

Y Pwyllgor Iechyd a Gofal Cymdeithasol

**Bil Adennill Costau Meddygol ar gyfer Clefydau
Asbestos (Cymru)**

**Ymatebion i'r Ymgynghoriad
Ionawr 2013**

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Health and Social Care Committee

**Recovery of Medical Costs for Asbestos Diseases
(Wales) Bill**

**Consultation Responses
January 2013**

Bil Adennill Costau Meddygol ar gyfer Clefydau Asbestos (Cymru)

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Ymatebion i'r Ymgynghoriad

Consultation Responses

* Ar gael yn y Gymraeg/Available in Welsh

RMCA1	Asbestos Awareness and Support Cymru	Asbestos Awareness and Support Cymru
RMCA 2a 2b	Cymorth Canser Macmillan Cymru	Wales Macmillan Cancer Support
RMCA3	Unite a GMB	Unite and GMB
RMCA4	Cymdeithas y Cyfreithwyr Anafiadau Personol	Association of Personal Injury Lawyers
RMCA5	Comisiwn y Gyfraith	Law Commission
RMCA6	Fforwm y DU ar gyfer Grwpiau Cymorth Dioddefwyr Asbestos	Asbestos Victims Support Groups Forum UK
RMCA7	Tenovus	Tenovus
RMCA8	Bwrdd Iechyd Hywel Dda	Hywel Dda Health Board
RMCA9	Marie Curie	Marie Curie
RMCA10	Cymdeithas Yswirwyr Prydain	Association of British Insurers
RMCA 11	Bwrdd Iechyd Aneurin Bevan	Aneurin Bevan Health Board
RMCA12	Fforwm y Cyfreithwyr Yswiriant	Forum of Insurance Lawyers
RMCA13	Grŵp Clefydau Diwydiannol Lyons Davidson	Lyons Davidson Industrial Disease Group
RMCA14*	Lesley Griffiths AC, Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol	Lesley Griffiths AM, Minister for Health and Social Services
RMCA15	Yr Athro Ceri J. Phillips, Prifysgol Abertawe	Professor Ceri J Phillips, Swansea University
RMCA16	Mari Thomas Swyddog Polisiau Cyllid Cymdeithas Llywodraeth Leol Cymru	Mari Thomas Finance Policy Officer Welsh Local Government Association
RMCA17	E Kay Powell, Cymdeithas y Cyfreithwyr	E Kay Powell, The Law Society

Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA 1 – Asbestos Awareness and Support Cymru

Consultation on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

Evidence of Asbestos Awareness & Support Cymru

Introduction

1. This evidence is submitted by Asbestos Awareness and Support Cymru (AASC), a support group for victims of asbestos related diseases and their families. It has a web presence plus Facebook and Twitter and offers a signposting service to improve access to the best services available within Wales.
2. It is a registered charity and is a member of the National Asbestos Victims Support Forum.
3. The overall aim is to be the leading connected community within Wales to enhance the quality of life for those victims of asbestos exposure and their families.
4. Financial compensation awarded to families who have lived and died from an asbestos related disease as a consequence of the negligence of employers has made a significant impact upon lives. The move to secure compensation has also strengthened the message that breaches of Health and Safety Law and putting workers lives at risk is not to be tolerated. Human life is precious.
5. The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill is welcomed as it is demonstrating not only a concern for the welfare of patients but also highlighting the costs incurred by the NHS for what has been negligent behaviour by employers.

Executive Summary

6. AASC welcomes this move to improve care to victims of exposure to asbestos related disease but also sees that financial resources could be used to enhance the care already being provided by the NHS.
7. As a health measure the financial compensation secured through the Bill create positive health outcomes for families affected by asbestos exposure.
8. There has been complacency around the dangers of asbestos exposure which heightens the risk that numbers diagnosed with illnesses such as mesothelioma are going to increase and this will naturally impact upon levels of NHS care provided.
9. The Bill will have the effect of improving care and support provided to asbestos victims.
10. The Bill will demonstrate to the rest of the UK and to the world that Wales does recognise the damaging effect asbestos has had upon workers.
11. The Bill illustrates a Wales wide responsibility for the NHS and that financial resources are needed to ensure that our high quality of care can continue but has been compromised by employers continuing to shirk responsibilities for their employees.

Financial Support

12. Care to victims of asbestos exposure requires financial resourcing, from the initial consultation with the General Practitioner to Consultant, nurse specialist, and other health specialists called upon to provide advice on mobility and breathing exercises such as physiotherapists and occupational therapists. Each of these professions requires payment and on top of that is the need to cover drug and surgical treatment costs.

13. Support to victims of asbestos related diseases and their families continues outside the NHS through the Third Sector with one to one meetings and group sessions, and hand holding through emotionally traumatic stages of an illness. Emotional support through the Third sector groups such as AASC is crucial not only for the victims but also the informal family carers. Any financial compensation acquired through this Bill and made available to the Third sector would be valued.

14. Extra financial resources secured through the implementation of the Bill could help in the development of increased telephone helpline support, more face to face meetings and improved collaboration between victims, carers and health professionals. Enhancing connections between the 'care givers' and the 'care receivers' will bring about 'piece of mind'. Pathways of care will be strengthened thus minimising the sense of despair, distress, pain, suffering and isolation and replacing with confidence, respect and knowledge that someone does care.

15. It is recognised that administrative costs will be incurred through the processing of compensatory payments and it is hoped that these will not be too onerous and eat into the compensation secured.

Summary.

- AASC welcomes the opportunity to comment on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill and recognises that this is a brave move for the Welsh Government to undertake but it is a move undertaken on behalf of the many who have fallen prey to evils of asbestos dust.

- We hope that the Bill continues successfully through the legislative process to secure extra financial resources which will be made available for improved care.

- The world is watching Wales for what will be an historic step forward in supporting asbestos victims.

Asbestos Awareness & Support Cymru

18 December 2012.

Macmillan information on Asbestos and Mesothelioma



Briefing for: **Mick Antoniw AM**
Purpose: **Provide an overview of the link between
Asbestos and Mesothelioma**
Date created: **May 2012**

Introduction – Factors and causes of Mesothelioma

Asbestos is the most common cause of mesothelioma. Up to **9 out of 10** cases of mesothelioma are caused by exposure to asbestos fibres. Occasionally, mesothelioma develops in people who have never been exposed to asbestos. The other causes of the disease are not fully understood, but in rare cases mesothelioma has been linked to exposure to radiation.

Key statistics¹

- Every year around **2,400 people** are diagnosed with mesothelioma.
- Mesothelioma is around five times more common in men than in women. In 2008 there were almost 2,000 cases in men and over 400 in women.
- Around 9 out of 10 mesothelioma cases occur in people aged 60 and over.
- Mesothelioma incidence rates have increased almost four-fold since the early 1980s.
- The incidence of mesothelioma is expected to peak around 2020 and to decline rapidly thereafter
- Overall, mesothelioma has a poor prognosis. By the time someone has symptoms and goes to their doctor, the disease is very often advanced.
- One-year **survival rates** for mesothelioma for **men is 34%** and women **40%**.
- Around **2,300** people died from mesothelioma in the UK in 2009.
- The Health and Safety Executive estimates that around **500,000** non-domestic buildings in the UK are likely to contain asbestos.
- Only buildings built after 2000 are unlikely to contain asbestos.

Wales Figures²

Number of deaths where asbestosis or mesothelioma was the underlying cause of death, in Wales and the United Kingdom, 2005-10.

Area	2005	2006	2007	2008	2009	2010
Wales	6	5	7	1	13	8
Pneumoconiosis due to asbestos						

and other mineral fibres						
Wales	73	76	87	96	103	95
Mesothelioma						
UK	141	145	144	147	217	194
Pneumoconiosis due to asbestos and other mineral fibres						
UK	1,934	2,005	2,032	2,160	2,293	2,291
Mesothelioma						

Asbestos

Asbestos is a natural mineral found in many countries. Asbestos is a mineral not naturally found in UK soil. All diseases caused by asbestos are the result of imported asbestos. Asbestos acts as an insulator (to keep heat in and cold out); it has good fire protection and it protects against corrosion.

There are three main types of asbestos: blue asbestos (crocidolite), brown asbestos (amosite) and white asbestos (chrysotile). Asbestos was commonly used in UK industries until the ban on imports of blue and brown asbestos in the 1980s. The use of all types of asbestos was banned in 1999.

Exposure to asbestos

People most likely to have been exposed to asbestos at work include:

- joiners and construction workers;
- plumbers;
- electricians;
- boilermakers; and
- shipbuilders.

Minimal casual exposure can result in mesothelioma.

These jobs were mostly done by men. Mesothelioma is five times more common in men than in women. People who have not worked directly with asbestos can also sometimes develop mesothelioma. These include:

- Family members of people who've worked with asbestos and brought the dust home on their clothes;
- People who lived near asbestos factories; and
- People who worked in buildings containing asbestos materials, which were disturbed or damaged.

The link between asbestos and lung disease

Mesothelioma doesn't usually develop until many years after exposure to asbestos. It can take any time from 10–60 years, although the average is about 30–40 years after exposure.

Managing Asbestos

Under Regulation 4 of the Control of Asbestos Regulations 2006 and Control of Asbestos Regulations 2012, there is a duty to ensure that asbestos is managed properly in non-domestic premises.

Evidence from the Health and Safety Executive highlights that the Regulations are not always being followed. Between November 2010 and July 2011 the HSE³ carried out a series of inspections of schools outside local authority control to determine their standards of asbestos management. The inspections resulted in enforcement action being taken. The level of enforcement is high and shows that a significant number of schools outside local authority are failing to manage their asbestos safely.

In February 2012 The Health and Safety Executive launched a campaign to encourage trades people to deliver free hours of asbestos awareness training.

The impact on public Health

The following websites clearly highlight the impact asbestos has on public health.

- [The Human Face of an Asbestos Epidemic](#)⁴
- [NHS E Learning for Health view Professor Kieran Sweeney](#)⁵
- [Asbestos in Schools website](#)⁶

More information around Mesothelioma can be found on Macmillan Cancer Support website⁷

Contact

For further information please contact Gwenllian Griffiths, External Affairs Manager, Wales Macmillan Cancer Support.

07793 579375 / 01656 867973

GGriffiths@macmillan.org.uk

¹ <http://www.hse.gov.uk/statistics/causdis/mesothelioma/index.htm>

² <http://www.theyworkforyou.com/wrans/?id=2012-04-24b.105339.h>

³ HSE Enforcement Action for Failure to Manage Asbestos in Non-LA Schools
<http://www.asbestosexposureschools.co.uk/pdfnewslinks/HSE%20ENFORCEMENT%20SUMMARY%20%20NOV%2010%20to%20Jul%2011.pdf>

⁴ <http://www.youtube.com/watch?v=UpJ2se23Xy4>

⁵ http://www.e-lfh.org.uk/projects/lead/patient_journey.html

⁶ <http://www.asbestosexposureschools.co.uk>

⁷ <http://www.macmillan.org.uk/Cancerinformation/Cancertypes/Mesothelioma/Mesothelioma.aspx>

Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA 2b – Macmillan Cancer Support

Mark Drakeford AM
Chair, Health and Social Care Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Dear Mark

RE: CONSULTATION ON THE RECOVERY OF MEDICAL COSTS FOR ASBESTOS DISEASES (WALES) BILL

Thank you for the invitation to address the Health and Social Care Committee on the above Consultation. While Macmillan whole-heartedly welcomes the Consultation and the detailed scrutiny undertaken by your committee, and supports the Bill in principle, we do not feel we have the specialised knowledge to respond to the inquiry's set questions on this occasion.

However, I would recommend that you contact Lorna Johns from Asbestos Awareness and Support Cymru (AASC) by emailing enquiries@a-a-s-c.org.uk. Macmillan has provided a grant to this organisation to fund some of their work. Alternatively, contact Mesothelioma UK. Either of these organisations would be able to answer in more detail the Consultation's questions.

I am enclosing a copy of Macmillan's briefing for Mick Antinow AM on Asbestos and Mesothelioma for your information.

With best wishes,



Susan Morris
General Manager
Macmillan Cancer Support in Wales

Enc



Consultation – Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Joint response from Unite Wales and GMB Wales & South West trade unions

General

1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos related diseases in Wales? Please explain your answer.

Yes. We believe that there is a compelling case for a Bill to allow recovery of costs of NHS treatment of asbestos related diseases in Wales. Hundreds of Welsh workers die every year from asbestos related disease and exposure to asbestos at work has caused suffering and hardship for thousands of others over the past decades. Many of Unite and GMB's current membership have been exposed to asbestos. Our members who have worked in the insulation industry, ship building, power stations, manufacturing and construction are among the occupational groups most at risk of developing asbestos related disease.

What must not be overlooked here is the incalculable human suffering asbestos disease inflicts on Welsh workers and the devastating effect on their families. Those who suffer most are the estimated 100 people who will die each year in Wales from mesothelioma, the fatal asbestos cancer. There is no known cure for mesothelioma. The average life expectancy of a mesothelioma patient is 12 -18 months from the onset of symptoms with many dying in less than a year from diagnosis. HSE reports that most people who develop mesothelioma were exposed to asbestos at work.

We note from the Regulatory Impact Assessment that the treatment of patients diagnosed with asbestos related diseases has cost and continues to cost the Welsh NHS an average of £23,000 per patient, placing a considerable financial burden on the already financially hard pressed NHS in Wales. At diagnosis of the disease, there will be attendances to GPs, referral to consultants for radiology, biopsies, radiotherapy, and chemotherapy and in many cases, palliative care.

