

PROPOSED RECOVERY OF MEDICAL COSTS FOR INDUSTRIAL DISEASE (SCOTLAND) BILL – STUART McMILLAN MSP

SUMMARY OF CONSULTATION RESPONSES

This document summarises and analyses the responses to a consultation exercise carried out on the above proposal.

The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. These three sections have been prepared by the Scottish Parliament's Non-Government Bills Unit (NGBU). Section 4 has been prepared by Stuart McMillan MSP and includes his commentary on the results of the consultation.

In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for, or opposition to, the proposal (or particular aspects of it). In interpreting this data, it should be borne in mind that respondents are self-selecting and it should not be assumed that their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. A consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

Copies of the individual responses are available on the following website: <https://stuartmcmillansnp.wordpress.com/industrial-diseases-consultation-2018/>. Responses have been numbered for ease of reference, and the relevant number is included in brackets after the name of the respondent.

A list of respondents is set out in the Annexe.

SECTION 1: INTRODUCTION AND BACKGROUND

Stuart McMillan's draft proposal, lodged on 28 March 2018, is for a Bill to enable Scottish Ministers to recover, from the party responsible for causing an industrial disease, certain costs incurred by the NHS in providing care and treatment to those suffering from that disease.

The proposal was accompanied by a consultation document, prepared with the assistance of NGBU. This document was published on the Parliament's website, from where it remains accessible:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/12419.aspx>

The consultation period ran from 29 March to 22 June 2018.

Stuart McMillan contacted 66 individuals and organisations who had responded to the 2015 consultation, and engaged in publicity for the consultation through news releases, social media, and interviews with the BBC, the Daily Record and the Greenock Telegraph and specialist stakeholder media. The consultation was viewed 311 times on Mr McMillan's website.

The consultation exercise was run by Stuart McMillan's parliamentary office.

The consultation process is part of the procedure that MSPs must follow in order to obtain the right to introduce a Member's Bill. Further information about the procedure can be found in the Parliament's standing orders (see Rule 9.14) and in the *Guidance on Public Bills*, both of which are available on the Parliament's website:

- Standing orders (Chapter 9):
<http://www.scottish.parliament.uk/parliamentarybusiness/26514.aspx>
- Guidance (Part 3):
<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25690.aspx>

SECTION 2: OVERVIEW OF RESPONSES

In total, 16 responses were received.

The responses can be categorised as follows:

- Five were from representative organisations;
- One was from a public sector organisations (NHS Forth Valley);
- Seven were from private sector organisations (three insurance providers and four legal firms); and
- Three were from private individuals (including one advocate).

It should be noted that six submissions provide almost identical comments. Where comments from these respondents have been quoted in this document, they are attributed to 'respondents from the insurance industry' rather than list the six separately.¹

The main themes arising from the responses were—

- Support in principle for the proposed Bill and the policy changes made since the member's previous consultation on a member's Bill, especially in relation to retrospectivity and insurance;
- Many respondents, however, sought further clarity on how the scheme would work in practice; and
- Many respondents also highlighted concerns about the amount of revenue the proposed Bill would actually recover and whether the costs involved in administering the scheme would be greater than the costs recovered, especially in the short term.

¹ These were Aviva (ID:03), Zurich Insurance Plc (ID:04), Allianz Insurance Plc (ID:09), the Association of British Insurers (ABI) (ID:10), Clyde and Co (ID:12) and the Forum of Scottish Claims Managers (ID:13). NB: Clyde and Co is a law firm with a focus on the insurance sector rather than an insurance provider.

SECTION 3: RESPONSES TO CONSULTATION QUESTIONS

This section sets out an overview of responses.

The consultation document outlined the aim of the proposed Bill. As the same issues were broadly raised in relation to questions 1 and 2, the responses to these questions have been summarised together. Respondents were asked:

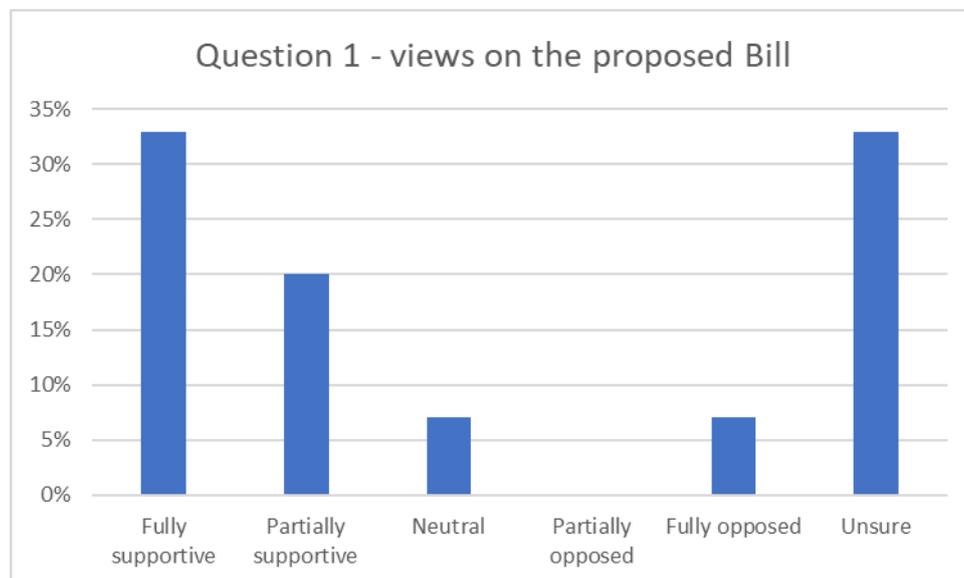
Question 1: Which of the following best expresses your view of the proposed Bill?

