Financial Services Authority

Tracing employer's liability insurance consultation

A response by the Association of Personal Injury Lawyers
September 2010

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Introduction and key principles

1. We are grateful for the opportunity to respond to this consultation, having given comments on the draft in May this year. Many of the arguments made in that paper are, of course, repeated here. APIL also submitted a full response to the Department for Work and Pensions consultation 'Accessing Compensation' in May and we have repeated some of the arguments made in that in this response. A copy of our response to this consultation is included as Annex A

2. The 'Transfers' section of the paper states that currently "insurers are subsidised by claimants that are unable to trace the relevant insurance company and/or are not aware of the existence of potential coverage." This is a situation which clearly cannot continue. It is against all the principles of natural justice that people who are injured through no fault of their own are denied compensation, to the benefit of insurance companies who have receive premiums from employers. The same paragraph goes on to outline the possible amount of money which could be 'transferred' from insurance companies to claimants and states that the industry could bear this level of transfer without having a 'negative effect on the stability of the industry'. This appears to miss the point of principle that where liability exists it is the insurance industry's duty to pay fair compensation to injured, sometimes dying, individuals whose only 'crime' was to turn up for work.

3. We also note that in the section of the paper entitled 'Our consultation', the FSA's proposals "are intended to secure improvements in consumer protection in the longer term…" Unfortunately the proposals as set out in this draft are likely to have a negative impact on consumer protection, for the reasons outlined in this paper. There is also reference, on page six, to the fact that the measures outlined in this paper intend to 'improve consumer protection until primary legislation is in place'. We believe that these measures should be introduced through statute, and urge the FSA to press the Government for legislation on this issue as a matter of urgency.

4. APIL has always argued for a compulsory database of insurance information to be established by statute, rather than FSA rules, and to be overseen by the Government, to ensure its complete independence and longevity. The Government already oversees a number of databases, which ensure that individuals or companies comply with legislative obligations. We see no reason why this database should be outside Government control, unlike the TV licence database, or the Companies House database which ensures companies submit tax returns. We have fundamental concerns, based on the current experience of how the FSA operates, that principles-based regulation is not robust enough to protect injured people. We are also anxious about the prospect of what is effectively an insurance-based solution to a problem which has been caused by the poor record-keeping of insurers, who have known for decades about potential liability for long-tail diseases, and should have been retaining policy information effectively in preparation. We also have concern about the level of policing, transparency and strength of sanctions which may be imposed as they are set out in this paper.

5. We continue to be extremely concerned about the potential penalties which the FSA will be able to administer. The question relating to this, which was included in the draft consultation, has been removed. In the 'sanctions for non-compliance' section of the paper, it is stated that failure to comply 'may, in very serious cases' lead to a firm's permission to carry out contracts of insurance being withdrawn. While we understand from the FSA that the word 'may', in this context, reflects a range of tools at its disposal to bring sanctions against insurers, it will not, we submit, be sufficient to compel insurers to comply with the provisions. As this may be the final consultation on this issue before a new system is put in place, it is important that the FSA defines a 'very serious' case, to ensure insurers can be held to account.

6. We also know from previous experience that disciplinary action taken by the FSA against an insurer does not always reach the public domain, which raises concerns over a lack of transparency and clarity over compliance levels.

7. We note that, as with the draft, this paper is not concerned with arguments relating to the need for a fund of last resort for EL cases. We submit, however, that if the proposals in this paper were to be implemented, the need for a fund of last resort to provide proper protection for injured workers would be even more pressing than it is now.

8. Even the most efficient of databases, if set up now, will not be able to capture every EL insurance policy. There will always be injured people in respect of whom the relevant EL policy information has been lost. Those people must have the safety net of a fund of last resort (or ELIB). Equally, an efficient and compulsory database will help to ensure that the number of claims brought against the ELIB remains manageable. We profoundly believe that a fund, backed by a statutory database, is the only just, fair and moral option.

Question 1 Do you agree that our proposal to require all insurers with permission to carry out contracts of general insurance in the UK, to notify us, with director approval, whether they carry out (ie are potentially liable for) UK commercial lines EL contracts, and for us to publish a list of general insurers showing whether they are potentially liable and including a link to the tracing information required?

9. In our response to the draft version of this consultation in May, we expressed uncertainty about the terminology which the FSA used in this question, and we are grateful for the clarification provided in this paper.

10. We remain of the view that these steps are the bare minimum we would expect if the consumer protection obligations which insurance companies have are to be met, although we are uncertain whether this step provides enough information over and above that which is already currently available.

