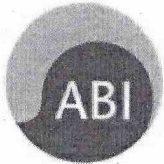


19 APR 2013

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Otto Thoresen Director General

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Mrs Rosemary Butler AM
Presiding Officer
The National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

18 April 2013

Dear Presiding Officer

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2012

I am writing to raise the serious concerns of the ABI with the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill ("the Bill").

Background to the Bill

The Bill proposes extending the system of recovery of NHS charges. Under this system, where a party pays compensation for an injury caused to another party, the first party is liable to make a payment to the Secretary of State for Health for the cost of providing the second party with NHS hospital treatment and ambulance services. Currently in the UK costs are recoverable for road traffic accidents¹ and all other injuries², but not for standalone disease cases. The Bill proposes extending the system of recovery of NHS charges to include asbestos-related diseases.

The ABI recognises the motivation behind the Bill as the desire to help sufferers from asbestos-related diseases. This is a vital area of responsibility for the insurance industry, and the ABI, working with central and devolved governments, medical research bodies and other stakeholders, has developed a comprehensive package of proposals to help these sufferers across the UK, including in Wales. I have included here our publication *Helping People with Mesothelioma* which outlines these proposals in more detail.

We do, however, have serious concerns about this Bill:

- **Legislative competence** - we believe some of the provisions of the Bill fall outside the jurisdiction of the National Assembly for Wales, and therefore are likely to lead to legal challenge, to the extent that:
 - clause 15 in effect relates to financial services, and is not properly incidental to the rest of the Bill, which makes it contrary to section 108(7) of the Wales Act 2006

¹ Road Traffic (NHS Charges) Act 1999

² Health and Social Care (Community Health and Standards) Act 2003



- the Bill proposes to raise money annually for which no specific purpose is ascribed and, as such, confers on Welsh Ministers a general tax-raising power which is outside of the devolution settlement
 - the provisions of the Bill may breach compensators' rights under the European Convention on Human Rights (ECHR), contrary to section 108(6) of the Wales Act 2006;
- **Unjustified cost** - we believe the Bill puts a retrospective cost on compensators, including insurers and Welsh public bodies;
 - **Administrative burden** - we believe the Bill creates an unnecessary and complex level of administration for Welsh health bodies and other government bodies, to collect funds for an insufficiently clear purpose.

I address each of these concerns in further detail below.

As you know, the Bill passed Stage 1 in the National Assembly for Wales on 21 March 2013. The committee responsible for scrutinising the Bill is the Health and Social Care Committee. In January 2013 we provided written³ and oral evidence⁴ to the Committee outlining our concerns with the Bill. The Committee subsequently published its report on 7 March 2013⁵. The report provides a comprehensive overview of the evidence and raises a number of concerns about the practicalities and cost implications of the Bill. However, we do not believe that the Committee has considered the fundamental issues of legislative competence; undertaken sufficient scrutiny of the ECHR implications on the National Assembly if the Bill is passed in its current form; or properly considered the extent of the administrative burdens imposed. Indeed the Committee's report proposes two extensions of the Bill - to cover all industrial diseases, and to cover more of the NHS costs incurred⁶ – which only serve to reinforce our concerns with the Bill.

Legislative competence and unjustified cost

As the Presiding Officer for the National Assembly for Wales, you stated that the Bill was within the legislative competence of the Assembly on 3 December 2012⁷, a view with which the ABI, respectfully, disagrees to the extent set out below. Although the Health and Social Care Committee did request information about legislative competence issues in its consultation on the Bill, this question was neither addressed directly in the oral evidence session considering the Bill nor in the Committee's report.

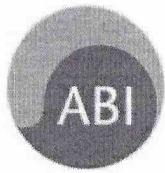
³<http://www.senedd.assemblywales.org/documents/s15553/RMCA10%20-%20Association%20of%20British%20Insurers.pdf>

⁴<http://www.senedd.assemblywales.org/documents/s13318/16%20January%202013.html?CT=2>

⁵ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 Committee Report, March 2013

⁶ Ibid, Recommendations 1, 2, 3 and 4, page 8

⁷<http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9122-pos-e.pdf?langoption=3&ttl=PRI-LD9122-POS%20-%20Presiding%20Officer%26%238217%3Bs%20Statement%20on%20Legislative%20Competence%3A%20Recovery%20of%20Medical%20Costs%20for%20Asbestos%20Diseases%20%28Wales%29%20Bill%20>



The Bill falls outside of the National Assembly's legislative competence for the following reasons:

- Under section 108(7) of the Wales Act 2006, a provision of an Act is within the Assembly's competence if 'it relates to one or more of the subjects' for which the Assembly has jurisdiction. On the face of it, the Bill may look like it relates to "health and health services" or the "organisation and funding of the NHS", which do fall within the Assembly's competence. However, the wording of the 2006 Act requires the question of competence to be considered in relation to each provision in the Bill as well as the Bill as a whole, and must be assessed by reference to "the purpose of the provision having regard... to its effect in all the circumstances" - section 108(7)⁸.
- Clause 15 of the Bill, included here at Annex A, plainly relates to "financial services... including insurance", not to health or health services. Legislation relating to financial services falls outside the Assembly's legislative competence under Paragraph 4, Schedule 7 of the Wales Act 2006. Recent Supreme Court decisions suggest that the correct way of determining whether a particular provision falls within the legislative competence of a devolved legislature is to consider whether the provision has a devolved topic as its 'pith and substance' i.e. not simply as its tangential purpose or effect. Clause 15 does not relate to funding of the NHS or treatment of diseases either directly or tangentially. The pith and substance of clause 15 is to modify the scope of insurance policies to include a new head of claim. Further, clause 15 cannot be said to be "incidental to or consequential on" other competent matters in the Bill, as the Supreme Court has held that such "incidental" provisions must be "*the kind of minor modifications which are obviously necessary to give effect to a piece of devolved legislation, but which raises no separate issue of principle*"⁹. The extension to the scope of insurance policies provided by clause 15 is not necessary to give effect to the remaining provisions of the Bill, and plainly raises an entirely new and separate question of principle, namely whether a particular head of claim should be considered to be within the scope of an insurance policy that does not refer to it.
- In its current form, the Bill allows the funds raised to be applied by Welsh Ministers as they see fit. The effect of this is to raise an annual sum to which no specific purpose is ascribed. This means that the Bill cannot be argued to fall within the Assembly's competence by relating to the funding of the NHS, because there are no guarantees that the sums raised will be spent on the NHS if Welsh Ministers decide to use them for another purpose. In the absence of such hypothecation, the Bill would simply be conferring on Welsh Ministers a general tax-raising power, something outside the scope of the devolution settlement.
- In purporting to amend the scope of insurance policies issued both before and after the effective date of the legislation, the Bill interferes with compensators' peaceful enjoyment of their possessions contrary to Article 1 of the First Protocol of the ECHR (A1P1). This is therefore contrary to section 108(6) of the 2006 Act, and outside the

⁸ Wales Act 2006

⁹ Lord Neuberger in Local Government Byelaws (Wales) Bill 2012 [2012] UKSC 53



Assembly's legislative competence. Interference with property rights can only be justified if it is in the public interest and is proportionate. This is particularly so where the legislation is intended to have retrospective effect – in this case, as asbestos-related diseases take so long to emerge, the insurance policies affected were written 30 or 40 years ago. The ABI's view is that this justification for interference has not been made, either by the proponents of the Bill or by the Assembly in its consideration of the Bill to date.

For these reasons, we would expect that any attempt to claim funds from an insurer because of the Bill's retrospective effect on insurance policies will lead to litigation from the insurer having their funds appropriated. The costs of this litigation do not seem to have been taken into account in the Regulatory Impact Assessment (RIA) for the Bill.

Disproportionate administrative burden

We believe that the Bill imposes a disproportionate burden on the health service in Wales and other public bodies because of the difficulties in establishing cost recovery in disease cases and the minimal benefits of a cost recovery system for these cases. For these reasons, expanded below, both the UK Government and Northern Ireland Executive decided not to extend recovery to disease cases.

The difficulty of establishing cost recovery for disease cases

The system of recovery of NHS charges was originally proposed by the Law Commission in the 1990s. The Law Commission consulted¹⁰ on recovery of costs for all injuries, and also for standalone disease cases. The resulting Law Commission report¹¹ indicated that, while in principle there should not be a reason to distinguish between recoveries for different types of claim, this should be subject to a cost-benefit analysis.¹² In 2002, the UK Department of Health consulted on the extension of recovery of costs to personal injury cases, and proposed¹³ that disease cases should not be included because overcoming the number of practical issues would outweigh the potential benefits. The Northern Ireland Department of Health, Social Services and Public Safety came to the same conclusion when they consulted on this issue in 2003¹⁴.