(Fully supportive / partially supportive / neutral (neither support nor oppose) / partially opposed / fully opposed / unsure)

Please explain the reasons for your response.

Question 2: What do you think would be the main practical advantages and disadvantages of the proposed Bill?

Fifteen respondents answered questions 1 and 2. In response to question 1, eight respondents supported the proposed Bill, five were fully supportive and three were partially supportive. Five respondents were unsure whether they supported the proposed Bill. Only one was (fully) opposed and one was neutral (neither supportive nor opposed).



Four (of the five) who were unsure and two (of the three) who were partially supportive were the six respondents from the insurance industry. They supported the general principles of the proposal but argued that, “in the absence of the type of detail which we envisage will be contained in the draft Bill, we are unable to express a detailed view” (Zurich Insurance Plc (ID:04)). All expressed concerns about how the proposed Bill would achieve its policy objectives and these are set out in more detail later on in this section.

There were a number of issues raised in relation to the proposed Bill—

Improved health and safety

One of the main advantages cited for the proposed Bill was that it would encourage businesses to improve the health and safety conditions in the workplace. Brian Carson (ID:01) argued that “some organisations see health and safety as an affordable breach to take as they rarely carry the real costs of their actions”. He suggested the proposed Bill would address this and act as a deterrent to bad practice.

Increased NHS resources

The other most cited advantage of the Bill was that it would allow the NHS to recover costs associated with treating industrial disease. This was considered important because, as NHS Forth Valley (ID:02) stated, “the cost of treating industrial disease is substantial and adds to the pressures faced by the NHS”.

At the same time, however, a number of respondents did query whether significant amounts of money would be recovered – Kennedys LLP (ID:08) argued the proposed Bill would be “unlikely to actually raise any or much revenue for the NHS in reality” – or whether the amount recovered would make a meaningful difference to the overall NHS budgets. NHS Forth Valley (ID:02) itself went on to argue that “it is unlikely that significant costs savings will be realised within the universal service free at the point of delivery as individuals suffer complex combinations of illness and disability and will require on-going care which, within the Scottish context, will always be from the NHS”.

Fairness

A number of respondents argued it was a matter of principle that “the party causing harm should bear responsibility for the remedy” (Sandy Carmichael, ID:05). Thompsons Solicitors (ID:16) stated—

“It is illogical that medical costs are recovered in cases of industrial accident, but not industrial disease. It is right that the ‘polluter pays’ principle is extended to the recovery of the medical costs for the treatment of victims of industrial disease.”²

Retrospectivity

This is the second consultation for a member’s Bill relating to industrial disease proposed by this member; a consultation for the proposed Recovery of Medical Costs for Asbestos Diseases (Scotland) Bill was published in 2015.

² Please note that Thompsons Solicitors Thompsons provided advice and support to Stuart McMillan in relation to his draft proposal.

The first proposed Bill was similar to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2013 which was found by the Supreme Court to be outwith the competence of the National Assembly for Wales on two points. The first point was that it retrospectively imposed liability on compensators and their insurers and was, thus, in breach of Article 1, Protocol 1 of the European Convention on Human Rights.

On this matter of retrospectivity, the member has confirmed this proposed Bill would not have any retrospective application, i.e. the proposed Bill would only relate to medical costs associated with the treatment of an industrial disease caused by exposure which occurred after the commencement of the Bill.

Many of the 15 respondents welcomed the fact that the proposed Bill would not have any retrospective application.

A number of respondents did, however, question the value and impact of the proposed Bill if it only related to the consequences of any future exposure. First, it was argued that, due to the stricter regulation of the modern workplace, the chances of someone developing an industrial disease due to exposure at work nowadays are likely to be very limited. The six respondents from the insurance industry argued that, “given the significant improvements in health and safety over the last decades, it is anticipated that the number of claims covered by the proposed Bill will be relatively minimal”. The Institute and Faculty of Actuaries (IFA) (ID:14) made the same point. It referred to evidence from the Health and Safety Executive which assumed that current asbestos exposure levels are less than 1% of exposure levels at their peak in the 1960s whilst only 5% of deafness claims between 2010-12 was caused by exposure pre-2000.³ The IFA also highlighted the significant latency period between exposure and the development of an industrial disease and concluded that “removing the retrospective element is likely to severely limit the amount recuperated under the proposed scheme for many years”.

