Dear [Name],

I start by thanking you for your dedicated attention to the Mesothelioma Bill and its aims.

At Committee Stage on the 10th June, I promised to clarify several points that came up in our discussion. The first I should like to clarify is the amount of the levy to be imposed on active Employers’ Liability insurers. This is expressed as a percentage of the Gross Written Premium (GWP) of the EL market. In the 2012 impact assessment, the levy was quoted at 2.16%, and in the 2013 impact assessment it was stated to be 2.24%. This is because each document contains our best estimate of the levy as a % of GWP and is updated in line with the best evidence available at the time and the latest detail of the policy. The approach for calculating the levy has remained consistent throughout.

Secondly, it is useful to note that two percentages are presented in each iteration; a % of GWP over a 10 year period, and a % of GWP over the first 4 years of the scheme. The latter figure is higher due to the volumes of cases and the age profile, and subsequent payment level that individuals with mesothelioma receive. The figures quoted above are for the 10 year period. In the 2013 ad hoc statistical report the figure 2.61% was quoted, and this figure represents the amount of the levy over the first 4 years, not for the 10 year period.

In reference to the 2013 ad hoc statistical report, I would like to take this opportunity to make a correction, and to point to some alterations. Lord Alton kindly drew my attention to an error on Table 5 which outlines the number of deaths, applications to the scheme and scheme payments. The line labelled
as “six months of 2012” erroneously included figures for the whole of 2012 – this has been corrected. We have also expanded Table 3 and stated explicitly that tables 4 and 5 are based on 100% of average civil compensation. The revised version of this publication is now available on the GOV.UK website at: https://www.gov.uk/government/publications/analysis-to-support-the-passage-of-the-mesothelioma-bill

On the subject of figures, I should like to mention one aspect of further analysis that we are pursuing. In committee, when discussing how much it might cost to move the start date of the scheme to February 2010, or to as far back as when we start having useable records, 1968. I indicated that the former scenario would come at an extra cost of £119 million, and that the latter would cost a further £747 million to that. These figures are estimates for how much it would cost to move the date, and to make payments at 100% of the rate of civil damages. I feel that further work to show the cost of moving the start date and making payments at 70% of civil damages could add further value and interest to related discussion. My department are examining this further, and will publish revised data in due course.

I turn now to an issue raised by Lord Howarth, regarding the issue of legal aid in instances where an individual takes a case to tribunal, and whether these individuals would be in pursuit of justiciable rights under the European Convention on Human Rights. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides that the new director of legal aid casework can provide ‘exceptional funding’ for certain cases. An application must be made for an ‘exceptional case determination’. Under section 10(3), an exceptional case determination is a determination:

a) that it is necessary to make the services available to the individual … because failure to do so would be a breach of:
   1) the individual’s convention rights (within the meaning of the Human Rights Act 1998), or
   2) any rights of the individual to the provision of legal services that are enforceable EU rights, or
b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

More detailed guidance on the exceptional funding regime has been produced by the Lord Chancellor and can be found at: http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf
Another matter that we came to in our discussion was that of payments made under the 2008 and 1979 schemes, the sizes of those schemes, and related payment recovery. Where individuals have received a payment under one of these schemes, and then go on to receive compensation as a result of a successful civil damages claim, the scheme payment is recovered. In relation to this matter, the noble Lord McKenzie asked about savings made by government as a result of scheme repayments, in particular as a result of future unpaid ’79 scheme payments. I should stress that this scheme is not intended to be a profit-making venture for any involved party. We estimate that for each successful applicant to the scheme, the total amount recoverable (including 2008 or 1979 scheme payments and recovery of benefits) will be £20,480.

Perhaps it would be helpful to supply some more data related to the 1979 and 2008 act schemes. In 2011-12, the 1979 Act scheme paid out a total of £28m to Mesothelioma-only cases, £15m of which was subsequently recovered. The 2008 Act scheme made payments to Mesothelioma only cases totalling £9m in the same year, with recoveries representing £4m. The Diffuse Mesothelioma Payment Scheme will make payments significantly larger than those under the 1979 and 2008 schemes, and recovery of either of those payments will also apply. It is envisaged that the scheme administrator will deduct the appropriate amount from the scheme payment before the individual is paid, and that the administrator will then pay that amount to DWP.

