearly is no question that further investment in mesothelioma research is urgently required.

We have heard from the Minister that this will peak in two years' time, but listen to this stark warning from Dr Stefan Marciniak, the honorary consultant physician at Cambridge University's Institute for Medical Research, who told me that there will be a continued increase in cases worldwide well into this century owing to the ever-increasing use of asbestos in the BRIC countries, and that carbon nanotubes share frightening similarities with asbestos-like minerals and could lead to a second wave of mesothelioma. That is why we need urgent research

I am delighted to see the Minister and his noble friend Lord Howe on the Front Bench today. The Minister will be sponsoring a reception later this month on mesothelioma research for an invited audience of some 40 people. I know that he will agree that such meetings, welcome though they are, are not enough and certainly not a substitute for statutory obligations. By themselves, such initiatives are unlikely to lead to the sea change in investment that is needed to ensure that the recent advances in mesothelioma research are sustained. If we do not seize this legislative moment, all the talk will vanish into the ether. It will be the informal approach that lacks viability, not this amendment.

As my noble friend Lord Walton of Detchant suggested in Committee, the amendment proposes that the funds be administered by a competent third party, which would have no difficulty in investing in all the different types of research that are so urgently required. We need both a statutory levy on the insurance firms and a greater effort from our public research institutions in dealing with a disease that will kill more than 2,000 people every year in the United Kingdom. It is vital that we as legislators grapple with the source of so much misery and suffering, which is the reason, after all, for the millions of pounds of compensation payments for which the Bill provides.

The amendment proposes a commendably simple approach and, crucially, has not been opposed by the insurance industry, whose representatives I met last

week. No letter has been received by Members of your Lordships' House from the industry opposing this very modest amendment.

Having listened to suggestions made in Committee by the noble Lord, Lord McKenzie, and others, we explicitly provide in the amendment for the scheme—a levy of no more than 1%—to be proportionate. The supplement reflects insurers' market share, as the main levy contained in the Bill already does.

In the face of a vicious disease that according to the Government's figures will claim the lives of some 56,000 more British citizens and the lethal nature of which we have known about since the Merewether report of 1930, it would be nothing short of a national scandal if we did not seize this rare legislative chance to offer those who have faced the blight of this horrific disease something better than what has gone before. I beg to move.

Lord Walton of Detchant: My Lords, I have been pleased to add my name to this amendment, so forcefully and ably proposed by my noble friend Lord Alton. This is an appalling and tragic disease. Although my specialty was never respiratory medicine, in the course of my professional career I saw many people suffering from

mesothelioma and recognised to the full its utterly devastating effects. Indeed, one such person was a professional colleague of mine who was a consultant neurologist. One of the disease's most unfortunate features is that, after exposure to asbestos, particularly blue asbestos, the incubation period is extraordinarily long. People sometimes do not develop the disease for many years after exposure. Indeed, I recently learnt of an 87 year-old man who had developed mesothelioma for the first time, having worked at the age of 40 as carpenter cutting up sheets of asbestos. That is one of its appalling features, and its effects are utterly distressing. It is not a localised cancer that grows in a single location where a surgeon can remove it; it is a diffuse involvement of cancerous tissue that grows over the surface of the lung, between the lung and the chest wall. It gradually begins to strangulate the lung and eventually causes respiratory failure. It is a devastating disease—I need say no more.

However, as my noble friend has said, research on this topic is extraordinarily limited. I speak as someone who had 14 years' involvement with the Medical Research Council, ending up as a member of the council for four years. At that time, we received research grant applications from a huge number of notable doctors and scientists seeking to research particular conditions.

The MRC, as part of its policy, used to identify priority areas which it saw as requiring further research effort, but it did not identify single diseases such as mesothelioma. It talked about problems of mental health, and about problems of ageing. Even the notable Cancer Research UK campaign, which has been a massive contributor to research in cancer in the broadest sense, has not identified single-disease conditions as having a particularly high priority in its programmes.

It is interesting that the British Lung Foundation and four leading insurance firms three years ago reached an agreement under which they collectively granted £1 million a year for three years to invest predominantly

in mesothelioma research. The results were impressive. New researchers from other fields who had never thought of working on mesothelioma started to take an interest. This led to the creation of Europe's first mesothelioma tissue bank, storing biological tissue and funding work to identify the genetic architecture of the disease.

My experience as a doctor, having been involved with a huge number of different charities funding research over the years, is that the existence of charities that are established to support research on single diseases has been immensely valuable and important in attracting new scientists into the field for which they have provided funds. One has to think only of the British Heart Foundation, which has given a massive impetus to work on heart disease. Without the money which the Multiple Sclerosis Society has collected over all the years, we would never have had the same effect.

In my research field of neuromuscular disease, had it not been for the work of the Muscular Dystrophy Campaign there is little doubt that we would not have reached the stage that we now have, where research on exon skipping has led to the introduction of a drug for the treatment of the most severe form of the disease. Those are massive developments, but they came about because funds had been raised by individual charities and groups specifically for research in that disease.

As my noble friend said, until this recent initiative by the British Lung Foundation, the funding for research on mesothelioma had been miniscule. Unfortunately, the funding by the BLF and others has now run out. The sole purpose of the amendment

is to persuade the Government to accept that a tiny percentage of the levy which they already lay on insurance companies for the support of patients with this condition and their families should be specifically devoted to research. That could make a massive contribution to the future of patients with mesothelioma and to the development of an effective treatment in the foreseeable future.
The Government cannot protest on the grounds of hypothecation, because the levy under Clause 13 is already hypothecated. They cannot just say that people working on mesothelioma can apply to the Medical Research Council. Of course they can, but the crucial point about the levy is that it would provide funds that will attract scientists to work on that highly intractable problem. The fact that it is intractable is not an excuse. It deserves more attention, it deserves funding, and this group of amendments is one way to make certain that that funding will be made available and that scientists will be attracted to work in this field.

4.30 pm

Lord Selsdon: My Lords, I thought that the death sentence was cancelled many years ago, but I almost seem to have heard my own death sentence now. I worked with asbestos for many years. I picked up Cape blue. Every now and then, when you get a cough in your throat, you think, “Oh, have I caught this disease”—I cannot even pronounce it—“Is there something wrong with me?”. That was during a period in industry. I came out of the Navy, where of course we had masses of asbestos protecting ships, in repairs and elsewhere. I worked with it. It was to some extent a mystical product because it was the only fire protection kit available.

I then went into industry because of the new developments. These were the new plastics, which were suddenly to replace the whole of the construction industry. I learnt about polyurethane, formaldehyde, polytetrafluoroethylene, poly this, poly that. I would work on the shop floor without a mask, because when you are young you do not have a mask, and when sent out to do roofing materials, lay asbestos cement, cutting and so on, of course we did not wear heavy boots with protective caps; one wanted to be flexible. We did not have safety ladders; we slid down the outside. When I was working on the Blyth Colliery project as a young rep up in the north, I learnt about mining diseases—silicosis and all those things that I could not pronounce.
However, that was another period of time. Now, quite suddenly—and, I think, correctly; I have been impressed by what I have heard today—out of this something has been identified. I have tremendous regard for what the noble Lord, Lord Alton, does, but it is the right thing in the wrong place. This Bill is the right one to go through, and it could have gone through years ago. As I tried to look at the figures, I suddenly realised that I am even more grateful to your Lordships’ House because 50 years ago, when I first came here, I would not have left the asbestos and the plastics world without having to be in your Lordships’ House. I changed my job and went into building and industrial research and I have learnt, over many years, an enormous amount from noble Lords and have great respect for them.
I think that my noble friend Lord Freud and his colleagues have got it right. The question that I ask is: why was this not done a long, long time ago? What is being done about all those other historic diseases that may have come from chemicals of one sort or another? As we have new research developments, those who develop a particular product never think of the future. They do not understand what smells and other things can do. I never wore a mask and now I feel that I am starting to cough a bit, but I have learnt a trick. In your Lordships’ House, when you stand up to speak,

many people need a glass of water or need to clear their throat. That may lead them to believe that they have one of these industrial diseases. However, it is strange but there is a little trick that you can do: wiggle your toes. That gets the circulation going and stops you having a dry throat and having to look to the Doorkeepers to ask for water.

I say to the noble Lord, Lord Alton, that I will help in any way that I can to raise money for a research fund and others. I think that the way to approach it is to look at those who may have had great success in property development or things of this sort. Located in their buildings—probably in almost every building in London—are likely to be unacceptable levels of asbestos. However, the levels are not unacceptable until you find it. It may be behind every board. We used to make a product called asbestolux, which was a fire-proofed, simple board used in all homes instead of plywood, which was too expensive at that particular time.

Throughout the land, from our colonies, asbestos, such as the Cape blue asbestos, is virtually everywhere. The danger is, once you try to move it and destroy it,

you create dust and some of the research has not yet managed to identify how you screen it. Perhaps your Lordships have been in a block where someone is redeveloping a flat and before you know it, in comes an enormous team of people with large fans that suck and circulate. You wonder whether that is taking out some of the micro ingredients that come with asbestos.

Obviously, you will find that in the building trade, people do not necessarily follow what are called “building regs”. Therefore, many accidents have happened with saws and so on that could have been solved. Therefore, to the noble Lord, Lord Alton, and to others, I say: let us just get on with this Bill and get it through. It can do a lot of good as it stands. Do not hold it up and I will see what we might be able to do to encourage some support anywhere else. I am grateful to your Lordships for listening to me and I feel that perhaps I will not fade away quite as early as I thought.

Lord Pannick: My Lords, I have not wiggled my toes but I have added my name to the amendment of the noble Lord, Lord Alton. In his compelling speech, the noble Lord referred to the letter that the Minister sent on Monday. In it the Minister expressed his support for increased research, but he added that,

> “unfortunately, the mechanism proposed is just not viable”.

The letter does not provide what we lawyers call further and better particulars as to why the Minister believes that the proposal is not viable; nor did the Minister throw any light whatever on this matter in Grand Committee. Indeed, in his opening remarks this afternoon the Minister very helpfully referred to a number of other matters, but he did not give any explanation in relation to this issue.

In Grand Committee, the Minister focused on a concern that research funding was the responsibility of the Department of Health, while this was a DWP-sponsored Bill. I hope that we will not hear that argument again today. As a matter of law, of course the Government are indivisible, and, as a matter of efficiency, government departments talk to each other. I am encouraged to see the noble Earl, Lord Howe, in his place today.

What other reasons, therefore, could there possibly be for the Minister to suggest that the proposal of the noble Lord, Lord Alton, is not viable? The Government must be satisfied that Clause 13 of their own Bill is viable in providing a levy. These amendments simply provide for a research supplement on this levy, which would be

clear as to those who are obliged to pay, the amount and the purpose. Nor can it be that the Minister thinks that these amendments do not reach their target. As the noble Lord, Lord Alton, mentioned, the amendments have been drafted by Daniel Greenberg, a former parliamentary counsel of distinction, who is editor of the authoritative work *Craies on Legislation*.
Nor could it sensibly be suggested by the Minister that the amendments are not legally viable because they might be the subject of some legal challenge under the Human Rights Act or the European Convention on Human Rights. The Bill contains a levy and there are many other examples of statutory levies introduced by Parliament to advance good causes. The noble Lord, Lord Alton, has given a number of examples;
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I mentioned in Grand Committee the levy on bookmakers under the Betting, Gaming and Lotteries Act 1963 for the purpose of improving horse racing in this country. If, as Ministers must believe, the levy in Clause 13 is legally viable and those other levies are legally viable, I cannot understand why the amended levy of the noble Lord, Lord Alton, is not equally viable. Any legal action to challenge an amended clause—amended in the terms of the noble Lord, Lord Alton—would be a legal action, to coin a phrase, that is not legally viable.

There is a vital need for research and research funding to combat this awful disease. To include these amendments in the legislation would encourage research. I do not accept for a moment the concern expressed by the noble Lord, Lord Selsdon, that for us to do our job and improve the Bill would somehow hold it up. There is ample time for debate on such matters if—I hope it will not be the case—the other place disagrees with us. When it comes to a choice between liability on the insurers and the Minister's concerns about viability, I am with the noble Lord, Lord Alton.
Lord Howarth of Newport: My Lords, I, like all noble Lords, want to see more research into mesothelioma, above all into ways to prevent people developing this terrible and lethal disease. Noble Lords may be aware that quite recently Russia, leading a group of another six countries —Kazakhstan, Ukraine, Kyrgyzstan, Zimbabwe, India and Vietnam—blocked a move to have white asbestos listed under the UN convention that requires member countries to decide whether or not they should risk importing that substance. I fear that asbestos-related diseases, including mesothelioma, will long remain with us; we will need research for the long term.
I am entirely sympathetic to the purposes of the noble Lord, Lord Alton, his co-signatories to the amendment and the larger number of co-signatories to the letter that they were kind enough to send to us. I congratulate the noble Lord on his dedication in this matter. However, I have some difficulties in accepting the precise proposition of the noble Lord. I have no problem about hypothecating part of the levy for the purpose of research; I accept that precedents are there in the Gambling Act, the Betting, Gaming and Lotteries Act and other measures. I would not presume to take issue with the noble Lord, Lord Pannick, on the question of viability as he has just expounded it. In Committee, I heard noble Lords who are eminent in the fields of medicine and academic research support the case made by the noble Lord, Lord Alton, and I applaud them for that.
However, there is a problem. The insurance industry has told us that it is a willing funder on the basis that the Government will fund the major part of the costs of research. The employer's liability insurers see themselves as very much the junior partner in that partnership with the state. It was probably not the case with the

gambling legislation and the other measures that have been referred to that the Government were expected to more than match the funding that the relevant industry should supply.
These amendments omit to state the implication for government funding of what they would impose on the insurance industry. I wonder why that is so. I can
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imagine that there are good reasons why the amendments do not require the state to commit itself to fund mesothelioma research specifically.

At one time I was Minister for Higher Education and Science; that experience confirmed me in my very strong belief in the arm's-length system. If we were to abandon that, it would be only a few steps to the relationship between Stalin and Lysenko. The arm's-length principle is essential for the maintenance of academic freedom and for research quality. Of course, it is legitimate for the Government to take a strategic view and, indeed, for the Department of Health and the National Institute of Health Research to set priorities and make broad allocations. As the noble Lord, Lord Walton of Detchant, told us, when he was a member of the Medical Research Council, the council identified broad priority areas, although it did not think it appropriate to identify individual diseases for which it was determined to fund research. That was because the criterion for making specific awards must be, above all, that of quality. Peer review, not Parliament or the Government, should determine who receives publicly provided funding for research. It follows from that that funding from the state cannot be guaranteed in perpetuity in any particular field of research. Ample funding has already been provided by the state for which mesothelioma researchers are eligible to bid. The employer's liability insurers have already provided funds for research and have indicated that they are willing to continue to do so. Therefore, the problem of finding money for research into mesothelioma is not a lack of money on the part of the state or a lack of money forthcoming from the insurers. The problem must be that there has been a lack of high-quality proposals for research in this field. There may have been some quite good proposals; I think that some 80% of bids to the National Institute of Health Research are unsuccessful. Such is the competition for funding from that source that only the very best receive it, so it is not only people who care very strongly about mesothelioma who are disappointed about the lack of funding in any particular field.
Are we to legislate simply to compel the employer's liability insurers to do what they are already doing and have stated that they are willing to do? If, for good reason, we are not specifying an obligation on the Government, is the Minister none the less proposing to legislate thorough these amendments to place a moral, if not a legal, obligation on the state to fund mesothelioma uniquely, notwithstanding how weak academically particular proposals might be, and notwithstanding the needs that there are for research funding in other fields?
I am left feeling that these amendments, although I completely sympathise with their intention, do not yet articulate a satisfactory position. I think that in a moment the Minister will report to us on his conversations with the noble Earl, Lord Howe, who it is very good to see here listening to this debate, but I suspect that the noble Lord, Lord Alton, ought primarily to be addressing himself to the scientists rather than to the Government.
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4.45 pm

Lord Wigley: My Lords, I support the amendment. I shall address in a moment the points made by the noble Lord, Lord Howarth, but I want to signal my support for Amendment 2 and the associated amendments, which will allow a very small percentage, some 1%, of the levy on active insurers to go towards a supplement for further research into mesothelioma. As we heard from the noble Lord, Lord Alton, a few moments ago, any way of encouraging new people to come into this area of research must be worth while, and that is something that the noble Lord, Lord Howarth, did not address in his remarks. At present the mechanisms are not generating enough research and the research that is currently being undertaken is in danger of being eroded, if not ended. I am also glad that Amendment 24 specifies that the Secretary of State must consult insurers, medical charities and research foundations before making regulations in this respect. I congratulate the noble Lord, Lord Alton, on his perseverance on the matter.

As has been mentioned, in 2011 the British Lung Foundation invested £850,000 in research into mesothelioma, and £400,000 was invested by other charities. In Committee the indications were that it did not appear that much money was coming from the Government. Now, if I understand it correctly, the Medical Research Council has found some rabbits to come out of the hat, and that is all to the good. However, more work clearly needs to be done. If we give due credence to the figures that have been quoted and requoted about the 56,000 people who are in danger of dying from this, if any progress can be made by way of research to reduce the likelihood of those people dying, that is something that we as a House have a duty to undertake. Whether or not this is the appropriate vehicle to do so, it is the vehicle that we have to hand at the moment and we should not lose this opportunity.

The agreement brokered by the British Lung Foundation has meant that over the past three years four large insurance firms have collectively invested £1 million a year into research in this area. I warmly welcome that initiative. It has seen concrete results, as has been mentioned, such as the creation of Europe's first mesothelioma tissue bank. However, that funding will soon be coming to an end and we need to ensure that the research goes on. The firms that were involved in the initial agreement have indicated that the industry as a whole should be involved in funding future research—that idea comes from them—and that a voluntary agreement would be unworkable. If we are to secure the breakthrough that we need in this area, funding must be made available for research. If that needs legislative underpinning, so be it. Perhaps the Minister can indicate that if the amendment passes, or if he finds another way to reach the same objective when the debate goes on to another place, he will consider including the possibility of a short annual statement on the amount of funding going into mesothelioma research from all sources and the progress that is being made.

Lord Lester of Herne Hill: My Lords, I greatly look forward to the Minister's reply. I just want to say one sentence. The very first thing I had to do when I came

to the Bar in 1964 was to act in relation to the Industrial Training Act 1964, which, as I recall, imposed a levy on the building industry in order to subsidise training within the industry, and it worked perfectly well.

The Lord Bishop of Norwich: My Lords, I support this group of amendments and I thank the Minister for his work, which was well illustrated at the beginning of this debate. I knew very little about mesothelioma until I saw its debilitating effects on friends, including the former Bishop of Peterborough, Ian Cundy, who some

Members may recall died in 2009. The knowledge that the cause of this cancer has been lurking in one's body for 20 years or more of active life may suggest in itself that more research into detection and treatment may prove valuable. There is nothing that can be done to rewrite someone's life history, which may include often unwitting exposure to asbestos while young, but much can be done to promote research into a disease that will kill 2,400 people in the UK this year—the equivalent of wiping out one of Norfolk's smaller market towns within 12 months. If that sort of tragedy happened it would be front page news but this passes us by too easily.

I am not sure that even now I fully understand why mesothelioma is such a Cinderella of cancer research but this amendment provides a practical way of providing a corrective. The levy proposed is practical and proportionate and it might even stimulate more high-quality researchers to think that this is a worthwhile and reliable area in which to have a sustained work programme over many years. I recognise too that it may even stimulate more voluntary contributions to such research, quite apart from what the Government may give. I also understand that it has some support within the insurance industry. Although I have no expertise in this area, from all that I have read—I am very grateful for the way in which the proposers of this amendment have circulated the House with such material—I hope the Minister will look on this proposal or something like it sympathetically.

Baroness Masham of Ilton: My Lords, I congratulate the Minister on his hard work on this Bill and I am pleased he understands what an awful condition mesothelioma is. It seems this condition has almost been written off as far as research is concerned. However, there are so many developments and advances in modern research that there should be research into all types of tragic conditions. There should always be hope. Research into one condition can often find a cure for another by chance. My noble friend Lord Alton of Liverpool explained the need for research so well. I hope your Lordships will support these amendments. It is good to see Ministers from two departments coming together. This is very hopeful. I support these amendments.

Lord Stoneham of Droxford: My Lords, I start by giving apologies from my noble friend Lord German who should be standing in my place today but is at a family funeral. I join in the praise for the two Front-Bench spokesmen for the dedication and commitment they have given to this legislation.

The amendment is worthy and I have admiration for the persistence of the noble Lord, Lord Alton. However, this is quite an easy target to win support for medical research and we have to question whether it is an effective amendment. All the evidence we have heard today suggests that it is not necessarily the lack of funding that is the problem but the lack of effective research proposals. That is what we should be addressing. If the insurance companies thought there was effective research to be supported, they would be the first to support it because it would reduce their liability. That is what we need to address. The Minister in his response should help us.

