



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

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

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

Overview

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

Response to the Consultation Questions (following numbering)

General

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

We have no view on the need for this legislation

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

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

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

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

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

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

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

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

³ op.cit. para 40

⁴ ibid .

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

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

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

and, later

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

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

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

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

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

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

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

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

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

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

We have no view on the impact on organisations

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

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

Does the victim have to be resident in Wales?

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

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

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

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

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

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

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

Powers to make subordinate legislation

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

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

Financial Implications

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

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

Other comments describe

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

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

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

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

Please refer any questions regarding this response to:

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