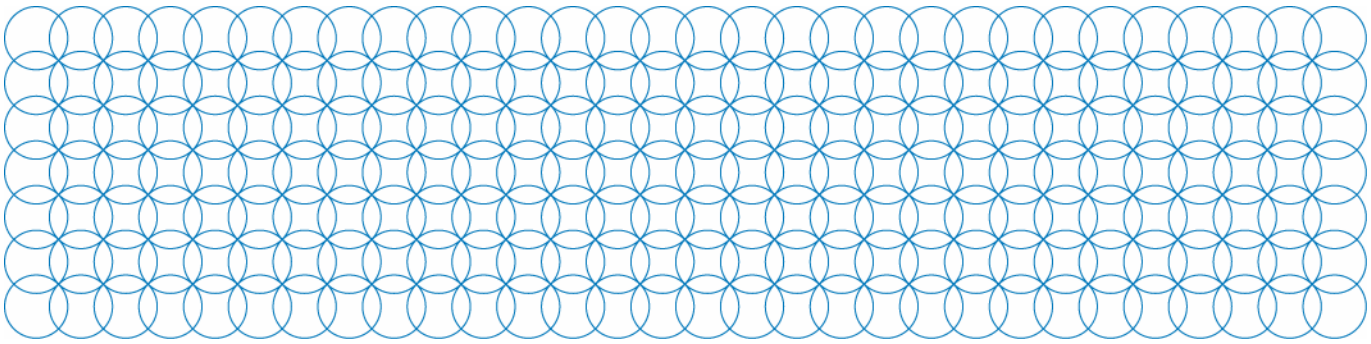
Ministry of JUSTICE

Pleural Plaques

Consultation Paper CP 14/08
Published on 9 July 2008
This consultation will end on 1 October 2008



Ministry of JUSTICE

Pleural Plaques

A consultation produced by the Ministry of Justice.

This information is also available on the Ministry of Justice website: www.justice.gov.uk

Contents

Executive summary

This consultation paper considers the Government response to the House of Lords decision in *Johnson v NEI International Combustion Ltd and conjoined cases* (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*.

In a unanimous decision on 17 October 2007, the Law Lords upheld a Court of Appeal decision that the existence of pleural plaques does not constitute actionable or compensatable damage. Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. On the basis of certain High Court decisions in the 1980s, it was possible for damages to be awarded for negligent exposure to asbestos which had led to the presence of pleural plaques. However, following the decision in *Rothwell*, this is no longer possible.

The paper considers the law and medical evidence underpinning the House of Lords decision, and indicates that independent reviews of the medical evidence have been commissioned from the Industrial Injuries Advisory Council and the Chief Medical Officer.

The paper proposes that action should be taken to improve understanding of pleural plaques and in particular to provide support and reassurance to those diagnosed with pleural plaques to help allay their concerns.

In light of the representations that have been received from those who are strongly of the view that pleural plaques should be compensatable, the paper considers the issues that arise in relation to changing the law of negligence and invites views on whether this would or would not be appropriate.

It also invites views on the merits of establishing a ‘no fault’ payment scheme for individuals who have been diagnosed with pleural plaques, and looks at two possible approaches. One would be to establish a ‘no fault’ payment scheme limited to those with work related exposure to asbestos and diagnosed with pleural plaques within a fixed period prior to the House of Lords judgment who had not already received compensation. The second would establish a ‘no fault’ payment scheme for all those similarly exposed and diagnosed now or in the future. The paper discusses whether any payment should be made, and – if so – by whom; the amount of the payment; and the risks, benefits and costs of both schemes.

The Government acknowledges that there are genuine difficulties in respect of all the options considered in the paper, which would need to be resolved satisfactorily if they were to be taken forward.

Introduction

Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. They do not usually cause significant symptoms (if any) and do not impair lung function. Pleural plaques are in themselves benign but are a marker of exposure to asbestos.

This paper considers the Government response to the House of Lords decision in *Johnson v NEI International Combustion Ltd and conjoined cases* (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)* on pleural plaques. The consultation is aimed at the legal profession, trades unions, insurers, asbestos support groups and others with an interest in this issue in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 47 have been followed.

An Impact Assessment has been completed and indicates that people diagnosed with pleural plaques, their employers and former employers (including Government), and insurers are likely to be particularly affected. The proposals are likely to lead to additional costs for businesses and the public sector. An Impact Assessment is attached at Annex A at page 30. Comments on the Impact Assessment and the specific questions it contains are particularly welcome.

Copies of the consultation paper are being sent to:

Amicus

Anthony Coombs, Solicitor

Asbestos Victims Support Group Forum UK

Association of British Insurers

Association of District Judges

Association of Personal Injury Lawyers

AXA Insurance

Bar Council Law Reform Committee

Beachcroft LLP

Berrymans Lace Mawer, Solicitors

Bond Pearce, Solicitors

Browne Jacobson LLP

British Medical Association

Confederation of British Industry
Citizens Advice Bureaux
Civil Justice Council
Clinical Disputes Forum
Dr John Moore-Gillon
Dr Robin Rudd
Dr Jeremy Steele
DWF LLP
Engineering Employers Federation
Federation of Small Businesses
Field Fisher Waterhouse LLP
Forum of Complex Injury Solicitors
Forum of Insurance Lawyers
GMB
Groupama Insurance
Halliwells LLP
Her Majesty's Council of Circuit Judges
Institute of Legal Executives
Insurers Underwriters Association
Irwin Mitchell, Solicitors
John Pickering & Partners LLP
Law Society
Leigh Day & Co, Solicitors
Master of the Rolls
Medical Defence Union
Medical Protection Society
NFU Mutual
NHS Litigation Authority
Norwich Union
Ogden Working Party
Pannone LLP
Personal Injury Bar Association
Professor Mark Britton
Professor Tony Newman-Taylor

Resolute Management Services Ltd

Royal & Sun Alliance Insurance Group Plc

Senior Master Whitaker

Senior Presiding Judge for England & Wales

Transport and General Workers Union

Thompsons, Solicitors

Trades Union Congress

UCATT

UK Asbestos Working Party 2007

UNISON

UNITE

Walker Smith Way, Solicitors

Which?

Zurich Financial Services

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

1. Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. They do not usually cause significant symptoms (if any) and do not impair lung function. Pleural plaques are in themselves benign but are a marker of exposure to asbestos.

2. This consultation paper considers the House of Lords decision in *Johnston v NEI International Combustion Ltd and conjoined cases* (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases*) and discusses the Government's response.

Background

3. This section of the paper sets out background on the history of the legal judgments on pleural plaques; the law of negligence; and the medical grounds underpinning the judgments.

History of the legal judgments on pleural plaques

4. On the basis of certain High Court decisions in the1980s, it was possible for claimants to be awarded damages for negligent exposure to asbestos which had led to the presence of pleural plaques. In *Church v. Ministry of Defence*[1] and *Sykes v. Ministry of Defence*,[2] Peter Pain J and Otton J respectively held that symptomless pleural plaques, on their own, were sufficient to constitute actionable damage. In *Patterson v Ministry of Defence*,[3] Simon Brown J held that, although a "symptom-free physiological change" such as pleural plaques was not in itself an actionable injury, when combined with the risk of future disease and anxiety (neither of which in themselves would be actionable) then together they could create a cause of action. This was known as the "aggregation theory". A successful claim typically received an award of provisional damages of between £5000 and £7000 (leaving open the possibility of a further claim if the claimant subsequently developed mesothelioma or another asbestos-related disease), or a full and final award of between £12,500 and £20,000.

5. Under the legal system in England and Wales, where questions of law are in doubt, authority in establishing the correct interpretation of the law rests with the Court of Appeal and, in the event of further appeal, the House of Lords. The interpretation by the High Court of the law in this area was not challenged until the insurance industry brought the case of *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases).*

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1 The Times, 1984, March 7th
2 The Times, 1984, March 23rd
3 Decided 29 July 1986, reported (1987) CLY 1194

6. The insurers' decision to mount a challenge was based on two basic arguments: first, that no claimant had suffered an injury sufficient to found a claim in negligence; and second, that in so far as there was any such injury, the present level of quantum (i.e. the amount of damages awarded) was far too high. The High Court was asked to try ten test cases and through them to make the required rulings. In nine cases the issues were both of those set out above; in the tenth case the issue was only as to quantum.

7. The ten test cases were tried by Mr Justice Holland, who gave his judgment, on 15 February 2005,[4] in favour of the claimants. He held that pleural plaques were compensatable, but reduced the amount normally payable to provisional damages of £4,000 and full and final damages of £7,000 (except where special damages were in issue or the award included an element for a recognised psychiatric illness).

8. There were eight appeals to the Court of Appeal against the High Court judgment. Seven of the appeals were by the insurers. The eighth was by one of the claimants, who appealed against the quantum of damages awarded by the High Court (and in whose case liability was never in issue). The Court of Appeal, on 26 January 2006,[5] reversed the decision of the High Court, finding in favour of the insurers. The Court of Appeal held that pleural plaques were not compensatable. In the case brought by the claimant regarding quantum, the court held that the High Court had erred in principle and that the matter should be remitted to that court for assessment of damages.

9. Four of the claimants appealed to the House of Lords against the Court of Appeal judgment. In a unanimous decision on 17 October 2007,[6] the Law Lords upheld the Court of Appeal decision that the existence of pleural plaques does not constitute actionable or compensatable damage. In doing so, it considered and rejected the "aggregation theory".

The Law of Negligence

10. The law of negligence is fully set out in the House of Lords judgment in *Johnston & Others* given on 17 October 2007. The Law Lords considered and summarised the law of negligence in their judgment**,** the relevant provisions of which are set out below.

    Lord Hoffman

    [2] "Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both

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4 [2005] EWHC 88 (QB)
5 [2006] EWCA Civ 27
6 [2007] UKHL 39

to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury and therefore has a cause of action. In the absence of such compensatable injury, however, there is no cause of action under which damages may be claimed and therefore no computation of loss in which the risk and anxiety may be taken into account. It follows that in my opinion the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury. The same is true even if the anxiety causes a recognised psychiatric illness such as clinical depression. The right to protection against psychiatric illness is limited and does not extend to an illness which would be suffered only by an unusually vulnerable person because of apprehension that he may suffer a tortious injury. The risk of the future disease is not actionable and neither is a psychiatric illness caused by contemplation of that risk."

Lord Hope of Craighead

[36] "My Lords, no action lies for a wrong which has not resulted in some element of loss, injury or damage of a kind that was reasonably foreseeable and for which the claimant can sue. It is the limits of this, most basic, principle of the law of negligence that are under scrutiny in these appeals."

