

BLM

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

Unsure

We are unsure of the proposed legislation and the precise terms of the Bill are not yet known. We welcome the removal of the retrospective elements of the previous Asbestos Bill. However, we have reservations of the merit of the proposed legislation and the practical consequences of the proposed system to recover NHS charges arising from exposure that takes place after the enactment of the legislation.

The extent of the NHS charges said to be incurred from industrial / occupational diseases in Scotland is un-quantified. Further research is required regarding the cost to the NHS of the provision of care and treatment arising from such conditions. The extent of the present disadvantage to the NHS caused by the lack of recovery is unclear. Further information regarding the cost to the NHS is required. Also further information is required in relation to the current levels of industrial disease claims, beyond the Civil Justice Council statistics relating to actions raised.

It is also unclear what disadvantage (if any) is suffered by those persons with industrial diseases who receive treatment from the NHS, compared to those receiving treatment from the NHS who have been involved in road traffic accidents or accidents at work. Those individuals with diseases caused by negligence have a right of redress against the negligent party and, in that respect, no access to justice issue is being met by this Consultation.

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

Disadvantages:

Causation, allocation and attribution - It may be difficult to attribute NHS charges associated with occupational diseases to particular negligent organisations. A person may have been negligently exposed to harm by a number of employers and it is unclear at this stage how (a) treatment charges might be allocated across negligent employers and/or (b) how non-negligent exposure to the same harm might be dealt with.

In addition, how are the differences between divisible and non-divisible diseases to be dealt with in relation the liability of negligent organisations?

It is also unclear how any body administering the proposed scheme might attribute the injured person's condition to a particular negligent organisation without detailed medical evidence and analysis.

The date of diagnosis of a condition may not also be clear and may be different to that claimed by the injured person.

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Liability - As noted above, it is unclear how earlier or later periods of non-negligent exposure will be dealt with.

With the introduction of NHS charges for such claims it may be possible that due to increased potential financial liabilities – particularly if the treatment charges are significant - compensators may be more likely to take issue with liability and defend substantive claims more thoroughly. In light of this the payment of damages to the injured person could well be delayed.

The issue of cross-jurisdictional exposure is also not addressed in the consultation document.

Co-morbidities - Often injured persons have a number of other medical conditions that can have a bearing on their claimed condition. There will be complex questions arising in relation to the condition claimed, the effect of other conditions not caused by the workplace and the extent of the medical treatment provided.

Transitional arrangements - The transitional arrangements proposed for the legislation are not clear. How is negligent exposure (giving rise to treatment charges) before the Bill is in force to be dealt with in comparison to exposure after the Bill is in force?

We would welcome further reassurance that any negligent exposure before commencement is entirely outwith the proposed scheme, even where treatment charges are incurred only after commencement.

Contributory Negligence - No allowance for contributory negligence has been made, unlike the system for the recovery of NHS charges from road traffic accidents and accidents at work.

Quantification of NHS Charges - It is unclear how the NHS charges are to be quantified, especially as many industrial conditions may require various treatments from a number of sources.

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?

Neutral

There has been no information provided regarding the cost of utilising the existing UK-wide mechanisms, i.e. the Compensation Recovery Unit of the Department for Work and Pensions. No costing has been provided. The response of the Compensation Recovery Unit to this proposal is also unknown and should be obtained before further steps are taken.

Despite the absence of costings at this stage, it appears to us highly likely that setting up a standalone mechanism for Scotland only is highly likely to be more expensive than the alternative of using the CRU mechanism. We would strongly recommend that any financial impact assessment should (a) set out clearly costings in respect of these

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models and (b) compare them against the sums likely to be recovered should the proposals be taken forward.

If any scheme were to be taken forward, we would suggest that:

- any right of recovery arising in favour of the NHS must be entirely contingent upon and ancillary to an injured person successfully recovering damages in respect of the disease for which treatment was provided, and
- there should be a clear and robust appeals process via which 'paying parties' may raise matters such as those outlined in our response to question 2 above.

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: Some increase

(b) Businesses: Some increase

(c) Individuals: Unsure

The state already recovers from compensators the cost of Social Security payments made in relation to industrial diseases, with recovery of benefits such as Industrial Injuries Disablement Benefit and statutory awards such as Pneumoconiosis Act payments.

Cost to Insurers

It is likely that insurers will be the main payer of these NHS charges on behalf of their policyholders. Although it may be suggested that the proposed system will be targeted at negligent organisations, the practical effect of the system will be the organisations' insurers will be likely to bear the cost of the NHS charges recoupment. As is the current position in relation to NHS charges from road traffic and accidents in the course of employment, it is likely that insurers will meet the cost of that liability under their policies of insurance. It seems to us that this would inevitably cause some increase in insurance premiums for businesses operating in Scotland.

Cost to Negligent Organisations

Given that the liability to repay treatment charges is very likely to fall to be met by insurers, it is unclear to us whether negligent organisations causing industrial diseases would suffer a direct financial penalty, unless self-insured.

In addition the examples provided in the consultation paper of the relative costs of NHS charges for certain industrial disease claims are highly subjective and do not appear to be based upon any fully-developed empirical evidence or research.

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

No response offered.

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?

No response offered.

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

No response offered.

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?

No response offered.

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

It is unclear to us in what way the payment of NHS charges for industrial diseases might improve health and safety practices of negligent organisations.

The full effect of the proposed legislation will not be known until the draft Bill is seen. In our view, detailed research regarding the need for, the likely effects and, in particular, the financial implications of, the proposed scheme is required before detailed legislative proposals are drawn up and taken forward.