

## Asbestos exposure risk public liability insurance for schools.

In October 2011 AiS discovered that in general academies and free schools are unable to obtain commercial public liability insurance cover for asbestos exposure risks. Therefore at the DfE Asbestos Steering Group meeting of 8<sup>th</sup> February 2012 they asked how academies and free schools could meet any future asbestos related claims from former pupils or non-employees. However DfE were unable to give satisfactory answers to their questions. At that meeting and the next one of 14<sup>th</sup> June AiS asked for an expert from the insurance industry to attend the next meeting so that the facts could be established. DfE suggested that a member from their academy unit could also attend.

On 6<sup>th</sup> September DfE contacted AiS and asked *“Could you let me know what your questions and concerns are over those we discussed at the last meeting? If they are within the remit of the steering group, I can then identify the most appropriate person/s to attend.”*

This is a response to the DfE e-mail.

### *Questions and concerns*

The questions and concerns are those we discussed at the last two meetings of the DfE Asbestos Steering Group. They have also been raised in a series of Parliamentary questions.

At no stage has a satisfactory answer been given about how future asbestos related claims will be met from former academy and free school pupils and non-employees. It is essential that these questions are resolved. Also, because of the implications, it is very much within the remit of the steering group to look into this problem, find solutions and inform schools of those solutions.

### *Remit of steering group.*

An insurance industry expert should be asked to attend to explain why they will not insure school pupils against asbestos exposure risks. If it is because the risks to pupils are so high that they are uninsurable then that is most relevant to the steering group’s remit to *“To consider the risks posed by asbestos in schools and other children’s settings.”*<sup>1</sup>

In addition the lack of asbestos risk insurance cover has far reaching implications for the government’s policy of managing asbestos in schools rather than removing it. If the issues are not resolved then the government cannot expect those schools that are unable to obtain insurance cover to manage their asbestos.

They cannot expect people to be governors of academies or free schools if they could be liable for settling any future claim.

And they cannot expect pupils to attend schools that contain asbestos if the schools are not insured against any future claim they may make.

In addition Academies and Free schools cannot be allowed to enter blindly into an agreement that could have far reaching implications for their financial viability. The governors have to be aware of the risks from asbestos and informed of the implications if they do not have full public liability asbestos risk insurance.

If a solution is available then the steering group should give the facts to schools so that they can take informed decisions about how to properly manage their asbestos. That is within the remit of the

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<sup>1</sup> DfE Asbestos Steering Group TORs 25 Mar 2011

steering group which is *"To raise awareness of and promote the need to ensure proper management of asbestos in schools and other children's settings."*

### *The unresolved issues*

The Minister confirmed in a Parliamentary answer that *"there is a general asbestos exclusion for public liability insurance."*<sup>2</sup> However, in the absence of commercial insurance, future claims can still be met in local authority schools as they self insure. But most academies and free schools do not have the resources to do so.

In academies the legal responsibility for the safety of pupils and non-employees rests on the academy trust. Therefore they are legally liable for any claim that may be made against the academy. The question therefore arises that if they are not insured who will pay any compensation awarded against the academy?

In answer to a Parliamentary question the Schools Minister implied that in the absence of public liability insurance the governors' liability insurance will meet any future claims.<sup>3</sup> Experts have advised that this is incorrect as governors' liability insurance is not meant to be a catch-all insurance and will not normally provide cover for other uninsurable risks.

The Minister explained that the liability would fall on the academy trust rather than individual members of the trust *"An academy trust is a corporate body so its members should not be held personally liable provided they act reasonably and in good faith"*<sup>4</sup> However it must be questioned whether it would be considered that the trust had acted reasonably and in good faith if they failed to have a contingency fund when they were unable to obtain insurance cover - and that question can only be resolved by the courts. If they considered that they had not acted reasonably and in good faith, then it must be presumed that the individual members of the trust would be personally liable to settle any claim.

The academy trust members are school governors. Most governors are not trained in asbestos awareness and will not be aware of the very real potential that any failure in asbestos management could expose pupils to asbestos with the possibility that any one of them might subsequently develop mesothelioma. Inevitably they will also not realise the personal implications for themselves and the financial burden on the academy if a future claim is made when there is no insurance cover.