Lord Scott of Foscote

[65] ….."a number of well-established principles of law, not in dispute before your Lordships nor I believe at any stage in this litigation, need to be kept firmly in mind. First, a cause of action in tort for recovery of damages for negligence is not complete unless and until damage has been suffered by the claimant. Some damage, some harm, some injury must have been caused by the negligence in order to complete the claimant's cause of action….

[66] Second, it is accepted that a state of anxiety produced by some negligent act or omission but falling short of a clinically recognisable psychiatric illness does not constitute damage sufficient to complete a tortious cause of action. This has been the law for a long time….

[67] Third, it is accepted that a risk, produced by a negligent act or omission, of an adverse condition arising at some time in the future does not constitute damage sufficient to complete a tortious cause of action. The victim of the negligence must await events. Here, too, however, it is common ground that if some physical injury *has* been caused by the negligence, so that a tortious cause of action *has* accrued to the victim, the victim can recover damages not simply for his injury in its present state but also for the risk that the injury may worsen in the future and for his present and ongoing anxiety that that may happen."

Lord Rodger of Earlsferry

[87] "In summary, three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's

negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result."

Medical grounds underpinning the legal judgments on pleural plaques

High Court Judgment of 15 February 2005

11. The judgment given by Holland J. considered in detail the medical grounds underpinning the claims, and set out the medical evidence as to the cause and significance of pleural plaques as follows:

[3] "This litigation has been greatly assisted by the respective contributions of two consultant physicians, pre-eminent in this field, Dr. Robin Rudd and Dr. John Moore-Gillon. Leave aside contributions to individual cases, they have provided respective generic reports, they have agreed upon a joint report and they have each given oral evidence. Between them there has been provision of an invaluable, uncontroversial résumé of the relevant medicine wholly adequate for the debate before me and for this judgment. The following is founded upon their advice.

[4] Asbestos. Asbestos fibres are of two main types: serpentine and amphibole. The former are curly and flexible, typically the product of white asbestos (chrysotile); the latter are straight and stiff, typically the product of blue asbestos (crocidolite) or brown (or grey) asbestos (amosite). The body has mechanisms for the clearance, alternatively for the neutralising of inhaled asbestos fibres but a proportion of inhaled asbestos will remain in the body for the balance of the lifetime. Per Dr. Moore-Gillon: "It is this characteristic of persistence in the body which gives rise to the long term risks associated with asbestos exposure." Adverting to clearance, this occurs much more rapidly with respect to chrysotile than with amphibole hence the greater the risk of disease from the latter. It is helpful to cite from Dr. Rudd's report of the 11th June 2004:

"Following deposition in the alveolar regions 'scavenger cells' known as macrophages try to engulf the fibres. They succeed with shorter fibres but fail with larger fibres. The cells which fail in their attempts to engulf fibres die and release chemical mediators. These and chemicals generated at the surface of the asbestos fibres are responsible for producing inflammation. If this is sufficiently severe and long lasting fibrosis, i.e. the laying down of complex protein called collagen, may develop. Removal by macrophages and dissolution in situ succeeds in clearing some of the asbestos fibres from the lungs. Clearance occurs much more rapidly for chrysotile than for the amphiboles, probably at least partly accounting for the greater propensity of the latter to cause disease. Fibres which remain in the lungs commonly become coated with ferroprotein to form ferruginous bodies, also termed asbestos bodies."

[5] The Pleura. The movement of the lung in the course of respiration is facilitated by a slippery membrane covering, that is, the pleura. There are two layers to the pleura: the parietal pleura which lines the inside of the rib cage, and the visceral pleura which covers the lungs. Normally there is no gap between these layers which are lubricated with pleural fluid. It is to be emphasised that the pleura is separate from, and not part of the lung. Per Dr. Rudd, op cit "The route by which asbestos fibres reach the parietal pleura has not been fully elucidated". He lists alternative suggestions – none such presently assist.

[6] Pleural plaques. These are localised areas of pleural thickening with well demarcated edges. They usually develop on the parietal pleura but occasionally develop on the visceral pleura. They consist of bland fibrous tissue. The pathogenesis remains uncertain but it is believed that the presence of asbestos fibres leads to a prolonged low-grade inflammatory response resulting in the release of chemical mediators, in turn leading to the laying down of fibrous tissue. The following propositions can be ventured:

a. Pleural plaques are by far the most common respiratory effect of asbestos inhalation.

b. They may occur after occupational exposure at a lower level than is needed to cause asbestosis.

c. The frequency of occurrence and the extent have a relationship with the amount inhaled and the duration of exposure.

d. The presence of pleural plaques does not normally occasion any symptoms. Very occasionally the patient may be aware of an uncomfortable grating sensation on respiration.

e. Given an absence of symptoms, the presence of pleural plaques is only established by way of chest x-ray or C.T. scan – alternatively on post-mortem autopsy – often incidental to some other investigation. When reading an x-ray it may not be easy to distinguish between pleural plaques and pleural thickening.

f. Pleural Plaques are rarely detected during the first 20 years following exposure to asbestos. However, exposure to asbestos does not necessarily result in the development of plaques notwithstanding the subsequent passage of 20 or more years.

g. With time plaques may become more extensive.

h. Plaques do not in themselves threaten or lead to the other asbestos induced conditions nor indeed are they a necessary pre-condition for such; they do not increase the risk of lung cancer; they differ from diffuse pleural thickening; and their pathology is entirely distinct from that of mesothelioma.
It is the exposure to asbestos that they evidence, taken in conjunction with the probable life expectancy, which accounts for the risks of further asbestos induced conditions as deployed with respect to each of the Claimants – see below.

[7] With a view to assisting the elucidation of one of the legal issues, the Doctors were asked to express views as to whether pleural plaques signified an 'injury' or a 'disease'. They emphasise that such choice of categorisation does not normally concern the clinician but advise that in some (but not all) medical textbooks pleural plaques are categorised as a benign disease.

[8] Finally, it is of some value to cite from a contribution of Dr. Rudd to Occupational Disorders of the Lung, 2002:

"Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos-induced pleural disease, nor to pose any risk of malignant change leading to mesothelioma. Their presence may indicate, nevertheless, a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. On average, in the absence of any other evidence about exposure it is reasonable to assume that subjects with plaques will have had higher exposure to asbestos than subjects without plaques. The frequency of development of other complications of asbestos exposure in persons with plaques is not a function of the presence of the plaques, but of the asbestos exposure that caused plaques. Since plaques may occur after a wide range of different exposures, the risks of other asbestos-related conditions may differ widely between different populations and individuals with plaques.""

[64] "… I have had much to mind the expert evidence, as well explained to, and understood by the Claimants, and to its effect namely that (in forensic terms) the identification of pleural plaques has an 'evidential' rather than a 'substantive' significance. Thus, their existence confirms the significant permanent physical penetration by asbestos fibres but does not add in any way to the resultant disabilities, actual or prospective. It is with that confirmation to hand that the physician is able to make risk assessments that are based upon the level of exposure and the history – risk assessments that do not stem from, nor are influenced by the plaques but which flow from the now evidenced initial exposure. Further, it is not the plaques per se that engender anxiety (save to the unforeseeably irrational) it is again the now evidenced internal presence of asbestos and the risk assessments arising from such."

12. Holland J. identified a number of issues for his consideration (at paragraph [65] of his judgment), one of which was whether permanent penetration, with the implications necessarily flowing from such, constitute 'damage' or 'injury' so as to complete the foundation for a claim in negligence. The judge's answer to this issue was in the negative, for the reasons set out at paragraph [71] of his judgment:

[71] "…inferred permanent penetration by asbestos fibres cannot, simpliciter, constitute injury or damage so as to found a cause of action. Penetration that is permanent (that is, such that has defeated the body's natural defences) raises a potential for damage, but no more. For damage to found a cause of action such has to be real,

other than minimal and capable of being discovered – actual discovery is immaterial to this issue…."

13. Holland J. concluded that pleural plaques per se cannot found a cause of action.

[80a] "I start by rejecting any notion that pleural plaques per se can found a cause of action. I am not satisfied that for forensic purposes they can be categorised as a 'disease' nor as an 'impairment of physical condition'. This whole forensic exercise arises because for practical purposes there is no disease, nor is there any impairment of physical condition. If I am wrong, then, the expert evidence as to their significance points (as is in effect, conceded) to them being disregarded as 'de minimis'. I do not think that that status can be enhanced by associating with such, the risk of onset of asbestos related symptomatic conditions as arise not from the plaques per se but from the history starting with the initial exposure – still less do I think that that status can be altered by invoking anxiety arising out of the now articulated risks."

Court of Appeal Judgment of 26 January 2006

14. The Court of Appeal judgment summarised the relevant different effects that ingestion of asbestos fibres can have upon the body by utilising the findings of Holland J. in his High Court judgment. It indicated that "…the judge in the present case was assisted by two eminent consultant respiratory physicians… and has set out the salient facts in a way from which no party has dissented." The Court of Appeal agreed that pleural plaques constitute a physiological change in the body but that they do not found a cause of action.

[18] "Pleural plaques undoubtedly constitute a physiological change in the body. We have described the nature of this change above. For present purposes their relevant feature is that, save in the case of about 1% which no one has suggested has significance, they are symptomless, have no adverse effect on any bodily function and, being internal, have no effect on appearance. In short, ignoring the 1%, no one is any the worse physically for having pleural plaques."

[19] "It has always been the law in England and Wales that negligence is not actionable per se, it is only actionable on proof of damage. While such damage need not be substantial it must be more than minimal. This is not controversial…."

[23] "It is common ground in this case, rightly in our view, that the development of pleural plaques is insufficiently significant, of itself, to constitute damage upon which a claim in negligence can be founded."

House of Lords Judgment of 17 October 2007

15. Each of the Law Lords considered whether pleural plaques are actionable damage. Lord Hoffman confirmed at paragraph [11] of the judgment that the finding of fact by Holland J., in his High Court judgment, that pleural plaques in themselves were not damage, is unassailable, and that:

    [19] "…One is not concerned with whether the plaque is in some sense 'injury' or a 'disease'. The question is whether the claimant has suffered damage. That means: is he appreciably worse off on account of having plaques? The rare victim whose plaques are causing symptoms is worse off on that account. Likewise, the man with the disfiguring lesion is worse off because he is disfigured. In the usual case, however (including those of all the claimants in these proceedings) the plaques have no effect. They have not caused damage."

16. Lord Hope of Craighead confirmed at paragraph [49] of the judgment that although pleural plaques are a form of injury, they are not harmful; they do not give rise to any symptoms, nor do they lead to anything else which constitutes damage, and that:

    [50] "…there is no cause of action because the pleural plaques in themselves do not give rise to any harmful physical effects which can be said to constitute damage…."

17. Lord Scott of Foscote confirmed, at paragraph [68], that the conclusion reached by Holland J. that pleural plaques per se could not found a cause of action was in part a finding of fact but also a conclusion of law.