We believe that in cases where there is a clearly identifiable negligent employer and a civil compensation settlement is due it is only right that the negligent party (or their insurer) should reimburse the NHS for the cost of medical treatment paid for by NHS Wales. We believe that the 'polluter pays' principle should apply. The Bill will achieve this socially desirable outcome by requiring the negligent employer, or the insurer of the negligent employer, to contribute towards the

costs to society of providing medical treatment and support to Welsh workers who develop asbestos disease.

The Bill will displace the financial burden from the Wales NHS, which currently bears the cost of providing medical care and treatment, and transfer it to the negligent employer which caused the disease, or their insurer. The view of our members and, we believe, of Welsh working people generally, is that the aim of the Bill is entirely consistent with progressive social policy.

2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

Yes. The Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum. It makes clear the intended purpose of the Bill and the mechanism for recovery of NHS costs.

3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos related diseases in Wales? If not, what changes need to be made to the Bill?

We believe the sections of the Bill are appropriate, internally consistent and proportionate to the aims of the Bill. The Bill is clear in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos related diseases in Wales. This is further expanded and illustrated in the Explanatory Memorandum. We therefore do not consider that any changes need to be made to the Bill.

4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

Clearly the Bill will have a positive impact on the NHS in Wales in that it will reimburse the NHS in Wales for the significant costs for treatment of patients diagnosed with asbestos related diseases. In addition, as outlined by the Bill, the costs recovered will be of benefit to both the services provision of the NHS in Wales and the future treatment of victims of asbestos related diseases.

The establishment of an administrative process for the recovery of costs of the treatment of patients diagnosed with asbestos related diseases to the NHS in Wales will, of course, involve some initial change. However, we believe that the Explanatory Memorandum clearly outlines the available options. We support the proposed use of the existing injury compensation scheme coordinated by the CRU at the Department of Work and Pensions. We believe this would achieve the most cost effective balance by using established CRU structures and procedures, automated systems, data links to compensators and NHS bodies with the advantages of a single point of contact for data collection and administration of recovery of NHS treatment costs from compensators.

Moreover, the positive impact of these changes and the cost to society in the long term significantly outweigh any potential organisational adjustment at the outset.

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

We believe the Bill and the related Explanatory Memorandum make clear the provisions of the Bill and the mechanism of implementation.

We are aware that the Association of British Insurers (ABI) have indicated in their initial consultation response that they object to the Bill. We believe that the commercial interests of insurers should not take precedence over the principle of social justice which the Bill aims to deliver. Insurers who may claim that the impact of the Bill will result in the increased cost of insurance to employers in the current marketplace should be reminded that those insurers have already received, invested, reserved and profited from the premiums they were paid by employers in the past whose negligence is the cause of Welsh workers currently developing asbestos disease.

We also reject the specious objection from ABI that the NHS in Wales has already received the cost of treatment in the form of National Insurance Charges paid by workers – and that the Bill would result in duplication of payment. This ignores the obvious fact that if the insured employer had not negligently exposed Welsh workers to asbestos those workers who develop asbestos disease would not have done so and the substantial cost to the NHS in Wales of treating those patients would never have arisen. The ABI objection to the Bill offends the ‘polluter pays’ principle.

6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?

We believe the Bill falls within the legislative competence of the National Assembly for Wales, under subject heading 9 of Part 1 of Schedule 7 to the Government of Wales Act 2006. This specifically includes the prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder; and the organisation and funding of National Health Service. The purpose of this Bill is relevant to the ‘treatment of disease, illnesses under this subject heading and the proposal of the Bill fits within ‘organisation and funding of National Health Service.’

Powers to make subordinate legislation

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

The Bill strikes an effective balance between provision outlined in the Bill itself and the provision that will be made by subordinate legislation. This is similar to the

Health and Social Care (Community Health and Standards) Act 2003. Much of the procedure of the Bill in practice will be administrative, technical and incredibly detailed. Parts of provision of the Bill will also necessitate flexibility. This is therefore more suitable to subordinate legislation rather than the Bill itself.

Financial implications

8. What are your views on the financial implications of the Bill?

In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

It is estimated that the cost of care of victims of asbestos related diseases to the NHS in Wales is £2 million a year. The recovery of the costs of the treatment of asbestos related diseases in Wales would be significant to the NHS in Wales at a time when it is financially hard pressed.

The scale of the costs associated with the administration of the scheme are dependent on the administrative system used, the level of charges agreed within the tariff system and the amount of cases processed. However, the Explanatory Memorandum clearly outlines a number of options at varying initial and recurrent costs per annum. We refer to our response to Q4 outlining support for making the most effective use of existing CRU procedures for recovery of NHS treatment costs in order to minimise the administrative and business costs and maximise the net return.

We believe it is necessary and desirable to keep the administrative and business costs of the recoupment process to a minimum. We support the introduction of a tariff system for the calculation and recovery of NHS treatment costs. We note from the Explanatory Memorandum that there is a close correlation between the average cost in the proposed standard tariff (£25,361) with the average figure for the actual cost of treatment (£23,299) although we appreciate that there is potential for wider variation due to the relatively small sample of cases that formed the basis of the treatment cost analysis. In principle we consider that a form of capped tariff system is a reasonable and proportionate means of delivering the objectives of the Bill whilst minimising the operational costs.

We also believe that the combination of a capped standard tariff system with a CRU based recovery mechanism will provide an efficient means of dealing with any appeals and challenges by compensators or other parties and should minimise the scope for challenges due to the simplicity and clarity of a tariff based approach.

In addition, in relation to the costs for organisations liable for paying NHS charges the Bill does not create any new entitlement to compensation where a claim would not already exist. Successful claims arise when it is proven that a party such as the employer has been negligent. The status quo means that the NHS in Wales and therefore the public purse and the taxpayer must pick up the tab for the negligent party. We believe that this Bill is necessary, just and would ensure that the right party, or their insurer, is held responsible for their wrongdoing.

Other comments

9. Are there any other comments you wish to make about specific sections of the Bill?

It is important to GMB and Unite that the Bill binds the Crown so as to achieve parity of treatment between the recovery of NHS costs from commercial sector employers and insurers as well as government departments and former nationalised industries where many of our members worked and were negligently exposed to asbestos. It would be inequitable that a Crown employer who would also have made provision for risk, and who was as negligent as any private sector employer, should not bear the same responsibility to pay the same dues to society.

We reiterate our full support for the Bill which we believe is representative of Wales leading the way on matters of political substance and principle and delivering on the practicalities of implementing social justice. GMB and Unite in Wales commend this Bill for the benefits it confers on the NHS in Wales and the improved level of support and treatment it will generate for the people of Wales who will suffer the devastating effects of asbestos disease due to the legacy of employer negligence.

For further information please contact:

Unite - Hannah Blythyn on 07980 237694 or hannah.blythyn@unitetheunion.org
GMB – Mike Payne on 07980 753124 or mike.payne@gmb.org.uk

Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA4 – Association of Personal Injury Lawyers (Apil)

**National Assembly for Wales Health and Social Care Committee
consultation on the Recovery of Medical Costs for Asbestos Diseases
(Wales) Bill**



A response by the Association of Personal Injury Lawyers

January 2013

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain the access to justice they need and deserve. APIL currently has more than 4,500 members committed to supporting the association's aims, all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics. APIL currently has more than 170 members in Wales.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Sam Ellis, Parliamentary Officer

APIL

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 943 5426; Fax: 0115 958 0885

E-mail: sam.ellis@apil.org.uk

The Association of Personal Injury Lawyers (APIL) welcomes the opportunity to respond to the Health and Social Care Committee's consultation on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, which was tabled by Mick Antoniw AM on Monday 3 December 2012. APIL is encouraged by the support the Bill has received from across the political parties in the National Assembly for Wales.

Consultation questions

General

1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer

The purpose of the Bill, to recover costs incurred by the NHS in Wales by treating patients suffering from such asbestos-related diseases from a liable employer or insurer, follows the established principle that the polluter pays. As an organisation which campaigns for the rights of people injured through no fault of their own, APIL believes that it should be the wrongdoer, and not the state, who should pay the costs of compensating and supporting someone who has been injured or who suffers diseases due to negligence.

According to figures obtained from the Office of National Statistics following a Freedom of Information request by APIL, there were 457 deaths in Wales between 2006 and 2010 in which mesothelioma was the underlying cause. With the death rate from mesothelioma expected to peak by 2016, according to the Bill's explanatory memorandum¹, APIL believes this Bill to be very timely.

¹ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Explanatory Memorandum incorporating the Regulatory Impact Assessment p. 6

2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer

The stated objective of the Bill is to recover the costs incurred by the NHS in Wales from the liable employer or insurer. The Bill, as drafted, establishes who will be liable to pay the costs, the mechanism for how those costs will be paid, and the timeframe of when the costs have to be paid. APIL is therefore satisfied that the Bill delivers the stated objectives as set out in the explanatory memorandum.

3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales? If not, what changes need to be made to the Bill?

APIL believes that the sections of the Bill are appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales.

4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

Different organisations and stakeholders will have to carry out various tasks as a result of the changes proposed in the Bill. Insurers will have to apply for the certificate setting out the amount of costs to be paid, the Compensation Recovery Unit will then have to co-ordinate with the relevant NHS Trusts and Local Health Boards, and the NHS Trusts and Local Health Boards will have to calculate how much is to be recovered.

The explanatory memorandum explains that the patient will have to supply the compensator with details of medical treatment. The lawyer acting for the patient, therefore, may have to ensure that information is kept about the location and nature of the treatment received, as the patient may not be able to recall such detailed information. The patient may have received medical treatment not only in Wales, but in England as well, and the lawyer will have to assist the patient in only supplying the relevant information, as some vulnerable patients may find this confusing.

As the NHS in Wales will now have a vested interest in successful litigation, APIL hopes that this Bill will result in the patients' medical records being supplied much more quickly during the initial claim for compensation. If medical records are obtained much earlier, a compensation award could be made much more quickly, providing the financial support for the patient, and also allowing the NHS in Wales to recover its costs from the liable defendant.

The impact on all the above, however, is relatively small compared to the benefits that this Bill will deliver for the NHS and potentially for sufferers of asbestos-related diseases.

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

There are some barriers that may prevent the NHS in Wales from recovering the costs from the liable defendant. One such barrier could be enforcement issues, such as ensuring that the liable defendant pays the correct costs within the imposed timeframe. In this instance, however, section 8 of the Bill, recovery of charges, gives powers to allow Welsh Ministers to demand payment, if needed.

Another barrier, which the Bill would be unable to deal with as it is an issue for the UK Government, is the number of sufferers of asbestos-related diseases who are unable to trace an insurer, which means compensation cannot be recovered. The explanatory memorandum issued with the Bill reveals that it can take “anywhere between 10 and 60 years for symptoms to develop after exposure to asbestos²”. During this time, an employer could have gone out of business and the employers' liability (EL) policy could have been lost.

An Employers' Liability Tracing Office (ELTO) has been established to help search for EL policies across the UK. According to its annual report, between May 2011 and April 2012, ELTO had a success rate of 71 per cent in tracing EL insurance policies³.

² Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Explanatory Memorandum incorporating the Regulatory Impact Assessment p. 5

³ ELTO Twelve Month Report May 2011-April 2012 p. 15

While it is unknown how many sufferers of asbestos-related diseases could not trace an EL policy in Wales, it is inevitable that such cases do exist, and the NHS may be unable to recover the costs incurred by the NHS in Wales in these cases.

6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales.

APIL welcomes the Bill, but as an organisation which campaigns for the rights of injured people, question six is outside the area of APIL's expertise.

Powers to make subordinate legislation

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

As with question six, question seven is not within APIL's expertise as a campaign group for injured people.

Financial implications

8. What are your views on the financial implications of the Bill?

The Bill is likely to have a financial impact on the insurance industry which will almost always be the compensator. The Welsh Government and the NHS in Wales will also bear some operating costs, as explained in the explanatory memorandum.

The costs incurred, however, will be nothing compared to the pain and suffering of victims of asbestos-related diseases, and this Bill recognises that in terms of caring and supporting for a sufferer of one of the diseases, it should be the liable defendant who should cover the costs.

Other comments

9. Are there any other comments you wish to make about specific sections of the Bill?

There are no further comments APIL wishes to make about specific sections of the Bill itself.

In the explanatory memorandum, however, the Compensation Recovery Unit (CRU) is referred to as the preferred body to administer the scheme. If this is to be the case, APIL believes there should be a dedicated team at the CRU to deal with these claims.

- Ends -

Association of Personal Injury Lawyers

▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

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**Law
Commission**

Reforming the law

Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA5 - Law Commission

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t
f 020 3334 0201
e

Mark Drakeford AM
National Assembly for Wales
Cardiff Bay
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CF99 1NA

Dear Mr Drakeford,

Thank you for your letter of 11 December 2012.

In 1999 the Law Commission produced a report entitled "Damages for personal injury: medical, nursing and other expenses; collateral benefits". One issue considered as part of that project was the recovery of NHS expenditure from a tortfeasor where the victim of a tort had been treated by the NHS. We considered whether the recovery scheme should be expanded from road traffic accidents (which it covered at the time) to include all personal injury cases where a victim had been compensated.

In our 1996 consultation paper on the same topic, we noted that this was a controversial issue with party-political aspects. We therefore considered it from a purely legal standpoint, and our report did not investigate in depth the policy advantages and disadvantages of the idea.

Our report did recommend the recognition of a general legal principle to the effect that the NHS would be able to recover its expenditure from a tortfeasor. This was on the basis that by treating the victim for free, the NHS had effectively discharged part of the tortfeasor's liability. We argued that this was an unjust enrichment, and the NHS should have a restitutionary claim as a result. We did consider briefly the argument that administration costs would outweigh the benefit to the NHS, and stated that our recommendation was subject to a full cost/benefit analysis being undertaken.

