

National Assembly for Wales
Health and Social Care Committee

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Stage 1 Committee Report

March 2013



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

An electronic copy of this report can be found on the National Assembly's website
www.assemblywales.org

Copies of this report can also be obtained in accessible formats including Braille, large print; audio or hard copy from:

Health and Social Care Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: 029 2089 8242
Fax: 029 2089 8021
Email: HSCCommittee@wales.gov.uk

© National Assembly for Wales Commission Copyright 2013

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

National Assembly for Wales
Health and Social Care Committee

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Stage 1 Committee Report

March 2013



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

Health and Social Care Committee

The Committee was established on 22 June 2011 with a remit to examine legislation and hold the Welsh Government to account by scrutinising expenditure, administration and policy matters encompassing: the physical, mental and public health of the people of Wales, including the social care system.

Current Committee membership



Mark Drakeford (Chair)
Welsh Labour
Cardiff West



Mick Antoniw*
Welsh Labour
Pontypridd



Rebecca Evans
Welsh Labour
Mid and West Wales



Vaughan Gething*
Welsh Labour
Cardiff South and Penarth



William Graham
Welsh Conservatives
South Wales East



Elin Jones
Plaid Cymru
Ceredigion



Darren Millar
Welsh Conservatives
Clwyd West



Lynne Neagle
Welsh Labour
Torfaen



Lindsay Whittle
Plaid Cymru
South Wales East



Kirsty Williams
Welsh Liberal Democrats
Brecon and Radnorshire

*Mick Antoniw AM, as the Member in charge of the Bill, did not attend meetings where the Bill was under consideration by the Committee. Vaughan Gething AM declared himself to be a long-standing and committed supporter of the Bill and felt it was more appropriate to excuse himself from the Committee's consideration of the Bill.

The following Members substituted under Standing Order 17.48 for Mick Antoniw and Vaughan Gething at relevant meetings:



Mike Hedges
Welsh Labour
Swansea East



Gwyn R Price
Welsh Labour
Islwyn



Jenny Rathbone
Welsh Labour
Cardiff Central

Contents

Summary of Conclusions	5
Recommendations.....	8
1. Introduction.....	10
Terms of scrutiny	10
The Committee’s approach	11
2. Background.....	12
Explanatory Memorandum	12
3. General Principles and the Need for Legislation.....	14
Background	14
The National Assembly’s legislative competence to make the Bill... ..	14
Our view	16
The suitability of asbestos-related diseases	16
The “polluter pays” principle	17
The impact of the Bill upon settlement times.....	18
Our view	20
4. Scope of the Bill	21
Range of asbestos-related diseases covered	21
Our view	22
Eligible treatment	23
Our view	25
Our view	28
Excluded payments.....	28
Timeframe for eligible treatment	29
Our view	31
Geographical scope	32
Our view	33
5. Liability of insurers	34
Retrospective effect	34
Our view	35

6. Financial implications	36
Circulation of funds within the Welsh public sector	36
Our view	39
Use of recovered funds	40
Our view	42
Our view	43
7. Administration.....	44
The role of the Compensation Recovery Unit at the Department for Work and Pensions	44
Our view	45
Appeals	46
Our view	48
8. Powers to make subordinate legislation	49
Report of the Constitutional and Legislative Affairs Committee.....	49
9. Secretary of State and Crown Consent.....	50
Annexe A - Witnesses	51
Annexe B - List of written evidence	53

Summary of Conclusions

This report outlines the findings of the Health and Social Care Committee's Stage 1 consideration of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

We undertook detailed scrutiny of the Bill and as a result have made a number of recommendations to the Member in Charge of the Bill, Mick Antoniw, and to the Welsh Government, which are set out later in this report.

General principles

We have also, as is required under Standing Order 26.10, considered the general principles of the Bill.

The main principle underlying the Bill is that, in relation to asbestos-related diseases, those responsible for causing harm should also be responsible for meeting the costs of that harm – the so called “polluter pays” principle.

We are content with this as a general principle in relation to asbestos-related diseases. However, this may well be a principle that could also be applied more widely to other industrial diseases. We believe the Welsh Government should give greater consideration to the wider application of the principle to these and other relevant diseases and should consider bringing forward a Government Bill to this effect.

We also believe there are a number of matters arising from the practical application of the principle in the Bill, which will require further exploration should the Bill proceed to its next stages. These issues, along with relevant recommendations, are set out in more detail later in this report. However, our main concerns can be summarised as follows:

Adequate recovery of costs

- there is a concern that the mechanism set out in the Bill may not recover some significant costs of treating asbestos-related diseases;
- clearly, there is a trade-off between ease of administration and ensuring that all relevant costs are recovered;

- however, the implications of this “stop the clock” approach - where only costs incurred before a compensation settlement has been agreed are recovered - need to be applied in a way which gives the maximum feasible effect to the “polluter pays” principle, particularly in relation to non-mesothelioma asbestos-related diseases;
- in particular, more work is needed to see if a way can be found to “stop the clock” at a later point, in order to maximise the costs that can be recovered.

Circulation of funds within the Public Sector

- an element of the costs recovered by the Welsh Ministers will be from bodies that are also funded by the Welsh Ministers, notably Welsh local government and the NHS itself;
- if the amount recovered from these bodies is sufficiently high, a point might come when it would be questionable whether it made sense to recover funds from one part of the public sector in Wales simply to recirculate it to another part;
- we do not believe the evidence we have heard shows this to be the case at the present time. However, we believe that more needs to be done by proponents of the Bill to scope the potential impact of a changing profile of claims in the future and to address the concerns raised in evidence to the Committee on this point.

The role of the Compensation Recovery Unit

- the Explanatory Memorandum sets out a number of options for administering arrangements for recovering funds. The preferred option is to use the Department for Work and Pensions’ Compensation Recovery Unit (CRU), which already carries out a similar role in relation to recovering costs of medical treatment arising from road traffic accidents;
- if the Bill is to proceed, then we believe it will be important for the Member in charge, and the Welsh Government to secure greater clarity from the CRU about the role which is envisaged for it. At this stage there is no in principle agreement in place for the CRU to carry out this work and this inevitably leaves an area of uncertainty as to its willingness and ability to do so;

- while this is by no means a fatal flaw, we believe it is important for the Assembly to have greater clarity on this point when it is asked to agree the general principles of the Bill.

Detailed consideration at Stage 2

Despite our concerns about these practical issues, we do not believe they amount to an insurmountable challenge either to the overall aim of the Bill nor the general principle it seeks to enshrine.

Stage 2 is the appropriate point at which to give consideration to detailed changes that can address the sorts of issues we have identified. On this basis, we are content that the Bill should proceed to Stage 2 for detailed consideration.

Recommendations

The Committee's recommendations are listed below, in the order that they appear in this report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

Recommendation 1. We recommend that the Welsh Government should consider implementing the “polluter pays” principle for all industrial diseases, and other diseases where liability for cause can be established, and consider bringing forward its own Bill to give effect to this principle. (Page 20)

Recommendation 2. We recommend that an affirmative resolution regulation making power is included in the Bill that would provide for the costs of primary and community services to be added in the future to those services for which costs can be recovered. (Page 26)

Recommendation 3. We recommend that the Member in charge and the Welsh Government should give further consideration to whether and how the costs of palliative care are included in the tariff. (Page 28)

Recommendation 4. We recommend that the Member in Charge and the Welsh Government should give further consideration to the cost profile of non-mesothelioma asbestos diseases, whether the “stop the clock” mechanism is appropriate in these cases and whether the clock could be stopped at a later point, in order to maximise the costs that can be recovered. (Page 32)

Recommendation 5. We recommend that the financial estimates, on which the Bill is based, are updated as quickly as possible, ideally before the Stage 1 debate, and in any event before detailed consideration of the Bill at Stage 2. In doing so, we expect the Member in charge and the Welsh Government to address more thoroughly the extent to which recovered funds are likely to recirculate within the Welsh public sector, looking in particular at likely future patterns of liability within the public sector. (Page 40)

Recommendation 6. We recommend that the Member in charge or the Welsh Government should bring forward the necessary amendments to impose a duty on the Welsh Ministers to report annually to the Assembly on the costs recovered, the use to which

those funds have been put and the recipients of those funds.
(Page 41)

Recommendation 7. We recommend that Section 16 of the Bill is amended to include “research” as one of the specific uses of recovered funds.
(Page 43)

Recommendation 8. We recommend that the Welsh Government or the Member in charge obtain as a matter of high priority, and before the Bill receives detailed consideration at stage 2, confirmation that the CRU is willing, in principle, to undertake the role envisaged for them in the Bill’s Explanatory Memorandum and that it has sufficient capacity to do so.
(Page 46)

Recommendation 9. We recommend that the Member in charge or the Minister ensure that the consent of the Secretary of State has been obtained, if this is necessary and clarify the position by the Stage 1 debate if possible.
(Page 50)

Recommendation 10. We recommend that the Member in charge or Minister ensures that any necessary consent of Her Majesty and or the Duke of Cornwall to this provision has been sought or obtained pursuant to section 111(4) of the Government of Wales Act 2006 and clarifies the position by the Stage 1 debate if possible.
(Page 50)

Recommendation 11. We recommend that the Member in charge or Minister ensures that any necessary consent of the Secretary of State has been sought or obtained pursuant to Schedule 7 to the Government of Wales Act 2006 and clarifies the position by the Stage 1 debate if possible.
(Page 50)

1. Introduction

1. At its meeting on 13 November 2012, the National Assembly's Business Committee referred the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill¹ ('the Bill') to the Health and Social Care Committee ('the Committee'), for consideration of the general principles (Stage 1), in accordance with Standing Order 26.9. The Business Committee agreed that the Committee should report to the Assembly by 8 March 2013.