    [68] "…Pleural plaques are not visible or disfiguring. None of the appellants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic and were not the first stage of any asbestos-related disease. The inhalation of the fibres and the formation of the plaques involved no pain or physical discomfort. Those being the facts the conclusion that the presence of pleural plaques could not per se suffice to complete a tortious cause of action in negligence is, in my opinion, unassailable. Indeed both before Holland J and in the Court of Appeal the appellants conceded that that was so…."

18. Lord Rodger of Earlsferry summarised, at paragraph [87], three elements which must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result, and:

    [88] "In these cases the claimants do not suggest that the presence of the asbestos fibres in their lungs constitutes an injury. Rather, they argue that the plaques constitute an injury – the plaques are 'a physical change' in their bodies, as envisaged by Lord Pearce in *Cartledge*'s case [1963] 1 All ER 341 at 349, [1963] AC 758 at 779.

> Taken by themselves, however, the plaques are benign and asymptomatic. So, even assuming that the plaques could constitute a relevant 'injury' to the claimants' bodies, they do not cause them any material damage and so do not give rise to a cause of action…."

19. Lord Mance confirmed, at paragraph [103], that he agreed with the conclusion reached that pleural plaques by themselves do not constitute or involve injury and damage sufficient to enable an action to lie in tort.

20. Compensation is already available for a range of asbestos-related diseases such as mesothelioma, asbestosis, pneumoconiosis and asbestos-related lung cancer, and the House of Lords judgment confirms that if the claimants did develop any recognised asbestos-related disease in future they would then have a claim in respect of that disease. However, following the Law Lords' decision compensation is no longer available for pleural plaques.

21. The courts reached their conclusions based on the expert medical evidence presented to them and the Court of Appeal indicated that there was no dissent from the parties to the case in relation to the validity of that evidence.

22. In addition, the Industrial Injuries Advisory Council (IIAC), whose remit includes providing independent advice to the Secretary of State for Work and Pensions on the prescription of industrial diseases for the purposes of Industrial Injuries Benefits, conducted a detailed examination of the evidence in relation to asbestos-related diseases – including pleural plaques – and published a report in July 2005.[7] The conclusion it reached was that "there is a lack of evidence that pleural plaques cause impairment of lung function sufficient to cause disability. IIAC does not recommend adding pleural plaques to the list of prescribed diseases, but will continue to monitor new research".

Further consideration of evidence

23. It is important to ensure that any decisions the Government takes in response to the representations it has received on pleural plaques are reached on the basis of the best available current medical evidence. The Secretary of State for Work and Pensions has therefore asked the IIAC to undertake a further review of pleural plaques in relation to the Industrial Injuries Benefit Scheme in parallel with this consultation. In addition, the Chief Medical Officer has agreed to appoint a group of NHS experts to conduct an independent review of the available evidence. The Government is especially keen to gather evidence about the extent to which people with pleural plaques subsequently develop serious asbestos-related conditions such as mesothelioma, as this relates to questions about the anxiety that an individual may suffer. At present, there is a shortage of evidence in this area. A fuller understanding would help to

[7] http://www.iiac.org.uk/pdf/command_papers/Cm6553.pdf

determine the most appropriate means of responding to the Law Lords judgment and supporting people who have developed pleural plaques.

Increasing support, help and information for people with pleural plaques

24. The Government proposes to take action to raise awareness of the nature of pleural plaques, to understand the issue and to help allay concerns where this is possible. We know that this condition is often misunderstood and that there is a need to improve understanding not only for those diagnosed but also among the wider public. For example, a guidance note could be issued to doctors on the meaning for patients of a diagnosis of pleural plaques and the extent of the risk that they will develop a recognised asbestos-related disease. There could also be a leaflet explaining the nature of pleural plaques, which would be made available to hospitals, GPs' surgeries, Citizens' Advice Bureaux, trade unions and other outlets. Information could also be made available on relevant websites.

Q1: Do you think that the proposals to raise awareness of the nature of pleural plaques will help allay concerns?

25. The Government is firmly committed to providing a fair, efficient, and timely system to support victims of mesothelioma and other asbestos-related diseases, and has been taking forward a range of initiatives to ensure that sufferers are able to receive the compensation to which they are entitled as quickly as possible. For example, in the Compensation Act 2006 we brought forward legislation to enable claimants who have contracted mesothelioma after wrongful exposure to asbestos at different times by more than one "responsible person" to recover full compensation from any such person, rather than having to trace them all and recover compensation on a piecemeal basis.

26. The Government has also worked with the Civil Justice Council, the judiciary and stakeholders to develop a new Practice Direction to be used by the courts when dealing with mesothelioma claims to ensure that claims are resolved as quickly as possible, and that interim payments can be awarded at the earliest opportunity. The Practice Direction came into effect on 6 April 2008.

27. Furthermore, initiatives are currently being taken forward by the Department for Work and Pensions, for example through provisions in the Child Maintenance and Other Payments Act 2008, to provide up-front financial support to mesothelioma sufferers who were previously not eligible for help from the Government, including those who were exposed to asbestos from a relative (for example, from washing their clothes).

28. Some concerns have been expressed that if compensation is not available for pleural plaques, this would delay the process of obtaining compensation if the person subsequently developed mesothelioma, and could affect the ability of the person to receive compensation during their

lifetime. However, in view of the fact that pleural plaques are not actionable damage, and that no causal link has been established between them and the development of asbestos-related diseases, it would not be appropriate to make payments solely for the purpose of saving time in the event that an asbestos-related disease subsequently arose. We believe instead that initiatives such as those set out above represent an effective way of ensuring that mesothelioma sufferers receive compensation on as timely a basis as possible.

29. It has also been suggested that if a centralised register or database of people diagnosed with pleural plaques were set up, this could help avoid delays in obtaining details of employment history and insurance in the event that a person with pleural plaques subsequently developed an asbestos-related disease at some future point. The Government has discussed the possibility of such a register with key stakeholders representing claimant and defendant interests.

30. There was little enthusiasm for such a register and a number of practical difficulties were identified. For example, it was considered that an ongoing register would be disproportionate, as on stakeholders' past claims experience it appeared that no more than 5% of people diagnosed with pleural plaques subsequently develop an asbestos-related disease. In addition, stakeholders also expressed the view that the desirability of allaying people's concerns about a diagnosis of pleural plaques (particularly given the low risk of developing an asbestos-related disease) could be undermined by the requirement to go on a register. Ministers indicated during the adjournment debate in Parliament on pleural plaques on 23 January 2008 that the development of a register does not appear to be appropriate. However, any views which consultees may have on this would be welcome.

Changing the law

31. In addition to raising awareness of the nature of pleural plaques, the Government has received strong representations that it ought to go further in responding to the Law Lords' judgment. Some have argued that the Government should in fact overturn that judgment by changing the law of negligence.

32. If legislation were introduced to change the law of negligence, this would mean that people diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able successfully to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision in *Rothwell*.

33. The costings set out in the Initial Impact Assessment at Annex A estimate the total potential cost (in present value) of changing the law in this way on pleural plaques alone at between £3.7bn – £28.6bn. The wide range of the costs reflects the uncertainty regarding the potential number of claims. At this time and on the basis of the available information it is not possible to provide a narrower range.

34. Vigorous arguments have been advanced as to why the law should be changed. In particular, it has been pointed out that for over 20 years there was an established right to claim compensation for pleural plaques. The curtailment of that right means that those who are now being denied compensation feel a strong sense of injustice. Moreover, those campaigning for the Law Lords' judgment to be overturned argue that although pleural plaques seldom cause immediate symptoms, they are associated with an increased risk of fatal conditions like mesothelioma or asbestosis.[8] At the same time, the Government is mindful of a number of difficulties with changing the law.

35. The House of Lords judgment raises very complex issues. It was a unanimous decision based on fundamental principles of the law of negligence. Given the complexity of the issues and the strength of the findings of the Law Lords the Government considers that there would need to be very strong reasons to interfere with the Law Lords' decision. Two main arguments have been advanced against such a proposal.

36. First, to ensure that all those affected by the decision could receive compensation, the legislation would need to apply to the cases included in the decision itself and all cases where there had been no judgment or settlement prior to the House of Lords decision. This would include all those whose cases had been stayed pending the House of Lords decision or the Court of Appeal decision, or had been withdrawn/discontinued, or who had not commenced proceedings because of the Court of Appeal or House of Lords decision. Retrospective provisions of this nature could potentially raise issues in relation to the European Convention of Human Rights on the basis that they interfered with settled arrangements in a way which could be argued to breach the Convention. There is an argument that exceptionally a judgment can be overturned by primary legislative intervention. It would be necessary to assess the proportionality of any such interference and the likely effect any change would have, against the justification for the interference, especially given the very clear nature of the Law Lords' reasoning. Retrospective provisions were included in the Compensation Act 2006 to reverse the effect of the House of Lords judgment in *Barker v Corus (and conjoined cases)* in relation to who would be liable in mesothelioma claims. However, in that instance the Government made clear that these were highly exceptional circumstances affecting seriously ill claimants, and the degree of retrospectivity affected a very small number of cases over a very short period. The provisions simply removed a procedural hurdle to people getting compensation for mesothelioma quickly, and did not relate to making the condition compensatable in the first place.

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[8] http://www.yctonline.co.uk/TUC%20-%20Risks%20%20weekly%20health%20and%20safety%20update%20-%20Risks%20279%20-%2021%20October%202006.eml.html#tuc-12551-4 Amicus prepares Lords appeal on pleural plaques

37. Secondly, the determination as to whether a particular disease or condition constitutes an injury for which compensation is available has traditionally been a matter for the courts under the common law.

38. Interference with the fundamental principles on which the Law Lords' decision was based could have wider consequences and could be used as a precedent to argue for compensation in other situations. For example, it might lead to calls for compensation in other circumstances where no actionable damage has yet occurred, such as simply for the exposure to asbestos, and the worry from such exposure, regardless of whether this has resulted in any symptoms or injury.

39. It might also raise the possibility of compensation claims being made much more widely for the risk of an illness occurring or for worry that something might happen (for example in relation to the effects of passive smoking in the workplace or exposure to the sun in the building industry or other jobs involving outdoor work). If developments in the law of this nature occurred, this could considerably increase the level of litigation and the possibility of weak or spurious claims and could have damaging effects on business and the economy.

40. In addition, there is a risk that the desirability of raising awareness of the nature of pleural plaques and allaying unnecessary concerns could be undermined by the provision of compensation, as this could send mixed messages about the nature of the condition and increase concerns.

