

# Accessing compensation – Supporting people who need to trace Employers' Liability Insurance

Government response to consultation

July 2012

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## **1. Introduction**

### **1.1 Background**

The DWP consultation, “Accessing Compensation – Supporting people who need to trace Employers’ Liability Insurance” was published on 10 February 2010.

Its main purpose was to consider two proposals: firstly the establishment of an Employers’ Liability Tracing Office (ELTO) to manage an electronic database of employers’ liability insurance policies; secondly, the establishment of an Employers’ Liability Insurance Bureau (ELIB) to provide a fund of last resort enabling those unable to trace an Employers’ Liability (EL) insurance policy to claim compensation.

### **1.2. The rationale for change**

The Employers’ Liability (Compulsory Insurance) Act 1969 requires most employers carrying on business in Great Britain to insure their liability to their employees for bodily injury or disease sustained in the course of their employment. The Act came into effect on 1 January 1972. Although prior to that EL insurance was not compulsory, in practice many employers arranged the appropriate cover.

Employers’ Liability Compulsory Insurance (ELCI) provides security to firms against compensation costs which could lead to financial difficulty and to employees by making compensation available even where firms become insolvent. It supports the right of employees who suffer bodily injury or disease during the course of their employment to be fairly compensated and ensures employers fund the costs of their negligence so the “polluter pays”.

In cases of employer negligence, most individuals are able to make a claim for injury or disease directly against their current or former employer. Some, however, have difficulties in tracing the relevant EL insurance policy. This is especially the case for employees who develop long-tail illnesses, where symptoms do not appear until decades after they were exposed to the agent that caused the disease. At the time of their employment they were unlikely to have known that they may need to bring a future claim against their employer or to have recorded the details of the EL insurer. By the time of diagnosis the relevant EL records may have been lost or destroyed. Employers also may not have retained old EL insurance details, especially if their business ceased trading.

In 1999, to help with this problem, the voluntary Code of Practice for tracing Employers’ Liability Insurance Policies (ELCOP) was established. Under ELCOP the insurance industry ran an online Tracing Service to help employees find the relevant EL policy. Even where an employer has ceased trading, many people do identify and claim directly against their former employer’s insurer. It has been estimated that around 4% of EL claimants needed to use the ELCOP Tracing Service to identify an insurer to claim against, usually where the claimant has a long-tail disease.

Although the ELCOP began to operate in 1999, it was not always possible to capture data on policies which had lapsed earlier, and some records had already been destroyed. So

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insurers' databases do not always hold a complete record of the policies they issued and some searches are ultimately unsuccessful.

In 2010, the 2010 annual review of the ELCOP showed that 9028 potential claimants used the Tracing Service that year, of whom 5469 (61%) were able to find an insurer in order to pursue their claim for compensation.

Some people will be able to get help from the lump-sum payment schemes run by the Government, but the amounts paid normally fall well short of the levels they would be entitled to in civil damages.

### **1.3 Developing the long-term solution**

In developing a long-term solution, the Government is committed to continuing a full dialogue with interested parties. The main aim of this consultation was to seek the views of stakeholders on proposals for improving the process for tracing employment and insurance records, as well as providing greater support to individuals who are unable to trace such records.

Initial views were sought on how an ELTO could be funded and managed. A database would need to contain sufficient information to improve tracing of EL policies and the consultation asked about the nature of the information to be stored and the feasibility of storing older records alongside new ones.

An ELIB would be a compensation fund of last resort and would ensure that some individuals who are unable to trace EL insurance records would receive compensation. The consultation covered issues around what a potential ELIB should cover:

#### **Type of accident/disease**

- All claims
- Long-tail disease claims
- Mesothelioma claims only

#### **Timing of claim**

- Claims where an employer/insurer cannot be traced
- Claims brought from the start of the scheme
- Claims where diagnosis is made after the start of the scheme.

The consultation asked about the impact of an ELIB on insurers and employers, how much should be paid by way of compensation, and what limitations should be placed on claims to the ELIB. It also raised the issue that some employers may choose not to take out EL insurance once an ELIB is in place, thereby transferring costs to those honest enough to buy ELCI, and asked what more could be done to ensure that employers meet their legal obligation to obtain ELCI cover.

These were complex issues and the Government has remained in active discussions with all stakeholders since the public consultation closed in May 2010, to ensure the best solutions can be found.

## **2. Consultation**

### **2.1 Background**

A consultation paper was published on 10 February 2010 to ask for initial views and ideas to provide a solution which will best meet the needs of our society, beyond financial compensation alone, today and for the future. In addition to the formal consultation, officials held public meetings in London, Leeds, Manchester, Bristol and Glasgow.

When the consultation ended on 5 May 2010 the Department had received 57 responses from individuals, firms or representative bodies from the insurance, employer and legal communities and support groups. A list of those who contributed is attached at Annex A.

DWP would like to thank all those who responded to the consultation document and attended the stakeholder meetings.

### **2.2 What this report does**

Part 3 of this report provides a summary of the issues raised by consultees, which has helped to inform the Government’s response to the consultation. It captures the key issues raised by respondents during the consultation period. We have not been able to include absolutely every point raised or quotations from every organisation. But we have considered every contribution to ensure that this report provides a fair and balanced representation of the responses received.

Part 4 summarises the conclusions and the Government’s response to the consultation.