11. We welcome the fact that these proposals would cover both compulsory and voluntary EL cover, although we have reservations about how far-reaching this will be when taken as part of the package of measures being proposed in this paper. We note that the current consultation document states that the proposals will not extend to organisations which were not required to have ELCI cover, unless they chose to insure on a voluntary basis.

Question 2 Do you agree with our proposal for the tracing information to be included in an Employers' Liability Register?

12. We have always believed that in order to ensure a database fulfils its purpose of providing details of insurers who wrote EL insurance it must be flexible enough to be effective with no compulsory fields. It should always be possible to return a trace with a small amount of information.

13. We welcome the clarification that information about company subsidiaries will be included, as this was not clear in the draft consultation. In addition to information on subsidiaries, details of group companies should also be included, to ensure the maximum amount of information on each policy is held, as this will increase the possibility of a successful trace being returned. It is also important that any information about changes of company names should be included, along with details of when the changes took place. This will ensure the best possible chance of a successful search, even in circumstances where the company's name has changed since the claimant was employed.

14. We note the removal of the reference to carrying out screening to ensure that the information is only used for the purpose of tracing insurers. It would be appreciated if the FSA could clarify whether it still intends to put this in place, and if so, how this would work in practice. Similarly, the possibility of the FSA modifying the proposed requirements, if they become 'unduly onerous in particular circumstances', has been removed. If this means that, once introduced, this aspect of the proposals will not be modified, we welcome this. We are concerned, however, that the reference to modifying the requirements has been retained in relation to question six.

Question 3 Do you agree with our proposal to require insurers that enter into or renew Employers' Liability cover in the future to keep a record of the Employers' Reference Numbers provided by Her Majesty's Revenue and Customs and any Companies House Reference Number allocated by the Registrar of Companies for all employers covered by a new or renewed policy?

15. Yes. APIL called for the Companies House Reference Number to be included in our response to both the draft consultation from the FSA and the 'Accessing compensation' consultation from the DWP. The inclusion of the Companies House Reference Number will ensure that effective searches can be carried out even after a company has gone out of business, when the HMRC number alone would not be successful.

Question 4 Do you agree with our proposals for access to the Employers' Liability Register?

16. We have consistently argued that any database must be fully live and interactive, as well as being flexible when dealing with data.

17. Injured people and their representatives must have full access to a live database, to ensure the database can be 'interrogated' and that flexible and intuitive searches can be made. Live and complete access to the database will reduce costs for claimant solicitors and insurers, as there will be fewer search requests to submit and process.

18. At the present time, when a search is returned with a negative result by the tracing service, it is not known if that is because there is no record to be found or if there has been some error in the spelling of an employer's name or an error in its trading address. Live and complete access will allow intuitive, intelligent searching by victims and their representatives which is more likely to give a positive result – the purpose of the database. The consultation document says that the insurer or tracing office would have to respond to a request 'without delay' but there is no indication of the timescale this would involve. Live access for solicitors would remove this ambiguity.

19. We welcome the fact that the FSA has taken on board comments we have previously made about the need for flexibility in the database, so that matches will be returned to any specified character string and common variations in the spelling of names. This is an important first step, but in itself will not be sufficient for the database to serve injured people as intended. Only a 'live' and interactive database with no compulsory fields will ensure the best possible chance of returning a positive trace, and can gain the compensation they so desperately need. The importance of this cannot be over emphasised.

Question 5 Do any discrimination issues arise from our proposals?

20. We are unsure whether 'discrimination' in this question is used in relation to claimants or insurers, so we will offer comments in relation to both.

21. There may be discrimination issues arising where claimants have impaired sight, or other disabilities which mean they are unable to use the database themselves. The solution to this potential problem is to give solicitors full and live access to the database, so that a search can be made on the behalf of the claimant. This would remove any possibility of discrimination, as solicitors have a duty to comply with the Disability Discrimination Act 2005.

22. If the term discrimination is used in relation to insurers, and the fear is that certain insurers will have better tracing systems, which may lead to more claims being brought against them, this can be avoided by ensuring that all insurers place the maximum amount of information in the public domain.

Question 6 Do you agree that the ELR should include at least those policies for which insurers are potentially liable that, on or after 1 November 1999, were entered into, renewed, or for which claims were made?

23. We note that the FSA now recognises that 'at least' information on policies entered into, renewed, or for which claims were made since 1999, will be included on the database. We assume this to mean that this information is the minimum which will be included, but if this 'minimum' is, in fact, the standard to be adopted, this information on its own will not be sufficient. To only include the information suggested would be a retrograde step even from the highly flawed current voluntary system, and would not provide injured people with the level of service they deserve.