Second, respondents argued the lack of retrospectivity would make it difficult to separate out the liability – and the medical treatment costs – for industrial disease following exposure which occurred continuously before and after the commencement of the Bill. This argument is explored further in a later section.

Insurance

The second point on which the Supreme Court held the 2013 National Assembly of Wales Bill to be outwith the Assembly’s competence was in relation to insurance. Insurance is a policy area reserved to the UK Parliament. In the consultation document, the member stated the proposed Bill would not “impose the liability on the employer’s liability or public liability insurer, but would find the negligent party responsible for the treatment costs”.

³ The IFA (ID:14) stated it focused on deafness cases arising from chronic exposure to noise as these are the most common cases.

Many of the 15 respondents welcomed this statement. The Faculty of Advocates (ID:06) stated that, “in principle, we consider that a Bill arising from the draft proposal would be within the legislative competence of the Scottish Parliament”.

A small number of respondents, however, continued to raise concerns on this point and sought further clarification that the Bill would not impose a new insurance liability. The consultation document stated the proposed Bill “would not create any new class of person who requires to pay compensation arising from an industrial disease”. There remains, however, confusion among some respondents on this issue: the IFA (ID:14) argued that “insurance disease cover is already provided by insurers and they would not need to develop a new class of insurance” whilst Kennedys LLP (ID:08) pointed out the consultation document made “mention of the requirement for a new class of insurance”.

Kennedys LLP, the one respondent who was (fully) opposed to the proposed Bill, argued it still relates to insurance matters and is, therefore, outwith competence—

“We are not confident the Scottish Parliament has the power to legislate on this Bill. ... Whilst the Bill refers to the ‘negligent party’, it is clear to us that this Bill is intending to legislate in relation to insurance. There is clear reference to the role of insurers as ultimately paying any negligent parties’ costs.”

Clyde and Co (ID:12) noted that the inclusion of claims for industrial disease was considered when the recovery of medical costs for treating injuries caused by negligence was introduced in 2003.⁴ Clyde and Co stated it was not included due to the “practical difficulties involved” and posited that “it is not clear that those difficulties have changed since 2003”.

Definition of an industrial disease

Two respondents, Allianz Insurance Plc (ID:09) and ABI (ID:10), specifically welcomed the intention that the proposed Bill would apply to the same industrial diseases covered by Industrial Injuries Disablement Benefit (IIDB). Scottish Hazards (ID:15), however, raised a concern that this introduced “an element of inequality into the proposed Bill, as well as failing to reflect the modern world of work and developing working practices and their known – and as yet possibly unknown – links to unprescribed illnesses”. Scottish Hazards was one of the three respondents who stated they were partially supportive of the proposed Bill; the application of the proposed Bill to the same diseases covered by the IIDB was the organisation’s main concern. Scottish Hazards expanded on this view in its response to question 6 on equalities.

⁴ The Health and Social Care (Community Health & Standards) Act 2003 provided for the recovery of medical costs for treating injuries caused by negligence.

Impact on personal liability claims process

Whilst many respondents broadly welcomed the policy objectives of the proposed Bill, they also raised concerns that there may be practical difficulties in achieving them. In particular, the six respondents from the insurance industry stated it would “not be as straightforward” to attribute liability to the negligent party in a personal injury claim relating to industrial disease as it is for a road traffic or other injury.

Particular concerns were raised with the following situations—

1 There was negligent exposure before and after the date on which the Bill comes into force, especially for those conditions which the law regards as indivisible. Zurich Insurance Plc (ID:04) asked “how a retrospective period of exposure (pre-enactment) could practically and correctly be identified and thereafter excluded bearing in mind the law as it stands regards a condition as indivisible”. Aviva (ID:03) stated “there will clearly be real issues in trying to ‘divide the indivisible’”.

2 The victim worked for multiple employers;

3 The negligent exposure occurred when the victim worked outwith Scotland (but received medical care in Scotland);

4 The victim suffered from co-morbid conditions, for example, a respiratory or lung condition alongside a history of smoking.

For these reasons, many respondents argued the scheme would need to provide for a very robust appeal and review process to be fit for purpose.

Some respondents argued these complexities would directly impact on the ability of the proposed Bill to achieve its policy objectives as they could cause delays to the processing of applications of recoverable costs. A number of respondents argued the legal complexities of the proposed bill could create areas of division and legal uncertainty which could result in unnecessary delay in resolving the cases and which would be counter-productive in achieving the proposed Bill’s policy objectives.

Two of the 15 respondents argued that an unintended consequence of the proposed Bill could be that insurance companies would contest claims for industrial negligence more rigorously. BLM (ID:11) argued “compensators may be more likely to take issue with liability and defend substantive claims more thoroughly”, whilst Ian Anderson (ID:07) argued insurance companies might dispute the “necessity of the medical costs involved and appropriateness of medical procedures used”. Ian Anderson also suggested the proposed Bill might create a “two-tier health care system” by incentivising the NHS to provide “more extensive treatments to such injured employees” in anticipation of the recovery of these costs.