## **3. Summary of responses**

### **3.1 Overview**

Respondents fell into three main groups:

- Claimant representatives – personal injury lawyers, asbestos charities, trades unions, private individuals.
- Insurer representatives – insurers, insurance associations, insurance lawyers.
- Business representatives – including the CBI and small business representatives.

The claimant group overwhelmingly supported the establishment of an ELTO and database. They supported the inclusion of historic policies in order to ensure the database is useful to people with long-tail diseases. Business representatives were also in favour of an ELTO.

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Insurer representatives supported the introduction of a database including all new and renewed EL policies and possibly some historic records, such as details of previous successful traces. They agreed to other historic records being included on a voluntary basis, but opposed any mandatory requirement to add all historic records, believing that back loading would be a disproportionate, costly exercise and a database could never be a full record given that some past records have already been lost or destroyed.

Claimant groups favour a universal ELIB, as a fund of last resort for all those injured or made ill at work who cannot trace a relevant EL insurer to claim against. Insurer groups largely opposed a universal ELIB of that kind, commenting that it would be disproportionate and potentially inequitable, putting costs on today’s insurers and businesses for past multiple societal failures. Some insurers agreed there may be a case for action on mesothelioma claims, but felt including other diseases or accidents would be “*a step too far*”. Business respondents were concerned about the potential costs to business of an ELIB.

### **3.2 Responses to specific questions**

A summary of the responses can be found at Annex B.

## **4. Conclusion**

It is the government’s overarching aim to ensure that employees who are injured or made ill as a consequence of their employment are not denied fair compensation. The responses we received to this consultation have been helpful in enabling us to consider the wider issue of the best ways of supporting people unable to trace an employer or insurer.

### **4.1 ELTO**

Ahead of our response to this consultation, the insurance industry set up an ELTO which began operation in April 2011. ELTO replaced the voluntary ELCOP tracing service. ELTO is an independent, not-for-profit company limited by guarantee and funded by a levy. ELTO’s members are organisations owning EL liabilities for UK employers, including active and run-off EL insurers. Interim directors have been appointed to its board.

ELTO manages a central on-line EL database (ELD) containing all new and renewed EL insurance policies from April 2011, policies from before April 2011 that have new claims made against them and policies that were identified through the previous tracing service.

ELTO has a contract with each of its members, requiring them to upload data onto the ELD in a specified format and within specified timescales. Members are required to meet certain performance requirements.

The ELD improves upon the previous tracing service, which relied solely on insurers checking against their own policy records.

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In February 2011 the Financial Services Authority (FSA) published rules that required all general insurers to notify the FSA of their actual or potential liability for UK commercial line EL cover and to produce an Employment Liability Register (ELR).

The ELR includes information about policies entered into and renewed from April 2011. It also includes information on earlier policies if a claim is made in respect of those policies on or after 1 April 2011. Firms have the option of producing and updating their ELR through a qualifying tracing office, ELTO, or on their own website.

ELTO membership satisfies the FSA policy requirement that insurers' record EL policies issued, renewed or claims made after 1 April 2011. The FSA policy statement acknowledged that some respondents objected to backfill to 1 November 1999 on the grounds that it would be disproportionate and others responded that it would have an adverse effect on consumer protection as it didn't go far enough. The FSA is actively considering how best to address the issue of historical policies including those providing cover before 1 November 1999 and published a consultation paper containing their revised proposals on 25 July 2012.

We agree that a firm's Companies House reference number and the Employer's Reference number (ERN) should be included in the list of data to be collected and since April 2012 it has been compulsory for insurers to collect these numbers from employers, which should make search results more thorough. It has also been agreed that HMRC will provide employees with details of employers' ERN's when requested. Some suggested that company directors' details should also be included, but using personal data raises issues of data protection, and more importantly, we do not believe this data will add anything to the effectiveness of tracing EL policies. For these reasons we do not propose to ask ELTO to include company director details.

To date more than 99% of the active EL insurance market has joined ELTO as have a large number of insurers in run-off who are not currently writing new insurance cover for employers but are still liable or potentially liable for past cover. A substantial number of additional policies have also been added voluntarily to the ELTO database by insurers, so much of the tracing information for new policies and some historic policies is readily accessible on the ELD. Where historical policies are not found on the ELD, members perform extended searches of their records.

We are greatly encouraged by the work the insurance industry has already put into creating an ELTO and the ongoing work to improve its tracing function. We have every expectation that the ELTO will deliver significant results, creating a database of records that will help many thousands of people trace policies and receive compensation and therefore we have no plans to change ELTO's current structure and processes. We look forward to seeing the results from its first year of operation.

Membership of ELTO is currently voluntary and there is no common standard of evidence on which insurers and run-off companies will accept that a policy has been correctly identified. This risks different outcomes for claimants in similar circumstances. We therefore propose to introduce legislation to ensure that all insurers who write EL insurance are required to become members of ELTO and abide by its rules (including insurers who actively write EL policies and those in run

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off with EL liabilities). Where there is a dispute over evidence, ELTO will establish a Technical Committee whose decisions on EL insurance cover will be binding.

This will improve tracing further by ensuring all EL insurers participate in tracing in a structured way and result in more cases being traced back to the insurance policy in place at the time of exposure.

### **4.2 ELIB**

While ELTO will ensure that, in future, more people can obtain civil damages for industrial diseases we accept that it may still be very difficult to trace historic policies, especially for those individuals suffering from long-tail diseases such as mesothelioma.

