EXPLANATORY MEMORANDUM TO

THE DIFFUSE MESOTHELIOMA PAYMENT SCHEME REGULATIONS 2014

2014 No. 916

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 To provide further detail of how the scheme will be administered, how claims will be made and determined and how reviews and appeals will be requested and administered. It also provides definitions of various terms in the Mesothelioma Act as well as the level of scheme tariff payments to be paid to eligible applicants.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Diffuse mesothelioma is a "long-tail disease": which means that it materialises decades after the exposure to asbestos which caused it. Many employees exposed to asbestos at work would in principle have a good claim in negligence against their employer, but they are often in practice unable to recover compensation by virtue of the passage of time as no solvent employer remains to be sued, and the employee is often unable to trace any insurer who was providing Employers' Liability (EL) insurance to their employer at the material time.

4.2 Although the insurance industry committed first to a voluntary Code of Practice[1] and secondly to an EL Tracing Office for tracing EL policies, many individuals, despite some improvements in tracing, remain without help. This is because insurers' databases are not always a complete record of all the policies they issued, as it has not always been possible for them to capture data on policies which had already lapsed and some records had already been destroyed, so some searches are ultimately unsuccessful.

4.3 This legislation corrects that market failure to trace historic EL policies by setting up a scheme of last resort to pay eligible applicants who are unable to find their employer or trace their employer's EL insurer.

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214605/code document.pdf

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Minister for Disabled People, Mike Penning, at the Department for Work and Pensions has made the following statement regarding Human Rights:

In my view the provisions of The Diffuse Mesothelioma Payment Scheme Regulations 2014 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 The regulations establish a scheme to make payments to eligible people with diffuse mesothelioma and eligible dependants of people who have died from diffuse mesothelioma before making an application to the scheme. People will be eligible for a scheme payment if they were first diagnosed with diffuse mesothelioma on or after 25 July 2012 as a result of negligent exposure to asbestos at work in the United Kingdom. The scheme will only be open to people who have not brought an action for civil damages against a relevant employer or employer's Employers' Liability insurer because they are unable to do so. In addition, in order to be eligible to claim from the scheme, applicants must not have received damages or a specified payment (specified in the regulations) in respect of diffuse mesothelioma or must not be eligible to receive a specified payment from another source.

7.2 The regulations explain how to make an application to the scheme, what information and evidence will be needed to support an application, how the application will be administered and how applicants can ask for a review and eventually an appeal if they disagree with the decision. The regulations do not specifically allow for a request for a review or an appeal to be made against compensation recoveries (where the amount of social security benefit and lump sum payments are recovered from a scheme payment and the amount of scheme payment recovered from a subsequent compensation payment) because reviews and appeals are dealt with in separate legislation that will apply here. The regulations list the amounts that can be paid under the scheme and define what is meant by a first diagnosis of mesothelioma.

7.3 The scheme will be funded by a levy on active EL insurers and is being introduced to correct the market failure where records of EL insurance no longer exist meaning some people with mesothelioma are not able to pursue a claim for civil damages.

7.4 **Consolidation**

"Informal consolidated text of instruments is available to the public free of charge via 'The Law Relating to Social Security' (Blue Volumes) on the Department for Work and Pensions website at http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/ or the National Archive website legislation.gov.uk . An explanation as to which instruments are maintained on each site is available here."

8. Consultation outcome

8.1 In February 2010 the Department for Work and Pensions published the consultation document, *Accessing Compensation - Supporting people who need to trace Employers' Liability Insurance*[2], which sought stakeholders' views 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. The consultation lasted 3 months. The Government's response to the consultation was published on 25 July 2012[3].

8.2 A total of 57 respondents fell into three main groups: claimant representatives, insurers' representatives and business representatives. Claimant and business representatives supported the establishment of an electronic database of EL polices as well as a scheme of last resort to pay people unable to bring a civil damages claim, although business representatives were concerned about the costs of such a scheme. Insurers' representatives supported an electronic database of policies but not the establishment of a payment scheme of last resort as disproportionate and inequitable putting the costs on today's insurers rather than those that took the insurance premiums.

8.3 The Government decided that, as the insurance industry had set up an electronic database, it would take no legislative action on that point and were not persuaded that a universal payment scheme should be set up but decided to set up a scheme only for those with mesothelioma who were statistically finding it more difficult to trace EL policies than those with other conditions.

8.4 We have consulted with key stakeholders (insurers, lawyers and sufferers' support groups) as we have developed these Regulations. We have included their suggestions where appropriate to do so.

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[2] For consultation document see: http://www.dwp.gov.uk/docs/elci-compensation-consultation.pdf

[3] For Government response to consultation see: http://webarchive.nationalarchives.gov.uk/+/http://www.dwp.gov.uk/docs/elci-compensation-consultation-response.pdf

9. Guidance

9.1 Guidance on how the scheme will be administered will be produced by the scheme administrator. We expect this to made available on their website around the timer that scheme payments start to be made around July 2014.

10. Impact

10.1 The impact on the private sector is that EL insurers will be required to pay a levy to fund the mesothelioma scheme.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has been prepared for the Bill and includes an assessment of the impact of levy on EL insurers. It is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262466/mesothelioma-payment-scheme-ia-nov-2013.pdf

11. Regulating small business

11.1 The legislation applies to small business.

11.2 The insurers that will pay the levy to fund the scheme will not be small enterprises. The effect on small businesses will be on some small solicitors who will now receive a payment towards the applicant's legal fees who would not have done so without the scheme.

11.3 Small business was consulted at the same time as everyone else in 2010 when options for action were presented. Since then meetings with certain small business representatives have taken place to update them on what is happening.

12. Monitoring & review

12.1 The Mesothelioma Scheme Administrator (who will be appointed following an open competition) will be required to report annually to the Secretary of State in an agreement to be set up with whoever the Secretary of State appoints as Scheme Administrator. This report will be published. In addition, an Oversight Committee will be set up outside legislation composed of independent members to oversee the workings of the Scheme. The Oversight Committee will also report to the Secretary of State.

13. Contact

Lee Eplett at the Department for Work and Pensions Tel: 0207 4495127or email: Lee.Eplett@dwp.gsi.gov.uk can answer any queries regarding the instrument.