41. On 29 November 2007, the Scottish Executive announced that it intended to legislate to reverse the House of Lords judgment so that pleural plaques would again be compensatable under the civil law in Scotland, and on 23 June 2008 it introduced the Damages (Asbestos-Related Conditions) (Scotland) Bill. The Government understands that it could be seen as unfair for compensation to be available in one part of the United Kingdom but not in another. However, the civil legal systems in Scotland and in England and Wales are separate and inevitably there are already many differences in the law, including in relation to damages and compensation. The question of whether to legislate in Scotland is a matter for the Scottish Parliament alone.

42. It is clear that the question of changing the law of negligence so that pleural plaques constitute actionable damage raises many complicated issues. While we invite views on overturning the judgment, we are not currently minded to favour this approach, not least because of the implications for the fundamental integrity of the law of negligence.

Q2: What are your views on whether it would or would not be appropriate to overturn the House of Lords decision on pleural plaques?

Financial support for pleural plaques

43. While some individuals and organisations have campaigned for the Law Lords judgment to be overturned, others suggest that a more appropriate response would be to provide financial support in the form of a payment scheme to those diagnosed with pleural plaques as a result of exposure to asbestos in the workplace. While there may be significant obstacles to creating any such scheme, the Government is willing to listen to further arguments on this and to consider what form any such scheme might take. This raises issues as it could mean the use of public funds to compensate individuals with no symptoms.

44. The consultation paper examines the rationale for such a scheme, and looks at the risks and benefits involved in two possible approaches.

45. There is no definitive information on either the total number of people with confirmed diagnoses of pleural plaques, or those people who will ultimately develop pleural plaques. This is largely due to the asymptomatic nature of pleural plaques, as well as the long latency. Estimates regarding the potential numbers of people who would be eligible for financial support are therefore highly uncertain, as they depend on a number of assumptions that cannot be verified, such as how many people will ultimately develop pleural plaques, and of these, how many would be diagnosed. This uncertainty regarding the number of pleural plaques diagnoses translates into a wide range for the potential costs of each of the options of financial support set out in the accompanying Initial Impact Assessment, as on the basis of current information it is not possible to provide narrower ranges.

Rationale for financial support

46. Whenever the law changes in relation to the right to claim compensation, or the amount of compensation, there will inevitably be people who benefit as a result of the change and others who lose out. In this instance the House of Lords has given a ruling that pleural plaques do not constitute compensatable or actionable damage. Particular grounds would therefore be needed for any scheme providing payments to people for pleural plaques to justify any scheme that may be introduced.

47. In that context, it may be argued that those most directly affected by the judgment, namely the claimants involved in the *Rothwell* case and others who had been diagnosed before the House of Lords decision was published and had an expectation of receiving compensation, therefore feel a legitimate sense of unfairness that compensation has now been denied to them. It could, however, also be argued that following the House of Lords decision, those previously responsible for paying compensation have an expectation that it should not now be payable.

48. It would also need to be decided how and by whom payments through the scheme should be funded. Many cases which were stayed pending the House of Lords decision related to the insurance industry, others to certain former nationalised industries related to Government departments such as

the Department for Business, Enterprise and Regulatory Reform, the Ministry of Defence and the Department for Transport.

49. We recognise that in view of the Law Lords' judgment, insurers may be reluctant to provide any funding on a voluntary basis, and any actual requirement on them to pay would be likely to need primary legislation. Legislation could provide for a sum to be paid by each relevant insurer or department into a central fund, calculated on a pro-rata basis based on the number of stayed cases, together with a pro-rata sum to cover other cases where pleural plaques had been diagnosed but compensation had not already been received.

50. The alternative would be for funding to be entirely the responsibility of Government, and the whole cost would fall to taxpayers.

51. A payment scheme of this nature could, depending on who would be required to fund it, raise issues in relation to the European Convention of Human Rights. It would be necessary to assess the proportionality of any such interference, and the likely effect any change would have, against the justification for the interference. In addition, the introduction of a payment scheme in this area could create a precedent and lead to calls for the Government to introduce payment schemes in a range of other areas. We must also be mindful that it is important that businesses that choose to operate within the UK can do so within a fair and transparent environment. If there is a reduction in confidence in the stability of the UK as a place to do business, the competitiveness of the UK could be damaged.

52. The two possible approaches to providing financial support which have been identified are as follows:

A no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007

53. We consider that a no fault scheme would be the simplest way to provide a payment to these people without involving any significant legal costs. This would mean that an applicant to the scheme would not have to prove negligence.

54. The costings set out in the Initial Impact Assessment at Annex A estimate the potential cost (in present value) of this option at between £52m – £196m (excluding set up costs). Estimates of the number of people who have been diagnosed with pleural plaques before the House of Lords decision are subject to a high degree of uncertainty. During the course of this consultation the Government will undertake further analysis in relation to the number of people diagnosed before the Law Lords' decision, better to inform the evidence base.

55. For the reasons set out above, there would be difficulties in introducing any scheme of this nature. The following section considers practical issues

that would also need to be addressed in the event that such a scheme were introduced.

How the scheme might work

56. The scheme would need to provide for a fixed payment to be made to the claimants in the *Rothwell* cases, and to any other person who could show that following workplace exposure they had been diagnosed with pleural plaques within a fixed period, say five years, prior to the House of Lords decision, and who had not received any compensation. This would include all those whose cases had been stayed pending the decision or the earlier Court of Appeal decision, or had been withdrawn or discontinued, or who had not commenced proceedings because of the Court of Appeal or House of Lords decision.

57. In view of the fact that the payment would be made on a no fault basis, there would be no need to prove liability, and the applicant would only need to provide evidence of the diagnosis of pleural plaques, proof of their identity, and that they had worked in an environment involving asbestos exposure. This would be similar to the criteria for the scheme for lump sum payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979. In view of this, legal costs would be minimised and we would not consider it necessary for the applicant to receive legal assistance, or for the scheme to make any payment for such assistance (as is similarly the case with the 1979 Act scheme). The applicant's right to bring a claim in negligence in the event that they subsequently developed an asbestos-related disease would of course be preserved.

58. The level of payment would need to be determined. As noted above, the High Court decision in *Rothwell* held that £4000 was an appropriate amount of provisional damages. A possible bracket of £4–6000 was then discussed in the Court of Appeal judgment, although a definitive view was not taken in view of the Court's decision that pleural plaques are not compensatable. Based on this, a fixed payment of £5000 has been used for the purposes of the Impact Assessment accompanying this paper. However, as pleural plaques have been held not to be actionable damage, and in view of the minimisation of legal costs, a lower figure may be more appropriate. This is likely to be necessary to make a no fault scheme affordable, were it to be introduced.

59. As a coordinating role would be necessary, we would envisage that the scheme would need to be run either by the Government, an appropriate agency or contracted out, and relevant administrative costs would need to be provided for. The scheme would require the maintenance of a register of all those who had made a claim and received a payment, to prevent the possibility of double payments being made.

60. In view of the fact that the scheme would only relate to past cases it would appear appropriate for a fixed limitation period to be applied within which all claims would have to be brought, so that unnecessary administrative costs were not incurred in dealing with outstanding claims several years

into the future. We would propose that the appropriate limitation period would be one year from the date the scheme came into force.

A no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 and also to those diagnosed with pleural plaques since the judgment and in the future

61. As well as providing a payment to people already diagnosed with pleural plaques who had not already received compensation, this scheme would also cover anyone diagnosed since the House of Lords judgment or in the future.

62. As noted above, given the clarity of the House of Lords judgment and the legal principles it embodies, a payment scheme would need particular grounds to be made out to justify it. A scheme limited to those diagnosed before the House of Lords decision could be justified on the basis of the expectation of payment that individuals held. This could not be said to apply to a scheme extending to diagnoses after the House of Lords decision.

63. In addition, it is not possible to reach an authoritative view on the likely ongoing incidence of pleural plaques or the timescale over which they may arise. Indications are that cases will appear at least until 2024. For the purposes of the accompanying Initial Impact Assessment, a projected period of 20 years has been used. However, there have been suggestions that incidence could continue to increase for at least 40 years after exposure. This means that any scheme providing a payment for future cases may well have to operate for a lengthy extended period and deal with a highly unpredictable number of cases, with unpredictable costs.

64. The Initial Impact Assessment estimates the potential cost (in present value) of this scheme to be £780m – £4.8bn (excluding set up costs). The wide range of the costs reflects the uncertainty regarding the potential number of claims. At this time and on the basis of the available information it is not possible to provide a narrower range.

65. The only way that pleural plaques can be recognised is by an x-ray or CT scan. Concerns have been expressed that the provision of future payments for pleural plaques may encourage the use in areas of heavy industry of “scan vans” offering x-rays and CT scans in return for a fee, for the purposes of obtaining a payment. The use of x-rays and CT scans are governed by two sets of regulations, the Ionising Radiation (Medical Exposure) Regulations 2000 and the Justification of Practices Involving Ionising Radiation Regulations 2004. The Chief Medical Officer has indicated that the only case for justifying the procedure in this context would be if there were a reasonable suspicion of asbestos-related lung disease arising from a known risk of asbestos exposure. Initiating an x-ray or CT scan purely based on a wish to demonstrate pleural plaques would not be justified, as pleural plaques are benign and do not impair lung function. The regulations governing the use of ionising radiation apply

equally to the NHS and the private sector. Compliance is monitored by a specialist inspectorate within the Healthcare Commission and they are empowered to enforce the regulations. If a private “scan van” were offering x-rays purely for the purpose of assessing eligibility for compensation then the Healthcare Commission could be asked to investigate.

66. This means that people will not be able to receive x-rays or scans purely in order to receive compensation for pleural plaques.

How the scheme might work

67. In terms of how any such scheme might operate, similar provisions to the first option could apply in relation to the evidence required to establish a claim, and a similar fixed payment could be made (adjusted annually for inflation in relation to future cases). In addition to the proposed limitation period of one year from the date of commencement of the scheme for cases already diagnosed, a limitation period of one year from the date of diagnosis could apply to new cases.

68. Administration of the scheme would clearly be far more complex and costly, both in view of the number of claims and the timescale over which they could arise. In particular, any provisions for pro-rata payments into the scheme by insurers and Government would need to be made on an annual basis. These payments would need to reflect actuarial advice on the likely demands on the fund each year.

69. One possible approach to control the parameters of any scheme and limit the potential costs and complexity might be to confine payments for future cases to employment in specific key industries where exposure to asbestos has been particularly prevalent. However, this would have to overcome the objection that it would discriminate between potential claimants on an arbitrary basis, and does not appear tenable.

70. Under both funding models, providing compensation could have the same wider consequences as a possible change to the law, as discussed above, and could be used as a precedent to argue for compensation in other situations. Consideration also has to be given to the effect on the UK economy of providing compensation in these circumstances.

71. The Government is of the opinion that the issues raised above would need to be taken into account before there was provision of a scheme to make a payment to those diagnosed with pleural plaques as a result of exposure to asbestos in the workplace.