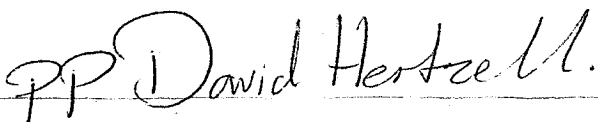
We did not consider illness or industrial disease separately from accident claims. Our recommendation was based on general legal principle which does not offer an obvious distinction between those two types of personal injury.

Our recommendations were adopted by the Department of Health in their 2002 consultation "The Recovery of National Health Service costs in cases involving personal injury compensation: a consultation". That consultation did specifically ask whether industrial diseases should be included within the scope of the recovery scheme. The Department of Health expressed an initial view that they should be included, although by the time the Health and Social Care Act 2003 was passed there was a specific exemption for "freestanding" diseases, which no doubt is the gap in the law your proposals are aimed at.

We mentioned the 2002 Department of Health consultation in our 2003 Annual Report, noting that our proposals were being taken forward. However we were not involved in this issue beyond the publication of our 1999 Report. We had no involvement in the preparation or enactment of the Health and Social Care Act 2003 and did not produce any publications on this topic in 2003. A search of our archive catalogue has shown that there are no files relating to this project extending beyond 2001. We were therefore at a bit of a loss as to what report the ABI was referring to. Having asked to see a copy we have now established that it was in fact a Northern Ireland Department of Health consultation, considering whether the Law Commission's 1999 proposals ought to be adopted in Northern Ireland. As far as we are aware the Law Commission has never expressed a firm view on whether the NHS cost recoupment scheme should extend to industrial diseases.

We have spoken with the ABI and clarified the matter. It seems unlikely, given the limited scope of our prior work in this area, that we would be able to provide any useful substantive input on this matter within the timescales needed. However, we will of course do whatever we can to assist the Assembly with what information we have.

Yours sincerely,

A handwritten signature in black ink that reads "David Hertzell". To the left of the name are the initials "PP" written in a cursive style.

David Hertzell



Submission to the Health and Social Care Committee

National Assembly for Wales

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

The Forum is a national organisation representing asbestos victims support groups throughout the UK. The groups provide a dedicated service to asbestos victims including: home visits for benefits and compensation advice; representation at tribunals; support meetings for mesothelioma sufferers and their families. The Forum campaigns for: improved services and treatment for asbestos victims; justice and full compensation, and; a ban on the trade and use of asbestos world-wide.

Submission

We have addressed the consultation questions below which come within the scope of our work, knowledge and expertise.

1. Is there a need for a Bill to recover medical costs?

We think there is a need for the Bill for the following reasons:

To properly fulfil the 'polluter pays principle' by meeting the full societal cost of asbestos-related diseases.

The established principle that the polluter pays is only fully complied with in respect of asbestos-related diseases where: the full societal costs of asbestos disease is met by those employers who negligently caused damage to health or loss of life through exposure to asbestos, and; where appropriate, by those who insured negligent employers.

The exigencies of life result in many people suffering many different diseases, incurring costs of medical treatment within the NHS, which are rightly funded through National Insurance. However, asbestos diseases, in the majority of cases, are caused by negligence and could, and should, have been prevented. The cost to society of fully meeting the treatment and care needs of asbestos victims resulting from negligence should be borne by the guilty party, or their insurers, not through National Insurance.

To fulfil unmet medical needs, the costs of which fall on the wider society

Often, medical costs are met by asbestos victims and their families who try to make up for unmet medical needs, as shown in the two examples below.

Mesothelioma sufferers and their families provide an enormous amount of funding for research into the treatment of mesothelioma, which attracts very little funding from the Department of Health. The Mick Knighton Mesothelioma Research fund has donated over £1 million, supporting many research projects, as has the June Hancock Mesothelioma Research Fund. Since Action Mesothelioma Day was inaugurated in 2006 over £110,000 has been donated to these research funds by mesothelioma sufferers and their families in Greater Manchester. A similar sum has been collected by other Forum members.

Insurers have acknowledged this unmet need by donating £3 million for mesothelioma research. However, we ask the Committee to understand that insurers received a huge windfall from the tax payer through recovery of state lump sum payments for over a decade. The compensation insurers paid to successful claimants was reduced by the amount of the state lump sum payment until 2008 when the Government finally decided to recover those payments, ending the tax payers' subsidy to insurers. The DWP recovered £23,953,961.00 in 2011¹, which is the amount that insurers would have recovered in that year. It is clear that over a decade, insurers received a windfall from the tax payer of well over £100 million.

It is our view that the insurers' donation to research came from the tax payer, not the insurers. Notwithstanding that view, we believe that the unmet need for research could be supported by recovery of NHS costs as set out in the Bill, which provides for certain and dependable income based on the polluter pays principle, and not reliant on goodwill (sic).

Mesothelioma Nursing posts. The charity Mesothelioma UK has, to date, funded three specialist mesothelioma nursing posts. Funding has come from a wide source of charitable donations to provide more specialist care for mesothelioma sufferers. The cost to society of specialist care of mesothelioma sufferers could be met by those who negligently caused this disease through the recovery of NHS costs as set out in the Bill.

To relieve the cost of occupational ill health as well as injury, which falls mainly on those affected and by their families.

The HSE estimate² that in 2011, 54% of the cost of occupational injury and ill health (excluding cancer) was borne by individuals, with employers bearing 24% and Government 23%. The HSE Executive Board (22 Aug. 2012) indicated that the cost to society of occupational cancer is in the region of 'double billion figures'.

The cost of ill-health, injury and cancer places an unacceptable burden on individuals and their families: over double the burden on the rest of society. This Bill goes a small, but significant way in reducing that burden.

8. Does the Bill deliver the stated objectives?

The Bill seeks to recover NHS costs of treating asbestos victims negligently exposed to asbestos to Welsh Ministers for the general benefit of asbestos victims and their families. As set out, we believe that the Bill does deliver those objectives by providing for the recovery of NHS costs in cases of negligent exposure to Welsh Ministers (S2) in accordance with the

¹ <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/2008-diffuse-mesothelioma/>

² HSE Costs to Britain of workplace injuries and work-related ill health: 2010/2011

National Health Service (Wales) 2006 for the purposes of treatment of, or other services relating to, asbestos-related diseases (S16).

4. How will the Bill change what organisations do? What will the impact be?

A compensation system which reflects the true cost to society of employer negligence properly fulfils an important objective common to all compensations systems: the prevention of further injury and disease. In 2002, an HSE report³ concluded that *'UK employers only bear a minority of the tangible costs of occupational ill health and injury through insurance premiums, and an even smaller fraction if non-tangible costs are included.'* It is unsurprising that the Report further concluded that employers did not cite the reduction of the cost of insurance premiums as a reason for improving standards of health and safety management.

In making employers and insurers more responsible for the cost to society of asbestos disease, the Bill will encourage better prevention, affirming the view that employer negligence should not be a cheap option. This is especially important as the failure of duty holders to comply with the Control of Asbestos Regulations, especially in respect of asbestos in schools, has caused public dismay, particularly in Wales. Moreover, the HSE has asked that the asbestos Hidden Killer Campaign is urgently reinstated because of their deep-felt concerns about the lack of worker awareness of the hazards of asbestos and the failure of duty holders to comply with the law.

8. Financial implications of the Bill

We support option 2i for the reasons set out in paragraph 123 of the Explanatory Memorandum.

With reference to paragraph 129 of the Explanatory Memorandum, we do not think that the proposed tariff scheme for mesothelioma untraced insurance, as announced by Lord Freud on the 25 June 2012, will impact on the number of mesothelioma claimants in Wales which will allow for recovery of NHS costs. This is because the tariff scheme is to be funded by a levy on insurers, which is likened to a 'tax', so that payments to mesothelioma sufferers successful in a claim on the scheme will be paid by public funds. Furthermore, payments are envisioned to be paid at approx. 75% of average mesothelioma awards and will not conform to the usual civil law rules for payment, e.g. payment to the deceased's estate.

Had the Government adopted the main, and only costed option, in the consultation i.e. an Employers Liability Insurance Bureau (ELIB), similar to the Motor Insurers' Bureau (MIB), then mesothelioma sufferers would be treated no less favourably than injured drivers and would receive a payment from an insurance fund which could be vulnerable to recovery of NHS costs.

Tony Whitston

Forum Chair

³ HSE Report 436/2002. 'Changing business behaviour – would bearing the true cost of poor health and safety performance make a difference?'

20 December 2012



Health and Social Care Committee - scrutiny of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Written submission from Tenovus, Wales' largest cancer charity

This paper is Tenovus' written response to the Health and Social Care Committee's call for evidence in relation to Mick Antoniw's Bill for the Recovery of Medical Costs for Asbestos Diseases.

During the initial consultation phase, Tenovus issued a statement fully supporting the general principles of the Bill and highlighting the effects the civil litigation costs reforms, as cited in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), will have on compensation claims for victims of asbestos-related diseases, namely that victims would be required to surrender a quarter of the damages that they have been awarded to pay for legal costs.

On 26 June 2012 Bill Esterson MP (Sefton Central, Labour) stated

"The legislation requires terminally ill asbestos victims who succeed in a claim for compensation against negligent, guilty employers to pay up to 25% of their damages for pain and suffering in legal costs. They are not part of the compensation culture, nor are they legally aided, so to include them in that provision is wholly wrong. Many sufferers are so defeated by their illness that they never make a claim under current circumstances. Victim support groups have been told by victims that the change proposed would be a significant further deterrent to them making a claim at all".

The UK government have subsequently stated that the (LASPO) reforms will not apply to mesothelioma cases and a review of the effects of the reforms on such cases will be implemented in Spring 2013.

In July 2012 the UK government announced new measures to speed up the process of compensating mesothelioma victims. These measures would be introduced as part of a multi-million pound support scheme to help those victims who cannot trace a liable employer or employers' liability insurer.

Some support groups welcomed the scheme as a step in the right direction but criticised its scope and particularly the exclusion of sufferers of other asbestos-related diseases such as lung cancer caused by exposure to asbestos.

A further announcement made by the UK government in December 2012 regarding the plans to speed up the process of compensating mesothelioma victims through the introduction of a pre-action protocol and electronic portal to register claims has also been met with criticism and is viewed by some as a further erosion of victims' access to justice and compensation. Concerns have been raised about making the process automated and not personal and that pay-outs will be significantly smaller as a result. This will have a huge impact on sufferers and their families.

There has been much discussion surrounding the notion of the 'polluter must pay' which is commendable and right; however, there needs to be further thought given to the very real possibility that this Bill will act as a deterrent to would-be claimants who may witness employers and insurers defending claims far more vigorously as they have more to lose where the recovery of medical costs becomes an additional factor.

It is well documented that mesothelioma is an aggressive and terminal disease with an average life expectancy of less than two years from diagnosis. A claim for compensation can take up to two years to settle which means that sufferers often die before their claims are paid out.

At Tenovus, we believe that the starting point should be the victims of asbestos-related diseases themselves and any discussion should surround how they can benefit from any proposed legislation. Victims and support groups should be at the forefront of these discussions and their views given weight above all others with an interest in the process.

With regard to the Bill generally, on 5 December 2012 Mick Antoniw made the following statement:

"The purpose of the Bill is simple. In cases where compensation has been paid in respect of a victim of an asbestos-related disease, with or without an admission of liability, the Welsh Government will be entitled to recover the cost of the medical treatment provided. The Bill does not create any new legal entitlement to compensation. It merely says that where compensation has been paid, the cost of medical treatment can be recovered by the Welsh Government with the intention that the costs recovered will be used to provide additional medical support and assistance to asbestos victims and their families. As Members will see from the Bill and the explanatory memorandum, the Bill could recover costs of just over £2 million each year. It is intended that that would be used, for example, to provide additional nursing and hospice care, support and counselling for families and other medical assistance. In this way, I believe that the Bill can make a real difference to the quality of life of asbestos victims who have been so cruelly smitten by this terrible occupational disease, and also to their families".



Tenovus broadly agrees with the premise that costs recovered will be used to provide additional medical support and assistance to asbestos victims and their families. However, what assurances can be given, and checks and balances put in place, to ensure that all the money recovered will go directly back into funding services for asbestos sufferers and not swallowed up by a cash strapped NHS?

Tenovus also raises the following questions: Will medical support and assistance not be available without this Bill? Will there be cause for concern amongst sufferers that resources are limited and they may not receive the best possible care? We believe that more consideration should also be given to the wider network of support services available to victims from the third sector for example, and whether there would be provision for financially supporting those vital services alongside those provided by the NHS.

Will there also be further provision for victims and their families to be supported through the cost of lengthy legal cases where an employer / insurance company is challenging a claim for compensation? It is noted that much of the delay in these cases is due to defendant tactics and thus the fear is that the added dimension of the recovery of medical costs will compound this.

Tenovus would like to thank the Health and Social Care Committee for the opportunity to respond to the Bill and look forward to viewing its development through the next stage.

For further information contact:

Dr Rachel Iredale, Director, Cancer Support, Tenovus. Tel: 029 20768797

Ms Julia Yandle, Advice Services Manager, Tenovus. Tel: 029 20768785



Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA8 – Hywel Dda Health Board

Dear Sir/Madam

I enclose a reponse from Hywel Dda Health Board to the above consultation:-

Hywel Dda Health Board would support recouping any costs as a general principal to mitigate against the use of NHS money.

Karen Morris
Swyddog Rhyddid Gwybodaeth/Freedom of Information Officer
Bwrdd Iechyd Hywel Dda / Hywel Dda Health Board
Llys Myrddin / Merlins Court
Lôn Winch / Winch Lane
Hwlfordd / Haverfordwest
SA61 1SB

Rhif Phone/ Telephone: 01437 771265
Facs/Fax/ 01437 771222
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Consultation on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Marie Curie Cancer Care memorandum to the National Assembly for Wales Health and Social Care Committee

Marie Curie provides end of life palliative care across Wales. This care is provided in two settings; our hospice in Penarth and in the community.

