CIVIL JUSTICE COUNCIL (CJC) RESPONSE -

REFORMING MESOTHELIOMA CLAIMS

Opening remarks

The CJC agrees that there is a need for mesothelioma claims, particularly those involving a living claimant, to be dealt with as quickly as possible.

While the suite of proposals outlined in the consultation paper could achieve this goal, some concerns arise at this stage because of the absence of important details (notably in respect of the claims 'gateway') and possible ambiguity as to how the measures outlined in the paper fit with the expedited procedure spearheaded by Senior Master Whitaker and applying to claims issued in the RCJ.

It should be noted that some of our members are not convinced that the present proposals will necessarily lead to reductions in the total time spent in resolving such cases. In addition, there is a concern that procedural reform advocated in the consultation appears to be optional (which is to say nothing of the merits or otherwise of the detailed measures).

Members of the Council were unable to agree on the question of whether the current consultation (and, in due course, publication of the Government's response) fulfils the conditions set down in section 48 of LASPO as necessary pre-cursors to the application of ss 44 & 46 to mesothelioma claims.

The Council recognises the benefits that an effective single channel for notification of these claims could bring. We are however concerned that the secure gateway outlined in the paper could be perceived as a mechanism for delivery of public access to justice owned and controlled by one set of interests. This is not to criticise the proponents of the 'gateway'; rather it is to call here for transparency and consultations with the full range of stakeholders management and oversight. We note that the structure of the board of Claims Portal Co Ltd may offer a precedent in this respect.

The CJC has set out some more detailed comments about aspects of the reforms in the responses to the consultation paper's questions below.

Responses to individual questions

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

We are not persuaded that the present system is not working reasonably satisfactorily.

The consultation paper notes that the DPAP anticipates greater *"specific urgency"* from parties handling mesothelioma claims. In relation to mesothelioma cases in particular, the current DPAP cannot be divorced from the very efficient RCJ process as both operate in tandem.

The Practice Direction can be seen here: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/pd_part03d and a further explanation by Senior Master Whitaker is provided here: http://www.asbestosforum.org.uk/whitaker2013.pdf

We have seen no evidence that the procedure set out in the Practice Direction is not working well in the claims to which it applies. We have not seen the evidence to support the passage in paragraph 28 that *"The result is understood to be that the majority of mesothelioma cases are either dropping out of the DPAP procedure or by-passing it altogether and proceeding straight to litigation …"*.

Further, there is no analysis of the delays which may be caused by obtaining medical records and reports, work histories and the like. Those elements may rest more on the claimant side of claims handling. On the compensator side, possible causes of delay could include denials, failures to respond in time and resolving issues of contribution or apportionment.

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

We are not persuaded that there are problems (see response to question 1).

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

We would first raise a preliminary point of process which neither concerns the merits of the proposed MPAP nor is intended as critical of its proponents. However, it strikes us as unfortunate that a set of proposals emanating from a single stakeholder group have been put, without apparent amendment, to consultation. Some might draw unhelpful inferences from that, which seems to us regrettable given the seriousness of the underlying claims here and given the obvious effort - albeit in one quarter - involved in preparing a draft MPAP.

Remaining at the level of principle, we would suggest that any MPAP should include the following key elements:

- an unambiguous sequence of procedural steps which clearly set out the obligations of parties and which provides time limits for completion/compliance
- meaningful incentives and sanctions which promote adherence to the procedure and penalise poor performance
- well-defined exit points or stages at which the claim may be taken into litigation (which would ordinarily be regarded as a last resort)

- an explicit link and a procedural flow through to the present Practice Direction (noted above) for matters in which proceedings are commenced.

We would make two points as regards criteria which may cause claims to fall out of any MPAP, if adopted. First, that this does not concern claims which are beyond the scope of the MPAP from their outset. Second, that claims which fall out of the current low value Pre-Action Protocols (for personal injury claims below £25,000) generally do so for three broad reasons which might also be adopted in the present setting, those being:

i. failure to admit liability,
ii. failure to agree quantum, or
iii. procedural non-compliance.

The question of a whether a fixed recoverable costs regime should be associated with any MPAP is dealt with below.

Some CJC members were concerned that there is no evidence that a new dedicated MPAP would address any problems of delay. Others took the view that an MPAP with clear time limits and a connection to the Practice Direction could achieve quicker resolution of cases and noted that promoting compliance with rules and practice directions was a key part of civil litigation post-Jackson.

Those who took the view that the proposed MPAP would be likely to increase delay and could add to costs drew attention to the following points in the draft version.