Noble Lords asked whether the regulations, provided for in clause 13 of the Bill, that will require active insurers to pay the levy could be shared ahead of report stage. We expect the basic features of these regulations to be straightforward but there are elements that require information from the insurance industry as well as sign off from HMT. Therefore we are unable to provide details of the regulations at this time. We are however happy to share our current expectations and would welcome any feedback or comments that will enable us to refine our work as we take it forward.

We expect the Levy to be set on an annual basis based on a simple formula: Total forecast scheme payments + scheme administration costs=total levy

To calculate how much each insurer will pay in levy we will use the Financial Conduct Authority annual returns to calculate the total employers’ liability gross written premium (EL GWP) in a given year and each insurer’s percentage share of this total. Each insurer will be notified of their share of the levy based on their total employers’ liability market share as a percentage of the overall total EL GWP. We cannot put this information in the public domain as it is market sensitive. The regulations will therefore contain the formula with the relevant figures attached. In addition they will contain details of when the levy is to be collected and which accounts it is to be paid into, at the moment this is expected to be the consolidated fund in HMT.
A Written Ministerial Statement will be produced each year to set out the amounts as it is not possible to include these in the Budget. We also intend to include in this WMS a table that will show the tariff payments by age for the corresponding year.

Turning to the issue of compensation recovery any payment made in respect of an illness or injury can trigger compensation recovery action. "Payment" in this context includes payment made by, or on behalf of, the party responsible by way of goods or services which necessarily relate to the injury or illness. For example, an individual may suffer an injury that means they are no longer able to get around freely. The party responsible may therefore buy them a car with suitable adaptations by way of compensation. This is sufficient to trigger compensation recovery so, as well as providing the car, the party responsible will be required to pay back any benefits paid in respect of the related injury. They cannot reduce the amount of compensation to take into account the benefits they are required to pay back if the car does not relate to a specific type of loss such as loss of mobility.

Schedule 1 inserts new section 8(a) into the Recovery of Benefits Act, which allows for scheme payments to be reduced to take into account benefits that are to be recovered. However, the scheme is making a payment in respect of Diffuse Mesothelioma so, even though the heads of damages are not specified, benefits paid in respect of Diffuse Mesothelioma become recoverable under current benefit recovery legislation.

I turn now to the question of scheme applications, and how they will be more straightforward than civil claims, something which I promised to clarify when the question arose at committee. The scheme is not a “no fault” scheme so the applicant will be required to meet the eligibility criteria. The criteria are similar but not identical to the requirements for bringing a civil claim for damages. Applications to the scheme will actually be easier than bringing a civil case:

- Unlike a civil claim, an applicant for a payment under the scheme will be undefended. The scheme administrator will assess whether the applicant has met the eligibility criteria by assessing the evidence as a whole and making a decision on the balance of probabilities. The scheme administrator can also ask for additional information from the applicant, whereas if a claimant fails to produce enough evidence in a civil case their claim will fail.

- Unlike in a civil claim, an applicant will not have to prove loss or the extent of this in order to receive a payment under the scheme. The assessment of loss is a complex and time consuming aspect of any civil claim for personal injury.
- Unlike in a civil claim, the applicant will not have to provide a report from a medico-legal expert to confirm causation. Provided the applicant meets all of the eligibility criteria under clause 2 on the balance of probabilities, they will satisfy causation.

- Unlike in a civil claim where any application for disclosure against third parties has to be made by the parties, the scheme administrator may ask for additional evidence or even seek documents from third parties to assist the application.

- Unlike a civil claim which may last for several years before any compensation is achieved, we intend that applying for a payment under the scheme will be a straightforward process with a payment being made to successful applicant wherever possible.

It may help to show the possible process an individual will go through to bring an application to the scheme;

1) Person diagnosed with Diffuse Mesothelioma and instructs a solicitor
2) Solicitor gathers information such as employment history and details of exposure
3) Solicitor attempts to trace relevant employer(s) and/or insurer(s) so that a claim can be issued against them

(Points 1-3 above would happen in most cases so an individual will have already provided their solicitor with much of the information required for making a scheme application)

4) If no party traced, an application is made to the scheme
5) Scheme reviews information provided by solicitor - if the eligibility criteria is met, a payment will be made

I hope this is clear. I should now like to address a matter raised by several peers at committee, that of environmental or secondary exposure. Lord Howarth asked if we have figures relating to the numbers of environmental exposure cases. The impact assessment published earlier in 2013, estimates that between 2014 and 2024 there will be an average of 241 cases of Mesothelioma caused by environmental exposure per year.