72. In light of the medical evidence available, the Government sees difficulties with both no fault schemes. Were any form of financial compensation to be offered, the Government considers the rationale for the open ended scheme to be weaker than that for the narrower scheme.

Q3: Do you consider that no fault financial support for pleural plaques would be appropriate? If so, what would the rationale for this be? If not, please give your reasons.

Q4: If a no fault payment scheme were to be introduced:

a) which of the above two schemes should be introduced, and why?

b) what level of payment would be appropriate?

c) how should the scheme be funded?

d) what limitation period should apply for each option?

Asymptomatic pleural thickening and asymptomatic asbestosis

73. The legislation which has been introduced by the Scottish Executive provides that in addition to pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis would also be compensatable. The House of Lords decision in *Johnston* did not specifically deal with these conditions, and the Government does not consider that it would be appropriate for any no fault payment scheme which might be adopted to extend to these other conditions. Asymptomatic pleural thickening and asymptomatic asbestosis are the initial stage of conditions which usually then lead on to the development of symptoms for which compensation under the civil law would be available. In contrast, there is no causal link between pleural plaques and the subsequent development of an asbestos-related disease.

Questionnaire

Q1: Do you think that the proposals to raise awareness of the nature of pleural plaques will help allay concerns?

Q2: What are your views on whether it would or would not be appropriate to overturn the House of Lords decision on pleural plaques?

Q3: Do you consider that no fault financial support for pleural plaques would be appropriate? If so, what would the rationale for this be? If not, please give your reasons.

Q4: If a no fault payment scheme were to be introduced:

a) which of the above two schemes should be introduced, and why?

b) what level of payment would be appropriate?

c) how should the scheme be funded?

d) what limitation period should apply for each option?

<u>Impact Assessment</u>

Q5: Do you have any estimates regarding:

a) the number of people currently diagnosed with pleural plaques?

b) the future number of people who will develop pleural plaques?

Q6: Do you have any estimates regarding the future distribution of pleural plaques cases, including the period of time over which people will develop pleural plaques?

Q7: Do you have any estimates regarding the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 1 October 2008 to:

Michelle Edwards
Ministry of Justice
Civil Law and Justice Division
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SW1E 6QW

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Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from Michelle Edwards at the above address.

Publication of response

A paper summarising the responses to this consultation will be published in November 2007. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you

could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Annex A – Impact Assessment

The following pages contain the Initial Impact Assessment.

Summary: Intervention & Options

Department /Agency:	Title:	
Ministry of Justice	**Impact Assessment of Pleural Plaques**	
Stage: Consultation	**Version:** Initial	**Date:** July 2008
Related Publications:		

Available to view or download at:

http://www.justice.gov.uk/index.htm

Contact for enquiries: Joana Quina **Telephone:** 020 7210 8217

What is the problem under consideration? Why is government intervention necessary?

In a unanimous decision on 17 October 2007, the House of Lords upheld the decision of the Court of Appeal of 26 January 2006 that the existence of pleural plaques does not constitute actionable or compensatable damage. The House of Lords judgment has led to pressure from representative groups, trade unions and MPs for the Government to take some action. There may be a need to provide clarification and reassurance regarding the nature of pleural plaques. The Government also wants to determine whether it would be appropriate to change the law of negligence, so that pleural plaques should be compensatable, or whether financial support should be offered to those diagnosed with pleural plaques due to workplace exposure to asbestos.

What are the policy objectives and the intended effects?

To consider whether those who have pleural plaques should be enabled to obtain reassurance and support regarding the nature of pleural plaques. This would allow those people with pleural plaques to be helped and reassured and to allay concerns. In addition it would improve the wider public's understanding of the nature of pleural plaques.This support may, in addition, either include payments to those diagnosed with pleural plaques or enable those diagnosed with pleural plaques due to negligent exposure to asbestos to claim compensation through the civil courts as was the case before the Court of Appeal decision in *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*.

What policy options have been considered? Please justify any preferred option.

1 – Do nothing;

2 – Increasing support, help and information for people with pleural plaques;

3 – Changing the law of negligence;

4 – 'No fault' payments to those exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period prior to the House of Lords judgment who had not already received compensation;

5 – 'No fault' payments to those exposed to asbestos in the workplace and diagnosed with pleural plaques after as well as before the House of Lords judgment.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Improving support and public awareness of the nature of pleural plaques would commence in 2008/9. Changing the law or any financial support scheme would be likely to require legislation and would hence depend on the Parliamentary timetable. Any financial support scheme should be reviewed after two years. However, the full costs and benefits could take up to 20 years to be realised.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: Bridget Prentice

.....Date: 8th July 2008

Summary: Analysis & Evidence

Policy Option: 2	Description: **Increasing support, help and information for people with pleural plaques**

COSTS

ANNUAL COSTS		Description and scale of **key monetised costs** by 'main affected groups' Guidance and information would be provided to those diagnosed with pleural plaques. This would primarily be in the form of a leaflet distributed to those diagnosed, and the costs refer to the production and distribution of such leaflets. The costs would fall to Government.
One-off (Transition)	**Yrs**	
£ 0		
Average Annual Cost (excluding one-off)		
£ 600-1,750	22	**Total Cost** (PV) **£ 10,000 – 30,000**

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS		Description and scale of **key monetised benefits** by 'main affected groups'
One-off	**Yrs**	
£ 0		
Average Annual Benefit (excluding one-off)		
£ 0		**Total Benefit** (PV) **£ 0**

Other **key non-monetised benefits** by 'main affected groups' There would be clarification in terms of what a diagnosis of pleural plaques means. The wider public would also have a better understanding of the nature of pleural plaques.

Key Assumptions/Sensitivities/Risks It is assumed that a diagnosis of pleural plaques is accompanied by a general state of anxiety and uncertainty about the implications in terms of the risks of developing a recognised asbestos-related disease. It is assumed that this anxiety could be reduced by increased understanding of the meaning of the diagnosis.

Price Base Year 2008	Time Period Years 22	**Net Benefit Range** (NPV) **£ -30,000 to -10,000**	**NET BENEFIT** (NPV Best estimate) **£ -20,000**

What is the geographic coverage of the policy/option?			England and Wales	
On what date will the policy be implemented?			2008/9	
Which organisation(s) will enforce the policy?			N/A	
What is the total annual cost of enforcement for these organisations?			£ N/A	
Does enforcement comply with Hampton principles?			N/A	
Will implementation go beyond minimum EU requirements?			N/A	
What is the value of the proposed offsetting measure per year?			£ N/A	
What is the value of changes in greenhouse gas emissions?			£ N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **N/A**	Small **N/A**	Medium **N/A**	Large **N/A**
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ N/A Decrease of £ N/A **Net Impact** £ N/A

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Summary: Analysis & Evidence

Policy Option: 3	Description: **Changing the law of negligence so that compensation can be claimed through the civil courts as was the case before the Court of Appeal decision**

COSTS

ANNUAL COSTS		Description and scale of **key monetised costs** by 'main affected groups' Those who were negligently exposed to asbestos in the workplace and are diagnosed with pleural plaques would be able to claim compensation through the civil courts. Compensation is assumed to be between around £11,500 and £13,400. Average legal costs are assumed to be around a total of £14,000.
One-off (Transition)	**Yrs**	
£ 0		
Average Annual Cost (excluding one-off)		
£ 252m - 2,022m	20	**Total Cost** (PV) **£ 3,670m – 28,640m**

Other **key non-monetised costs** by 'main affected groups' The impact on the courts of an increased number of claims. Danger of precedent in other areas. Uncertainty in the legal environment faced by business.

BENEFITS

ANNUAL BENEFITS		Description and scale of **key monetised benefits** by 'main affected groups'
One-off	**Yrs**	
£ 0		
Average Annual Benefit (excluding one-off)		
£ 0		**Total Benefit** (PV) **£ 0**

Other **key non-monetised benefits** by 'main affected groups'

Key Assumptions/Sensitivities/Risks There is a high level of uncertainty regarding the estimated number of future claims. Pleural plaques are asymptomatic and there may be a long latency period, so it is difficult to estimate with certainty the number of potential cases.

Price Base Year 2008	Time Period Years 20	**Net Benefit Range** (NPV) **£ -28,640m to –3,670m**	**NET BENEFIT** (NPV Best estimate) **£ -28,640m to –3,670m**

What is the geographic coverage of the policy/option?				England and Wales	
On what date will the policy be implemented?				2009/10	
Which organisation(s) will enforce the policy?				N/A	
What is the total annual cost of enforcement for these organisations?				£ N/A	
Does enforcement comply with Hampton principles?				N/A	
Will implementation go beyond minimum EU requirements?				N/A	
What is the value of the proposed offsetting measure per year?				£ N/A	
What is the value of changes in greenhouse gas emissions?				£ N/A	
Will the proposal have a significant impact on competition?				No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **N/A**	Small **N/A**	Medium **N/A**	Large **N/A**	
Are any of these organisations exempt?	N/A	N/A	N/A	N/A	

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ N/A Decrease of £ N/A **Net Impact** £ N/A

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Summary: Analysis & Evidence

Policy Option: 4	Description: **Financial support in the form of a 'no fault' payment for those diagnosed with pleural plaques, due to workplace exposure to asbestos, within a fixed period prior to the House of Lords decision on 17 October 2007**

COSTS

ANNUAL COSTS	
One-off (Transition)	**Yrs**
£ Not Available	
Average Annual Cost (excluding one-off)	
£ 52m – 196m	1

Description and scale of **key monetised costs** by 'main affected groups' Those who were diagnosed with pleural plaques within a fixed period prior to the House of Lords judgment and had not received compensation would receive financial support. For the purposes of this initial impact assessment a figure of £5000 has been used. The financial support scheme would be funded either by insurers and Government on a pro-rata basis, or solely by the Government. The nature of the scheme would depend on the number of claims. The set-up costs for the scheme have not been included.

Total Cost (PV) **£ 52m – 196m**

Other **key non-monetised costs** by 'main affected groups' Danger of precedent in other areas. Uncertainty in the legal environment faced by business.

BENEFITS

ANNUAL BENEFITS	
One-off	**Yrs**
£ 0	
Average Annual Benefit (excluding one-off)	
£ 0	

Description and scale of **key monetised benefits** by 'main affected groups'

Total Benefit (PV) **£ 0**

Other **key non-monetised benefits** by 'main affected groups'

Key Assumptions/Sensitivities/Risks There is a lack of certainty regarding the estimated number of claims, as these are directly related to the number of diagnoses.