Approximately 75% of the patients cared for by our community based nursing service have some form of cancer related life terminal illness whilst the figure is around 90% for those cared for in a hospice environment.

In the year 2011/12 our Community Nursing Service cared for a small number of people with asbestos related or potentially asbestos related terminal illnesses. The statistics are as follows:

Diagnosis Code	Diagnosis	Patients total	Patients attributable to asbestosis	Cost to NHS (planned care only)
C32	Larynx	4	4	£4,142
C34	Bronchus & lung*	291	7	£5,960
C45	Mesothelioma	5	5	£3,472
	Total		16	£13,574

* approx 2.5% attributable to asbestos exposure - see link below

<http://annhyg.oxfordjournals.org/content/50/1/29.full>

It is not necessarily the case that all those with cancer of the larynx were asbestos related. For the purposes of the proposed legislation however, this would not be an issue as costs would only be recovered where a causal link (and consequent payment of compensation) had been established between the disease and exposure to asbestos.

Included in the figures above are our estimates of the cost of providing Marie Curie nursing services care for these patients. This figure represents those costs that are covered by NHS Wales resources. It is important to note that (on average) half the cost of Marie Curie care is borne by NHS Wales and half by our own funds raised through charitable donations.

Marie Curie is supportive of this legislation. Of itself, it will have no impact on the care patients suffering from an asbestos related disease receive; that is

not its purpose. What it does have the potential to achieve is to release not insignificant funds back into the healthcare system in Wales. Marie Curie recognises that it is perhaps not appropriate to ring fence these funds through the legislation itself but we do think that there might be some provision in the legislation which specifically requires the government to report formally on how it has used the money and what rationale it used to reach those decisions.

Our key concern focuses on those resources that are used to support the care of people with an asbestos related disease that are generated by the Charity. Recovery of these costs does not appear to be covered by the Bill but they remain very real costs and those that could be used to provide more care should they be recoverable. As a matter of principle those costs that were recovered which were charitable funds should be returned to the charity and not to the NHS Wales funding 'pot'.

Simon Jones
Head of policy and Public Affairs, Wales

Consultation by the Welsh Assembly Health and Social Care Committee on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Response from the Association of British Insurers – 8 January 2013

The ABI is the voice of insurance, representing the general insurance, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has over 300 members, accounting for some 90% of premiums in the UK.

EXECUTIVE SUMMARY

1. The ABI recognises the motivation behind the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, 'the Bill', as the desire to help sufferers from asbestos-related diseases. This is a vital area of responsibility for the insurance industry and the ABI, working with central and devolved government departments, medical research bodies and other stakeholders, has developed a comprehensive package of proposals to help these sufferers across the UK, including in Wales. These proposals include funding research into care and cure of asbestos-related disease; raising awareness of asbestos exposure in the home and at work; reform to the legal system so that claims for compensation can be settled quicker; improved tracing of insurers to pay claims where employers have gone out of business; and a levy of £30-35m a year on insurers to provide financial support to sufferers of mesothelioma, the most serious asbestos-related disease, who have been exposed at work but cannot find an employer or insurer to claim from.
2. These proposals are currently being implemented and we expect them to be in place and helping mesothelioma sufferers in Wales and the rest of the UK by 2014. While the UK Department for Work and Pensions and Ministry of Justice are leading on a number of the reforms, we are committed to working closely with the devolved administrations on the proposals, and we are also meeting with Scottish and Northern Irish government officials to determine how they will be implemented in those jurisdictions. We would welcome the Health and Social Care Committee's engagement with our proposals and its help in shaping them for Welsh sufferers.
3. Against this background of wider reform, we do not view this Bill, which is also aimed at helping asbestos-related disease sufferers, to be necessary. We also believe that the provisions included in the Bill, to extend recovery of NHS costs which exist for injury cases to asbestos-related diseases, are not practical or proportionate. Disease claims are by nature more complex than injury claims, with comorbidities, unclear diagnoses and difficulty identifying treatment received. The UK Department of Health and the Northern Ireland Executive both concluded that the potential benefit of recovery of charges for disease claims were outweighed by these practical issues, and by the additional burden that would be placed on health service information systems. The costs and administrative burdens borne by health bodies to recover asbestos-related disease charges incurred by the NHS are likely to outweigh the estimated £2m per annum of benefits.
4. The Bill also imposes a new cost for each asbestos-related disease claim on compensators, including insurers, employers and the Welsh and UK Governments. Insurers would not have accounted for this additional cost when writing insurance cover decades ago, and will have to look to recoup the cost from current policyholders. While

the Welsh Assembly has competency over health issues, we do not believe that such modification of insurance policies falls within its competency.

RESPONSE TO CONSULTATION QUESTIONS

General

Q1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer.

The Bill is not necessary

5. We do not think there is a need for this Bill. The purpose of the Bill as stated in the Explanatory Memorandum is to resource 'the provision of services to asbestos victims and their families' (Explanatory Memorandum pt 40). However, as discussed above, there is already a package of proposals to help sufferers from asbestos-related diseases which will be rolled out across the UK by 2014.
6. The ABI has developed this package of proposals to help asbestos-related sufferers over several years, and in conjunction with government departments, medical research bodies and other stakeholders. The proposals are mainly aimed at sufferers of mesothelioma, an aggressive cancer of the lining of the lung which is almost always caused by asbestos exposure and is always fatal, usually within one or two years of diagnosis; but the proposals will also help sufferers of other asbestos-related diseases. The proposals include:
 - More coherent medical research on asbestos-related diseases, both on finding a cure for mesothelioma, and providing palliative care to ease sufferers' pain. Over the last three years, insurers have donated £3m to the British Lung Foundation research programme.¹ This has allowed them to undertake a variety of projects including the establishment of the first UK mesothelioma tissue bank and research into the genetic make-up of mesothelioma cells, and as a result of work already completed scientists are hopeful of a breakthrough on a cure for mesothelioma in the next decade. BLF has also been able to fund research into improving palliative care provision.
 - Raising awareness of asbestos exposure in the home and at work. Previously the HSE has run awareness raising campaigns on the danger of disturbing asbestos, but the funding stream for this has now been removed. Using insurers' funding over the last three years, BLF has run a 'Take Five and Stay Alive' campaign aimed at those considered at highest risk of exposure - DIY enthusiasts, and tradespeople like plumbers and electricians. The campaigns have had a good penetration rate with lots of people accessing the BLF microsite www.take5andstayalive.com.
 - Reform to the legal system for mesothelioma compensation so that claims can be settled quicker. Mesothelioma cases can be complex and we would always recommend that the sufferer use a claimant lawyer to help them through the legal process. However, too many claims go through a court process, and we believe a pre-action protocol specific to mesothelioma would ensure both sides exchange the required information and within set timescales that would allow the claim to

¹ www.blf.org.uk/Files/f00b4bf2-de60.../Changing-Lives-2011-12v3.pdf

settle pre-litigation. The Ministry of Justice has committed to consulting on a mesothelioma pre-action protocol in spring 2013.²

- Help for claimants whose employers have gone out of business and who need to find an insurer to claim against. In April 2011 the insurance industry set up the Employers' Liability Tracing Office (ELTO) to help all personal injury claimants find an insurer where their employer no longer existed. So far ELTO has a membership of 99% of relevant insurers, has built a database of over 8 million EL policies, and has demonstrated a marked improvement in finding policies for claimants.³ Over the next year we will be introducing further improvements including a committee to analyse evidence of a policy provided by claimants themselves.
- A fund to pay mesothelioma sufferers who have been exposed at work but cannot find a compensator to claim from. A levy on all EL insurers in the UK will provide £30-35m a year to around 200-300 claimants facing this terrible disease who would not otherwise receive financial support. The Department for Work and Pensions has undertaken to introduce legislation to underpin this proposal in 2013.⁴

The Bill is not practical or proportionate

7. The Bill proposes extending the system of recovery of NHS charges to include asbestos-related diseases. Under this system, where a person pays compensation for an injury caused to another person, the first person is liable to make a payment to the Secretary of State for the cost of providing the second person with NHS hospital treatment and ambulance services. Currently costs are recoverable for road traffic accidents⁵ and all other injuries⁶, but not for standalone disease cases.
8. The system of recovery of NHS charges was originally proposed by the Law Commission in the 1990s. The Law Commission consulted⁷ on recovery of costs for all injuries, and also for standalone disease cases. The resulting Law Commission report⁸ stated that, while in principle there should not be a reason to distinguish between recoveries for different types of claim, this should be subject to a cost-benefit analysis.⁹ In 2002, the UK Department of Health consulted on the extension of recovery of costs to personal injury cases, and proposed¹⁰ that disease cases should not be included because overcoming the number of practical issues would outweigh the potential benefits. The Northern Ireland Department of Health, Social Services and Public Safety came to the same conclusion when they consulted on this issue in 2003¹¹.

² http://www.parliament.uk/documents/commons-vote-office/December_2012/18-12-12/17.Justice-Reformsformesotheliomaclaims.pdf

³ http://www.elto.org.uk/Documents/ELTO_12_Month_Report_ISSUE.pdf

⁴ <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120725-wms0001.htm>

⁵ Road Traffic (NHS Charges) Act 1999

⁶ Health and Social Care (Community Health and Standards) Act 2003

⁷ Damages for Personal Injury: Medical, Nursing and Other Expenses (Consultation Paper) [1996] EWLC C144 (15 January 1996)

⁸ Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (Report) [1999] EWLC 262 (November 1999)

⁹ Ibid at pt 8.2

¹⁰ The Recovery of NHS Costs in Cases Involving Personal Injury Compensation: Consultation Summary of Outcome, Department of Health, September 2003

¹¹ The Recovery of NHS Costs in Cases Involving Personal Injury Compensation: Consultation, NI Department of Health, Social Services and Public Safety, 2003

9. The practical issues that arise in recovery for disease cases rather than injury cases include:
- the profile of health services costs for disease cases may be weighted towards the period after compensation has been paid and will therefore not be recovered;
 - many of the costs are likely to occur within the primary care sector and, as indicated in the last paragraph, are not proposed for recovery;
 - there may be practical difficulties in identifying the treatment received at hospital especially if treatment has been largely outpatient based;
 - because of the time period involved there may well be comorbidities, i.e. the patient may be being treated for more than one illness at the same time;
 - the point of diagnosis may not be clear cut and costly investigations may be needed to establish a diagnosis.
10. The Explanatory Memorandum recognises that differences exist between injury and disease cases that could cause difficulties (Explanatory Memorandum pt 37). For example, more coordination would be needed between the diverse health bodies involved in disease cases, and the complex packages of care involved may make the identification of costs difficult. The Explanatory Memorandum seems to suggest that, because of the diverse health bodies involved, it will be difficult to pay the recovered charges back to the hospital or ambulance trust that provided the treatment as happens with injury cases – an approach that it considers ‘too prescriptive’ for the purposes of the Bill (Explanatory Memorandum pt 40). However, the proposed solution of returning the recovered charges back to Welsh Ministers rather than to the health bodies does not guarantee help to asbestos-related claimants and creates further complexity – see the answer to Questions 2 and 5 below.
11. The practical difficulties and likely higher administrative cost of recovering charges for disease claims, combined with the small number of disease claims compared to injury claims, renders the provisions of the Bill disproportionate. According to the Explanatory Memorandum, recovery of costs for injury cases came to £13.5m in Wales in 2011-12 (Explanatory Memorandum pt 36). The Regulatory Impact Assessment does not sufficiently explore the costs and administrative burdens involved in the recovery of asbestos-related disease NHS charges (see answer to Question 8) but it is likely that they will outweigh the estimated benefits of £2m per annum for these cases (Explanatory Memorandum pt 30).

The Bill imposes a retrospective cost on compensators, including Welsh Government

12. The Bill creates a new part of a claim made against a compensator to return costs incurred by NHS bodies. As this element of the claim was not known at the time of the insurers underwriting the cover decades ago, the insurers would not have accounted for this in the pricing of the policy or in the reserves set for paying claims. Therefore it is a retrospective cost imposed after the policy was written. This is in contrast to road traffic claims where pricing of current motor policies reflects the cost of payments to the NHS. Additionally the Bill seeks to impose this cost not just after the policy was written and the pricing agreed but also after the insured event has occurred as well. Under the policies the insured event is the exposure to asbestos which will always have taken place many years before the diagnosis of the sufferer and the incurring of costs by the Welsh NHS. In the absence of reserves for an unforeseen head of loss, this cost is likely to be met by insurers through revenue at increased cost to Welsh businesses.

13. As a consequence of the Bill both the Welsh and UK Governments will also face additional costs as they are both compensators in their own right. Their costs will increase in the same way that insurers' costs will increase. There is no attempt in the Regulatory Impact Assessment to estimate this increase in cost or to suggest how it will be funded.

Q2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

14. We do not think the Bill delivers the objectives of reducing the financial burden on the NHS, or of helping to support asbestos-related disease claimants.
15. The Bill will not reduce the financial burden on the NHS, but instead proposes to use the funds raised to provide additional support asbestos related sufferers. As the Explanatory Memorandum recognises, returning the costs to the particular health bodies in which the costs were incurred is not practicable (see reasons listed under point 9 above). The Bill does not propose to do so, and therefore does not actually reduce the financial burden borne by these bodies.
16. The Bill does not give concrete details of how the monies raised will help support asbestos related sufferers, but proposes the recovered sums be retained by Welsh Ministers to allocate resources as they see fit (Explanatory Memorandum pt 40). Without a detailed explanation of how these monies will be attributed, there is no guarantee that this Bill will achieve material and sustainable outcomes for these sufferers as it is dependent on where Welsh Ministers allocate the monies year on year. Without an explicit commitment of funds raised to particular health funding, this Bill is, in effect, a hypothecated tax on insurers - see answer to Question 6 below.
17. Moreover, the Explanatory Memorandum states that monies will be diverted to care of asbestos-related claimants (point 40). However, care and treatment costs – including nursing, hospice care and support and counselling for families – is already covered in asbestos sufferers' compensation payments, so it is unclear what the monies could be used for, to help sufferers over and above that which is already covered within a settlement.