2. Bills, which are neither government Bills, committee Bills nor Commission Bills, are referred to as "Member Bills". The Member in charge of the Bill, who received agreement to introduce the Bill under Standing Order 26.91, is Mick Antoniw AM. On 3 December 2012 Mick Antoniw introduced the Bill and Explanatory Memorandum² and made a statement³ in plenary⁴ on Wednesday 5 December.

Terms of scrutiny

3. At the Committee's meeting on 5 December 2012, it agreed the following framework within which to scrutinise the general principles (Stage 1) of the Bill:

To consider:

- i. the need for a Bill to enable the Welsh Government to recover from employers or other bodies the costs of medical treatment and care provided to NHS patients in Wales who have sustained asbestos-related disease;
- ii. whether the Bill achieves its stated purposes;

¹ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill available at: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9122-e.pdf?langoption=3&ttl=PRI-LD9122%20-%20Recovery%20of%20Medical%20Costs%20for%20Asbestos%20Diseases%20%28Wales%29%20Bill>

² Explanatory Memorandum available at: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9122-em-e.pdf?langoption=3&ttl=PRI-LD9122-EM%20-%20Explanatory%20Memorandum%3A%20Recovery%20of%20Medical%20Costs%20for%20Asbestos%20Diseases%20%28Wales%29%20Bill%20>

³ Record of Proceedings 5 December 2012: <http://www.assemblywales.org/bus-home/bus-chamber-fourth-assembly-rop.htm?act=dis&id=241306&ds=12%2F2012#04>

⁴ A full meeting of the National Assembly for Wales.

- iii. the key provisions set out in the Bill and whether they are appropriate to deliver its stated purposes;
- iv. financial implications arising from the Bill;
- v. potential barriers to the implementation of the key provisions and whether the Bill takes account of them;
- vi. whether there are any unintended consequences arising from the Bill;
- vii the views of stakeholders who will have to work with the new arrangements;
- viii whether the Bill contains a reasonable balance between the powers on the face of the Bill and the powers conferred by Regulations.

The Committee's approach

- 4. The Committee issued a consultation and invited key stakeholders to submit written evidence to inform the Committee's work. A list of the consultation responses is attached at Annex A.
- 5. The Committee took oral evidence from a number of witnesses on the Bill. The schedule of oral evidence sessions is attached at Annex B. Full transcripts of these sessions are available on the Assembly's website at: <http://www.assemblywales.org/>
- 6. The Committee would like to thank all those who have contributed.

2. Background

Explanatory Memorandum

7. The Explanatory Memorandum for the Bill provides information about its purpose and intended effect. The section “How the Bill will achieve its purpose” states the following:

“The Bill will enable the Welsh Ministers to recover, from the compensator, the cost of certain medical treatment and services provided or funded by the Welsh NHS to patients who have sustained asbestos-related disease (specifically mesothelioma, pleural thickening, asbestos-related lung cancer and asbestosis).”⁵

8. It goes on to explain:

“The Bill does not create any new entitlement to compensation where a claim would not already exist, but only triggers recovery of the cost of certain medical treatment by the Welsh Ministers once a settlement or judgment in a claim for compensation is achieved by an asbestos sufferer or their personal representatives. As with the 2003 Act, a compensation payment will act as a trigger for cost recovery whether or not the party making it admits liability.”⁶

9. Mick Antoniw has previously stated his intention that “the medical costs recovered will be allocated by the Health Minister annually for the general benefit of asbestos victims and their families including support for palliative care and other treatment.”⁷

10. The Bill states that the money will go to the Welsh Ministers, with the Explanatory Memorandum explaining:

“... the recovered sums will be returned to the Welsh Ministers to be retained. Within the Annual Budget Motion, allocation of income for the recovered costs to the Department for Health, Social Services and Children Main Expenditure Group (MEG) would be sought, and for allocation of resources to the same

⁵ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Explanatory Memorandum, paragraph 38

⁶ Ibid – paragraph 39

⁷ Mick Antoniw AM’s website, [Asbestos Bill](#) [Accessed 15 November 2012]

MEG for the provision of services to asbestos victims and their families. Allocation of the resources recovered will cover the costs of administration of the scheme and could provide for funding for the general benefit of asbestos victims and their families, including support for palliative care and other treatment. Such funding would represent a contribution to the future costs to the NHS in Wales.”⁸

11. Section 16 of the Bill places a duty on the Welsh Ministers to have regard to re-allocating an amount, equal to the charges reimbursed under the Act, into the Welsh Consolidated Fund, for the purpose of treatment of, or services relating to, asbestos-related diseases. Though the Explanatory Memorandum states that the recovered costs could be used “for the general benefit of asbestos victims and their families”, this is not required by the Bill.

⁸ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Explanatory Memorandum, paragraph 40

3. General Principles and the Need for Legislation

Background

12. The Bill gives effect to Mick Antoniw AM's proposals to enable the Welsh Ministers to recover from a compensator (being a person by or on behalf of whom a compensation payment is made to or in respect of a victim of asbestos-related disease), certain costs incurred by the NHS in Wales in providing care and treatment to the victim of the asbestos-related disease.

The National Assembly's legislative competence to make the Bill

13. The Explanatory Memorandum⁹ says that the National Assembly for Wales has the legislative competence to make the provisions in the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill by virtue of Part 1 of Schedule 7, subject heading 9 (Health and health services) of the Government of Wales Act 2006.¹⁰

14. The Presiding Officer has decided that, in her view, the Bill is within the legislative competence of the National Assembly for Wales.¹¹ However, in reaching her conclusion she noted that it was a "finely balanced" decision in some respects.¹²

15. Some witnesses, notably the Association of British Insurers (ABI) and the Forum of Insurance Lawyers (FOIL), stated that they felt at least some provisions of the Bill lay outside the competence of the Assembly.

16. The ABI argued that the Bill primarily related to "financial services ... including insurance",¹³ a reserved subject under the Government of Wales Act 2006. Furthermore, both the ABI and FOIL stated that the Bill may be in contravention of the European Convention on Human Rights (specifically, the right to the peaceful enjoyment of property). The ABI

⁹ Explanatory Memorandum – Paragraph 4

¹⁰ Government of Wales Act 2006 c.32

¹¹ Presiding Officer's Statement on Legislative Competence: Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=241099&ds=12/2012>

¹² Health and Social Care Committee meeting 10 January 2013: HSC(4)-01-13 (p7): <http://www.senedd.assemblywales.org/documents/s12317/HSC4-01-13p7-e-PO%20Letter%20Asbestos%20Bill.pdf> and HSC(4)-01-13(p7)(Annexe): <http://www.senedd.assemblywales.org/documents/s12318/HSC4-01-13p7-e-PO%20Letter%20Asbestos%20Bill%20Annexe.pdf>

¹³ Association of British Insurers - Written Evidence (RMCA10) p.7

expanded upon this latter point when they provided oral evidence to the Committee, as follows:

“Under article 1, protocol 1 of the convention, individuals and, it seems clear from the case law, corporate bodies are entitled to quiet enjoyment of their property. Clearly, when you get into decisions of interference with that, it is a balancing exercise between the right to enjoy your property and rights within society. There is a material question over taking property, namely money, away from insurers and indeed other bodies, in a situation where, as it looks on the face of the Bill, it is going into general taxation, or indeed any other mechanism, and of whether that balance is a proportionate response. That is a material problem and it is very questionable.”¹⁴

17. Other witnesses (such as Mick Antoniw AM and the Minister for Health and Social Services), stated that the Bill fell within the “health and health services” subject of the GOWA 2006, and therefore was within the competence of the Assembly. They noted the conclusion reached by the Presiding Officer that the Bill fell within the competence of the Assembly. Mick Antoniw also noted the legal precedent which he felt had been established dealing with the human rights argument raised by the ABI:

"The competence issue has been dealt with by the Presiding Officer, and I think that the Minister has also dealt with it. Part of that view is also based on the fact that the issue of retrospectivity and the human rights issue—which I know has been raised—were well-canvassed in the AXA case, when there was an insurance industry challenge to the decision in Scotland to legislate on the pleural plaque issue. I believe that the Welsh Government was represented in that case as well. That case has basically overridden this and made some points about retrospectivity very clear. Retrospectivity already exists in the 2003 Act. Insurance is always about uncertainties in the future, so I do not think that that argument has real validity there either. This issue has already been canvassed legally, which supports this legislation. This legislation has the precedent of the 2003 Act, as well as the support of the Scottish decision,

¹⁴ Transcript of the Health and Social Care Committee (HSC) meeting 16 January 2013, paragraph 10:

which confirmed that the social objective justified dealing with issues of retrospectivity and the infringement of the right-to-property argument as well. Ultimately, we rely on the fact that the Presiding Officer has confirmed that this is within competence.¹⁵

18. The Minister also noted the similarity between the retrospective element of the Bill and that of the 2003 Act, and her legal adviser noted the Presiding Officer's view that the Bill falls within the Assembly's competence.