Many respondents also claimed that an increase in the cost of insurance premiums may be another unintended consequence of the proposed Bill. This is explored further in relation to question 4 on the financial implications of the proposed Bill.

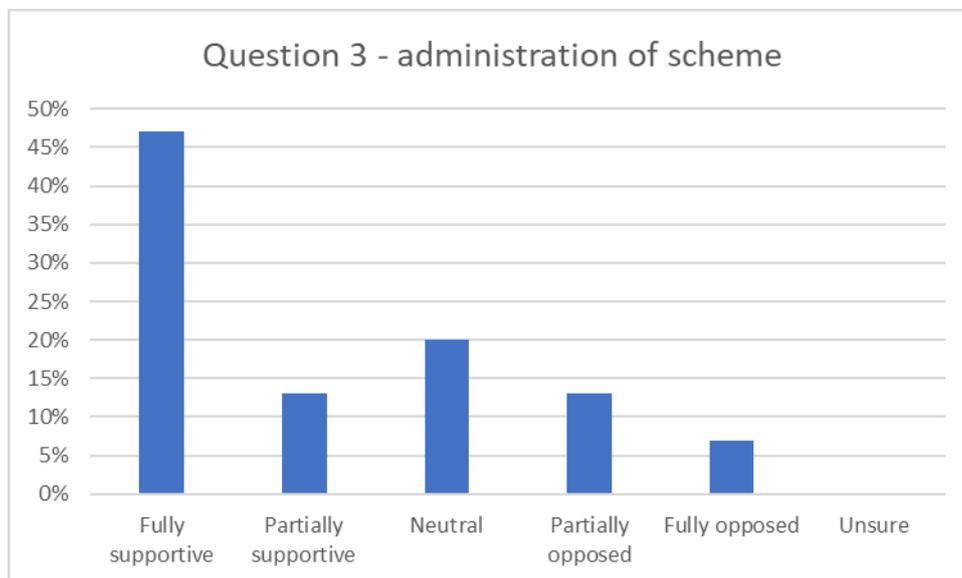
BLM (ID:11) highlighted that the proposed scheme makes no allowance for contributory negligence (unlike the recovery of NHS treatment costs for road traffic accidents and other injuries).

Question 3: What is your view of my preference for the recovery of medical costs for the treatment of industrial disease in Scotland to be incorporated into the Injury Costs Recovery scheme and administered by the Compensation Recovery Unit, part of the UK Department for Work and Pensions?

(Fully supportive / partially supportive / neutral (neither support nor oppose) / partially opposed / fully opposed / unsure)

Please explain the reasons for your response. Are there other ways the scheme could be administered?

Fifteen respondents answered this question. Nine respondents supported incorporation in the ICR scheme; of these, seven were fully supportive and two (were partially supportive. Three respondents were opposed; two were partially opposed and one was fully opposed. Three respondents expressed a neutral view.



The main reasons given for supporting incorporation in the ICR scheme were the consistency of approach (with the recovery of medical costs for road traffic and other injuries) and efficiency. It was generally acknowledged that to establish a separate scheme would be more expensive, complex and less efficient. For many respondents, cost efficiency was linked to the level of scepticism about the likelihood of any future exposure to harmful substances

which could give rise to an industrial disease. This point is discussed further in the next section. Allianz Insurance Plc (ID:09) argued—

“We agree that, if the proposed Bill was to proceed, delivering a consistency of approach in terms of how the scheme is administered will be of critical importance in order to maximise any net benefit. ... Anything other than this would complicate the process, delay implementation and increase the costs of administering recovery which may well cancel out any financial benefit delivered by the Bill.”

Two respondents took a neutral view. BLM (ID:11) stated that further information was required about the additional costs administering the scheme would place on the CRU; an estimate on the number of anticipated additional cases CRU would be expected to process and the view of the CRU itself. Scottish Hazards (ID:15) supported incorporation in the ICR scheme “in the short to medium term” and that it would “only suggest otherwise if a more cost-effective delivery method could be identified”.

The three respondents who opposed this proposal gave different reasons. Ian Anderson (ID:07) argued the “recovery of such [medical treatment] costs is probably best left to legal practitioners who have expertise in such matters since employers’ insurers normally fight ‘tooth and nail’ to totally avoid or reduce liability for medical costs”.

Thompsons Solicitors partially opposed incorporation, arguing that, as a result of the devolution of some welfare powers under the Scotland Act 2016, “it is now time to consider the creation of the Scottish Compensation Recovery Unit”.

The one respondent who was fully opposed to incorporation (and also the only respondent who was fully opposed to the proposed Bill overall), Kennedys LLP (ID:08), questioned the ability of the CRU to administer the scheme. It called for further research about the number of claims in order to understand properly the impact on the CRU. It also argued the “CRU is already overcapacity and stretched with a huge backlog leading Scottish claims to wait far too long for certificates”. It went on to state that, if the CRU was given additional resources to take on this additional work, it would revise its position to partial opposition.