The other important thing is that this levy has been arrived at by negotiation and agreement. It is not just a statutory levy that we are putting in place because we think that it is appropriate. It has been arrived at through agreement and negotiation. Are we saying that we have to start these negotiations again as we will be putting a supplementary payment on the people who have agreed to this levy? We need to know whether this will mean a serious delay to the legislation and its implementation. The Minister should give us answers to the complications that these amendments

could cause. We are interested in getting the benefits into the hands of the families who have suffered from this disease.
We also have to ask what we are arguing over. What are the sums of money that we are arguing over? They do not seem to me to be very large. The Minister should therefore tell us—I am sure that he will in his closing remarks—what efforts the Government are going to make to meet some of the requirements for funding if we can find effective research.
This issue seems worthy and worth support and it is very easy to argue for it. But what is the reality and effect of the amendment and what sort of delay will it cause to this legislation? Those are the key issues that the House should be looking at this afternoon.
Lord Deben: My Lords, the noble Lord, Lord Howarth, made an important contribution to this discussion. As a former Minister, I understand precisely the difficulties in which Ministers find themselves, particularly in the medical area, because there are many diseases that are extremely distressing and which, when specifically singled out, can cause all of us to feel that we ought to do something about it. There are few as distressing as this, but there are others in parallel.
It may be that what the Minister has said so far is the right answer, distressing and difficult though it is, particularly in terms of the danger that arises if we start deciding politically which diseases are properly sought after and which are not; this is a dangerous area to be in. My problem is slightly different. I hope that, in his response, my noble friend the Minister will not rely on the Treasury argument of hypothecation. One of the disastrous themes in this country's legislation is the refusal of the Treasury to accept that hypothecation is an essential part of sensible financial arrangements. Many things would be much better done if there was a clear connection between what people pay through tax and what happens.
I speak with an interest in mind, as a passionate believer in the environment. We will not get people to understand why they should pay congestion charges,
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for example, if the money is not clearly spent on reducing congestion. In other words, there needs to be hypothecation. I remember when I fought hard for and got the first hypothecated tax, the landfill tax, which few would now deny was very important. My noble friend the Health Minister remembers that as well as I do. It was a battle against a theology. I hope that, when the Minister comes to speak, he will do so in the terms of the noble Lord, Lord Howarth, and not in the terms of those who deny this kind of response—not on the basis of ensuring objective decisions by independent judgment, but on the basis that there is something inherently unacceptable about hypothecation.

If this country moved to greater hypothecation, it would be signally more democratic—although it might mean that the Treasury would have less opportunity to get its fingers on the money on its way to that for which it was needed. That is a wholly admirable aim: the effort to ensure that there is a link in the public's mind between what they pay and what they get is an essential part of our democracy. I hope that, of all the arguments my noble friend uses, he will eschew that one. I would not like to be pushed over the edge to not support him because of the importance of upholding the fine principle of hypothecation.
5 pm
Lord Empey: My Lords, the debate has been very interesting and, at many times, very moving. There is a general consensus that this is a terrible disease on which no

proper research has been carried out. We all want to see that fixed. These amendments represent one attempt to achieve that; perhaps the Minister can direct us towards another mechanism.

The right reverend Prelate said that it was a Cinderella of a disease, and I think the arithmetic explains why. Some 56,000 people in this country are expected to die with it over the next number of years, but it is deemed by many drug companies—I suspect, and perhaps some academics—as a disease of the past. Therefore, what is the point of researching it and spending money when it is dying out, literally? Wrong—this is a disease of the future, not of the past. If somebody takes a moment to search the internet for ship-breaking in Bangladesh, Chittagong and all those places, there are whole generations who have yet to develop this disease because the exposure of those people began only in the mid-1980s. They probably would not even have got to the stage of actually developing the disease.

However, we have a dilemma. As the noble Lord, Lord Howarth, rightly said—I have had some responsibility for this area myself—research is a unique area. It is built up around individual institutions, where academics, particularly postgraduate students, are attracted to pursue research, and there are just not enough of them around. We are delighted to see the noble Earl, Lord Howe, on the Front Bench—I have to say that the concept of a brick wall, the term that the Minister used in Committee, and the noble Earl do not go together. Can the Minister and his colleague advise us whether there is any administrative mechanism that either department could use to encourage people to come forward, such as offering specific sums of money for a particular type of research—in other words, offer a carrot—so that there would be something

for academics to aim for? Is that one solution? I do not care whether it is through legislation or an administrative mechanism—I do not think any of us do—but there is a general feeling that this has to be fixed.

I come from a city that must be close to being the UK capital—maybe after Liverpool—of this disease because of its industrial past. I do not want to delay the Bill because we have made great progress, the Minister has done a good job and we have had a very welcome announcement today. We want to keep the momentum going but the issue remains unresolved. Something must be done, be it through legislation, administrative mechanisms or all government departments working together to encourage the research councils. Has the Minister had a negative response from the insurance companies or any other source to this proposal? Are they threatening that if this were to happen, it may cast a shadow on the whole scheme? I think the House would very much welcome his response. Perhaps, in his winding-up remarks, the Minister could tell us. None of us wants to delay things. I do not think that there is an appetite for any particular scheme, but we want a solution. If the Government can bring it about by another mechanism, I think we would all be pleased.

Lord Kerr of Kinlochard: I had not intended to speak but I am moved to do so by the austere and Robespierre-like logic of the noble Lord, Lord Howarth. He was supported by the noble Lord, Lord Deben, who I strongly agree with in his advice to the Minister to eschew the hypothecation arguments. My advice would be to also eschew the Robespierre argument advanced by the noble Lord, Lord Howarth. The Minister is actually in such a good mood today that I rather hope he is going to accept this amendment.

I do not think that the noble Lord, Lord Howarth, is right. From my passing experience of being involved with and watching the noble Lord, Lord Tugendhat, who I see is in his place, playing a principal part in a university medical research programme, medical research does not seem to have any difficulty in accommodating well placed money from foundations, trusts, charities or private philanthropy. I do not see why a levy should be any different and I reject the reference to Stalin. It seems that this levy could go direct, but if the research councils need to be involved in this at all, it does not follow that the awards displaced would necessarily have been of higher quality.

I do not accept that the purity of the system is affected if money comes in from other streams. Universities seem to have managed to cope with that very well over the years, so we do not need to follow such an austere argument as that of the noble Lord, Lord Howarth. Although I accept that there is a worrying logic to it, in practice it does not work like that.

Lord McKenzie of Luton: My Lords, this has been a wide-ranging debate. I do not think I will be drawn into issues of hypothecation, although it is a tempting subject for debate. Throughout our deliberations on the Bill and before, the noble Lord, Lord Alton, has been passionate and convincing about the case for funding mesothelioma research. He has been supported in this by many noble Lords, including those who have added their names to his amendments, particularly the noble Lords, Lord Walton and Lord Pannick.

The case that the noble Lord makes is thorough and incontestable. Despite knowledge of this terrible disease and its long latency over many decades, research spending by Governments has been derisory. The noble Lord contrasted the levels of research on diffuse mesothelioma with other cancers to reinforce his point but he acknowledges, as does the noble Lord, Lord Walton—and as indeed do we—that the insurance industry has funded such research in the past. The ABI has made it clear to us in discussion that it stands ready to do so again in the future, if the Government are prepared to play their part. They had said that they would match-fund. I hope that we will hear from the Minister in a moment that the Government will play their part, and how they will do so.

We all recognise that the noble Lord, Lord Alton, has made his case about the need for a national research effort, so the issue is not whether but how this outcome is to be achieved. His approach is focused on the insurance industry's contribution, which, as he explained, is set down by Amendment 24 as a "Research supplement" raised under regulations under the levy provisions. That supplement could not exceed 1% of that required for payments under the scheme. The proposed regulations must cover how such amounts are to be applied and the role of the scheme administrator. Of itself, the amendment makes no reference to the Government's obligations. I think that we will hear a different approach from the Minister about the plans that he would wish to develop to attract quality research funding for mesothelioma. If this is right, we need to understand the parameters of this: how much is involved and what is expected of the insurance industry. We also need to understand whether the approach is inconsistent with that of the noble Lord, Lord Alton, which is to raise a levy on insurers.

We have thought long and hard about this and which is the best way forward. Our shared objective is, I believe, to get properly funded research under way as quickly as possible and on a sustainable basis. We all acknowledge the commitment and integrity of the Minister and his desire to fulfil this objective. After hearing the Minister

again, the noble Lord, Lord Alton, may consider that he has sufficient reassurance that his objectives will be met, albeit by the administrative route rather than the legislative one. Perhaps he has already concluded that from the extensive discussions he has had to date. If the noble Lord, Lord Alton, is not reassured, and presses his amendment, we are minded to support him in the Lobby.

The Parliamentary Under-Secretary of State, Department of Health (Earl Howe): My Lords, it may be a slight surprise to see a Minister from another Department of State responding to this amendment. However, my noble friend Lord Freud has asked me to speak to it as a reflection of the importance that he and I place on promoting research into mesothelioma. We are both sympathetic to the view that more money should be put into research on this disease. Indeed, before this amendment was tabled, my noble friend and I spent some time exploring possible routes for funding. It is the fruits of those discussions that I shall now cover. However, the mechanism proposed in this amendment is not the best way to achieve the objective that the noble Lord, Lord Alton, is aiming at.

There are a number of reasons for this. In Committee, my noble friend set out some technical but none the less important arguments as to why the Government are resistant to the idea of a supplementary levy for mesothelioma research. I will not rehearse those arguments again and my noble friend Lord Deben need not worry as I am not going to rely on them at all. I need to stress that any additional research charge of the kind proposed by the noble Lord, Lord Alton, would, like all taxation, have to be paid into the Consolidated Fund and, if hypothecated, would then have to be paid out by the Treasury for a specific purpose. The Treasury does not normally handle tax income in this way, and there would need to be more convincing arguments before it could consider doing so for mesothelioma research.

The more substantive problem with the amendment is to do with research policy. As noble Lords will be aware—and the noble Lord, Lord Howarth, pointed to this—there is a fundamental, widely accepted principle that the use of medical research funds should be determined not just by the importance of the topic but by the quality of the research and its value for money. There is a good reason for this. There will always be more proposals for high-quality medical research overall than there are resources available for funding, and it is arguably unethical to support second-rate work in a particular area at the expense of higher-quality work in another equally important one. Noble Lords will understand that this is why, as a rule, public sector funders of research do not ring-fence funds for particular diseases. It was the same principle that prompted Dame Sally Davies to restructure the research funding that the Department of Health was putting into the NHS over many years, so that funds would flow, as they now do, to the most important, highest-quality research.

In the case of mesothelioma, the real issue is not just the money; it is the quality of the research being proposed. How can we try to ensure that the research proposals in this field reach the quality threshold required to secure funding? If that threshold is reached, funding is much less of a difficulty; indeed there is no need to think about the forcible gathering of funds from insurers. If noble Lords agree, the goal is how we stimulate high-quality research proposals without undermining the country's strategic research mechanisms.

Lord Kerr of Kinlochard: We have heard from Robespierre. I hope we are not now hearing from Danton. Will the Minister accept that most foundation, trust, charity or philanthropic money for medical research is earmarked for particular diseases or

research topics? What is the difference between that and a levy from the industry for this disease?

5.15 pm

Earl Howe: My Lords, I accept that fully and I will come to that point in a second. Certainly there was a blockage in the research process, but it was not total. There is good news. As the noble Lord, Lord Alton, informed us, spending on mesothelioma research is not as low as noble Lords might believe from the discussions in Committee. The latest figures

from the Medical Research Council show that its annual spend on mesothelioma research rose from £0.8 million in 2009-10 to £2.4 million in 2011-12. We should not belittle those figures. That is in addition to the research supported by the £1 million a year donated by insurance companies to the British Lung Foundation, and research supported by the National Institute for Health Research. Therefore, on the ability of the system to support publicly funded mesothelioma research, we are not knocking at a closed door.

My noble friend Lord Stoneham is right that the issue that is holding back progress on research into mesothelioma is not lack of funding but the lack of sufficient high-quality research applications. This is an issue that we in the Department of Health, working with the National Institute for Health Research, have been seeking to address. I will now set out what we propose. There are four elements to it.

First, the National Institute for Health Research will ask the James Lind Alliance to establish one of its priority-setting partnerships. This will bring together patients, carers and clinicians to identify and prioritise unanswered questions about treatment for mesothelioma and related diseases. It will help target future research, and, incidentally, will be another good example of where patients, the public and professionals are brought into the decision-making process on health.

Secondly, the National Institute for Health Research will issue what is called a highlight notice to the research community, indicating its interest in encouraging applications for research funding into mesothelioma and related diseases. This would do exactly what the noble Lord, Lord Alton, wants, and what the noble Lord, Lord Empey, suggested. It would make mesothelioma a priority area.

Thirdly, the highlight notice would be accompanied by an offer to potential applicants to make use of the NIHR's research design service, which helps prospective applicants to develop competitive research proposals. Good applications will succeed.

Finally, the NIHR is currently in discussion with the MRC and Cancer Research UK about convening a meeting to bring together researchers to develop new research proposals in this area. The aim is for the event to act as a catalyst for new ideas that will further boost research into mesothelioma. I was very interested in what the noble Lord, Lord McKenzie, told us about the offer of matched funding from the ABI. I look forward to hearing more about that.

As my noble friend Lord Freud mentioned, on 25 July in the Palace of Westminster precincts, he and I will co-host an event run by the British Lung Foundation that will focus on mesothelioma. I will take this opportunity to invite noble Lords to join us to hear about current research and to get a family perspective on the disease.

The four steps that I have set out offer a better and much more realistic way of achieving what we all want to see happen. The problem with the remedy that the noble Lord proposed is that it will not of itself deliver that objective. I could sum up

the issue by saying that the availability of funds does not guarantee the spending of funds. Nor does it guarantee the quality of research on which such funds would be spent. It is also worth

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making the point that it would create a precedent that might encourage other and perhaps less deserving interest groups to seek special treatment for a disease about which they care passionately.

I hope the noble Lord will recognise that his amendment has galvanised the Government into action. He can credit himself with having achieved a valuable outcome by tabling it. I hope that he will consider not pressing it. I have given undertakings today that I will be keen to take forward with him and with all relevant stakeholders.

Lord Wigley: May I ask the noble Earl to respond to my earlier question on whether, in the context of the four proposals that he has brought forward, there might be a mechanism for some form of annual report on the progress of mesothelioma research so that we do not lose focus on this important issue?

Earl Howe: I think that there is scope for that, whether it is a stand-alone report or is built automatically into the report that is produced by the department or the MRC. I would be happy to take that idea forward.

Lord Walton of Detchant: Before the Minister sits down and before my noble friend responds, perhaps I may ask the Minister this question. Let us suppose that, in the light of the developments and proposals that he has outlined, the insurance industry—the ABI—decides, in the goodness of its heart and bearing in mind the importance of this problem, that it wishes to make an ongoing and regular contribution to research in this field. Would the National Institute for Health Research be precluded from accepting non-government funds or would such funding have to be channelled, for example, through the cancer research campaign?

Earl Howe: A very great deal of the research conducted in this country is funded by different sources. It is funded by the Government, charities, universities, and industry. Nothing in the arrangements that I have outlined precludes a joint arrangement for funding mesothelioma research, which is why I welcomed the indication that the noble Lord, Lord McKenzie, gave about the ABI and the possibility of augmenting whatever funds are forthcoming from the MRC or the NIHR. That is an important point to make. I think I have said enough. The ball is in the noble Lord's court.

Lord Alton of Liverpool: My Lords, I am always grateful to the noble Earl and I know that the House will appreciate what he has said about the four steps that he intends to take. I think he would agree, though, that there is nothing incompatible in taking those very welcome steps and supporting the spirit of this amendment. I made it clear when I spoke at Second Reading, in Committee and again today that if the Government—during the many discussions that the noble Lord, Lord Freud, and I have had about this—had been willing to accept the principle and come forward with their own amendment, I would have been happy to withdraw my own. The principle that I have been trying to underline is the need for a statutory requirement to step up to the plate to deal with this killer disease, which we all agree will take any number of lives—an estimated 56,000 before the disease completes its first

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wave. We heard in the quotations I presented to the House earlier today that there is a possibility that, in the BRIC countries and with new forms of asbestos being used worldwide, it will not be 56,000 who die, but many more.

The noble Earl has suggested that if such a levy were imposed, it would be swallowed up into Treasury funds and there would be no guarantee that it would then be used for its intended purpose. I do not think that any of us really believe that that would be possible. If Parliament has legislated that a levy of up to 1% should be imposed—that is all; it is a levy inside a levy and what this entire Bill is about—there is no reason why that money should not then be used for this specific purpose. The noble Lord has already said that this should be a priority area.

The noble Earl has said that there should be competitive research proposals; very good research proposals have been put forward but, unfortunately, have not gained traction because the funding has not been available for them. It has been a Catch-22 situation. It was also said that it would be unethical to support second-rate work. Nobody in your Lordships' House would suggest otherwise—of course we accept that there should be no second-rate work and, through the Medical Research Council and specified outside bodies, an evaluation would be made of the quality of that work and of the proposals that have been put forward.

The noble Earl said that around £2 million will now be made available, and that is welcome. However, the House should just bear in mind, for example, the £22 million being made available this year for bowel cancer, the £41 million for breast cancer, the £11.5 million for lung cancer and the £32 million for leukaemia. Those comparisons show the position in which mesothelioma still appears in this terrible league table.

The noble Earl also said, quite rightly—and the noble Lord, Lord Howarth, touched on this, too—that we should protect the purity of the system, but my noble friend Lord Kerr of Kinlochard dealt admirably with that argument and I can add nothing more to what he said. No one wishes to pollute the process but the Bill before the House is about one specific disease, and that is why this amendment is before your Lordships. It is not that we are being asked to set a precedent for any number of other things. Mesothelioma has a unique characteristic. The reason that the noble Lord has been able to negotiate with the ABI and the industry is that, for instance, smoking cigarettes cannot lead to mesothelioma. This disease is specific and that is why the industry has accepted its responsibilities in this regard. Therefore, it is different from other diseases, and that is why we were able not only to have this Bill but to exclude from it even other asbestos-related diseases, which cannot be said to be specific, as mesothelioma is. I think that that is a perfectly good reason for attaching to the Bill an amendment that deals specifically with this disease.

I am extremely grateful to everyone who has participated in this debate. I am sure that we listened with great care to my noble friend Lord Walton of Detchant, who said that this could make a massive contribution and that it could pave the way for a cure. The noble Lord, Lord Selsdon, was right when he

asked why it was not done a long time ago. As long ago as 1965, the

Sunday Times

reported on work that had been done by the London School of Hygiene and Tropical Medicine. In cities such as Belfast, Liverpool, Glasgow and other epicentres of the disease, it had identified the nature of mesothelioma, as well as its very long

hibernation period, alluded to by the right reverend Prelate the Bishop of Norwich, before it had its terrible impact.

I doubt that there are many of your Lordships who have not come across people who have contracted this disease and died within the two years—that is all it takes—from the time that it is diagnosed until death. The right reverend Prelate referred to the late Bishop of Peterborough. When we dealt with the LASPO legislation last year, the noble Lord, Lord McNally, told a deeply moving story at the Dispatch Box about his sister, who had died as a result of washing the dungarees and overalls of her husband, who had worked in the industry. This is something that can affect us all and we need to do something about it urgently.

The noble Lord, Lord Pannick, said that it might be claimed that the amendment is not viable. That has not been said in the debate today, yet it was said in the letter that was distributed on Monday. The amendment deliberately mimics Clause 13 of the Bill so that it does nothing that the Bill itself is not doing. It cannot possibly be challenged under the Human Rights Act, but perhaps we could be challenged under that Act by victims of mesothelioma if we fail to do enough or take the opportunity to provide for proper research to deal with this disease.

The noble Lord, Lord Wigley, said that the mechanisms that we have at the moment are not generating the research but he said that this vehicle is at hand. There is no reason at all why this should delay the legislation. As I told your Lordships in my opening remarks, I met with the ABI. The industry had expressed no opposition; indeed, it has been generous in providing what funds there have been in the past towards dealing with this disease. Therefore, there is already a precedent here. I am certain that if the Government were to say that they would make available matching money, even more funds would be made available by the industry. The noble Lord, Lord Howarth, touched on that point, and rightly so. Yes, there is a moral obligation. Because of the privileges issue, it would not be appropriate to include that here, but there is no reason why it could not be attended to in another place and there is no reason at all why this should become a matter for ping-pong.

The mortality rate for most cancers is falling while it continues to rise for mesothelioma. There are humane and altruistic reasons for supporting funding for mesothelioma research, but for the Government and the insurance industry there are straightforward financial considerations, too. It would be impossible to eradicate all asbestos from our homes, schools, hospitals, factories and offices.

The Bill represents a genuine desire to act justly to those who have been afflicted with mesothelioma, which is why I have supported the noble Lord, Lord Freud, throughout in placing the Bill before the House. However,

the one certain way to prevent deaths from mesothelioma will be to find a cure. That will not happen without adequate resources and that in turn requires political will. That is why I thank all those who have spoken today in the debate and who have supported the amendment. I would like to test the will of the House.