Our view

19. Ultimately, whether the Bill is within the Assembly's legislative competence is a matter for judicial rather than legislative decision. Section 112 of the Government of Wales Act 2006, provides a specific mechanism for referring such questions direct to the Supreme Court for consideration.

20. Although her decision was a finely balanced one, we have noted the Presiding Officer's view, that the Bill is within the legislative competence of the National Assembly for Wales.

The suitability of asbestos-related diseases

21. As pointed out by witnesses such as the Association of British Insurers, existing legislation that enables NHS costs to be recovered (Health and Social Care (Community Health and Standards) Act 2003),¹⁶ excludes diseases from its scope. The ABI stated that this was because the additional complexities involved in diseases, when compared to injuries, means that the potential benefit of recovering charges in diseases cases would be outweighed by practical difficulties.

22. Consequently, the ABI stated in written evidence to the Committee:

“The costs and administrative burdens borne by health bodies to recover asbestos-related disease charges incurred by the NHS are likely to outweigh the estimated £2m per annum of benefits.¹⁷

¹⁵ HSC Transcript 24 January 2013, paragraph 243

¹⁶ Health and Social Care (Community Health and Standards) Act 2003 – 2003 c.43

¹⁷ Association of British Insurers, - Written Evidence (RMCA10) paragraph 3

23. However, other witnesses, such as the Minister for Health and Social Services, stated that certain characteristics of asbestos-related diseases made them particularly suitable for legislation to recover the costs incurred by their treatment. These reasons include:

- easy tracing of causation;
- easily identifiable treatment.

24. When providing oral evidence to the Committee, the Member in charge explained his rationale for seeking to broaden the NHS cost recovery principle to include asbestos related diseases, stating:

“All diseases are very complex and have very different factors, but what we know about asbestos disease is that it is relatively easy to identify and to confine its cause. For example, we know that mesothelioma is only caused by asbestos exposure. There are no other causes. We also know that in countries such as Wales—the same is true of other parts of the UK—there is a particular legacy and, to some extent, it is about doing something to resolve the consequences of that particular legacy.”¹⁸

25. One of the Minister’s officials noted the clear causal link between asbestos exposure and developing an asbestos-related disease. He said:

“That is why we think that the recovery of costs in relation to this particular disease would be much more easily identified than if it is was extended to all other diseases.”¹⁹

26. It should be noted that these reasons were most often discussed in relation to mesothelioma, whereas the Bill also covers asbestosis, asbestos-related lung cancer and pleural thickening, as well as the psychological effects of these illnesses.

The “polluter pays” principle

27. Broadly speaking, the “polluter pays” principle states that whoever causes harm should pay for its consequences. GMB and Unite, who provided joint evidence, stated that the Bill applied the “polluter pays”

¹⁸ HSC Transcript 10 January 2013, paragraph 17

¹⁹ HSC Transcript meeting 24 January 2013, paragraph 23

principle to asbestos-related diseases, and therefore had their support. When providing oral evidence to the Committee, they stated:

“The fact is that if someone is negligently exposed to this type of material and they suffer consequences from that, the people responsible for that exposure should pay the full costs.”²⁰

28. Asbestos Victims Support Groups Forum UK made a similar point in its written evidence to the Committee, stating that it felt the Bill was needed:

“To properly fulfil the ‘polluter pays principle’ by meeting the full societal cost of asbestos-related diseases.”²¹

Furthermore,

“The cost to society of fully meeting the treatment and care needs of asbestos victims resulting from negligence should be borne by the guilty party, or their insurers, not through National Insurance.”²²

29. However, as Dr Rachel Iredale, representing TENOVUS, pointed out the principle may be somewhat more difficult to establish in practice:

“I know that a lot of work is going on about the extent to which asbestos is in public sector buildings ..., we work in a building that was formerly Government-owned, which is now in private hands but occupied by a third sector organisation, and which has asbestos in every single window sill, every ceiling tile and every stairwell. If you adopt the principle of the polluter pays in that instance, who is the polluter? ...”²³

The impact of the Bill upon settlement times

30. The Bill has no direct effect on compensation payments made to individuals suffering from asbestos-related diseases as its provisions only take effect once a compensation payment is made.

31. However, discussion took place about the possible extent to which the Bill could have a knock-on effect upon individuals’

²⁰ HSC Transcript 10 January 2013, paragraph 170

²¹ Asbestos Victims Support Groups Forum UK - Written Evidence (RMCA6) page 1

²² Ibid.

²³ HSC Transcript 24 January 2013, paragraph 155

compensation claims. Tenovus speculated that, due to the increased costs involved in settling a claim, employers and insurance companies could be expected to fight cases harder, therefore leading to a longer settlement time.

32. Other witnesses, such as FOIL, suggested that as the Bill only provides for the recovery of costs of treatment provided up until the point at which a compensation payment is made, it provides an incentive for employers and insurers to settle claims early.

33. Michael Imperato, representing the Association of Personal Injury Lawyers, suggested that these two drivers would in effect cancel each other out, resulting in no identifiable difference to the time claims take to settle. He suggested that this was borne out by his experience of the recovery of NHS costs under the Health and Social Care (Community health and Standards) Act 2003.

34. Vaughan Gething AM, supporting the Member in charge, also made this point.

35. Witnesses representing Asbestos sufferers suggested that, even if claims took longer to settle, this was a price worth paying for what they saw as the just consequence of the Bill. Tony Whitston the Chair of Asbestos Victims Support Groups Forum UK told the Committee:

“I do not have the statistics for you on this, but it is my feeling that the families would say that this is a just and reasonable thing to do. I cannot say that, in all circumstances, it will not make it harder, and none of us wants to make it harder, but in the round, I think that it is a judgment that has to be made. I have made mine, and those I have spoken to are in general agreement. I do appreciate, however, that Members of the National Assembly will have to weigh this up. My opinion, however, is that, in the round, it would be better for society at large to see this go forward and, at the same time, I would urge the members of all political communities throughout UK to look at measures to reduce the cost of litigation in order to ensure access to justice. We are not concerned about lawyers’ fees or how they get on; we are just concerned about a good system and a just system. I beg you to consider it in the round.”²⁴

²⁴ HSC Transcript 10 January 2013, paragraph 127

Our view

36. The general principle upon which the Bill is based is that those that are responsible for causing harm should also be responsible for meeting the costs of that harm. We are content with this as a general principle as it relates to asbestos-related diseases. However, this may well be a principle that could also be applied more widely to other diseases, where liability for cause can be established. The wider application of the “polluter pays” principle in this way is a matter that the Welsh Government should consider. One possibility would be for it to bring forward its own Bill on the matter.

Recommendation 1: We recommend that the Welsh Government should consider implementing the “polluter pays” principle for all industrial diseases, and other diseases where liability for cause can be established, and consider bringing forward its own Bill to give effect to this principle.

37. We also have a number of reservations about the practical application of the polluter pays principle in this Bill. These reservations, along with relevant recommendations, are set out in more detail later in this report and are also addressed in the summary of our conclusions.

4. Scope of the Bill

Range of asbestos-related diseases covered

39. When questioned on this point, most witnesses stated that the range of asbestos-related diseases covered by the Bill was appropriate.

40. Professor Ceri Phillips listed the four diseases included in the Bill, describing them as the “four main diseases associated with the inhalation of asbestos fibres”.²⁵

41. When asked whether the range of diseases was appropriate, Simon Cradick from FOIL said:

Yes. There are only four principal related diseases: mesothelioma; lung cancer in the presence of significant asbestos exposure; asbestosis, although, clinically, you cannot diagnose asbestosis other than by reference to history—it is clinically indistinguishable from idiopathic pulmonary fibrosis; and diffuse pleural thickening. Pleural plaques is a fifth, but it is symptomatic, and it is not actionable other than in Scotland.²⁶

42. A considerable amount of the discussion throughout the Committee’s consideration centred on the Bill’s function with regards to mesothelioma cases. It is common ground that mesothelioma is almost invariably caused by exposure to Asbestos. However, it may be more difficult to assess the impact of the Bill in relation to the other diseases it covers due to issues such as patients suffering from comorbid conditions (therefore making treatment for asbestos-related diseases harder to isolate within treatment the individual is receiving for other conditions).