It should be noted that the DWP/CRU itself did not respond to the consultation. Clyde and Co (ID:12) referred to the concerns raised by the CRU in response to the 2013 National Assembly for Wales Bill about administering a Wales-only scheme and anticipated similar difficulties would be likely in administering a Scotland-only scheme.

Question 4: Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

- (a) Government and the public sector;**
- (b) Businesses; and**

(c) Individuals?

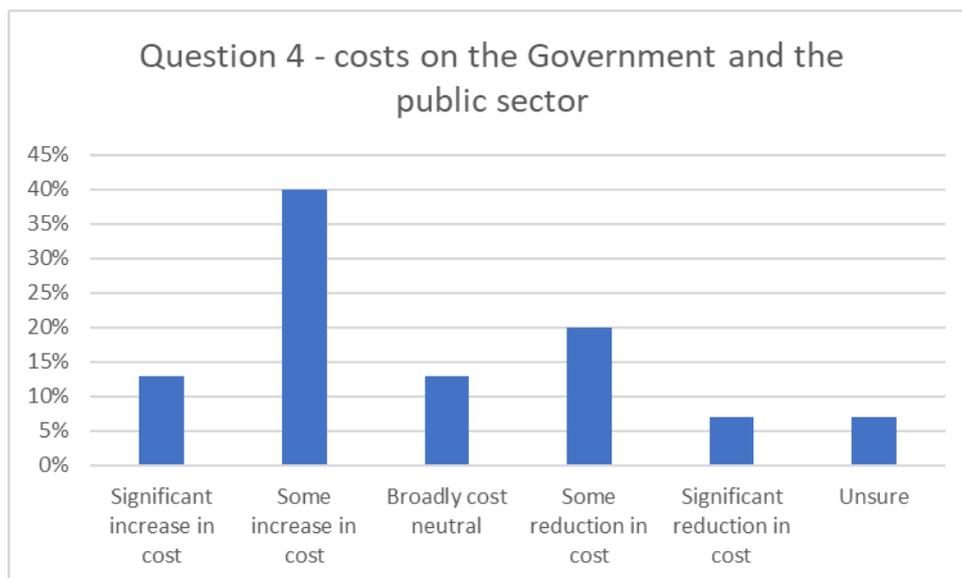
(Significant increase in cost / some increase in cost / broadly cost neutral / some reduction in cost / significant reduction in cost / unsure)

Please explain the reasons for your responses.

Fifteen respondents answered this question.

Government and the public sector

In terms of costs or savings falling to the government and public sector, there were mixed views. Eight thought it would lead to an increase in costs, of which six anticipated some increase and two a significant increase. Four respondents thought the proposed Bill would lead to a reduction of costs for the Government and public sector, of which one thought there would be a significant reduction and three thought that there would be some reduction of costs. Two respondents thought the proposed Bill would be broadly cost-neutral and one was unsure.



Those who argued the proposed Bill would lead to an increase in costs referred to the additional administrative costs falling to the CRU and noted that these would be significantly greater if the Scottish Government, rather than the DWP, administered the scheme.

It was also argued that, regardless of who administers the scheme, the complexities around industrial disease would mean the scheme would be more expensive to administer than it currently costs for road traffic accidents and other injuries. Allianz Insurance Plc (ID:09) argued these additional expenses would be “specific to the administration of industrial disease claims as these are often more complex and raise additional challenges over and above that experienced when administering recovery for road traffic and workplace accident claims”.

As discussed in the earlier section regarding retrospectivity, a number of respondents expressed grave doubt whether – due to improvements in health and safety and the latency period inherent in some industrial disease – the proposed Bill would recover the level of resources the member expects. The IFA (ID:14) expected—

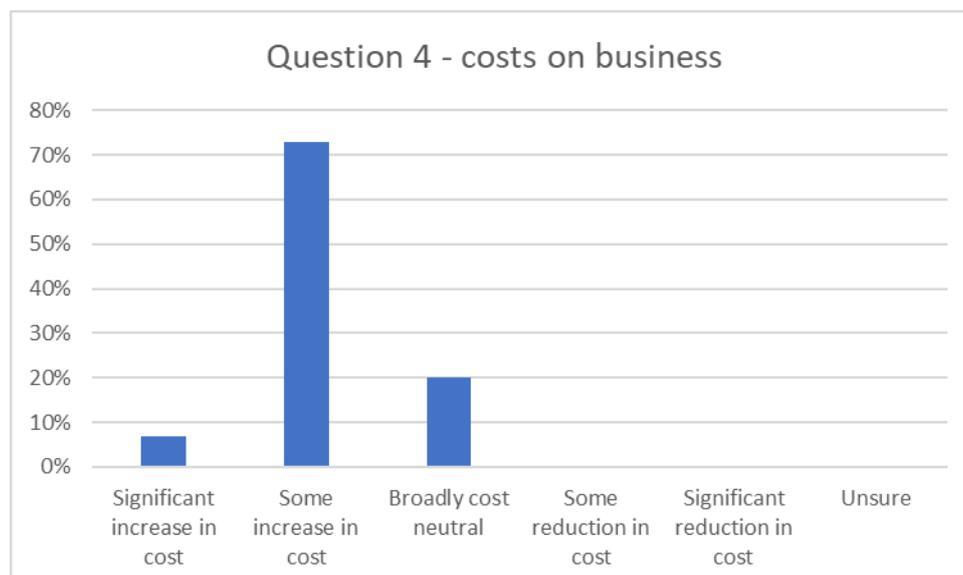
“the recoveries made in the year after commencement are likely to be very small for deafness and almost zero for asbestos-related disease. It may take several years before cases due to future exposure are significant. ... the running costs involved are likely to be higher than the recoveries made in the initial years.”

