

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

Explanatory Memorandum  
incorporating the Regulatory Impact Assessment

May 2013

# **Recovery of Medical Costs for Asbestos Diseases (Wales) Bill**

Explanatory Memorandum to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

This Explanatory Memorandum has been prepared by Mick Antoniw AM and is laid before the National Assembly for Wales.

It was originally prepared and laid in accordance with Standing Order 26.6 in December 2012, and a revised Memorandum is now laid in accordance with Standing Order 26.28.

## **Member's Declaration**

In my view the provisions of Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, introduced by me on 3 December 2012, would be within the legislative competence of the National Assembly for Wales.

**Mick Antoniw AM**

Assembly Member in charge of the Bill

24 May 2013

# CONTENTS

<b>Part 1</b> .....	<b>1</b>
1. Description .....	1
2. Legislative Background .....	2
3. Purpose and intended effect of the legislation .....	5
4. Consultation .....	11
5. Power to make subordinate legislation.....	14
<b>PART 2 - Regulatory Impact Assessment</b> .....	<b>19</b>
6. Options .....	19
7. Estimate of Costs and benefits.....	21
8. Competition Assessment .....	46
9. Post Implementation Review .....	47
<b>Annex A - Explanatory Notes</b> .....	<b>48</b>
<b>Annex B - Consultees</b> .....	<b>57</b>

# Part 1

## 1. Description

1. The Bill's aim is 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.

## 2. Legislative Background

2. On 21 March 2012, Mick Antoniw AM was successful in the ballot held under Standing Order 26.87 for the right to seek leave to introduce a Member's Bill. His proposal related to recovering the costs of medical treatment and care provided to patients in Wales who have sustained asbestos-related disease (mesothelioma, pleural thickening, lung cancer and other associated diseases) and have received compensation following a settlement, court judgment or agreement from an employer or other body, corporate or incorporate. On 16 May 2012, the National Assembly for Wales agreed that Mick Antoniw AM could lay a Bill to give effect to the pre-ballot information he provided.
3. The Bill was introduced on 3 December 2012. On 19 March 2013 the National Assembly for Wales voted on the general principles of the Bill, and agreed that the Bill should proceed for Stage 2 scrutiny. The Health and Social Care Committee conducted Stage 2 scrutiny and voted on potential amendments to the Bill on the 24 April 2013. The Committee requested a revised Explanatory Memorandum be provided prior to Stage 3 in accordance with Standing Order 26.27.
4. The Assembly's Standing Orders provide for Bills to be introduced by individual Assembly Members, as well as the Welsh Government, in policy areas where the Assembly has legislative competence.
5. The legislative competence enabling the Assembly to make an Act in relation to recouping the costs of providing NHS services to patients that have sustained asbestos-related disease from a compensator is derived under subject heading 9 (Health and health services) of Part 1 of Schedule 7 to the Government of Wales Act 2006, which in particular includes the prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder; and the organisation and funding of national health service.
6. The Bill is concerned with the recouping of care and treatment costs which have been funded by the NHS and, as such, the proposal fits within "organisation and funding of national health service". The purpose of the Bill is also relevant to the "treatment of disease, illness" under this subject heading. Although the trigger for the recovery of costs is the making of a compensation payment, the Bill does not create any new liability, or affect the existing liability, to pay compensation to victims of asbestos exposure.

## ***Relationship with existing legislation***

7. The principle behind the Bill is that the cost to the public purse of providing NHS services should be recouped from the person who has caused (or is alleged to have caused) the harm that gave rise to the need for those services. The Road Traffic (NHS Charges) Act 1999<sup>1</sup> (“the 1999 Act”) provided that where a person paid compensation for an injury (including a fatal injury) caused in a road traffic accident, that person was liable to make a payment to the Secretary of State for the cost of providing the victim with NHS hospital treatment. The amount recoverable by the Secretary of State was set out in a certificate of NHS charges issued to the person making the compensation payment. The method of calculation was prescribed in regulations and the liability to pay these treatment costs was extended to insurers.
8. In 2003 the UK Parliament enlarged this scheme by enacting the Health and Social Care (Community Health and Standards) Act 2003<sup>2</sup> (“the 2003 Act”). Part 3 of the 2003 Act extended recovery of NHS charges to *all* types of injury, not just road traffic cases, and to the cost of providing ambulance services as well as hospital treatment.
9. Section 150 of the 2003 Act applies in relation to a person making a compensation payment to an injured person where that injured person has received or been provided with NHS treatment and/or ambulance services as a result of the injury sustained. In such cases the person making the compensation payment is liable to pay the relevant NHS charges to the Secretary of State or the Scottish Ministers in respect of hospital treatment received and/or ambulance services provided to the injured person (section 150(10)).
10. The machinery of the 2003 Act is similar to that established by the 1999 Act. The amount recoverable is set out in a certificate of NHS charges, for which detailed provision is made by sections 151 to 153 of the 2003 Act. Again, the amount for which the certificate is issued is calculated in accordance with regulations (section 153(2) and (10)). By section 160 of the 2003 Act, regulations provide for information to be given to the Secretary of State or Scottish Ministers to enable them to identify cases in which a certificate should be issued, to whom and for what amount. Information held by the Secretary of State for the purposes of the recovery of social security benefits can also be used for this purpose (section 161). There are provisions for review of and appeals against certificates, with appeals to be referred to an independent tribunal (sections 156 to 158).
11. The 2003 Act contains various provisions to enforce the liability to make a payment of recoverable NHS charges, where the compensator

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<sup>1</sup> 1999 (c.3)

<sup>2</sup> 2003 (c.43)

has failed to do so. The certified amount is generally payable within 14 days (section 154) and is recoverable by means of civil proceedings in a county court in England and Wales, or Sheriff court in Scotland (section 155). By section 164, an insurer who is liable under their policy of insurance for the injury is also made liable, under that policy, to pay for the recoverable NHS charges. That liability to pay the recoverable NHS charges cannot be excluded, though the amount can be limited by regulations.

12. The 2003 Act also provides for the Secretary of State or Scottish Ministers to pay over to the responsible body of the relevant NHS hospital or relevant ambulance trust the sums recovered under the Act (section 162). Section 163 enables regulations to be made to cater for compensation to be made by multiple lump sum payments, periodical payments, interim payments and payments into court. Section 165 enables regulations to extend the recovery scheme to NHS treatment in certain non-NHS hospitals. Schedule 10 excludes certain categories of compensation payments from triggering liability to pay NHS charges. These include compensation orders against convicted persons and payments under personal insurance or trust arrangements.
13. Section 150 of the 2003 Act restricts recovery to costs relating to treatment etc. of an *injury* (which in this context does not include any stand alone disease).

### 3. Purpose and intended effect of the legislation

#### *Background*

14. Asbestos (blue, brown and white) is a group of minerals that occur naturally as bundles of fibres. These fibres, found in the soil and rocks in many parts of the world, are made of silicon, oxygen, and other elements. The fibres have a high tensile strength, which can be woven, and are resistant to heat and most chemicals. First recorded uses of asbestos date back as early as 2500 B.C. and became very popular during the Industrial Revolution in the late 1800s.
15. Due to their properties asbestos fibres were used extensively in the UK through the 1900s and were used in a wide range of manufactured goods, including fireproofing and insulation. The use of blue and brown asbestos was banned in the UK in 1985 and a complete ban on the use of asbestos products was introduced when white asbestos was banned in the UK in 1999. Any building built before 2000 (houses, factories, offices, schools, hospitals etc) can contain asbestos.
16. Asbestos materials in good condition are safe unless asbestos fibres become airborne, which happens when materials are damaged. When these fibres are inhaled they can cause serious diseases which are responsible for over 4,500 deaths a year in the UK.<sup>3</sup>
17. Exposure to asbestos can cause four main diseases:
  - (i) Mesothelioma - a cancer of the lining of the lungs; it is always fatal and is almost exclusively caused by exposure to asbestos;
  - (ii) Asbestos-related lung cancer - which is almost always fatal;
  - (iii) Asbestosis - a scarring of the lungs which is not always fatal but can be a very debilitating disease, greatly affecting quality of life;
  - (iv) Non-malignant pleural disease - a non-cancerous condition affecting the outer lining of the lung (the pleura). It includes pleural thickening which can be disabling and pleural plaques which seldom cause disability. Both conditions are associated with anxiety and a significant increased risk of developing fatal asbestos malignant disease.<sup>4</sup>
18. It can take anywhere between 10 and 60 years for symptoms to develop after exposure to asbestos.