5.30 pm

Earl Howe: Before the noble Lord finally decides what to do with his amendment, may I just explain why the Government have not brought forward their own amendment, which was one of his criticisms? We do not believe that a legislative

route is necessary. We believe—as the noble Lord, Lord Empey, indicated—that we can do this in other ways. We can give the process exactly the kind of kick-start that was referred to in the debate much more effectively than can this amendment. Funders for research build areas for research by bringing researchers and clinicians together, not by throwing money at a problem, which is, I am afraid, what this amendment would do.

Lord Alton of Liverpool: My Lords, this is not about throwing money at problems. That is certainly something that I have always eschewed throughout the whole of my time in politics. You have to demonstrate the case and there is a case here. If 56,000 of our countrymen are going to die of this disease over the next 30 years or so, we have to find adequate resources to tackle mesothelioma. That is not being done by this Bill. We have a rare opportunity to do something about it.

Lord Walton of Detchant: Before my noble friend sits down and eventually decides what action he proposes to take, I wish to ask him whether he feels that the important developments referred to by the noble Earl, Lord Howe, relating to forthcoming meetings between the Medical Research Council, the NIHR and other organisations, might not—at the moment—be a useful way forward?

Lord Alton of Liverpool: I am grateful to my noble friend and yes, of course I am delighted that those meetings are going to happen. The noble Earl was kind enough to say that perhaps the debates that have been precipitated on this issue in Committee, at Second Reading and again today have helped to bring that about. However, the moment will pass and all of us who sit in this House know that once the legislative vehicle has moved on, the opportunity to make something happen disappears into the ether. That is why I intend to press this to a vote and to test the will of your Lordships' House.

5.32 pm

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5.44 pm

Amendment 3

Moved by ***Lord Freud***

3: Clause 1, page 1, line 7, leave out subsections (2) and (3)

Amendment 3 agreed.

Clause 2 : Eligible people with diffuse mesothelioma

Amendment 4

Moved by ***Lord McKenzie of Luton***

4: Clause 2, page 1, line 17, leave out "25 July 2012" and insert "10 February 2010"

Lord McKenzie of Luton: My Lords, the amendment stands in my name and that of my noble friend Lady Sherlock. I shall also speak to Amendment 8. The two amendments are linked, and we see Amendment 8 as being consequential.

The amendment addresses one of the major bones of contention with the legislation: its start date. The payment scheme, which we all applaud, is applicable only to those first diagnosed with diffuse mesothelioma on or after 25 July 2012. This is, as we know, the date when the Government responded to the consultation

published by the previous Government. It was more than two years after the consultation closed. Over that period, some 600 individuals will have died from diffuse mesothelioma without them or their dependants receiving proper compensation.

We were told in Committee that it took so long to move from consultation to response because of the complexity of the issues and the intense work with stakeholders, including the insurance industry. We accept this, but it can hardly then be argued that the insurance industry did not know what was coming. It would surely have been on notice as to the likely parameters of the scheme, because it was a key participant in the negotiation, which in effect required some degree of agreement. It is not as though the scheme was somehow sprung on the industry from out of the blue.

We had some debate in Committee about the date on which insurers could reserve against liabilities. As my noble friend Lady Sherlock exposed in her usual forensic analysis, it is not a matter of reserving against liabilities. The levy is apparently a tax and should be provided for in the usual way when it arises.

It has been suggested that the February 2010 date, the date on which the consultation document was issued, was insufficient notice to create the expectation of the introduction of a scheme that would have to be funded by the insurance industry. We disagree. It is an entirely appropriate start date. Paragraph 60 of the document states clearly:

"Having considered this carefully, the Government are persuaded that an ELIB"—an employer liability insurance bureau—

> "should form part of the package of measures to improve the lives of those who, for whatever reason and through no fault of their own, have been injured or made ill",

by work.

That was clearly putting people on notice that the then Government were intent on introducing an ELIB broadly on the terms of the Motor Insurers' Bureau. Moreover, this intent was not limited to a scheme to cover diffuse mesothelioma; it was a broader intent to cover those more generally who were missing out on justifiable compensation. Although a very valuable scheme, what is now provided for in the capital is a smaller, less costly scheme than was signalled in the February 2010 consultation. It should have been no surprise for insurers. The arguments in favour of a July 2012 commencement are flimsy to say the least. In its briefing for today, the Law Society states: "There is little justification for disqualifying cases diagnosed between the announcement of the consultation in February 2010 and July 2012".

Of course, the Minister will tell us that there is greater cost, that it could tip all this finely balanced negotiation over the edge, and that co-operation from insurers would recede, but the cost originally presented to us for a February 2010 start date was an extra £190 million. It is now transpired that that assumes payment at 100% and presumably took no account of any additional compensation recovery that might ensue and assist with smoothing. It would be dependants rather than sufferers who

would mostly benefit from this, because many of the latter would, sadly, not have survived, but that is no reason to deny justice. I beg to move.

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Lord Howarth of Newport: My Lords, the common theme of the amendments in this group is that they increase eligibility with a view to increasing justice. I add my personal thanks to the noble Lord, Lord Freud, for all his personal commitment to achieving just outcomes through the legislation, and I hope that he will be willing to contemplate the amendments that I have added to this group.

First, I entirely support my noble friends Lord McKenzie of Luton and Lady Sherlock in their amendments which would bring forward the start date for eligibility to 10 February 2010. Amendment 5 in my name would extend eligibility to a person diagnosed with diffuse mesothelioma who was self-employed at the time of exposure to asbestos. Amendment 6 would extend eligibility to a person who is a member of the same household as a person exposed to asbestos in the course of their work.

The employers' liability insurers have bluntly and, I feel, rather brutally, expressed their view that the self- employed should not be eligible. As they have explained to us:

"As employers' liability insurers will be funding the untraced scheme, payments from the scheme will only be made to those who would have been covered by employers' liability insurance".

The ABI has, however, made one small, decent concession, saying that under the untraced scheme, if someone has been negligently exposed during employment and self-employment but is unable to find an employer or insurer to claim against, they will be able to receive a payment from the untraced scheme without a deduction for the period they were self-employed.

In Committee, my noble friends Lord Browne, Lord Wigley and Lord McKenzie explained that on the kind of industrial and construction sites where people were negligently exposed to mesothelioma, there was frequently no real distinction between employed and self-employed status. In many cases, it may have suited employers to classify people as self-employed who were, to all intents and purposes, employed. Indeed, in Committee the noble Lord, Lord Freud, himself accepted that,

> "some people will appear to be self-employed where the reality is that that was an artificial, tax-driven construct. In that case, if they can demonstrate that in practice they were acting like an employee, they would be eligible for a payment under the scheme.".—[

Official Report

, 5/6/13; col. GC 220-221.]

I am very grateful for what the noble Lord said then, but we need to go a bit further. We need to ensure that everyone, whether they were nominally, technically or otherwise self-employed, is covered and is eligible to receive payments from the scheme.

What is the position of those who were genuinely self-employed, did insure, but whose documentation has gone missing? Should they not be included? The ABI itself admits:

"There will only be a very small category of people who have been solely self-employed and therefore not eligible for a payment from the untraced scheme".

The Minister undertook to ask the ABI for its figures, but unfortunately, he then had to write to us to say that it did not have any reliable figures. What is clear, by the ABI's own admittance, is that the numbers are very small.

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The suffering of self-employed people who contracted diffuse mesothelioma, and the suffering of their dependants, is no less than the suffering of people who were employed in the technical sense. I believe that it would be wrong for us to abandon them, and I believe that it would cost very little by way of an addition to the levy, to embrace them in the scheme.

In Committee there was extensive concern expressed by noble Lords on all sides about the predicament of members of the household of someone who had been exposed to asbestos in the workplace, who were diagnosed with mesothelioma, when the person who was actually employed had not been diagnosed. Indeed, a household member might have predeceased an employee who has not, or not yet, been diagnosed. The noble Lord, Lord Alton, reminded us of one particular instance, movingly described to us in our proceedings on other legislation, of the sister of the noble Lord, Lord McNally. Other noble Lords in Committee were aware of individual cases where this had happened. In particular, the most frequent instances were when a wife, or perhaps a daughter, was regularly doing the laundry and washing the contaminated overalls.

In writing to us, the noble Lord, Lord Freud, gave us an estimate that an average of 214 cases of mesothelioma would be caused by environmental exposure in the years 2014-24. I take it that that is a wider category that would include household members; indeed, the friend of the noble Lord, Lord Walton of Detchant, the consultant neurologist who died, might have been included. We are talking of a significant, though not a huge, group of people. Is it right to abandon them on the technicality that they were not themselves employees?

The term "secondary exposure" was used in Committee, but I think we are really talking about the direct effect of employers' negligence. It is the same lethal fibres in the same workplace that will have caused the disease to hit a person, whether self-employed or a household member in the circumstances I have described. Surely it was through employers' negligence that employees were allowed to come home wearing their contaminated workwear; they should not have done so. On this, the ABI has been silent. Perhaps even it cannot contrive presentable reasons as to why it should not pay out of a scheme which, after all, is not based on precise legal liability.

This scheme deals with the situation of claimants who, by definition, cannot avail themselves of their legal rights. I do not think that the employers' liability insurers ought to hide behind legal technicalities. If, however, the employers' liability insurers are adamant, and if the Minister remains reluctant to compel them, then I hope that he will consider levying the public liability insurance. He was as good as his word; he discussed the question of public liability insurance in this context with the Association of Personal Injury Lawyers and with the ABI. He wrote to us following that discussion to say that, in the main, it would be the public liability policy that would apply when the affected person was not directly employed by the liable employer. In many cases, I think it is the same insurer.

I have not tabled an amendment relating to public liability insurance because, as I take it, this is already covered by Clause 13(1), which states:

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“The Secretary of State must make regulations requiring active insurers to pay a levy”.
It does not specify active employers’ liability insurers, and in Clause 13(7) I do not see that the definition of the term “active insurer” excludes the public liability insurers. I would be grateful if the Minister would confirm that the legislation as drafted does give him the power to levy the public liability insurers. If that is not the case, I am sure that there will be no difficulty in tabling an amendment for Third Reading.

The Government’s 2008 scheme does not worry about who in particular was responsible for cover; it simply compensates people who have contracted mesothelioma. This new scheme should do the same, and in particular, should embrace mesothelioma victims who are self-employed or household members. The scheme is intended belatedly to make amends, and it should do so fully and generously. If the employers’ liability insurers would accept that, then that would be gracious on their part. I beg to move.

Lord Wigley: My Lords, I support these amendments and I will pick up the important points made by the noble Lord, Lord Howarth of Newport. I entirely support his emphasis on the need to ensure that those who suffered at second hand—whether it was the wives, daughters, or sometimes mothers of people in the industry who have been infected by the particles from washing clothes—should most certainly be covered if they have suffered a loss of health as a result.
The implication is that the insurance policies that were provided for the employees in case of negligence by the employer only relate to the employee in a very narrow sense. That needs to be explored in depth because there is a category of people who have undoubtedly suffered ill health and some who have died, and there may well be many more that come through from that avenue.
However, I return to the generality of these amendments. It has been noted in this debate that the scheme proposed by the Bill has its roots in the consultation announced by the previous Labour Government in February 2010, which is the date in these amendments. However, the scope of the assistance proposed in that consultation was, of course, significantly wider than what we have ended up with in the Bill.

6 pm

The Employers’ Liability Insurance Bureau—ELIB—which was proposed by that consultation, would have compensated all industrial disease victims in situations where their employers’ liability insurer cannot be traced. The consultation ended in May 2010, but no announcement on any scheme came forward until this other date—25 July 2012. There is no magic in that date, but it has now become a fixed date that will have a tremendous effect on those who are cut off by the way it will be implemented.
Under the proposed scheme, victims will be protected if they were diagnosed after 25 July 2012. Those who were diagnosed between 9 February 2010 and that date will be, for completely arbitrary reasons, excluded from this scheme. The person who is diagnosed on

26 July 2012 will qualify, but if he is diagnosed on 24 July he will not. This is utterly unfair, which is why I urge noble Lords to support Amendments 4 and 8, which would bring this wronged group back into the scope of the scheme. That would be only

logical. Not only is the insurance industry excused liability for all claims prior to July 2012, but is costs are also reduced, since in giving average compensation it will not need to enter into negotiations on a case-by-case basis. The insurance industry is, no doubt, the winner in this instance.

I contrast this package with that of industrial workers suffering from other forms of lung disease, who were compensated by the Pneumoconiosis etc. (Workers' Compensation) Act 1979. Under that Act, workers who had suffered—if I remember correctly, going back to the 1950s—were taken on board. Why is there such a difference between the very generous treatment of sufferers in that instance, and this instance, where people are cut off in such an arbitrary manner?

We have all, no doubt, had messages from the families of those who have died from this horrendous disease. I will quote from two of them very briefly. Jean Kenyon says, simply, "My husband is a victim diagnosed in 2011. Why is he not included? It is a gross injustice". John Gordon writes, "My late wife was diagnosed with mesothelioma in January 2012. Does this mean she suffered a horrendous death, which included a great deal of pain and mental anguish, which could only be recognised after 25th July 2012?". In fact, it will not be recognised at all as things stand.

This is wrong, unfair, illogical and insensitive. I urge noble colleagues to support the amendments in the names of the noble Lord, Lord McKenzie, and the noble Baroness, Lady Sherlock.

Lord Browne of Ladyton: My Lords, I support this group of amendments. In the interest of the efficient use of our time I shall do so principally by adopting the arguments that have already been advanced by my noble friends in support of them, and will seek only to reinforce one point and augment another in relation to Amendments 5 and 6.

The quotations which my noble friend Lord Howarth deployed from the ABI's brief come from the brief that the ABI provided to some of us—in a discriminating fashion, I recollect—in anticipation of the Committee stage on 5 June. On that occasion I deployed these very same quotations; I do not think that the noble Lord, Lord Howarth, had them at that stage. I made this point then, and I wish to repeat it: the ABI's argument in relation to self-employed people seems to be, "This was a very small number of people". I felt that that argument read that since we were leaving behind only a small number of people, we could be justified in doing so. I deployed the argument that that increased the injustice substantially and that extending the scheme to this very small number of people would have a very limited effect on the total cost of the scheme and on its administration. I also argued that it would be a deep and disproportionate injustice to leave those people behind because they were probably victims of the same negligence; they probably picked up the fibres that caused this dreadful disease in exactly the same workplaces as employed people did,

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but just happened to be working in them at the time. I repeat that point as there is some significant merit in it.

In relation to the group of people who are referred to in the Minister's letter of 4 July as those who are infected by environmental or secondary exposure, there is a more compelling argument as to why these persons should be included in this scheme. It relates to the way in which public liability insurance and compulsory employers'

liability insurance—or employers' liability compulsory insurance, which I think is its proper title—was sold historically. It may still be sold this way, but I know that it was sold in this fashion. I explored this argument in Committee—I am grateful to the Minister, who, in his characteristic fashion, addressed comprehensively in his letter those issues that he did not have a briefing to address in Committee—and I have now had it confirmed, from the information in the Minister's letter, that it is right. Almost invariably, employers' liability compulsory insurance was sold in a package, with, among other things, public liability insurance. Consequently, it is invariably the case that the insurers, who carry the employers' liability risk, also carry the public liability risk. It is the behaviour of exactly the same insurers, in either destroying their records or failing to be available to those who identified them as the insurers who carried these risks, that has caused this deep failure in the insurance market. Therefore, there is no difference in relation to the mechanism of insurance and its failure to provide compensation for people who have been exposed to environmental or secondary exposure, compared with those who were employed in the first instance.

It is almost incontrovertibly the case that were an employer to have been sued by the person who was exposed at the secondary level, that person would have been able to establish that they were owed a duty of care and that there was a direct causal connection between the exposure of their relative or loved one and their contracting the disease. Had they had somebody to sue, they would have been able to get compensation. If the employer does not exist and the insurer cannot now be found, they are in exactly the same position as the relative who was exposed to the fibres and carried them home. I made that argument, and from the way I read the very carefully worded letter from the Minister, that appears to be what his researchers have revealed: that this group of people would have been covered by public liability insurance and that almost invariably the same insurers would have carried that risk. There is no argument, therefore, that has any merit, that those people who were in the category of secondary exposure should be excluded from this scheme. The opposite is the case. Given that exactly the same players would have been involved in the processes that caused their contracting this disease and dying from it, we should honour the experience they have had by including them in the scheme.

Lord Stoneham of Droxford: My Lords, I will comment on a number of issues to which these amendments give rise—and they are very sensitive issues. Any start date is arbitrary, and there will always be people who are caught by a start date, so whether it is 2010 or 2012,

there will inevitably be feelings of unfairness. However, the earlier the start date, whatever the cost—perhaps the Minister will clarify the cost, but we were told it was £119 million, and if it is 70% of that it will come to £80 million—agreeing to that concession would cause a 25% increase in the cost of this scheme. Where is the money going to come from? Will it come from a new negotiation, or from reduced benefits and compensation for those who will receive money from the scheme? That question has to be answered by the movers of the amendment.

On the issue of coverage, there are obviously concerns about the self-employed and people from the same household, but are we saying that we are going to complicate this legislation and hold it up while we have an argument about public liability insurance versus employee insurance? That would be a recipe for severe delay. The great advantage of this legislation is that we have kept it simple and we have an

agreement. It is a balancing act to get to that agreement and to get the legislation through so that it benefits the people who were in employment. Once this settles down, we could consider coming back to this—I hope the Minister will do so at some stage—and look again at how we might cover the self-employed and people from the same household, but if we start that discussion now we will be here until 2015 or 2016 before we have legislation to benefit the families for whom it is intended.

Lord Alton of Liverpool: My Lords, I will speak briefly to these amendments, in particular to support what the noble Lord, Lord McKenzie, argued in Committee and what these amendments call for today. We had a long debate on 5 June, in which I spoke at some length. The point I made then, which partly answers what the noble Lord, Lord Stoneham, has just said about the arbitrariness of dates, was that the original consultation period is surely the point from which this scheme should kick in, not the date of July 25 last year, the last day of the Session, when a welcome announcement was made that there would be a Bill along these lines and a scheme of this kind.

The consultation date of February 2010 is, for me, a seminal date. For those affected it represented a promise waiting to be fulfilled. The eligibility date should be at the commencement of the consultation. After all, the Association of British Insurers began the discussions at that time. It can hardly have woken up on 25 July last year, shocked at having failed to make contingency plans or reserves. Therefore, applying the date of February 2010 is the right and fair way to go about this. It is the date that people anticipated and expected. In law, as well, it is far more consistent. After all, there will be people who were diagnosed with mesothelioma during that period and it is important that they are accepted as part of this scheme.

I know that the Minister will not be in a position to share the legal advice that he has been given within the department, but we might well leave ourselves open to claims because of the consultation document that was issued and the clear indication that this scheme would probably begin from as long ago as February 2010, rather than 25 July last year. For those reasons alone, I am happy to support the noble Lord, Lord McKenzie.

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Lord Wills: My Lords, I, too, support these amendments and endorse everything that has been said. On Amendment 4, as my noble friend on the Front Bench has said, little credence should be attached to arguments that insurers could not reasonably have expected in February 2010 that a scheme such as this could not have been brought forward in the foreseeable future. Indeed, it is highly likely that the only reason for the selection of that date is that it reduces costs. That is not a negligible consideration, but, as we have heard, those costs are likely to be relatively small. We have heard that they represent a considerable percentage increase, but with all respect that is not the concern here. The issue is the absolute sums that are involved, which are relatively small. They ought to be easily affordable by insurers, particularly in light of the long period in which insurers have got away without paying sums that they should have been paying. In my view, those costs are unlikely to have to be passed on to employers.

Lord Howarth of Newport: My noble friend was making the point that for many years insurers got away with not paying compensation. I believe that the figure is that some 6,000 mesothelioma sufferers died uncompensated in the years since 1968. That would have saved the employer's liability insurers £1 billion. They are very well able to do a little more for mesothelioma sufferers now.

6.15 pm

Lord Wills: My noble friend makes an extremely important point. In Committee, he made some very telling points about all the ways, not just the direct financial ways that he has just calculated, in which insurers have benefited during the very long period when legislation such as this was not in place.

We then have to ask whether these increased costs can be justified. We should be looking at the expectations not of insurers but of victims. Victims certainly expected that the start date of a scheme such as this would be in February 2010. I hope that the Government will now satisfy the expectations of victims, not insurers.

I will speak briefly to Amendment 6, to which my noble friend Lord Howarth spoke very powerfully. We have heard all sorts of moving stories in this House, in Committee and elsewhere, of tragedies that have happened in precisely the way that he has described. I heard them in my own constituency surgeries when I was the Member of Parliament for North Swindon. My noble friend said—I hope I am quoting him correctly—that this amendment is necessary because the exposure of these people is a direct result of negligence by employers. I agree with him. It is a matter of common decency that these people should be covered by the scheme, and I hope that the Government will agree with this amendment.