In addition, the six respondents from the insurance industry argued there would be “an element of simply moving funds around” between government departments and public bodies as one of the largest groups of employers found negligent in personal injury claims has been the government and local authorities. These respondents argued that “we are likely to be in a position where government and public bodies require to pay treatment costs to the DWP who then require to distribute that to the NHS”.

Those who argued the proposed Bill would lead to savings for the government and public sector did so in anticipation of the recovery of substantial monies. For example, Sandy Carmichael (ID:05) argued that there would be “significant savings for the NHS” and that the “cost of administration would be marginal”.

Businesses

In terms of costs or savings falling to businesses, there was more consensus. Twelve thought it would lead to an increase in costs (eleven thought some increase and one thought a significant increase). Three respondents thought the proposed Bill would be broadly cost-neutral.



Increased premiums falling to businesses were anticipated as a “knock on effect” of the proposed Bill. The respondents from the insurance industry argued that, “if insurance companies are to pick these up, then it is inevitable that they will seek to recover that additional outlay by way of increased [employer liability insurance] premiums. That would impact on all premium payers.”

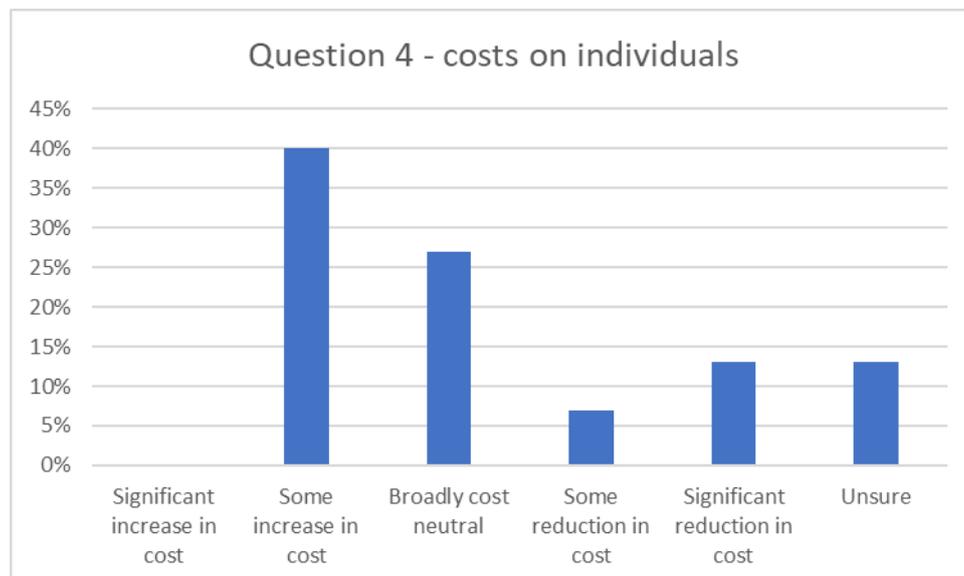
Furthermore, the IFA (ID:14) argued—

“The increase in premiums would most likely happen close to the commencement date whereas, as discussed above, the recovery of medical costs may not be significant for several years. Depending on how insurers implement their premium increases this additional costs to businesses might not just fall to those likely to do the harm.”

In contrast, Sandy Carmichael (ID:05) argued the cost would be “broadly cost neutral since businesses and their insurers will have a clear financial incentive to improve performance and compliance”.

Individuals

There was a mixed picture in terms of the anticipated costs on individuals. Three respondents thought the proposed Bill would lead to a reduction in costs (two thought a significant reduction and one thought some reduction). Six respondents thought there would be some increase in costs. Four respondents thought the proposed Bill would be broadly cost-neutral and two were unsure.



There were, however, very few comments made in response to this part of the question. Scottish Hazards (ID:15), who thought the proposed Bill would result in a significant reduction in costs to individuals, argued—

“The biggest potential benefit for individuals arising from these proposals is not monetary, it is through workers being less likely to be exposed to occupational disease and having the right to enjoy their family and the right to life. ... There will potentially be substantial financial benefits for individuals through increased financial security through increased working lives in healthier, safer and fairer workplaces.”

Question 5: Are there ways in which the Bill could achieve its aim more cost-effectively (e.g. by reducing costs or increasing savings)?

Eight respondents answered this question.