It was clear from the responses to the consultation that opinion between stakeholders, on the introduction of an ELIB was divided and the issues involved were complex. For this reason we have been working intensely with all stakeholders since the consultation closed to ensure all issues have been fully considered and to develop fair and workable proposals.

#### **Support scheme for mesothelioma sufferers**

Following our discussions with stakeholders we are not persuaded that a universal ELIB should be set up, however we propose setting up a support scheme for those people with mesothelioma who were exposed to asbestos through their employer’s negligence and who remain unable to trace a liable insurer or employer.

The proposed scheme will be funded by a levy on insurers currently writing EL policies. Payments from the scheme will be at a level set such that the overall amount received by the claimant will be somewhere between that offered by state benefits and average payouts from civil action. This will ensure that those who are able to trace an insurer remain incentivised to do so in order to claim full compensation.

We recognise that a scheme that is only open to occupational mesothelioma sufferers may not go as far as some would have hoped for. However we consider that there is a unique case for helping people with mesothelioma that were exposed to asbestos in the course of their employment. Mesothelioma is fatal and almost exclusively caused through exposure to asbestos, which distinguishes it from other asbestos-related diseases, and it is generally accepted that exposure to asbestos in the UK since 1961 largely results from negligent business practices. Unlike accident cases, which are more immediate and therefore more likely to be picked up by the employee’s current employer or ELTO, mesothelioma victims are less likely to be able to trace a liable employer or insurer as their exposure to asbestos will have taken place decades before they develop any symptoms.

It is for these reasons we have decided to introduce a scheme only for mesothelioma sufferers.



**The scheme levy will be drawn from insurers that are active in the EL insurance market.**

We consider a levy on EL insurance is the fairest and most practical way to fund a mesothelioma scheme and reflects the origin of the problem in historic employer and insurer practices. Work with stakeholders suggested that alternative funding solutions such as attempting to retrospectively allocate historic exposure to individual insurers would incur disproportionate cost or legal complexity and push back the timetable for getting compensation to those who need it.

As the insurance market is competitive we believe it is unlikely that the introduction of the levy will mean insurers will move from their default pricing structure to increase EL prices. Even where insurers do pass the costs on to employers we expect the actual impact is likely to be relatively low.

**Compensation levels will be made in accordance with a tariff based on a percentage of the average damages awarded in the civil courts.**

We have decided that the level of payment should be based upon a percentage of civil damages to ensure a financial incentive to trace an insurer is maintained in the system and claims will only be brought to the scheme when all other avenues have been exhausted.

**Timing**

We appreciate the urgency of the situation faced by people with mesothelioma who need to trace an EL insurance policy to claim against and we aim to introduce our proposals at the earliest opportunity. Primary legislation is required to introduce the support scheme and compel insurers to join ELTO.

In recognition of the time required to bring forward legislation enabling a scheme to be set up and the pressing need to provide some assurance to mesothelioma sufferers, we are making public our intention that the scheme should be open to claimants who are diagnosed with mesothelioma on or after 25 July 2012, as a result of exposure to asbestos at work and who are unable to trace a liable employer or relevant EL insurance policy to claim against. Existing state schemes will continue to provide support to mesothelioma sufferers until their claim against the scheme is determined, but the amount of any relevant state benefits received by the claimant will be deducted from their scheme payment before it is made. The overall amount received by the claimant will be at a level set somewhere between that offered by state benefits and average payouts from civil action so that those who are able to trace an insurer remain incentivised to do so in order to claim full compensation.

The consultation raised other specific issues about how a proposed scheme would work, including time limits for making a claim, whether claims from dependants should be accepted, how claims should be met when the scheme commences and how to ensure the scheme only pays out on appropriate claims. All of these questions will be addressed once the exact details of the scheme have been fully considered.

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When coming to our decision we have taken into account the following factors

- the particular difficulties associated with mesothelioma and how it is distinguished from other asbestos-related diseases,
- avoiding placing substantial additional burdens on today's employers; focusing on mesothelioma sufferers helps ensure any potential increases in premiums for compulsory EL insurance are more manageable,
- ongoing work to reduce the time taken between diagnosis and compensation payment, and reducing legal costs for claimants and insurers, for both traced and untraced cases,
- the availability of information to determine the allocation of liabilities.

### **4.3 What else is being done to support people with mesothelioma**

The Ministry of Justice (MoJ) is looking to introduce a new mesothelioma Pre Action Protocol (PAP), which is intended to expedite the pre-litigation process for dealing with mesothelioma. Although PAPs are not mandatory they are used for pre-litigation procedures to make the process quicker and more efficient, ensuring that those suffering from mesothelioma can receive early compensation where liability is established.

We believe that our proposals plus the ongoing work across government will ensure people who develop mesothelioma as a consequence of their employment will be able to access the compensation they rightly deserve as quickly as possible.