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<sup>3</sup> Health & Safety Executive

<sup>4</sup> Health & Safety Executive

## ***Incident levels***

19. Deaths from mesothelioma continue to increase in the UK and the deaths occurring now are due to past exposures to asbestos when it was widely used. The average latency period for mesothelioma is between 30 and 40 years, however it can take 50 years or more from the date of last known exposure before symptoms arise.
20. According to figures produced by the Health and Safety Executive the number of mesothelioma deaths in the UK has increased from 153 in 1968 to 2,347 in 2010.<sup>5</sup> The number of mesothelioma deaths occurring annually in Wales is estimated to be around 90 (based upon Standard Mortality Rates of mesothelioma cases data)<sup>6</sup>. The care provided by the NHS in Wales for these cases alone is estimated to be in excess of £1.6 million per year.<sup>7</sup> It is projected that the number of deaths occurring in the UK will continue to increase and is expected to peak between about 2016<sup>8</sup> and 2020<sup>9</sup>.
21. The overall scale of asbestos-related lung cancer deaths is difficult to ascertain due to the diagnosing of these cancers as a result of exposure to asbestos rather than other causes such as smoking. However, it is estimated that there are probably about as many asbestos-related lung cancer deaths each year as there are mesothelioma deaths. In addition, there are hundreds of asbestosis and non-malignant pleural disease cases each year<sup>10</sup>.

## ***Legal liability for the disease***

22. The dangers of asbestos have been known for well over a century and with regard to minimising the exposure to asbestos a number of regulations and Acts have come into force.
23. The Asbestos Industry Regulations 1931 (“the 1931 regulations”) covered the main asbestos manufacturing processes and aimed to protect workers from the worst of asbestos exposure. However, these regulations were only industry specific and did not apply outside the asbestos industry, thereby prolonging the period during which insulators, plumbers, boilermakers, shipyard workers and others were exposed to asbestos.

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<sup>5</sup> Health & Safety Executive

<sup>6</sup> Research undertaken by the Welsh Institute for Health and Social Care in 2012

<sup>7</sup> Research undertaken by the Welsh Institute for Health and Social Care in 2012 and additional research commissioned by the Welsh Government

<sup>8</sup> Health & Safety Executive

<sup>9</sup> Trends in Incidence of Mesothelioma and Evaluation of Exposure to Asbestos, Richard Wilson, Harvard University, 2001

<sup>10</sup> Health & Safety Executive

24. The 1931 regulations were revoked by the Asbestos Regulations 1969 (“the 1969 regulations”) which aimed to give the first quantitative control levels of exposure to asbestos in workplaces. The 1969 regulations went further than the 1931 regulations’ statutory duty on employers to ensure that all staff in factories, power stations, warehouses, institutions and other premises were protected from the dangers of working with asbestos. The 1969 regulations applied to every process which used either asbestos or any article that contained asbestos and sought to minimise exposure to asbestos dust.
25. The Health & Safety at Work Act 1974 required employers to conduct their work in such a way that their employees would not be exposed to health and safety risks and to provide information to other people about their workplace which might affect their health and safety.
26. The Control of Asbestos at Work Regulations 1987 introduced statutory control procedures to prevent workers from exposure to asbestos in the workplace and applied to all work activities directly involving asbestos.
27. The Control of Asbestos at Work Regulations 2002 updated and extended many of the preceding regulations, as well as introducing various changes, including the introduction of an explicit duty to manage asbestos in all non-domestic premises.
28. The Control of Asbestos Regulations 2006 (“the 2006 regulations”) combined The Control of Asbestos at Work Regulations 2002; The Asbestos (Licensing) Regulations 1983; and The Asbestos (Prohibitions) Regulations 1992 (and all of their respective amendments) into one set of asbestos regulations. The 2006 regulations covered work with asbestos, prohibitions on the importation, supply and use of asbestos, and licensing of asbestos-removal activities.
29. The Control of Asbestos Regulations 2012 came into force in April 2012, updating previous asbestos-related regulations to take account of the European Commission's view that the UK had not fully implemented the EU Directive on exposure to asbestos (Directive 2009/148/EC).
30. In many cases where asbestos-related disease is diagnosed, negligence and breaches of health and safety law can be established with the assistance of specialist legal support, particularly from trade union lawyers, resulting in civil actions for compensation being brought by asbestos disease sufferers and their families. These cases can result in court judgments being entered against former employers and insurers, or in out of court settlements being made, whether with or without any admission of liability.
31. The cost of treating asbestos-related disease imposes a considerable financial burden on the NHS in Wales, at least £1.6million per annum based on current estimates of standard mortality rates and sample cost

data for mesothelioma alone. At commencement of diagnosis of the disease, a typical care pathway may include attendances to general practitioners, referral to consultants for radiology, biopsies, radiotherapy, chemotherapy, surgery and in some cases, ultimately palliative care.

32. The Bill represents the extension in Wales of the principle underpinning the scheme under the 2003 Act that those responsible or alleged to be responsible for causing harm also recompense for the cost of treatment. Whilst, section 150 of the 2003 Act restricts recovery to costs relating to treatment etc. of an *injury* (which in this context does not include any stand alone disease<sup>11</sup>), the Bill enables the Welsh Ministers to recover charges in respect of the cost to the NHS in Wales of care and treatment for asbestos-related disease. A detailed description of the Bill's structure and content appears in the Explanatory Notes (see Annex A).
33. In cases where a compensation payment is made to a victim of asbestos related disease, the Bill will ensure that compensator will also reimburse the cost of certain medical care and treatment paid for, or provided, by NHS Wales. This is similar in principle to existing legislation that enables the recovery of Department of Work and Pensions (DWP) benefits in personal injury cases (under the Social Security (Recovery of Benefits) Act 1997) and NHS medical costs in cases of injury (under the 2003 Act). In most cases, the compensator will have been insured under an employer's liability or public liability policy. That enables the victim to recover compensation under that insurance policy even if the employer or other party is no longer trading. As noted above, the 2003 Act also enables recoverable NHS charges to be collected under the insurance policy. The Bill proposes similar provision.

### **Administration**

34. Local Health Boards and NHS Trusts in Wales have considerable experience in recovering costs from individuals and third parties, not just as a result of legislation relating to personal injury claims as detailed above, but also in relation to the treatment of patients who are not normally resident in the UK; and from private patients who undergo treatment in the NHS.
35. The proposed scheme fits broadly under the remit of the existing personal injury compensation scheme which operates under the 2003 Act. This scheme was established to meet the fundamental principle that those responsible for causing injury to others should meet the cost of associated NHS treatment. It applies only to cases where

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<sup>11</sup> See section 150(5) of the 2003 Act

compensation for personal injury is recovered from the third party employers/insurers.

36. The current scheme is operated on a UK wide basis (excluding Northern Ireland where a comparable scheme operates) and is coordinated by the Compensation Recovery Unit (CRU) which is part of the DWP. The 2003 Act places an obligation on insurers and solicitors to notify the CRU of personal injury compensation claims in progress, including whether the injured person attended hospital, and to request a certificate of NHS charges when the case is determined, whether by court judgment, settlement or agreement. The relevant NHS health body is informed of the case and is then responsible for detailing the service provided in terms of outpatient attendances, inpatient length of stays and any ambulance journeys. The CRU on receipt of this information calculates the cost using a simple daily tariff covering inpatient stays (or outpatient care if no inpatient care was necessary) plus any ambulance journeys. The CRU liaises with the insurers to recover the costs, which in turn are paid to the health body, enabling additional investment in health care services. Disputes with insurers are dealt with in the first instance by the CRU, and there is also an appeal system via an independent tribunal.
37. The scheme has proved very successful (recovering some £13.5m in Wales in 2011-12) primarily because of the coordinating role of the CRU with the insurers; the clear identification of the patient and treatment provided; the simple tariff mechanism which is efficient and effective and the incentive for the NHS to retain full recovery of the funds. The application of this scheme to the proposed asbestos arrangement offers many attractions, not least in their similarities, which include the legal obligation on the insurer to notify the Welsh Ministers of the claim in progress and any compensation payment made, and the subsequent raising of a charge by the NHS for the costs incurred.
38. There are however a number of key differences between how the scheme works in personal injury cases and how it might work in cases involving asbestos related diseases:
  - a. The clinical pathways of patients who suffer from medical conditions caused by asbestos often involve treatment with more than one health body. The current injury cost recovery scheme under the 2003 Act does recover costs in cases of multiple NHS care providers at present. However, it is likely to be more common in the treatment of asbestos related diseases that more than one health body will be involved. This may require coordination between different organisations on a more frequent basis.
  - b. The personal injury cost recovery scheme uses a simple standard inpatient/outpatient tariff developed to reflect average

costs of care. The treatment of asbestos related disease may typically involve more complex packages of treatment when considered against the average costs of care for personal injury. However, research set out below at paragraphs 106-151 suggests that the tariff system used for the current personal injury scheme could also be used for the cost recovery scheme in the Bill.

### ***How the Bill will achieve its purpose***

39. 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).
40. 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.

### ***Using the recovered medical costs***

41. 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 (section 162). In view of the relatively modest sums (in the context of NHS funding) anticipated to be recovered by the Bill, and the intention to invest the funds recovered for the treatment of, or services related to, asbestos-related diseases, such as research, that approach is not considered the most effective mechanism to maximise the benefit from the funds recovered. Instead the recovered sums will be returned to the Welsh Ministers. Within the Annual Budget Motion, allocation of income for the recovered costs to the Department for Health and Social Services would be sought, and for these to be used 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 research, support for palliative care and other treatment. Such funding would represent a contribution to the future costs to the NHS in Wales.