Lord Freud: My Lords, I thank noble Lords for these amendments, which all share the same broad aim: to widen the scope of the scheme to get more people into it. I will take the amendments in turn and address first those tabled by the noble Lord, Lord McKenzie, and the noble Baroness, Lady Sherlock, regarding the start date for eligibility. I will then address the amendments tabled by the noble Lord, Lord Howarth, on the self-employed and household members.

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We discussed the start date of the scheme at some length in Grand Committee. Clearly, it has received a lot of focus and continues to do so today. Under Amendments 4 and 8, once the scheme comes into force all living people who were diagnosed with diffuse mesothelioma on or after 10 February 2010 would be eligible for a payment from the scheme. They would also provide that any living dependant of a person with diffuse mesothelioma who had died on or after 10 February 2010 would be eligible for that payment.

Although it hurts to do this, I have to reject these amendments and ask that the noble Lord and the noble Baroness do not press them. I say that in the knowledge of the strength of feeling among all of us in this Chamber that the Bill should go as far as possible to help as many people as possible. The core issue is that this Bill was the subject of intensive negotiation. On top of that, it has been shaped by what I have felt to be innumerable obstacles that we have had to work around, and I need to restate why we cannot move the date as the amendments propose.

The start date of 25 July 2012 has been criticised for being arbitrary, but it is the date on which we announced that a scheme would be set up and it is the most legitimate date on which to commence eligibility. It is from that date that eligible people and insurers alike could expect that the scheme would be set up.

The proposed date of 10 February 2010 relates to the date when the previous Government published their consultation paper,*Accessing Compensation: Supporting People Who Need to Trace Employers' Liability Insurance*. If noble Lords will allow me to correct myself, in Committee I said that that was published on 11 February, but other noble Lords were correct and it was in fact published on the 10th of that month. This was a consultation, not a decision in any particular direction, and did not create any expectation that people would be likely to get any sort of payment over and above what the Government provide for people with diffuse mesothelioma.

I therefore cannot see that it is an appropriate start date for eligibility, and I fear that, were we to use it as such, it could be more reasonably criticised for being arbitrary than the existing start date.
We touched on the reasons why it took so long from the consultation being published to the scheme being announced to Parliament, so I will revisit them only briefly. I would have liked to have announced the scheme much sooner than 25 July 2012, but the issues involved were complex. We worked closely with stakeholders, including the insurance industry, claimant groups and solicitors, and all in all the process took longer to deal with than I had hoped. In addition to creating an expectation among people with mesothelioma, the announcement gave insurers notice that we intended to bring forward the scheme. From that date, those insurers will have had to factor the cost of the levy into their financial forecasts and plans.
There is one more point to mention that supports using the date of the announcement. Given that the insurers who are paying the levy to fund the scheme are not necessarily the same ones who took the premiums that paid for the historical insurance policies, we have to be able to demonstrate that the costs to them are

fair and proportionate. Simply put, the earlier the start date, the higher the costs. If the scheme started on 10 February 2010, the extra costs, as I said earlier in response to the question from my noble friend Lord Avebury, would be £75 million.

Again, I need to take noble Lords from the figure of £119 million that I used in Committee. That figure was based on paying 100% of average civil damages to all claims, regardless of age. The £75 million figure that I am providing now is based on a tariff of 75% of average civil damages, which I have already talked about today, and takes the age of those making a claim into account. I think I owe noble Lords an apology to the extent that I have created any confusion.
I have spoken before about the risk that we take in raising the costs of the scheme. A litigious industry such as the insurance industry could easily delay the scheme with legal challenge if the costs were perceived as unfair. The other risk is that higher costs would be passed on to employers. I know that noble Lords would like us to do more, and indeed the Government would like to do more, but we cannot ignore these risks.
Lord Howarth of Newport: The Minister is worried that the employer's liability insurance will default to the position of litigious opposition to the scheme if we attempt to improve it in these modest ways. Given that insurers have accepted the principle that they should fund a scheme, surely they would have no strong legal case to make in objection. Should he not simply say, "See you in court."?
Lord Freud: I have tried desperately hard not to end up in that position, because the "See you in court" line would just end up by tying us up for years with uncertain outcomes and would stop us getting payment to the people who need it from next July, which is when I want the payments to go out. I want this scheme up and running and working in April next year so that we can start making the first payments. I have tried in every way to ensure that we do not run into that kind of problem. The noble Lord may accuse me of not being robust enough, but I assure him that even to get to where we are it could be said that we have had to be as robust as possible.
The real problem is the technical difficulty with the four-year smoothing period that we have to use. We are going to have much higher costs in the first year as it in effect bundles up two years already and one year of running costs, so we are going

to have substantially elevated costs in the first year that we have to find a way of smoothing, and we are doing that over a four-year period. If we extended that smoothing back even further to work in another two years' worth of money—that £75 million—into the scheme, that would open up the whole agreement not just with the insurers but within the Government. On our assumptions, that would in effect push the levy rate up to approximately 4% in that period. That in itself would undermine what we are trying to achieve, which is to ensure as much as we can that these costs are not just passed on to British industry through higher current employer liability rates. That is the core reason. This is always about how much money you can get safely to people, and the adjustment in the amendment would undermine that.

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Of course, any start date that we choose will exclude some people. The best possible way forward is to pin eligibility to the date when people with diffuse mesothelioma had a reasonable expectation of a payment and insurers knew that they would need to start factoring in the cost of the levy as an additional business cost.

I need to remind noble Lords again that the existing provision for sufferers of mesothelioma will remain in place for those who are not eligible to come to the scheme. I thank the noble Lord and the noble Baroness again for these amendments. I understand the reason behind them, but I have given the reasons why I would like them not to press them.

I turn to the amendments tabled by the noble Lord, Lord Howarth. These seek to be helpful to a wider group of sufferers, but we cannot extend the legislation to people who are self-employed or who were secondary-exposure cases. The Bill addresses a specific failure of insurers and employers to retain adequate records of employer's liability insurance, and would provide payments to those affected by this failure who cannot trace a liable employer or employer's liability insurer against which to bring a civil claim.

Following our discussion in Grand Committee, we talked with the Association of Personal Injury Lawyers, which advised us that an employer would have had to have specifically added elements to their employer liability policy to cover families of their employees. The association was not able to identify any specific cases where this has happened, which leads me to suggest that this is not a common occurrence. Family members who contract mesothelioma through coming into contact with asbestos as a result of someone working with it may have recourse to civil damages through public liability insurance, but our scheme is funded by the companies currently selling employer's liability insurance and not by insurers more widely.

6.30 pm

Picking up the noble Lord's more technical point about the Bill, Clause 13(7) specifies the meaning of active insurer as,

> "a person who, at any time during the reference period, was an authorised insurer within the meaning of the compulsory insurance legislation".

That means in practice that employer's liability insurers are specified. I sympathise with the noble Lord that that is not immediately apparent on first reading the Bill. I am grateful to my team of lawyers, who understand this rather better.

We cannot expect companies to fund cases when they have never received premiums. The proposed amendment imposes a disproportionate burden on the employer's liability insurers, who will fund the scheme through the levy. In answer to

the point raised by the noble Lord, Lord Browne, employers had to have asbestos cover in their employer's liability policies, but we are aware of no requirement for a public liability policy to cover asbestos.

Lord Browne of Ladyton: My more fundamental point is that the insurers that sold employer's liability compulsory insurance were the same insurers that sold public liability insurance to individual employers, because they were sold in a package. That was my experience

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when I was the Minister for employment between 2003 and 2004 when, the noble Lord will remember, there was a significant failure of the employer's liability compulsory insurance market that had to be resolved. His letter of 5 July to me and others confirms that that is still the case, according to his research. These insurers are not separate insurers, they are the same insurers, and I suggest that the requirement to carry cover in relation to the specific risk of asbestos would have been irrelevant to public liability.

Lord Freud: I have just made the point that the public liability may have been bundled up with employee liability but it did not necessarily cover asbestos risk. That is the issue. If we start going into this, we are just blasting open and widening the position in a way that is very complicated and difficult to deal with under the timelines we are dealing with.

Moving to the second group about the self-employed, here the matter is not so clear-cut. Some people may appear to have been self-employed but if they are able to demonstrate when making their application that in fact they were employees, they may be eligible for a payment under the scheme. There is considerable case law amassed on this and we will ensure—Ican commit to the noble Lord, Lord Howarth—that the scheme will reflect this when assessing applications.

I know it is not fashionable but I should point out that there is a technical problem with the amendment, which is cumulative, but I will not go through it. As drafted, this amendment does not work because you have to be an employee and self-employed. In our spirit of co-operation, if we wanted to take it we would adjust it, but there are good reasons in both cases why we do not want to.

Baroness Masham of Ilton: My Lords, what happens to the wife who has been contaminated by her husband's dungarees? Will she get anything?

Lord Freud: Yes, my Lords. That specifically is what the state provision is there for. In particular, the 2008 mesothelioma scheme was set up to make payments to people, such as wives, who worked with asbestos. It is a smaller payment but that is what it was designed to do. I ask the noble Lord to withdraw his amendment.

Lord McKenzie of Luton: I thank the Minister for his response, and all noble Lords who spoke in favour of Amendments 4 and 8. I also thank my noble friends Lord Howarth and Lord Browne for addressing the issues in Amendments 5 and 6.

To pick up the Minister's reply, if the response to everything we have discussed tonight is basically that the scheme is locked down and there have been negotiations—this point was made by the noble Lord, Lord Stoneham as well—we might as well go to the bar because I am not sure that we are going to shift anything tonight. We pay tribute to the Minister—

Lord Freud: I must come in on that. The group—huddle?—of noble Lords who have been working on this Bill have made enormous changes to what we are

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doing. Noble Lords' concerns have fed straight in and we have made a series of changes. I do not want any Peer to feel that their views and the work they have done has not been taken, absorbed, acted on and gone to right to the edge of what is possible. I assure the noble Lord that the bar is not the place for him.

Lord McKenzie of Luton: I am grateful to the noble Lord for that explanation although it is a pity about not being allowed to go to the bar. I want to make it clear that we have acknowledged, I hope fulsomely, the work the Minister has done on this. I acknowledge also the acceptance that what we have deliberated on in Committee and in meetings has influenced the Bill but if we are now saying that in a sense we have come to a full stop, I wonder what progress we can make. However, I will carry on with the argument.

As far as the start date is concerned, I simply do not accept the point that the insurers did not know until July 2012 that there was the expectation that a scheme would be set up. From what the Minister has told us, there have been two years of intense negotiations, generally with the ABI, which has had to discuss matters and negotiate with a range of insurers. There was an intense process under way, as we understand it, and therefore it must have been very clear to insurers that something was very likely to come from this and that was going to be the sort of scheme that has now emerged. I do not accept that the first insurers knew about it was the point when we said: "Here is the document. This is what we are going do".

Lord Freud: I just want to clarify the point about the expectations or otherwise of the insurance industry. From our negotiations, which went on for a long time —more than a year; I cannot remember exactly—it would have been anticipating that the specific insurers with historic liability would have been pinned down in a completely different way from this levy. We spent an enormous amount of time working on that. As I have already told the House, my first instinct was to try to get the actual insurers that wrote the liability to find the money out of their balance sheets. I judged that the legal risks to that approach were high—not impossible, but high—and we therefore switched to this other approach. Actually, the expectations that the industry might have had would not have been set anything like as early as noble Lords might think.

Lord McKenzie of Luton: Again, I am grateful to the Minister for that explanation, but it seems to me that the expectations were not set only at the point of July 2012. On the cost that the Minister has outlined, I understand that it has reduced from the original figure of £119 million. I do not think that the figures that the Minister has given reflect any additional benefit recovery potential that would come from having two more years in the scheme, or know whether that was fed in to any analysis of how it might impact on the spreading that would arise from that. Maybe we will have to have that discussion on another occasion. I do not think that we are going to see eye to eye on this.

On Amendments 5 and 6, the noble Lord prayed in aid a technical deficiency of the drafting. I have done it myself; I think it was the noble Lord, Lord Deben,

who advised generally against that. The thrust of the point made by the noble Lord, Lord Browne, was that, basically, whether it is the employer liability route or the public liability route, you are basically coming back to the same insurers. Obviously, the Minister's point about there being some hope for the self-employed —being able to argue that in certain circumstances they were de facto employees—is helpful.

We do not accept the proposition that the start date should be the 2012 date. February 2010 is a better date. That was when the expectation was effectively created. In fact, when you look at it, the insurers ended up with a lesser scheme than was proposed in February, so their expectation should have been of a higher obligation arising from that. A broader bureau was consulted on at that time. Having said all that, I wish to test the opinion of the House.

6.42 pm

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6.54 pm
Amendments 5 and 6 not moved.

Amendment 7
Moved by ***Lord Freud***

7: Clause 2, page 2, line 19, leave out "regulations made by the Secretary of State" and insert "the scheme"
Amendment 7 agreed.

Clause 3 : Eligible dependants

Amendment 8 not moved.

Amendment 9
Moved by ***Lord Freud***

9: Clause 3, page 2, line 47, leave out "regulations made by the Secretary of State" and insert "the scheme"
Amendment 9 agreed.
Clause 3 agreed.

Clause 4 : Payments

Amendment 10
Moved by ***Lord Freud***

10: Clause 4, page 3, line 4, leave out "regulations made by the Secretary of State" and insert "the scheme"
Amendment 10 agreed.

Amendment 11

Moved by ***Lord McKenzie of Luton***

11: Clause 4, page 3, line 4, at end insert "but shall be not less than 100% of the average damages recovered by claimants in mesothelioma cases"

Lord McKenzie of Luton: My Lords, I shall speak also to Amendment 13. Amendment 11 requires that those diagnosed with diffuse mesothelioma and eligible under the scheme should receive payment of an amount no less than 100% of the average actual damages recovered in mesothelioma cases. Because the scheme under consideration is a payment scheme rather than a strict compensation scheme, it has been agreed that a tariff based on average compensation levels taken over recent periods should be taken as a reasonable proxy for compensation amounts. The tariff, which we will discuss in subsequent amendments, is comprised of bands depending on age at date of diagnosis. It is understood that the starting tariff is accepted by the Government, the insurance industry and the Asbestos Victims Support Groups. What is not agreed is the percentage of the tariff that should be paid.

The amendment proposes that it should be 100%, a full compensation equivalent. Hitherto, the Minister has referred to payment levels of 70% of the tariff and today we heard the good news that he has been able to negotiate this a little higher with the ABI, with the proposition that it now be 75%. These amounts are of course separate from the payments towards legal costs and any research supplement, should that re-emerge. We should make clear again that we consider that the Minister has done a first-rate job in bringing the scheme thus far. We have no doubt that he has had to endure many painful engagements with the insurance sector, whose failure—or market failure in his terms—is at the root of the problem that this Bill seeks to address. I wish him to go further. I do not wish to seem ungrateful for these efforts but we have an obligation to speak to the victims to see it from their point of view.

The payment scheme provided for in this Bill operates when somebody has been negligently exposed to asbestos and has consequently contracted diffuse mesothelioma. This is, as we have heard, a terrible disease, invariably fatal, which inflicts untold suffering on those who contract it and also on their families. In Committee, a number of noble Lords spoke of their own harrowing experience of witnessing the awful pain that mesothelioma causes. The only thing that prevents individuals in these circumstances getting proper compensation—the government schemes fall far short—is the inability to trace the employer that caused negligent exposure to asbestos or the insurance company which provided employer liability insurance cover. No blame can be attached to mesothelioma sufferers for this. It is not their fault that, because of the passage of time, records have been lost or destroyed. Many can trace those responsible and the new tracing office will help more in the future. That is good news. That is as it should be. However, for those who cannot, why should they not be treated in an equivalent manner? They are the victims. If I may, I will quote from an e-mail received from Tony Whitston, who, as many will know, has been a tireless campaigner for asbestos victims. Tony said: "For mesothelioma sufferers and their families, compensation isn't about money per se. For mesothelioma sufferers, compensation provides solace that their loved ones will have some financial security when they die. For their families, compensation is about justice. No one will stand in the dock and answer for the terrible suffering and loss of life, past, present and to come. Compensation stands in for justice. To diminish compensation is to demean the pain and suffering families have witnessed and cheapens the justice they thought they had obtained".

If we are encouraged to look at this through the eyes of the insurance industry, we will be told, as we have been, that a discounted payment is necessary to encourage individuals to trace an employer or insurer. We will be told that not all employers in the employer liability market will have been in the market or on risk over the years when people were exposed. That is notwithstanding that tracing or accessing the scheme has to follow the same routes. References to public liability policies not being traced are, by and large, a red herring. Collectively, over the years, the industry would have had premiums for liability that it has not had to meet, and it still has the benefit of premiums for other exposures that remain outside this scheme. If there has to be some rough justice at the edges of these arrangements, clearly the justice should go to the sufferers. The insurance industry should make amends for its failures of the past.

Our Amendment 13 seeks to take the insurance industry at its word. It has expressed concern that a levy rate of more than 3% could tip matters over to a situation where the levy costs would have to be passed on to industry. The noble Lord referred to that in his opening remarks. We are sceptical about whether pricing of employer liability policies would work collectively for all 150 or so market players in this way. However, accepting that 3% is a tipping point for the sector, Amendment 13 requires that the levy is a minimum of 3% or such lower sum as would provide for 100% of the tariff.

For the initial four years of the scheme, the industry would doubtless claim that at 75% of the tariff it is already at 3%, or perhaps above it, in which case the

amendment should not cause it a problem. On the Government's figures, the levy would be close to 3% for a 75% payout over the initial four years of the scheme but below 3% for the latter six years if the tariff is to be paid in full. Given that no one, we hope, is arguing that the percentage levy will reduce in future, except to the extent of avoiding paying more than 100% of the tariff, the amendment should be readily acceptable.

If the Minister is unable to accept the amendment as it stands, could he at least confirm that it is not the intention to reduce the levy rate in real terms after the smoothing period unless that produces more than 100% of the tariff? Amendment 13 sits perfectly well with that in the name of my noble friend Lord Browne and the noble Lord, Lord Wigley. I beg to move.

7 pm

Lord Howarth of Newport: My Lords, Amendment 16 is in my name. Again, the common theme is that the amendments in this group seek to maximise the amount that will be paid to mesothelioma victims and their dependants. I will come in a moment to my own amendment but I would like to say a few words in strong support of the amendments in the names of my noble friends Lord McKenzie of Luton and Lady Sherlock. It was certainly not the fault of the claimants that the documentation went missing and it is very hard to see why they should bear the burden. The Minister has spoken of the dangers of a disproportionate burden on the employer's liability insurers, but is it not a disproportionate burden on the mesothelioma victims? The ABI has put forward various arguments as to why payments under the scheme should not be at the same level as the average of court awards. The first is that an incentive must be provided for claimants to go to court. If they could just as easily get

100% by going to the scheme, why would they bother to go to court? With respect to the ABI, this argument is nonsense. This will not be a matter of choice for the claimants. The Minister's letter to us of 4 July made it clear that the scheme is designed as a,

> "last resort where all routes to civil action against the relevant employer or insurer are closed to the individual".

The procedures under the scheme will make that a compelling reality. There will be the single portal and the identical search for documentation. Whether someone is on their way to having their case heard in court or considered by the administrators of the scheme, they will have recourse to the scheme only if they are unable to have recourse to the court, so the incentive argument is nonsense.

The ABI has also said that it is important to ensure that the overall cost to insurers is sustainable in the long term. I believe that the overall cost of a somewhat improved scheme—we have been debating today a variety of ways in which that scheme might be improved —would indeed be affordable. Apart from the fact that the insurers did very well for decades in being able to invest the premiums of mesothelioma sufferers whose documentation could not be found and who therefore could not bring a case, we have to remember in addition that between 1979 and 2008 the employer's liability insurers were effectively subsidised by the taxpayer to the tune of hundreds of millions of pounds, as they

were allowed to keep the amounts paid out under the Government's pneumoconiosis scheme to offset against the cost of the liabilities of the insurers.

Even now, because the Minister declined in Committee to incorporate in the Bill the possibility of creating parallel and comparable schemes for other diseases such as asbestosis, asbestos-related lung cancer or pleural disease, only some 50% of sufferers from asbestos-related diseases stand a possibility of being compensated under this scheme. Those other 50% will in effect be subsidising the insurers. Those are a handful of reasons why I take with deep scepticism the proposition that the insurers could not afford to improve the scheme. We know, indeed, that their case load will fall, so even if it was a little pricey for them in the early years it would rapidly become more affordable. The Government are also going to smooth the way over the early years.

It is unlikely that the cost of these improvements would cause the cost of the scheme to creep above the 3% of gross written premiums. I prefer the DWP's calculations on this to the ABI's. However, if that were to happen it would not be a disaster and is not terribly relevant, because it is other factors that move premiums. The Minister's fear that any improvements to the scheme would lead to the point at which additional burdens were placed, by way of higher premiums, on employers and industry is misplaced. The premiums that are charged in this market are the product of multiple factors and paying the beneficiaries-to-be somewhat more generously would not have an effect on the premiums. I do not believe that the percentage of gross written premiums has any bearing on what premiums are sought in the marketplace. The employer's liability insurers pitch their premiums at the maximum that competitive market conditions allow. They will always do that, so the Minister's fear is misplaced and he should call their bluff on that.

