



Proposed Recovery of Medical Costs for Asbestos Diseases Bill Consultation Response

On behalf of the Forum of Scottish Claims Managers

The Forum of Scottish Claims Managers (FSCM) works to improve the handling of insurance claims to deliver a better service to claimants and seeks to promote the interests of the Forum members in civil justice matters covering the handling of insurance claims. We support reforms to promote improvements to the law to enable consumers easier and quicker access to justice. The Forum membership covers a number of major insurers and financial institutions together with claims handling companies and Local Authorities. This briefing paper is intended to inform MSPs of the Forums' views on the Proposed Recovery of Medical Costs for Asbestos Diseases Bill.

Summary

We welcome the opportunity to engage and contribute to the discussion and debate around the treatment of victims of asbestos related diseases and highlight the proactive approach of insurers in seeking to improve the position of sufferers. We support the desire to help those who suffer from asbestos related diseases however do not accept that the proposed Bill does anything to support or improve the position of such sufferers.

We also believe that the recent ruling of The Supreme Court in relation to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill creates a clear and insurmountable obstacle to the introduction of this proposed legislation in Scotland.

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: **The proposal does not benefit or positively impact upon any claim the claimant has and may in fact be detrimental as some parties required to meet such claims may have limited funds to allocate in this area and any additional cost to the compensator will challenge resources. Conversely, the absence of any such legislation will have no adverse effect on asbestos disease sufferers. If extensive additional costs are introduced by way of recovery of Medical Costs then, for direct compensators/businesses, funding these additional costs may directly impact local authority/government services in other areas.**

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: **Legislation in this field is not necessary and as proposed is not an appropriate means to address the issues identified. The Bill does not have any positive outcome or benefit to the victims. If the issue is to generate funds for medical research into asbestos related disease, then significant funds have already been provided to the British Lung Foundation by some insurance company members of this Forum which is a more appropriate research funding route.**

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: **The set up and assessment of the charge will be difficult and complex. The extent of the benefits to be repaid will be an issue if there are a number of historic employers who are not contributing to the claim. There are also likely to be issues surrounding the fact that many claimants with asbestos related disease will have significant simultaneously presenting conditions and will be receiving medical treatment for multiple unrelated medical conditions at the same time. This adds additional layers of complexity, bureaucracy and cost over the existing schemes.**

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: **The payment of a benefit to an individual together with a subsequent award of damages should not necessarily result in all benefits requiring to be repaid. It should be open to Scottish Ministers to exclude some repayment by specification.**

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: **Insurers are not the actual wrongdoers in asbestos related disease claims. The rationale which exists for imposing liability on wrongdoers does not apply to insurers who did not expose people to asbestos. When insurance policies were written around the 1960's and premiums were taken by insurers, it could not have been envisaged by any insurer, or indeed any party, that there may ultimately be a requirement to repay these benefits. These are not "Damages" which would be covered by any insurance policy and the only way to overcome that would basically be to re-write a 40 year old insurance policy, which is not possible. The potential repayment of these charges is not restricted to insurers and there are numerous asbestos claims where legal entities have to meet the cost "Damages" on their own as there is no insurance in place. Over and above business entities, there are a significant number of such claims involving self-funding bodies including government and local authorities. We do not believe that the Scottish Parliament has the power to legislate on such matters and it is clear from the decision of the Supreme Court in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015]* that this proposed legislation interferes with the rights of insurers under Article 1, Protocol 1 of the European Convention on Human Rights and is without justification and therefore outside the competence of the Scottish Parliament.**

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.

We do not believe that either option is appropriate. Simply allocating funds to the Health Board area where the treatment took place is not necessarily the most obvious/appropriate solution. There are areas where a significant proportion of the elderly male population may have asbestos related disease and by implication those areas will have a higher spend on asbestos related disease. There are however situations where remote Health Boards may be involved in treating asbestos victims on a rare/occasional basis and it may be questionable whether it is appropriate to allocate funds to such Health Boards.

We have already confirmed that insurers voluntarily fund medical research in this area to a significant extent and we believe that regulated funding of medical research carries a lighter administrative burden and more workable solution than the complexities and challenges and inequalities this Bill would introduce.

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.

There will be a financial impact for any organisation which meets a liability for damages in an asbestos related claim – the introduction of this Bill will increase the total amount spent on claims. If a local authority has to meet a claim in full or in part, then that money will have to be allocated from an existing budget. Depending on the type and volume of claims that have to be dealt with, there is a real possibility that there will be an adverse impact on budgets for provision of local authority services.

The potential additional spend in relation to repayment of benefits may, in some cases, reduce the budget available to deal with the compensation aspect of asbestos claims.

There will also be a significant administrative burden on the NHS and the DWP for dealing with cases where ultimately any monies flow through to another entity. We also foresee disputes regarding potential liabilities where full insurance coverage cannot be confirmed so compensating parties may challenge the extent of their proportionate liability.

Q8 What is your assessment of any implications for equality?

We do not anticipate any implication for equality arising from this Bill.

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.

The legislative powers of the Scottish Parliament are relatively wide however it is clear that the introduction of this Bill will be incompatible with Article 1, Protocol 1 of the European Convention of Human Rights as outlined in the consideration given by the Supreme Court of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill and is therefore not justified or within the competence of the Scottish Parliament.

Q10 Do you have any other views or comments you would like to make on this proposal?

There are a number of issues which arise in relation to this proposal

- a) A similar Bill in Wales was referred to the Supreme Court which has determined that the Welsh Act is in breach of Article 1, Protocol 1 of the European Convention of Human Rights. Given that this legal issue is exactly the same in Scotland, any Bill will face a legal challenge by those proposed paying parties. The alternative would be for the Scottish Parliament to refer the matter to the Supreme Court as the Welsh Assembly did.**
- b) It should also be recognised that this is not simply an additional cost to be picked up by insurance companies. There are numerous uninsured legal entities which have to meet such claims from their own funds and these proposed additional payments may potentially impact on the liquidity of such organisations.**
- c) It is anticipated that there will be an increase in public liability claims against public bodies such as hospitals, schools and other public service buildings which were built incorporating asbestos products. Many of these future claims would be met by the public bodies as opposed to insurance companies and it is inevitable that the introduction of this Bill will impact upon local services provided by local authorities in the areas where public liability claims occur and result in a continued financial drain on available resources.**