24. The proposals in this section could be disastrous for people bringing claims arising from employment before 1999. It should also not be forgotten that, despite the undertaking of many insurers to keep records for 60 years after 1999 (as part of the current code of practice) the success rate for post-1999 searches is still woefully low.

25. We are also opposed to the suggestion that only policies 'for which insurers are potentially liable' should be included in the database, regardless of the cut off date for inclusion. It is fundamentally wrong that some policies should be omitted from the database simply because insurers believe they could only be 'potentially' liable. We believe that all liabilities, potential or otherwise, should result in the inclusion the policy in the database.

26. The consultation states that the FSA understands some records which date back to pre-1999 have been lost or destroyed, and we would appreciate it if the FSA would disclose the source of this information, as we can see no reason why a large number of records should have been lost or destroyed. While we note the concerns expressed in the consultation that some of these records may be in paper form, modern technology is more than capable of transferring the information into a compatible electronic format.

27. The consultation document states that in order to meet the requirements in relation to making policy information available for tracing, the insurer 'would retain all records relating to contracts of insurance under which it is potentially liable, whenever written, to ensure it meets claims when due'. We would like to know who will ensure that this is being done, as the current voluntary system for tracing EL insurers proves that many insurers are incapable of keeping records in a fit state to search.

28. We must also register our serious concern about insurers being able to apply for a waiver or modification of FSA rules, if the rules are thought to be 'unduly onerous'. While we are grateful to the FSA for setting out the process by which a waiver or modification would be granted, we have reservations about the detriment to consumers if any modifications or waivers were granted, as it could result in information not being adequately recorded, which may lead to difficulties when it comes to requesting a trace in the future.

Question 7 Do you agree that the Employers' Liability Register should be updated at least quarterly?

29. Yes.

Question 8 Do you agree with our proposal that the ELR should be certified by a director each time they are updated and that they should be audited annually?

30. Yes. Due to the seriousness of the issues at stake, it is important that this is overseen at director level.

Question 9 Do you have comments on our proposals to allow insurers to arrange for tracing offices to make tracing information available, the requirements that would apply to insurers using a tracing office and the conditions the tracing office needs to meet of which the insurer would need to have adequate evidence?

31. We have some fundamental concerns about the proposals in this section of the consultation which can be summarised as follows:

32. The consultation document now states, in a change from the draft paper, that any tracing office must provide the insurance company whose information it stores with a full copy of the database, upon request, without delay. This does not go far enough, and for the sake of transparency, all databases must be fully open and available for use by anyone who may wish to search. We understand that there have been data protection issues raised in relation to this, but it should be remembered that, if there is a legal requirement to display an insurance certificate, the information is generally in the public domain, in the workplace, in any event. The database simply provides further and easily accessible detail.

33. The fact that the FSA is unable to regulate tracing offices which will provide services to insurance companies, will not provide adequate safeguards for consumers. Any new system must be completely and properly policed, and sight of the database on request and an annual report is simply not robust enough.

34. It is also insufficient to suggest that tracing offices should accept search requests without delay and be adequately updated with new information. As we have said before, any database must be live and interactive, not relying on responses within an unspecified time period.

35. We are pleased that the reference in the draft paper to the economics of the tracing office determining its optimum level of service has been removed. We firmly believe that the purpose of a tracing office, to provide injured people with details of their employer's insurers, not its economics, should determine its optimum level of service.

Question 10 Do you have any comments on the draft instrument in Appendix 1?

36. A general lack of detailed knowledge on the Financial Services and Markets Act 2000, on our part, means that we are unable to provide detailed comment on the draft instrument. We, like others, will be relying on the expertise of those within the FSA to ensure that the draft instrument is correct. The one point we do have in relation to Annex 1, however, relates to the information to be provided about policy information when a claim has been made against the policy. Section 1.1 on page 7 of Annex 1 sets out what information is required for new and renewed policies, but there is no information about policies against which a claim has been made. Clarification on this point would be appreciated.

37. We would also reiterate that the attributes of a database foreseen throughout the Annex, such as in 8.4.4 (2) and in 8.4.8 (1) do not go far enough, and that rather than an 'effective search function' and allowing responses to requests for information to be 'provided without delay', the database must be live and interactive, for the reasons set out in response to question four above.

Question 11 Do you agree with our cost assumptions?

38. We note that the cost assumptions provided in the consultation are taken from the DWP's consultation published earlier this year. In our response to that consultation we were unable to give detailed comment about the potential costs. We retain those reservations at this stage, as there is no evidence provided for the figures included in the paper, and no indication as to how the figures have been reached.

