

Recovery of Medical Costs for Asbestos Diseases (Scotland) Bill

“A proposal for a Bill to enable the Scottish Ministers to recover, from anyone responsible for paying compensation to a victim of asbestos-related disease, certain costs incurred by the NHS in Scotland in providing care and treatment to that victim.”

A consultation by Stuart McMillan MSP
Member for West Scotland
January 2015

FOREWORD

There are many areas in relation to which political parties disagree and take differing views on issues of policy and legislation. The Debating Chamber at the Scottish Parliament has seen many great political debates over the years. Parties disagree, robust arguments are exchanged and legislation is formed.

There is one area in relation to which politicians of all parties have tended to stand together at Holyrood. That is in relation to standing up for and providing support to the victims of asbestos related disease. Scotland's proud industrial history is scarred by the legacy of asbestos related disease which has caused so much harm to so many over the years.

I have no doubt that it is for that reason that the Scottish Parliament has shown support on legislative reform on such issues. To date, that legislative reform includes:

- Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007
- Damages (Asbestos Related Conditions) (Scotland) Act 2009
- Damages (Scotland) Act 2011

It is easy to assume that the health impact of our industrial past is nearing an end; and the number of Scottish citizens and families who will be damaged and killed by asbestos related diseases will diminish in number to zero in the near future. That is not, however, the nature of the diseases. Scottish families and communities will continue to suffer because of asbestos related disease and the NHS who provide the immeasurable care and support to those families will continue to bear the financial cost for decades to come.

Everyone in Scotland agrees that what the victims of asbestos related disease have been forced to suffer is wrong. Everyone in Scotland agrees that they require the best care and attention that only the Scottish NHS can provide. Nevertheless, I do not think that it is fair that the financial burden of providing that cost should rest solely on the taxpayer when the companies who exposed our workers to asbestos are well insured.

Scottish victims of asbestos related disease have in fact fallen behind victims of other injuries throughout the UK in terms of what can be recovered in relation to their NHS treatment.

The law was changed in 1999¹ to allow the NHS across the UK to recover the cost of providing treatment to victims of accidents. That Act related to only victims of road traffic accidents. The law was extended in 2003² to victims of all injury. The law in relation to Scotland has never been

¹ The Road Traffic (NHS Charges) Act 1999

² Health and Social Care (Community Health and Standards) Act 2003

extended to cover industrial disease and has never been extended to victims of asbestos related disease.

On 21 March 2012, Mark Antoniw AM³ was successful in a ballot for the right to introduce a Member's Bill at the Welsh Assembly. He proposed a Bill relating to the recovery of costs of medical treatment and care provided to patients in Wales who have sustained asbestos related disease. That Bill has been passed by the Welsh Assembly but is currently the subject of a legal challenge before the Supreme Court.

I believe that it is time again for the Scottish Parliament to consider a similar legislative proposal. I believe that the Bill which I propose will put the victims of asbestos related disease on an equal footing with victims of injury throughout the UK and also ensure that much needed finances are recouped by the NHS to ensure that asbestos related victims continue to receive the highest quality of care that we have come to expect of the NHS and which has, until now, served victims so well.

It is crucial that an important proposal such as this one is consulted on as widely as possible. I am keen to gather views from victims, support groups, trade unions, insurers, charities and, most importantly, ordinary Scottish citizens.

I hope that you will be able to respond to this Consultation. I would be happy to meet with organisations or individuals who have a particular interest in the subject matter.

