

Health and Social Care Committee

Meeting Venue:
Committee Room 1 – Senedd

Meeting date:
16 January 2013

Meeting time:
09:00

For further information please contact:

Steve George & Fay Buckle (Legislation), Llinos Dafydd (Policy)

029 2089 8403/8041
HSCCommittee@wales.gov.uk

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



Agenda

1. Introductions, apologies and substitutions

2. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 – Evidence Session 4 (09:00 – 10:00) (Pages 1 – 9)

HSC(4)–02–13 paper 1

Association of British Insurers

Nick Starling, Director of General Insurance, ABI;
Dominic Clayden, UK & Ireland Claims Director, Aviva;
Faye Glasspool, Director UK Legacy, RSA

3. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 – Evidence Session 5 (10:00 – 10:30) (Pages 10 – 16)

HSC(4)–02–13 paper 2

Forum of Insurance lawyers

Simon Cradick, Partner, Morgan Cole LLP representing the Forum of Insurance Litigators

**4. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill:
Stage 1 – Evidence Session 6 (10:30 – 11:00) (Pages 17 – 24)**

HSC(4)–02–13 paper 3

Association of Personal Injury Lawyers (APIL Wales)

Michael Imperato, APIL Wales Co-ordinator

**5. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill:
Stage 1 – Evidence Session 7 (11:00 – 11:30) (Pages 25 – 26)**

HSC(4)–02–13 paper 4

Marie Curie Cancer Care

Simon Jones, Head of Policy and Public Affairs, Wales

Marie Curie Hospice, Cardiff and the Vale

6. Papers to note (Pages 27 – 29)

**7. Motion under Standing Order 17.42 to resolve to exclude the
public from the meeting for the following business:**

Item 8

**8. Social Services and Wellbeing (Wales) Bill: Consideration of Expert
Advisers (11:30 – 12:00)**

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.

Agenda Item 3



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:

Shirley Denyer
Shirley Denyer LLP
FOIL Knowledge Services (Consultant)

shirley.denyer@foil.org.uk

Sinclair House
2D Park Avenue
Eccleston Park
Prescot
Merseyside
L34 2QZ

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
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

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

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

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

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.

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

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.

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

³ ELTO Twelve Month Report May 2011-April 2012 p. 15
Page 7 of 8

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

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

● T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk



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

Health and Social Care Committee
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
RMCA9 – Marie Curie

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

Health and Social Care Committee

Meeting Venue: **Committee Room 3 – Senedd**

Meeting date: **Thursday, 10 January 2013**

Meeting time: **09:04 – 15:23**

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



This meeting can be viewed on Senedd TV at:

http://www.senedd.tv/archiveplayer.jsf?v=en_400000_10_01_2013&t=0&l=en

Concise Minutes:

Assembly Members:

Mark Drakeford (Chair)
Mick Antoniw
Rebecca Evans
Vaughan Gething
William Graham
Mike Hedges
Elin Jones
Darren Millar
Julie Morgan
Lindsay Whittle
Kirsty Williams

Witnesses:

Mary Burrows, Betsi Cadwaldr University Health Board
Professor Peter Donnelly, Wales Deanery
Dr Helen Fardy, Wales Deanery
Professor Derek Gallen, Wales Deanery
Dr Jeremy Gasson, Wales Deanery
Professor Michael Harmer, National Clinical Forum
Joanne Barnes–Mannings, Asbestos Awareness and Support Cymru
Hannah Blythyn, Unite Wales
Paul Davies, Welsh Institute for Health and Social Care
Marie Hughes, Asbestos Victims Support Groups' Forum UK
Lorna Johns, Asbestos Awareness and Support Cymru
Mike Payne, GMB Wales & South West
Tony Whitston, Asbestos Victims Support Groups' Forum UK

Fay Buckle (Clerk)
Llinos Dafydd (Clerk)
Steve George (Clerk)
Claire Griffiths (Deputy Clerk)
Catherine Hunt (Deputy Clerk)
Olga Lewis (Deputy Clerk)
Gwyn Griffiths (Legal Advisor)
Joanest Jackson (Legal Advisor)
Philippa Watkins (Researcher)
Victoria Paris (Researcher)
Robin Wilkinson (Researcher)

1. Introductions, apologies and substitutions

1.1 Apologies were received from Lynne Neagle. Mike Hedges substituted for Mick Antoniw for Items 1–4. Julie Morgan substituted for Vaughan Gething for Items 1–6.

2. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Evidence Session 1

2.1 The Committee took evidence from the Member in Charge of the Bill, Mick Antoniw AM, Vaughan Gething AM, Mr Paul Davies and Mrs Joanest Jackson.

3. Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

3.1 The Committee resolved, in accordance with Standing Order 17.42(ix), to meet in private for items 4, 7, 8 and 12.

4. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Consideration of Member in charge's evidence

4.1 The Committee considered this item in private session.

5. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Evidence Session 2

5.1 The Committee took evidence from the representatives of Asbestos Awareness and Support Cymru and Asbestos Victims Support Groups' Forum UK.

6. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Evidence Session 3

6.1 The Committee took evidence from representatives of the GMB and UNITE Trade Unions.

7. Social Services and Wellbeing (Wales) Bill: Consideration of Expert Advisers

7.1 The Committee considered the paper and requested that the Clerks approach suggested candidates.

8. Social Services and Wellbeing (Wales) Bill: Factual Briefing

8.1 The Committee received a factual briefing from Welsh Government officials.

BREAK

The Committee adjourned from 12.01 to 13.30

9. Health board reconfiguration plans – Evidence from Wales Deanery

9.1 The witnesses responded to questions from members of the Committee.

10. Health board reconfiguration plans – Evidence from the National Clinical Forum

10.1 The witnesses responded to questions from members of the Committee.

11. Papers to note

11.1 The Committee approved the minutes of the meetings held on 29 November and 5 December 2012.

11.1 Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Letter from Presiding Officer

11.1 The Committee noted the letter.

11.2 Forward Work Programme – January to February 2013

11.3 The Committee noted the paper.

12. Food Hygiene Rating (Wales) Bill: Consideration of Draft Regulations

12.1 Members considered the draft Regulations and the Chair agreed to write to the Minister on the points raised.

TRANSCRIPT

View the [meeting transcript](#).