## 4. Consultation

### *Background*

42. In May 2012, Mick Antoniw AM contacted 31 organisations to ask for their views on the general principles behind his Bill and what it aimed to achieve.
43. These organisations were identified because of their interest and/or expertise in the subject matter of the Bill. A list of all those contacted is provided at Annex B.
44. There were 10 responses to the initial consultation which lasted 28 days. These are listed below:
  - Asbestos Awareness and Support Cymru
  - Association of British Insurers (ABI)
  - Association of Personal Injury Lawyers (APIL)
  - Asbestos Victims Support Groups' Forum UK
  - Clydeside Action on Asbestos
  - Fire Brigades Union (FBU)
  - Macmillan Wales
  - National Union of Rail, Maritime and Transport Workers (RMT)
  - Tenovus
  - UNISON Cymru
45. Subsequently three further responses were received from:
  - GMB
  - Mesothelioma UK
  - Unite

### *Analysis of consultation responses*

### *Summary*

46. Of the 13 responses received, twelve organisations supported the general principles of the Bill and one did not.

## ***Summary of responses in support***

47. **Asbestos Awareness and Support Cymru** – support the principle of the Bill and commend the intention to use the recovered costs to support asbestos victims and their families.
48. **Association of Personal Injury Lawyers (APIL)** – support the general principles of the Bill and argue strongly for the “polluter pays” principle in the case of industrial disease issues. APIL said they were encouraged by cross party support in Assembly for the principle of the Bill.
49. **Asbestos Victims Support Groups’ Forum UK** – fully support the general principles of the Bill. Stated that the societal cost of asbestos-related disease is largely borne by the tax payer and argued that, if the “polluter pays” principle that underpins compensation systems for industrial disease and injury was upheld and the cost of relevant NHS treatment was recovered, more resources may be able to be dedicated to support mesothelioma research.
50. **Clydeside Action on Asbestos** – support the general principles of the Bill and the proposal that the costs recovered should be used for the benefit of asbestos victims and their families.
51. **Fire Brigades Union** – offered their congratulations on the Bill.
52. **GMB** – believes that the drain on the resources of NHS Wales for the treatment of asbestos related diseases should be analogous to the principle of the “polluter pays” established elsewhere in legislation. And that those employers and their insurers responsible for the asbestos exposure, as established by the successful compensation claim, should pay for the treatment of asbestos related diseases in Wales. Therefore GMB would welcome the proposed Bill on the recovery of NHS charges for asbestos related diseases, and would wish to see it become law as soon as possible.
53. **Macmillan Wales** – believes the Bill will have a significant impact on people diagnosed with mesothelioma as a result of exposure to asbestos fibres. Interested in how the costs recovered will be used to benefit asbestos victims and their families.
54. **Mesothelioma UK** – support the general principle behind the proposed private members bill and hope the costs associated with meeting the wider holistic care need of patients and their families will also be incorporated into the Bill.
55. **National Union of Rail, Maritime and Transport Workers (RMT)** – support the general principles of the Bill; asked that the list of workplaces traditionally affected by asbestos-related diseases should

include railway vehicle construction and maintenance. RMT suggest that some of the money recovered under the Bill should be available for research into asbestos-related illness and development of new treatments.

56. **Tenovus** – fully support the general principles of the Bill. Draw attention to the current position regarding the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the current status of the hold on the recovery of up to 25% of mesothelioma sufferers' compensation.
57. **UNISON Cymru** – fully support the general principles of the Bill and the intention that any costs recovered be allocated for the benefit of asbestos victims and their families including support for palliative care and other treatments.
58. **Unite** - support the principles of the Bill and believe that the costs of diagnosing and treating patients suffering from asbestos related diseases should be borne by negligent employers or their insurers.

### ***Summary of responses against***

59. **Association of British Insurers (ABI)** – do not support the principles of the Bill because, in ABI's view, the Bill would not have the intended effect of improving the compensation process. ABI argued that the effect of the Bill would be to reimburse the NHS for costs that it had already received funding for through the claimant's own National Insurance Charge. ABI cited a Law Commission report of 2003 on extending the NHS charges recovery scheme to accident claims, which concluded the practical and material disadvantages of extending the recovery scheme to disease claims outweighed the potential benefits. They also questioned the Assembly's legislative competence to pass legislation in this area.

## 5. Power to make subordinate legislation

60. The 2003 Act leaves much of the administrative and technical detail of the recovery scheme to be prescribed in subordinate legislation. That includes, in particular, the method of calculation of recoverable charges under sections 153(2) and (10); and the information which various categories of person (the victim, the compensator, the hospital or ambulance trust, etc) must provide to the Secretary of State or Scottish Ministers whenever a person claims compensation for an injury (section 160). It also includes such matters as the method and time limit for appealing against a certificate of NHS charges (section 157(7); making provision for cases involving compensation by way of multiple lump sums or periodical payments (section 163); limitation of the amount of charges recoverable under an insurance policy (section 164(4)); and application of the Act's provisions, with modifications, to certain treatment in non-NHS hospitals (section 165). By section 150(12), the Secretary of State or Scottish Ministers may also make regulations amending Schedule 10 by removing or modifying any category of excluded payment (i.e. those compensation payments that do not trigger the obligation to pay NHS charges).
61. Regulations under the latter power (section 150(12)), and the first set of regulations prescribing the amounts recoverable under section 153(2), are subject to the affirmative procedure. All other powers (except commencement orders) are subject to the negative procedure. The Secretary of State must also consult the Welsh Ministers before making any regulations under Part 3. See section 195(3) and (5) to (8) of the 2003 Act.
62. Care has been taken to ensure the proper balance between provision on the face of the Bill and provision to be made by subordinate legislation. It is concluded that the right approach is for the Bill to prescribe the fundamental principles, scope and structure of the recovery scheme for asbestos-related disease, while leaving the technical detail of the administration of the scheme to recover costs to subordinate legislation, in a similar way to the 2003 Act.
63. The Table below sets out a summary of the powers to make subordinate legislation in the Bill. In relation to each such provision, the table states:
- The person upon whom, or the body upon which, the power is conferred;
  - The form in which the power is to be exercised;
  - The appropriateness of the delegated power;
  - The applied procedure (affirmative, negative, no procedure) if any.

**Table**

<b>Section</b>	<b>Power conferred on</b>	<b>Form</b>	<b>Appropriateness of delegated power</b>	<b>Procedure</b>	<b>Reason for procedure</b>
Section 3(7)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations as require flexibility to amend definition of “excluded services” to respond to possible future changes in pattern of service provision.	Affirmative	Amending the definition of “excluded services” requires scrutiny by affirmative procedure as this would result in a significant change to the Act, whereby additional services would be brought within the cost recovery regime.
Section 4(2)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations as require flexibility to amend list of exceptions to take account of future developments	Affirmative	Removing a payment from the excluded list requires scrutiny by the affirmative procedure as this would result in a significant change to the Act, whereby additional payments would then trigger the liability of a compensator to pay NHS charges under the Act
Section 4(3)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations as require flexibility to amend list of exceptions to take account of future developments	Negative	Adding payments to the excluded list will generally be an administrative/technical function which would not impose any additional financial liabilities on a compensator
Section 5(2)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations as will accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/ administrative in nature

<b>Section</b>	<b>Power conferred on</b>	<b>Form</b>	<b>Appropriateness of delegated power</b>	<b>Procedure</b>	<b>Reason for procedure</b>
Section 5(8)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations as will accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/ administrative in nature
Section 6(2)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to allow flexibility and to accommodate significant detail which would encumber the reading of the Bill	Affirmative (for first set made; negative for subsequent sets)	Setting the initial tariff will require affirmative procedure as this is a key provision in the Act and will impose additional financial liabilities upon compensators, whereas subsequent changes to the tariff will be relatively minor and carried out on a regular basis
Section 6(3)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to allow flexibility and to accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/ administrative in nature
Section 6(8)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/ administrative in nature
Section 9(2)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/ administrative in nature

<b>Section</b>	<b>Power conferred on</b>	<b>Form</b>	<b>Appropriateness of delegated power</b>	<b>Procedure</b>	<b>Reason for procedure</b>
Section 10(7)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill	Affirmative (for the first set made; negative for any subsequent sets)	Regulations relating to applications for waivers and appeals will be subject to affirmative procedure in the first instance as they will establish the process to bring an appeal to the First Tier Tribunal. Any subsequent changes to the process for the application for waivers and appeals will be minor and technical/administrative in nature, and thereby appropriate to be made under the negative procedure
Section 12(1), (2) and (3)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/administrative in nature
Section 14(1)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/administrative in nature
Section 14(3)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill	Negative	Content will be technical/administrative in nature
Section 15(4)	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations as require flexibility to vary any limit, for example, to take into account other changes made by regulations under the Bill	Negative	Content will be technical/administrative in nature