Finally, the third reason that the ABI gives is to stop people getting more than the courts would award. In its briefing, it said to us:

“As the payments will be made … on a straightforward tariff, some people will receive more compensation under the scheme than they would have received in civil compensation, and the aim is to set the tariff at a level that means this will only happen in a small number of cases”.
Elsewhere, it told us that the intention is for the tariff to be set “a little below” the average of awards made in civil cases. A little below? The proposition is that 30% should be docked from the average of court awards in the payments provided under the scheme. Seventy per cent was not enough and while we are very grateful to the Minister for easing the level of payments up to 75% of the average of court awards, that is still not enough. Nor would 80%, as in the amendment of my noble friend Lord Browne and the noble Lord, Lord Wigley, be sufficient in my view. Ninety per cent is the very minimum with which we could be satisfied. As the Association of Personal Injury Lawyers has pointed out, the Financial Services Compensation Scheme, which provides compensation where insurers have become insolvent, pays at the 90% level.
I turn for a moment to my own Amendment 16, which would prevent what I regard as excessive demands for repayment by the DWP through its agency, the
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Compensation Recovery Unit. The rationale for the figure of £110,000 is that if we expect the average of payments over the next 10 years to be £87,000—it may be fractionally more, now that the Minister has moved it up to 75%—and if, as the Minister has advised us, the average recovery required from claimants will be £20,480, add those two figures and you get to £107,500. Round that up a little and you get to £110,000. That is appropriate because payments under the scheme, unamended, will be meagre. At the same time, the DWP —and no doubt the Treasury, lurking behind it— aggressively intends to reclaim 100% in recovery of benefits and lump-sum payments from people who will have received only 70% of what they might have received in court.

Moreover, the department intends no abatement in its reclaiming to take account of pain and suffering, which they would do in the case of an award by the courts. So we risk the £87,000 typical award by the scheme being reduced by around a further £20,000 as a result of the DWP’s reclaims. According to the Association of Personal Injury Lawyers, the best estimate of what mesothelioma victims and their dependants will receive from the scheme will, therefore, be only 60% of what the courts might have awarded. It cannot be right that these people should receive only 60% of their legal entitlement when they have suffered a double negligence: negligence on the part of their employer and negligence on the part of their insurer. The Minister has said that his intention, in this legislation, is to remedy a market failure. To be frank, that is a euphemism. We are talking about a gross and scandalous dereliction of their proper responsibility on the part of a number of insurers, affecting a significant number of people who should have had cover. This has been a great evil and we should make amends as fully and generously as we possibly can. Is that double negligence on the part of employers and insurers, from which they have already suffered, to be compounded by a double meanness on the part of the Government, insisting on taking 100% of 70% and taking no account of pain and suffering? The Government are being too greedy here.
Lord Wigley: My Lords, I shall speak primarily to the lead amendment, to which I have added my name, and return to Amendment 12, which stands in my name, at the close of my remarks.

The scheme proposed by the Bill will provide neither the full amount of compensation to which the sufferer would usually be entitled, nor full protection for those suffering from asbestos-related diseases. It is utterly unjust that those who have already suffered a wrong, due both to their injury and to the negligence of their employers in losing their insurance records, should now face losing a significant percentage of their damages.

The Government have offered the justification that mesothelioma claimants should be encouraged to seek out "all other avenues" before coming to this scheme. As I said during earlier stages of the Bill, this attitude shows a flagrant disregard for the harsh realities of this disease, not to mention the fact that the sufferers usually die very soon after diagnosis, so leaving their families with less compensation than they would otherwise have been entitled to. Of course, I welcome the move

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to increase the compensation payable from 70% to 75%, and I thank the Minister for securing that improvement. However, whether the Government propose that claimants should receive 30% or 25% less than the average worth of a claim, it is essentially unfair that any reduction is happening at all. By point of comparison, the Pneumoconiosis Act 1979 was designed to award full compensation to claimants and is reviewed annually.

The difference between 100% and 70% compensation for these claims is not to be balked at. On 25 June, the noble Lord, Lord Wills, asked the Government what assessment had been made of the likely impact on the insurance industry if it was made to pay the full 100% of compensation to sufferers under the proposed scheme. In his response, the noble Lord, Lord Freud, said that over the first 10 years of the scheme, if the tariff were 100%, the amount of compensation paid would total £451 million. Under the 70% tariff originally proposed, the insurance industry was, by comparison, forecast to pay £322 million. However, the money that the insurance industry saves by getting away with 70% or 75% is a cost suffered by the victims' families.

The Minister also said that the Government,

> "are getting an average of £87,000 a head to people who suffer from this terrible disease".—[

Official Report

, 25/6/13; col. 654.]

It is presumably now nearer to £94,000 at the 75% level. According to the Association of Personal Injury Lawyers, if the tariff was set at 100% and based on the figure proposed by the noble Lord, Lord Freud, the amount of compensation awarded would be around £124,000. That is a £30,000 shortfall in what the victims and their families can expect and it is a big difference. It is a difference of millions of pounds for the insurance companies but, my goodness, that £30,000 difference for the victims will be even harder to bear.

Finally, I want to share with the House two of the many comments that I have been sent by families of asbestos victims. Sandra Emery wrote:

"It took Parliament … a hundred years to ban asbestos. As a result, I have lost my mother and brother to mesothelioma. Please do not compound the error by passing such inequitable legislation".

As Kerry Jackson says:

“All victims and their families deserve 100% of what they are entitled to … this is a disease that has come through pure neglect”.
I ask the Government for an undertaking that they will continue to seek other ways to increase the compensation to around 100%. I plead with them to reconsider. I will not be pressing my amendment for the 80% level, which I would have done had the Minister not come forward with an increase. However, in order to register my support for the principle, if the 100% amendment is pressed to a vote I shall support it.

7.15 pm

Lord Browne of Ladyton: My Lords, I have added my name to the amendment in the name of my noble friend Lord Wigley. When he and I put our names to the amendment, we were unaware of what the Minister would be able to achieve without the benefit that our amendment being carried by your Lordships’ House might give in strengthening his negotiating hand. I have immense respect for my noble friend and his decision not to press his amendment and I will not seek

to do otherwise. However, I want to add to what has already been said in relation to this group of amendments and the principle of justice.

In one of the early sentences of his introductory speech at Second Reading, the Minister enunciated a principle that, if a person is damaged by the negligent actions of another, that person should be entitled to compensation and, therefore, justice. I paraphrase him and I am sure that I do not do justice to the eloquence of his words at the time, but I remember pointing out that there was an inconsistency between that and other recent actions of his Government in relation to health and safety law. We all agree with that principle and, with all due respect to the arguments that can be made, I suspect that the Minister does not equate the payments from the scheme with justice. He will be comfortable at the Dispatch Box and probably will, in his characteristic style, say that he is not presenting this as justice. Justice for these people would be for an employer who is insured to sue, and 100% compensation. So we are not going to do justice. I regret that we are not going to do justice to the victims of this dreadful behaviour and of the dreadful history that followed it, not necessarily on the part of employers—which went out of business for lots of reasons—but certainly on the part of the insurance industry.
However, we have a duty to strive for justice. The Minister eloquently expressed, as he has done on a number of occasions, that this is basically a negotiation. He has negotiated on behalf of the victims in a situation where hitherto they had only statutory schemes to look to, and he is to be congratulated on his achievement. I have experience of the responsibilities he holds and know just how difficult the job is. I have congratulated him on it in the past and he gets a significant amount of deserved credit in this House for what he has achieved.
He says that his ability to improve the scheme is a function of a number of practical and realistic things: what is negotiable in the circumstances of what the market will bear; and the point at which he judges, and the insurance industry tells him, that it will be compelled to transfer the marginal cost of the scheme to British industry and thus affect competitiveness. It is also a function of the fact that he is operating in a situation where he is seeking to have the scheme funded by what he calls active insurers, which are not necessarily the insurers that historically wrote the policies that carried the risk in the first place.
I accept all that. In the debate on the previous group of amendments, my noble friend Lord McKenzie made a point that prompts my own, which is different from any

that have been made in the debate. We do not doubt the Minister's bona fides, but whether we are at the limit of his negotiating ability, or whether we can help him go a bit further towards the sort of figure that is more like justice, it would be helpful if we knew how many of the insurers with which he is negotiating are those that carried this risk in the first place and behaved in the way they did.

Until now, the Minister has deployed very adroitly the point about active insurers as opposed to those who carried the risk. However, he has done it in a very

generalised way. I was not moved to interrogate him in detail until he explained, probably for the second time —I did not pay enough attention the first time—to my noble friend Lord McKenzie that when he first approached the issue, his desire was to place the burden on those insurers that underwrote the policies and risk in the first place. That implies that he must have thought that there were enough of them to carry the burden. Therefore, this cannot be an insignificant number of insurers. The inference I drew from the argument that he put forward in his contribution—which he may now regret—was that a disproportionate burden was being placed on people who were not about when the problem was being created. However, my knowledge of the Minister and of his abilities, which is growing, suggests that the opposite is the case, and that more of these insurers than we think will have to pay up.

If I had thought about this before, I might have argued for a differential levy in order to get a significantly increased amount of money, so that we could all do what we wanted to do, which was get much beyond 70%. Is the Minister in a position to help us? It may not be of any great assistance to us, although there is still Third Reading, but at some stage—I am not asking him to name and shame, although I would quite like him to—it would be interesting to know the number of insurers involved. Perhaps we could go a bit further. Could he describe the scale of this market in monetary terms, and the proportion of the market that is controlled by those companies that let this insurance market fail? We would then all have a better sense of justice and of where we should apply the burden.

I will say two more things. Unfortunately I had to leave the Grand Committee before we came to debate this issue. When I read the *Official Report*, I was extremely impressed by the amendment of my noble friend Lady Donaghy, which proposed adopting the idea of the incentive that the ABI deployed—which my noble friend Lord Howarth demolished and which the Minister has now abandoned—and reversing it to fix the compensation at 130% of the average, in order to incentivise the insurance companies to get their colleagues to find the policies, and to get the people who wrote them to carry the risk and burden. That is where the incentive should be in this situation.

I see that the noble Lord, Lord Stoneham, is in his place. I am glad that, thus far in the debate, he has not deployed the argument of delay in relation to this legislation. I do not resent—but I do not like—the idea that those of us who have been trying to improve the legislation somehow have to step back because we may delay the point at which very deserving people can get some form of payment. I do not like it for a simple reason. The Bill was introduced in your Lordships' House and went into Grand Committee. We are now on Report and this is the first and earliest point at which we can vote on anything in it. If the argument of delay in these circumstances is to have any merit, it means that we have to accept whatever is presented to us by the Government if it is broadly in a good area of public policy. If in future we ever

have to face an argument for reform of the House of Lords, we had better not do that.

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Lord Wills: My Lords, I, too, support the amendments in this group and endorse everything that my noble friend on the Front Bench said in support of them. In doing so, I express my appreciation for the achievement of the Minister in nudging the percentage up to 75%. It is a significant advance and I appreciate all the effort that must have gone into achieving it. However, I am afraid that it is still not enough.

I will say a few additional words in support of Amendment 13, to which I added my name. It sets out a mechanism to try to ensure that the Bill can be a final settlement of the issue. It does so by setting out to ensure a continuing equitable balance between the various interests at play. We have heard at all stages of the Bill that there is strong support in your Lordships' House for the percentage paid to be not less than 100% of the average damages recovered by claimants in mesothelioma cases, and for the start of the scheme to be 10 February 2010. However, at the same time, I think that your Lordships' House recognises the strenuous efforts made by the Minister to achieve a settlement with insurers that could be delivered rapidly. With respect to my noble friend Lord Browne, the issue is not so much the processes of Parliament as how obstructive the insurers are going to be. I appreciate that there is a risk of unpicking what the Minister has achieved and encouraging insurers to dig their heels in and be obstructive. We have seen too much evidence of the obstructive approach that they adopted in the past for that not to be a risk. Nevertheless, we can improve the Bill further, and this amendment seeks to do that.

As I understand it, the basis of the settlement, which can be achieved rapidly, is that costs should not exceed 3% of the levy. That is the point at which insurers estimate that they would have to pass on costs to employers. It is the actuarial assumptions made by insurers on this basis that have reduced the figure to less than 100% for payments under the scheme, and set the start date at 25 July 2012. Those actuarial assumptions are just assumptions. They could be questioned, and, as we have already heard, the Government's assumptions are different. However, it may turn out that they are accurate. All assumptions at this stage can be only a best guess.

If it does turn out that these actuarial assumptions by the insurers have overestimated the cost of the scheme, the amendment will address that eventuality. If, over time, once the smoothing period is over, the cost of the scheme amounts to less than the 3% of the levy that insurers are currently willing to contribute, the end result will be that insurers will up paying less than they are currently prepared to pay—in effect, they will save money—while victims of mesothelioma will continue to receive less than many, and perhaps most, in your Lordships' House and outside it believe that they should receive. Such an outcome would be manifestly unjust, and would lead to considerable pressure in Parliament for new legislation to put right such injustice.

The amendment seeks to avoid that situation, and all the further delays and uncertainty for victims of this disease that would result, by ensuring that such an injustice will not occur. It places no new burdens on insurers at all; it merely seeks to ensure that, whatever the outcome of the actuarial assumptions that underpin

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the current provisions of the Bill, insurers will pay what they are currently prepared to pay. It offers the victims of this dreadful disease the comfort that, if there is more money available as a result of those assumptions turning out to be inaccurate, it is those victims that will get it and not the insurers. This avoids the prospect of future

wrangling and disputes, which I would have thought the insurers would certainly welcome. It would be in nobody's interest to reopen the matter in this way, and this amendment offers a continuing equitable outcome. I hope that it will find favour with the Government.

7.30 pm

Lord James of Blackheath: My Lords, before the Minister replies, I should like to return to a point that came up in Committee and to try to set the industry context in which these misunderstandings, particularly those of the noble Lord, Lord Browne, are occurring. I should declare my interests. I was an elected member of the Council of Lloyd's throughout the whole six years of its rescue; I was in the somewhat unhappy position of being chairman of its audit committee for those six years; and, finally, I was chairman of the committee that created Equitas. I have twice stood trial in America for the fraudulent signing of the audit certificate of Lloyd's, of which I was fortunately acquitted each time, as it was a 25-year mandatory sentence. I therefore have some perspective on these affairs.

The noble Lord, Lord Browne, has a fundamental misunderstanding. There is no such thing as an insurance industry in the context in which all these liabilities were first conceived. Insurance companies do not exist. They have morphed into what is now, effectively, a vast international reinsurance market, where all these liabilities have been swept up and eventually reinsured with each other until they are all divided up against the entire global insurance market., Lloyd's itself is now wholly owned by Berkshire Hathaway and the negotiations will, therefore, have to be entirely with Berkshire Hathaway and its chairman—good luck in getting charity from him.

The context, therefore, is not that there are a lot of companies waiting to have separate negotiations. You have to hold negotiations with something like Swiss Re, as it will represent the entire financial community which has come together to provide a collective bond to underwrite, first of all, Lloyd's, and then everywhere else. The negotiation is very difficult for the Minister to undertake and it is in that context that I know he will now answer us.

Lord Freud: My Lords, I thank noble Lords for tabling these amendments. I will start with those relating to the rate of payment and then I will turn to the amendment of the noble Lord, Lord Howarth, on the recovery of payments over £110,000. The amendments tabled by the noble Lords, Lord McKenzie and Lord Wigley, and the noble Baroness, Lady Sherlock, seek to ensure a minimum level of scheme payment at either 100% or 80% of the value of an average mesothelioma civil damages claim. I completely understand and appreciate that noble Lords would like to see payment levels that are closer to, if not equal to or above, those of average civil damages. Equally, I take from our

debates that I have noble Lords' full support in wanting to guarantee that we get the maximum possible payment for people who, through no fault of their own, clearly cannot bring a case against an employer or their employer's insurers. As we have often discussed, the funds to provide these payments are to be raised through a levy imposed on the active insurance market. The amount of levy to be imposed, and consequently the amount we can pay eligible people, has been determined following considerable work and negotiation.

Perhaps I may pick up the point about incentives made by the noble Lord, Lord Howarth. We have not made that argument. To the extent that it has appeared in some of the earlier texts on this Bill, I think it reflects a shape that was somewhat different when that argument might have applied. We have not made it. It is not relevant to this particular scheme. The noble Lord, Lord Browne, made the point in reverse. I actually give the credit for the 130% to the noble Baroness, Lady Donaghy, who proposed it originally. I have taken that point in a somewhat different way. That is what has driven the discussions with the FCA and led to its much tighter determination to have an effective incentive for insurance companies to do the tracing that they should do and to ramp up the tracing effect.
We have a duty here to do our best to ensure that costs are not passed on willy-nilly to British industry and that the levy works in that way. At that time, many of the insurers were not necessarily in the business on the same scale that they are today. I know that the noble Lord, Lord Browne, has asked for a full analysis. My noble friend Lord James gave him a picture of the kind of capital pools we are talking about. That is what insurance essentially is, with companies acting as agents. It is extraordinarily hard, but there is already a big split—I do not have reliable figures: I thought I had, but they are not reliable enough to quote in public—between a large number of run-off companies that are not active anymore, many of which are in run-off, which is the polite way of saying they have given up administration, because of some of the liabilities that they took. That needs to be monitored, which is difficult to do. There is also the matter of the market share of these companies. They may have been active for 50 years, but their market share may have changed dramatically. There is also the fact that some may have kept very good records while others have not, leading to a double whammy effect. Those that have paid up, because they have really good records, are probably those from which we are trying to take more money through this levy. I do not have a market analysis of the kind that the noble Lord, Lord Browne, wants, but I am confident in saying that nobody else has either.
Let us move on to where we have got to. Thanks to the combined and consistent pressure on the insurance industry from both the Government and noble Lords, we have secured what I could call a reluctant agreement from insurers that the scheme payments will now be set at 75% of average civil compensation. I emphasise again the important role played by noble Lords in getting that outcome. I am grateful for that. I have already talked about the different assumptions of the Government and the industry regarding the volume of

applications. The insurers have based their calculations on their own figures, which they think will require a levy of close to 3% of their gross written premium.

This has been a tough negotiation and even those with whom the Government were negotiating have had a tough job persuading others in that industry that there is an affordable package here. We want more, but this is a significant move from the insurance industry. If we could pay people more, we would, but this is a balancing act. If we were to go up to 80% or 100%, we would be very concerned about the costs being passed straight on to British industry. Indeed, a key concern that I have had about the structure of the scheme is that that should not happen, or that the risks of it happening should be minimised, and that is what the smoothing mechanism for the first four years is about. I know that the noble Lord, Lord Browne, will not like me saying this but there could be delay and delay and a full renegotiation

is quite a painful process, as I know he will understand better than virtually anyone else.
On the point about the 3% made by the noble Lord, Lord Wills, I have been fully on the record since the beginning of the afternoon about the two points relating to the CPI and, more importantly, about our intention to review the matter at the end of the smoothing period. I hope that he appreciates how far that goes towards meeting his concerns.
Your Lordships have been very generous in what they have said about this matter but I think that a real expression of gratitude here would be if the noble Lord did not call a vote on this. That is the kind of gratitude that I understand and appreciate.
Before I close, I shall turn quickly to the amendment tabled by the noble Lord, Lord Howarth, which would allow the scheme to recover a scheme payment already paid only if the amount of the payment was above £110,000. Clause 4 is intended to allow the scheme to recover any payment, or part payment, in specified circumstances. Those specified circumstances will form part of the regulations setting up the scheme and will be debated in due course. However, the intention is that a payment that has been made in error will be subject to repayment. This amendment would allow the scheme to recover a payment made in error only if that payment was above £110,000. Payments of £110,000 or less could never be recovered.
If someone receives a payment and it is subsequently established that the payment was made in error or obtained as a result of some fraud or misrepresentation—it does not happen very often but there are one or two examples—it is right that the person who received that sort of payment should be asked to repay it, regardless of the level of the payment. It would not be appropriate to allow someone to keep any payment if it had been established that they were not eligible for it. It would clearly be unfair to allow one person to keep a payment of £110,000 but to recover a payment of £110,000 and a penny paid to someone else.
It may be that the noble Lord's amendment is intended to address the recovery of social security benefits and government lump sums from scheme payments, but the amendment as drafted does not achieve that.

Provision for compensation recovery is dealt with in Clause 11 and Part 1 of Schedule 1, although I acknowledge that, like one or two other bits of the Bill, they are somewhat impenetrable.

The noble Lord's intention may be to prevent the scheme administrator reducing scheme payments in order to offset the cost of repaying recoverable benefits and lump sums to the Secretary of State of £110,000 or less. Recovery of benefits legislation applies where a person makes any payment to or in respect of another person in consequence of an accident, injury or disease and specified social security benefits or lump-sum payments have been paid in respect of the same incident. This is the basic principle of not receiving money or being compensated twice—the use of the word "compensation" here is more casual than legal—and we believe that that principle should apply here.
The other effect is that a person could receive a scheme payment plus benefits and a lump sum. That would mean that some people could well end up in a more advantageous position than someone receiving the full amount of compensation directly from an employer or traced insurer, which clearly cannot be right. I appreciate the noble Lord's intention to maximise the amount that people with

mesothelioma can receive but this is simply not the way to achieve that end. Therefore, I urge him not to press the amendment.