43. Some witnesses noted that identifying causation, and therefore liability, for asbestos-related diseases other than mesothelioma – such as lung cancer – could be difficult. FOIL told the Committee:

“There are major differences with regard to lung cancer and asbestosis, where diagnosis and the attribution of asbestos-related disease are much more difficult. Mesothelioma has been in front of the House of Lords and the Supreme Court on

²⁵ Professor Ceri J Philips - Swansea University – Written Evidence (RMCA15) page -:

²⁶ HSC Transcript 16 January 2013, paragraph 192

three occasions. A massive amount of medical evidence has been produced before the court; that has been done, but lung cancer has not. There has been no equivalent litigation on lung cancer.”²⁷

44. However, any difficulties involved in identifying causation do not have a direct bearing on the operation of the Bill. This is because the Bill only takes effect once a compensation payment is made, so any potentially complex questions about causation will already have been decided before the provisions of the Bill take effect.

45. Furthermore, in instances where a compensation payment has been reduced to take account of contributory negligence (that is, the compensator is not deemed wholly responsible for the exposure leading to the disease), the amount of NHS costs to be recovered will be reduced proportionally to reflect this.

46. On this point, Mick Antoniw informed the Committee:

“There is provision within the Bill that, when someone achieves a settlement, they will normally have a proportion knocked off if they are a smoker, which allows for that. So, there would be a proportionate identification. So, that will be clear on the face of the settlement with regard to the proportion of the cost that would be recovered.”²⁸

Our view

47. Much of the evidence we received has related to mesothelioma, where there seems little doubt that exposure to asbestos is the predominant, if not sole, cause of the illness. The proponents of the Bill have argued that the nature of mesothelioma, including a direct causal relationship from exposure to asbestos, with few complicating co-morbidities, makes the disease particularly suitable for the recovery of costs, once liability has been established or a compensatory payment made.

48. The causes of other asbestos-related diseases are not necessarily so clear cut. Lung cancer, for instance, can have multiple causes and establishing liability may be more problematic. Nevertheless, no evidence has been presented to us that would draw into question that

²⁷ HSC Transcript 16 January 2013, paragraph 157

²⁸ HSC Transcript 24 January 2013, paragraph 232

the diseases set out in Section 3(3) of the Bill are “asbestos-related diseases”.

49. In any event, the Bill does not establish or allocate any liability for causing asbestos-related diseases. It simply establishes a mechanism for reclaiming the costs to the NHS of treating the victims of these diseases once a compensation payment has been agreed between the victim and a compensator.

50. In the light of this we are content with the range of asbestos-related illnesses set out in Section 3(3) of the Bill.

Eligible treatment

Background

51. Section 3(5) of the Bill defines “relevant Welsh NHS services”, for which costs may be recovered under the Bill. Section 3(6) sets out a number of “excluded services” from this definition.

52. Section 4 introduces the Schedule, which defines a number of “excluded payments”.

53. The list of excluded payments can be amended using subordinate legislation, while no such facility is provided for the excluded services.

Primary care

54. Section 3(6) (a) excludes from the Bill the costs of primary medical, dental and ophthalmic services, which are referred to in Parts 4, 5 and 6 of the National Health Service (Wales) Act 2006²⁹ (“the 2006 Act”). However, there is no specific definition of these terms in the 2006 Act.

55. These Parts of the 2006 Act deal with the contracting arrangements between Local Health Boards and practitioners, without going into detail as to the services to be provided. Full detail is to be found in the National Health Service (General Medical Services Contracts) (Wales) Regulations 2004 (as amended)³⁰ together with corresponding dental and ophthalmic regulations.

²⁹ National Health Service (Wales) Act 2006 – 2006 c. 42

³⁰ SI-2004/478(W.48)

56. The lack of precision in the 2006 Act means that the effect of this exclusion can be varied by changing the services provided under those contract regulations. However, as the trend is towards increasing use of primary and community care, the effect of widening the scope of GP contracts would be to widen the scope of this exception.

57. The Member in charge of the Bill explained that the exclusion of primary care services was essentially to keep the Bill as simple as possible, while maximising the costs that could be recovered:

“Mick Antoniw: When we started thinking about the format of the Bill, the fact that there was an already well-established precedent in legislation made that a suitable model to take forward. However, in order to tie asbestos into that, we had to look at the efficiency of this system, and we decided, as we went along ... that we would be spending too much on administration if we were to look at primary care costs and a lot of incidental NHS costs around this. However, if we mirrored as closely as we possibly could the road traffic scheme, which is predominantly an in-patient tariff system, that would enable us to recover the biggest chunk of the costs that were incurred for the least expenditure.”³¹

58. The Minister and her officials confirmed in oral evidence that the current proportion of costs falling to primary care may be as little as 1 to 5 per cent:

“Lesley Griffiths: Most of the costs would be within secondary care, because, for instance, if you have cancer, you would want to be treated quickly, and most of that treatment would take place in secondary care. So, we think that the breakdown is predominantly in secondary care and not in primary care. Is there anything else that you want to add to that?

Mr Osland: I think that you are right. The evidence that we have looked at, particularly the 12 cases specifically cited in the explanatory memorandum, indicates that only around 1% to 5% of the total cost of the treatment for these sufferers was considered to be a cost incurred in the primary care setting. That proves that the majority of costs would be in the

³¹ HSC Transcript 10 January 2013, paragraph 59

secondary care setting and, therefore, covered by the tariff that we intend to adopt.”³²

59. Another point raised was that the simplicity provided by limiting recoverable costs to secondary care costs could minimise the number of appeals. Professor Ceri Phillips stated:

“If one can keep it tight, in the sense that this is what the disease costs, even if that is not accurate, but is something that is explicit, then that would probably limit the amount of legal challenges that one would have. If we did open it up to try to accurately specify and attribute the consultation with the professional, and try to get every penny back, as it were, that would make it much more complicated and much more open to scrutiny from the legal profession.”³³

60. However, a number of witnesses (such as Asbestos Awareness and Support Cymru) agreed that, while it may not currently be worthwhile seeking to recover the costs of primary care, it may be worth doing so in future, particularly if care patterns change significantly to place a greater emphasis on primary care.

61. Both the Member in charge and Minister for Health and Social Services agreed in principle to consider amending the Bill in such a way.³⁴

62. Mike Payne, from the GMB union, stated that all medical costs should be recoverable, as a fuller application of the “polluter pays” principle.

Our view

63. We accept that the evidence indicates that primary care currently forms only a small part of the cost of treating victims of asbestos-related diseases. We also accept that there is a sound case for excluding those costs from the tariff for the sake of administrative simplicity.

64. However, should care patterns change in future so that a greater emphasis is placed on primary care services, the Bill allows no

³² HSC Transcript 24 January 2013, paragraphs 37 & 38

³³ Ibid, paragraph 131

³⁴ Ibid, paragraphs 39-44 & 201-204

flexibility to adapt to those changes without further primary legislation. This inflexibility on “excluded services” contrasts markedly with the flexibility provided by Section 4(3) to change the list of “excluded payments” set out in the Schedule.

65. We are, therefore, of the view that the Bill should be “future-proofed” by including the ability to broaden the scope of eligible treatment should care patterns significantly change. This could be done by narrowing the scope of the ‘excluded services’ specified in section 3(6), through affirmative resolution subordinate legislation.

Recommendation 2: We recommend that an affirmative resolution regulation making power is included in the Bill that would provide for the costs of primary and community services to be added in the future to those services for which costs can be recovered.

Palliative care

66. The Bill does not set out whether hospice or other palliative care, particularly care provided under contract by the third sector, would fall foul of the exceptions set out in Section 3(6). However, it seems unlikely that palliative care would be excepted unless it is commissioned as part of a GP contract, which is currently unlikely to be common.

67. Discussion of the Bill’s operation has been on the basis that costs would be calculated using a tariff approach, as described in the Bill’s EM.³⁵ Although there is no reference to a tariff system in the Bill itself, Section 6(2) provides a regulation making power, which will be used to specify the amounts of the initial tariff and any subsequent changes to it.

68. In discussion with witnesses, particularly Marie Curie Cancer Care,³⁶ a degree of uncertainty was expressed about whether the costs of palliative care commissioned or funded by the Welsh NHS (the Bill is clear that private care is an excluded service) will be recovered. This is because funding for palliative care does not specifically follow individual patients. NHS funding for palliative care is a block payment so it may be problematic to finally decide what the extent of the cost to the NHS had been.

³⁵ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Explanatory Memorandum, paragraphs 102-120

³⁶ HSC Transcript 16 January 2013, paragraphs 303-306

69. The Minister and her officials were clear that the Bill *does* allow for the recovery of palliative care costs, while accepting that further work needs to be done on the precise way in which the tariff would need to operate to reflect those costs:

“Lesley Griffiths: When we have looked at palliative care costs, we have seen that many of them are in the third sector, such as Marie Curie.