In a subsequent Parliamentary answer the Minister made the legal position clear *"The Secretary of State for Education...is not legally responsible for any compensation awarded, and nor is he bound by the terms of the funding agreement to compensate an academy for any such liability."* It is implicit in the answer that the academy would be expected to meet any claim from its insurance cover, and if that was unavailable then the claim would have to be met from its own resources.

It needs to be confirmed whether academies are aware of this or aware that they need a contingency fund to meet any potential claims. It is reasonable to assume that they are not aware as the Minister has not informed them. This is apparent from his written answer *"No guidance has been issued to local authorities, academies or free schools in respect of insurance cover for asbestos exposure risks."*

This policy is flawed and contrary to the whole concept and principle of having the financial certainty that one is insured against risks and that any claim can be met.

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<sup>2</sup> Parliamentary written answer Schools asbestos. Ian Lavery MP/ Minister of State Nick Gibb MP 21 Mar 2012 see Annex 2.

<sup>3</sup> Parliamentary written answer Schools asbestos. Annette Brooke MP/ Minister of State Nick Gibb MP 22 May 2012 see Annex 2.

<sup>4</sup> Parliamentary written answer Schools asbestos. Annette Brooke MP/ Minister of State Nick Gibb MP 22 May 2012 see Annex 2.

DfE has a duty to ensure education and therefore the Minister gave the assurance that if an academy had to settle a claim from its own resources then *“The Department for Education would work with any affected academy or free school to ensure that it remained financially secure and the education of its pupils was not compromised”*<sup>5</sup>

DfE however added the caveat that *“Academies are meant to have insurance and therefore if an award was made that brought the financial viability of the school into question this would be done on a case by case basis, taking into account a range of factors which would include, for example, the financial viability of the school and its overall performance.”*<sup>6</sup>

The caveat puts into question the credibility of the assurances, because the unresolved question has to be what would happen if the academy or free school was not financially viable or had a poor performance?

DfE’s statement that decisions will be on a case by case basis avoids addressing the problem now and instead defers decisions and any proper solution until the first claim is made. Because of the long latency of mesothelioma that could be twenty or thirty years from now when the first victims from academies and free schools develop mesothelioma. At which point it is far too late for an academy to be told it should have had a contingency fund and for a former pupil with a terminal illness to discover that their school had been unable to obtain insurance and that no one has properly thought through how to meet their claim.

A further problem is that some academies believe that they have full public liability asbestos risk cover when they do not. Expert brokers have stated that the exclusion clauses in some policies for negligence and long term exposures in effect means that most potential claims will not be covered. It might take thirty years for a claim to be made and only then will the academy realise the profound significance of these exclusions.

There are now 1,957 academies and 55 free schools therefore this is a problem that affects the governors and many thousands of pupils and non-employees in schools. If asbestos is present in a school there is always the potential for claims. If asbestos management is to be a viable option then there is a practical and moral obligation on the government to ensure that there are means in place to meet those claims.

It is within the remit of the DfE Asbestos Steering Group to make schools aware of the situation and the options so that they can make informed decisions on how best to effectively manage their asbestos so that the financial future of the schools and the safety and wellbeing of the occupants is ensured. An expert from the insurance industry and a representative of DfE’s academy unit would assist in achieving this as they would provide the steering group with the facts and allow them to make informed recommendations to academies, free schools and other schools in the country.

## **Annex 1: DfE Asbestos Steering Group TORs**

### **1. Aims**

1.1. To promote the effective management, by schools and by local authorities, of asbestos in schools and other children’s settings.

1.2. To raise awareness of and promote the need to ensure proper management of asbestos in schools and other children’s settings.

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<sup>5</sup> Parliamentary written answer Schools mesothelioma. Annette Brooke MP/ Minister of State Nick Gibb MP 12 Jun 2012 see Annex 2.

<sup>6</sup> Minutes DfE Asbestos Steering Group 14 Jun 2012. AiS note of DfE Asbestos Steering Group 14 Jun 2012.

1.3. To review and contribute to the development of guidance and targeted training materials on asbestos management for school and Local Authority staff.

## **2. Terms of Reference**

2.1. To consider the risks posed by asbestos in schools and other children's settings

2.2. To contribute to the development of the DfE/HSE/Partnerships for Schools (PFS) plans to ensure that asbestos is competently managed in schools.