39. We note the figure of £30.7 million for the one-off cost to the insurance industry, but would like to see, in the interest of transparency, the publication of the detailed evidence which led to this figure being reached. We are concerned that the cost to brokers of adapting their systems for the ELTO would appear to be based on an assumption, and urge the FSA to carry out more detailed work on the potential cost to ensure that an accurate figure is reached.

40. We are uneasy with the figures relating to additional compensation payments being counted as a 'transfer', rather than a 'benefit', of the new system. Failing to include additional compensation payments as a benefit does not reflect the purpose of the system, which is to increase the number of people who are able to trace details of their employer's insurer.

Question 12 Do you have any comments on our cost benefit analysis?

41. The cost benefit analysis sets out what are considered to be 'serious practical difficulties in achieving the ideal of providing appropriate information in respect of all policies for which insurers have potential liabilities for UK commercial lines EL cover'. The solution to this problem, as set out further down in this section, appears to be that the only historical information to be provided should be post-1999. This, we submit, is not an answer to these difficulties, but an avoidance of them, which will have a detrimental effect on injured people.

42. The consultation document also states that since 1 November 1999 'many insurers agreed to hold policy information in readily searchable form'. The woeful record of the current voluntary code of practice for tracing EL insurers shows that this undertaking has not been fully delivered by the insurers, and illustrates the need for a compulsory, statutory database to ensure that the mistakes of the past are not revisited.

Question 13 Do you have any comments on our compatibility statement?

43. We do not believe that the statement is compatible with proper consumer protection, especially in this context, when some people are dying without receiving the compensation to which they are entitled.

44. The 'light touch' approach of rules, guidance and principles is simply not robust enough to deal with all the concerns we, and others, have raised about the need for a full and flexible database, available to all, which is transparent, subject to independent oversight, compulsory and properly policed.

Annex A – APIL response to Department for Work and Pensions consultation *Accessing compensation* – May 2010

Introduction and key principles

1. Government recognition that help is needed for thousands of people who cannot claim compensation for the injuries and diseases they have sustained, just by going to work, is extremely welcome.

2. All employees have the right to go to work and come home again unharmed. But, when they are injured or exposed to a hazard by someone which causes injury or disease, they should receive the full and fair compensation which is their right. Many such people are now suffering from horrendous diseases, such as mesothelioma, and too many are dying without receiving the compensation which would have made their final hours more comfortable, because they cannot trace the insurers of former employers. In the vast majority of cases, insurance premiums will have been paid by the relevant employer, but policy information cannot be retrieved either because it has not been properly preserved, or because the current tracing system is largely ineffective, despite efforts to improve it, which are acknowledged by APIL.

3. When the current voluntary code of practice was drawn up more than ten years ago, the then-APIL president, Frances McCarthy, said "the Government has missed a key opportunity to make a real difference to people who are left out in the cold because they cannot trace insurers of former employers..... a voluntary code without really strong sanctions is simply not going to work." She went on: "There is also a serious need for a new employers' insurers' bureau which could operate as an 'insurer of last resort' for the many people who are not going to be helped by this new code."

4. The Government now has a real opportunity to commit to an intelligent and holistic response to this problem in the form of a fund of last resort to provide compensation when all other avenues have failed, supported by a compulsory, independent database of insurance policies, set up on a statutory basis, which will stand the test of time and in which injured people can have total confidence. Anything less will simply add further insult to injury.

5. Both should be introduced in tandem for the benefit of all concerned. Even the most efficient of databases, if set up now, will not be able to capture every EL insurance policy. There will always be injured people in respect of whom the relevant EL policy information has been lost. Those people must have the safety net of a fund of last resort (or ELIB). Equally, an efficient and compulsory database will help to ensure that the burden on the ELIB remains manageable. We profoundly believe that a fund, backed by a statutory database, is the only just, fair and moral option.

6. There is a precedent for such an approach with the Motor Insurers' Bureau. It is completely iniquitous that an effective compensation system can be set up for the drivers of some 28 million cars on the roads, and yet there is no similar system in place for the 1.2 million employers in the UK[1].

7. During debates, and in press articles, many misleading arguments have been made against the introduction of an ELIB. These arguments are usually based on cost to insurers and to premium payers. The reality is that this is a compulsory market in which insurers have had the freedom to set their own premiums and, if they have failed to price risk properly, injured and dying people should not have to pick up the tab.

[1] Consultation paper, page 12, paragraph 30

8. A fund of last resort may increase premiums, as they do for motor insurance, but this is a small price to pay to ensure that injured people are compensated for occupational illness and disease. The take-up of employers' liability insurance has always been much higher than for motor insurance so the additional cost of uninsured claims will be very small for each insured.