Q3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales? If not, what changes need to be made to the Bill?

17. We do not think that recovery of costs for disease cases is practicable, therefore we do not think the Bill as it stands, or an amended Bill, can effectively introduce a regime to allow the recovery of costs.

Q4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

18. The Bill will have an impact on the following organisations:
- Health bodies will have the added administrative responsibility for tracking where the costs are incurred;
 - Claimants may be required to provide more information to health services at a difficult time;

- Insurers will bear the cost of the creation of a new head of damage for each asbestos-related disease claim. Insurers will need to reserve sufficient capital now to cover this extra cost on each claim, for the next 40 years. Further work is required in the Regulatory Impact Assessment to estimate these costs;
- Other compensators, such as Welsh and UK Governments and self-insured businesses will face increased costs;
- Employers would ultimately bear the cost of any significant impact on insurers.

Q5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

19. For the reasons set out in answer to Question 6, provisions of the Bill do not fall within the competence of the National Assembly for Wales. While the Explanatory Memorandum argues that the Bill relates to health service funding (pt 4), the Bill provides for no particular application of the funds recovered and as such, represents a provision merely raising a hypothecated tax from insurers. This is therefore a bill which has financial services, and more specifically, insurance as its target and effect and, as such, is outside the competence of the Welsh Assembly by virtue of the exceptions set out in Part 1 of Schedule 7 of the Government of Wales Act 2006. Accordingly, any Act which was based on this Bill would not be law pursuant to section 108(2) of that Act, might face legal challenge and could not be implemented or enforced. Similar barriers might arise from Human Rights challenges to the Bill.

Q6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?

20. We believe the Bill falls outside of the Welsh Assembly's competence because in essence it is a financial services Bill rather than a health Bill.
- Under s108(7) of the Wales Act 2006, a provision of an Act is within the Assembly's competence if 'it relates to one or more of the subjects' for which the Assembly has jurisdiction. If this Bill related to funding arrangements for the treatment of illnesses in might be within the Assembly's legislative competence.
 - This Bill does not relate to "health and health services" or to the "organisation and funding of the NHS" as the moneys raised are free to be applied by Welsh ministers as they see fit. The effect of the Bill is therefore to raise a hypothecated tax to which no specific purpose is ascribed. See answer to Question 5 above.
 - Even if the funds recovered by the Bill were to be applied to the funding of treatment of the diseases in question, the Assembly's competence to make each provision must be assessed by reference to "the purpose of the provision having regard... to its effect in all the circumstances" - section 108(7).
 - Case law establishes that legislative competence exists for a particular provision if it has a devolved topic as its 'pith and substance' i.e. not just as its tangential purpose or effect.
 - Clause 15 does not relate to funding of the NHS or treatment of diseases either directly or tangentially. The pith and substance of clause 15 is to modify the scope of insurance policies to include a new head of claim with no direct link to NHS funding or treatment of disease.

- Clause 15 instead relates to “financial services... including insurance” which is an exception to the Assembly’s legislative competence set out in paragraph 4 of Schedule 7 of the Wales Act 2006.
- The provisions of clause 15 cannot be said to be “incidental to or consequential on” other competent matters in the Bill as such must be “*the kind of minor modifications which are obviously necessary to give effect to a piece of devolved legislation, but which raises no separate issue of principle*” (Lord Neuberger in *Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53). The extension to the scope of insurance policies provided by this proposed clause raises an entirely new and separate question of principle.
- In purporting to amend the scope of insurance policies issued before, as well as those issued after, the effective date of the legislation the Bill interferes with insurers’ peaceful enjoyment of their positions contrary to Article 1 of the first protocol of the Convention of Human Rights and is thereby excluded pursuant to section 108(6) of the Welsh Act 2006.
- Moreover, the Bill proposes to extend this modification to past policies, which may impact on insurers’ A1P1 right under the European Convention on Human Rights. This right protects the peaceful enjoyment of possessions against interference, in this case insurers’ reserves, unless that interference is justified. Justification of the interference hinges on whether it is in the public interest and is proportionate. We believe the interference contemplated by the Bill is disproportionate for the reasons set out above.

Powers to make subordinate legislation

Q7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

21. For the reasons set out in our answers to Questions 5 and 6, any power to make subordinate legislation on an issue which has not been devolved to the Welsh Assembly is not within the competence of that institution.

Financial Implications

Q8. What are your views on the financial implications of the Bill?

In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

22. There are many financial implications of the Bill, both for the public and private sectors. We find the Regulatory Impact Assessment to be lacking in the following areas:

- It is proposed that NHS charges be recovered for all asbestos diseases (mesothelioma, lung cancer, pleural thickening, and asbestosis) - yet initial costings for the proposals have been based only on a review of 11 mesothelioma cases. The three other asbestos diseases, all with varying treatments and timescales, must also be taken into account.

- The administrative costs on NHS bodies and feasibility of recovery also need to be assessed, taking into account comorbidities, date of diagnosis issues and treatment across health trusts.
- As noted above, businesses without insurance or who are unable to trace a relevant insurance policy would have to bear the costs of this new head of damage themselves; with potentially significant, unforeseen and therefore unplanned for financial impact on their business operations.
- The impact on Welsh public bodies needs to be assessed, including hospitals, health boards, and schools as liable employers in asbestos cases. The NHS historically has not used commercial insurers for employers liability cover, instead running its own scheme; which means meeting the cost of claims comes from their own budgets. In addition, schools usually obtain cover via that purchased by their local authority, which tends to involve a deductible arrangement, where the school will also retain a financial interest in claims.
- Under the existing Compensation Recovery Unit (CRU) process, most costs in RTA cases are "front loaded" in the period immediately after the incident. However, the reverse tends to apply in asbestos cases, where it may not be possible at the outset of an asbestos claim to identify and report that treatment has been received and where it was administered. A new process to report this later and/or for CRU to specifically question a claimant/compensator would therefore be necessary.
- Also under the existing CRU process, 'Certificates of Charges' (which detail the NHS treatment incurred for each case) are only valid for a finite period of time. If the claim does not settle in that period, a new Certificate has to be requested. Under the Bill's proposals, applicable NHS health authorities in Wales would therefore need to be able to resource the re-visiting of patient notes at regular intervals, so as to update Certificates; which require review and amendment throughout the lifetime of a claim. More so than for the usually "front loaded" RTA cases, treatment and therefore costs for asbestos cases will be on-going in this period. This needs to be taken into account in the Bill's cost and benefit analysis.
- The potential costs of appeals in the CRU process should also be taken into account in the cost-benefit analysis for the Bill. Following settlement of damages and payment of the Certificate, a Compensator may issue an Appeal. This ranges from arguing errors in calculation and/or that charges billed relate to treatment for co-morbid or unrelated conditions. The Appeal process is "free", in that no charge is payable to make an Appeal. The appeals will require technical consideration if they are to be properly adjudicated, which will result in increased work and expense for CRU and Welsh health authorities. Successful appeals result in reimbursement of sums to the Compensator by CRU.
- The Bill's cost-benefit assessment should also consider wider reforms taking place which will have implications for asbestos-related disease sufferers in Wales. For example, the introduction of a mesothelioma 'pre-action protocol' is planned to be in place in 2014; which will reduce the settlement times of cases, and therefore reduce the costs potentially recoverable by health bodies.

Other comments

Q9. Are there any other comments you wish to make about specific sections of the Bill?

23. No.



Bwrdd Iechyd
Aneurin Bevan
Health Board

Ref: AG/GR/sm

Direct Line: 01633 435958

7th January 2012

Mark Drakeford AM
Cardiff Bay
Cardiff
CF99 1NA

Dear Dr Drakeford,

Many thanks for inviting comments on this consultation. I note PHW are not included on the list of consultees so my Director of Public Health Dr Gill Richardson has assisted in this response. Please find our views summarised below.

Q1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer.

A1. We believe that a bill to recover NHS costs from the industry may be valuable if the means to implement it were given due consideration. Many companies will have ceased to exist in the long content period of 20 – 35 years that it would take for an individual to develop an asbestos related condition. Thought must also be given to general conditions that may be excavated by any dust (e.g. asthma) and asbestos specific conditions which we believe you are mainly concerned with.

Q2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

A2. Yes

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Bwrdd Iechyd Aneurin Bevan yw enw gweithredol Bwrdd Iechyd Lleol Aneurin Bevan
Aneurin Bevan Health Board is the operational name of Aneurin Bevan Local Health Board

Q3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos related diseases in Wales? If not, what changes need to be made to the Bill?

A3. Yes, but attention will need to be given as the situations where local authorities and Health Boards may themselves be approached for costs e.g. from facilities and estate workers. In theory a Health Board could be claiming expenses from itself.

Q4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

A4. Health Boards do not currently attempt to recover costs from occupational industries for asbestos, coal or other material used in industry.

Q5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

A5. The main barrier to implementation will be the absence for a responsible employer due to the time lag from exposure to diagnosis. Also consideration must be given to these any identified as an incidental finding at post mortem.

Q6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?

A6. We believe it does.

Q7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

A7. Detailed legal guidance is best sense on this but the concept seems to make good sense from our point of view.

Q8. What are your views on the financial implications of the Bill?

In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

A8. The estimates on cost retrieval are probably optimistic for the reasons outlined above.

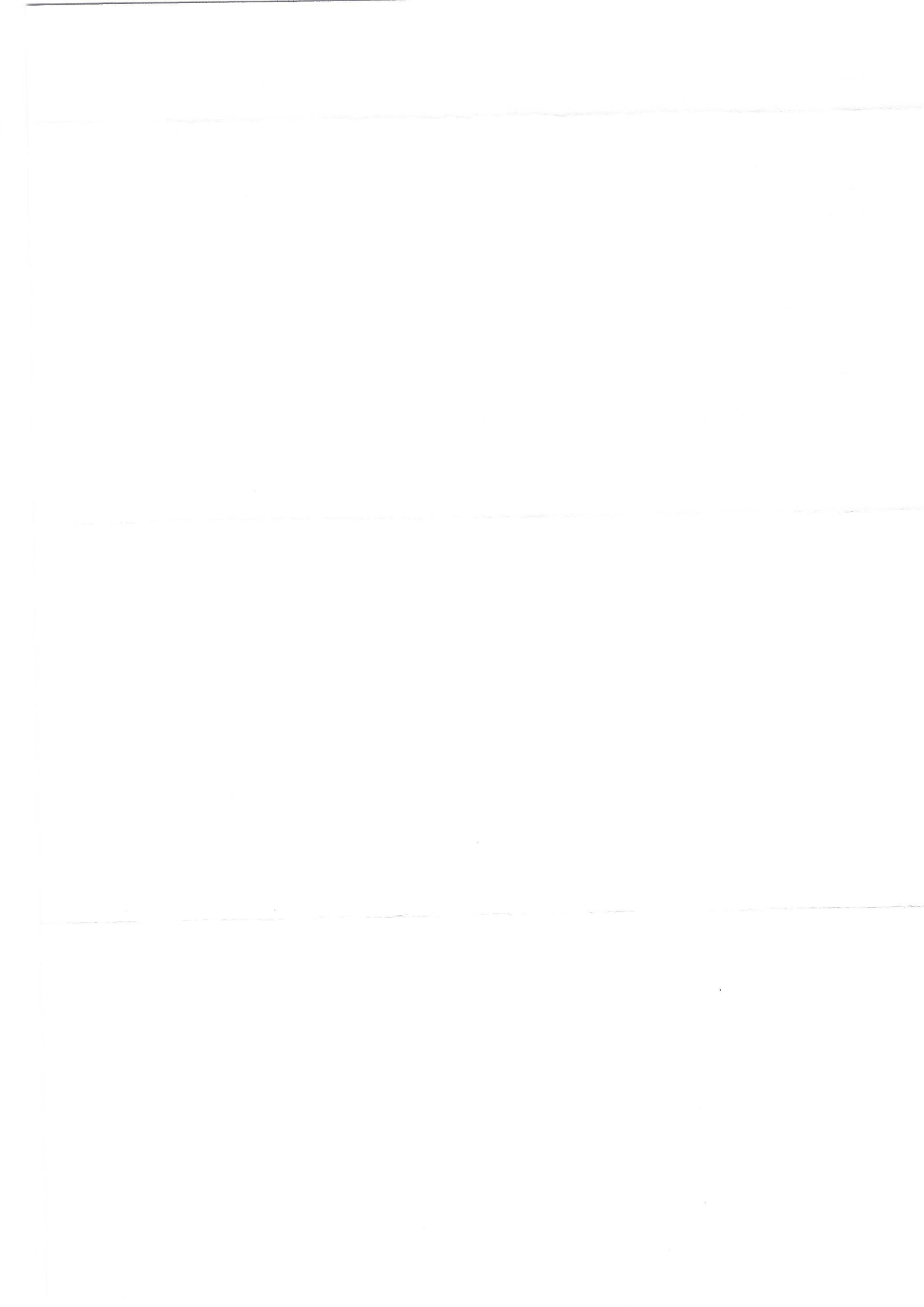
Other Comments

The only other comments we would offer would be that the Bill would set a procedure for other occupational specific diseases and that some such as these related to zoonoses e.g. farming sector fall into categories of employer that would be unable to survive. Compensation claims should the procedure be applied wider.