1.3 – the introduction of sanctions would add a further step in the process and cause delay.
4.2.1 – the pre-action obligation on the claimant to provide details of all sources of exposure to asbestos is unnecessarywhen by s3 of the Compensation Act 2006 the claimant can establish entitlement to damages from any defendant responsible for a material increase in risk of contracting mesothelioma.
4.4 – the obligation on the claimant before taking action to provide a great number of documents including those not in his or her control or possession could have potential to lengthen the process.
4.5 – the opportunity for the defendant to request clarification when unable to determine liability may be an opportunity many compensators might avail themselves of and add to delays (when in many cases a “show-cause” hearing would have determined liability questions).
4.6 – a similar issue in relation to documents, which under 4.4 above are “not intended to be exhaustive”, so resolution disputes on what are or are not essential documents could cause delay
5.1 to 5.3 – these sections could be read as providing nearly 3 months for a compensator to provide “a reasoned answer” to the claim, a period which seems incompatible with the stated aims of the MPAP and one in which some claimants could die
5.5 – adding “a reasonable deadline” resolve disputed aspects of the claim (bearing in mind the possible sanctions for the claimant) could contribute to further delay
5.6 – potentially adds further time, on something of an open-ended basis, if it “is not reasonably possible” for the compensator to complete enquiries
6.1 to 6.5 – questioning the medical expert as set out here may have costs as well as timing implications (note that no time limits on question or replies are specified anywhere in section 6).
6.6 – this could be read as restricting the claimants’ ability or need to obtain expert evidence until after the period in paragraph 5.3.
7.3 – builds in a further delay of 21 days, before issuing proceedings, following service of the statement of employment and exposure, schedule of loss, medical report and records.
8.1 – an expectation to follow the protocol in relation to a living claimant.

We would reiterate that while the ABI has clearly invested significant time and effort in drawing up the MPAP included for consultation, the Government (and in turn the Rule Committee, should some form of an MPAP be implemented) will need to ensure that it takes a fully balanced view of any Protocol's requirements and provisions, having due regard to consultation comments from across the spectrum of interested stakeholders.

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

This will depend largely on the final form of the MPAP, and in particular whether claimants sign up to it, or will face sanctions if they do not.

However, in light of the obligations on claimants (referred to in part in the response to question 3 above), there could be greater front loading of costs in these claims (and perhaps more costs overall in certain cases).

If it is adopted then there is scope for a reduction in litigation costs, although it should be noted that the speed and manner of the specialist court process in the Queen's Bench Division has also had the effect of minimising legal costs.

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

The proposal is for a secure mesothelioma claims gateway (SMCG) to function as a single co-ordinated point for notifying claims and which will be funded by the insurance industry.

There is limited information about the how the gateway might operate. It could offer a number of benefits, as mentioned in the consultation paper e.g. single point of entry, not needing to reload sensitive personal data for subsequent claims etc. As such it should further the Government's objective and the timeliness of claims being processed and determined. As the consultation paper notes (and which the CJC welcomes) there may be additional benefits in terms of capturing data for clinical research and actuarial services.

Equally the gateway could add to delay and increase cost, subject to the detail and how it might apply in practice. For example, scanning hundreds if not thousands of pages of medical records relating to a mesothelioma claimant sufferer and perhaps dependents is likely to be a challenging task of itself.

However, the gateway will not of itself ensure claims are settled quickly, particularly as it is non-compulsory. As it is not compulsory the question of the value of data captured is reduced.

The main concerns the CJC has are in relation to the governance of the gateway. If it is funded by the insurance industry, it could follow that it would be operated and managed by the industry. The consultation paper is silent on the way in which the gateway's constitution and operational rules will be drawn up. That contrasts notably with the

structure of the board of Claims Portal Co Ltd (which has overseen the RTA scheme since 2010 and the EL/PL scheme since July 2013), which has 8 directors with claimant and defendant interests equally represented.

It is worth noting that the Claims Portal Ltd Joint Venture Agreement refers to the funding issue in this way:

> *"The parties agree that in principle the cost and management of the Portal should be financed by claimants' representatives and compensators in proportion to use by those users, but this was not practicable when setting up the Portal. The parties will therefore work towards achieving this objective (without materially increasing cost to insurers) as soon as is reasonably practicable and to ensure that decision making shall be afforded equally to the directors of A and B."*
>
> *"The "A" directors are claimant representatives and "B" directors are insurers."*

It may well be that the benefits of the gateway attract claimants anyway, but the CJC feel it is more likely to succeed with a broader based constitutional framework.

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

The gateway provides a secure infrastructure for cases which can be undertaken by the MPAP, but if the case does proceed to litigation the gateway data remains in place. The gateway needs to have compatible IT for the transfer of data between different processes, and also has to be kept fully updated.

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

Given the sensitivity of the data held, IT security will be of paramount importance.

We have already pointed out that it appears inappropriate that this type of gateway or portal should be funded and controlled by just one stakeholder involved in these claims. A more balanced governance structure (see above) would offer appropriate safeguards.

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

As a general principle the CJC sees the force in the introduction of fixed costs in lower value or fast track civil litigation, in line with the Jackson LJ's recommendations for controlling costs and ensuring greater proportionality of costs. We would favour an approach aligned to the provision in Civil Procedure Rule 45.12(1) allowing recovery of costs higher than the fixed costs where the court considers there are exceptional

circumstances which justify it.