## **Annex A – Consultation respondents**

The Actuarial Profession

Association Insurance and Risk Managers

Allianz Insurance

All Party Group on Occupational Safety and Health

AMLIN Insurance

Asbestos Support West Midlands

Asbestos Victims Support Groups Forum UK

Association of British Insurers

Association of Personal Injury Lawyers

AVIVA Insurance

BAI claims

Beechcroft solicitors

British Insurance Brokers Association

British Lung Foundation

Boyes Turner

Browne Jacobson solicitors

Ms L Cass

Chartis Insurance

Confederation of British Industry

Co-operative Insurance

Ecclesiastical Insurance

Federation of Small Businesses

Field Fischer Waterhouse solicitors

Fire Brigades Union

Forum of Insurance Lawyers

GMB Union

Groupama Insurance

Health and Safety Executive

Ms M Hoare

Institute of Insurance Brokers

Irwin Mitchell solicitors

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International Underwriting Association

John Pickering and partners LLP solicitors

Kennedy's solicitors

Keoghs solicitors

Leigh Day solicitors

Lloyds Market Association

Merseyside Asbestos Victims Support Group

MMA Insurance

Oliver & Co solicitors

Oliver & Co solicitors

Pannone LLP solicitors

QBE Insurance

Re: Liability(Oxford) Ltd

Mr A Rendell

Mr M Rickard

RMT Union

RSA Insurance

Scottish Court of Session

Scottish Government

Shoosmiths solicitors

Thompson's solicitors

TUC

UCATT Union

UNITE (Derby Central) Union

UNISON Union

Zurich Insurance

## Annex B – Summary of responses to questions

**Question 1: Is this the correct data to be recorded or is something else needed to properly identify EL policies?**

**Question 2: Is there a better unique employer identifier than the employers’ reference number provided by Her Majesty’s Revenue and Customs to facilitate tracing of EL insurance policies?**

It was agreed that the data suggested is correct provided it is properly and fully collected but more could be added. Fifteen respondents (mostly claimant groups) said a limited company’s Employer’s Reference Number (ERN) would be a useful measure to include. Although it has limitations, they believe its inclusion would greatly strengthen tracing given this number will remain constant, though the company’s name or ownership may not. Five claimant groups said company directors’ details, including National Insurance Number should be recorded (or included on annual returns submitted to Companies House). Two respondents suggested that EL certificates should be filed with a company’s annual returns; this would assist in tracing as well as compliance. Five claimant respondents said that the database should use intelligent search engine techniques to accommodate variations in spellings. Some said the search mechanism should not have mandatory fields, so that traces can be returned with minimal data.

Insurer and business groups agreed that the ERN is the correct reference to use. Several insurer respondents said that subsidiary company information needs to be complete and accurately recorded (including dates of cover and to be able to note any changes during period of cover). Two insurers said that the database needs to be able to deal with situations where a number of insurers write a proportion of the risk. Also, it needs to accommodate EL details where employers have obtained cover under a trade scheme and their details may not be individually listed. Two insurer representatives said claimant solicitors may have their own databases of EL insurance information and where this exists it should be included too. One insurer also said this. Other suggestions included adding trading names and colloquial names that businesses may be know by.

**Question 3: Which historic records would it be feasible and proportionate for the insurance industry to include in any electronic database?**

Claimant groups strongly favoured the fullest possible inclusion of all historic paper based (at least the historic paper records of industries from where a claim is most likely) and electronic records, including details of previous successful traces and claims. They acknowledged this will be difficult, and not without expense, but believe it is feasible and proportionate. Without this they maintained that an ELTO will be no more successful than the ELCOP. Practical suggestions for transferring records onto the database included

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setting an order of priority for data to be transferred, for example include details for industries that used asbestos first, or include data from 1960 onwards, or to use commercial companies.

***“Whilst it would be clearly an expensive and time consuming process to record all this information we submit that it would be entirely justifiable to require them to do so”***

(Trade Union)

***“It is essential that all historic records are captured as soon as possible from a variety of sources before the records are irretrievably lost”.***

(Victims Support Group)

Most insurers oppose the inclusion of historic records. They suggested that, given that the vast majority of records will never be called upon it would be a disproportionate cost, especially for those insurers who already have efficient tracing systems in place. As many records are already lost, or destroyed, or may not contain sufficiently useful information, a historic database could never be a full record of all policies issued in any event. They said there may be difficulties in requiring firms no longer in business or in run off to provide historic policy information and there could be issues around compliance and enforcement if all historic records were to be included.

***“...it is not feasible to require compulsory registration of historic information, as much of this is likely to be irretrievable”***

(Insurance Lawyer)

***“There should be no compulsory requirements to provide historic records because it will be impossible to monitor what records insurers have and therefore whether there has been compliance”***

(Insurer)

However, the insurer group believes that an ELTO of all new policies going forward, along with improvements in EL enforcement should effectively solve the problems experienced by those unable to trace an insurer. They agree that previous successful searches should be included and records that are readily available could be transferred. Some suggest a voluntary scheme to allow individual insurers to populate the database with their historic data, provided this does not lead to a mandatory scheme for others.

### Question 4: How should an electronic database be funded?

Claimant groups favour that insurers fund the set up and running of the database, in the belief that the insurance industry received the EL policy premiums and the need for the database is the result of insurers failing to maintain proper records.

***“.... the database should be funded by the insurance industry given that they have received the premiums in respect of all these policies and therefore have a moral obligation to do all they can to trace the policies”***

*(Claimant representative)*

Twelve claimant respondents specifically said a database should be funded through a levy on EL insurers. Seven insurers also supported a levy. Three insurance respondents said that a database could be funded through the Insurance Premium Tax (chargeable on EL portion of premiums) as this would be the most transparent way to show the cost burden. One respondent said the database should be paid for by government, on the grounds that,

***“....asbestos is a societal problem that should be accepted as a Government responsibility”***

*(Risk management organisation)*

**Question 5: Who should be represented on the board and what structure should such a board take?**

Respondents generally agreed that claimant and defendant interests need to be fairly represented on the board. There was considerable support to expand the current review body membership to include patient/sufferers on the new board. Fifteen claimant respondents suggested that the Asbestos Victims Support Groups are included.