Mr Osland: Again, the Bill does allow us to recover those costs at this time. The work that has been done so far—as explained in the explanatory memorandum—is based only on in-patient care treatment in a secondary care setting. However, we still have work to do in identifying how the tariff system will work in detail and in practice. Indeed, we may consider that, if a fair amount of cost has been incurred in a hospice setting, for example, which the NHS has paid for, it could form part of a tariff system. However, we have yet to really work out all of the details.”

70. The Member in charge and his advisers explained that while the costs of palliative care are not explicitly included in the tariff established under the Health and Social Care (Community Health and Standards) Act 2003, the tariff that the EM proposes to use could be designed to capture costs such as these.

“Mick Antoniw: The provision in the Bill is fairly broad already and includes, for example—and I know that it has already been mentioned—hospice care and things like that. The question is: what is the most effective way of maximising the amount recovered in the most cost-efficient way? So, I think that those powers are there.”³⁷

71. When asked whether and how a referral from a hospital to a hospice for end-of-life care would trigger the recovery of NHS costs, Mr Paul Davies, one of the Member in charge’s supporters, told the Committee:

“Mr Davies: It would not because, under the tariff system, the in-patient day tariff is a hospital tariff. So, whether it is secondary or tertiary care, that is the currency. Hospice care is

³⁷ HSC Transcript 24 January 2013, paragraph 184

not the currency even though the patient would have been referred from the NHS. The actual costs would certainly have to be included in total, but the assumption is that, at the moment, based on the cases that we have looked at, the tariff is sufficient to secure that money in total.

And later:

“In terms of hospice care, I do not know whether that is fully a part of it. As I said, in the study that we looked at there was no instance of NHS-funded hospice care, so it was not included. There was little or no palliative time; the patients more or less died within 12 months.”³⁸

Our view

72. Palliative care is an important consideration in the treatment and care of a number of asbestos-related diseases, particularly mesothelioma and asbestos-related lung cancer, which are almost inevitably fatal illnesses.

73. Despite this, the costs of palliative care may not be a significant element of the overall cost to the NHS of treating victims. Working out what the additional cost to the NHS of treating specific victims is, when care has been provided under a “core funding” arrangement, may also prove problematic.

74. Nevertheless, we believe that it is appropriate for the costs of care to be recovered and that there is, therefore, a need for greater clarity about how palliative care costs will be included in the tariff used to recover costs.

Recommendation 3: We recommend that the Member in charge and the Welsh Government should give further consideration to whether and how the costs of palliative care are included in the tariff.

Excluded payments

75. As explained above, a number of payments do not count as a “compensation payment” for the purposes of the Bill. They will therefore not trigger the recovery of NHS costs. A list is given in

³⁸ HSC Transcript 24 January 2013, paragraphs 187 & 190

Schedule 1 to the Bill. Welsh Ministers may amend this Schedule by virtue of the powers in Section 4.

76. No witnesses raised any concerns with the list of excluded payments included in the Bill, or the method provided for in the Bill to amend this list.

Timeframe for eligible treatment

77. The Bill enables costs to be recovered for treatment provided up until the point at which a compensation payment is made. The cost of subsequent treatment will not be recovered, unless a further compensation payment for the same or another asbestos-related disease is made. Section 14 would enable regulations to be made to apply the Act to cases in which more than one payment is made by way of compensation.

78. As noted earlier in this report, it has been suggested that, due to the increased costs involved in settling a claim, employers and insurance companies could be expected to fight cases harder, therefore leading to a longer settlement time.

79. However, other witnesses (such as FOIL) stated that this may provide an incentive for compensators to settle claims early. Consequently, a greater proportion of treatment provided to the individual would be outside the recovery mechanism proposed in the Bill.

80. Furthermore, the ABI noted that this effect could be exacerbated by some work being undertaken by the insurance industry and UK Government to speed up the compensation claim process for asbestos sufferers.

81. Simon Cradick (FOIL) told the Committee that:

“It did not appear to me in the explanatory notes that consideration has been given to when that settlement might be achieved, and what element and percentage of the costs will have been incurred at that point.”³⁹

³⁹ HSC Transcript 24 January 2013, paragraph 144

82. The Member in charge noted that this “stop the clock” mechanism was favoured due to its simplicity and the certainty it provides to both the NHS and the compensators paying the charges.

“Mick Antoniw: I will first deal with the post-liability costs and why there is a cut-off date. We are mirroring the precedent that already exists with the road traffic scheme and other legislation—recovery of benefits legislation—in personal injury cases. The main reason is that if you do not have a cut-off date, you have no certainty as to how much you are going to recover and when you are going to recover it. You must also then have an administrative system that is continually examining the ongoing costs. We think that it can probably be more easily dealt with by virtue of the fact that, in those cases, you often have what are called provisional damages, where compensation is settled on liability of an asbestos disease on the grounds that it will not deteriorate. In this particular case, that would trigger liability for the costs up to that particular date.

The provisional damages part means that the parties can come back to court at a later stage if they develop a further asbestos-related disease—if they go on to develop lung cancer or mesothelioma, which is a cancer of the lining of the lungs. As much as anything, it is about keeping the administrative cost down. It is also about giving clarity to the NHS, or the Welsh Government, as to the amount it is likely to recover. In fairness, we also want to give clarity to the insurance industry, so that when it is assessing what its liabilities are and what it is going to cost them, which is quite important in the work that it does, it knows what it is going to be liable for up to a particular stage. With the cut-off date, I echo Vaughan’s point that it creates an incentive to conclude matters as early as possible. The sooner an insurance company says, ‘Yes, we hold our hands up and accept that we are to blame and will now pay the compensation. On top of that, because of this legislation, we have to pay medical costs’, the more we minimise the costs for which they are liable. It is about clarity and minimising the cost of administration.”⁴⁰

⁴⁰ HSC Transcript 10 January 2013, paragraphs 23 & 24

83. It was suggested to Members (by Michael Imperato of APIL) that mesothelioma was particularly suitable for this “stop the clock” mechanism, as the aggressive nature of the illness means that most costly treatment is delivered early on in the process, with the latter months consisting of palliative care, which is comparatively less expensive. The average time it takes to settle a claim, it was suggested, was long enough that this mechanism would capture the significant portion of the costs incurred.

84. Michael Imperato told the Committee:

“...the first thing that happens is that the sufferer will be sent to a consultant and they will have chemotherapy, scans and biopsies and what have you—that is all early on. It is very much a front-loaded treatment.”⁴¹

85. Conversely, Simon Cradick from FOIL said:

“I would imagine that claims are settled in six to nine months in those cases. That would, on average, be well before the terminal stages of the disease, which is where the vast majority of costs are likely to be incurred.”⁴²

Our view

86. The Bill seeks, through the “stop the clock” approach, to strike a balance between simplicity of administration and establishing a high degree of certainty, both for the NHS and compensators, about the level of costs that will be recovered. In the case of mesothelioma, the evidence we have received suggests that, while not perfect, this is an appropriate and proportionate way of recovering a large proportion of medical costs, while providing confidence about the amount of costs that will be recovered.

87. We are concerned that there is not yet sufficient evidence to make the case that this approach is equally valid for other asbestos diseases. We note that the cost calculations set out in the Explanatory Memorandum are based exclusively on cases of mesothelioma and that, so far, little consideration has been given to the cost profiles of other asbestos-related diseases. This is not to say that the mechanism in the Bill is inappropriate to these diseases but it suggests that more

⁴¹ HSC Transcript meeting 16 January 2013, paragraph 221

⁴² Ibid, paragraph 190

work is needed in this area before the Assembly can reach a fully informed view on the matter. In particular, more work is needed to see if a way can be found to “stop the clock” at a later point, in order to maximise the costs that can be recovered.

Recommendation 4: We recommend that the Member in Charge and the Welsh Government should give further consideration to the cost profile of non-mesothelioma asbestos diseases, whether the “stop the clock” mechanism is appropriate in these cases and whether the clock could be stopped at a later point, in order to maximise the costs that can be recovered.

Geographical scope

88. The Bill provides for the recovery of costs whenever treatment is paid for by the NHS in Wales, regardless of where the exposure to asbestos fibres takes place. Members questioned witnesses on how it would be practical for the Welsh Government to recover costs in instances where the exposure took place, and compensation payments were made, outside of Wales.

89. The Minister and the Member in charge suggested that this recovery of costs would not be a problem. The Minister noted that this issue equally applied to the current NHS costs recovery scheme, and did not present a significant difficulty. She said:

“Provided that the medical treatment was provided and funded here in Wales, the provisions of the Bill will apply, even if the exposure took place outside Wales, or even if the compensation payment was made outside Wales.