7.45 pm

Lord McKenzie of Luton: My Lords, I thank all noble Lords who have spoken in favour of Amendments 11 and 13. Perhaps I may deal briefly with the Minister's reply. We agree that we want to get the maximum possible out of this. We acknowledge the improvement in the incentive for tracing that the noble Lord announced earlier, and I think that all noble Lords accept the increase from 70% to 75% in the level of recovery. However, we always come back to analysing this from a justice point of view: what is fair to insurers and what is fair to people who have contracted diffuse mesothelioma because of employers' negligence. We cannot get away from the fact that justice for them has to be 100% of the compensation that they would otherwise receive if there were formal compensation arrangements rather than the tariff. One hundred per cent of the tariff is justice; anything less is not.

I am not sure that we heard a compelling argument as to why the 3% minimum was not appropriate, particularly if it is where insurers are at the moment, certainly over the initial period. That would seem to be an easy one for the Minister to accept. However, given the hour and given the business that we have left to do, I should like to test the opinion of the House on Amendment 11.

7.46 pm

Division on Amendment 11
Contents 119; Not-Contents 153.
Amendment 11 disagreed.

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Amendments 12 and 13 not moved.

Amendment 14

Moved by ***Lord Freud***

14: Clause 4, page 3, line 5, leave out "regulations" and insert "scheme"

Amendment 14 agreed.

Consideration on Report adjourned until not before 8.45 pm.

Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013

Motion of Regret

7.58 pm

Moved by ***Lord Bach***

That this House regrets that the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, laid before the House on 7 March, will result in a substantial number of vulnerable people not being eligible for legal aid because of the capital in their house. (SI 2013/480)

Lord Bach: My Lords, one way of cutting legal aid is to take areas of law out of scope, which is something that this Government have done with a vengeance. As this House knows very well, social welfare law has been potentially destroyed by Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, there is another way to do the same thing, and that is to cut the number of people who can obtain legal aid in those areas of civil law—and there are precious few of them—which are still in scope; for example, mortgage possession and eviction cases, community care cases, mental capacity cases and some domestic violence cases as well. By these regulations that we are debating tonight, which my regret Motion deals with, Her Majesty's Government have excluded many who could claim legal aid previously. Is that a fair or just thing to do, particularly at a time of hardship and austerity for so many people? That is my point.

Before 1 April, any person in receipt of means-tested welfare benefits—for example, income support or guaranteed state pension credit—would qualify for legal aid on both income and capital. They were described as being passported. A quick decision

could be made, which was easy to administer for the Legal Services Commission as was, the providers of that legal advice and the clients themselves.
Now the Government have put into place radical changes. The regulations require a capital test as well as an income means test: if a person has more than £8,000 capital, they are denied legal aid. Interestingly, under welfare benefit law, that sum is £16,000 and if they have anything less than £16,000, they would still qualify. My first question to the Minister is: why the difference? The welfare benefit system also ignores the value of a person's main dwelling but in these regulations the value of their main dwelling is taken into account. Therefore, my second question is: why is it taken into account under these regulations but not under welfare benefit regulations?

Of course, there is a disregard of £100,000 for any equity and £100,000 for any mortgage. Do the Government deny that many people who own homes with mortgages and some equity will not qualify for legal aid? The state has recognised in the benefits system that these people cannot easily, or at all, access their capital because it is tied up in the property that they have. Why will that not apply in these cases too? My case is that this will affect a large number of people's access to some sort of justice. Her Majesty's Government estimate 4,000 people will be affected. The belief of many outside is that that is an unbelievably small figure and that there will be many more in practice. This is simply unfair.
There is also a need for a general discretion to disregard income and/or capital where it was or is equitable in all the circumstances. In the 2000 regulations, there was a general discretion to disregard where it was equitable in all the circumstances. There has been no evidence of abuse of those regulations in that way. Why is it not in these regulations? We all know cases, perhaps involving mental capacity or disability, where justice demands legal help by way of legal aid. But because of the inflexibility of these regulations there is, to coin a phrase, no way out. There is certainly no way out with the exceptional funding scheme, which perhaps now should be called the very rarely exceptional funding scheme because it is not relevant to cases that are still in scope. Section 10 of LASPO is there for areas of law now out of scope. I fear the fact that there is no flexibility, and that the £8,000 capital is such a ridiculously low figure, shows that the purpose of these regulations is not to advance justice but to restrict it—not to help people sort out their legal problems but to make absolutely certain that they cannot.
In 2009, when austerity had already begun, the Labour Government did not reduce eligibility for legal aid in social welfare law; they increased it by 5%. We recognised that at a time of economic difficulties, it is crucial to ensure that people get quality and inexpensive legal advice to sort out their legal problems rather than go without any access, with the consequences that everyone knows; namely, that problems multiply and magnify until often in the end the state has to pick up the pieces arising out of problems with debt, welfare benefit mistakes and loss of employment. That decision by that Government was not a soft-hearted decision: it was based on a realisation that not only is access to justice right in principle; in this instance it saves the state money. It is not rocket science; it is just something that this Government do not get.
I look forward to the contributions of other noble Lords in this debate and to the Minister's reply. I ask him on this occasion please to address the debate itself. When I was a Minister, like him, I had to undergo from time to time debates where the government policies that I was trying to defend were attacked from start to finish by practically everyone who spoke. It is not a comfortable position but I would argue

that there is still a duty on Ministers to answer the debate being heard at that time. I do not think that the Minister did himself justice last Thursday in the debate that the noble Baroness, Lady Deech, began, but I know that he can. Anyone who heard him at Question Time today dealing with the noble Lord, Lord Tebbit,

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and others will know that he is an experienced and skilful performer in this House. Therefore, I ask him to deal with the issues that are raised in this debate and not just read out his speech.

There are already cases of people not getting legal aid when they should. That is a consequence of so much social welfare law being taken out of scope. There are also cases of people who have legal problems in areas that are still in scope but as a result of the regulations that we are debating tonight they are not able to access justice. That is a bit of a scandal. The Government should think again about these regulations and I hope that the House will agree with me that they are, at the very least, to be regretted. I beg to move.

Lord Pannick: My Lords, I thank the noble Lord, Lord Bach, for moving this Motion. Over the past three years he has played an essential role in identifying with forensic skill and great eloquence the defects in the series of measures that this Government have brought forward to limit legal aid in our society. The noble Lord has repeatedly pointed out, accurately and with some degree of force, that legal aid is a vital cement in our civil society. There is no point whatever in this place conferring rights unless people have the opportunity to vindicate them. It would be a great shame if there were further reductions in the ability of persons other than the wealthy to vindicate their rights by legal process.

The essential defect in these regulations is their treatment of the capital sums owned by persons who are otherwise eligible for legal aid. I cannot understand why the regulations apply different criteria to capital from the criteria that are applicable in welfare law. Regulation 8(2) provides that any person with more than £8,000 in capital will be denied legal aid, even though welfare benefits law provides that persons qualify for means-tested benefits even though they have up to £16,000 of capital.

There is a further discrepancy in that the welfare benefits system ignores the value of a person's home. These legal aid regulations will disregard only £100,000 of equity in property, under Regulation 39; and £100,000 of any mortgage, under Regulation 37. The inevitable result is that many people who own their own homes will be excluded from legal aid, even though they cannot in practice access the capital.

All this is very unfortunate, given that the Legal Aid, Sentencing and Punishment of Offenders Act has already reduced the scope of legal aid so that it is now skeletal. I am very concerned that even within the much reduced scope of legal aid under that Act, people who have no income and who are therefore eligible for welfare benefits will be unable to obtain legal advice and assistance. As the noble Lord, Lord Bach, said, there is a vital need in the regulations for more flexibility.

The Minister will no doubt tell us, as he usually does, that funds are limited and that economies are needed, but to adopt criteria, as the regulations do, which are more onerous than the criteria applied to welfare benefits is simply irrational and fails to understand the vital function of legal aid itself as a welfare benefit for the needy in our society. My essential question for

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the Minister is this: why are the criteria for capital in these regulations different from, and more onerous than, the criteria for welfare benefit law?

Baroness Deech: My Lords, I shall speak in support of my noble friend Lord Pannick and the noble Lord, Lord Bach, who is also my friend but not technically my noble friend. I want to put the regulations in perspective and to inquire whether the Government realise the pressure that these calculations will place on other parts of our society. I will mention just two issues.

This Government and their predecessors have pushed very hard to widen house ownership in the past 20 or 30 years. It has been successful. Ownership, of modest homes, has spread to all corners of society. To include their value in the assessment of legal aid places an unfair burden on a modest number of the population who have striven to own their own home. Not only that, but having owned one's own home one now finds that it has to be sold to pay for one's care in old age. It may have to be sold to raise money if one has the misfortune to be involved in expensive litigation. Not only that but, heaven forbid, it might even come to a mansion tax. In other words, one is putting much too much pressure on that wide swathe of population that owns a home of relatively modest value. They might have bought it for a five-figure sum years ago, but they will now find their house in that more than £100,000, and then £8,000, asset rank, depriving them of legal aid. The assessment costs will bite into the limited funds that are available for legal aid, because given the way in which the legislation is drafted, assessing whether someone is eligible for legal aid will involve quite a complicated process.

8.15 pm

The regulations will also place pressure on the Bar, which, as I have mentioned many times in this House, I regulate but do not represent. Barristers are already doing an extraordinary amount of pro bono work—they represent people for free, which I discovered when I started regulating—but there is a limit to how much pro bono work can be expected of the Bar, especially the junior Bar, when legal aid is in effect being removed from many areas where the most altruistic of our young people and older barristers practise. There is no more good will by way of pro bono that can be drawn, or no more than there is at the moment.

We have also seen a growth in the number of litigants in person. People who are not getting legal aid are representing themselves. The calculations in these regulations will include a number of people who think that they can represent themselves, or indeed have to. This has caused, as we have already seen in judicial comments, a great deal of trouble for judges, who are trying to control what is going on in court and are finding that cases are taking longer and that there is no parity of arms between the self-representing litigant and the litigant on the other side who may be able to afford a barrister. Complaints are arising from this, because the litigants in person do not understand, and cannot be expected to understand, how procedure works and what can be expected of the judge and the barrister on the other side.

The knock-on effects of these regulations, which almost get rid of legal aid, will bear their own costs. I join others in urging and pleading with the Government to withdraw and redraft them.

The Lord Bishop of Norwich: My Lords, a key reference in this Motion of Regret is to "vulnerable people", which is why this non-lawyer dares to stand amid such legal luminaries and feels a bit vulnerable himself.

A civilised country is one where we are all free under the law and where vulnerable people are not left defenceless against unjust treatment by another person, organisation or even an agent of government. Vulnerability is relative, of course, but the calculations that inform the regulations under discussion concern people who may be a very long way, as we have heard, from financial comfort and security, and may have multiple other needs.

The level at which permitted disposable capital is set is likely to render some older people in particular less capable of securing legal aid when faced by serious problems requiring legal redress. The levels seem to be set deliberately low. An older person with a capital value in their house of, let us say, £150,000 and an income that is modest yet sufficient to take them over the limits here might have to sell up to pay for legal services in a case, for example, involving mental capacity or criminal negligence. If they do not sell, they will have no access to the law, or, as the noble Baroness, Lady Deech, has just illustrated, they would have to represent themselves.

Do we think that such a person should move away from the support structure of family and friends just when they might need them most, when suffering from an injustice, if they are to realise any capital? Perhaps I am painting too gloomy a picture, but these seem to me to be the likely consequence of the regulations. I should be grateful if the Minister would address such dilemmas and what someone in such a dilemma is expected to do.

Last week, the Justice Secretary's statement that he was ideologically opposed to legal aid for prisoners in almost all situations, however disabled or disadvantaged they were, caused comment. I know that this is not the focus of this Motion of Regret, but the use of the word "ideological" was worrying. Ideology has too often trumped humanity in the history of the 20th century. Of course, the term emerged from the French Revolution, so its pedigree is argued over.

Although I am sure the Minister will robustly defend the regulations, I hope he will recognise that if they damage access to legal representation for vulnerable people, the Government will have to change course on humanitarian grounds and not defend themselves on the basis of a flawed ideology.

Lord Beecham: My Lords, I congratulate my noble friend Lord Bach on raising this issue by means of the Regret Motion. To prepare for this debate, I did of course read the regulations and the Explanatory Note. It occurred to me that it would be helpful to look at the impact assessment. However, that posed a certain

challenge. It took about three-quarters of an hour for the Printed Paper Office and me to track down the appropriate documentation, because the reference in the Explanatory Note is not very helpful, and apparently nobody in the Ministry of Justice was able to respond to a telephone call from the Printed Paper Office.

However, I was eventually able to access the impact assessment, which was revised on Royal Assent. It certainly makes interesting reading. It discloses that a majority of respondents to the initial consultation,

> "did not support the Government's proposals for reform",

although some did. It would be interesting to know what proportion of respondents supported the proposal out of the 5,000 who responded. "Some" could mean as few as two but conceivably a few more. It would be interesting to know what the balance was.

There has been no specific consultation on these regulations. However, the impact assessment made it clear that the changes have the potential to have a disproportionate effect on women, BME citizens and those between the ages of 25 and 64. Nevertheless, it stated that the Government's conclusion was that clients should have a financial stake wherever possible. That financial stake could be as much as 30% of disposable income. Disposable income is not generously calculated. Roughly speaking, a contribution of that size would pay for an evening out for the Chancellor and whoever he chose to entertain—Lynton Crosby seems to be quite a popular accompaniment to any Minister.

There is also a serious point, which the noble Baroness, Lady Deech, referred to, about the question of the capital value of property to be taken into account. Given the current level of house prices, certainly in this part of the country, just over £100,000 of capital represents very little in the way of property. Values are substantially higher than would be reflected in other parts of the country. A pensioner on pension credit whose mortgage has been paid off and whose home is worth £110,000, who could be living in a very modest property in London to exceed that figure, will be ineligible for legal aid. A recently unemployed father on jobseeker's allowance in negative equity with a home worth £240,000 and a mortgage of £250,000—so not in possession of any equity at all—will also be disqualified from receiving legal aid. A disabled man receiving employment and support allowance with a mortgage of £150,000 on a home worth £210,000—again, in London, that will not get you very far—will also be ineligible for legal aid. There is a real question of hardship here. It is certainly undesirable that people in that position should be compelled to have, to use that rather ugly phrase, "skin in the game" to access justice.

There is a particular question on which perhaps the Minister can help me. Regulation 40 states that,

> "payment made out of the social fund under the Social Security Contributions and Benefits Act",

must be disregarded. Does that apply to the Social Fund in its new incarnation, because it is of course no longer a national Social Fund; it has now been passed to local authorities? I do not necessarily ask for an answer tonight, but it is unclear to me whether that disregard will apply to payments made under the new regime.

Another issue, mediation, has been raised by the Law Society, among others, and is something that the Government are very keen to push. I have my reservations about the degree to which it will actually help to resolve cases. Nevertheless, it is available, it has been used, and the Government want to encourage it. The same eligibility criteria will apply. Have the Government taken that into consideration? There is also the issue of the cost of administration of the system. Clearly administering the new regime will involve greater costs than the previous regime.

Then there is the question of how many people will be affected. As my noble friend said, the Government's original estimate was 4,000. As he said, that is widely viewed as an underestimate. Admittedly the scheme has been going for only a few months, but have the Government made any attempt to ascertain the likely numbers, and can they project them? If they have not done that yet, will the Minister undertake to do so after, say, six months, nine months or a year, so that we can assess the impact on those affected?

It is unfortunate that we find ourselves in the position of considering significant changes to a scheme whose scope is in any case being substantially narrowed. Clearly, the likelihood of people being deterred from pursuing a remedy will be borne out in the event. It is difficult to argue with those who believe that deterring claims is part of the Government's objective, at least as much as the potential savings that will accrue, at the expense, as the right reverend Prelate pointed out, of many vulnerable people.

I entirely endorse the terms of the Motion and look forward with interest to hearing from the Minister. I join my noble friend in congratulating the Minister on the line that he took this afternoon in questions about human rights. If I may say so, he distinguished himself from some of those around and behind him this afternoon in a very effective way. A little more of that from him would win him even more plaudits around the House. I congratulate him, and I hope that in that spirit he will respond a little more constructively to my noble friend's Motion than might otherwise be the case.

8.30 pm

The Minister of State, Ministry of Justice (Lord McNally): I think there is a line in TS Eliot about, "Woe unto me when all men praise me".

This debate gives me the opportunity to clarify the position in the regulations laid before the House on 7 March concerning the issue of capital in relation to financial eligibility for civil legal aid. I will certainly respond to the debate, as I did last Thursday. In fact, I reread the debate and my reply. I think that I covered most of the points raised by the 14 lawyers and two others who contributed to that debate.

The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 set out the rules that the director must apply to determine whether an applicant's financial resources are such that the applicant is financially eligible for civil legal services under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These regulations broadly replicate effects of Parts 1 and 2 of the Community

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Legal Service (Financial) Regulations, which were made under the Access to Justice Act 1999. Indeed, a number of the points that were raised tonight were in complaint of parts that replicated that Act.

However, as part of Government's consultation in 2010, entitled *Reform of Legal Aid in England and Wales*, the Government proposed several changes to the rules concerning financial eligibility and contributions for civil legal aid. One of these changes was the removal of capital passporting. Two others were to cap the subject matter of the dispute disregard at £100,000 for all forms of civil legal services, and to increase the levels of income based contributions to a maximum of 30% of monthly disposable income. Before the 1 April, someone receiving certain income-based benefits such as income support, could have up to £16,000 disposable capital but be automatically passported through the means test and be deemed eligible for legal aid. However, a person not receiving a passporting benefit, and who had more than £8,000 in disposable capital, would be ineligible for legal aid.

It is inequitable that applicants with similar levels of capital may or may not be eligible for legal aid depending on the source of their income. To achieve greater internal alignment and fairness to all applicants for legal aid, the Government proposed that in future, people in receipt of passporting benefits should have their

capital assessed in the same way as it is assessed for others, although they would still be passported through the income side of the test.
The Government's response to that consultation in June 2011 confirmed that they would take forward the proposal, and this is reflected in these new regulations. Therefore, under the new rules, all applicants for civil legal aid are subject to the same capital eligibility test. This means that any applicant with disposable capital above £8,000 will be ineligible for civil legal aid, regardless of whether they are in receipt of benefits. If the applicant's disposable capital is more than £3,000 but does not exceed £8,000, they will be required to make a contribution from that capital towards the costs of the legally aided services.
Ensuring that the capital assets of all applicants are subject to the same eligibility test helps to focus limited public legal aid funds on the most financially vulnerable clients and means that those who can afford to pay, or can contribute towards the costs, do so. It is estimated that assessing all applicants' disposable capital will result in approximately £10 million a year of savings in steady state. This is not insignificant against a backdrop of continuing pressure on public finances, where we need to continue to bear down on the cost of legal aid to ensure we are getting the best deal for the taxpayer. Disposable capital comprises all capital assets, including equity in land and buildings, money held in a bank, investments, stocks, shares and the monetary value of valuable items. However, there are certain disregards in calculating the amount of an individual's disposable capital, including for mortgages and for equity in an individual's home.
It may be helpful if I explain what these are. If an applicant is contesting property with their partner, their share of capital is assessed individually. Any outstanding mortgage, up to the value of £100,000, is

subtracted from the value of the property. Where assets are in joint names, they will generally be treated as owned in equal shares. Thus the remaining equity is divided equally between the parties. The first £100,000 of the applicant's equity is then disregarded under the subject matter of the dispute rule. The applicant then receives a further £100,000 equity disregard if the property is their main dwelling. If the remaining equity exceeds the £8,000 capital limit, the applicant will be financially ineligible for legal aid.

In practice, this means that only those applicants who are contesting large amounts of capital, or homes registered in joint names that are valued in excess of £500,000, and where there is a mortgage of at least £100,000, are excluded on capital grounds. We do not think it unfair or unreasonable that people who are disputing substantial assets fall outside eligibility for civil legal aid.
Where a property is not the subject matter of the dispute, is in an applicant's sole name and worth more than £208,000, that applicant would not normally be eligible for legal aid. However, a further disregard of up to £100,000 would apply if the applicant was aged 60 or over and had monthly disposable income of less than £315. The financial eligibility criteria for civil legal aid are designed to focus our limited resources on those of moderate means and with moderate amounts of capital. This helps to ensure that we can continue to provide services for vulnerable persons, such as victims of domestic violence, children at risk and those with mental health problems.
For domestic violence and forced marriage cases where the applicant seeks an injunction or other order for protection from harm to the person, or seeks committal

for breach of any such order, there is a power to disregard the eligibility limits. In this way, we extend eligibility to legal aid for victims of domestic violence irrespective of the value of any property that the individual may own. A contribution may be required from income or capital.