Price Base Year 2008	Time Period Years 1	**Net Benefit Range** (NPV) **£ –196m to –52m**	**NET BENEFIT** (NPV Best estimate) **£ -196m to –52m**

What is the geographic coverage of the policy/option?			England and Wales	
On what date will the policy be implemented?			2010	
Which organisation(s) will enforce the policy?			N/A	
What is the total annual cost of enforcement for these organisations?			£ N/A	
Does enforcement comply with Hampton principles?			N/A	
Will implementation go beyond minimum EU requirements?			N/A	
What is the value of the proposed offsetting measure per year?			£ N/A	
What is the value of changes in greenhouse gas emissions?			£ N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **N/A**	Small **N/A**	Medium **N/A**	Large **N/A**
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ N/A Decrease of £ N/A **Net Impact** £ N/A

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Summary: Analysis & Evidence

Policy Option: 5	Description: Financial support in the form of a 'no fault' payment for those diagnosed with pleural plaques, due to workplace exposure to asbestos, both before and after the House of Lords decision on 17 October 2007

COSTS

ANNUAL COSTS		Description and scale of **key monetised costs** by 'main affected groups' Those diagnosed with pleural plaques as in option 4 and also those diagnosed after the House of Lords judgment would receive financial support. For the purposes of this initial impact assessment a figure of £5000 has been used. The costs of these payments could fall to both the private and public sectors, according to the estimated number of claims for each sector. It is also possible that Government would be the sole source of funding. The set-up costs for the scheme have not been included.
One-off (Transition)	**Yrs**	
£ Not Available		
Average Annual Cost (excluding one-off)		
£ 54m – 330m	20	**Total Cost** (PV) **£ 780m – 4,762m**

Other **key non-monetised costs** by 'main affected groups' Danger of precedent in other areas. Uncertainty in the legal environment faced by business.

BENEFITS

ANNUAL BENEFITS		Description and scale of **key monetised benefits** by 'main affected groups' groups'
One-off	**Yrs**	
£ 0		
Average Annual Benefit (excluding one-off)		
£ 0		**Total Benefit** (PV) **£ 0**

Other **key non-monetised benefits** by 'main affected groups'

Key Assumptions/Sensitivities/Risks There is a high level of uncertainty regarding the estimated number of future claims. Pleural plaques are asymptomatic and there may be a long latency period, so it is difficult to estimate with certainty the number of potential cases.

Price Base Year 2008	Time Period Years 20	**Net Benefit Range** (NPV) **£ -4,762m to -780m**	**NET BENEFIT** (NPV Best estimate) **£ -4,762m to -780m**

What is the geographic coverage of the policy/option?			England and Wales	
On what date will the policy be implemented?			2010	
Which organisation(s) will enforce the policy?			N/A	
What is the total annual cost of enforcement for these organisations?			£ N/A	
Does enforcement comply with Hampton principles?			N/A	
Will implementation go beyond minimum EU requirements?			N/A	
What is the value of the proposed offsetting measure per year?			£ N/A	
What is the value of changes in greenhouse gas emissions?			£ N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **N/A**	Small **N/A**	Medium **N/A**	Large **N/A**
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ N/A Decrease of £ N/A **Net Impact** **£** N/A

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base

Contents:

- This Impact Assessment provides an initial assessment of the different options for Government action following the House of Lords decision *in Johnston v NEI International Combustion Ltd and conjoined cases* (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*.[9]

Background

1. Pleural plaques are small localised areas of fibrosis found within the pleura (the membrane surrounding the lungs) caused by asbestos exposure. This does not usually cause significant symptoms (if any) and does not impair lung function. Pleural plaques are in themselves benign but are a marker of exposure to asbestos. As pleural plaques are entirely internal, they are invisible and are discoverable only by x-ray or CT scan. Pleural plaques are usually diagnosed incidentally in the course of medical investigations of other conditions.

2. On the basis of certain High Court decisions in the 1980s, it was possible for claimants to be awarded damages for negligent exposure to asbestos which had led to the presence of pleural plaques. A successful claim typically received an award of provisional damages of between £5,000 and £7,000 (leaving open the possibility of a further claim if the claimant subsequently developed an asbestos-related disease), or a full and final award of between £12,500 and £20,000.

3. The interpretation by the High Court of the law in this area was not challenged until 2004, when the insurance industry brought the case of *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*. The insurers' decision to mount a challenge was based on two essential grounds: first, that no claimant had suffered an injury sufficient to found a claim in negligence; and second, that in so far as there was any such injury, the present level of quantum (i.e., the amount of damages awarded) was far too high.

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[9] [2007] UKHL 39. The judgment can be found at http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm

4. In the initial decision in *Rothwell* in February 2005, the High Court[10] held that pleural plaques were compensatable, but reduced the amount normally payable to provisional damages of £4,000 or full and final damages of £7,000 (except where special damages were in issue or the award included an element for a recognised psychiatric illness). The insurers appealed against the judgment, and on 26 January 2006 the Court of Appeal[11] found in their favour and held that pleural plaques were not compensatable. This decision was appealed by four of the claimants to the House of Lords.

5. In a unanimous decision on 17 October 2007, the House of Lords upheld the Court of Appeal decision that the existence of pleural plaques does not constitute actionable or compensatable damage.

6. The judgment confirms that if the claimants were to develop any recognised asbestos-related disease in future they would then have a claim in respect of that disease. Compensation is already available for a range of asbestos-related diseases such as mesothelioma, asbestosis, pneumoconiosis and asbestos-related lung cancer.

7. The Consultation Paper to which this Impact Assessment refers considers the actions that the Government might take following the House of Lords decision. It presents four policy options in terms of a Government response.

The need for a Government response to the House of Lords' decision that pleural plaques are not actionable or compensatable damage under the civil law of negligence

8. The Government has received strong representations that it should respond to the House of Lords decision that the existence of pleural plaques does not constitute actionable or compensatable injury. In particular, arguments have been put forward that the Government should overturn the judgment by changing the law of negligence, so that those diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision in *Rothwell*. While the consultation paper invites views on overturning the judgment, the Government is not currently minded to favour this approach, not least because of the implications for the fundamental integrity of the law of negligence.

9. The Government acknowledges that, although pleural plaques are not in themselves harmful, a diagnosis of pleural plaques is likely to cause anxiety. It proposes that is both appropriate and important to improve public understanding of pleural plaques, and in particular to provide support and reassurance to those diagnosed with pleural plaques. This support could be in the form of the provision of clarification and reassurance regarding the nature of pleural plaques. The Government also wants to determine whether it is appropriate to change the law of negligence or to provide financial support by enabling the award of no fault payments for those who have developed pleural plaques from workplace exposure to asbestos.

Sectors and Groups Affected

10. People diagnosed with pleural plaques will normally have had workplace exposure to asbestos. Workplace exposure to asbestos tends to be greater within industries associated with heavy industrial use of asbestos in the past, for example shipbuilding, construction, steel, railway engineering and the insulation industry. In addition, these industries tend to be associated with certain geographical areas, such as the North East. However, it should be noted that workplace exposure to asbestos may also have occurred across a wider range of occupations and industries.

11. The main groups affected are employers/former employers (including Government), insurers, and those diagnosed with pleural plaques.

[10] [2005] EWHC 88 (QB)
[11] [2006] EWCA Civ 27

Options

Option 1 – Do nothing

12. Under this option, those diagnosed with pleural plaques would not receive any financial support. No educational initiatives, such as a communication campaign to improve public understanding of the nature of pleural plaques, would be undertaken.

Option 2 – Increasing support, help and information for people with pleural plaques

13. This option acknowledges that, because the nature of pleural plaques is often misunderstood, there is a need to improve understanding not only for those diagnosed with pleural plaques, but also for the wider public. This option considers developing initiatives to raise awareness of the medical evidence in relation to pleural plaques in order to allay concerns. This could take the form of distributing leaflets which would clarify the nature of pleural plaques and the medical evidence. Such leaflets could be made available, for example, through doctors, hospitals, trade unions, and Citizens Advice Bureaux (CABs). Guidance could also be issued to doctors and use made of websites to provide information.

Option 3 – Changing the law of negligence

14. Under this option, those diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision in *Rothwell*. To ensure that all those affected by the decision could receive compensation, the legislation would need to be retrospective and to apply to the cases included in the decision itself and all cases where there had been no judgment or settlement prior to the House of Lords decision. This would include all those whose cases had been stayed pending the House of Lords decision or the Court of Appeal decision, or had been withdrawn/discontinued, or who had not commenced proceedings because of the Court of Appeal or House of Lords decision.

Option 4 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007, who had not already received compensation

15. Under this option, those exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period, say five years, prior to the House of Lords judgment and who had not already received compensation would receive financial support. The Consultation Paper seeks views on what level of payment would be appropriate, but for the purpose of this Impact Assessment, a figure of £5,000 has been used. All those whose cases had been stayed pending the House of Lords or Court of Appeal decision, or had been withdrawn/discontinued, or who had not commenced proceedings because of the Court of Appeal or House of Lords decision, as well as the cases included in the decision, would be eligible for a payment. The no fault scheme would be funded either by insurers and Government on a pro-rata basis on the number of claims, or funded fully by Government. A limitation period of one year (within which all claims would have to be made) would apply.

Option 5 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007and who had not already received compensation, and also to those diagnosed with pleural plaques since the judgment and in the future

16. Under this option, those exposed to asbestos in the workplace and diagnosed with pleural plaques both within a fixed period prior to the House of Lords judgment and subsequently would receive financial support in the form of a payment of £5,000 each, as in the previous option. Also as in the previous option, the no fault scheme would be funded either by insurers and Government on a pro-rata basis on the number of claims, or funded fully by Government. A limitation period would apply, and would consist of one year from the date of commencement of the scheme for cases already diagnosed and one year from the date of diagnosis for new cases.

Costs and benefits of the options

Option 1 – Do nothing

Benefits

17. There would be no benefits to those diagnosed with pleural plaques (both currently and in the future). In the context of options 3, 4 and 5, employers/former employers (including Government) and insurers would not have to pay compensation or make any no fault payment.

Costs

18. Under this option, there would be a continued lack of awareness by those diagnosed with pleural plaques and the wider public as to the nature of pleural plaques. There would be a continued lack of understanding of the medical evidence relating to pleural plaques, and any anxiety felt by those diagnosed and their families would not be reduced.

Option 2 – Increasing support, help and information for people with pleural plaques

Benefits

19. This option would demonstrate a clear commitment from Government to ensuring that both those diagnosed with pleural plaques and the wider public gain a clearer and better understanding of the meaning of a diagnosis of pleural plaques. It would raise awareness of the medical evidence in relation to pleural plaques and it would help to allay concerns. It would, therefore, also contribute towards reducing the anxiety felt by those diagnosed with pleural plaques, as well as their families.

20. Given the long latency of pleural plaques, any leaflets or advice would need to be reviewed, say every two or three years. This means that not only would new medical research be continually and consistently monitored, but also any new evidence related to pleural plaques would be communicated in a transparent way. This would provide added reassurance to those diagnosed.

