

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.