Lord Moonie asked if data pertaining to the numbers of claims (both successful and unsuccessful) brought against insurers by someone other than the employee was available. Unfortunately, relevant data is not available. However, we have looked in to the question of whether these secondary exposure cases are likely to be covered by employer’s liability insurance, or public liability insurance. If it were the former, those people could have legitimate reason to believe they would be able to come to this scheme. If it were the latter, the scheme would not be able to accept those cases, on the
grounds that the scheme looks to address a very specific market failure within the employer’s liability market, by raising funds from that same market.

We have asked the Association of Personal Injury Lawyers (APIL) whether there are likely to be cases where wives or children have made a claim against an employer liability insurance policy for secondary exposure. From our enquiries with both APIL and the ABI, we believe that, in the main, it would be the PL policy which would apply when the affected person was not directly employed by the liable employer. While the relationship with the employee is the route to liability on the basis of foresight of risk, that does not mean that the spouse of an employee would be covered by the EL policy, unless the policy in question specifically provided for it. We understand from conversations with APIL that in many cases it is the same insurer who provided both PL and EL cover. In terms of numbers, it is really difficult to be clear how many people are affected.

Another matter which received detailed attention in our debate was that of people who were self-employed when the exposure that caused them to contract diffuse Mesothelioma took place. Lord Howarth and Lord Alton asked if we had details as to how many people fall into this category. Collecting data on those who have been self-employed for most or all of their working life is very difficult, especially in these cases where we are talking about employment histories that extend back 40 or 50 years or more. Consequently, we do not have any reliable figures pertaining to the self-employed.

The noble lord, Lord McKenzie asked if there is a definition of ‘self-employed’ that we might lean on, especially considering that the lines are often blurred. Unfortunately, there is no single definition of an employee. Whether someone is an employee or not does not always depend on whether they have a formal, written contract of employment. Difficult cases arise, namely where there is no formal written contract of employment and someone is described as a contractor (self-employed or otherwise), but they allege that their circumstances amount to employment. In such cases, whether there is an employment contract will depend on the specific facts of the case and the use of established common law tests.

If this situation arises when an individual is making an application to the scheme, the scheme administrator will draw on the relevant legal knowledge to assess the case. This would arise, for example, if the applicant’s HMRC record of employment states that they were self-employed or employed by another tortfeasor (another party who exposed them to asbestos, negligently or in breach of statutory duty) (such a tortfeasor would also have to be untraceable to allow someone to come to the scheme), but they allege they were an employee of the untraceable employer. The scheme administrator would not turn such a case away without considering the issue properly and employing the correct legal tests. In sum, it is a complex issue, and each case
would be assessed on it individual merits when applying for a scheme payment.

At Committee Stage we also discussed the inclusion of the Scheme Rules in regulations and the scope of the Technical Committee. I indicated that these were under consideration following the DPRRC's recommendations. I hope that Noble Lords will appreciate the resolution of these discussions with the attached letter to Baroness Thomas, as the chair of the DPRRC, confirming that we will accept these amendments.

I hope I have been able to satisfy the queries of the house with these answers, and I look forward to further discussion and debate at report stage.

I shall place a copy of this letter and the attached letter to Baroness Thomas in the House Library.

Yours sincerely

David

Lord Freud
Minister for Welfare Reform
Dear Cola,

Thank you for your report dated 23 May 2013 which recommended that:

- the Scheme Rules, provided for in Clause 1(3) and 1(4), should be made by statutory instrument subject to negative resolution;
- Clause 15(10), allowing for expansion of decisions of the Technical Committee to other diseases, should be removed; and
- the nature of the body that will undertake the functions of the Technical Committee should be explored in Committee.

As you will be aware, the Technical Committee was discussed in Lords Grand Committee on 10 June 2013 and this is something I have committed to discuss further with Peers.
Following that discussion and your recommendations, I am pleased to confirm that the Government have decided to introduce amendments to the Bill to make the changes you suggested at the first two points above. These will be introduced for debate at Lords Report stage.

Yours sincerely

[Signature]

Lord Freud

Minister for Welfare Reform