9. Employers have a great deal of power over their workforce, over workers' welfare and wellbeing. It is inconceivable that, in the 21st century, a robust system cannot be devised to ensure employees are able to receive full and fair redress when they find themselves injured or dying through no fault of their own, simply because they turned up for work.

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 HMRC to facilitate tracing of EL policies

10. In order to ensure a database fulfills its purpose of providing details of insurers who wrote EL insurance it must be flexible. We envisage a database with a search mechanism which has no compulsory fields. It should be possible to return a trace from a small amount of information. The consultation document does not make it clear whether a search would be possible without any of the fields mentioned, and this would be a real problem, especially with historic data, which is often incomplete.

11. There must also be allowances made for potential human error when entering information into search fields. A search for a company including the word 'Davis' should also return results for 'Davies', ensuring that there is the best possible chance of receiving a successful tracing result.

12. The way that data is stored will also have to be flexible, in order to cope with historic data, which may be in different technological formats or incomplete. This data will still need to be searchable, and the database will have to cope with these searches.

13. It is important that the database includes details of the previous names of companies, and the dates the changes took place, where appropriate. This is important because searches are often made for companies which have changed names since the claimant was employed. Including the details of any name changes will ensure the best possible chance of a successful search.

14. While we have no objection to the inclusion of the HMRC number, the experience of our members tells us quite clearly that it will not, on its own, work as a unique employer identifier. The Companies House Unique Identifier must also be included.

15. There are also many examples of companies which have taken on the trading names of other companies, through various business arrangements. Such arrangements can lead to wholesale changes in the make up of the company, but, again, the Companies House number cannot be changed. The Companies House number will also be simple to search for historically, as numbers are stored even after companies have gone out of business. The HMRC number would not be effective in these circumstances.

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

16. The database must include all available past information including information relating to subsidiaries and group companies. Only by having the maximum amount of information stored will the database be able the deliver the best possible service to claimants.

17. The database will need to contain more information than simply the past searches of the current tracing code, as its success rate has been consistently unsatisfactory since it was created in 1999. It is also vital that insurance companies are compelled to send all policy details to the database, so that the information can be placed on the database. Only a compulsory database will, in the long term, help to provide injured people with the compensation they need, as well as reducing the burden on the ELIB.

18. It may also be the case that if an Employers' Liability Insurance Bureau (ELIB) were to be established insurers would be encouraged to provide information they hold about their competitors. We would certainly welcome this, as there is a wealth of 'unofficial' knowledge among insurers which could be used to help injured people.

19. It is also important that the source of the data is recorded, whether it has come from the current tracing code, an insurer, claimant solicitor or elsewhere. Some sources will, of course, be more reliable than others, and so should be easily identified. To limit the chances of the database including unreliable information, its structure should include the capacity for information to be checked at the point of entry. The importance of quality control cannot be overstated here.

20. It is also important that the information provided to the database must be binding, to ensure that there is no possibility of an insurer reneging on information years after it has been submitted. Despite the points raised above, however, no database, no matter how well populated, will ever be a sufficient response to the current problem of tracing insurers. As explained in our introduction, there has to be a fully operational fund of last resort to pay compensation when the database does not provide a successful search, and the two must operate in tandem.

Question 4 – How should an electronic database be funded?

21. We support the suggestion in the consultation document that the database should not only be for the use of claimant lawyers, but should be designed in such a way that claimants themselves, as well as dependents can gain access to information.

22. It would be highly unsatisfactory for sick workers and their dependents to have to pay for access to information which could lead to them obtaining the compensation to which they are entitled. The electronic database should, therefore, be funded by the insurance industry, which has a duty to ensure that people are able to gain access to the compensation they deserve.

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

23. It is difficult to comment on the specific structure of the board to govern the ELTO at this stage, when there is no detail of the structure of the actual organisation available. In terms of board members, we understand that the Forum of Asbestos Victims Support Groups is to be invited to join the ELCOP Review Body, and we would welcome the inclusion of that organisation on the new ELTO board.

24. There may be other consumer organisations which could be involved in the ELTO board, but due to the current lack of detail regarding the structure of the ELTO, we are unable to comment at this stage. We would be happy to reconsider this issue once more information regarding the structure of the ELTO is available. We are concerned, however, that any other members of the board must be familiar with the processes and the issues surrounding EL insurance and tracing.

25. We are also concerned that the new board should not include individual companies, but instead only representative bodies. Individual companies can have narrow interests, and a number of individual companies, even from the same industry, may be unable to reach a consensus on certain issues. It is also important that the board is manageable and workable, and the number of participants on the board must be controlled, while ensuring a balance of claimant and defendant views.