<b>Section</b>	<b>Power conferred on</b>	<b>Form</b>	<b>Appropriateness of delegated power</b>	<b>Procedure</b>	<b>Reason for procedure</b>
Section 20(2)	Welsh Ministers	Order by Statutory Instrument	This provision is required because the Bill does not come fully into force upon receiving Royal Assent but is to be implemented by Welsh Ministers	No procedure	This is normal for Orders which simply bring into force provisions of Acts
Schedule, para 4	Welsh Ministers	Regulations by Statutory Instrument	Suitable for regulations to accommodate significant detail which would encumber the reading of the Bill, and to allow flexibility to amend the list of trusts as required to take account of future developments	Negative	Content will be technical/ administrative in nature

## PART 2 - Regulatory Impact Assessment

### 6. Options

64. This Regulatory Impact Assessment presents two different options in relation to the policy objectives of the Bill. One option is the 'Do Nothing' option and there is an 'intervention' option with three sub-options for the administration of the scheme. It is not considered that a voluntary system would be practicable in this case, under a voluntary arrangement there is evidence to suggest that not all insurers in the market would comply which would both fail to meet the policy objectives sought and provide such insurers with an unfair market advantage.
65. Each of the three intervention sub-options assumes in the calculations set out in this impact assessment that the amount to be recovered will be based on the same standard treatment tariffs and calculations as those used by Department of Works and Pensions' Cost Recovery Unit (CRU) to determine treatment costs in injury cases<sup>12</sup>. The alternative method of claiming back the actual treatment cost associated with each case has not been considered due to the perceived high costs involved in assessing individual cases. The Department of Health has confirmed that the current approach adopted under the 2003 Act of a tariff system to calculate NHS costs in injury cases is used as the cost and complexity involved in calculating actual costs is considered too expensive and burdensome. The current injury cost recovery scheme reflects a practical, workable compromise to recover NHS costs for episodes of care, but without burdening the NHS to undertake complex administrative exercises to recover actual costs per case.
66. The options assessed in this document are –
- a. **Option 1** – do nothing.
  - b. **Option 2.i** – introduce legislation that requires employers, insurers or other responsible compensators, to pay appropriate charges in respect of NHS treatment and care provided to individuals, who have successfully claimed compensation for the ill health that they have suffered as a result of asbestos exposure. This system would be administered by the CRU (on behalf of the Welsh Ministers).

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<sup>12</sup> Z1 – Recovery of benefits and or lump sum payments and NHS charges, <http://www.dwp.gov.uk/publications/specialist-guides/technical-guidance/z1-recovery-of-benefits-and/>

- c. **Option 2.ii** – introduce legislation that requires employers, insurers or other responsible compensators, to pay appropriate charges in respect of NHS treatment and care provided to individuals, who have successfully claimed compensation for the ill health that they have suffered as a result of asbestos exposure. This system would be administered by the Welsh Government.
  
- d. **Option 2.iii** – introduce legislation that requires employers, insurers or other responsible compensators to pay appropriate charges in respect of NHS treatment and care provided to individuals, who have successfully claimed compensation for the ill health that they have suffered as a result of asbestos exposure. This system would be administered by the Local Health Boards in Wales on behalf of the Welsh Ministers.

## 7. Estimate of Costs and benefits

67. Each of the administration options is analysed in terms of how far they would achieve the Bill's objectives, along with an assessment of the additional cost and benefits and risks, associated with each option.
68. As noted in the Explanatory Memorandum to the Bill above, there are around 90 mesothelioma deaths each year in Wales. However, a compensation claim is not pursued in each case and not all compensation claims are successful. Based on data obtained from the CRU for mesothelioma, asbestosis and pleural thickening cases settled in Wales, and allowing for the anticipated growth in disease incidence, it is assumed that there will be between 94 – 101 cases of mesothelioma, asbestosis and pleural thickening each year for which NHS treatment costs can be recovered.
69. Recovery of costs for asbestos-related lung cancer has not been included in the costs and benefits analysis. The conclusions of additional research into cases set out in the Tariff section below (paragraphs 123 to 131) have identified that there are limited incidences of claims being pursued in Wales in respect of lung cancer linked to asbestos
70. The costs and benefits associated with each option have been assessed over a five year period, 2013-14 to 2017-18. The recovery of NHS treatment costs is expected to begin during 2014-15. IT system development costs are assumed to be incurred in 2013-14 and it is assumed that familiarisation/training costs will be incurred in 2013-14. The costs and benefits are presented in Present Value (PV) terms using a discount rate of 3.5 per cent. This is in line with the guidance in HM Treasury's Green Book.
71. The main costs resulting from this Bill relate to the administration of the scheme and the costs for organisations that would be liable to pay NHS charges. The scale of these costs will depend on the administrative system used, the agreed level of charges within the tariff system involved and the volume of cases processed.
72. The treatment costs to be recovered under the Bill represent a benefit to the public sector, although in some cases this will be offset where the public sector is the compensator. The recurrent administrative system used to recover costs will be funded from the very costs which are recovered, and the remainder of the recovered costs will be available to the Welsh Ministers, for example, to be invested in care and research into the treatment of existing and future sufferers of asbestos related diseases.

73. The costing estimates included in this Impact Assessment are based on initial work undertaken by the Welsh Institute for Health and Social Care (WIHSC) in 2012, to-
- Identify suitable administrative mechanisms for the recovery of costs associated with inpatient treatment for asbestos-related compensated injury, and scoping the extent of financial recovery which may be anticipated.
  - Identify alternative approaches and appraise them in terms of cost, efficiency, effectiveness and “organisational fit”.
  - Identify, using a number of case studies, the types of healthcare input required into such cases and to estimate the scale of the likely financial recovery.
74. Additional research work has also been undertaken since the Bill was introduced into the Assembly to extend the sampling of mesothelioma cases considered in the WIHSC research, and to include examination of case data for the other diseases covered by the Bill to inform the estimates of recoverable amounts. This revised Explanatory Memorandum reflects the subsequent review of assumptions which have been updated where necessary.

### ***Option 1 - Do Nothing***

75. Under this option, the current system would be unaltered. This means that in cases where successful cases for compensation have been pursued by asbestos disease sufferers and/or their families, the NHS costs of treatment would not be recovered. There are no additional costs or benefits associated with this option.

### ***Options 2.i, 2.ii and 2.iii***

76. Options 2.i, 2.ii and 2.iii all include the same system of calculation, recovery and reappportionment of costs in relation to treatment and care provided to individuals. The only difference in the costs and benefits associated with each option is how (and particularly by whom) the system is administered.
77. Three options have been considered for administering the system, with the administrative functions carried out on behalf of the Welsh Ministers by the Compensation Recovery Unit (DWP), Welsh Government or the Local Health Boards respectively.

## ***Option 2.i***

78. As is noted above, the existing injury compensation scheme is coordinated by the CRU at the Department of Work and Pensions. In this option the same unit would be commissioned to administer the asbestos-related disease cost recovery scheme.
79. There are a number of advantages to this option. Due to their provision of services for the whole of the UK (excluding Northern Ireland) for injury and benefits cost recovery, the CRU is already experienced in handling compensation recovery cases, disputes relating to the amount of costs to be recovered and debt recovery. Comprehensive, cost efficient, largely automated systems are in place with established data links to compensators and NHS bodies across the UK giving an established single point of contact. The operation of this scheme is expected to be very similar to that for personal injury cases with the main differences being that asbestos-related disease cases may require more co-ordination across NHS bodies, possibly more frequent issuing of certificates as the diseases progress and that the recovered income would be returned to the Welsh Ministers rather than the NHS bodies.

## ***Administrative Costs***

80. If the scheme were to be administered by the CRU, due to the extensive automated systems used for the current recovery schemes, additional up-front costs would be incurred if changes were required to be made to these systems. Further scoping work is required with the CRU, however indications are changes required could include:
- Limited changes to the automated tariff calculations, it is probable that few changes will be necessary, but some small modification may be required;
  - Developing a new electronic data collation form and;
  - Ensuring that the relevant payments are made direct to Welsh Ministers.
81. Advice has been sought from the NHS Wales Informatics Service (NWIS) regarding the estimated costs of such re-development of the existing CRU systems, this has been estimated at £82,500. However, this initial outlay is expected to deliver a more efficient system and lower recurrent costs (compared to options 2.ii and 2.iii) in later years.
82. Staff in the CRU, Welsh Government and the LHBs would need to be trained to use the new system, these training costs are assumed to be £5,000 in total in 2013-14.

