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# POST

Change in the law raises fears scheme could be first rather than last resort

## Market faces ‘moral imperative’ to backdate 100% of meso compensation



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Insurers and defendant lawyers have rejected calls for the 100% compensation level for the diffuse mesothelioma scheme to be backdated and for it to include other asbestos-related cancers, as doing so would be too problematic.

The government said last week, following a review, that the cap on compensation for mesothelioma victims unable to trace their employer would be raised from 80% of average civil compensation to 100%, following lower than anticipated claims in the first six months since the scheme was established.

However, the new compensation level will only be available to those diagnosed on or after 10 February 2015.

John Spencer, president of the Association of Personal Injury Lawyers, told *Post* that, while he welcomed the change, there was a “moral imperative” to backdate the scheme.

He said: “It’s more than deliverable and more than achievable given the lower-than-anticipated uptake, which clearly the insurers have anticipated they can afford.

“The possibility of extending this to all asbestos-related cancers would be another way to utilise the anticipated payment to good effect.

“There is no logical distinction between asbestos and the rest [of industrial diseases] except that it is a very fast killer and an agonising death for those who suffer from it.”

Doug Jewell, project worker

for the Asbestos Victims Support Groups Forum UK, agreed it was disappointing that an arbitrary date had been selected.

“Why should someone who was diagnosed the day before only get 80% and someone who was diagnosed the day after get 100%?” he said.

“There have been just over 200 successful applicants thus far and there are 60 applications that are currently being considered. With numbers that low and expected to be that low it doesn’t seem to make sense not to backdate it. We hope they will change their mind on that.”

However, Derek Adamson, partner at defendant law firm DWF, said the fact remained that “current insurers are paying these claims in circumstances where they did not take a premium for them” and therefore “a balance needs to be struck”.

There is also the possibility that backdating it would create liabilities that the scheme could not meet, he said.

David Pugh, chair of the disease sector focus team for the Forum of Insurance Lawyers, told *Post* it should be remembered that mesothelioma victims who are unable to trace their insurer would previously have received nothing.

“It should be seen as a positive that more people are getting compensation, rather than some people are getting slightly less,” he said.

Bob Howe, head of global operations for Axa Liabilities Managers, said that, while the scheme had proved “much more affordable” than initially anticipated, a number of concerns remained.

He explained: “The big concern we had [about] the change was that [the scheme] might become one of

first response rather than last resort. Moving the compensation to 100% could make it likely that in some circumstances the true compensator will not be sought.

“[There is] a lot of emphasis on the scheme administrator to make sure they deflect away from the scheme claims that ought to be paid somewhere in the market.”

However, he said the safeguards noted by Department for Work and Pensions minister Lord Freud were welcome: “[Lord Freud] has enabled the insurance market to have access to more audits of the scheme administrator to help make sure that that happen,” he added.

The fact the review has come so early in the lifespan of the scheme has taken some within the industry by surprise, Howe noted.

“As an industry, we would have preferred to look at a longer series of data to decide whether what we were seeing was a true run rate, or if something else was going on,” he said.

Nevertheless, he conceded the current claims rate suggested the scheme was more than capable of meeting liabilities and was thus unlikely to be a burden on insurers.

He said: “We’re dealing with a level of claimants that is approximately one-third of what we thought it would be. You would have to go quite a long way before it would produce an unaffordable levy.”

Despite the financial burden of an expanded scheme seeming within the industry’s capabilities to meet, Howe said the extension to other asbestos-related cancers would cause “a lot of problems”.

He explained: “The most likely candidate for such an extension would be lung cancer claims related to asbestos exposure. But whereas

### Shifting payout level for Diffuse Mesothelioma payment scheme

**22 July 2013**

House of Lords passes the *Mesothelioma Bill*. Insurance industry agrees to **75%** compensation after negotiations at the committee stage.


**6 March 2014**

Gallagher Bassett is appointed to run the scheme. The Department for Work and Pensions decides the cap can be raised from 75% to **80%** as the final cost of the scheme’s administration is now known.


**10 Feb 2015**

Government says it will increase payouts for scheme claimants to **100%** of average civil compensation after lower than expected claims levels in the first six months of the scheme.



with mesothelioma the only cause is asbestos exposure, there are many possible causes of lung cancer – the primary one being smoking – and they would all have to be eliminated.”

Jewell conceded an extension to include other diseases was “more difficult” as there is no clinical way to prove that the cancer was caused by asbestos exposure rather than other carcinogens.

However, he said there was a possibility to put limits on the scheme such as “cases [where] the person wasn’t a smoker – and the only reasonable and likely cause was asbestos”.