Costs

21. A package of support could take the form of distributing leaflets providing information on pleural plaques. The leaflet would explain in clear terms the nature of pleural plaques and the medical evidence. Such leaflets could be made available, for example, through doctors, hospitals, trade unions, and CABs. It is expected that it will be necessary to review the leaflets periodically, say every two or three years, to account for any changes either in medical evidence, or updating other details such as those for where to go for more support and advice.

22. The cost of producing and distributing each set of the leaflets would naturally depend on the numbers produced. In determining the costs it is essential to have an estimate of the number of those likely to be diagnosed with pleural plaques. It is also necessary to have information in terms of the distribution over time, or profile, of those diagnoses. There are no statistics on the total number of those people with confirmed diagnoses of pleural plaques. This is largely due to the asymptomatic nature of pleural plaques, as well as the long latency. It is important to acknowledge the uncertainty regarding the number of those who will develop pleural plaques, and that it is not possible to provide a definitive estimate.

23. It is possible, however, to examine two different approaches for determining the number of people with pleural plaques. One approach is to look at statistics available on the number of cases of pleural plaques diagnosed incidentally during the course of medical examinations of other conditions. The other approach is to attempt to estimate the number of people who will ultimately develop pleural plaques – this can be approximated by estimating the number of people with occupational exposure to asbestos, then estimating the proportion that would develop pleural plaques, and then estimating the number that is likely to be diagnosed.

Pleural plaques diagnoses obtained in the course of medical examinations of other conditions:

24. Reports made by respiratory physicians participating in the Surveillance of Work-related and Occupational Respiratory Disease (SWORD) scheme, which is part of the Health and Occupation Reporting (THOR) network run by Manchester University[12] include estimated annual numbers of new cases of benign pleural disease (which includes pleural plaques). The vast majority of the cases of benign pleural disease (96–99%) were seen by chest, rather than occupational, physicians. About three-quarters of the estimated cases of benign pleural disease were classified as "predominantly plaques". On this basis, it is estimated that over the five-year period 2002–2006, there were around 4,500 cases of pleural plaques, giving an average of around 900 cases per year.

25. It is important to note that the cases of pleural plaques identified by SWORD are likely to substantially underestimate the number of people with pleural plaques. Given that pleural plaques are asymptomatic and few of the cases reported to SWORD had other diagnoses of asbestos-related disease in addition to plaques, this suggests that many of these cases were identified via chest x-rays following referral of individuals to chest physicians for other respiratory conditions, rather than because of the plaques themselves. So the figure of 900 cases per year should be taken at best as a lower bound for the cases of pleural plaques diagnosed each year.

Pleural plaques diagnoses taking into account underlying epidemiological conditions:

26. The following paragraphs describe a possible methodology, including the assumptions made,[13] which has been suggested by a company operating in the insurance sector**.** Whilst the Association of British Insurers (ABI) has indicated that it is not able to provide meaningful figures on the number of people with pleural plaques, it has indicated informally that this methodology provides a reasonable approach to estimating the number of people who will ultimately develop pleural plaques.

27. Although there are currently no studies that provide a specific estimate for the number of workers exposed to asbestos in the UK, it is possible to obtain an approximation by using comparable figures for the US. It is widely cited that in the period 1940–1980, 27.5 million workers were occupationally exposed to asbestos.[14] This equates to 14.6% of the US population at the mid-point of this period. Applying the same proportion to the UK yields an occupational exposure of around 7.7 million. By taking into account the number of people who have died (from all causes) this number is likely to be reduced to around four to five million.

28. A number of studies provide estimates for the proportion of workers occupationally exposed to asbestos who develop pleural plaques.[15] On the basis of such studies, it would appear reasonable to estimate that 25% to 50% of those with occupational exposure to asbestos ultimately develop pleural plaques. Combining these estimates with the ones in the paragraph above of four to five million, would yield a range of 1 million to 2.5 million potential people with pleural plaques.

29. It is unlikely that everyone occupationally exposed to asbestos and who developed pleural plaques would be scanned and diagnosed – pleural plaques are asymptomatic, and clinicians determine whether x-rays or CT scans are necessary on a case-by-case basis. In addition, there are regulations, which apply equally to the NHS and the private sector, governing when an x-ray or CT scan can be taken.[16] To take into account that not everyone who has pleural plaques will be diagnosed, we assume that between 20% and 50% of those who have pleural plaques will be

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[12] More details can be found at http://www.medicine.manchester.ac.uk/coeh/thor/.

[13] Except the assumptions on the proportion of those with pleural plaques who will be diagnosed. The initial assumption proposed was 100%.

[14] Nicholson WJ, G Perkel and IJ Selikoff (1982), "Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980–2030", *Am J Ind Med*, 3:259-311.

[15] Examples include:
Chapman, SJ et al (2003), "Benign Asbestos Pleural Disease", *Curr Opin Pulm Med*, 9(4), 266-271;
American Thoracic Society (2004), "Diagnosis and initial management of non-malignant diseases related to asbestos", *Am J Respir Crit Care Med*,170, 691-715;
Chailleux, E. and M. Letourneux (1999), "Medical Impact of the Screening of Asbestos-Related Benign Pleural Lesions", *Rev Mal Respir*, Vol. 16, pp. 1286-1293;

[16] The Ionising Radiation (Medical Exposure) Regulations 2000; The Justification of Practices Involving Ionising Radiation Regulations 2004.

diagnosed. This means that there may be between 200,000 and 1.25 million diagnoses of pleural plaques.

30. As can be clearly verified from the information in the paragraphs above, there is a high level of uncertainty regarding the numbers of pleural plaques diagnoses, and this is transposed into a wide range for the estimates. Consequently, at this stage we have estimated that the number of leaflets produced and distributed could vary between 5,000 and 50,000, and they would be published and distributed every two years over 22 years (starting in 2008 and lasting for a further 20 years – see paragraph 35 for more details). Accordingly, the total costs could range between around £10,000 and £30,000 in present value terms. The cost of producing and distributing these leaflets would be absorbed within Government departmental budgets.

Question 5: Do you have any estimates regarding:

a) the number of people currently diagnosed with pleural plaques?

b) the future number of people who will develop pleural plaques?

Option 3 – Changing the law of negligence

Benefits

31. This option would meet the concerns of those who have made strong representations that people with pleural plaques should be able to claim compensation through the civil courts. However, difficulties could arise from Government interference with the Law Lords' decision. One of the difficulties is the need for retrospective provisions in legislation that would overturn the House of Lords judgment, which could potentially raise issues in relation to the European Convention on Human Rights, on the basis that those provisions interfered with settled arrangements in a way which could be argued to breach the Convention.

32. Given that this option would be considered in addition to the option of raising awareness of the nature of pleural plaques, there would also be the benefit under that option of a clearer and better understanding of the meaning of a diagnosis of pleural plaques, which would help to allay concerns and any anxiety. However, there is also the risk that the combination of a campaign to raise awareness of the benign nature of pleural plaques, coupled with changing the law of negligence so that those with a diagnosis could claim compensation, could lead to some confusion.

Costs

33. In order to estimate the potential costs of this option, we have assumed low to high scenarios for the amount that is awarded in compensation. These assumptions are based on the UK Asbestos Working Party 2004 report,[17] which assumed an average cost to insurers of settling a pleural plaques claim of £11,000 in 2004, as well as claims inflation rates of 1% (low), 3% (medium) and 5% (high). At 2008 prices, compensation is, therefore, assumed to be between £11,500 and £13,400. In addition, we have assumed average total legal costs of around £14,000 per claim (£8000 for claimants and £6000 for defendants).[18] We have assumed that this option would be implemented in 2009/10, due to the need for primary legislation.

34. Because of the additional retrospective element of this option, it is necessary to include both the number of cases that had been stayed pending the House of Lords or Court of Appeal decision, as well as future cases. In terms of stayed cases, we understand that there are around 1,500 cases relating to the main Government departments affected, i.e., the Ministry of Defence (MOD); the Department for Business, Enterprise and Regulatory Reform (DBERR), and the Department of Transport, (DfT). We have not been provided with the number of stayed cases for insurers. We have made the assumption that there are approximately 5,000 cases.

35. As was mentioned previously, it is not possible to provide definitive estimates on either the ongoing incidence of pleural plaques or the timescale over which they will arise. The importing and use of new asbestos was banned in November 1999. Pleural plaques are not usually detected during the

[17] UK Asbestos – The Definitive Guide, available at http://www.actuaries.org.uk/__data/assets/pdf_file/0004/34969/Lowe.pdf.
[18] Financial Memorandum to Damages (Asbestos-Related Conditions) (Scotland) Bill

first 20 years following exposure to asbestos, and it has been indicated that cases will appear at least until 2024. For the purposes of estimating the possible costs of compensation for pleural plaques, it has been assumed claims will arise over a period of 20 years. Although there is no certainty as to the incidence of pleural plaques over time, it is unlikely that cases will be uniformly distributed, and it is more likely that cases will instead increase up to a certain point and then start to decrease until they tail off. As such, we have assumed that around 60% of cases will occur by 2019 (with cases peaking at around 2015), and that around 90% of cases will occur by 2024, with the remainder tailing off by 2029.

Question 6: Do you have any estimates regarding the future distribution of pleural plaques cases, including the period of time over which people will develop pleural plaques?

36. In terms of the number of future cases falling to the main Government departments affected (MOD, BERR, DfT), these have been estimated at around 10,500. In terms of the numbers of future cases falling to the private sector, at paragraph 29 we estimated that the total number of future diagnoses of pleural plaques could range between 200,000 and 1.25 million. We assume that once a person has been diagnosed with pleural plaques, they will make a claim. So the total number of claims falling on both the public and private sector would be 200,000 to 1.25 million.

37. Including both stayed and future cases, the present value of the cost of compensation and legal costs ranges between £3,670 million and £28,640 million. It is, however, important to acknowledge that the uncertainty in the possible number of claims, with the added complexity of the distribution of the claims, as well as uncertainty regarding claims inflation, will necessarily have an effect on the estimated costs.

38. There may be an incentive for individuals to seek x-rays or CT scans. However, as previously referred at paragraph 29, the use of x-rays and CT scans is governed by regulations and these tests must be justified by the practitioner. As these regulations apply to both the NHS and the private sector, we would expect that this would mitigate the possibility of any x-ray or scan being carried out in the absence of a clear medical need.

39. In addition, businesses operating in the UK have expectations of a fair and transparent legal environment that could be adversely affected by a decision to overturn the House of Lords judgment.