The practical issues that arise in establishing recovery for disease cases rather than injury cases include:

- the profile of health services costs for disease cases may be weighted towards the period *after* compensation has been paid and will therefore not be recovered;

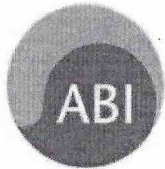
¹⁰ Damages for Personal Injury: Medical, Nursing and Other Expenses (Consultation Paper) [1996] EWLC C144

¹¹ Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (Report) [1999] EWLC 262

¹² *Ibid* at pt 8.2

¹³ The Recovery of NHS Costs in Cases Involving Personal Injury Compensation: Consultation Summary of Outcome, Department of Health, September 2003

¹⁴ The Recovery of NHS Costs in Cases Involving Personal Injury Compensation: Consultation, NI Department of Health, Social Services and Public Safety, 2003



- there may be practical difficulties in accurately identifying the treatment received at hospital, especially if treatment has been largely outpatient based;
- because of the time period involved, the patient may be being treated for more than one illness at the same time which would make it difficult to ascertain the costs to be recovered for each illness;
- the point of diagnosis may not be simple to establish and costly investigations may be needed to establish a diagnosis.

The Explanatory Memorandum accompanying the Bill recognises that the differences between injury and disease cases could cause difficulties¹⁵. It seems to suggest that, because of the diverse health bodies involved, it will be difficult to refund the recovered charges back to the hospital or ambulance trust that provided the treatment as happens with injury cases – an approach that it considers ‘too prescriptive’ for the purposes of the Bill¹⁶. The Bill’s solution to this issue is to return the recovered charges back to Welsh Ministers rather than to the health bodies. However, as discussed above this confers a general tax-raising power on Welsh Ministers, which is out of scope of the current devolvement settlement.

To deal with this point, the Health and Social Care Committee has recommended that the sums raised should be attached to a particular purpose, for example medical research for asbestos-related diseases¹⁷. However, this form of hypothecated tax, i.e. raising monies from a particular category of person for a particular expenditure purpose, is used sparingly by the UK Treasury even where there is a clear justification in linking the tax and the service for which it pays. The ABI does not believe there is sufficient justification in this case.

The minimal benefits of a cost recovery system for disease cases

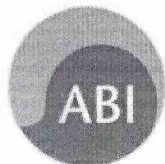
The RIA does not sufficiently analyse the costs and administrative burdens associated with the Bill. The Explanatory Memorandum suggests that recovery should be done through the Department for Work and Pensions Compensation Recovery Unit (CRU). The Committee report quotes a response from CRU¹⁷ which highlights a number of practical obstacles to using its systems, including IT changes and repaying charges to Welsh Ministers rather than to the treatment provider. Although these obstacles are not insurmountable, as the Committee’s report recognises, serious and unanswered questions remain about whether the amounts the Bill proposes to recover justify the cost of the administrative changes required. This is even without taking account of the costs of any litigation that may occur.

¹⁵ Explanatory Memorandum pt 37

¹⁶ Explanatory Memorandum pt 40

¹⁷ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 Committee Report, March 2013, Recommendation 7, page 9

¹⁷ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 Committee Report, March 2013, page 44



The practical difficulties and higher administrative cost of recovering charges for disease claims, combined with the small number of disease claims compared to injury claims, renders the provisions of the Bill disproportionate. According to the Explanatory Memorandum, recovery of costs for injury cases amounted to £13.5m in Wales in 2011-12¹⁸. The RIA estimates the benefits of this Bill, which will recover costs for asbestos-related diseases, at £2m per annum¹⁹.

We have submitted requests under the Freedom of Information Act to all seven Welsh health boards²⁰ which would be responsible for calculating the costs that should be recovered under the Bill. Of these, one has not yet responded; one has never dealt with asbestos-related claims; and two do not hold the relevant information. Of the remaining three health boards, the total expenditure in 2010/2011 for in-patients and day cases for asbestos-related diseases was £476,240.

Even allowing some extra cost recovery for those health boards that have not responded, it would appear that the RIA significantly overestimates the potential benefits of the Bill as well as underestimating the costs. Furthermore, the RIA does not sufficiently consider the extent to which the costs of establishing and running the recovery system will in fact be greater than the amounts recovered.

Many of the costs are likely to occur within the primary care sector and are not currently proposed for recovery in the Bill. The Committee report recommends that both primary and community costs, and palliative care costs, should be considered to be included in recovery²¹. However, this goes beyond the recovery principle in place for road traffic accidents and other injuries, and exacerbates the issue of implying more into past insurance policies than was undertaken at the time.

Furthermore, there is a real concern that a significant proportion of the costs will be recovered from public bodies in their role as employers, such as the NHS itself. This is why the Welsh Local Government Association (WLGA) opposes the Bill, stating 'Whilst the intent of the Bill is laudable, it is the WLGA's view that it will result in a further cost burden for local authorities at a time of contracting available resources.'²² Indeed, the Committee's report itself states that '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'²³. The Committee did not consider that they had sufficient evidence to determine whether this was the case, and has called for more work to be done on this point.