The eligibility waiver for victims of domestic violence seeking protection from harm is a significant concession. This measure improves access to legal aid for domestic violence victims by extending eligibility beyond the original limit. It means that immediate legal advice and representation is available for those who need it and who otherwise would not qualify under the normal eligibility regulations. For those applicants required to pay a contribution, as legally aided clients they will benefit from the reduced cost of representation under legal aid rates as opposed to private rates.

There is a concession for pensioners who are in receipt of an income of £315 a month or below. Disregards of between £10,000 and £100,000 can be applied to any capital assets that they hold, including both property and savings, depending on the level of their income. For example, a monthly income of £76 to £100 attracts a capital disregard of £70,000. This is in addition to the allowances that normally apply, such as the equity disregard. Pensioners who receive a passporting benefit are entitled to the maximum disregard of £100,000.

The financial eligibility criteria for civil legal aid are designed to focus our limited resources on the poorest people. Bringing the capital rules for those receiving benefit into line with the rules for those who are not will help to do that, and will improve the fairness of the system. The substantial provision for disregards that I have outlined will ensure that an appropriate degree of sensitivity to individual circumstances is maintained, in particular as regards capital in the form of equity in the home. This is a sensible and reasonable measure.

The noble Lord, Lord Bach, made a number of points about the difference in the capital tests. Legal aid is not a welfare benefit and should not necessarily be treated in exactly the same way as universal credit, which is a working-age benefit. This is reflected in the different functions of income support and legal aid. The former is intended to lift people out of poverty over the long term while not penalising people for saving, while the latter is for people required to deal with a short-term legal issue and the associated expense.

The noble Lord, Lord Pannick, said that our LASPO reforms have reduced legal aid to skeletal proportions. I remind the House that we are talking about an exercise that has brought legal aid down from £2.1 billion to £1.5 billion. Neither the noble Lord, Lord Bach, nor the noble Lord, Lord Pannick, do their case any good by pretending that a system that will still spend something like £50 million on welfare legal aid and £1.5 billion in total can be described as “skeletal”. The noble Lord, Lord Bach, said how generous the Labour Government were in 2009. In 2010, we had to take some very tough decisions. Again, I question whether the noble Lord, Lord Bach, has any authority to encourage us to believe that in 2015 a Labour Government would try to restore any of these changes to legal aid.

I hear what was said by the right reverend Prelate and the noble Baroness, Lady Deech. However, they do not do the cause that they espouse—desiring to help the poorest and most vulnerable in our society—any good by arguing that these changes, which will affect people with quite substantial assets behind them, are the right priority in the circumstances in which we find ourselves. The noble Baroness, Lady Deech, mentioned litigants in person. We are monitoring the impact of litigants

in person. However, as I pointed out to the noble Lord, Lord Bach, in a more recent exchange we had, LASPO has been in practice for just over 100 days. He has been forecasting perfect storms and disaster for at least a year. We are keeping a close eye on these things and will monitor these various issues. However, the constant argument of disaster does not serve anybody. The very first Statement I made from this Dispatch Box was to the effect that if a part of your spending is directed at the vulnerable and the needy and you cut it, of course you will affect the vulnerable and needy. In those circumstances we have tried to make sure that we concentrate the money we have available where it is most needed. I will have a look at the Social Fund disregard and will write to the noble Lord—unless it was in that bit of paper that was passed to me. Even if it was, I will write to him.

This has been an interesting debate. The modest changes that we have made to the financial eligibility rules for civil legal aid are consistent with the fundamental

objective of our reforms. We need to continue to think carefully about how taxpayer-funded money is spent and focus legal aid on the highest-priority cases and those most in need, while delivering the savings needed to address the national financial deficit. I hope that I have covered most of the questions raised in the debate, and I hope that the noble Lord, Lord Bach, will agree to withdraw his Motion.

Lord Bach: My Lords, I thank all noble Lords who have spoken in this debate, in particular the Minister for the trouble he has taken to respond to the debate. I am grateful to all noble Lords, particularly the noble Lord, Lord Pannick, for his extraordinarily flattering remarks, which were somewhat exaggerated. However, it was very good also to hear from the noble Baroness, Lady Deech, and from the right reverend Prelate the Bishop of Norwich; the Government should listen with some care to the remarks that he made. I am grateful, too, as always, to my noble friend Lord Beecham for summing up the Opposition's view so clearly and crisply.

We should remember that we are discussing areas of law where the Government decided that legal aid should continue, not those areas of law where they thought that legal aid was completely meaningless or was not legal or appropriate. These are areas where people's need for legal aid is acute: for instance, housing repossession, domestic violence or community care. With these regulations the Government have said, on the one hand, "These are the areas where legal aid is appropriate", but on the other, "Those of you who may be poor in income terms but have a small amount of capital cannot take advantage of where we are keeping legal aid in scope".

That is not a satisfactory position for the Government to take. To say that what has been taken out of legal aid—particularly out of social welfare law—is skeletal, seems to be an overstatement rather than an understatement, when we look at what is left in scope compared with what has been taken out, which includes all welfare benefit social welfare law, all employment social welfare law, the vast majority of housing social welfare law and nearly all debt social welfare law. The word "skeletal" is not wrong at all.

Legal aid is part of our welfare system and should be so. It is part of our social security system and a protection for all our citizens, or so it ought to be. That was the idea when it was first formulated—an idea that has grown up with Governments of all persuasions over the past 60 years. It is a great shame to hear the Minister say that it can be completely divorced, as it were, from the rest of the social security system. It cannot be: it remains a protection for all of us.

These regulations make the position more complicated, more costly, more unfair and more inflexible. That is not satisfactory. Of course, I am tempted—as I always am—to divide the House on the issue. Noble Lords have spoken in pretty clear terms of what is felt around the House. However, the House has probably voted quite sufficiently in the early part of this evening. We have had the debate and will be able to read it in *Hansard*. I have no doubt—I know that the Minister will look forward to this—that we will come back to

these issues in due course, but probably after the summer rather than before. I beg leave to withdraw my Motion.

Motion withdrawn.

Mesothelioma Bill [HL]

Mesothelioma Bill [HL]

Report (Continued)

8.47 pm

Amendment 15

Moved by ***Lord McKenzie of Luton***

15: Clause 4, page 3, line 10, at end insert—

"(2A) The average damages recovered by claimants in mesothelioma cases shall be determined by reference to the gross tariff, as set out in Schedule (Tariff).

(2B) The gross tariff will be up-rated annually by the general level of prices as measured by the Consumer Price Index and reviewed at least every five years."

Lord McKenzie of Luton: My Lords, in moving Amendment 15 I shall speak also to Amendment 19. These address aspects of the levy. That subject was covered in large measure by the noble Lord in his introductory statement, so I hope that I can be brief. However, given that we have not yet seen a draft of the levy regulations, nor will we by the time the Bill leaves your Lordships' House, we need as much clarity as possible on what they will contain.

Amendment 15 sets out a gross tariff as a schedule to the Bill. It is based on the national institute analysis that sought to determine average civil compensation awards for mesothelioma cases based on recent experience. It is set out in yearly age bands and stretches from age 40—that is, at date of diagnosis—to age 94. The tariff is intended to be a proxy for levels of compensation that would have been awarded had individual compensation assessments been made. It is expressed in gross amounts, so if payments are made at less than 100%, the relevant percentage would apply. The tariff excludes the legal cost of reimbursement. I understand that the amounts included in that gross tariff, reflected in the proposed new schedule, are not contentious and are accepted by the Government, the ABI and the Asbestos Victims Support Group campaigners and its professional advisers. However, it would be good to have the Minister's specific confirmation of that.

The Government may resist the tariff going in a schedule to the Bill, although we would contend that that is where it belongs. An alternative approach is acceptable to us, as long as there is certainty on the gross starting tariff. The amendment also calls for the tariff to be uprated annually by reference to inflation. We have adopted the CPI measure and the Minister has already said that that is the intent. However, again, it is important to have that on the record.

The amendment further calls for the tariff to be reviewed at least every five years. Not only is this reasonable in terms of generally ensuring that the tariff is aligned with reality, but it implicitly recognises the changes that might ensue following the

uprating of civil compensation claims following LASPO deliberations. It would be helpful to have confirmation from the Minister that it would be the intent to align the tariff with the outcome of any such review. I beg to move.

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The Parliamentary Under-Secretary of State, Department for Work and Pensions (Lord Freud): My Lords, I thank the noble Lord and the noble Baroness for their amendments. As I understand it, their purpose is to set out the exact tariff to be used by the scheme and to require that the growth tariff would be uprated annually in line with the consumer prices index. I support the intention of the amendments, although I do not think that they are necessary. I shall explain why.

I put on the record that it is our intention to uprate the scheme payments annually in line with the CPI. If we were to put that in the Bill, we would have no flexibility to uprate by any other amount in future. For instance, we have given an undertaking to review the scheme's operation and the rates of payment at the end of the smoothing period. Obviously I cannot pre-empt the findings of the future review, but were any review to show that a gap had developed between average civil damages and scheme payments, we would want to address that. If we were required by the Bill to uprate only in line with the CPI, we would be unable to do so.

Regarding the proposed tariff to be included in the Bill, I confirm that we have published an ad hoc analytical publication that sets out the same figures that are included in the table attached to the amendment. These are the figures that we will be using as a baseline when we calculate the percentage level of damages. If we included the table as a schedule, as the amendment proposes, we would need either annual primary legislation or a regulation-making power to make any change to the schedule. As I say, I am happy to go on record to say that the figures contained in the report that we have published will be used when we calculate the amounts that individuals will receive. We will publish in regulations the amounts that people will receive from the scheme.

I hope that I have covered these issues in adequate detail and have put the position on the record without the need for these amendments, which I understand were intended to tease out these issues. I hope that the noble Lord will feel able to withdraw the amendment.

Lord McKenzie of Luton: I thank the Minister for his reply. It dealt satisfactorily with the purpose of the amendment, which I beg leave to withdraw.

Amendment 15 withdrawn.

Amendment 16 not moved.

Clause 7: Scheme administration

Amendment 17

Moved by ***Lord Howarth of Newport***

17: Clause 7, page 4, line 12, at end insert—

"( ) must ensure as far as possible that the scheme administrator is unbiased as between the interests of the insurance industry and the interests of applicants to the scheme,"

Lord Howarth of Newport: My Lords, this amendment is intended to highlight the important issue of conflict of interest, which we have not sufficiently considered so far in our proceedings. The Government are proposing

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that a scheme intended for the benefit of mesothelioma sufferers should be run by the same insurance industry whose negligence deprived mesothelioma victims of

legal redress and which for years held out against fair and decent treatment. As envisaged by the ABI, the industry would create an incorporated body, accountable to its funders in the industry through its board.

In its briefing to us, the ABI has made mention of the possibility of competition that the Minister informed the House about earlier today. I applaud his intention to ensure that there is a competitive tender of the administration of the scheme; that is right in principle. However, it may be difficult for the noble Lord to find other tenderers that are competent to run the scheme. Let us see.

Meanwhile, the difficulty we need to keep clearly in sight is that it is in the insurers' interest to pay 75% or even less of the average civil court settlements. It is in their interest to avoid costly procedures and negotiations of the kind the court route requires of them. Indeed, it is in their interest to determine that applicants for awards from the scheme are found to be ineligible. It is in their interest, after all, to reduce the levy.

The Bill, as drafted, and the scheme, as proposed, create an administrator and a technical committee that have pretty well plenipotentiary powers to assess eligibility, the validity of documentation and the significance of evidence. Under Clause 4(3)(b), the scheme may,

> "in particular, give the scheme administrator power to decide when to impose conditions or what conditions to impose".

That is a fairly blank cheque. In the scheme contents that we have been shown, which are to be brought in by regulation, the scheme administrator has powers to refuse altogether to make payment. We need to be well aware that there is a bias built into this system. It may be unavoidable but it is there.

The ABI has informed us that, of 4,051 ELTO searches in the year from May 2011 to April 2012, 2,354 were successful in tracing the documentation; it follows that 1,697 were unsuccessful. Yet the ABI is predicting that only 200 to 300 claimants will be found to be eligible each year. What is to happen to the other five-sixths of those whose documents could not be traced?

The powers of the administrator and technical committee are, as I have suggested, almost total. Admittedly, there is provision for reviews and appeals and, if this is to be a body created under legislation, there may be scope for judicial review, but that of course is not a desirable way to resolve these cases.

The insurance industry is going to be judge and jury in what is in its own interest. The case for using the insurance industry to administer the scheme is that it understands the business. However, I hope that the Minister will describe to the House how he intends to ensure fair play. The history of employer's liability insurers does not inspire confidence and it is not satisfactory to design into the scheme a blatant conflict of interest. Therefore, the question is: will the oversight committee proposed in the amendment from my noble friends on the Front Bench be sufficient to ensure fair play?

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My Amendment 30 would require the Secretary of State to report on the performance of the scheme and the administrator to Parliament each year. This amendment is modelled on a provision that the Government have written into the Intellectual Property Bill. It is an admirable provision. If the Minister is willing to agree that there should be an oversight committee, should it report to the Secretary of State and the Secretary of State then report to Parliament on an annual basis? I hope that that will

be the case. The matters on which we should look to the Secretary to State to report to Parliament include: the performance of the administrator; all the relevant data and statistics to enable us to know the performance of the scheme in detail; the number and variety of cases; the speed at which cases are processed; the pattern of tariff payments; the evolving relationship between payments under the scheme and awards made by the courts; and the scale and nature of compensation recovery unit recoveries from payments. We should also be told about what is happening in the field of research, which we debated at length this afternoon.

9 pm

The report ought also to cover those matters that are the responsibility of the Ministry of Justice in the Government's two-pronged strategy to support people with mesothelioma. We need to know, therefore, what legal costs are being incurred. We need to have reports on reviews and appeals that have taken place—and, indeed, on the issue of legal aid and the cases that may be justiciable under the ECHR and which would be eligible for legal aid. We will need to know about the progress of the conditional fee agreements, about which we are waiting to learn from the Ministry of Justice what it intends.

All in all, we need to have an understanding of the state of co-operation between the DWP and the Ministry of Justice. It does not appear, at the moment at least, that it is as good as it should be. I took the precaution of inquiring at the Library yesterday, and made a final check today, to see whether the Ministry of Justice consultation had finally come out—a consultation that has been promised so many times, and upon which our expectations have been dashed so many times. Believe it or not, unless the Minister can correct both me and the Library, it has even now, after all these postponements, still not appeared. It does not seem that the Ministry of Justice shares the sense of urgency of the Minister at the DWP.

To its credit, the DWP is anxious to make haste to get its side of the bargain on the statute book. The Ministry of Justice appears to be entirely uninterested. It is so busy demolishing the foundations of justice with its attacks on the legal aid system that it has no time to spare any consideration for mesothelioma sufferers. It is simply awful. The Minister himself has said that he envisages a five-yearly review. Perhaps every five years, the annual report will be really super.

Finally, I suggest that the report should also cover the Government's plans to establish other schemes—which is the subject of Amendment 29 in the name of my noble friends—and their thoughts about an Armed Forces scheme, which the noble Lord, Lord James of

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Blackheath, wants to see. I would go even further than the noble Lord. There is clearly an equal and extensive range of obligations on the Government to ensure that people who have contracted mesothelioma as a result of negligence on the part of the state or its agencies —on construction sites, shipyards and the enormous variety of industrial situations where the state itself may be the employer or has contracted to employ other employers—are no less well looked after and compensated than those who have been the victims of other employers and are unable to get redress from employer's liability insurers. The Government self-insure, and have therefore taken that responsibility upon themselves. The annual report ought to cover the range of the Government's responsibilities in this whole area.

Mesothelioma victims have few champions. They have the Asbestos Victims Support Group's forum and the Association of Personal Injury Lawyers. They have the noble

Lord, Lord Freud, whom I am sure they appreciate very much, and my noble friend Lord McKenzie of Luton, as doughty champions for them. Noble Lords in this House and Members of Parliament in another place are also committed to supporting them. However, their case was ignored by policymakers for decades. Again and again, the avarice of the insurance industry outweighed the generosity of the Government in 1979 and again in 2008.
Continuing parliamentary vigilance is essential. The Minister has so far promised an annual Written Ministerial Statement. That is not enough: we need a full annual report. I beg to move.

Lord McKenzie of Luton: My Lords, we have Amendments 25 and 29 in this group and we support Amendments 17 and 30 in the name of my noble friend Lord Howarth, although there is some overlap between the two sets of amendments. I will be brief as I believe we are pushing at an open door from what the Minister told us earlier today. Amendment 25 calls for the establishment of an oversight committee to monitor, review and report to the Secretary of State on the overall arrangements touched on by this legislation. It would undertake this task in relation not only to the scheme and the technical committee but to the tracing office and the electronic information gateway. They fit together, and we know that the insurance industry sees them as an integrated package.
The idea of an oversight committee was originally prompted by concerns over the extent to which the insurance industry may be engaged in all of this, possibly as a scheme administrator—although we welcome the news announced earlier today about the open competition—and certainly on the technical committee, running the tracing office and devising the portal. An oversight committee properly constituted would provide a level of reassurance for those whom the scheme should benefit and would be a counterweight to the level of engagement of a powerful industry with clear financial interests in how it all works, as my noble friend Lord Howarth so powerfully demonstrated. That is why we believe that the oversight committee should include representatives of asbestos victims support groups and the trade unions which have supported them, with an independent chair. Effective oversight would, we suggest, help the hard-pressed DWP resources,

and an annual report from the committee could be incorporated with an annual report to Parliament by the Minister.

In Committee and in meetings thereafter, the Minister has expressed support for an oversight committee. We heard it again today and I know that he has considered various options. While disappointed not to see a specific amendment from the Government today, we hope for an assurance that they will introduce an amendment when the Bill passes to the House of Commons. I was not quite sure that it was clear enough in the noble Lord's opening statement, so I hope he will clarify matters. It would be good if that assurance spelt out at least the bare bones of what is intended.
Amendment 29 is a return to the issue of support for sufferers of other asbestos and long-latency diseases. The payment scheme in this Bill relates to those diagnosed with diffuse mesothelioma. It therefore excludes other asbestos-related diseases such as asbestos-related lung cancer and asbestosis. It also includes other work-related, non-asbestos diseases such as pneumoconiosis. The DWP's June 2013 analysis quotes the Health and Safety Executive data on industrial diseases, which

has an annual estimate of sufferers of asbestos-related diseases of some 3,500—that excludes those suffering from mesothelioma—and of non-asbestos-related industrial diseases of some 4,200. Many of these will face the same problem in identifying a negligent employer or an employer liability insurer. The DWP's June note acknowledges that many of the diseases covered do not share the same characteristics as mesothelioma, and that their severity and progression may vary, depending on the heaviness of exposure to asbestos.

It also highlights the fact that, for example, only a small proportion of asbestos-related lung cancers are compensated through government schemes, because of the range of different causes of lung cancer that mask an asbestos cause. Notwithstanding this, and perhaps somewhat strangely, in computing the effect of extending the scheme, it has been assumed in the data that the same proportion of those with diffuse mesothelioma who can access the scheme proposed by the Bill will be able to access an extended scheme, that the same level of scheme payment will be received, and that the same amount of benefit will be recovered. These are fairly broad-brush assumptions, to say the least. In resisting this amendment, the Minister will doubtless point to the costs of bringing forward an extension of the scheme. On the basis of their estimates over a 10-year period, they suggest that there will be 5,100 successful applicants for other asbestos-related diseases and 6,100 with non-asbestos work-related diseases. There will be additional levy on insurers of £478 million and £564 million respectively.

At face value, these figures are shocking. It is not so much the amounts as the suggestion that over the 10-year period some 11,200 people will miss out. By how much will depend on benefit recovery arrangements, but they could miss out to the tune of £1 billion. If the concentration were just on the other asbestos-related diseases, not expanding the scheme will deny 5,100 people, who will miss out just because an employer has gone out of business or cannot be located and a relevant insurer cannot be established.

The amendment requires the Secretary of State to bring forward proposals within a year to establish other schemes to cover these other diseases. We have been clear that we do not want the pursuit of broader coverage to hold up the scheme for diffuse mesothelioma, and there is no reason why acceptance of the amendment should cause this to happen. It is accepted that it will be difficult to graft onto the mesothelioma scheme the tariff approach, given the varying degrees of suffering that some of the other diseases entail, and that there may be convoluted issues around causation. Therefore, while continuing to acknowledge the merits of the mesothelioma scheme, we should no longer look aside from those people—many thousands on the Government's own figures—who face terrible suffering because of the negligence or breach of statutory duty of an employer. This is all the more important where access to the state lump sum and social security support is more difficult, as it is for some.

The Minister has come thus far and we have supported and congratulated him on doing so. Indeed, he has expressed sympathy for a broader scheme. Accepting the thrust of these amendments would add to that journey, which I beg him to undertake. If he cannot, he will of course be aware that the campaigns will go on.