***“We firmly believe that a voice should be given to asbestos sufferers and that a representative of the Asbestos Victims Support Group Forum UK should be present on the board.”***

*(Claimant representative)*

Scottish groups pointed out that their interests can be overlooked and it is essential that a representative from Scottish claimants is included. Three claimant respondents said that the board should consist of representative organisations and that individual firms should not sit on the board. Some also expressed their concerns about a board being overly represented by insurer groups and said the chair should be independent. Suggestions included a DWP chair or retired member of the judiciary.

Insurer respondents tended to agree that all relevant stakeholders need to be represented and governance needs to be transparent. Some suggested that the current board arrangements would be a good model. Five insurers specifically said that the board should have an insurer chair, given that ELTO would be a requirement on insurers only.

***“There should be a fair balance, recognising that the burden of compliance with the database requirements falls upon the insurers and hence the chair should be an insurer representative.”***

*(Insurer)*

Other suggestions included a Health and Safety Executive representative given their role in EL enforcement, a government representative for crown risks and the medical profession to advise on medical issues. Also, membership should be reviewed annually.

**Question 6: Should the coverage of an ELIB be limited to where there is a legal requirement to insure, as is the case with the MIB, or should the ELIB provide universal coverage?**

Claimant groups strongly favoured an ELIB, covering all accidents and diseases, including pre1972 claims. They suggest most employers insured their workforce prior to EL becoming compulsory and the problem is not that employers were uninsured but that insurers cannot be traced or they have lost or destroyed their records.

***“This is the only fair way to deal with the problems encountered by not being able to trace appropriate insurers otherwise there would be continued denial of access to justice”***

*(Trade Union)*

***“To restrict the coverage of the ELIB only where there is a legal obligation to insure would be inconsistent with its underlying objectives....”***

*(Private Individual)*

The insurance sector and their representatives overwhelmingly oppose an ELIB, saying it could result in legal and practical difficulties and running costs would be disproportionate to the benefit it may bring. One suggests even where premiums were taken they were not taken for unforeseen liabilities or even those that were foreseen but still some way off. If however an ELIB was introduced most insurance respondents said it should be confined only to where there was a legal requirement to insure.

***“....if one is to be adopted then it is only fair and just that the coverage is limited to circumstances where the industry has received a premium to provide cover due to the legal requirement to purchase insurance.”***

*(Insurer)*

***“The argument advanced by those proposing the establishment of an ELIB rests heavily on the assertion that since insurers took the premium, insurers must meet the claim.....Since this is the logic upon which the ELIB is firmly based, there can be no justification for such a scheme to cover situations where there is no compulsory requirement to do so.”***

*(Insurance Lawyer)*

Two insurance respondents suggested that an ELIB should only cover long-tail diseases or even mesothelioma only.



***“...if a fund is to be created at all, it should formally be confined to the most serious diseases only and probably to mesothelioma alone.”***

*(Insurance Lawyer)*

Another view was that, in mesothelioma cases, individual insurers should only be liable for their portion of the claim and the ELIB pay the remainder.

**Question 7: How should an ELIB be funded?**

Almost all claimant groups said that the full costs of ELIB, including set up and running costs should be paid by the insurance industry.

***“It is accepted that insurers fund the Motor Insurers bureau. For the same policy reasons accepted in respect of the MIB, insurers should fund an ELIB.***

*(Victims Support Group)*

***“Insurers make multi-billion pound profits each year, so there is no need for them to increase insurance premiums, it can easily be paid from their past, current and future ELCI revenues”***

*(Trade Union)*

Suggested funding mechanisms from claimant groups include:

- A levy could be placed on insurers that provide EL insurance, working in a similar way to the MIB. A levy should not lead to increased premiums.
- It should be compulsory for insurers to pay a share of its cost based on the historical share of the EL market. If it was based on current share there would be a risk that insurers might migrate out of the EL market and current insurers would be paying for the responsibilities of past EL insurers.
- A charge could be imposed on the whole of the insurance industry rather than limiting charges to insurers who provide EL cover. This would mean that companies who operate in the EL market would not be unduly burdened.
- A combination of a levy on insurers to cover future claims and government funding for retrospective claims.

The insurance sector strongly oppose an ELIB funded by the insurance industry, saying the problem was created by multiple societal failures and it would be inequitable for the insurance industry or their customers to have to fund an ELIB set up to address these failures. Hence, a number of insurers said government should fund an ELIB. Some said that EL is not profitable and funding an ELIB could be a further drain on a loss making area, which could lead to equity issues. However, if an ELIB was introduced they made the following suggestions for funding it:

- Current market share. Where insurers may only be able to operate in the UK market if they belong to the ELIB and pay a proportionate share of the costs. A funding mechanism based on historical share of the market would be difficult to

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quantify and could lead to competition issues, as new entrants to the market wouldn't have the additional costs of ELIB. It would also be difficult to estimate the market shares of those no longer in the market. However, it was also argued that, an ELIB funded from current market share could distort the market favouring larger insurers, which could result in less choice in the market. This is because those with larger general reserves could have an advantage over those with fewer reserves, as they would be more able to delay passing on any costs.