Stuart McMillan MSP

³ Member of the Welsh Assembly (Assembly Member)

How the consultation process works

1. This consultation is being launched as the first stage of the process of introducing a Members' Bill. The process is governed by Chapter 9 of the Parliament's Standing Orders and can be found on the Scottish Parliament website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

2. A minimum 12 week consultation period is required, following which responses will be analysed. Thereafter, I will lodge a summary of consultation responses in the Parliament. If the final proposal secures the support of at least 18 other members from three or more political parties or groups, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Members' Bill. A Member's Bill follows a 3-stage scrutiny process during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act of the Scottish Parliament.
3. The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, identifying equalities issues, suggesting improvements and, in general, assisting in ensuring that the resulting legislation is fit for purpose.
4. Details of how to respond to the consultation are provided at the end of the document.
5. Additional copies of the document can be requested by contacting me at **Room 4.11, The Scottish Parliament, Edinburgh, EH99 1SP; telephoning 01475 720930 or by emailing stuart.mcmillan.msp@scottish.parliament.uk**. Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me. An on-line copy is available on the Scottish Parliament's website under Parliamentary Business / Bills / Proposals for Members' Bills / Session 4 Proposals.

Background

The current legislation

Scots law has its origins in Roman law. Even ancient Roman law recognised that there are circumstances where compensation must be paid where someone causes suffering to another. For more than a century, Scots law has recognised that the payment must be made by the wrong-doer if she or he has been negligent or otherwise breached a rule of law such as Acts of Parliament or Regulations. Suffering has never been restricted to physical injury. The law has long recognised that the requirement to pay compensation includes the circumstance where the wrong-doer causes the victim to suffer disease.

Society has always known that the effect of negligence causes wider suffering than the victim of the injury or disease. The victim's family will suffer. There will also be a financial burden on the State. The law, accordingly, contains rules which allow a victim to recover costs and loss suffered by their family members (called 'services'⁴).

For reasons of sound public policy, the law has developed since 1992 to recognise the financial burden placed on the State by wrong-doers causing injury and disease by requiring them to provide financial recompense to the public purse.

The law firstly addressed social security payments. It recognised that the victim of an injury or disease may require to claim certain State benefits because of the injury or disease they have suffered. Legislation was introduced which placed an obligation on a person or company who causes injury or disease in circumstances where they are required by law to pay compensation ("a compensator") to recompense or repay to the State certain social security benefits. In most instances of course the compensator would not be the individual or company but their insurer.

The original legislation was the Social Security Administration Act 1992. That Act was amended, while retaining the original core purpose of the State recovering from the compensator in the Social Security (Recovery of Benefits) Act 1997.

There are of course other ways in which injury or disease can have a financial impact upon the public purse. Accordingly, the law was further developed in 1999 to require the compensator to not only repay State benefits but also to repay the cost of treatment provided by the NHS. The extension to NHS treatment was first contained in the Road Traffic (NHS Charges) Act 1999 ("the 1999 Act"). This Act related only to NHS charges arising from road traffic accidents.

In 2003, the law was further developed. The Health and Social Care (Community Health and Standards) Act 2003 ("the 2003 Act") extended the obligation on compensators to repay NHS charges in relation to all incidents causing "injury". Because the Act related specifically to "injury" it did not relate to industrial disease and, in particular, did not relate to asbestos related disease.

In relation to all three circumstances where a compensator is required to make payment to the State, certain social security benefits, road traffic accidents and all incidents causing injury, the

⁴ Damages (Scotland) Act 2011

obligation only arises where there has been a negligent or other wrongful act in circumstances where the law requires a payment of compensation to a victim. If there is no fault and, accordingly, no obligation to pay compensation to the victim, there is no obligation to pay anything to the State.

The law in Scotland has not changed since 2003.

In the current economic climate, there is no reason why the law in Scotland should not be reformed to require the compensator to repay to the NHS the cost of providing treatment and care to victims of asbestos related disease particularly where there already exists that obligation to do so in relation to other negligent injuries.

Administration of the current state recovery system

Because the general principal has been established that a compensator ought to repay certain costs to the State in the legislation described, there already exists the administrative, procedural and intellectual infrastructure to ensure that the practical side of the proposals contained within this consultation document are both realistic and achievable.