Lord Freud: My Lords, it would be most convenient to deal with these amendments in their original order. If I may, I will start with the amendment moved by the noble Lord, Lord Howarth, on the scheme administrator, and then turn to the two amendments tabled by the noble Lord, Lord McKenzie, and the noble Baroness,

Lady Sherlock, which relate to an oversight committee and future reports on further schemes. I will then turn to the amendment of the noble Lord, Lord Howarth, on annual performance.
Amendment 17 is intended to make certain that the body chosen to administer the scheme is able to operate in a wholly objective and unbiased manner. I know that there has been concern among noble Lords about the insurance industry's involvement with this scheme, especially its administration. I agree that it is paramount that the administrators of a scheme that is intended to help its applicants must be able to do so in a fair way. I am confident that the necessary safeguards are in place to ensure this without the need for an amendment on the matter.
First, I remind noble Lords of the commercial procurement strategy that I spoke about earlier. The scheme administrator will be chosen through an open procurement competition that will be launched in time to meet our aim of taking the first applications in April 2014 and making payments next July. Members of the insurance industry will be allowed to tender, as will the shadow body created by the ABI. Legal specialists may also tender. The body will be chosen through this exercise according to our commercial criteria, which include being able to administer the scheme as set out by the scheme rules.
Secondly, I refer noble Lords to the scheme rules, which set out clearly every aspect of the scheme administration and specify how the administrator may or may not act. Compliance with the scheme rules will form an integral part of scheme arrangements.
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I will pick up the point made by the noble Lord, Lord Howarth, on the power of the administrator to impose conditions when making payments. As we spent a lot of time in Committee discussing, this is designed to allow the scheme's administrator to place a payment in trust where the payment was made to a minor or to a person who lacks capacity. I am content that the selection process for our scheme administrator, in conjunction with the scheme rules, provides sufficient assurance that the scheme administrator will not be able to influence or interpret the running of the scheme. I hope that the noble Lord is reassured by this explanation, and I urge him to withdraw the amendment.
Amendment 25 proposes an oversight committee that would monitor the performance of the scheme and other related matters and report to the Secretary of State. I agree with the idea behind this amendment. The suggestion was made in Committee, and since then we have been exploring available options for some form of oversight. I spent some time looking for an existing mechanism or body already within the auspices of the DWP that I could utilise, but I have not been able to find a suitable vehicle. We are therefore continuing to explore all the options.
We face one restriction which noble Lords will appreciate more than most—on the setting up of new non-departmental public bodies—and we have to deal with that issue as we develop our options. I am working with stakeholders to identify a suitable structure that will allow for effective scrutiny of the scheme without necessarily requiring underpinning legislation.
There are several areas in this amendment that I wish to reflect on. The first is the proposed use of the oversight committee to monitor the Employers' Liability Tracing Office. ELTO is a private company funded by the insurance industry. The Association of British Insurers is currently looking to recruit representatives from stakeholder groups to sit on the board of ELTO to monitor its performance. Having

stakeholder representatives on the board of ELTO will allow them to directly influence the work of ELTO, as well as ensure that it is performing to expected standards. In addition, we expect that the technical committee will sit within ELTO. If that expectation is realised, the ELTO board, which by then should include stakeholder representatives, will be able to monitor the performance of the technical committee and report on this through the annual ELTO report. It will also allow stakeholders to identify any concerns and raise them with the DWP so that remedial action can be taken as necessary.

Next, I must reflect on the proposal in the amendment to report on the proposed electronic information gateway. There may well be merits in looking at how any gateway interacts with the scheme in order to ensure that it is supporting, rather than hindering, applications. However, we cannot yet say whether or not an electronic information gateway will be introduced, so it is not possible to work out the details of how this monitoring may be carried out. I prefer a non-legislative solution to this issue that allows us to set up a proportionate and flexible oversight committee, made up from all stakeholder groups that have a stake in the operation of the scheme. It will provide valuable support to

DWP officials as they monitor the scheme's performance in the years ahead. We will continue to work with stakeholders on the proposals over the recess.

I now come to the amendment that would require a report to be published giving details of government plans to establish future schemes. I understand the desire for us to commit to going further and to helping as many people as we can. We have discussed before why the particular nature of mesothelioma lends itself to a discrete scheme aimed at that disease alone, and that separate schemes would be required to provide for sufferers of other diseases. While I understand and agree with the intention to keep up this momentum and for a commitment to do further work, I am afraid that I must reject this amendment. First, the complex and varied nature of other diseases would necessitate significantly more complex schemes that could take several variables into account. They are the ones that the noble Lord, Lord McKenzie, pointed to, and include the severity of the disease and the contributory factors when calculating eligibility and payment amount. The complex nature of the necessary schemes would also necessitate high costs.

Secondly, I draw noble Lords' attention to the work of ELTO and the recent work of the FCA in conjunction with ELTO that I spoke about earlier. These two bodies have taken very positive steps towards correcting the market failure in the insurance industry. In the first year, the overall rate of successful traces increased from 46% to 71%, while the rate of successful mesothelioma traces increased from 34% to 58%. This work should not be underestimated. It may be that, in time, the work of these bodies brings further improvement until one day we get to a stage where the number of untraced records is so small that additional schemes are not needed. We need to give the measures that are in place sufficient time to show the progress that they are making.

The figures show that a much more significant improvement has been made in the overall tracing rate than in the rate of tracing mesothelioma-only cases. This shows that a scheme for mesothelioma cases is necessary, and reinforces my point that the steps we have taken already may in the fullness of time be sufficient for other diseases.

We also need to be mindful of the resource constraints within which we have to operate. The DWP will rightly focus on ensuring that the scheme operates as expected in its first years. There will undoubtedly be teething problems, as there are in any new scheme. Although we will do our utmost to minimise them, it would be naive to think that there will be none. It would therefore not be the best use of limited resources to divert them into producing a report into other schemes. As I have indicated, this would be complex to design and would be at the expense of the scheme that we have.
While I do not accept the amendment, which would commit us and future Governments to producing a formal report every year, I am alive to the need to review the situation as time goes by. Certainly, once we are able to see how much ELTO has improved things and how well the payment scheme has worked, the Government will be in a position to undertake such a review. I remind noble Lords that provision exists for
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sufferers of other asbestos-related industrial diseases under the scheme in the 1979 Act. Therefore, I urge the noble Lord and the noble Baroness not to press their amendment.

The final amendment in this group, tabled by the noble Lord, Lord Howarth, would require the Secretary of State to report to Parliament on the performance of the scheme within six months of the end of each financial year. It is not necessary to include this provision. Scrutiny and reviews are already planned for the scheme, without the need for including details in legislation. As I said, I am happy to commit to making a statement to the House on the scheme's performance.
Other amendments deal with the issue of scrutiny via some form of oversight committee. We are still working on the details, but we expect that performance information will be made available, probably online. This may be in another format. Perhaps it will be monthly rather than annual. We are looking at the matter and will consider it alongside the oversight committee. Indeed, the oversight committee may have views on the best way to make the information available. With that, I urge the noble Lord to withdraw his amendment.
Lord Howarth of Newport: My Lords, I am grateful to the Minister for his full response to each amendment in this group. He tells us that sufficient safeguards are in place to ensure the objectivity and unbiased behaviour of the scheme administrator, and asks us to accept that the open procurement competition will be a contributor to guaranteeing that impartiality. However, it may be difficult for him to find anybody competent to run the scheme who is not in the industry, so the problem of conflict is likely to persist. I do not wish continuously to impugn the motives of people in the insurance industry, and would like to think that those who are appointed to work as administrators of the scheme will set out with the best of honourable intentions.
We are always being warned, however, that we should avoid situations of conflict of interest and, from time to time, people are vulnerable to the temptations that conflicts of interest present to them. There is a whole institutional temptation here because the insurance industry stands to gain significantly from cases not going to court and from cases not being handled generously by administrators, who will have such absolute powers of determination. I therefore remain concerned about this, although the Minister offered a little reassurance about Clause 4(3)(b) when he said that it was harmless. Certainly, on the face of it, the wording of it seems to give enormously

large powers to the administrator, but I accept what he said about the purpose of that particular piece of drafting.

Moving on to the oversight committee, it is good that the Minister agrees that there should be such a committee; he made his points about getting stakeholders on to the board of ELTO and the technical committee being within ELTO, so that stakeholders would be in a position to keep an eye on the performance of those parts of the whole apparatus. He said, understandably enough, that he wants a non-legislative solution, but we will probably want to know a good deal more about the provision that he intends to propose before

we can agree that it is right in principle that there should be a non-legislative solution. My noble friends may want to reserve the right to return to that, whether that is here or in another place.

As to the report on future schemes, the Minister again rejected the proposal from my noble friends, as he does not want to divert scarce resources—no doubt of time and energy, as well as money—to preparing that. He suggested that the complexities of the other asbestos-related conditions are such that they would not fit well into the mould of the scheme that we are legislating for in this Bill. I hope, however, that the Minister will continue to reflect on the fact that there are—as my noble friends explained compellingly, and rather movingly—large numbers of people who are suffering from these other conditions. At the moment they have all too little support; we know that there is a vast disparity between the lump sums that are paid under government schemes and the awards that the courts provide and the lesser payments that the scheme will provide. These people continue to be seriously disadvantaged and we cannot be happy with that.

I was pleased that the Minister was able to tell us that the success rate in tracing has been improving spectacularly, which suggests that it could always have happened if there had been the will on the part of the industry to do this. We must be pleased that it is now doing better but, equally, we must have means to keep the pressure up and to ensure that, in the future, there is not again any deterioration in the success rate of tracing and, above all, that elements of the industry do not resume the practice of conveniently losing or shredding documentation, which is the great scandal. They are getting off all too lightly in that regard.

On the annual report, the subject of Amendment 30, the Minister wanted us to accept that scrutiny and reviews are already planned and that we do not need to worry because everybody will keep an eye on it and Parliament does not need to be too bothered by it. I do not think that the annual Written Ministerial Statement that the noble Lord has promised is good enough for Parliament, even when combined with the online information that he said will be made available. He will have seen already the intensity of interest in your Lordships' House and he will certainly see both greater intensity of interest in the House of Commons when it comes to scrutinise this Bill and a wide and deep concern across the country. I think that it is a proper responsibility of Parliament to invigilate this process, and an annual report is a convenient and practical means for Parliament to do so. Therefore, I am disappointed that the Minister has resisted that. This is a subject that I think we will wish to return to but, in the mean time, I beg leave—

9.30 pm

Lord McKenzie of Luton: Before my noble friend withdraws the amendment, perhaps I may clarify one point with the Minister. I was slightly less reassured about the oversight committee than I expected to be, partly because it looks as though it might be a fragmented effort, given the ELTO structure. The noble Lord said that his preference was for a non-legislative solution, and we do not have a problem with that. However, will a conclusion be reached as to whether the non-legislative

solution will be found by the time the alternative of a legislative solution passes in the Commons? It would be a pity if we had not concluded on this and decided in due course that we needed a legislative solution and the Bill had completed its passage.

Lord Freud: My Lords, my aim is to know where we are with the structure over this Recess. I think that I owe the noble Lord a letter at the end of the Recess setting out where we have got to on that so that he will be able to talk to his colleagues in the other place. If he thinks that a gap is developing, that is a way for me to handle that uncertainty.

Lord Howarth of Newport: In the mean time, I beg leave to withdraw the amendment.

Amendment 17 withdrawn.

Clause 9 : Unauthorised disclosure of information: penalties etc

Amendment 18

Moved by ***Lord Freud***

18: Clause 9, page 6, line 3, leave out "281(5)" and insert "154(1)"

Lord Freud: This is a minor amendment which removes an erroneous reference to Section 281(5) of the Criminal Justice Act 2003. The appropriate transitional provision which relates to the offence in Clause 9 of this Bill is Section 154(1) of that Act.

Amendment 18 agreed.

Amendment 19 not moved.

Clause 13 : The levy

Amendments 20 to 23 not moved.

Amendments 24 and 25 not moved.

Clause 15 : Technical Committee to decide certain insurance disputes

Amendment 26

Moved by ***Lord Freud***

26: Clause 15, page 9, line 11, leave out "or anyone else"

Lord Freud: The amendments in this group concern the technical committee that will be established to make decisions regarding disputes about whether an insurer provided employer's liability insurance to a particular employer at a particular time. The amendments do two things: first, they make clearer the definition of "potential insurance claimant"—in other words, those who could be in dispute with an insurer about cover and whose disputes might come to the technical committee for a decision—and, secondly, they remove the power of the Secretary of State to expand that definition in the future.

Currently, the definition of a potential insurance claimant includes those who allege that an employer is liable for damages and an employer or anyone else who is alleged to be liable for damages. Amendment 26 removes the phrase "or anyone else". This phrase is

not deemed necessary because we are not able to identify any further parties that could come to the committee, other than those already listed.

Amendment 27 removes Clause 15(10), which gives the Secretary of State powers to make regulations to amend the definition of potential insurance claimant. This could include extending the scope of the technical committee to cases concerning other diseases or bodily injury. Amendment 32 makes a consequential amendment to Clause 17 to reflect the fact that, with the removal of Clause 15(10), there will be no regulations under Clause 15.
The Delegated Powers and Regulatory Reform Committee, in its report, recommended the removal of the power to amend the definition of "potential insurance claimant" unless its purposes could be more precisely specified. Having considered the points made by the DPRRC about this power, we are persuaded that these amendments are necessary. Clause 15 as it stands potentially broadens the scope of the Bill in a way that is not consistent with the focused nature of the rest of the Bill. Furthermore, as we are not able to specify the exact circumstances in which the Secretary of State might choose to expand the classes of people about to bring disputes before the technical committee, we agree that such a broad regulation-making power is inappropriate.
I hope that noble Lords can support the wish to make the Bill as robust as possible, and support the removal of unnecessary regulation-making powers. I beg to move.
Lord McKenzie of Luton: My Lords, we have no difficulty in accepting these amendments. As far as Amendment 27 is concerned, we are a little unhappy to see this disappear but accept that, without broader schemes evolved and being brought forward, it does not make particular sense.
So far as Amendment 26 is concerned and the deletion of "or anyone else", can the Minister just remind us who that was intended to cover or who the drafters originally thought ought to be covered?
Lord Freud: My Lords, I think that is the most difficult question I have had in the past three years. I simply do not know what was in the draftsman's mind. I think it was a standard reflex to capture anything that may not have been in the list. When we had the chance to go over it in more detail, we really could not think of anything else so it became redundant. I think that is the explanation and I am deeply impressed by the question.
Amendment 26 agreed.

Amendment 27
Moved by ***Lord Freud***

27: Clause 15, page 9, line 15, leave out subsection (10)
Amendment 27 agreed.
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Amendment 28
Moved by ***Lord James of Blackheath***

28: After Clause 16, insert the following new Clause—
"Establishing additional schemes
The Secretary of State shall by regulation establish another scheme in relation to long-latency asbestos-related diseases in current and retired members of the Armed Forces."

Lord James of Blackheath: My Lords, the sole purpose of this amendment is to make sure that we do not lose track of the very important but parallel issue of

asbestosis that affects members of the fighting services. I remind noble Lords of the amendments made some six years ago by the former Government that were very much against the interests of former officers and servicemen, particularly in the Royal Navy. There was a very bad record of asbestos-related illness, particularly on ships such as HMS “Furious”, HMS “Albion” and, above all, the Royal Yacht “Britannia”, which was a floating death-trap.

The unfortunate consequences of the amendments made six years ago were that the amount of compensation one was entitled to was reduced very drastically; in addition, the period of claim was limited so severely that it could not possibly allow for the inevitable eventual development of the disease and the justification for a claim. Armed Forces people have been very poorly treated in this and although we are talking here of a different branch of asbestosis, I remind your Lordships that in the insurance world they would not make that distinction. Nobody ever wrote a policy for mesothelioma on its own any more than they wrote one for asbestosis without embracing the generality of it. This is an important factor that has sometimes been forgotten in this debate.

In the matter of the Armed Forces, these people have been left exposed—to a greater or lesser degree—to all the consequences we have been talking about that are associated with this disease. They are going to be somewhat perplexed when they find out that the Government have gone out of their way to pass this splendid Bill to help sufferers of a different form of asbestosis while doing nothing whatever to amend the drastic reductions made six years ago to the terms available to servicemen.

I was very grateful for a joint meeting between the Minister’s department and the MoD, from which I came away with the great expectation that there would be a thorough analysis of data of the actual exposure and the number of cases concerned, and that this would open the way for some sort of parallel accommodation to be agreed. There was no question of dipping into this Bill’s pot to pass money over but there was the suggestion of perhaps a separate pot being arrived at by the Ministry of Defence, which could help to close the gap between the have-nots of the Armed Forces and the haves who will benefit from this Bill.

The reason for this amendment is that, unfortunately, the MoD has not provided the expected data. I talked to the noble Lord, Lord West, about this matter earlier and he showed a keen interest. He was an officer on one of the ships that was greatly affected and had the

responsibility of overseeing the engine room replenishment of one. He therefore regards himself as a prime candidate for the condition in time. We have not had those data and it looks as if it is the Navy that has been remiss; yet it is the Navy about which we are most concerned.

May I please send a message via the Minister to ask the Navy to stir its stumps a bit and do something about getting those data to us? We need them. The idea would then be to see what can be done to put together a programme that will not result in a *Daily Mail* headline such as, “Callous Government plan for the many and abandon their heroes of the seas”. We do not want that, and it would be unfair anyway. We need a commitment to do something for Armed Forces people who have had a very bad deal for the past six years. We need to do something to put it right.

I have tabled this amendment in order to keep people interested in the possibility of having that debate, which we cannot do until we know the data and what can be

done. I do not wish to press this amendment tonight but I certainly wish to roll it over to Third Reading, in exactly the same wording, in the hope that by then we will have a more positive approach to how we can arrive at a solution to give some parallel improvement to the terms available to former members of the fighting services. On that basis, I urge the Minister to do whatever he can to stimulate that dialogue. I would be happy to participate in any stage of it.

Lord McKenzie of Luton: My Lords, the noble Lord, Lord James, raised this issue with passion and commitment in Committee and, doubtless, previously. I am not sure that I understand all the detail of the proposition he is advancing and the background case but I certainly encourage him to continue with his campaign. I think that the noble Lord was seeking to advance the argument that some people are being dealt with under this Bill but that there are members of our Armed Forces who are not being dealt with on an equivalent basis. He keeps referring to asbestosis. This Bill relates to diffuse mesothelioma, which is different from asbestosis. In fact, we have just set our face against developing a scheme that has broader implications for people with asbestosis.

Lord James of Blackheath: I thank the noble Lord for that. I hope I made clear the distinction that I am looking at this matter from an insurance industry point of view; namely, that asbestosis covered everything and that six years ago we inadvertently disadvantaged the Armed Forces so severely that we have put them way below the benchmark that we are seeking in this Bill for sufferers of mesothelioma. A comparison is bound to be struck. Veterans' groups are bound to pick it up and there will be people who are very unhappy to see this deficiency on their part.

Lord McKenzie of Luton: I am grateful to the noble Lord for that clarification, and I accept the point. If he is comparing people with diffuse mesothelioma who are not being treated on an equivalent basis, it seems that there is a case. I think that I would hang on to my point that asbestosis is different and that we have not sought to address that in this Bill.

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Lord James of Blackheath: I am talking about the sufferers and the industry.

9.45 pm

Lord Freud: My Lords, I thank my noble friend for his amendment and assure him that I am sympathetic to his desire to provide support for current and retired members of the Armed Forces. As he would expect, however, I must reject the amendment.

This Bill's remit is strictly mesothelioma, which was a point made by the noble Lord, Lord McKenzie. Nevertheless, I hope that it will continue to draw into the spotlight the issues highlighted by the amendment and that the momentum from this Bill will assist my noble friend as he continues to advocate on behalf of service personnel.

I remind my noble friend of the distinctive characteristics of mesothelioma that allow for a relatively straightforward and quick scheme to be established, such as its undeniable link to asbestos exposure, the lack of co-causality with other factors such as smoking, and the very short time between diagnosis of the symptoms and death. These unique elements of diffuse mesothelioma allow us to establish a scheme that will make payments quickly and efficiently.

It is important to note, too, that the mesothelioma payment scheme proposed in the Bill addresses a market failure related to employer's liability insurance. Armed Forces personnel are not normally covered by employer's liability insurance due to the Government self-indemnifying. It is therefore not appropriate for insurers to be required to fund payments for individuals for whom they have never received

premiums. My noble friend has already indicated that he will withdraw the amendment, and I urge him to do so.

Lord James of Blackheath: I beg leave to withdraw the amendment.

Amendment 28 withdrawn.

Amendments 29 and 30 not moved.

Clause 17 : Regulations under this Act

Amendments 31 and 32

Moved by ***Lord Freud***

31: Clause 17, page 9, line 39, leave out "4 (amount of payment)" and insert "1 (the scheme)"

32: Clause 17, page 9, line 40, leave out ", 10 or 15" and insert "or 10"

Amendments 31 and 32 agreed.

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

Amendment 33

Moved by ***Lord Freud***

33: Clause 18, page 11, line 1, leave out "The Secretary of State may by regulations" and insert "The scheme may"

Amendment 33 agreed.