Option 4 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 who had not already received compensation

Benefits

40. Under a ‘no fault’ scheme with a fixed sum payable for diagnoses prior to the House of Lords judgment, those who had been diagnosed within a fixed period, say five years, before the House of Lords decision was published, and who had an expectation of receiving compensation would have this expectation realised and would have certainty in terms of a fixed payment.

41. Given that this option of financial support would be considered in addition to the option of raising awareness of the nature of pleural plaques, there would also be the benefit under that option of a clearer and better understanding of the meaning of a diagnosis of pleural plaques, which would help to allay concerns and any anxiety.

42. As the payment would be made on a no fault basis to people exposed in the workplace there would be no need to prove liability, and it would be a simple process for the claimant to receive payment. The claimant would only need to provide evidence of the diagnosis of pleural plaques, proof of their identity, and that they had worked in an environment where they had been exposed to asbestos. This simplicity, and consequent speed of the process, would be an added benefit.

Costs

43. The Consultation Paper seeks views on what level of payment is appropriate, but in order to estimate the potential costs of this option, we have assumed a fixed payment of £5,000. This amount is based on the possible bracket of £4,000 – £6,000 that was discussed in the Court of

Appeal judgment in *Rothwell* (although a definitive view was not taken given the decision that pleural plaques were not compensatable). Because of the no fault nature of the scheme and the simple evidential requirements, the scheme would not involve any significant legal costs.

44. In terms of the number of cases that had been stayed pending the House of Lords or Court of Appeal decision, as referred to in paragraph 34, we consider there are approximately 6,500 cases, with 5,000 falling to insurers, and the remainder to the main Government departments affected, MOD, DBERR, and DfT.

45. In addition to the cases stayed pending the House of Lords or Court of Appeal decision, the financial support scheme under this option would also provide for a fixed payment to those *diagnosed* with pleural plaques following workplace exposure to asbestos, who might not have commenced proceedings because of the Court of Appeal or House of Lords decision. Although it is extremely difficult to provide a reliable estimate of how many cases may have been diagnosed, but for which no compensation was received, within a fixed period (which we are assuming to be five years), we attempt to provide an approximation for a possible range of estimates.

46. As referred to in paragraph 24, the Health and Occupation Reporting (THOR) network run by Manchester University includes estimated annual numbers of new cases of benign pleural disease (which includes pleural plaques). It is estimated that in the period 2002–2006, there were an average of around 900 cases per year. This would give approximately 4500 cases for diagnoses of pleural plaques five years prior to the House of Lords decision. Note that this figure does not exclude those people who were diagnosed and received compensation during that period. This is likely to be more of an issue for the period before the Court of Appeal decision. In addition, as was referred to at paragraph 25, the cases of pleural plaques identified by SWORD are likely to underestimate the number of diagnoses. Therefore, these estimates provide one approximation of a lower bound for the diagnoses for the five years prior to the House of Lords decision.

47. Another way of providing an approximation is to use the estimates available from the UK Asbestos Working Party 2004 report.[19] This report provided projections of the number of pleural plaques claims that were expected to be filed each year, as well as the estimated average cost of settling those claims. The projections of the number of expected claims were made on the basis of subjective judgement, and were based on projections of legal claims rather than taking into account underlying epidemiological considerations. Projections of pleural plaques/thickening claims (where the vast majority, c. 90% refer to pleural plaques) were provided for scenarios of low, medium and high future numbers of claims. The low scenario assumed there would be 19,000 claims; the medium scenario assumed there would be 63,000 claims; and the high scenario assumed there would be 104,000 claims. The number of pleural plaques claims were estimated from survey responses by insurers. For the two-year period between the Court of Appeal and House of Lords decisions, it was estimated that between 5,000 for the low scenario, 22,000 for the medium scenario and 32,000 for the high scenario pleural plaques claims could be filed. To obtain a figure for the remaining years (to make up the five year period being considered), we add these projections to a further 2700 diagnoses (estimated from the SWORD data, as above).

48. Combining these estimates would provide a range of between around 11,000 and 41,200 potential applicants under this option. We acknowledge the high level of uncertainty of these estimates, but believe that in the absence of better information it is more appropriate to consider these estimates rather than ignoring the set of people who were diagnosed yet did not receive compensation. During the course of this consultation the Government will undertake further analysis in relation to the number of people diagnosed before the Law Lords' decision, to better inform the evidence base.

Question 7: Do you have any estimates regarding the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation?

49. We have assumed that the scheme could not be implemented before 2010. This is due to the need to legislate and then to set up the scheme. In addition, it is assumed that a limitation period of one

[19] UK Asbestos – The Definitive Guide, available at http://www.actuaries.org.uk/__data/assets/pdf_file/0004/34969/Lowe.pdf.

year applies, so that the scheme will only run for not much longer than one year. For a payment of £5,000, the present value of the cost of the payments ranges between £52 million and £192 million. We have also provisionally estimated the costs of administering the scheme. On the basis that the criteria for the lump sum payments in this scheme would be similar to those under the Pneumoconiosis etc (Workers' Compensation) Act 1979, the present value of the staff costs in administering it would be in the range of around £0.5 million to £2 million, depending on location and number of claims. Office occupancy costs have been provisionally estimated at between £0.1 million and £1 million. It is important to acknowledge that the uncertainty in the possible number of claims will necessarily have an effect on all the estimated costs. At this stage it is not possible to provide a reasonable estimate for the costs of setting up this scheme.

50. There is the risk that the introduction of a no fault scheme in this area could create a precedent and lead to calls for Government to introduce no fault schemes in a range of other areas.

51. It is envisaged that the scheme would be funded by insurers and Government on a pro-rata basis. However, insurers may be reluctant to provide any funding on a voluntary basis, so that any actual requirement to pay would be likely to need primary legislation. The alternative would be for Government to be the sole provider of funding for the scheme.

Option 5 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 and who have not already received compensation, and also to those diagnosed with pleural plaques since the judgment and in the future

Benefits

52. Similarly to the previous option, this financial support option would be considered in addition to the option of raising awareness of the nature of pleural plaques. As such, there would be the benefit of that option of a clearer and better understanding of the meaning of a diagnosis of pleural plaques, which would help to allay concerns and anxiety. However, there is also the risk that the combination of a campaign to raise awareness of the benign nature of pleural plaques, coupled with financial support for those with a diagnosis could lead to some confusion.

53. The benefit of meeting settled expectations that could be used to justify awarding payments to those diagnosed with pleural plaques prior to the House of Lords decision does not apply to diagnoses following the decision.

Costs

54. As in the case of the previous financial support option, we have assumed a fixed payment of £5,000, and that the scheme would only be implemented in 2010. As was mentioned previously, it is not possible to provide definitive estimates on either the ongoing incidence of pleural plaques or the timescale over which they will arise. For the reasons provided at paragraph 35, we assume that the financial support scheme would need to be in place for a period of 20 years, and that during this time the number of cases will increase up to around 2015 and then start decreasing until they tail off by 2029.

55. As detailed at paragraph 36, the total number of future claims falling on both the public and private sector is assumed to be between 200,000 and 1.25 million.

56. Including the cases considered under the previous financial support option (i.e., those diagnosed with pleural plaques before the date of the House of Lords decision on 17 October 2007), and all future cases, for a payment of £5,000, the present value of the cost of the payments ranges between £768 million and £4,667 million. Taking into account the staff costs in administering the scheme, as well as the office occupancy costs the present value would be in the range of around £12 million to £95 million, depending on location and number of claims. As was the case with the previous option, it is important to acknowledge that the uncertainty in the possible number of claims, with the added complexity of the distribution of the claims, will necessarily have an effect on all the estimated costs. At this stage it is not possible to provide a reasonable estimate for the costs of setting up this scheme.

57. The points made in paragraphs 50 and 51 also apply to this option.

58. Any incentives for individuals to seek x-rays or CT scans and for these to be carried out without a clear medical need would be mitigated by regulations on the use of these tests, as referred to at paragraphs 29 and 38.

Competition Assessment

59. Under option 3, the retrospective elements could potentially raise issues in relation to the European Convention of Human Rights, on the basis that they interfered with settled arrangements in a way which could be argued to breach the Convention. In addition, under options 4 and 5 a payment scheme, depending on who would be required to fund it, could also raise issues in relation to the ECHR. In addition, if firms are faced with elements of uncertainty regarding the legal environment they face, then this could affect future decisions on location, and therefore be damaging for businesses, and ultimately detrimental to the UK economy. It is, therefore, important to recognise the strategic risk in terms of the impact on the business community of pursuing any option that would entail the award of compensation or no fault payments.

60. If insurers were required by legislation either to contribute towards the funding of the financial support schemes (for both the payment of awards and setting up/administering of the schemes), or made liable for compensation if the House of Lords judgment were overturned, then there is the possibility that this requirement might lead insurers to charge higher premiums for employers' liability compulsory insurance. This risk is arguably greater under the option of changing the law of negligence, as there is high uncertainty as to the number of claims, and the compensation and legal costs would be higher.

Small Firms Impact Test

61. As referred to in the Competition Assessment above, if insurers are either required to contribute towards the funding of a financial support scheme that awards payments to those diagnosed with pleural plaques or to pay compensation following a change in the law of negligence, this may have an effect on insurance premiums. This may have an effect on small firms.

Legal Aid Test

62. The option of changing the law of negligence is the only one for which the legal aid test might be applicable. However, with the exception of clinical negligence cases, personal injury cases are generally not eligible for legal aid. Therefore, the funding for claims for compensation would be primarily through Conditional Fee Agreements, and there would be no impact on legal aid.

Health Impact Assessment

63. Pleural plaques can only be diagnosed by an x-ray or CT scan. There could be an incentive under options 3 and 5 for individuals to seek x-rays and CT scans. However, Paragraph 58 explains that the use of x-rays and CT scans is governed by regulations and that these tests must be justified by the practitioner. This would mitigate the possibility of any x-ray or scan being carried out in the absence of a clear medical need.

Race, Disability and Gender Assessment

64. As occupational exposure to asbestos affects primarily men, there will be no major impact on gender equality. Equally, it is anticipated there will be no major impact upon disabled or minority groups.

Human Rights Assessment

65. The retrospective elements of option 3 could potentially raise issues in relation to the European Convention of Human Rights on the basis that they interfered with settled arrangements in a way which could be argued to breach the Convention. The payment schemes in options 4 and 5 could, depending on who would be required to fund them, also raise issues in relation to the European Convention of Human Rights. In relation to all these options, it would be necessary to assess the proportionality of any such interference and the likely effect any change would have, against the justification for the interference.

Specific Impact Tests: Checklist

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	N/A	N/A
Carbon Assessment	N/A	N/A
Other Environment	N/A	N/A
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	N/A	N/A

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 28.

Produced by the Ministry of Justice

Alternative format versions of this report are available on request from Michelle.Edwards@justice.gsi.gov.uk or from telephone number 020 7210 8719.