Currently, the scheme to recover both social security benefits (under the 1997 Act) and NHS charges (under the 1999 and 2003 Acts) is operated on a GB wide basis (excluding Northern Ireland where a comparable scheme operates) by the Compensation Recovery Unit (CRU) which is part of the Department of Work and Pensions. This scheme places an obligation on insurers and solicitors to notify the CRU of personal injury compensation claims in progress, including whether the injured person attended hospital, and to request a certificate of NHS charges when the case is determined, whether by Court Judgement, settlement or agreement. The relevant NHS body is informed of the case and is then responsible for detailing the service provided in terms of outpatient attendances, inpatient length of stays and any ambulance journeys. The CRU on this information calculates the cost using a simple daily tariff covering inpatient stays (or outpatient care if no inpatient care was necessary) plus any ambulance journeys. The CRU liaises with insurers to recover costs, which in turn are paid to health body, enabling additional investment in health care services. Disputes with insurers are dealt with in the first instance by the CRU. There is also an appeal system via the Independent Tribunal Service.

The extension which I propose will operate on the same basis. The CRU shall continue to co-ordinate the entire process in the way described above. There are however a few practical differences. Firstly, accident and injury circumstances will generally lead to only one clinical pathway of patients. Victims of asbestos related disease will however often require treatment with more than one health body. This may require co-ordination between different organisations on a frequent basis.

Additionally, the treatment of asbestos related disease may typically involve more complex packages of treatment when compared against an average injury claim. I however do not believe that this presents an insurmountable barrier.

Why is new legislation necessary

The first recorded uses of asbestos date back as early 2500BC. Its use grew significantly during the industrial revolution despite the dangers associated with this first noticed at the turn of the 20th century; and by 1917 and 1918 several studies in America showed compelling evidence linking industrial exposure to asbestos with workers dying unnaturally young. By the 1930's medical journals established clearly the link between working with asbestos and serious asbestos related disease. The first legislation to protect workers exposed to asbestos was the Asbestos Industry Regulations 1931 ("the 1931 Regulations").

Despite all of this, asbestos continued to be used widely by industry, albeit further legislation was introduced to control the use of and exposure to asbestos⁵. A complete ban on the use of asbestos was not introduced until 1999 in the UK.

Exposure to asbestos can cause five main industrial diseases:

- Mesothelioma – a cancer of the lining of the lungs; it is always fatal and is almost exclusively caused by exposure to asbestos;
- Asbestos related lung cancer – which is almost always fatal;
- Asbestosis – a scarring of the lungs which is not always fatal but can be very debilitating, greatly affecting quality of life;
- Pleural Thickening – a non-cancerous condition affecting the outer lining of the lung (the pleura) the debility caused by the condition will vary from victim to victim; and
- Pleural Plaques – a non-cancerous condition affecting the lining of the pleura. The condition can cause debility, significant upset and fear about future health because the scarring to the lungs confirms a biological change caused by asbestos fibres entering the body and victims of pleural plaques can go on to develop other asbestos related diseases including asbestosis, asbestos related lung disease and mesothelioma.

The latency period between exposure to asbestos and the victim showing the signs of an asbestos related disease can be very long. There can be a period of between ten and sixty years between exposure and the development of the disease. The impact of our industrial use of asbestos will therefore be with us for many decades to come.

There are many reasons why I believe the bill is necessary, desirable and entirely appropriate.

Firstly, Scottish society, industry and our economy have benefited from a proud industrial history. It is a history however scarred by industrial injury and disease seen none more acutely than our workers who were exposed to asbestos at work. That is why the Scottish Parliament has always been quick to act to support victims of asbestos related disease.

⁵ Health and Safety at Work Act 1974, The Control of Asbestos at Work Regulations 1987 and the Control of Asbestos at Work Regulations 2002, the Control of Asbestos Regulations 2006, Control of Asbestos Regulations 2012

In that spirit, it is entirely right and proper that victims of asbestos related disease are put on an equal footing with victims of road traffic and other accidents.

Secondly, I believe it is wrong that the tax payer should bear the full financial burden of caring for victims of asbestos related disease when there are compensators who have insurance and on whom the burden ought more fairly and appropriately fall.