The Faculty of Advocates (ID:06) suggested that conditions for which the treatment costs are “relatively minor” should be excluded.

Ian Anderson (ID:07) argued that legal disputes about the appropriateness of medical procedures used could be avoided by requiring two physicians to certificate the treatment given.

In relation to the concerns raised about exposure which occurred before and after the commencement date, the IFA (ID:14) suggested that the proposed Bill should be explicit about how this should be addressed in order “to reduce the risk of unintended retrospective effects”.

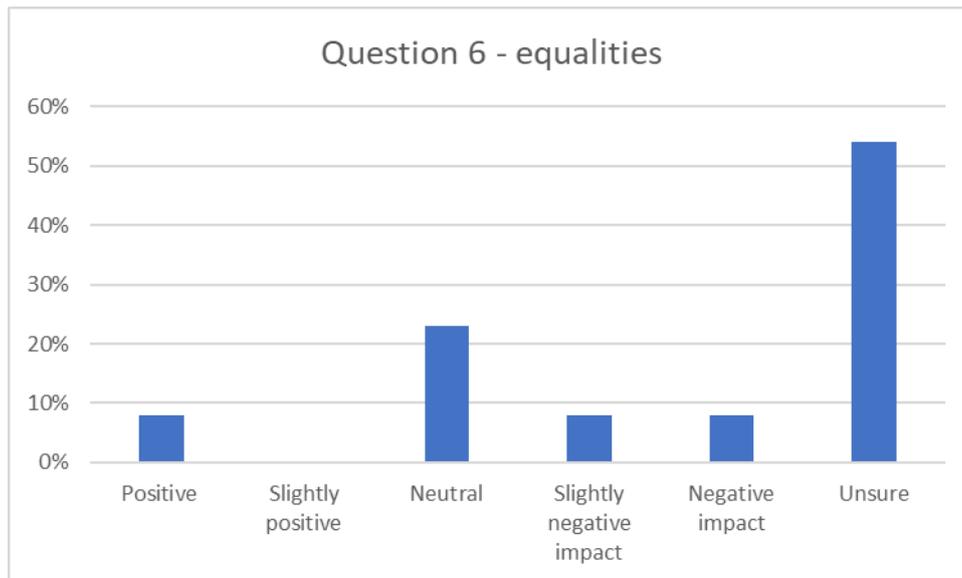
Other comments made did not directly relate to this question.

Question 6: What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, race, religion and belief, sex, sexual orientation?

(Positive / slightly positive / neutral (neither positive nor negative) / slightly negative / negative / unsure)

Please explain the reasons for your response.

Thirteen respondents answered this question. Seven responded that they were unsure about the impact of the proposed Bill on equality. Three answered that the proposed Bill would have a neutral (neither positive nor negative) impact. One answered that it would have a positive impact. One answered that it would have a negative impact and one answered that it would have a slightly negative impact.



Only one comment directly related to this question.

Scottish Hazards (ID:15) thought the proposed Bill might have a slightly negative aspect due to the reliance on the industrial diseases covered by the IIDB. It argued—

“Research has shown that most sufferers of prescribed diseases are men, reflecting earlier comments that the prescription system is outdated and based on work and work environments that are no longer relevant, although the tragic consequences remain. ... Scottish Hazards is concerned that the current list of prescribed diseases and out dated IIDB system fails to take into account emerging evidence on the risks of “new” occupational cancers and this may adversely impact on women.”

Question 7: In what ways could any negative impact of the Bill on equality be minimised or avoided?

Four respondents provided substantive answers to this question.

Scottish Hazards (ID:15) argued that, if the IIDB was devolved to the Scottish Parliament, that would be an opportunity to review the list of industrial diseases it covers.

Sandy Carmichael (ID:05) suggested setting objectives by which impact may be measured, then auditing regularly and reporting to the Parliament.

Question 8: Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

(Yes / no / unsure)

Please explain the reasons for your response.

Ten respondents provided substantive answers to this question.

There were single references to the impact of the proposed Bill on—

- health and safety benefits to the workforce;
- environment, through the more responsible use of harmful substances;
- economy, as the proposed Bill should “stimulate the liability insurance markets with resulting economic investment gains” (Ian Anderson (ID:07));
- NHS, if the recovered monies were used to “develop a strategy for NHS delivered occupational health services and research” (Scottish Hazards (ID:15)).

The six respondents from the insurance industry argued the financial sustainability of the proposal was dependent on whether the scheme recovered higher costs than were spent administering it.

Question 9: Do you have any other comments or suggestions on the proposal?

Nine respondents answered this question.

Again, the respondents from the insurance industry argued that more detailed information about how the proposed Bill would be implemented was required before they could take a definitive position, especially in the light of continuing medical advances in research and treatment. They also argued that it would be consistent if the Bill introduced a cap on NHS charges, as is the case with other recovery claims.

Sandy Carmichael (ID:05) suggested subsequent legislation should be introduced to recover medical costs of treating occupational ill-health.

SECTION 4: MEMBER'S COMMENTARY

Stuart McMillan MSP has provided the following commentary on the results of the consultation, as summarised in sections 1-3 above.