The CJC fully endorses the principles set out at paragraph 42 of the consultation paper and governing fixed recoverable costs, which are set out below.

> *The Government's provisional view is based on the principles that FRCs*
> *a. should support the proposals set out in this consultation document to speed up the settlement of mesothelioma claims;*
> *b. would primarily be suitable for application in mesothelioma claims subject to the MPAP. This implies that for these claims:*
> *i. the claims process is sufficiently defined and sufficiently predictable; and*
> *ii. liability for damages is not at issue.*
> *c. should be set at a level which accurately reflects the amount and nature of the legal work involved in managing the mesothelioma claim efficiently;*
> *d. should not compromise access to justice for sufferers and their dependents, and should allow legal representatives to provide their clients with the required legal work to professional standards; and*
> *e. should operate overall so as to not discourage parties from using the MPAP to reach settlement without the need for litigation.*

The CJC agrees with the approach taken by the Civil Procedure Rule Committee in relation to RTA cases, that if there are fixed costs for claimants there should be fixed costs for defendants.

If introduced, it is important that fixed recoverable costs (FRCs) are subject to review and kept up to date.

There is a view among some on the claimant side of the debate that FRCs in the RTA and EL / PL schemes may have been set at low levels. This could be a potential credibility problem for the Government in gaining support for the proposal to introduce FRCs here. There could be a risk that low levels of FRCs give rise to access to justice risks, and/or see cases being brought by less experienced legal practitioners.

Any fixed recoverable costs regime should be subject to detailed research, discussion and consultation with all stakeholders in the claims sector, particularly specialist practitioners and interest groups.

A final point on FRCs is to ask whether July 2014 presents a timetable for a new regime that will prove to be too challenging? While certain CJC members thought that it would be achievable to introduce FRCs during the next nine months, others took the view that FRCs could be introduced after any procedural changes take place, when the amount of legal work required could be more accurately assessed.

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

Views of Council members varied on this issue, but overall option C found the greatest favour, as it allied the merit of having fixed fees to control costs with greater flexibility to acknowledge that cases will present with different characteristics (for example length of

unprotected exposure to asbestos, complexity of expert reports) and see some variances in levels of damages awarded.

The three tiered Fixed Recoverable Cost model is therefore the most attractive, and would also be consistent to the tiered approach adopted for fixed recoverable costs in other employers' liability claims.

The CJC is unable to offer a view on what the levels of FRCs should be – this is an area where the experienced and specialist claimant and defendant interests are best placed to advise, with the benefit of such research and evidence as is available.

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

In the final report of his comprehensive Review, Lord Justice Jackson identified a number of cost drivers in litigation, with Conditional Fee Agreements found to be the *"major contributor to disproportionate costs in civil litigation"* (at page xvi), with the key drivers identified as recoverable success fees and after-the-event insurance premiums. The Government has acted to address this and abolished recoverability of these elements from most areas of civil litigation, though not in mesothelioma cases pending the current review (see comments under Question 14 below).

Absent additional liabilities, the key drivers will be base costs (themselves affected by market forces), the costs of experts, but also of course the complexity of cases. The strength of the drivers will vary from case to case. Clearly the measures proposed have the potential to reduce costs through earlier resolution in a significant number of cases, assuming a system can be devised which proves acceptable to all parties.

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

As we have said above any fixed recoverable costs regime should be subject to research and proposals being put forward in consultation with the industry, specialist practitioners and interest groups. We would again repeat that the principles set out in paragraph 42 of the consultation paper (and quoted above in response to question 8) are of critical importance.

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

The Jackson Review recommended that fixed recoverable costs should apply in all fast track cases, and there is no reason – conceptually – for them only to apply to cases falling within the MPAP. In addition, it may be a disincentive for claimants to enter the MPAP if they feel that not doing so would have costs recovery advantages.

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

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

We have assumed small businesses subject to mesothelioma claims will not be directly affected by the proposals on the basis they will have taken out employer liability cover.

Question 15: **Do you agree that sections 44 and 46 of the LASPO Act 2012 should be brought into force in relation to mesothelioma claims, in the light of the proposed reforms described in this consultation, the increase in general damages and costs protection described above, and the Mesothelioma Bill?**

As mentioned in this response's opening remarks, Council members hold divergent views on whether the current consultation exercise amounts to the review set out in s48(1) LASPO (below) and announced to Parliament as a pre-requisite for extending the changes made in part 2 of the Act to mesothelioma claims.

> ***48 Sections 44 and 46 and diffuse mesothelioma proceedings***
> *(1) Sections 44 and 46 may not be brought into force in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma until the Lord Chancellor has—*
> *(a) carried out a review of the likely effect of those sections in relation to such proceedings, and*
> *(b) published a report of the conclusions of the review.*