26. APIL would welcome the opportunity to continue its involvement in this area by taking a place on the new board, as suggested on page 17 of the consultation document.

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?

27. An ELIB should pay compensation for all people who have been injured or made ill through work, regardless of whether there was a legal requirement to insure. The number of cases which would be brought by people where there was no such requirement (such as in family-run businesses) is likely to be very small, and it would be wholly unjust that someone with a terminal disease, for example, could not receive compensation, simply because the illness was caused by the negligence of a family member, who was not required to have insurance.

28. It is also likely that even before EL insurance became compulsory, employers would have still taken out cover, as the consultation document recognises.

Question 7 – How should an ELIB be funded?

29. The only just answer is that an ELIB must be funded by the insurance industry. As insurers take premiums from defendants to cover the eventuality of paying out compensation, the insurance industry should fund an ELIB, in the same way that the insurance industry funds the MIB.

30. In addition to this, it is also worth baring in mind that until the passage of the Child Maintenance and Other Payments Act in 2008, there was a loophole in existing legislation which meant the Government was unable to recover payments made under the Pneumoconiosis etc (Workers' Compensation) 1979 Act. If a claimant went on to bring a successful civil claim, any payment made under the 1979 Act was taken into account, and the civil claim was reduced accordingly. This effectively meant that insurers were benefiting from a monetary windfall, which was being provided by the Government.

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

31. The introduction of an ELIB may save some insurance companies money, as the burden of paying compensation will be shared more evenly. Under the current system insurers who are easier to trace, as well as the Government, which is a 'constant' as a defendant are often at a financial disadvantage, bearing more of the compensation burden. Insurance companies may also save money through the removal of requests for information being made through the current ABI tracing code. If the database and ELIB work effectively, insurers will no longer need to employ people to deal with such requests.

32. The Government may also be able to save money through the introduction of an ELIB, as it will be able to claw back payments which had been made to injured people under the Industrial Injuries Disablement Benefit and the Pneumoconiosis etc (Workers' Compensation) Act 1979.

33. There is also a potential to save legal costs in these cases, as currently cases which require searching under the present tracing code can be time consuming. With a new, efficient database and the ELIB, legal time, and therefore costs, are likely to be reduced.

34. As we point out in our introduction, employers may face an increase in premiums if a fund were to be introduced, as all costs are eventually passed down the line. In a highly competitive market, however, the increase to individual businesses will be negligible next to the suffering of someone who has been needlessly injured by his employer.

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 to 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?

35. An ELIB should function in the same way as the courts currently do when an insurer is traced. Damages awarded by the civil courts, or agreed to in out of court settlements, in accordance with common law, on the merits of each individual case, should be satisfied by the ELIB.

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

36. It would be unfair to exclude a claimant from the ELIB simply because he had a certain type of illness or injury. The latest review of the current tracing code shows that only 50 per cent of post 1999 traces are successful, and these people would continue to be unable to claim compensation if only long-tail diseases were covered by the ELIB.

37. The recent case of *Kmiecik v Isaacs*, illustrates the need for an ELIB to cover claims where an employer is uninsured. The claimant was unable to receive compensation after an accident at work because his employer was uninsured, and did not have sufficient personal wealth to satisfy a judgment. A claim was brought against the occupier of the property where the accident occurred, but this was dismissed by the court. It would be wholly unfair for compensation not to be received in cases like this once an ELIB is established.

Question 13 – How could we ensure an ELIB paid out in all appropriate claims and not those that would otherwise have not been paid?
Question 14 – What level of evidence is needed to settle claims if contemporary records have been destroyed?
Question 15 – How should an ELIB start to meet claims to ensure fairness to claimants and funding at the start of any scheme?
Question 16 – Should an ELIB meet claims to dependants after a person has died if a claim has not previously been compromised?
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?

38. As stated above, an ELIB should function in the same way as the courts currently do when an insurer is traced. There is clear law in relation to these questions, which we believe should still apply to the ELIB.

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

39. A fund would not alter the fact that every business which employs staff is legally obliged to have employers' liability insurance to a minimum cover level of £5 million. Research has indicated that there is currently a 99.5 per cent compliance with the law, and to suggest that a fund of last resort is going to turn law-abiding employers into criminals is completely unrealistic. Nevertheless, it is a criminal offence to be uninsured, and the key is to ensure the law is enforced. A fund backed by a compulsory database of insurance policies would assist with this.