It is important to recognise that my proposal will not create any new class of person who requires to pay compensation arising from asbestos related disease. The obligation to repay the NHS benefits will only arise where there is negligence or a breach of a statutory obligation which gives rise to a primary obligation to compensate the victim or, in cases where exposure to asbestos has caused death, the victims' families.

Under the rules which currently exist in relation to recovery of NHS charges for injury, the money which is recovered by the state is repaid to the health board which provided the original treatment. That would be the intention in relation to recovery in respect of asbestos related disease.

The main objective of the proposal

The objective of the proposed Bill is:-

- To place an obligation on compensators to repay, to the Scottish Ministers, the cost of NHS charges associated with the care and treatment of victims of asbestos related disease.

The proposed Bill will seek to achieve the following: -

- Impose a statutory obligation on compensators to repay NHS charges associated with the care of victims of asbestos related disease.
- Allow Scottish Ministers to exclude certain payments and charges from the obligation to repay by secondary legislation.
- Create a framework for certifying the amount which requires to be repaid, calculating that sum and the basic means of recovery by the Scottish Ministers.
- Create an appeal and review process including an appeal on a point of law to the Social Security Commissioner.
- Specifically extending insurance cover.
- Provide statutory framework for recovery, via the courts, in circumstances where the compensator does not fulfil their obligation voluntarily.

Administrative provisions within the proposed Bill

The proposed Bill will contain detailed provisions in relation to calculating the amount to be repaid to the Scottish Ministers, the process of certifying the appropriate sum, steps the Scottish Ministers can take to recovery charges if the compensator does not make payment voluntarily under the basic operation of the Bill and in relation to a compensator being able to challenge the certified amount by review and appeal.

The provisions follow very closely the Health and Social Care (Community and Standards) Act 2003 and the important role that the Compensation Recovery Unit play within the existing process of recovery of NHS charges in relation to injury. The systems and processes are already in place because of the 2003 Act. The CRU has the skill and systems to extend their role into the area in my proposal. I can therefore see no difficulty with the administration of the certification and recovery process.

Power to exclude certain payments

Under the 2003 Act certain payments (known as excluded payments) are specifically excluded from the recovery of charges process. Excluded payments do not appear on the certificate the CRU prepare and do not form part of their calculations as to the sum the compensator must pay. There is a list of such excluded payments contained within Schedule 2 to the 2003 Act. For example,

accommodation and services provided for private patients (including in NHS facilities) are excluded payments under the 2003 Act.

I do not propose to list any services as excluded in my Bill. I do however believe that the Scottish Ministers should have the power to make certain payments excluded if circumstances require it. The proposal accordingly will give the Scottish Ministers the power, by regulations, to create excluded payments for the purpose of the Bill.

Extending insurance cover

There have been many examples of insurance companies seeking to avoid making certain types of payments of compensation on the basis that their individual policy did not cover particular wrongs. This practice has been seen in many occasions over the years in relation to “long tail” compensation claims such as industrial disease and in particular asbestos related disease claims⁶. It would be wholly inappropriate if such an approach was taken to the recovery of NHS charges in my proposal. To avoid that, my proposed Bill will contain specific provisions to extend the liability of a liable person to their insurer.

Financial resource recovered by Scottish Ministers

It is my proposal that the money recovered is placed into the general health budget and allocated to the Health Board which provided the care. This reflects what currently happens with recovery of costs in terms of accident cases. An alternative view may be that the money should be allocated, either wholly or in part, and used specifically for the purpose of providing treatment and other services relating to asbestos related disease, including research.