¹⁸ Explanatory Memorandum pt 36

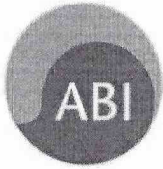
¹⁹ Explanatory Memorandum pt 30

²⁰ Betsi Cadwaladr, Abertawe Bro Morgannwg, Aneurin Bevan, Cardiff & Vale University, Cwm Taf, Hywel Dda, Powys

²¹ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 Committee Report, March 2013, Recommendations 2, 3 and 4, page 8

²² <http://www.senedd.assemblywales.org/documents/s15560/RMCA16%20-%20Welsh%20Local%20Government%20Association.pdf>

²³ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Stage 1 Committee Report, March 2013, page 6



Conclusion

For all of the reasons outlined above, I would urge you to consider whether all the provisions of the Bill fall within the National Assembly's legislative competence as defined in the 2006 Act. Moreover, given the number of substantial issues raised by the responsible Committee on both practical and financial implications of the Bill (out of 11 recommendations in the Committee's report, 5 related to gathering more evidence), I would urge you to ensure the Assembly has sufficient evidence on all the relevant facts to reach an informed view on whether it is appropriate to pass this legislation.

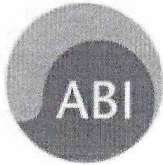
As we believe the Bill raises fundamental issues relating to the scope of the devolution settlement, I am writing in similar terms to:

- the Secretary of State for Wales
- the Counsel General for Wales
- the Chairman of the Welsh Affairs Select Committee in Westminster

Yours sincerely

A handwritten signature in black ink, appearing to read 'O. Thoresen', with a long horizontal flourish extending to the right.

Otto Thoresen
Director General



Clause 15 of Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

15 Liability of insurers

- (1) If a compensation payment is made in a case where—
 - (a) a person is liable to any extent in respect of an asbestos-related disease, and
 - (b) the liability is covered to any extent by a policy of insurance, the policy is also to be treated as covering any liability of that person under section 2.
- (2) Liability imposed on the insurer by subsection (1) cannot be excluded or restricted.
- (3) For that purpose excluding or restricting liability includes—
 - (a) making the liability or its enforcement subject to restrictive or onerous conditions,
 - (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy, or
 - (c) excluding or restricting rules of evidence or procedure.
- (4) Regulations may in prescribed cases limit the amount of any liability imposed on an insurer by subsection (1).
- (5) This section applies in relation to policies of insurance issued before (as well as those issued after) the date on which this section comes into force.
- (6) References in this section to policies of insurance and their issue include references to contracts of insurance and their making.



Mr Otto Thoresen
Director General
Association of British Insurers
51 Gresham Street
LONDON
EC2V 7HQ

Your ref:
Our ref: PO461/RB/SG

1 May 2013

Dear Mr Thoresen

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

Thank you for your letter of 18 April setting out the ABI's concerns about the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

I note that the ABI submitted written evidence to the Health and Social Care Committee, which was responsible for scrutinising the Bill at Stage 1. The ABI also attended a meeting of the Committee, at its invitation, to give oral evidence.

As you are aware, the Committee has now completed its Stage 1 consideration of the Bill and published its report. I note that the Committee's report took into account your evidence about legislative competence. I appreciate that their conclusion on this matter may not be one with which you wholly agree. However, I am sure you will appreciate that it is not part of my role as Presiding Officer to question the Committee's conclusions, which were agreed as part of an open and democratic process.

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As you point out, when the Bill was introduced, I made a decision that, in my view, its provisions were within the Assembly's legislative competence. I am required to make such a decision under section 110(3) of the Government of Wales Act 2006. I have no further statutory functions in this respect thereafter. After introduction, whether a Bill proceeds is a matter for political debate and decision in the Assembly.

Unfortunately, your letter arrived too late for me to consider it and reply before the Bill completed its Stage 2 consideration in Committee. However, there is a further opportunity for amendments to the Bill to be submitted at Stage 3 and the Bill as a whole, as amended, will need to receive final approval from the Assembly at Stage 4 before it can become law.

There is, therefore, still time for you to inform Assembly Members of your concerns and for them - if they are persuaded by your arguments - to table amendments based on those concerns (or indeed to vote against the Bill as a whole).

Moreover, as a contribution to the public and Assembly debate on this matter, I intend to make this correspondence available to Assembly Members, as background to their Stage 3 consideration.

Yours sincerely

Rosemary Butler AM, Presiding Officer