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

40. Regulation 4 (4) of the Employers' Liability Compulsory Insurance Regulations 1998, which was repealed in 2008, should be reinstated. The regulation required employees to retain a certificate of EL cover for 40 years after it had expired, and meant that, in theory, tracing the insurer of a previous employer was straightforward. The fact that the regulation was difficult to enforce was no excuse for repealing it, as it is the job of Government and external agencies to ensure that such regulations are properly enforced. Not only should this regulation be reinstated, but penalties must be introduced to give it teeth, in order to help innocent employees, who have the right to go to work and come home again unharmed.

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

41. If a database is established it must be available and effective in the long term, as it will be used by injured people, their representatives and families for decades to come. The best way fully to ensure such longevity and independence is for the database to be administered and overseen by the Government.

42. The DWP has suggested that the Financial Services Authority may have the power to make a rule to compel insurers to provide information; it is unclear at this stage if it would have the power to levy the necessary funds from insurers to pay for a database. It is a concern, however, that a database created by FSA rule would not have the same authority as a database created by statute. In addition, if the FSA were also to regulate the database or the proposed ELTO, which will oversee it, there is a concern that such regulation would be weak and opaque, based on our current experience. It is also a concern that the FSA does not answer directly to any government department.

43. It would also be entirely inappropriate for the ABI to administer and oversee the new database or the ELTO, not least because there is no guarantee as to the ABI's longevity as it is simply a trade association with no statutory basis. We are also concerned that a new database must not be a new version of the current voluntary tracing code, which has failed to provide a good service for more than a decade. For these reasons we regard it as inappropriate for a database or ELTO to be overseen by either the FSA or the ABI.

44. We would also want to have input into ongoing discussions surrounding how a database would function, if it is pursued as a policy option. It is important that a new database will provide sick and injured workers with a better level of service than the current tracing code, and the best way to ensure this is to have detailed input from all stakeholders throughout the process.

45. The figures expressed in the impact assessment, in relation to recovery of benefits, could prove to be conservative, based on the figures in recent parliamentary answers[2]. The figures in the impact assessment may not, therefore, represent the full saving that the Government may achieve through the establishment of an ELIB. We would urge the Government to look at these figures again, and ensure that the estimates for additional benefit recovery are as accurate as possible.

46. We are also concerned that the additional compensation that would be paid by insurers to claimants is expressed as a 'transfer' rather than a benefit. The money that should have been paid out in compensation by the insurance industry, which would be paid once an ELIB is established, should be counted as a benefit, rather than simply a transfer. The money rightly belongs to the injured person, rather than in the profits columns of insurance companies.

[2] A copy of the answers are attached to this response as appendix 1

Appendix one

Parliamentary answer published in *Hansard* 9 September 2009

Industrial Diseases: Social Security Benefits

Julie Morgan: To ask the Secretary of State for Work and Pensions how much has been paid to people with *(a)* hand arm vibration syndrome, *(b)* noise-induced hearing loss and *(c)* other work-related diseases through (i) industrial injuries disablement benefit for disease and deafness and (ii) other disability benefits in each of the last three years; and how much of that money has been recovered by the Government in accordance with the Social Security (Recovery of Benefits) Act 1997. [287749]

Jonathan Shaw: The available information on the monies paid through industrial injuries disablement benefit is in the table.

Payments through industrial injuries disablement benefit in 2006-07	
Injury	*Amount paid (£ million)*
Hand arm vibration syndrome	22
Noise-induced hearing loss	37
Other work-related diseases	103
Notes: 1. Figures rounded to the nearest million. 2. Industrial injuries disablement benefit expenditure on particular diseases is estimated using annual statistical data. Latest finalised annual statistical data is for 2006-07. Figures for the next two years are not yet available. *Source:* DWP statistical and accounting data.	

Information on payments of other disability benefits is not available broken down by the disease categories requested.

The amounts recovered in each of the last three years by the Government in accordance with the Social Security (Recovery of Benefits) Act 1997 covering industrial injuries disablement benefit and other disability benefits are detailed as follows:

Recoveries of monies paid through industrial injuries disablement benefit			
£000			
	2006-07	*2007-08*	*2008-09*
Hand arm vibration syndrome	1,727	1,857	1,306

Noise-induced hearing loss	42	24	36
Other work-related diseases	6,931	8,562	9,830

Recoveries of monies paid through other disability benefits			
£000			
Disease	*2006-07*	*2007-08*	*2008-09*
Hand arm vibration syndrome	15,956	22,580	11,413
Noise-induced hearing loss	16	19	0
Other work-related diseases	6,716	7,438	14,223
Note: Information is rounded to the nearest thousand pounds. *Source:* DWP accounting data.			