- An increase in Insurance Premium Tax or by introducing a separate bureau tax, although it was noted these options are likely to be passed onto the consumer.

***“IPT is already collected by the Government and it would seem appropriately and eminently fair for that tax to be the vehicle for the establishment of an ELIB”***

*(Insurer)*

- Government funded. A view also shared by some individual respondents.

***“....this is a historical and societal failure, and should be, in our view, funded by the country as a whole and not current firms purchasing EL cover”***

*(Insurance broker)*

***“Funding for such retrospective exposures should be met from central government funding and compensation should be restricted to mesothelioma sufferers only. Society should not turn its back on the injustice of mesothelioma sufferers going uncompensated, but equally it has to be accepted that this obligation is one that society owes as a whole and should not be imposed as a burden on today's businesses.”***

*(Private Individual)*

- Enhancing the benefits paid under the Pneumoconiosis etc. (Workers' Compensation) Act 1979.

The business sector raised concerns that if ELIB is funded by the insurance sector, costs may be passed on to businesses, a burden they may not be able to afford.

***“If ELIB does go ahead it is vital that small firms do not face a rise in costs; it must be funded elsewhere.”***

*(Small Business Representative)*

**Question 8: What would be the impact on insurers and employers of establishing an ELIB?**

Suggestions included:

- It will force insurers to keep better records, saving in costs on things like insurance archaeologists.

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- ELIB will penalise current employers (some of whom may not have even been in business at the time claimants were exposed to the substances causing their illnesses) who comply with EL insurance requirements.
- It may lead to distortion in the market which could result in less competition. This could drive up individual ELIB levy costs and adversely affect insured future premium rates.
- It risks driving insurers out of the EL market, making it harder for employers to get cover. The small business sector suggested it is already difficult to obtain EL cover and it could become a more burdensome task.

***“It should be noted that the EL insurance market is extremely fragile, and has sustained extremely heavy losses over the last 10 years. ABI figures indicate that the EL insurance market losses amount to over £2.38billion between 1999 and 2008. Any additional cost burden at this time could have significant negative impacts on the market and its customers”***

*(Insurer)*

- A potential moral hazard – generating a disjoint between the purchase of cover and the payout of compensation. Liability is shifted from responsible employers in the past and places it on the current employers.
- It may lead to higher premiums and risks reducing employers' incentives to comply with the legislation.
- It may result in claims farming and fraudulent claims, which can result in higher operational costs.

***“...the issue of fraudulent claims is significant in the motor industry, as a result the MIB operates tight controls to reduce these risks which in turn increase operational costs.”***

*(Insurer)*

- It would be difficult and expensive to control and monitor claims' requirements associated with ELIB. The checks and balances that would need to be in place would be expensive.
- The legal costs could be disproportionate to the benefits an ELIB would bring.
- It may open the floodgate for other central funds of last resort.
- There might be less incentive for employers to fully investigate claims and ELIB could become an insurer of first resort. Also it may result in more frivolous or speculative claims being made.
- It may be a barrier for new market entrants; some insurers may leave the market resulting in less choice higher prices.
- Employers may choose not to buy ELI if premiums go up, leading to reduced coverage and increased risk for employers and employees.
- It could lead to the creation of a 2 tier system e.g. people who are unable to identify occupational exposure or those who can but there is an employer/ insurer who is

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able to defend liability may not receive any compensation. However those who can identify occupational exposure but there is no employer insurer may receive compensation based on a very weak case.

**Question 9: Should the level of general damages be based on amounts being awarded in the courts or on some different basis?**

**Question 10: Should the level of compensation be decided based on an individual's needs or on a fixed Tariff?**

**Question 11: Should Special Damages be incorporated within a fixed tariff or should they be dealt with on an individual basis?**

All claimant group respondents agreed that damages should be based on the amounts awarded in the court, based on an individual's need and that special damages should be dealt with on an individual basis too.

***"...to depart from conventional principles of assessment of damages for personal injury and death would be arbitrary and unjust"***

*(Claimant Solicitor)*

A similar thought was expressed by other individuals.

***"Justice is justice, no matter who is paying. The courts determine damages"***

*(Risk Consultant)*

Most of the insurer group believed that the level of damages, including special damages should reflect the average settlement of similar cases, provided via a tariff. It was widely accepted that the tariff should be at a level lower than that payable in civil damages. This would help maintain a balance between providing compensation and proportionality in the costs of any compensation scheme where a premium may not have been received. A tariff would enable insurers to rely on the cost over time (comparing with Criminal Injuries Compensation Board) and will also provide a necessary incentive to pursue insurers who may be traceable. It would also make the point clear that the ELIB is truly a fund of last resort, which can only be approached when everything else has failed. This view was also shared by other individual respondents.

***"I believe that the ELIB, if established, should operate as a fund of last resort, the level of general damages awarded should be slightly less than that awarded by the civil courts. Some degree of financial incentive should be retained for the claimant to make every effort to identify a defendant against which to target their claim..."***

*(Private Individual)*

Insurer groups raised concerns about the legal costs involved with dealing with cases on an individual basis. One insurer pointed out that one of the benefits of a tariff system would be that payments can be made quicker, enabling terminally ill claimants to receive

payment in lifetime. Another said there was a precedent to support the principle that a fund of last resort created under statute such as Criminal Injuries Compensation Authority can legitimately compensate at a lower rate than would be found in civil cases.