At the present time, foreign compensators, or those outside Wales, are required to register a claim with the CRU in the same way as a UK-based compensator. So, if the Bill is passed by the Assembly, we will ensure that, as part of the implementation process, those affected by the Act are aware of the legislative changes that are going through. Again, if we use the compensation recovery unit, its experience would help us to identify how best we could inform compensators not based in the UK.”⁴³

⁴³ HSC Transcript 24 January 2013, paragraph 55

Our view

90. We are content that the Bill does not raise any significant issues in terms of its geographical scope.

5. Liability of insurers

Retrospective effect

91. One of the functions of the Bill is to extend the cover of insurance policies of liable persons to meet their liability to pay the charges. To the extent that the exposure to asbestos may have been in the past, there may be an element of retrospective effect. The ABI argued that this aspect of the Bill was unfair.

92. As the ABI explained:

“The issue is that the premiums were set many decades ago on the basis that it would just be liability that is paid. What has been introduced here is an extra cost. The principle here is not so much the issue of whether the costs should be paid by the liable partner but the issue of retrospectivity, where a retrospective cost is imposed.”⁴⁴

93. However, section 3(1) limits the operation of the Bill to cases in which compensation payments are made after section 3 comes into force. This may have the consequence of encouraging the settlement of outstanding cases before that date.

94. The Member in charge and his advisers argued that this extension of liability was no different to that provided for under the Health and Social Care (Community Health and Standards) Act 2003.

95. The Member in charge stated:

“This legislation has the precedent of the 2003 Act, as well as the support of the Scottish decision, which confirmed that the social objective justified dealing with issues of retrospectivity and the infringement of the right-to-property argument as well.”⁴⁵

96. Reiterating this point, his legal adviser stated:

⁴⁴ HSC Transcript 16 January 2013, paragraph 76

⁴⁵ HSC Transcript 24 January 2013, paragraph 243

“...the wording in the 2003 Act and the Bill before you is identical in applying to insurance policies that were in place prior to the 2003 Act coming into force and to the Bill.”⁴⁶

97. The Member in charge also suggested that, as insurers are in the risk business, it is reasonable to impose costs on them that they would not have specifically foreseen when they originally wrote policies:

“Insurance is always about uncertainties in the future, so I do not think that that argument (*that the retrospective aspect makes the Bill unfair*) has real validity there either.”⁴⁷

Our view

98. The 2003 Act does not differ from the Bill on this point in principle. However, due to the lengthy latency period for asbestos-related diseases, compared with the immediacy of accidental injuries, there may well be a difference in scale between the functions of the two pieces of legislation; that is, the degree of retrospectivity will be greater in the Bill than the 2003 Act.

99. Nevertheless, we are content that the Bill will not apply to compensation payments that have already made and that it is inevitable that insurance claims arise for matters and amounts that could not be fully foreseen when the original policies were taken out. We believe that is the nature of the insurance business.

⁴⁶ HSC Transcript 24 January 2013, paragraph 245

⁴⁷ Ibid, paragraph 243

6. Financial implications

100. Some witnesses, such as the ABI, raised concerns with the financial assessment made in the Bill's EM relating to the amount of the recovered NHS and administration costs (addressed elsewhere in this report). However, Professor Ceri Phillips, a Health Economist, noted that:

“...the appraisal is a very detailed consideration of the costs and benefits and is basically technically sound, although the incorporation of variation around the estimates used would have proved helpful.”⁴⁸

Circulation of funds within the Welsh public sector

101. Some witnesses claimed that a significant amount of the recovered funds would come from within the Welsh public sector. The ABI told the Committee that as much as 40 per cent of funds recovered would not be paid by insurers but would fall to local government bodies or others in the public sector:

“Ms Glasspool: It is difficult to give an absolute figure on that. We think that, under your proposals, probably 40% would not come from an insurer and would fall to local government bodies or pre-privatised industry, such as steelworks, et cetera. When we looked at the impact assessment, it was not clear that it had necessarily been taken into account that, whereas you get some moneys back, you have to pay a lot of moneys out as a compensator, not just as an administrator of the scheme.”⁴⁹

102. The WLGA in its written evidence was also concerned that a significant amount of the costs could fall to be recovered from Local Government in Wales.

“7. Where there is a risk that employees may make claims against their current or previous employers, those employers generally hold Employers' Liability Insurance and this is the case with all local authorities in Wales. However, the level of protection specifically related to asbestos diseases can vary. It should also be noted that it is the insurer on cover at the time

⁴⁸ Professor Ceri J Phillips, Swansea University – Written Evidence (RMCA15)

⁴⁹ HSC Transcript 16 January 2013, paragraph 32

of the exposure that is liable for the costs of such claims, rather than the current insurer.

8. The pattern of claims against local authorities in Wales for Asbestos Disease is quite varied, as is the degree of protection arranged by the authorities through insurance policies. Currently, the majority of Employers' Liability insurance policies within local government will operate policy excesses of anywhere between £15,000 and £100,000. This means that for each individual claim, it is the authority itself that will bear the initial liability for costs. In some cases, the taxpayer bears approximately 50% of damages awarded for such claims."⁵⁰

103. Furthermore, a range of factors mean that in a number of instances, public sector bodies themselves may be liable to pay the recovered NHS costs, rather than an insurer. These factors include:

- high excesses of relevant insurance policies held by local authorities. As mentioned above, the WLGA states these are "of anywhere between £15,000 and £100,000";
- many Welsh local authorities were insured at the likely time of asbestos exposure (1950s - 1980s) through Municipal Mutual Insurance (MMI), which was established by a group of local authorities in 1903. This organisation suffered financial difficulties, and in 2012 notice was given that the "Scheme of Arrangement" should be triggered meaning that local authorities will be exposed to the potential for a levy and potential liability for a proportion of any future claims against MMI;
- some public sector bodies have traditionally insured themselves.⁵¹

104. Both the Minister and the Member in charge accepted that a proportion of the recovered funds would come from within the Welsh public sector but neither accepted that the amount would be as high as 40 per cent and the Minister was explicit that she did not believe it to be "a huge issue".⁵²

⁵⁰ Welsh Local Government Association - Written Evidence (RMCA16), paragraphs 7 and 8

⁵¹ Ibid, page 3 paragraph 10 and page 5 paragraph 4

⁵² HSC Transcript 24 January 2013, paragraph 18

105. The Member in charge expanded on the recent work undertaken by Thompsons Solicitors that placed the proportion of the asbestos-related diseases claims they dealt with relating to public sector employers at about 10 per cent:

“Mick Antoniw: I was surprised when I heard that, [claim of 40%] because it seemed to appear out of thin air in response to a question; it does not seem to be based on evidence, and I have not seen any other evidence for it. So, I did my best to carry out my own research on it, and I went to Thompsons Solicitors, which is a firm that I used to be with and one of the largest handlers of personal injury claims in the country. It took its last 165 settlements from the last 12 months and did an analysis of against whom the claims had been brought. Of the 165 cases, seven were against local authorities, eight were against Government departments—those are not necessarily Welsh Government departments, they could be UK Government departments—and none were against NHS trusts, although I know that there have been cases brought against NHS trusts in the past. That amounted to 9.09%. I remember, after I heard that 40% figure, wondering what, from my experience, I would have expected the figure to be, and, off the cuff, I actually said at the time that I thought it would be around 10%, so that seems to fit very much within that. So, there will be a certain number of local authority cases, but it will certainly be well below 40%. If anything, the statistics that I have been given are somewhat biased towards the higher end for the public sector, because of where the work comes from through to Thompsons, which is from public sector unions and so on.”⁵³

106. A number of witnesses, including the Member in charge, made the point that it was fair that the legislation applied to all instances where compensation payments were made for asbestos-related diseases, regardless of the sector the compensator was from. The Minister said:

“Why should it not apply to the public sector, as with the private sector, if it is at fault? While I acknowledge that not all public sector bodies would be liable under the Bill, or would

⁵³ HSC Transcript 24 January 2013, paragraph 213

have third-party insurance, I do not see why we should differentiate between different categories of employers.”⁵⁴

107. A further point, raised by the unions, is that the number of asbestos sufferers exposed as a result of public sector employment is likely to increase. Mike Payne (GMB) told the Committee:

“There is now a third group, relating to today’s exposed occupations, which reflect inadvertent exposure. These are people who work in public buildings such as schools, hospitals and libraries. This exposure is often due to a misunderstanding of management responsibilities in relation to asbestos surveys and record-keeping, which might be down to inadequate training and a general lack of knowledge on the subject of control of asbestos.”⁵⁵

108. Furthermore,

“The current evidence, we believe, shows that it is those in the third group who are increasingly registered as sufferers of those diseases, which is reflected in the change in expectation relating to mesothelioma deaths. They are now not expected to peak in 2015, as was previously suggested, but peaking in something like 2020, and phasing out in something like 2040.”⁵⁶

Our view

109. It seems beyond dispute that a proportion of the funds recovered by the Bill will be from public sector bodies. This will not be solely bodies funded by the Welsh Government, but could include UK bodies such as the Ministry of Defence. Nevertheless, some of the recovered funds will involve a degree of recirculation of funds between public sector bodies funded by the Welsh Government.

