

Forum of Scottish Claims Managers

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

Unsure

Without having sight of a draft Bill, we simply cannot declare a position on the Bill.

However, we do welcome the proposal outlined in the consultation document that all retrospective elements will be removed by ensuring the Bill only applies to those industrial diseases which are developed as a consequence of exposure after the commencement date of the Bill.

There are, however, numerous practical problems that would need to be resolved for the Bill to work in practice and achieve the stated aims.

Those responsible for causing individuals to require NHS treatment either as a consequence of a road traffic accident or accident at work are already held liable for at least some of the cost of that treatment and we note the proposed Bill seeks to treat victims of industrial disease in exactly the same way.

This is not a straightforward proposition for a number of reasons detailed below and a final position on the proposed Bill will be taken on sight of the Bill.

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

If the Bill is framed appropriately, then it will provide clarity as to which conditions are covered, what sums may require to be repaid and by whom. If the Bill were to be enacted, similarity in approach and an alignment to the existing recovery schemes for road traffic accidents and accidents at work would be a definite advantage.

In terms of disadvantages, we would like to see outlined in the Bill how the situation will be dealt with where there is negligent exposure both before and after the coming into force of the Bill. In such circumstances there will clearly be real practical issues, such as:

- 1. How can the effect of a period of negligent exposure before enactment of the Bill (a retrospective element) practically be identified and excluded? (particularly where the law regards the condition as indivisible and there is exposure after enactment as well)*
- 2. How can the NHS treatment of the condition be broken down and attributed to different exposure periods straddling the enactment of the Bill when it's one condition?*
- 3. Co-morbid conditions - For example, an individual may have some respiratory or lung condition alongside a significant past smoking history*

13 (Non-Smart Survey)

These are very complex legal questions created even where there is exposure with a single employer, but will be even more complicated and create numerous legal complexities where there are multiple employers before and after the coming into force of the Bill.

Attributing the treatment of individuals with industrial disease is not as straightforward as it can be for accident victims where there is a definitive date of accident to work from and usually, a clear path of whether days in hospital were attributable to that index accident or not.

There are jurisdiction and cross border issues to contend with - the proposed Bill only relates to Scotland. One issue which may well arise is the situation where an individual is treated for industrial disease in Scotland as a consequence of exposure that may have taken place in England, or the individual may have different periods of exposure whilst working both in Scotland and elsewhere in the UK or abroad - the proposed Bill would have to make allowance for these scenarios.

Many of the points highlighted make it clear that the proposed Bill is going to be significantly complex to deal with the practicalities. It is unclear at this stage if the administration of such a scheme is going to be handled by the DWP or a separate body that would require to be set up by the Scottish Government. It is recognised that a separate recovery scheme operated by the Scottish Government would be more expensive, complex and less efficient. In fact, both options would have wider cost implications.

The complexities in this area, mean that any scheme would certainly have to contain a very robust appeal and review process to be fit for purpose.

The costs involved in setting up a separate scheme would require to be analysed alongside the benefit to the NHS of the proposed Bill. 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. A detailed cost benefit analysis will require to be carried out.

At a time when the overall aim of the justice system is speed of access to justice for victims of industrial disease, (as can be evidenced by the Scottish Civil Justice Council considering a mandatory pre-action protocol for industrial disease claims right now) the legal complexities of the proposed bill could create areas of division and legal uncertainty which in turn could result in unnecessary delay in resolving the cases which would be counter-productive overall.

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

Whilst we are unsure about the proposed Bill until we see the detail, we do support the proposal that administering the 3 recovery schemes in the same place makes

13 (Non-Smart Survey)

sense as the aim of the proposed Bill is to have consistency between industrial disease claims, road traffic accidents and accidents at work. The easiest way to seek to implement that is to have industrial disease claims in Scotland incorporated into the current scheme operated by the DWP, but having due regard to the complexities outlined in answer 2.

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:** Some increase

There are several aspects of the proposed Bill that will result in an increase in cost to the Government and the public sector. The cost will be significantly greater if the Scottish Government has to administer the recoveries.

Even if the recoveries are to be dealt with by the DWP there will be an increased cost in setting that up. The administration of the scheme will also involve significant cost as matters are not as straightforward as road traffic accident claims and accidents at work.

In addition, there will be an element of simply moving funds around between Government departments and public bodies. This is certainly the position as one of the largest payers of industrial disease claims historically has been Government and Local Authorities. We are likely to be in a position where Government and public bodies require to pay treatment costs to the DWP who will then require to distribute that to the NHS.

For business and individuals who may operate as sole traders, there will also be an increase. There is an element of inconsistency with the consultation paper in relation to whether the cost of repayment lies with the negligent party, or the insurance industry. Either way there will be an increase in cost to businesses as they will either have to meet these costs directly themselves, or if insurance policies cover the cost, then it is inevitable that additional cost would be covered by way of increased premiums. That will impact all premium payers.

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

Unable to comment.

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?

Unsure

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

Unable to comment.

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?

The sustainability of the proposed Bill is obviously dependent upon the final terms of the Bill and the level of treatment costs that require to be repaid. This has to be balanced against the cost of either the DWP administering the scheme, or the Scottish Government setting up a body to administer the scheme.

The non-retrospective nature of the proposed Bill is unlikely to result in significant recoveries for the NHS, certainly in the early years, and therefore there have to be questions in respect of sustainability.

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

The fact that this is a proposal document, as opposed to a draft Bill, does raise potential queries given the lack of specification.

The removal of any retrospective element of the proposal is welcomed, but the inconsistency in respect of who will actually be repaying the treatment costs requires to be clarified.

NHS charges are currently subject to a cap in respect of other types of claim. It is anticipated that a similar cap will apply to industrial disease claims. That would certainly ensure a consistent approach.

One other comment is that there have been huge drives and progress made in relation to various treatments for numerous conditions over the years. It is anticipated that this progress will continue. Many of these are unforeseeable at the present time and it is unclear how these may impact upon any proposed Bill.

Clearly a more detailed response can be made once the proposed Bill is published.