⁶ Durham v BAI (Run Off) Ltd & Others [2012] UKSC 14

Questions

Q1 Do you support the general aims of the proposal as outlined above?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes Undecided
 No

Reasons for response _____

Q2 Do you agree that legislation is a necessary and appropriate means of addressing the issues identified?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes Undecided
 No

Reasons for response _____

Q3 Do you think that the administrative, review/appeal and enforcement objectives in my proposal will work and that the Compensation Recovery Unit will be able to adequately deal with the extended role imposed upon them?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes Undecided
 No

Reasons for response _____

Q4 Do you agree that the Scottish Ministers should have the power to create excluded payments by regulation?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes Undecided
 No

Reasons for response _____

Q5 Do you agree that liability to repay NHS charges should extend to insurers and the best way to achieve this is by expressly extending liability on the face of the Bill?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes Undecided
 No

Reasons for response _____

Q6 Do you agree that the money recovered be paid into the general health budget and allocated to the appropriate Health Board or do you consider it more appropriate that the money be allocated for asbestos related care, including research?

Please indicate which option you consider more appropriate and outline the reasons for your response.

- Q7** How will the proposal change what organisations do? What is your assessment of the likely financial implications (if any) of the proposed Bill to you or your organisation? Please provide specific examples as to the impact the proposal will have on your organisation, if any.
- Q8** What is your assessment of any implications for equality?
- Q9** Do you have any views on whether the proposal will fall within the legislative competence of the Scottish Parliament? Please answer as fully as possible.
- Q10** Do you have any other views or comments you would like to make on this proposal?

HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Responses should be submitted by 5pm on Monday 30th March 2015 and sent to:

Stuart McMillan MSP
Room 4.11
Scottish Parliament
Edinburgh
EH99 1SP

Tel: 0131 348 6807

E-mail: Stuart.McMillan.MSP@Scottish.Parliament.uk

Please indicate whether you are a private individual or an organisation.

Respondents are also encouraged to begin their submission with short paragraph outlining briefly who they are, and who they represent (which may include, for example, an explanation of how the view expressed was consulted on with their members).

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that the normal practice is to make responses public – by posting them on my website. I am also obliged to provide responses to the Scottish Parliament’s Information Centre (SPICe), which may then make them available to MSPs or staff on request.

Therefore, if you wish your response, or any part of it, to be treated as **anonymous**, please state this clearly along with the reasons for this. If I accept the reasons, I will publish it as “anonymous response”, and only the anonymised version will be provided to SPICe. If I do not accept the reasons, I will let you know and give you the option of withdrawing it or submitting it on the normal attributable basis. If your response is accepted as anonymous, it is your responsibility to ensure that the content of does not allow you to be identified.

If you wish your response, or any part of it, to be treated as **confidential**, please state this clearly and give reasons. If I accept the reasons, I will not publish it (or publish only the non-confidential parts). However, I would still be obliged to provide a full copy of the response to the Parliament’s Non-Government Bills Unit (NGBU), and a redacted copy to SPICe when lodging my final proposal. As the Parliament is subject to the Freedom of Information (Scotland) Act (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it) and the Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.

NGBU may be responsible for summarising and analysing the results of this consultation and will normally aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published in full.

There are a few situations where not all responses will be published. This may be for practical reasons: for example, where the number of submissions we receive does not make this possible or where a large number of submissions are in very similar terms. In the latter case, only a list of the names of people and one response who have submitted such responses would normally be published.

In addition, there may be a few situations where I may not choose to publish your evidence or have to edit it before publication for legal reasons. This will include any submission which contains defamatory statements or material. If I think your response potentially contains such material, usually, this will be returned to you with an invitation to substantiate the comments or remove them. In these circumstances, if the response is returned to me and it still contains material which I consider may be defamatory, it may not be considered and it may have to be destroyed.

Data Protection Act 1998

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. Normally I will publish all the information you provide (including your name) in line with Parliamentary practice unless you indicate otherwise. However, I will not publish your signature or personal contact information (including, for example, your home telephone number and home address details, or any other information which could identify you and be defined as personal data).

I may also edit any information which I think could identify any third parties unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

Further information about the Data Protection Act can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received by NGBU or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). So if the information you send me is requested by third parties the Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, even if I have agreed to treat all or part of the information in confidence or to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at:

www.itspublicknowledge.info.