83. The current Service Level Agreement (via the Department of Health) with the CRU is some £155,000 per annum for dealing with approximately 20,000 cases, this includes the cost of pursuing debts and the preparation and management of appeal cases. Initial discussions have been held with the CRU regarding the practical aspects of coordinating this scheme. Based on those discussions, the annual processing charge for the 94-101 cases of asbestos-related disease a year is assumed to be £5,900 rising to £6,300, with a further £2,000 to be incurred each year for the additional management and system monitoring costs. Total recurrent costs for the CRU are therefore estimated as £7,900 rising to £8,300 per annum.
84. The seven Local Health Boards in Wales and two of the three NHS Trusts in Wales (as applicable) will be required to provide the CRU with details of the care provided to the relevant individual. Again, this is the same as in personal injury cases under the current scheme operated by the CRU. The impact on the individual LHBs is expected to be relatively small given the number of cases anticipated and familiarity with the general process. Initial research with NHS Wales bodies has indicated that the work would typically be undertaken by someone in Band 5 of the NHS pay scale, the mid-point cost for that band (including overheads, pension and employers' National Insurance Contributions) is £31,850. The nature of the treatment involved means that each mesothelioma case is expected to be more complicated than the average injury case that LHBs currently look at, which take approximately 1-2 hours to deal with. For the purposes of this RIA it is assumed that the average asbestos-related disease case will require at most one working day to consider, at a cost of approximately £125. Given the anticipated workload of 94-101 cases per annum, the total LHB and NHS Trust cost associated with this option is approximately £11,700 rising to £12,600 per annum.
85. It is proposed that the CRU would handle any certificate reviews and subsequent appeals, although it is considered that these should be minimal due to the fact that compensation claims will already have been agreed and a standard tariff will be used. Current rates of appeal in personal injury cost recovery and asbestos-related disease benefit cases are less than 1%. The administrative costs of handling appeals and requests for certificate reviews are included in the estimates of average cost per case handled by the CRU, NHS and businesses. The estimate of recoverable amounts has been reduced by one per cent each year to reflect the assumed amounts not recoverable due to appeals.
86. It is intended that such appeals as arise would be referred to the First Tier Tribunal for adjudication. Although the rate of appeal is assessed as low, an estimate of a total of £5,000 has been made for the costs of this service from the Ministry of Justice in 2014/15. A reduced level of appeals expected after the first year, with estimated costs declining to £2,000 per annum thereafter.

## ***Business<sup>13</sup> Costs***

87. All relevant employers and insurance companies will need to familiarise themselves with the requirements of the scheme and the processes to be followed. The cost per individual business is expected to be relatively small, however, due to the number of organisations that could potentially be affected, an indicative transitional cost of £10,000 has been assumed to fall in 2013-14.
88. The recovery of NHS treatment costs will be triggered at the point that a compensation payment is made to, or in respect of, a person because of an asbestos-related disease. Since the recovery of NHS costs will form part of an existing compensation process, the additional legal cost incurred by the liable employer or insurance company is expected to be minimal. The employer or insurance company will be required to request the certificate of NHS Charges and upon receipt of the certificate, make the relevant payment. A nominal fee of £100 per case to cover the additional administrative cost of complying with the legislation is assumed. In 50% of cases there is assumed to be some minor legal involvement relating specifically to the recovery of NHS treatment costs, the cost of this is assumed to be £100. These additional costs are considered to include any potential additional administration costs incurred in cases of appeal, as noted above current appeal levels on existing schemes administered by CRU are fewer than 1% of cases. The additional recurrent cost to employers or insurers of the proposed legislation is therefore between £14,100 rising to £15,150 per annum.
89. The average cost recovery for NHS treatment itself (which represents a cost to the employer or insurer) is covered in 'The Tariff System' section below.
90. The process and the stages under option 2.i are set out below:
- Stage 1: The compensator (typically an insurer) notifies the CRU of an asbestos-related compensation claim, including details of care provided as supplied by the patient, and requests a certificate of NHS charges in a specified format and time period.
- Stage 2: The CRU notifies the relevant Local Health Board(s) and NHS Trust(s) requesting details of care provided, again required within a specified format and time period.

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<sup>13</sup> The term 'business' is used throughout the impact assessment to refer to the liable employers and insurance companies. These employers and insurance companies may be private sector or public sector organisations.

Stage 3: The CRU calculates the NHS costs recoverable and issues the certificate to the compensator, requesting payment. Payment received is forwarded direct to the Welsh Ministers by CRU.

### ***Option 2.ii***

91. In this option, the administration of the scheme is handled by a dedicated unit within the Welsh Government (WG). The unit would assume a coordinating role in the same way as the CRU in collating the necessary information to forward to the NHS bodies concerned; receiving details of the care provided; issuing the certificate of the total cost; recovery of payments direct from the insurer and resolve any disputes with the insurer.
92. This option would offer the benefit of a single point of contact for both the insurer and the NHS bodies but would require the establishment of a dedicated office within an existing, preferably finance, function in the Government and the establishment of suitable data collection and administration functions.

### ***Administrative Costs***

93. The coordination of this scheme would represent a new function within WG and there will be transition costs associated with establishing a system for managing the claims and staff training. Specifically, there would be costs involved in the scoping and development of standard forms, databases and secure data transmission arrangements for the forms via the NHS Secure File Sharing Portal. These systems would also need to be tested. Recent experience from developing and testing a similar system suggests that the cost of this would be approximately £5,000. An additional £2,500 has been assumed to cover staff training costs in WG and the LHBs. Total transition costs for the organisations administering the scheme are therefore expected to be £7,500.
94. Undertaking all of the administration of the scheme within WG is expected to require one additional full-time member of staff at HEO level. The cost of this taking into account salary, pension and overheads is £38,100 per annum.
95. There will be a requirement for the LHBs and Trust(s) to provide the Welsh Government with details of the treatment provided in each case. As in Option 2.i, this function is expected to cost a total of £11,700 rising to £12,600 per annum. As per Option 2.i, the cost of appeals referred to the First Tier Tribunal for 2014/15 is estimated at £5,000, falling to £2,000 in subsequent years. This gives an overall recurrent administrative cost of £54,800 reducing to £52,700 per annum.

## ***Business Costs***

96. Business costs in this option are assumed to be the same as those in Option 2.i, with transitional costs of approximately £10,000 and annual costs estimated to be £14,100 rising to £15,150.
97. The average cost recovery for NHS treatment itself (which represents a cost to business) is covered in 'The Tariff System' section below.

## ***Option 2.iii***

98. The final option for administering the scheme is for the notification of claims to go directly to the Local Health Board (LHB) with primary responsibility for providing care. The lead LHB would be responsible for liaising with any other health bodies involved in the treatment and providing a coordinated response on the health care provided. The LHB would also be responsible for issuing the certificate to the insurer and returning the net income to the Welsh Government (after the deduction of administrative costs).
99. One advantage of this option is that the LHBs in Wales are experienced in dealing with data collation for the existing injury scheme, and there are already processes and teams in place within LHBs to provide the DWP with information on personal injury cases. However, such a system would not provide for a single point of data collation, expertise and management of cases, and in the set up of processes to collate the data requirements is likely to lead to the duplication of activities across LHBs.

## ***Administrative Costs***

100. Transition costs are expected to be similar to those identified for Option 2.ii and are assumed to be £7,500
101. This option significantly increases the annual cost incurred by the LHBs. Unlike the previous two options in which the LHBs simply respond to a request for information on the health care provided to an individual, in this option the responsible LHB would need to deal directly with the liable employer/ insurer, coordinate a response from any LHB, NHS Trust or healthcare provider that has provided the individual with relevant treatment, issue the final certificate and forward the net payment to the Welsh Government.
102. Undertaking the administrative/coordination role is expected to require one additional FTE across the 7 LHBs in Wales. Assuming that the relevant pay band is Band 5 of the NHS scale then the cost is £31,850

per annum (including salary, pension and overheads). This is assumed to be in addition to the £11,700 rising to £12,600 cost per annum for the LHBS to generate the data on the treatment received in each case. The total cost to the LHBS in Wales is therefore estimated to be between £43,550 and £44,450 per annum. As per Option 2.i the cost of appeals referred to the First Tier Tribunal for 2014/15 is estimated at £5,000, falling to £2,000 in subsequent years. This gives an overall recurrent administrative cost of £48,500 reducing to £46,400 per annum.

### ***Business Costs***

103. Business costs in this option are assumed to be the same as those in Option 2.i, with transitional costs of approximately £10,000 and annual costs estimated to be £14,100 rising to £15,150.
104. The average cost recovery for NHS treatment itself (which represents a cost to business) is covered in 'The Tariff System' section below.

### ***The Tariff system***

105. Estimating the amount of money that will be recovered through this scheme (and paid for by the liable employer/insurance company) requires consideration of the proposed tariff system and the relevant treatment pathways.
106. A form of capped tariff system is being proposed for the Bill, in common with the existing injury cost recovery scheme, as a practical approach to facilitate the recovery of NHS costs incurred, without requiring significant administrative costs for establishing on a case by case basis the actual cost of treatment. Using a tariff system means that the amount claimed is likely to vary from the actual cost of each individual case.
107. Research has been undertaken and is set out below to look at whether the tariff system used in the repatriation of NHS costs under the current injury cost recovery scheme provides a practicable basis for the proposed scheme. The research into assessing the costs in treating medical conditions that arise from exposure to asbestos has considered all diseases covered by the Bill.