Yours Sincerely



Dr Andrew Goodall
Prif Weithredwr/ Chief Executive
Bwrdd Iechyd Aneurin Bevan/ Aneurin Bevan Health Board



Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA12 – Forum of Insurance Lawyers



Informing Progress - Shaping the Future

Written submission to the National
Assembly of Wales, Health and Social
Care Committee, on the Recovery of
Medical Costs for Asbestos Diseases
(Wales) Bill from the Forum of
Insurance Lawyers.

January 2013



Informing Progress - Shaping the Future

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This written submission has been drafted following consultation with the membership.

Any enquiries in respect of this response should be addressed initially to:

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Written submission to the National Assembly of Wales, Health and Social Care Committee, on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill from the Forum of Insurance Lawyers.

1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer.

The cost of NHS treatment for asbestos related disease is not recovered elsewhere in the UK. Specific and detailed consideration was to given to the question of whether NHS charges for disease claims should be included within the provisions of the Health and Social Care Community Health and Standards Act 2003, which extended the recovery of NHS charges to EL and PL claims as well as road traffic claims. It was concluded that disease claims should be excluded, for a number of reasons (see further Q5 below).

It is unclear to FOIL on what basis it could be said there is a need in Wales (as distinct from elsewhere in the UK) to recover NHS charges for asbestos related disease (as distinct from other types of disease).

2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

In general terms, the Bill appears to achieve the stated objective of recovering NHS charges for asbestos related disease (though it is unclear how these funds will be used). Whether that stated objective can be achieved in practice remains to be seen. (For the reasons set out in the answer to Q5, we foresee that the costs of administering any such scheme may outweigh the benefits).

For example, significant emphasis is placed on the treatment of mesothelioma. It is the stated aim of insurers and government departments, who are expected to pay the NHS charges, wherever possible to settle mesothelioma claims at the earliest juncture to ensure that victims are compensated as soon as possible. It is FOIL's understanding from the terms of the Bill, and the existing NHS charges recovery regime, that recovery will be limited to charges incurred to the date of

settlement of a claim. It is unclear what actual recovery is expected to be made in the majority of such claims.

3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales? If not, what changes need to be made to the Bill?

See Q2

4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

It is possible that compensators will seek to identify Welsh claimants and expedite settlement of their claims, to minimise exposure to recovery of NHS charges. Such behaviour would obviously benefit the individuals to the possible detriment of non-Welsh Claimants.

Companies, State bodies and local authorities with legacy liabilities but no (or incomplete) relevant historic EL insurance cover will need to make provision for the additional liability.

It is possible more claims will be fought, where there is an issue over the correct diagnosis and attribution of the disease to asbestos exposure.

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

FOIL foresees practical difficulties. In terms of disease claims generally:

- the profile of NHS costs may be weighted towards the period after compensation has been paid and will, therefore, not be recovered;
- many of the costs are likely to occur within the primary care sector and will, therefore, not be recovered;
- there may be practical difficulties in identifying the treatment received at hospital especially if treatment has been largely out-patient based;

- because of the time period involved there may well be co-morbidity, i.e. the patient may be being treated for more than one illness at the same time;
- the point of diagnosis may not be clear cut and costly investigations may be needed to establish a diagnosis.

As regards the specific conditions:

Mesothelioma

- Date of settlement is likely to mean limited recovery in the majority of claims.
- There may be some dispute as to date of onset of symptoms and thus what treatment should be included.

Lung cancer

- Lung cancer would give rise to major issues of causation where the claimant is a smoker (as the great majority are) and/or exposure to airborne asbestos fibres is other than heavy.
- If a simple test is applied - has the defendant made a payment? - the potential liability for large NHS charges being added to the claim might discourage settlement of some claims and result in causation being fought more frequently.

Asbestosis

- Asbestosis is indistinguishable from Idiopathic Pulmonary Fibrosis clinically.
- Diagnosis is usually made by reference to an individual's account of historic exposure to airborne asbestos fibres, which is usually unsupported.
- The cost of treatment is unclear from the Explanatory Notes but is likely to be modest in comparison to malignant conditions

Diffuse pleural thickening

- DPT may be more easily diagnosed clinically as asbestos related but not always.
- Again, the cost of treatment is unclear but is likely to be modest in comparison to malignant conditions.

In light of the above, and the fact that a significant number of cases are likely to involve the State as compensator, the cost of implicating and administering the scheme may outweigh any benefits. There may well be increased legal fees incurred in the challenges which are likely to arise in relation to causation and what treatment relates to asbestos and other conditions. The Bill should not affect the compensation which is paid to victims in terms of amount.

6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales.

FOIL believes that the Bill may be open to challenge as incompatible with Article 1 of Protocol 1 to the European Convention on Human Rights. The recent challenge to the Scottish Damages (Asbestos Related Conditions) Act failed because the Act altered the definition of injury. This Bill envisages a retroactive creation of a new liability to a third party. These are matters upon which the Welsh Government would have to take legal advice and then publish that advice. It would certainly make sense for that to be done at an early stage.

However, as FOIL's expertise lies primarily in the areas of common law and insurance law, as opposed to public law, it does not seek to proffer an expert view.

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

FOIL does not proffer an expert view.

8. What are your views on the financial implications of the Bill?

It appears that the "Estimate of Costs and benefits" assumes a full recovery of the cost of treatment of mesothelioma. It is unclear what consideration has been given to the driver for early settlement of such claims, and the impact of early settlement on the amount of recoverable charges.

Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA13 – Lyons Davidson Industrial Disease Group

Response to Consultation Questions

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The views expressed in this response are my own gained from my experience over several years dealing solely with claims on behalf of individuals affected by asbestos related diseases and their families.

1. I agree that there is a need for a Bill to allow recovery of costs of NHS treatment for asbestos related diseases in Wales. This is an innovative step taken by the Welsh Ministers. Following the case of *Drake -v- Foster Wheeler* [2010] EWHC 2004, I have included several successful claims for contributions towards Hospice care on behalf of the families of mesothelioma victims. This has secured thousands of pounds for Hospices who otherwise rely on raising their own funds. In the same way the costs of NHS care should be repaid by the "polluting" party which will provide valuable resources for the Welsh Government to support the sufferers of asbestos related diseases and invest in research. In my experience the families of the bereaved will also take comfort from the fact that the monies are recovered and used to help others.
2. I think the Bill does deliver the stated objectives as set out in the Explanatory Memorandum particularly with regard to patients suffering from mesothelioma. I think it may be more difficult to deliver the objectives for non malignant asbestos related diseases such as pleural thickening particularly where the patient is suffering from other conditions.
3. My concern would be the time it would take to obtain the NHS certificate of costs but the cost of this administrative process has been built into the planning notes. I have experienced delayed responses from finance departments at Hospices who are unused to requests for statements of the costs of their care which has from time to time held claims up for a short period. Admittedly the procedure outlined in the Bill should not hold up settlement of a civil claim for damages as the onus appears to be on the paying Defendant party to account to the Welsh Ministers for the cost and takes place post settlement of claims.
4. The Bill should not affect the Claimant solicitor process as the recovery process of costs takes place post settlement. However paying Defendant parties will have to also take into account the costs of the NHS care as an additional cost alongside compensation and other related costs of the claim.
5. I do not foresee any barriers to implementing the provisions save for objections from the paying parties because of the additional cost.
6. My view is that this is an innovative and impressive use by Welsh Ministers of the legislative competence of the National Assembly for Wales.
7. The Welsh Ministers have to be able to retain sufficient powers to make subordinate legislation to ensure that the Bill can become a useful and workable vehicle for change.
8. I believe the costs of introducing the Bill are justified. Given the estimate of approximately 80 mesothelioma claims successfully being brought in Wales, if the average cost to the NHS for each

patient is approximately £25,361 then the gross annual recovery would be £2.3 million so the comparative administrative costs of introducing this new scheme is worthwhile.

9. My view is that this will be easiest to introduce insofar as patients suffering from mesothelioma are concerned. As outlined in the explanatory notes many cases of asbestos related lung cancer remain undiagnosed. Further complications may be caused by asbestos related pleural thickening where provisional damages are awarded but presumably the medical certificate cost will be triggered at the date of settlement. It makes sense for the Department for Work and Pensions to contact the appropriate NHS Finance Board to alert them to the fact that a medical certificate needs to be produced. As already noted there may be delay caused by the fact that costs might have been produced by more than one NHS Board.

Insofar as claims are concerned, paying Defendants should be reassured by the fact that the costs of Claimant's solicitors should not be increased by the introduction of these measures.

I would be interested to have more information about how the Welsh Ministers propose to use the funds.

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Y Pwyllgor Iechyd a Gofal Cymdeithasol
Bil Adennill Costau Meddygol ar gyfer Clefydau Asbestos (Cymru)
RMCA14 – Lesley Griffiths AC, Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol

Y Pwyllgor Iechyd a Gofal Cymdeithasol

Ystyriaeth Cyfnod 1 o'r Bil Adennill Costau Meddygol ar gyfer Clefydau Asbestos (Cymru) – Mick Antoniw AC – Bil Aelod

Tystiolaeth Ysgrifenedig gan y Gweinidog Iechyd a Gwasanaethau Cymdeithasol

Cwestiynau'r ymgynghoriad

Cyffredinol

1. A oes angen Bil i'w gwneud yn bosibl adennill costau triniaeth y GIG ar gyfer clefydau sy'n ymwneud ag asbestos yng Nghymru?

Byddai'r Bil yn galluogi Gweinidogion Cymru i adennill y costau y mae'n rhaid i gyrff y GIG yng Nghymru eu talu wrth ofalu am bobl sy'n dioddef o glefydau sy'n gysylltiedig ag asbestos a'u trin, a darparu bod yr arian sy'n cael ei adennill yn cael ei ddefnyddio i ofalu am ddiodefwyr a'u trin. Ar hyn o bryd, nid oes unrhyw sail ddeddfwriaethol i Weinidogion Cymru adennill y costau hyn. Credaf ei bod yn briodol i'r rheini sy'n gyfrifol am y cysylltiad ag asbestos orfod cyfrannu at ofal a thriniaeth diodefwyr, yn hytrach na bod pwrs y wlad yn gorfod talu'r holl gostau hyn, ac rwyf o'r farn bod y Bil yn cyflawni hyn mewn modd cymesur a chyfiawn.

2. A ydych yn credu bod y Bil, fel y'i drafftwyd, yn cyflawni'r amcanion sydd wedi'u nodi yn y Memorandwm Esboniadol?

Rwy'n fodlon bod y Bil fel y'i drafftwyd yn cyflawni prif amcanion yr Aelod sy'n gyfrifol amdano. Wrth gwrs, bydd hi'n ddiddorol clywed barn y Pwyllgor ac eraill ar sut y gellir ei wella.

3. A yw adrannau'r Bil yn briodol o ran cyflwyno cyfundrefn i'w gwneud yn bosibl adennill costau triniaeth y GIG ar gyfer clefydau sy'n ymwneud ag asbestos yng Nghymru? Os nad ydynt, pa newidiadau y mae angen eu gwneud i'r Bil?

Mae'r Llywodraeth yn fodlon bod adrannau'r Bil a'r pwerau sydd ynddynt i greu is-ddeddfwriaeth yn briodol i alluogi'r cynllun adennill costau arfaethedig i weithredu. Os bydd y Cynulliad yn pasio'r Bil, mae Gweinidogion Cymru yn bwriadu ymgynghori, maes o law, ar yr is-ddeddfwriaeth sydd ei hangen i weithredu cynllun i adennill y costau perthnasol. Bydd hi'n bwysig sicrhau bod unrhyw gynllun arfaethedig yn adennill y costau'n effeithiol gyda chyn lleied o wariant gweinyddol â phosibl.

4. Sut y bydd y Bil yn newid yr hyn y mae sefydliadau yn ei wneud ar hyn o bryd, a pha effaith y bydd newidiadau o'r fath yn ei chael, os o gwbl?

Yn fras, byddai'r Bil yn ymestyn, mewn perthynas â thriniaeth a ddarperir gan, neu ar ran, y GIG yng Nghymru, darpariaethau tebyg i rai Deddf Iechyd a Gofal Cymdeithasol (Iechyd Cymunedol a Safonau) 2003 sy'n berthnasol i achosion anafiadau personol, i ddiodefwyr clefydau cysylltiedig ag asbestos. Felly mae gan sefydliadau (yn arbennig, Byrddau Iechyd Lleol ac Ymddiriedolaethau'r GIG yng Nghymru) beth profiad o weithredu cynllun tebyg i'r

un a ragwelir gan y Bil. Mae'r Memorandwm Esboniadol yn rhoi asesiad o'r effaith ar y gwahanol sectorau dan sylw.

Ni ragwelir y bydd angen i Fyrddau Iechyd Lleol ac Ymddiriedolaethau'r GIG ddatblygu a gweithredu trefniadau sylweddol newydd er mwyn darparu gwybodaeth i gefnogi'r cynllun adennill costau. Fodd bynnag, bydd angen rhywfaint o waith datblygu yn y cyfnod pontio. Mae'r Memorandwm Esboniadol yn trafod hyn.

5. Beth yw'r rhwystrau posibl i roi darpariaethau'r Bil ar waith (os ydynt yn bodoli), ac a yw'r Bil yn rhoi ystyriaeth ddigonol iddynt?

