



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.

[Type text]

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.

For further information please contact:

Mari Thomas, Finance Policy Officer
mari.thomas@wlga.gov.uk

[Type text]

Welsh Local Government Association
Local Government House
Drake walk
Cardiff
CF10 4LG

Tel: 029 2046 8600

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.