110. Even allowing for some of the liable bodies operating on a UK basis, we are not convinced that the proportion of re-circulated funds will be as high as the 40 per cent claimed by the ABI, for which there seems to be little evidence. The work done by Thompsons on behalf of the Member in charge suggests that the proportion of cases

⁵⁴ HSC Transcript 24 January 2013, paragraph 18

⁵⁵ HSC Transcript 10 January 2013, paragraph 158

⁵⁶ Ibid, paragraph 159

involving public bodies could be as low as 10 per cent, but this may also need to be tested further.

111. We are also of the view that if costs are to be recovered from employers and their insurers, it would be unfair to exclude public sector bodies from that responsibility.

112. We also note that, even at the higher end of the estimates that have been suggested, there is likely to be a net benefit to the Welsh NHS of significantly over £1million in each of the first 4 years that the scheme operates.

113. Nevertheless, we recognise that this is a legitimate area of concern, particularly for local government in Wales. It is important that there is a proper understanding of the Bill's impact in this area before the Assembly comes to give it final approval.

Recommendation 5: We recommend that the financial estimates, on which the Bill is based, are updated as quickly as possible, ideally before the Stage 1 debate, and in any event before detailed consideration of the Bill at Stage 2. In doing so, we expect the Member in charge and the Welsh Government to address more thoroughly the extent to which recovered funds are likely to recirculate within the Welsh public sector, looking in particular at likely future patterns of liability within the public sector.

Use of recovered funds

Reporting on the use of recovered funds

114. A number of witnesses have suggested that the Bill could be improved by tightening the link between the recovery of funds and their use to support sufferers of asbestos-related diseases.

115. The Law Society has described the current provision as “weak and vague”.

“The section in the Bill providing for the allocation of recovered medical costs appears under 'Miscellaneous'. The provision is weak and vague. If a purpose of the legislation is to retain funds at a national level to provide additional services for asbestos-related diseases then this should be a clear direction to the Welsh Ministers and the section making that provision

should appear prominently. This is particularly important if treatment or services which are outside the usual NHS services, such as hospice care and funding of third parties, are envisaged.

“This provision should be stated clearly in the Bill – for example by way of a duty on the minister to provide resources equivalent to the amounts raised as a result of this new law to organisations not currently funded by the NHS who provide palliative care and support to victims of these diseases. Otherwise, there is a real danger that the benefits will be lost from either the NHS budget which will be reduced by the amount that is gained or the funds could be lost within the NHS bureaucracy.”⁵⁷

116. When put to witnesses, a number of them have supported the idea of including within the Bill a requirement for the Welsh Ministers to report annually on the amount of funds recovered and the use to which they have been put.

117. When put to them, this idea was also supported by the Member in charge and the Minister, who agreed to table an amendment to the Bill to give the proposal effect.⁵⁸

Recommendation 6: We recommend that the Member in charge or the Welsh Government should bring forward the necessary amendments to impose a duty on the Welsh Ministers to report annually to the Assembly on the costs recovered, the use to which those funds have been put and the recipients of those funds.

The recipient of recovered funds

118. The 2003 Act requires recovered NHS charges to be paid over to the hospital or ambulance trust that provided the treatment or services in question. The Bill does not follow this approach. Instead, the recovered sums will be returned to the Welsh Ministers to be retained centrally.

119. When questioned about this approach, Vaughan Gething AM, supporting the Member in charge, stated that the reason the funds are

⁵⁷ The Law Society – Written Evidence (RMCA17)

⁵⁸ HSC Transcript 24 January 2013, paragraph 15

to be retained centrally rather than dispersed to individual Health Boards is to maximise the impact of the recovered charges.

120. He said that:

“If you were going to get £2 million that would then be split up between different boards, we questioned whether you would get real value for that money and whether you would get more value in having one fund whose money could be directed into projects [...]. We took the view that there would probably be greater utility to having one fund where that money can go back, and then allocate it in a way that we would expect.”⁵⁹

Our view

121. Some Members of the Committee have questioned whether it would be fairer for the funds to be routed directly to the Health Boards that have incurred costs by treating individuals with asbestos-related diseases. The spread of asbestos-related diseases throughout Health Boards in Wales is likely to be uneven, reflecting the clustering of these diseases, particularly in areas with an industrial legacy.

122. On balance, we are content with the approach set out in the Bill. However, the Minister may wish to take into account whether particular Health Boards incur a disproportionate share of the overall cost of treating asbestos-related diseases when deciding how to allocate recovered funds. We believe the public’s ability to understand the Welsh Government’s approach in this matter would be enhanced by our recommendation at paragraph 115. (Recommendation 5)

Use of funds

123. The EM states that recovered funds “could provide for funding for the general benefit of asbestos victims and their families, including support for palliative care and other treatment”. Section 16 of the Bill as introduced says little about the use of this money, stating that:

“The Welsh Ministers must have regard to the desirability of securing that an amount equal to that reimbursed by virtue of section 2 is applied, in accordance with the National Health

⁵⁹ HSC Transcript 10 January 2013, paragraph 80

Service (Wales) Act 2006, for the purposes of treatment of, or other services relating to, asbestos-related diseases.”⁶⁰

124. A number of witnesses, particularly those representing asbestos victims groups, have either made the case or agreed that research into asbestos-related diseases should be one of the uses to which recovered funds are put.

125. British Lung Foundation, in its written evidence to the Committee, noted the lack of funding currently available for research into asbestos-related diseases. Consequently, it stated that:

“Research into effective treatment must therefore be the primary objective of any funding source established to benefit those with asbestos-related disease.”⁶¹

Our view

126. Although there does not seem to be any reason why recovered funds could not be used to fund research into asbestos-related diseases, we believe the current wording of Section 16 with its reference to “treatment of, or other services relating to, asbestos-related diseases” may be ambiguous. We believe it would be helpful to remove any ambiguity by amending Section 16 of the Bill to include research as one of the specific uses of recovered funds.

Recommendation 7: We recommend that Section 16 of the Bill is amended to include “research” as one of the specific uses of recovered funds.

⁶⁰ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill (as introduced - Section 16)

⁶¹ British Lung Foundation – Written Evidence (RMCA19), paragraph 14

7. Administration

The role of the Compensation Recovery Unit at the Department for Work and Pensions

127. The EM rehearses a range of options for implementing the Bill. It states that the preferred option is for the recovery of funds to be undertaken by the Department for Work and Pensions' Compensation Recovery Unit (CRU). The CRU currently operates the compensation recovery scheme under the 2003 Act on a UK-wide basis (excluding Northern Ireland).

128. Witnesses agreed that the similarity between the role envisaged for the CRU delivering the Bill's objectives and its current work made this a pragmatic suggestion.

129. The Committee Chair wrote to the CRU in December 2012. The CRU's response was received on 8 February, which was too late to have been considered when taking evidence from other witnesses. The CRU's response included the following information:

“Whilst implementing the scheme would be possible in principle we feel that such a decision would have to be made at Ministerial level and suggest that you make such an approach at the appropriate time. Notwithstanding the need for such clearance we would point out that there may be capacity issues as CRU is currently heavily committed to supporting the Welfare Reform agenda, which requires significant IT and process changes within CRU.

There are differences between recovering NHS costs under the new scheme and recovery under the proposed new scheme and consideration would have to be given to the following points:

- developing current IT to reflect the proposed tariffs and for recovering charges in disease cases in Wales only;
- differences to processes in the issuing of the Certificate of NHS Charges;
- repaying charges to the Welsh Government rather than the treatment provider;
- co-operation of the treatment provider as they would not receive the resulting charges.

Although we have been able to identify the above potential issues, we are unable to estimate the associated costs. Timescales to amend the CRU IT system and costs would need to be negotiated with the DWP CRU IT suppliers and would require more detailed information.

CRU have not had any input into the assumptions/calculations made in the Explanatory Memorandum. Whilst we do not anticipate that any of the issues would be insurmountable, we would need more detailed information relating to volumes and processes of the proposed scheme prior to commenting further on costs relating to IT changes and the administration of the scheme.”⁶²

130. In the light of this, the Committee Chair wrote on 11 February to the Member in charge and the Minister. The Chair expressed the view that the CRU’s response was likely to highlight the need for greater clarity about involvement of the Unit, as envisaged in the Bill. He asked for the Member in charge and Minister’s views on the CRU’s response as well as an update on progress in securing an in principle agreement that the CRU will undertake the work envisaged in the Explanatory Memorandum.

131. The Member in charge responded on 15 February and the Minister on 19 February. Their responses have been published alongside other written responses to our consultation. Both made essentially the same main points, that the issues outlined by the CRU were not fundamental objections or insurmountable obstacles. They emphasised that further dialogue with the CRU is in hand and that it was important that the views of the Committee and the Assembly, through the stage 1 scrutiny process, be taken into account before seeking any firm commitment from the CRU to a particular set of proposals.