Er bod y Llywodraeth o'r farn bod y costau gweinyddol a amlinellir yn y Memorandwm Esboniadol yn amcangyfrif cywir, bydd angen gwneud mwy o waith i gael syniad gweddol bendant o gostau gweinyddu'r cynllun. Yn arbennig, bydd angen i Lywodraeth Cymru gynnal trafodaethau manwl gyda'r Uned Adfer Iawndal (yn yr Adran Gwaith a Phensiynau). Ein bwriad, yn amodol ar ewyllys y Cynulliad, yw rhoi cynllun ar waith ddechrau blwyddyn ariannol 2014-15. Mae hwn yn darged uchelgeisiol o gofio bod angen ymgynghori ar, paratoi a phasio drwy'r Senedd sawl eitem o is-ddeddfwriaeth a fydd yn sail i weithredu'r cynllun adennill costau.

6. A oes gennych farn ynghylch y modd y daw'r Bil o fewn cymhwysedd deddfwriaethol Cynulliad Cenedlaethol Cymru?

Mae'r Llywodraeth yn cytuno â'r farn ym Memorandwm Esboniadol yr Aelod Cyfrifol bod darpariaethau'r Bil yn dod o dan bennawd pwnc 9 (Iechyd a gwasanaethau iechyd) Rhan 1 Atodlen 7 Deddf Llywodraeth Cymru 2006, sy'n cynnwys yn benodol trefnu ac ariannu'r gwasanaeth iechyd gwladol. Roeddwn yn falch iawn hefyd o weld bod y Llywydd wedi cadarnhau ei barn bod y Bil o fewn cymhwysedd deddfwriaethol y Cynulliad.

Pwerau i wneud is-ddeddfwriaeth

7. Beth yw eich barn am y pwerau yn y Bil i Weinidogion Cymru wneud is-ddeddfwriaeth (hynny yw, offerynnau statudol, gan gynnwys rheoliadau, gorchmynion a chyfarwyddiadau)?

Rydym yn fodlon bod y Bil, fel y'i drafftwyd, yn rhoi pwerau i Weinidogion Cymru wneud is-ddeddfwriaeth, dim ond os yw'n briodol gwneud hynny. Y prif reswm am hyn yw er mwyn gallu gwneud darpariaeth fanwl mewn perthynas â gweithredu'r cynllun adennill costau. Rydym yn fodlon hefyd â'r gweithdrefnau arfaethedig ar gyfer y Cynulliad sy'n cyd-fynd â'r pwerau, gan eu bod yn cyd-fynd i raddau helaeth â'r canllawiau y mae'r Llywodraeth yn eu dilyn wrth ddrafftio darpariaethau.

Goblygiadau ariannol

8. Beth yw eich barn am oblygiadau ariannol y Bil?

Fel y nodir uchod, bydd angen gwaith pellach i bennu costau manylach ar gyfer y cynllun sy'n cael ei ragweld yn y Bil. Mae'r Bil yn cynnig dull seiliedig ar dariff a fydd yn galluogi Gweinidogion Cymru i weithredu'r cynllun mewn modd sy'n cadw costau gweinyddol mor isel â phosibl, a byddwn yn ceisio gweithredu'r deddfwriaeth mewn modd sy'n lleihau'r

costau o gymharu â'r costau y gallwn eu hadennill. Ar y cyfan, rwyf o'r farn bod y Bil yn gyfle i ryddhau adnoddau sylweddol a bwriedir defnyddio'r rhain i ddarparu gwasanaethau ychwanegol er budd pobl sy'n dioddef o glefydau cysylltiedig ag asbestos a'u teuluoedd.

Health and Social Care Committee

Stage 1 Consideration of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Mick Antoniw AM – Members Bill

Written Evidence from the Minister for Health and Social Services

Consultation Questions

General

1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales?

The Bill would allow the Welsh Ministers to recover costs incurred by Welsh NHS bodies in providing care and treatment to sufferers of asbestos-related diseases, and provide for funds recovered to be used for the care and treatment of victims. There is currently no other legislative basis on which these costs can be recovered by the Welsh Ministers. I believe it is appropriate for those responsible for the exposure to asbestos to be required to contribute to the care and treatment of victims, instead of the public purse having to bear all these costs, and consider the Bill achieves this in a way which is proportionate and justified

2. Do you think that the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum?

I am content the Bill as drafted, achieves the main objectives the Member in Charge has set out for it. Of course, I will be interested to hear the views of the Committee and others as to how it might be improved.

3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales. If not, what changes need to be made to the Bill?

The Government is content the sections of the Bill and the powers therein for subordinate legislation, are appropriate to enable the proposed cost recovery scheme to operate. Subject to the Assembly passing the Bill, the Welsh Ministers intend to consult, in due course, on the subordinate legislation required to give effect to a scheme to recover the relevant costs. It will be important to ensure any prospective scheme operates effectively to recoup the costs with a minimum level of administrative outlay.

4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

Broadly speaking, the Bill would extend, in respect of treatment provided by, or on behalf of, the NHS in Wales, provisions similar to those of the Health and Social Care (Community Health and Standards) Act 2003 which apply to personal injury cases, to sufferers from asbestos-related diseases. As such, organisations (in particular, Local Health Boards and NHS Trusts in Wales) have some experience of operating a very

similar scheme to that envisaged by the Bill. The Explanatory Memorandum sets out an assessment of the impact on the various sectors involved.

It is not envisaged significantly new arrangements will be required to be developed and implemented by Local Health Boards and NHS Trusts in order for them to provide information to support the cost recovery scheme. However, there will need to be some transitional development work. This is covered in the Explanatory Memorandum.

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

Although the Government considers the administrative costs outlined in the Explanatory Memorandum to be an accurate estimate, further work will be required to establish with a degree of certainty the costs associated with administering the scheme. In particular, the Welsh Government will need to enter into detailed discussions with the Compensation Recovery Unit (in the Department for Work and Pensions). Our intention, subject to the will of the Assembly, is a scheme could be implemented from the beginning of the 2014-2015 financial year. This is an ambitious target given the need to consult on, produce and progress through the Assembly, a number of items of subordinate legislation that will support the operation of the cost recovery scheme.

6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?

The Government concurs with the view put forward in the Member in Charge's Explanatory Memorandum that the provisions of the Bill fall within subject heading 9 (Health and health services) of Part 1 of Schedule 7 to the Government of Wales Act 2006, which in particular includes "organisation and funding of national health service". I was also very pleased to see the Presiding Officer has confirmed her view that the Bill is within the legislative competence of the Assembly.

Powers to make subordinate legislation

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

We are content the Bill, as drafted, provides powers for the Welsh Ministers to make subordinate legislation only where it is appropriate to do so. This is principally to allow for detailed provision to be made in relation to the operation of the cost recovery scheme. Further, we are content with the proposed Assembly procedure attached to the powers, as these broadly align to the guidelines that the Government follows when drafting provisions.

Financial Implications

8. What are your views on the financial implications of the Bill?

As stated above, further work will be required to establish more detailed costings for the scheme which the Bill envisages. The Bill proposes a tariff-based approach which will enable the Welsh Ministers to implement the scheme in such a way as to keep administrative costs to a minimum, and we will seek to implement the legislation in such a

way as to minimise the costs relative to the costs which we are able to recover. Overall I consider the Bill presents an opportunity to release significant resources which it is intended will be utilised to provide additional services for the benefit of victims of asbestos-related diseases and their families.

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: personal statement

Introduction

There are four main diseases associated with inhalation of asbestos fibres:

- Mesothelioma - a form of cancer mainly affecting the lining of the lungs
- Asbestos related lung cancer
- Asbestosis - a non-malignant scarring of the lung tissue
- Non-malignant pleural disease

There is no specific Welsh study assessing the costs associated with asbestos related diseases, with the only information available that from a study that estimated that the hospital costs of mesothelioma in UK in 2000 of £16 million¹ - and which would probably equate to £23.3 million at current prices. The study also highlighted that such estimates “are certain to be gross underestimates of the total health service costs of asbestos related illness and treatment,” given that lung cancer cases due to asbestos, other cancers linked to asbestos-exposure and other asbestos-related diseases were not included in the calculations of the cost burden.

Comment on costs and benefits appraisal of the options

1. The appraisal is a very detailed consideration of the costs and benefits and is basically technically sound, although the incorporation of variation around the estimates used would have proved to be helpful.
2. The assumption that there will be 80 cases each year for which NHS treatment costs can be recovered fails to take into account the HSE data that shows the increasing trend in mesothelioma cases until at least 2016.
3. The CRU tariffs used are those from April 2010 – as stated these are uplifted each year to reflect inflation – and would therefore increase the gross annual recovery amount.
4. The choice of a 5-year time perspective seems rather limited.
5. One aspect of the rationale for government involvement in the economy is to offset adverse effects on society resulting from what are termed externalities, where the effects of production impact on others not directly involved in that process. The repayment of costs incurred by the NHS resulting from the treatment of asbestos-related diseases – in addition to compensation paid to the sufferers – is intended to fully capture all of the costs associated with the production process.
6. However, the adoption of a societal perspective in the cost-benefit analysis may not be the most appropriate approach in this particular context.
7. The inclusion of the ‘business costs’ into the calculations, and specifically the NHS cost repayment, will make it impossible for the net present values to be positive given that the cost to businesses equates with the benefit to government. The issue in essence here is whether the additional cost borne by private sector organisations, resulting from the

¹ Watterson A, Gorman T, Malcolm C, Robinson A, Beck M. The economic costs of health service treatments for asbestos-related mesothelioma deaths. Ann NY Acad. Sci 2006; 1076: 871-881.

[Type text]

payment of compensation, will adversely affect the decision to continue with production. If there is still a net gain to the organisation from continuing with production there remains a net efficiency gain for society and should therefore be viewed accordingly.

8. However, as indicated in some cases the compensator will be public sector organisations and there will therefore be a negative impact on the Exchequer, which basically becomes a transfer between respective public sector organisations.
9. The perspective employed by NICE, for example, in their appraisal of technologies is that of the National Health Service and personal social services, while other appraisals view the evaluation from the perspective of the public purse.
10. If a partial societal perspective was employed for the cost-benefit analysis – and therefore not including the cost to employers/insurers the resultant net benefit would be positive, with net benefits gained of £7.8 million and NPVs of £6.9 million.

Ceri J. Phillips

January 2013

NAfW Health and Social
Care Committee
Consultation – Recovery
of Medical Costs for
Asbestos Diseases
(Wales) Bill



INTRODUCTION

1. The Welsh Local Government Association (WLGA) represents the 22 local authorities in Wales, and the three national park authorities, the three fire and rescue authorities, and four police authorities are associate members.
2. It seeks to provide representation to local authorities within an emerging policy framework that satisfies the key priorities of our members and delivers a broad range of services that add value to Welsh Local Government and the communities they serve.
3. The purpose of this document is to set out local government's response to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill in response to the National Assembly for Wales' Health and Social Care Committee's consultation.
4. The WLGA notes the intent behind the bill, notably to enhance the support for NHS budgets, which is estimated to have a financial impact of around £2 – £3 million for Wales per annum. Whilst the intent of the bill is laudable, it is the WLGA's view that it will result in a further cost burden for local authorities at a time of contracting available resources. As asbestos was widely used as a building material between the 1950s to the 1980s, including within public buildings such as schools, it follows that local authorities may be among the employers pursued should this Bill become law.
5. This paper will provide some background to the issues raised by the Bill from a local government viewpoint before addressing the specific consultation questions in turn.

GENERAL

6. As stated above, the intention of the Bill is laudable but it is local government's view that the proposal is likely to result in additional costs to other parts of the public sector in Wales, largely local authorities. Some in local government have questioned whether there is a conflict of interest for the NHS in this matter, in that they will be both certifying the cause and benefitting from the income. It is also likely that additional administration costs will be incurred by both the NHS and local authorities as a result of this Bill.³

7. Where there is a risk that employees may make claims against their current or previous employers, those employers generally hold Employers' Liability Insurance and this is the case with all local authorities in Wales. However, the level of protection specifically related to asbestos diseases can vary. It should also be noted that it is the insurer on cover at the time of the exposure that is liable for the costs of such claims, rather than the current insurer.
8. The pattern of claims against local authorities in Wales for Asbestos Disease is quite varied, as is the degree of protection arranged by the authorities through insurance policies. Currently, the majority of Employers' Liability insurance policies within local government will operate policy excesses of anywhere between £15,000 and £100,000. This means that for each individual claim, it is the authority itself that will bear the initial liability for costs. In some cases, the taxpayer bears approximately 50% of damages awarded for such claims.
9. The value of settlements agreed between Councils and claimants are often negotiated and based on a balance between cost avoidance of protracted legal proceedings and wishing to do the right thing by a claimant if the authority believes itself to be liable. This issue becomes more complex as greater numbers of employers are involved. It is also often the case that other employers are no longer in existence whereas local government is and is often the only organisation against which a claim can be made. Evidencing responsibility for claims that cover many years and a range of employers is difficult.
10. Most of the potential exposure would have occurred between the 1950s and the 1980s. At this time many predecessor authorities would have been insured through Municipal Mutual Insurance (MMI) which was established by a group of local authorities in 1903. Appendix 1 sets out in more detail the history and current status of MMI, but in summary the company suffered substantial losses between 1990 and 1992. In September 1992 MMI ceased to write new, or to renew, general insurance business and went into what is termed as "solvent run-off" at that time. Many local authorities were among the creditors of the company at this time and formed part of a contingent Scheme of Arrangement. In November 2012, notice was given that the Scheme of Arrangement should be triggered meaning that local authorities will be exposed to the potential for a levy and potential liability for a proportion of any future claims against MMI. If this Bill is passed it will result in a greater call on local authority resources. This brings an added complexity to the issue and a greater potential of further costs falling on local authorities.