Julie Morgan: To ask the Secretary of State for Work and Pensions how much has been paid to people with *(a)* mesothelioma, *(b)* asbestosis, *(c)* bilateral pleural thickening and *(d)* other prescribed asbestos diseases (i) under the Pneumoconiosis etc (Workers Compensation) Act 1979, (ii) through industrial injuries disablement benefit for disease and deafness, (iii) under Part 4 of the Child Maintenance and Other Payments Act 2008 and (iv) through other disability benefits in each of the last three years; and how much of that money has been recovered by the Government in accordance with the Social Security (Recovery of Benefits) Act 1997. [287750]

Jonathan Shaw: Information on payments to people under the Pneumoconiosis etc. (Workers Compensation) Act 1979 is only available for all work-related diseases covered by the scheme, not individual diseases. The available information is in the table.

Financial year	*Payments (£ million)*
2006-07	26
2007-08	27
2008-09	32
Note: Figures rounded to the nearest £ million *Source*: DWP statistical and accounting data	

The available information on monies paid through Industrial Injuries Disablement Benefit is in the following table. Industrial Injuries Disablement Benefit expenditure on particular diseases is estimated using annual statistical data. The latest finalised annual statistical data are for 2006-07.

Payment through Industrial Injuries Disablement Benefit in 2006-07		
£ million		
(a)	Mesothelioma	10
(b)	Asbestosis	[1]—
(c)	Bilateral pleural thickening	9
(d)	Other prescribed asbestos diseases	23

[1] Less than £1 million.
Notes:
1. Figures rounded to the nearest £ million except where stated.
2. The estimate for *(b)* is for primary carcinoma of the lung with accompanying evidence of one or both (A) asbestosis (B) unilateral or bilateral diffuse pleural thickening.
3. The estimate for *(c)* is for unilateral or bilateral diffuse pleural thickening.
4. The estimate for *(d)* is for pneumoconiosis, which is prescribed for occupations involving working with asbestos and a number of other occupations.
Source:
DWP statistical and accounting data

The Child Maintenance and Other Payments Act 2008 made provision for the new 2008 Diffuse Mesothelioma scheme (known as the 2008 scheme) which enables lump sum payments to be made to people who suffer from diffuse mesothelioma caused by exposure to asbestos in the UK, and who do not currently qualify for help from the Government. This scheme has only been running since October 2008. Information is only available for all work-related diseases, not individual diseases. The expenditure up to March 2009 is £5.5 million.

Note: This excludes Northern Ireland payments made under this scheme.

Source: DWP statistical and accounting data.

Information on payments of other disability benefits is not available broken down by the disease categories requested.

The amounts of money recovered in each of the last three years under the categories requested are set out in the following tables:

Recoveries of Pneumoconiosis etc. (Workers Compensation) Act 1979 Lump Sum payments—October 2008 to March 2009	
Disease	*£000*
Mesothelioma	4,465
Asbestosis	411
Bilateral Pleural Thickening	42
Other prescribed asbestos diseases	247

Recoveries of Industrial Injuries Disablement Benefit payments			
£000			
Disease	*2006-07*	*2007-08*	*2008-09*
Mesothelioma	3,024	3,944	5,306
Asbestosis	1,072	1,031	1,287
Bilateral Pleural Thickening	179	207	276
Other prescribed asbestos diseases	4,425	5,262	4,303

Recoveries of Child Maintenance and Other Payments Act 2008 Lump Sum payments—October 2008 to March 2009	
Disease	*£000*
Mesothelioma	165

Recoveries of payments through Other Disability Benefits			
£000			
Disease	*2006-07*	*2007-08*	*2008-09*
Mesothelioma	2,089	2,644	7,989
Asbestosis	556	418	976
Bilateral Pleural Thickening	70	276	134
Other prescribed asbestos diseases	19,972	26,699	16,537
Notes: 1. Information is rounded to the nearest thousand pounds. 2. Any lump sums paid under the 1979 Act or the 2008 scheme are recoverable under the Social Security (Recovery of Benefits) Act 1997. The lump sum payments are			

recoverable from all cases where the compensation is paid on or after 1 October 2008. Prior to that date data were not separately captured on these cases.
3. For Pneumoconiosis etc (Workers Compensation) Act 1979 'Other prescribed asbestos diseases' include Cancer, Pleural Plaques and Non-Coded diseases.
4. For Industrial Injuries Disablement Benefit and Other Disability Benefits 'Other prescribed asbestos diseases' include Cancer, Pleural Plaques and Other Work Related Diseases.
Source:
DWP accounting data