Our view

132. Although the Explanatory Memorandum sets out a number of options for administering arrangements for recovering funds, the use of the CRU is the Member in charge and the Minister’s preferred option, not least because this is, overall, the least costly option. While

⁶² Letter of 8 February 2013 from the Compensation Recovery Unit to the Committee Chair.

accepting that it is too early for any detailed agreement to be reached with the CRU, it is, nevertheless, of some concern that there does not as yet seem to be any in principle agreement in place for the CRU to administer the scheme. The CRU has also identified a number of practical hurdles, including the need to get agreement from UK Government Ministers, that mean that such agreement cannot be taken for granted.

133. While there remain a number of other options for administering the scheme if the CRU is not able to do so, these have not been fully explored. It is essential, therefore, that the Welsh Government or the Member in charge obtain confirmation as soon as possible that the CRU is willing, in principle, to undertake the role envisaged for them in the Bill's Explanatory Memorandum and that they have sufficient capacity to do so.

134. It would also be useful if the Minister could confirm that the costs set out in the Explanatory Memorandum, for all three administrative options, are ones that the Welsh Government accepts as reasonable and realistic.

Recommendation 8: We recommend that the Welsh Government or the Member in charge obtain as a matter of high priority, and before the Bill receives detailed consideration at stage 2, confirmation that the CRU is willing, in principle, to undertake the role envisaged for them in the Bill's Explanatory Memorandum and that it has sufficient capacity to do so.

Appeals

135. The ABI suggested that the scheme proposed in the Bill and EM could give rise to a large number of appeals from compensators, due to the differences between diseases and injuries provided for under existing legislation (for example, the greater presence of comorbidities). A larger number of appeals would lead to an increase in administrative complexity and reduce the scheme's net income.

136. The ABI suggested:

“There would be a review, I suspect, in every case of the breakdown of costs that were being sought.”⁶³

⁶³ HSC Transcript 16 January 2013, paragraph 47

137. The Member in charge provided evidence suggesting that the allowance for disputes and other non-payment issues in the EM's costings (1 per cent) was sufficient. He noted the small number of appeals under the existing CRU-operated scheme (0.1-0.2 per cent), and that he did not believe the differences between injury and asbestos-related disease would lead to the greater number of appeals predicted by the ABI.

138. On the issue of appeals on the basis of comorbidities, the Member in charge said:

"I do not think that any other comorbidity issues will be a significant factor, probably no more than the comorbidity that occurs even in the case of accidents, where someone may have a back problem and suffer damage to the spine."⁶⁴

139. On his experience of the nature of appeals under the existing scheme he stated:

"What you tend to have much more of is a mathematical challenge of the calculation and application of the costs, which are normally dealt with by means of a review. Again, there is provision within the Bill for the Welsh Government to amend the certificate, but what normally happens in practice is that a letter is sent in saying, 'No, these figures are wrong for reasons A, B, C—will you please review them?' The majority of them are dealt with that way, because they are predominantly to do with mathematical calculations."⁶⁵

140. Furthermore,

"In terms of more complex legal challenges, I have never really come across one. I am aware of one right at the beginning of 1999 when the system came in, but beyond that I do not think that there is great scope for appeals other than on the calculation side, potentially."⁶⁶

⁶⁴ HSC Transcript 24 January 2013, paragraph 232

⁶⁵ Ibid, paragraph 233

⁶⁶ Ibid, paragraph 234

Our view

141. We note the conflicting views relating to the likely number of appeals. On balance we think that the number of appeals is unlikely to be sufficient to undermine the cost basis on which the Bill is predicated, particularly having regard to the duty on Welsh Ministers to review certificates under section 9. However, the Member in charge and Minister will wish to consider whether further information is needed to establish a greater consensus in this area.

8. Powers to make subordinate legislation

142. Though Members raised questions about the appropriateness of the balance struck between provision on the face of the Bill and that left to subordinate legislation, and the timetable for implementing subordinate legislation with witnesses, no concerns were raised.

143. However, the Committee agreed that it would be helpful for the Minister to provide further clarification on the timescale for bringing forward subordinate legislation if the Bill is approved.

Report of the Constitutional and Legislative Affairs Committee

144. The Constitutional and Legislative Affairs Committee took evidence from the Member in charge and the Minister for Health and Social Services on 28 January 2013 and will report separately on the Assembly procedures applicable to each regulation or order making power.

9. Secretary of State and Crown Consent

145. Section 13 permits the supply of information by the Secretary of State or his or her agents to Welsh Ministers.

Recommendation 9: We recommend that the Member in charge or the Minister ensure that the consent of the Secretary of State has been obtained, if this is necessary and clarify the position by the Stage 1 debate if possible.

146. Section 17 applies the Bill to the Crown. This includes both the Crown itself and its agents such as UK Ministers and their departments. The Member in charge is keen that the Bill does apply to the Crown to ensure that all potentially liable employers are included.

Recommendation 10: We recommend that the Member in charge or Minister ensures that any necessary consent of Her Majesty and or the Duke of Cornwall to this provision has been sought or obtained pursuant to section 111(4) of the Government of Wales Act 2006 and clarifies the position by the Stage 1 debate if possible.

Recommendation 11: We recommend that the Member in charge or Minister ensures that any necessary consent of the Secretary of State has been sought or obtained pursuant to Schedule 7 to the Government of Wales Act 2006 and clarifies the position by the Stage 1 debate if possible.

Annexe A - Witnesses

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at <http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?Ild=1309>

10 January 2013

Mick Antoniw AM	Member in charge of the Bill
Vaughan Gething AM	Supporter and sponsor of the Bill
Paul Davies	Associate of Welsh Institute for Health and Social Care and supporter of the Bill
Joanest Jackson	Legal Adviser, National Assembly for Wales
Joanne Barnes-Mannings	Community Outreach Officer, Asbestos Awareness and Support Cymru
Lorna Johns	Strategic Research and Development Officer, Asbestos Awareness and Support Cymru
Tony Whitston	Chair, Asbestos Victims Support Groups Forum – UK
Marie Hughes	Mesothelioma Support (Greater Manchester Asbestos Victims Support Group), Asbestos Victims Support Groups Forum – UK
Hannah Blythyn	Campaigns & Policy Co-ordinator for Unite Wales
Mike Payne	Regional Political Officer, GMB

16 January 2013

Nick Starling	Director of General Insurance, ABI
Dominic Clayden	UK & Ireland Claims Director, Aviva
Faye Glasspool	Director UK Legacy, RSA
Simon Cradick	Partner, Morgan Cole LLP representing the Forum of Insurance Litigators

Michael Imperato	APIL Wales Co-ordinator
Simon Jones	Head of Policy and Public Affairs, Wales Marie Curie Hospice, Cardiff and the Vale
<i>24 January 2013</i>	
Lesley Griffiths AM	Minister for Health and Social Services, Welsh Government
Mark Osland	Deputy Director of Finance, Department for Health, Social Services and Children Legal Services, Welsh Government
Fiona Davies	Director, Cancer Support Team, Tenovus
Dr Rachel Iredale	Director, Cancer Support Team, Tenovus
Miss Julia Yandle	Advice Services Manager, Tenovus
Professor Ceri Phillips BSc.(Econ), MSc. (Econ), PhD	Health Economist, Swansea University, Swansea Centre for Health Economics, College of Human and Health Sciences:
Glyn Jones	Assistant Director of Finance (Operations), Aneurin Bevan Health Board
Mick Antoniw AM	Member in charge of the Bill
Vaughan Gething AM	Supporter and sponsor of the Bill
Paul Davies	Associate of Welsh Institute for Health and Social Care and supporter of the Bill
Joanest Jackson	Legal Adviser, National Assembly for Wales

Annexe B - List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at:

<http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?Ild=5425>

<i>Organisation</i>	<i>Reference</i>
Asbestos Awareness and Support Cymru	RMCA1
Wales Macmillan Cancer Support	RMCA 2a & 2b
Unite and GMB	RMCA3
Association of Personal Injury Lawyers	RMCA4
Law Commission	RMCA5
Asbestos Victims Support Groups Forum UK	RMCA6
Tenovus	RMCA7
Hywel Dda Health Board	RMCA8
Marie Curie	RMCA9
Association of British Insurers	RMCA 10 & 10a
Aneurin Bevan Health Board	RMCA 11
Forum of Insurance Lawyers	RMCA12
Lyons Davidson Industrial Disease Group	RMCA13
Lesley Griffiths AM, Minister for Health and Social Services	RMCA14
Professor Ceri J Phillips, Swansea University	RMCA 15
Mari Thomas, Finance Policy Officer, Welsh Local Government Association	RMCA 16
E Kay Powell, The Law Society	RMCA 17
Mick Antoniw AM, Member in Charge	RMCA 18
British Lung Foundation	RMCA 19
Compensation Recovery Unit	RMCA 20