2.3. To review progress against DfE/HSE/PFS plans to promote the effective management of asbestos in schools.

2.4. To ensure that key stakeholders are informed of relevant work that is undertaken to ensure that asbestos is managed effectively in schools.

2.5. To provide input to DfE, PFS and HSE in the preparation of any asbestos guidance that is drafted specifically for schools and children's settings.

2.6. To promote good practice in asbestos management in schools by local authorities, dioceses, school governors, head teachers, bursars and school business managers, parents' groups and the teaching and support staff unions – in the independent and maintained sectors.

2.7. To share good practice in documentation and systems in place to effectively record and manage the risks from asbestos in schools.

2.8. To provide an input into the development of any common standards, tools or documentation for schools, governors, dioceses and local authorities on asbestos management.

## **Annex 2. Parliamentary questions**

### **Schools: Asbestos 21 Mar 2012**

**Ian Lavery:** To ask the Secretary of State for Education (1) what level of funds his Department advise local authorities to hold in respect of asbestos-related claims made by former school staff and pupils; [100811] (2) what assessment his Department has made of the availability of employer and public liability insurance for asbestos exposure risks in academies and free schools; [100812] (3) what (a) arrangements his Department has made and (b) guidance his Department has issued for academies and free schools in respect of employer and public liability insurance cover for asbestos exposure risks to school staff, non-employees and pupils; [100813] (4) how many local authorities are unable to obtain public liability insurance for asbestos exposure risks to visitors and pupils in their schools; [100814] (5) how many local authorities are unable to obtain employers' liability insurance for asbestos exposure risks to school staff; [100815] (6) how many local authorities are self-insured for (a) employer and (b) public liability asbestos exposure risks to visitors and pupils. [100816]

**Mr Gibb:** Local authorities and schools are responsible for making their own arrangements for insurance. As such the Department does not maintain central records on insurance coverage in place.

No guidance has been issued to local authorities, academies or free schools in respect of insurance cover for asbestos exposure risks.

Discussions with insurers indicate that asbestos is not considered to be a barrier to obtaining employer liability insurance, though there is a general asbestos exclusion for public liability insurance.<sup>7</sup>

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<sup>7</sup> <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120321/text/120321w0003.htm#1203222000906>

**Schools: Asbestos 22 May 2012**

**Annette Brooke:** To ask the Secretary of State for Education whether an academy trust would be personally liable for an asbestos exposure claim against the academy. [108132]

**Mr Gibb** [*holding answer 21 May 2012*]: An academy trust is a corporate body so its members should not be held personally liable provided they act reasonably and in good faith. An academy trust acts as a single entity with an identity separate from that of its members. Responsibility for actions and decisions, therefore, lies with the whole academy trust rather than its individual members.

Academy trusts are required to have governor liability insurance with a minimum cover of several million pounds. This insurance covers the collective liability of the academy trust acting in good faith.<sup>8</sup>

**Schools: Mesothelioma 12 Jun 2012 :**

**Annette Brooke:** To ask the Secretary of State for Education (1) what process will be followed in the event that a former pupil or non-employee from an academy or free school develops mesothelioma and makes a claim against the school; and who would be liable for any costs; [108133]

(2) whether pupils and non-employees are covered for public liability asbestos exposure risks in academies and free schools. [108134]

**Mr Gibb** [*holding answer 21 May 2012*]: Academies and free schools are autonomous institutions and, as such, are responsible for making their own arrangements for insurance. The Department does not maintain central records of the insurance coverage in place. Discussions with insurers have however indicated that there is a general asbestos exclusion for public liability insurance.

The Secretary of State for Education, my right hon. Friend the Member for Surrey Heath (Michael Gove), is not legally responsible for any compensation awarded, and nor is he bound by the terms of the funding agreement to compensate an academy for any such liability. However, the Department for Education would work with any affected academy or free school to ensure that it remained financially secure and the education of its pupils was not compromised.<sup>9</sup>

*Michael Lees*  
10<sup>th</sup> September 2012

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<sup>8</sup> <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120522/text/120522w0003.htm#12052254002792>

<sup>9</sup> <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120612/text/120612w0003.htm#12061375000619>