First, I would like to thank all of those who took the time to respond to this consultation. This is a proposal that reaches across many sectors including insurance, medicine, health economics, victims' rights, and issues around the legislative competence of the Scottish Parliament. I appreciate the time and energy given over to this proposal and the depth of some of the suggestions to make the Bill more effective.

The core aims of the proposal are to recover much needed monies for the NHS in Scotland where someone has been injured or contracted an illness through work, and to raise the overall health and safety culture of Scottish workplaces. In 2017/18, the total recoveries made by the Department of Work and Pension's (DWP) Compensation Recovery Unit (CRU) from employers amounted to £67.7 million⁵, highlighting how vital my proposal, if passed, could be for our health service. Additionally, while the public understanding of asbestos-related diseases has increased massively over the past few decades, other industrial diseases have not had the same recognition.

While the quality of responses received is very high, the overall number of responses to the consultation is disappointing, and I have reflected on what that means in terms of understanding this complex landscape.

This proposal is an improvement on the previous proposal, which I consulted on in 2015, as it clarifies several of the areas where there were concerns around the legislative competence of the Scottish Parliament. The Faculty of Advocates has noted in its response that it considers this proposed Bill to be within the competence of the Scottish Parliament.

I appreciate the comments from Kennedys LLP regarding the proposal's potential for creating a new class of insurance if passed. However, I am clear that in the proposed Bill the liability would not be imposed on the employer's liability or public liability insurer, but would find the negligent party responsible for the treatment costs.

After the consultation closed, I wrote to the Cabinet Secretary for Health and Sport, the Cabinet Secretary for Justice, and the Cabinet Secretary for Social Security and Older People to establish the baseline costs for the creation of a Scottish Compensation Recovery Unit (CRU) if it were required. Regrettably, the Cabinet Secretaries were unable to meet with me. I therefore contacted the House of Commons Library to determine the annual running costs, including staff numbers and payroll costs, of the existing DWP CRU. Unfortunately, the DWP does not publish the running costs or staffing levels of the CRU.

⁵ <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data>

I also contacted the Secretary of State for Work and Pensions to indicate if her department would:

- a) Carry out this role on behalf of the Scottish Government if this proved to be the more cost effective route, and
- b) Support an interim agreement – if needed – that would allow NHS compensation to be collected by the existing CRU until a Scottish unit was established.

The Secretary of State's response outlined that the DWP would only enter into discussions with the Scottish Government directly on the proposal, however, as the CRU has already agreed to act on behalf of other jurisdictions, including Jersey and Guernsey, I believe the DWP could also act on behalf of Scotland as a precedent has already been set with regards to the CRU acting on behalf of other areas.⁶

Regardless of what the mechanism is for collecting NHS compensation, should this proposal be passed by the Parliament, the Scottish Government would need to hold discussions with the UK Government to establish an agreement on the matter.

On the issue of contributory negligence, I appreciate the challenges surrounding this, so sought further information on what would be the outcome for someone who presents themselves as having an industrial-related disease but is, for example, a smoker. As the treatment costs are specific to the ailment, for diseases such as mesothelioma, a person would undergo chemotherapy or radiotherapy treatment because they had been diagnosed with mesothelioma, not because they smoked. However, in some lung cancer cases there may be an overlap in terms of whether there is contributory negligence, given that the person smoked and had a diagnosis of lung cancer. In these situations, I have been advised that the general principle would be to reduce the amount of treatment costs to reflect this.

I appreciate Scottish Hazards' concern that the proposed Bill could, over time, fail to reflect the modern world of work and developing working practices and their known, or possibly as-yet-unknown, links to unprescribed illnesses (i.e. illnesses that we may not currently know about or consider to be an industrial disease). However, I believe that the legislation, if passed, could allow for reviews or amendments to be made to include future prescribed industrial illnesses once they are discovered and are proven to be linked to industrial work.

I am confident that the Bill process will allow the necessary space for debate, discussion and for a clear communications strategy to be put in place.

Lastly, the efforts of Clydeside Action on Asbestos must be noted. The steadfast and rigorous campaigning that this group has taken on over many

⁶ <https://www.gov.uk/government/publications/compensation-recovery-unit-bulletins/n>

years has led to real results for victims of asbestos-related diseases. I am deeply grateful for the time and energy it has given to this proposal.

ANNEXE

- ID:01 Brian Carson
- ID:02 NHS Forth Valley
- ID:03 Aviva
- ID:04 Zurich Insurance Plc
- ID:05 Sandy Carmichael
- ID:06 Faculty of Advocates
- ID:07 Ian Anderson
- ID:08 Kennedys LLP
- ID:09 Allianz Insurance Plc
- ID:10 Association of British Insurers (ABI)
- ID:11 BLM
- ID:12 Clyde and Co
- ID:13 Forum of Scottish Claims Managers
- ID:14 Institute and Faculty of Actuaries (IFA)
- ID:15 Scottish Hazards
- ID:16 Thompsons Solicitors