



**Informing Progress** - Shaping the Future

Written submission to the National Assembly of Wales, Health and Social Care Committee, on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill from the Forum of Insurance Lawyers.

January 2013



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**FOIL** (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

**FOIL** represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This written submission has been drafted following consultation with the membership.

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# Written submission to the National Assembly of Wales, Health and Social Care Committee, on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill from the Forum of Insurance Lawyers.

**1. Is there a need for a Bill to allow recovery of costs of NHS treatment for asbestos-related diseases in Wales? Please explain your answer.**

The cost of NHS treatment for asbestos related disease is not recovered elsewhere in the UK. Specific and detailed consideration was to given to the question of whether NHS charges for disease claims should be included within the provisions of the Health and Social Care Community Health and Standards Act 2003, which extended the recovery of NHS charges to EL and PL claims as well as road traffic claims. It was concluded that disease claims should be excluded, for a number of reasons (see further Q5 below).

It is unclear to FOIL on what basis it could be said there is a need in Wales (as distinct from elsewhere in the UK) to recover NHS charges for asbestos related disease (as distinct from other types of disease).

**2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.**

In general terms, the Bill appears to achieve the stated objective of recovering NHS charges for asbestos related disease (though it is unclear how these funds will be used). Whether that stated objective can be achieved in practice remains to be seen. (For the reasons set out in the answer to Q5, we foresee that the costs of administering any such scheme may outweigh the benefits).

For example, significant emphasis is placed on the treatment of mesothelioma. It is the stated aim of insurers and government departments, who are expected to pay the NHS charges, wherever possible to settle mesothelioma claims at the earliest juncture to ensure that victims are compensated as soon as possible. It is FOIL's understanding from the terms of the Bill, and the existing NHS charges recovery regime, that recovery will be limited to charges incurred to the date of

settlement of a claim. It is unclear what actual recovery is expected to be made in the majority of such claims.

**3. Are the sections of the Bill appropriate in terms of introducing a regime to allow the recovery of costs of NHS treatment for asbestos-related diseases in Wales? If not, what changes need to be made to the Bill?**

See Q2

**4. How will the Bill change what organisations do currently and what impact will such changes have, if any?**

It is possible that compensators will seek to identify Welsh claimants and expedite settlement of their claims, to minimise exposure to recovery of NHS charges. Such behaviour would obviously benefit the individuals to the possible detriment of non-Welsh Claimants.

Companies, State bodies and local authorities with legacy liabilities but no (or incomplete) relevant historic EL insurance cover will need to make provision for the additional liability.

It is possible more claims will be fought, where there is an issue over the correct diagnosis and attribution of the disease to asbestos exposure.

**5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?**

FOIL foresees practical difficulties. In terms of disease claims generally:

- the profile of NHS costs may be weighted towards the period after compensation has been paid and will, therefore, not be recovered;
- many of the costs are likely to occur within the primary care sector and will, therefore, not be recovered;
- there may be practical difficulties in identifying the treatment received at hospital especially if treatment has been largely out-patient based;

- because of the time period involved there may well be co-morbidity, i.e. the patient may be being treated for more than one illness at the same time;
- the point of diagnosis may not be clear cut and costly investigations may be needed to establish a diagnosis.

As regards the specific conditions:

#### Mesothelioma

- Date of settlement is likely to mean limited recovery in the majority of claims.
- There may be some dispute as to date of onset of symptoms and thus what treatment should be included.

#### Lung cancer

- Lung cancer would give rise to major issues of causation where the claimant is a smoker (as the great majority are) and/or exposure to airborne asbestos fibres is other than heavy.
- If a simple test is applied - has the defendant made a payment? - the potential liability for large NHS charges being added to the claim might discourage settlement of some claims and result in causation being fought more frequently.

#### Asbestosis

- Asbestosis is indistinguishable from Idiopathic Pulmonary Fibrosis clinically.
- Diagnosis is usually made by reference to an individual's account of historic exposure to airborne asbestos fibres, which is usually unsupported.
- The cost of treatment is unclear from the Explanatory Notes but is likely to be modest in comparison to malignant conditions

### Diffuse pleural thickening

- DPT may be more easily diagnosed clinically as asbestos related but not always.
- Again, the cost of treatment is unclear but is likely to be modest in comparison to malignant conditions.

In light of the above, and the fact that a significant number of cases are likely to involve the State as compensator, the cost of implicating and administering the scheme may outweigh any benefits. There may well be increased legal fees incurred in the challenges which are likely to arise in relation to causation and what treatment relates to asbestos and other conditions. The Bill should not affect the compensation which is paid to victims in terms of amount.

**6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales.**

FOIL believes that the Bill may be open to challenge as incompatible with Article 1 of Protocol 1 to the European Convention on Human Rights. The recent challenge to the Scottish Damages (Asbestos Related Conditions) Act failed because the Act altered the definition of injury. This Bill envisages a retroactive creation of a new liability to a third party. These are matters upon which the Welsh Government would have to take legal advice and then publish that advice. It would certainly make sense for that to be done at an early stage.

However, as FOIL's expertise lies primarily in the areas of common law and insurance law, as opposed to public law, it does not seek to proffer an expert view.

**7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?**

FOIL does not proffer an expert view.

**8. What are your views on the financial implications of the Bill?**

It appears that the "Estimate of Costs and benefits" assumes a full recovery of the cost of treatment of mesothelioma. It is unclear what consideration has been given to the driver for early settlement of such claims, and the impact of early settlement on the amount of recoverable charges.