**Question 12: Should an ELIB cover all claims, long-tail disease claims only or just those with mesothelioma?**

Claimant groups believed it would be unjust to exclude some diseases. As well as covering all claims including accidents they believe ELIB should also be able to cover diseases yet unknown, otherwise the inequity of the current problems could be repeated in the future. Some claimant respondents suggested, as the majority of cases are mesothelioma claims, the cost to extend an ELIB to cover all incidents would not be significant. One claimant respondent said, whilst ELIB needs to cover all cases if there was to be a priority it should be placed on mesothelioma sufferers, recognising the difficulties associated with this disease.

***“...the ELIB should cover all claims, including long-tail diseases and mesothelioma. However, we believe that priority should be placed on people suffering from mesothelioma as survival from the point of diagnosis is very low, usually between six months and three years”***

*(Claimant charity)*

Insurer groups, whilst reiterating their overall objection to the formation of an ELIB, suggest if it were introduced then it should be for mesothelioma only. This is because other long-tail diseases have other causative factors (such as age in noise induced hearing loss or smoking in lung cancer) which makes administration complex and costly. It was suggested that ELTO should be able to deal with short tail conditions negating the need to extend ELIB beyond long-tail conditions. Insurer respondents were also concerned about the risks of an ELIB covering all losses, one describing the proposal as a

***“...potential fraudster’s charter”***

*(Insurer)*

One suggestion was to deal with claims arising as a result of exposure before the set up of an ELIB differently from those arising after. Here, all claims arising post ELIB should be covered but only mesothelioma to be covered pre ELIB. This would future proof the ELIB without resulting in significant premium increases. It is acknowledged here that asbestos-related diseases are a special case but, to include all types of industrial diseases, could risk spiralling costs.

**Question 13: How could we ensure an ELIB paid out in all appropriate claims and not those that would otherwise not have been paid?**

Claimant groups tended to agree that the validity of a claim should be tested on current civil case principles, based on the burden of proof or through the courts system. One suggestion was for the ELIB to appoint claims handlers to deal with claims, assessing them in exactly the same way as they would be dealt with as a civil case.

***“Using court based procedures will ensure that all claims are paid properly and all available evidence is taken properly into account***

*(Victims Support Group)*

***“Only when claims have satisfied the evidential standards of proving employment, breach of duty, causation and quantum should they be paid by an ELIB”***

*(Claimant Solicitor)*

Insurer groups were concerned that there will be limited scope to defend any claims presented if an insurer or employer cannot be traced.

***“There would be no independent verification of working practises pertaining at the time in the case of old disease claims, or any information at all. If all injury claims were to be included, there would be little or no independent verification of accident circumstances. (Differs from MIB as usually there is a police report and contemporary statements)”***

*(Insurer)*

One insurer suggested that not being able to trace an employer or insurer could still mean there will be inequality as claims referred to the ELIB may be difficult to defend as it may not be possible to lead any rebuttal evidence and the claim may be paid on the testimony of the claimant alone. However in cases where an employer or insurer is traced, it might be more difficult for the claimant to prove negligence and that claim may fail. Hence, there would be two claimants in similar situations with different outcomes. They did however suggest the following:

- Anti fraud measures to detect claimants, and their representatives, who dissimulate or misrepresent
- Claims investigation and information requirements similar to those of MIB to detect frivolous or fraudulent claims.
- Limiting to mesothelioma claims only, which are generally more straightforward as exposure and diagnosis are well understood.
- Ensuring qualification requirements are extremely clear.
- Limiting legal costs to avoid speculative claims.
- Claims previously made and rejected must be excluded.

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- A tariff scheme would incentivise claimants to do all they can to seek other tortfeasors first.

In any event one respondent suggests that it would be impossible to ensure that ELIB only ever paid out in appropriate claims. The following statement sums up another's concern.

***“It is not possible to square the circle; there will always be a mesothelioma claim that does not succeed. The progression from a fund of last resort to no-fault compensation scheme for designated diseases must be a very serious unintended consequence of creating an ELIB”***

*(Insurer)*

**Question 14: What level of evidence is needed to settle claims if contemporary records have been destroyed?**

Claimant groups suggest that the burden of proof must remain with the claimant based on the balance of probability. Possible available evidence would include employment records, income tax records, national insurance records, payslips, medical evidence (the employment record and the disease should align), statements from claimant and other witnesses.

Insurer groups were concerned about the approaches that may be used, given historical information is likely to be limited and it might not be possible to defend claims fairly.

***“In respect of long tail diseases there might be no way of challenging the allegation, and the only defence may be to challenge facts such as the claimants employment record, or medical diagnosis.....it is likely that in practical terms an ELIB will become in all but name a “no fault” compensation scheme and introduce a two tier burden of proof into the civil compensation system”.***

*(Insurer)*

One insurer organisation suggested that evidence of employment (which could be sourced from income tax records) and exposure needs to be an essential starting point. Others suggested witness testimonies, health and safety practice and exposure to the harm, medical evidence linking the injury or disease to occupational exposure, desk top engineering reports that validate industry practice, HSE publications and literature from trade associations.