## ***Mesothelioma***

108. To fully assess the actual costs of treating mesothelioma cases, detailed medical case files have been provided in respect of 20 patients who have been diagnosed with mesothelioma. Examination of these cases, whilst revealing significant variations in care which are dependent on the patient's own medical condition, shows a strong clinical pathway. These steps are essentially -

- Patient visits GP with shortness of breath.
- Patient referred for chest X Ray at local hospital where initial findings are made.
- Patient has further tests at the local hospital, including CT scan.
- To confirm diagnosis, patients undergo biopsy procedures, often at more specialist centres if surgery is required. Later cases in the sample reviewed indicate a changing trend in that local hospitals often carry out CT guided biopsy procedures, which involve minimal invasive surgery.
- Once the condition is confirmed, depending on their medical condition, patients are offered palliative cycles of chemotherapy to alleviate their condition given the prognosis is poor.
- Patients' conditions can often deteriorate with subsequent stays in hospital particularly when breathing has become very difficult.
- Patients may stay at home with support from primary care teams.
- Patients may need palliative care in local hospice but this is fairly unusual given the short time between the onset of the disease and death.
- Death usually within 6 to 18 months from the onset of the disease, dependant on the nature of the disease.

109. It can be seen that these patients may depend on many clinical interventions provided in different clinical settings including in more than one LHB and/or NHS Trust. In the case of mesothelioma the outcome is invariably terminal within a relatively short period of time.

110. The detailed treatment records of individual patients have been examined to identify where possible all the medical and surgical interventions with actual costs assigned to each element of care and the total cost calculated.

The actual cost of NHS treatment in 20 cases examined is summarised in Table 1.

Table 1 – Summary of actual costs for the twenty patients

Patient Reference	Number of Inpatient Days	Total Actual NHS Cost	Patient Reference	Number of Inpatient Days	Total Actual NHS Cost
P1	64	£32,961	P11	35	£12,187
P2	35	£24,102	P12	69	£19,050
P3	15	£18,198	P13	2	£3,133
P4	42	£40,052	P14	0	£2,400
P5	23	£18,445	P15	11	£4,796
P6	49	£18,886	P16	107	£41,482
P7	17	£18,720	P17	5	£6,324
P8	6	£6,870	P18	11	£4,097
P9	86	£53,035	P19	14	£5,370
P10	16	£7,772	P20	7	£2,626
			Average	31	£17,025

Source: Research undertaken by the Welsh Institute for Health and Social Care in 2012 and extension research commissioned by Welsh Government.

111. The average cost for the 20 cases is £17,025 (at 2010/11 prices), however, this falls within a significant range with the highest cost at £53,035 and the lowest £2,400. Examination of the individual costs shows that the number/length of hospital inpatient stay is a significant factor in determining the overall cost. In the case of patient 9, the patient had 86 days of inpatient stay costing £45,285 which was 85% of the total cost. In the case of patient 14, the patient had no inpatient stays.<sup>14</sup>

112. The other material costs include chemotherapy and other outpatient attendances.

113. If the recovery of costs in relation to asbestos-related diseases is to be accomplished in a cost-effective manner it is inevitable that there will be a need to balance accuracy with simplicity. Accuracy is important from the viewpoint of both the Welsh Government in terms of maximising cost recovery, but also for the insurer in respect of fairness. To achieve full accuracy for every case however would present a significantly higher degree of workload and therefore administrative cost, and as such may not be cost-effective. The use of standardised tariffs would seek to offer a reasonable balance between accuracy and simplicity thus meeting the primary objectives of the legislation. Indeed, the Department of Health has confirmed that this was the original rationale for developing the standardised tariff for injury cases.

<sup>14</sup> Research undertaken by the Welsh Institute for Health and Social Care in 2012 and extension research commissioned by Welsh Government

114. Given that the inpatient stay is such a dominant factor in these cases, the actual costs were tested against the standard tariffs used nationally by the CRU for personal injury cases. In April 2010, the tariff stood at £719 per inpatient day or £585 for all outpatient attendances if no inpatient admission. In addition a separate charge of £177 per person journey for ambulance services is levied.<sup>15</sup> (Note these tariffs are uplifted for Hospital and Community Health Services inflation each year). Table 2 shows the comparison of the estimated cost recovered using the standard tariff and the actual cost for the 20 patients.

115. In the calculations below the tariff has been applied only to post-diagnosis treatment to provide clarity that the NHS treatment incidents for which costs are recovered relate specifically to the asbestos-related disease. Records examined allowed for the identification of all treatment related to the disease from the point of onset. However it is recognised that the inclusion of treatment episodes prior to diagnosis in the tariff calculation, whilst increasing the NHS costs recovered, may complicate the administration of individual cases.

Table 2 Comparison between Standard Tariff and Actual Cost

Patient Ref	Post Diagnosis NHS Cost	Post Diagnosis Tariff Recovery	Patient Ref	Post Diagnosis NHS Cost	Post Diagnosis Tariff Recovery
P1	£27,933	£35,231	P11	£9,788	£20,132
P2	£19,735	£15,099	P12	£9,760	£30,198
P3	£11,693	£7,190	P13	£2,716	£1,438
P4	£34,921	£26,603	P14	£1,322	£585
P5	£15,671	£10,785	P15	£72	£585
P6	£6,880	£14,380	P16	£32,975	£42,999*
P7	£5,126	£2,876	P17	£1,218	£585
P8	£417	£585	P18	£2,937	£6,471
P9	£30,000	£39,545	P19	£2,749	£4,314
P10	£7,020	£11,504	P20	£310	£585
			Average	£11,162	£13,585

\*Tariff capped

Source: Research undertaken by the Welsh Institute for Health and Social Care in 2012 and extension research commissioned by Welsh Government.

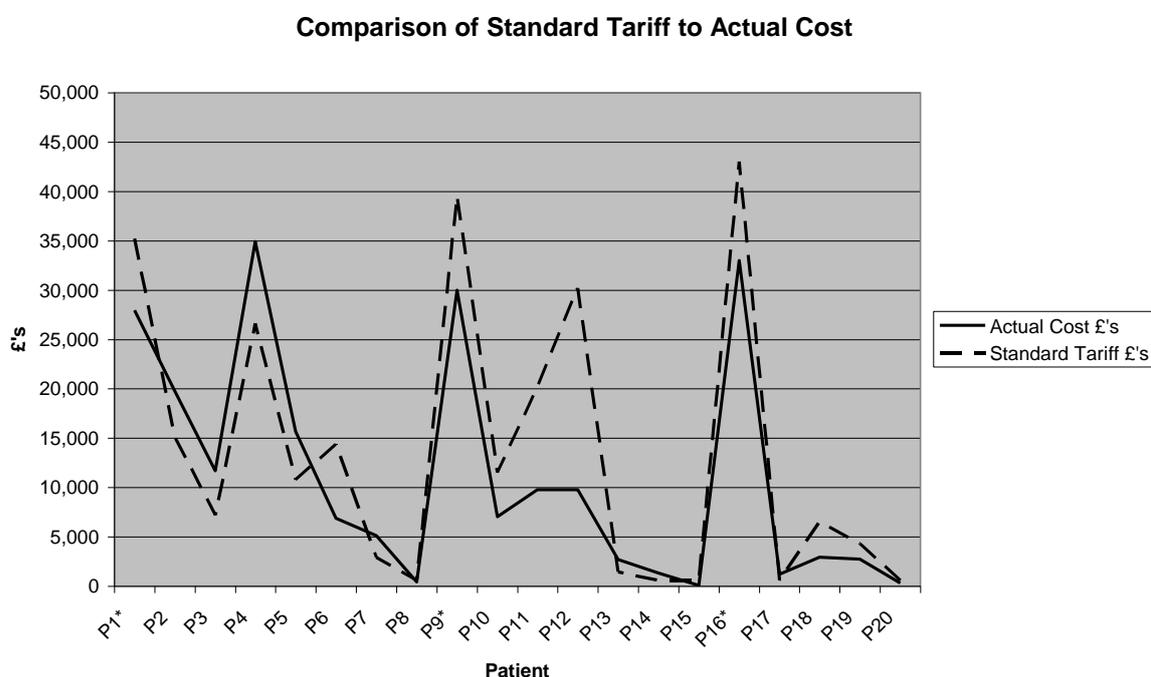
116. The tariff calculation has applied the current personal injury cost recovery scheme principles, for inpatient, outpatient and ambulance transfers, including the prevailing tariff cap where applicable. Under the current scheme there is a limit to the amount of NHS charges that can be recovered, known as the "capped" tariff amount, which 2010/11 amounted to £42,999. The calculation does not include a tariff for primary care, however primary care costs in the cases examined amounted on average to less than 3% of the total NHS cost incurred.

<sup>15</sup> Research undertaken by the Welsh Institute for Health and Social Care in 2012

117. At the individual case level there is significant (greater than 10%) variation between the actual cost of treatment and the figure calculated by using the standard tariff in the majority of the 20 cases. The variability shown at the case level is reflective of the relatively small data sample available for analysis.

118. A graphical view of the comparison is shown in the chart 1 below. This shows the degree of correlation for each of the twenty cases between the post- diagnosis standard tariff and the actual cost.