11. It is unclear at this stage if insurers would be prepared to include the additional costs that this Bill would introduced within existing policies or whether these are based upon prevalent regulation.
12. The Bill also refers to recovery of costs associated with “pleural plaques” which currently only applies in Scotland. It should be noted that the recovery of costs associated with “pleural plaques” is not recoverable in England or Wales following the House of Lords ruling in 2007 as they are not considered to be an asbestos related disease. This means that insurers would not be liable, leaving local authorities with a potential gap in insurance cover if the Bill becomes law and thus exposed to costs which will be difficult to quantify.
- 13.
- 14.

CONSULTATION QUESTIONS

General

1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer.

No. In a number of the claims brought against Councils there is minimal exposure and the other employers have greater exposure but because the Council is still in existence and the other employers have long since ceased trading Councils have to cover the whole of the claim. Similarly then, Councils would have to pick up all of the NHS treatment costs.

2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

Whilst the bill might deliver the stated objectives local government does not agree with that objective as it will place additional burden on local government resulting in no benefit to the public purse as a whole.

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3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales? If not, what changes need to be made to the Bill?

It is important that the charges are capped. As shown the costs can vary from an average of £23,299 to the highest of £53,035 and this is on a small sample of cases. As stated in the Explanatory Memorandum asbestos related diseases can take up to 60 years to manifest and it is very difficult for defendants to investigate such claims. In many cases the relevant employer has long since ceased trading or staff needed to provide evidence are no longer available. There should be some recognition of the length of time since exposure and whether the matter can be investigated

4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

The bill will increase the amount payable by Local authorities in respect of claims. Many authorities are either self insured or have high excesses. In addition, those that were insured with MMI will also be funding a portion of the claims once the scheme of arrangement is triggered. There are also cases which may have previously been negotiated on economic grounds and settlement agreed with the claimant and this will no longer be possible as the NHS treatment costs will have a large bearing on any discussion. This will also delay settlement of such claims as they are more likely to require the courts to confirm liability.

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

It will be difficult to show that all of the NHS treatment was due to an asbestos related injury as often there are other factors involved e.g. smoking, lifestyle etc. How will the costs be apportioned? Whilst the Bill mentions a reduction in the charges if the courts reduce the damages where the victim shares responsibility, there is no mention of a reduction if other illnesses are also treated.

6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales.

None

Powers to make subordinate legislation

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?

In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

As 6 above

Financial Implications

8. What are your views on the financial implications of the Bill?

In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

This will have financial implications for Local Authorities. From the figures included within Part 2 of the Explanatory Memorandum these could be estimated at between £23,000 and £53,000 per claim, although these figures could well increase over time. It will also lead to increased insurance premiums from insurers faced with additional costs.

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Appendix 1 Municipal Mutual Insurance Limited

Municipal Mutual Insurance (MMI) is an insurance company limited by guarantee and not having a share capital, which was established by a group of local authorities and incorporated under the Companies Acts 1862 to 1900 on 13 March 1903. The Company suffered substantial losses between 1990 and 1992. These losses reduced MMI's net assets to a level below the minimum regulatory solvency requirement. In September 1992 MMI ceased to write new, or to renew, general insurance business.

Since going into run-off in September 1992 numerous business and corporate disposals have taken place including the right to seek renewal of the larger part of MMI's direct personal and commercial lines insurance business to Zurich Insurance Company along with a number of MMI's assets and many members of its staff.

The Company is subject to a contingent Scheme of Arrangement under section 425 of the Companies Act 1985 which became effective on 21 January 1994. On 13 November 2012, the directors of the Company concluded that the terms of the Scheme of Arrangement should be triggered and served notice on the Scheme Administrator and the Company to that effect. As a result, the Scheme of Arrangement was triggered and the Scheme Administrator, Gareth Hughes, has taken over the management of the business of the Company. Any queries in relation to the Scheme of Arrangement should be referred in the first instance to the Company at its registered office.

The following is an extract from the proposal for a Scheme of Arrangement between MMI and its Scheme Creditors¹

The Scheme of Arrangement affected Scheme Creditors (as defined within the Scheme documentation) as follows:

- During the Initial Scheme Period (before a Trigger Event, as described below) has occurred), all liabilities of MMI will continue to be payable in full in the ordinary course of business as and when they fall due. Insurance claims reported to MMI will be processed in the normal manner and agreed claims will be paid in full in the same way as they have in the past.
- A Trigger Event will occur if the Directors give written notice to MMI and to the Scheme Administrator that:
 - a) the Directors have concluded that, without the occurrence of a Trigger Event and the operation of the Scheme in accordance with its terms thereafter, there is no reasonable prospect that MMI will avoid going into insolvent liquidation; or
 - b) the number of Directors has fallen, and remained for seven days below two.

¹ Further detail and all related documentation can be found at http://www.mminsurace.co.uk/MMI_Website/main.html

- If a Trigger Event occurs, a Levy may be imposed on all those Scheme Creditors which since the Record Date have been paid (or are treated as having been paid) an amount or amounts in respect of Established Scheme Liabilities which, together with the amount of Elective Defence Costs (if any) paid by MMI on its behalf since the Record Date, exceed £50,000 in aggregate.
- No Levy will be imposed on any Scheme Creditor in respect of the first £50,000 paid (or treated as having been paid) since the Record Date to or on behalf of such Scheme Creditor in respect of Established Scheme Liabilities or Elective Defence Costs.
- After a Levy has first been imposed, later payments in respect of Established Scheme Liabilities due to Scheme Creditors which have been paid (or are treated as having been paid) an aggregate amount in excess of £50,000 since the Record Date in respect of Established Scheme Liabilities or Elective Defence Costs will be made at a reduced rate (the Payment Percentage) to the extent that the aggregate of such payments since the Record Date exceeds £50,000.
- All liabilities of MMI which are not Scheme Liabilities will continue to be payable in full as and when they fall due during the period after a Trigger Event has occurred (the "Levy Period"). In addition, Established Scheme Liabilities will be paid in full by MMI to those who are not Scheme Creditors.
- The rate of Levy and the Payment Percentage will be determined by the Scheme Administrator acting in consultation with a Creditors' Committee.
- The PPB has agreed to make certain reimbursements to MMI in respect of payments made by MMI to certain persons who are eligible for protection under the Policyholders Protection Act 1975.
- MMI will remain liable to repay any amount levied by MMI on Scheme Creditors or reimbursed to MMI by the PPB and to make good any reductions in payment to Scheme Creditors through the application of the Payment Percentage. If MMI has insufficient assets to repay these outstanding amounts in full after MMI has fully discharged all of its other liabilities then the payments to Scheme Creditors and the PPB will be reduced *pro rata*.
- If all of MMI's other liabilities have been paid in full then a commission of up to £70 million will be payable to the Scheme Creditors and the PPB as recompense for assuming under the Scheme the risk, in the case of Scheme Creditors, of having a Levy imposed on them and of suffering a reduction in payment of Established Scheme Liabilities (and losing the time value of money as a consequence) or, in the case of the PPB, of having to make reimbursement to MMI. Commission payments will be made in proportion to the aggregate amount of Established Scheme Liabilities paid to each Scheme Creditor since the Record Date and of sums repaid to the PPB following reimbursement by the PPB as described below.
- Any surplus assets remaining after payment in full by MMI of all liabilities, including the commission referred to above, will be distributed among the members of MMI in accordance with its Articles of Association.



Consultation on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

January 2013



The Law Society is the representative body for 150,128 solicitors in England and Wales¹. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

The Law Society plays an active role in law reform, the effective operation of legal institutions and access to justice in England and Wales. The opportunity to contribute to the scrutiny of new laws for Wales is welcomed.

Overview

We have sympathy with the aims of the Bill but, as it stands, we are not clear that it is fit for purpose. The Bill needs to be clearer about the circumstances in which it applies, the amounts that can be claimed and the purpose for which the money is used.

Response to the Consultation Questions (following numbering)

General

1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer.

We have no view on the need for this legislation

2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

The overview in the Bill explains that the Act provides for the payment of charges in respect of National Health Service ("NHS") services, a system of certification for the charges and extends insurance cover in relevant cases to cover the payment of the charges. These are the three provisions. The Explanatory Memorandum repeats this in the description of the Bill:

"The Bill's aim is to enable the Welsh Ministers to recover from a compensator,... certain costs incurred by the NHS in Wales in providing care and treatment to the victim of the asbestos-related disease."²

However, the Explanatory Memorandum (and the Bill as considered below) goes on to include a separate provision for the use of the recovered medical costs.³

For injuries falling under the Health and Social Care (Community Health and Standards) Act 2003 recovered costs are returned to that part of the NHS which provided the treatment or services in respect of the injury.

In the case of the proposed legislation the recovered costs will be "returned to the Welsh Ministers". Further, "allocation of income for the recovered costs... would be sought for the provision of services to asbestos victims and their families. Allocation of the resources recovered will cover the costs of administration of the scheme and could provide for funding for the general benefit of asbestos victims and their families, including support for palliative care and other treatment."⁴

¹ Total number of solicitors on the roll as of 31 July 2011 - Law Society Annual Statistical Report

² Explanatory Memorandum to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, para 1

³ op.cit. para 40

⁴ ibid .

The language used here is imprecise. In the first sentence of the quote it appears that the intention of the legislation is to use recovered funds "for the provision of services to asbestos victims and their families". But the following sentence is not definite: "resources recovered ... could provide for funding for the general benefit of asbestos victims and their families".

This point is important as the Bill was introduced with the clear purpose of benefitting those afflicted by asbestos-related diseases. In Plenary Mr Antoniwi said:

"...the Bill could recover costs of just over £2 million each year. It is intended that that would be used, for example, to provide additional nursing and hospice care, support and counselling for families and other medical assistance. In this way, I believe that the Bill can make a real difference to the quality of life of asbestos victims who have been so cruelly smitten by this terrible occupational disease, and also to their families"

and, later

"With regard to impact, what is important, as with any legislation, is that you are able to show that there are people within Wales who will actually benefit from it. For people who are diagnosed with a terminal disease, those benefits could include additional funding in respect of hospice care, additional support for some of the organisations that offer such good counselling and support to family members, and interesting ideas as to potential innovations to help people who have developed various asbestos-related diseases".⁵

The section in the Bill providing for the allocation of recovered medical costs appears under 'Miscellaneous'. The provision is weak and vague. If a purpose of the legislation is to retain funds at a national level to provide additional services for asbestos-related diseases then this should be a clear direction to the Welsh Ministers and the section making that provision should appear prominently. This is particularly important if treatment or services which are outside the usual NHS services, such as hospice care and funding of third parties, are envisaged.

This provision should be stated clearly in the Bill – for example by way of a duty on the minister to provide resources equivalent to the amounts raised as a result of this new law to organisations not currently funded by the NHS who provide palliative care and support to victims of these diseases. Otherwise, there is a real danger that the benefits will be lost from either the NHS budget which will be reduced by the amount that is gained or the funds could be lost within the NHS bureaucracy.

3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales? If not, what changes need to be made to the Bill?

The sections provide a workable framework for a system of recovery of medical costs but as set out within this response some areas require further clarification.

When the regulations are made the Welsh Government must satisfy itself that this law is followed.

⁵ Plenary Statement: Introduction of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: 5 December 2012

Compensation may be paid without a case formally entering the justice system if it is negotiated beforehand. How will the Welsh Government know when to pursue recovery? It is not clear how compensators and their insurers will come to know they are liable under this new Assembly Act. What publicity will be given to this law outside Wales?

The point and basis of liability is clear and the onus is placed on the liable party to apply for a 'certificate'. But there is lack of clarity over how the Welsh Government will know that the Assembly Act has been triggered. The Welsh Government won't know whether or not there is any existing litigation or settlement, but they will need to find this out and who is liable. In most cases, this will probably be straightforward because the victim / patient will tell them, but if the patient does not wish to co-operate or there is uncertainty (if the patient had worked for more than one employer, for example) what happens? If medical costs are incurred in Wales in relation to the named diseases who within the NHS will be responsible for finding out whether the victim has received any compensation? Will there be a reporting system within the NHS in Wales? Is it up to the victim to supply details of the compensator? Will they be obliged to do so?

4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

We have no view on the impact on organisations

5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

Cross-border and cross-jurisdictional issues are of concern. Questions arise such as:

Does the victim have to be resident in Wales?

Will medical costs be pursued where the victim has been treated only partly in Wales and the proportion of the overall medical costs is low compared with the costs in other cases?

Will the Act apply to situations where exposure was outside Wales? In the rest of the UK, or overseas?

Does the compensation have to be paid within the jurisdiction of England and Wales?

6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales.

We note the assertions in the Explanatory Memorandum⁶ and that the Presiding Officer has stated that "the provisions of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, introduced on 3 December 2012, would be within the legislative competence of the National Assembly for Wales"⁷.

⁶ Explanatory Memorandum to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, paras 3-5

⁷ Presiding Officer's Statement on Legislative Competence: 3 December 2012

Powers to make subordinate legislation

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)? In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

We note the provisions for affirmative and negative procedure for the making of subordinate legislation under the proposed Assembly Act.

Financial Implications

8. What are your views on the financial implications of the Bill? In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

We note the commentary and research regarding the financial implications of this Bill and the thorough information provided in the Regulatory Impact Assessment.

Other comments describe

9. Are there any other comments you wish to make about specific sections of the Bill?

The Explanatory Memorandum does not explain why the meaning of "asbestos-related diseases" in the Bill is confined to four diseases.

Section 3(3) is vague. The descriptions in brackets appear to explain to the lay reader what each is but do not add anything to the technical meaning of each term. The section describes medical conditions which will or will not subsist and will be the reason compensation is being paid to the victim.

Why does the legislation not simply refer to asbestos-related diseases as the relevant factor is the liability to pay charges and this arises as a consequence of compensation being payable so any arguments around whether the disease is asbestos-related will have been concluded? In this way all conditions resulting from asbestos exposure will be covered.

Please refer any questions regarding this response to:

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