One insurance lawyer pointed out the National Audit Office report of the Coal Miners Compensation Schemes and the recommendations for initial scoping and feasibility, plus clarity on qualifying claims/standard of proof.

***“A decision to create and ELIB must not risk imposing on private enterprise the same problems of underestimating of claim numbers and cost which occurred with those schemes”***

*(Insurance lawyer)*

**Question 15: How should an ELIB start to meet claims to ensure fairness to claimants and funding at the start of any scheme?**

Claimant groups were in favour of all claimants who have been unable to trace an employer or insurer being able to present their claims at the beginning regardless of timeframes. Insurers, whilst opposing ELIB, would favour it meeting claims only where diagnosis is after ELIB's inception.

Insurers suggest there could be a large backlog of claims on introduction of an ELIB, which would require government funding.

**Question 16: Should an ELIB meet claims to dependants after a person has died if a claim has not previously been compromised?**

Claimant groups suggested that dependant claims should be accepted, in accordance with the current laws on dependants' claims.

Insurer respondents, were divided on this issue. Three from the insurer group who responded to this question said that claims should not be able to be brought post-mortem.

***“ We do not believe that an ELIB should have the remit to meet claims for the benefit of dependants after a person has died”***

*(Insurer)*

Other insurer group respondents, tended to agree that dependants should be able to claim in line with the law and existing entitlements.

***“In line with the law (including the rules of limitation) and existing entitlements, we believe that “yes” such a person should be able to claim. Otherwise an inability to claim would be inequitable, and will create a lottery in some cases as to the speed of death versus the speed to recompense under any such ELIB”***

*(Insurer)*



**Question 17: Should there be limitations on the time a person can take to bring a claim to the ELIB; if so, when should that time start and end?**

Claimant groups agreed that time limits for claims should be based on current laws on time limits for making personal injury claims. Some also suggested that any discretion courts currently allow should be accepted and that there should be no time limit on bringing a claim in respect of an unsatisfied settlement or judgement. During the initial period of an ELIB some claimant groups believe that claimants who were unable to bring a claim previously because they were unable to trace an employer or insurer, should be able to claim regardless of time limits. A claimant charity highlighted the needs of mesothelioma claimants which should be considered.

***“With such a short survival rate most patients would like to spend time with their family and discuss with them appropriate actions to take. To put a limit on when they will be allowed to make claims would be insensitive ....”***

*(Claimant charity)*

Insurer representatives agreed with claimant groups, that current laws on limitation should be applied. However some of them argued for a strict time limit (3 years) with no discretion over time limits being allowed. They believed a retrospective scheme could prove unworkable, highlighting difficulties encountered with previous schemes for mineworkers.

***“ If for example claims could be resurrected from the 1990’s and before, simply because a fund is now available to pay such claims, the ELIB would face the same risk of being inundated with claims as has happened with the coal miners compensation schemes, leading to any forecasts of potential costs being way too low”***

*(Insurance Lawyer)*

***“That period should be three years from the date of diagnosis and only accepted if the claimant is still alive”***

*(Insurer)*

**Question 18: Would the introduction of an ELIB have an impact on employer ELCI compliance?**

Claimant groups suggested that ELCI compliance is already very high and the introduction of an ELIB would not significantly negatively impact on this.

Insurers suggested that increased EL premiums may lead to some employers not purchasing ELCI in order to cut costs and the fact that a fund of last resort may encourage employers not to purchase ELCI, knowing that there is a fund to compensate injured employees. Some say that even small changes in EL rates can

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have profound effects on compliance, for instance new businesses (many of which fail in the first three years) may delay buying ELCI until their business is more stable.

Business sector respondents were also concerned that employers may feel less of an incentive to comply with ELCI legislation if their employees may be covered by an ELIB anyway. This along with the added frustration of having to pay for those who don't comply could impact on compliance.

One respondent believed that an ELIB would have no effect on compliance but the creation of an ELTO with the potential for better policing of non compliance would have a positive effect.

### **Question 19: What more can be done to ensure that employers which are legally obliged to obtain ELCI do so?**

Responses included:

- Inclusion of ELCI details on annual returns to Companies House – making this a requirement before companies who employ others can be incorporated.
- Policy details to be recorded on employees P60's by employers
- Greater penalties for non compliance, including directors being struck off.
- Using ELTO data base to check compliance.
- HSE to be given appropriate resource and funding to step up compliance monitoring.
- Look at the time allowed for the enforcement authorities to prosecute.

### **Question 20: Is there anything else, not covered by these questions, which you would like to tell us?**

Arguments have also been made for the amendment of the 1969 Act to include family businesses and any businesses that self insure but may lack the resources to satisfy a claim should be required to insure. Also that the 1969 Act should be enforced more rigorously than at present.

***“We seek reassurance that the Government is planning significant improvements in enforcement of the 1969 Act”.***

*(Insurer)*

Concerns were raised about bogus self employment and how an ELIB will allow access to a person who was ostensibly self employed but an employee to all intents and purposes.

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There were some calls for ELIB to provide support for people who are made ill, but not at work, for example those exposed to asbestos in the environment. This would avoid a two tier system of compensation.

Insurers raised concerns about legal fees and how these will be controlled in order to prevent costs becoming a burden on the ELIB.

It was suggested that adequate time is needed to test the success of an ELTO before a decision on an ELIB can be made. If ELTO is successful then for claims going forward there would be no need for an ELIB.