**Chart 1 - Comparison of actual costs and standard tariff**



Source: Research undertaken by the Welsh Institute for Health and Social Care in 2012 and extension research commissioned by Welsh Government.

119. The average cost recoverable for the standard tariff applied to post diagnosis treatment is £13,585, whereas the average actual NHS cost for post diagnosis treatment is £11,162, a difference of £2,423 or 21.7% in favour of the standard tariff at 2010/11 prices.

120. When compared to the average total NHS treatment cost (as set out in Table 1 including costs from the date of onset) for the cases examined, on average 80% of the total NHS treatment cost is recovered by applying the tariff to only post-diagnosis treatment. If the standard tariff were applied to the total NHS treatment in the cases examined, to include pre-diagnosis treatment, the average amount recoverable per case

would increase to £18,983, slightly above the average actual total cost incurred.

121. For the mesothelioma cases examined, the application of the standard tariff approach to post-diagnosis treatment only recovers the significant proportion of NHS cost incurred in an administratively simple manner using a well established methodology.
122. Two further points need to be considered in analysing this result and the appropriateness of using the standard tariff.
  - a. The comparison is only based on 20 cases spanning a 6 year period. Given the relatively small sample, it is not certain that these results are representative of the actual average cost of treatment.
  - b. Even if the sample holds true, medical advances could lead to different treatment patterns in the future which may invalidate the accuracy of the standard tariff which is primarily based on hospital inpatient stays. For example there may be opportunities to administer high cost drugs to patients in an outpatient or day care setting.

### ***Asbestos related lung cancer***

123. As set out in paragraph 21 of this Explanatory Memorandum the overall scale of asbestos-related lung cancer deaths is difficult to ascertain due to the complexities in diagnosing these cancers as a result of exposure to asbestos rather than other causes such as smoking. However, it is estimated by the HSE that there are probably about as many asbestos-related lung cancer deaths each year as there are mesothelioma deaths.
124. In the course of research undertaken, a clinical specialist confirmed it was extremely difficult to prove the cancer was as a direct result from asbestos exposure, as opposed to smoking or any other factor. Even with a detailed occupational life history linked to asbestos, the fact that many of these patients also smoked, which in itself would have significantly increased the cancer risk, meant many cases were not pursued.
125. Requests to the Association of British Insurers and to CRU for the number of compensation claims for lung cancer cases related to asbestos resulted in responses that such a level of detail was not held.
126. The number of lung cancer cases related to asbestos assessed for disablement benefit in 2011 was 315 in the UK, which is much lower than the ratio of lung cancer to mesothelioma would suggest.

127. It had been planned to sample 10 cases for review, however case records for 8 cases were obtainable covering a period of 11 years.
128. Information available from the HSE<sup>16</sup> indicates the average number of lung cancer cases linked to asbestos registered for disablement benefit to be around 5 per year in Wales. Applying the same proportion of mesothelioma claims settled a year to the estimated mesothelioma deaths per annum, this is likely to be only 3-4 cases per annum, including any growth of incidence mirroring mesothelioma trends.
129. Given the difficulties in projecting a reliable estimate of likely cases per annum, and that such cases will be small in number, costs and benefits related to this disease have been excluded from the option assessment calculations set out below.
130. In the 8 cases examined the clinical pathway followed broadly the same steps as mesothelioma, often with a similar prognosis. Patients are offered radiotherapy and/or chemotherapy following confirmation of cancer.
131. For these cases the application of the same standard tariff to post-diagnosis treatment would recover on average £12,262. Recoverable amounts at 2013/14 prices for 3-4 cases a year (and allowing for 1% non recovery due to appeals) would therefore amount to between £39,000 and £52,000 per annum.

### ***Non-malignant conditions of pleural thickening and asbestosis***

#### ***Pleural thickening***

132. Non-malignant pleural disease is a non-cancerous condition affecting the outer lining of the lung which is mainly due to asbestos exposure over many years. It includes two disabling forms of disease, diffuse pleural thickening and the less serious (and excluded from the Bill) pleural plaques. Pleural thickening is a condition that leads to shortness of breath and therefore impacts upon the quality of life of individual sufferers.
133. According to HSE there were 440 new cases of pleural thickening assessed for industrial injuries in the UK in 2011. Based on historic figures for the number of cases registered with the CRU as settled, and allowing for potential growth rates comparable to mesothelioma, it is estimated that the average number of pleural thickening cases eligible for NHS cost recovery in Wales will be 11-12 per annum.

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<sup>16</sup> HSE IIDB01

## *Asbestosis*

134. Asbestosis is a chronic inflammatory and fibrotic medical condition affecting the lungs caused by the inhalation and retention of asbestos fibres. It usually occurs after many years of high intensity asbestos exposure. There is a risk that asbestosis sufferers develop malignant cancers such as lung cancers and mesothelioma. Again patients experience shortness of breath and this therefore is a disabling condition affecting the quality of life of sufferers.
135. The number of newly assessed cases of asbestosis in the UK during 2011 was 725. Based on historic figures for the number of cases registered with the CRU as settled, and allowing for potential growth rates comparable to mesothelioma, it is estimated that the average number of asbestosis cases eligible for NHS cost recovery in Wales will be 24-26 per annum.
136. Despite the fact that the pleural thickening and asbestosis have differing pathologies, they have similar disabling effects and clinical pathways. An examination of 12 cases (6 for each condition) revealed the following clinical pathway.
- Patient visits GP usually with persistent cough and shortness of breath.
  - Undergoes chest X-ray which often shows chronic scarring or shadowing.
  - Referred for CT scan which usually confirms condition.
  - Sometimes requires CT guided biopsy or thoracoscopy to rule out malignancy.
  - Patient suffers with regular chest infections and is usually treated without needing hospitalisation.
  - Patient required routine medication to assist breathing including inhalers and occasionally oxygen.
  - Patient attends Chest Physician clinic at the local hospital for periodic review.
137. Unlike the mesothelioma and asbestos-related lung cancer cases, it is difficult to judge the onset of disease and often the medical records will go back over many years. The conditions are not necessarily life-threatening, which means that treatment of the condition will continue over a long period.
138. The review of 12 cases sampled related to records which ranged from 1 year to 12 years. This compares to an average time to settle claims in

such cases of 23 – 30 months (from CRU data). The Bill is constructed to recover NHS costs to the point of settlement to provide clarity and certainty for the liable party regarding their potential liability, and to avoid ‘hanging’ cases over many years requiring ongoing administrative expenditure. Therefore consideration of the average total NHS cost of treatment spanning many years in these cases is not appropriate.

139. As chronic conditions, a more realistic assessment to be considered is the average annual cost of treatment on an ongoing basis. The average cost of treatment in the cases examined amounted to £949 in 2010/11 prices. A further consideration is the cost of the standard clinical pathway over a year; GP prescribes medication – inhalers, (Tiotpium) to aid breathing, routine visits to GP – chest infections x3 plus antibiotics, routine visits to chest clinic x 2, which in 2010/11 prices would amount to an NHS cost of £754 a year.
140. Applying the same standard tariff principles as considered for mesothelioma and asbestos-related lung cancer, considering the clinical pathways identified and likely eligible claim period to settlement, it is probable that the recoverable amount for each case of these chronic conditions would be one outpatient visit at £627 at 2013/14 prices. This is a conservative basis of estimation, as 2 of the 12 cases reviewed involved inpatient stays post-diagnosis, one of which was for a period of 25 days.
141. The annual cost to the NHS as set out in the typical annual pathway above would be £807 in 2013/14 terms, which over a 10 or 20 year period would amount to £8,000- £16,000. The recovery from the tariff in these terms would be significantly below the cost borne by the NHS.
142. In assessing the appropriateness of the tariff mechanism for asbestosis and pleural thickening, the overall cost effectiveness of the mechanism to recover costs must be considered. Although the tariff significantly under-recovers the cost borne by the NHS for the treatment of chronic conditions, to seek to recover costs either on an annual on-going basis, or at the end of some further defined period would incur further significant ongoing administration costs with records needing to be retained over many years. Set up costs would undoubtedly also increase significantly.
143. Further there may be a disincentive for compensators to promptly settle cases if NHS cost recovery were to continue until some un-determined point in the future, whereas recovery to the point of settlement provides certainty for all parties.
144. Chronic cases may also receive provisional damages, which would recover costs relating to the initial diagnosis. If a sufferer goes on to be diagnosed with a malignant condition such as mesothelioma or

asbestos-related lung cancer, a further settlement may be pursued, which would allow for the recovery of additional NHS costs.

145. The volume of cases for asbestosis and pleural thickening combined per annum, accounting for likely growth patterns in asbestos related diseases, amounts to @ 35-38 cases in the period of this impact assessment. Given the relatively low costs of treatment when compared to mesothelioma cases, and the lower volume of cases anticipated for chronic conditions, the application of a standard tariff mechanism is considered overall to provide a reasonable recovery of NHS costs across the asbestos-related diseases covered by the Bill in an efficient and effective manner.
146. It is considered that, as with all newly introduced policy and programme areas, it would be appropriate to undertake a periodic evaluation of the effectiveness and appropriateness of the scheme. Such a review should encompass consideration of the ongoing relevance and reasonableness of the standard tariff. It is considered appropriate for the first review to take place 5 years after introduction. Costings for such evaluation are not included within this Explanatory Memorandum.
147. Taking the anticipated activity of 94 -101 asbestos related disease cases each year (based on CRU data for mesothelioma claims and settlements in Wales and anticipated annual growth rates) and the standard tariff recoverable amounts above, the gross annual recovery would be approximately £880,000 rising to £940,000 recoverable per annum (in 2013/14 prices)<sup>17</sup>. The current CRU injury scheme experiences appeals in @0.1%-0.2% of cases, making an allowance of 1% for appeals, the net recovered sum would be approximately £870,000 rising to £931,000.
148. The current CRU administered personal injury cost recovery scheme advises NHS bodies to reduce their provisions for anticipated income by 12.6% on the basis of trends in non-recovery of debts. However the profile of the compensators under the existing scheme and the scheme proposed by the Bill differs significantly. The personal injury cost recovery scheme processes thousands of claims per annum which include Road Traffic Accidents, these in turn includes non-insured drivers being pursued for cost recovery. The current scheme also includes all injuries arising from Employers Liability claims – for which employers may or may not be insured, and therefore payment may be pursued direct from a wide range of businesses, including SMEs.
149. The profile of compensators from which costs will be recovered for asbestos related disease, and the case volumes by comparison are

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<sup>17</sup> Prices uplifted using the Hospital and Community Health Services annual inflation factors, which are used for the present ICR tariff scheme, and reflects the inflationary factors relevant to NHS services provision.

unlikely to share such characteristics. Therefore as no reliable evidence is available regarding potential non-recovery of debt, no discount has been applied to the recoverable amounts used in the options analysis.

150. The recoverable amount in this revised Explanatory Memorandum is significantly lower than was estimated in the original Explanatory Memorandum of £2.01m per annum. Extended research has identified a changing pattern of mesothelioma treatment resulting in a reduced average recovery rate, due to fewer inpatient stays. Additional data on case settlement volumes for all diseases, and the propensity for claims in asbestos related lung cancer cases have also reduced assumptions. The revised estimate is considered a more robust and prudent assessment of likely values to be recovered.
151. The recovered NHS treatment costs represent a benefit insofar as they may be used for the benefit of asbestos related disease victims and their relatives, however, they are a cost to the compensating employer or insurance company. The net impact of the payments to UK society is therefore zero. The net recovered sum (@£0.9 million) is the same for options 2, 3 and 4.
152. Where an insurance company makes the payment, it is anticipated that the cost will be passed on to businesses and potentially consumers in the form of higher insurance premiums. The alternative is for insurers to absorb the costs of the scheme themselves, but from a purely financial perspective they may be unwilling/unable to increase their costs and potentially reduce their profit margins.

### ***Palliative care***

153. Palliative care may form part of the care pathway for any of the asbestos-related diseases covered by the Bill, but most particularly for mesothelioma and asbestos-related lung cancer.
154. The Bill allows Welsh Ministers to recover NHS costs for treatment or other services to the extent that they are provided, secured, commissioned or funded under the National Health Service (Wales) Act 2006 (“the 2006 Act”). This broadly means provided or funded by the LHBs and NHS Trusts in Wales.
155. Palliative care provided by the NHS in Wales is generally either through the direct provision of services in hospitals (including community hospitals), district nursing, hospice care via contracts for the provision of services with charities and third sector organisations, or home visit care by General Practitioners.
156. Other than home visits by General Practitioners, all other elements of palliative care noted above are either provided or funded directly by

LHBs and NHS Trusts in Wales, or the Welsh Government. Therefore palliative care provided on behalf of the NHS in Wales falls within the scope of “relevant Welsh NHS services” as defined at section 3(5) of the Bill. The only type of palliative care excluded relates to that provided as part of primary care services or secured privately by the individual.

157. The Tariff outlined above for the recovery of NHS costs mirrors the current ICR tariff. The current tariff does not calculate a specific charge for palliative care costs. It is considered that the proposed tariff approach does adequately allow for the recovery of palliative care costs on the following basis :

- a. Only 5 cases out of 20 mesothelioma cases examined involved palliative care in the cases examined. Of these 3 received charitable hospice care at nil cost to the NHS. The remaining 2 cases involved inpatient stays at community hospitals.
- b. In cases where a patient requires inpatient hospital palliative care, this is an eligible inpatient episode, and calculated in the certificate of charges accordingly. Therefore although no specific tariff is applied for palliative care, the related treatment costs are accounted for in the overall standard tariff rates.
- c. If palliative care is provided by a GP, as noted above, primary care costs for mesothelioma amount to less than 3% of the overall cost of treatment, therefore to specifically develop and administer a separate tariff for this proportion of cases and costs would be disproportionately costly.

158. As evidenced by the mesothelioma cases, palliative care is often provided by charities and third sector organisations. Where this is the case, under existing compensation legislation, (on the basis of the decision in the case of *Drake v Foster Wheeler* (2010) ECCH 2004 (H, H, J Anthony Thornton QC)), the victims of asbestos-related disease or their relatives can seek to recover the costs of palliative care which are not funded by a Local Health Board but from charitable donations on behalf of the provider.

### ***Public sector employers***

159. The long history of exposure to Asbestos fibres in the UK has encompassed a wide range of industries and occupations. This includes employees in the public sector in activities such as construction or maintenance of premises.

160. There will be cases where the liable compensator under the Bill will be a public sector entity. In such cases the relevant NHS costs would be recovered from one part of the UK public sector to another, however this does not contravene the principle underpinning the Bill.

161. Statistics regarding the ultimate liable compensator in asbestos-related disease claims are not readily available. Even if the public sector is determined as the compensator, they may or may not have relevant insurance arrangements which provide that any liability is borne by the private sector insurer.

162. Research has been undertaken with the CRU to identify the number of claims in the public sector. The CRU have provided statistics in relation to mesothelioma disease claims registered with the CRU in the last 5 years in Wales. Of 242 cases that have been settled in this period, 85.1% were in the non-state category. The 14.9% remaining relate to local government, NHS, Government departments and national industry, (without national industry this figure falls to 12.8%).

### **Mesothelioma disease claims relating to Wales registered with CRU, between 1 April 2007 and 31 March 2012**

<u>Compensatory Category</u>	<u>% of settled claims</u>
Government Department	2.5%
Local Authority	7.4%
National Industry	2.1%
NHS	2.9%
Non-State	85.1%
<b>Total</b>	<b>100.0%</b>

Source: Compensation Recovery Unit (CRU)

Notes: The classification the CRU have used to identify a 'State' claim is as follows. If the Compensator, Compensators Representative or Policy Holder is a Government Department (both central and local), Local Authority, NHS, National Industry or Possible National Industry the claim is classified as State. The remaining claims are classified as 'Non-state'.

Some Compensators within the State category may have commercial insurance, however this data does not identify such cases.

The data relates to mesothelioma claims only, registered with the CRU between 1st April 2007 - 31st March 2012 where the claimant's home address is Wales. Claims where an interim settlement date is held are categorised as being live rather than settled.

The CRU do not hold details relating to cases where no liable party could be traced and for which state compensation was provided. If state compensation only was provided, the details would not be registered with the CRU. The CRU would only be informed if a compensator was subsequently identified.

163. This data provides an indication of potential public sector liability in these cases, however it does not account for instances where public bodies may hold private sector insurance cover, it merely records the liable party, and could overstate the proportion of claims where the compensator is a public sector entity.

164. Research has also been undertaken by Thompsons' Solicitors<sup>18</sup>, who handle a significant proportion of asbestos-related disease cases in Wales.

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<sup>18</sup> Health and Social Care Committee - 24<sup>th</sup> April 2013 HSC(4)-13-13 - Paper 1 - Letter to the Chair from Mick Antoniw AM

165. Thompsons calculated that 9.7% of the defendants involved in 165 successful claims they processed in England and Wales were from the public sector. Analysis of these defendants reveals that seven were local authorities, eight were government departments and one was an NHS Trust. One was a Welsh public sector body while others were UK public sector organisations, such as the Ministry of Defence.
166. Based on this information, it would be reasonable to assume that the proportion of cases for which the public sector would be liable may be in the region of 9% to 15%, between £78,000 and £140,000 of the annual recoveries estimated. Evidence noted above does not suggest any recirculation arising will be entirely within the Welsh public sector, rather liable parties may well be public sector bodies outside Wales.

### ***Future trends in Asbestos-related disease claims***

167. Anecdotal evidence points to a change in the profile of asbestos related disease sufferers. Although Wales' industrial history is such that there is a significant latency of cases in heavy industry, cases are now coming forward for individuals working in premises where there is asbestos for maintenance workers, construction workers and so on. Exposure to asbestos in these types of occupation is now more controlled by the management of asbestos regulations for the monitoring, management and removal of asbestos.
168. Incidents have also started to emerge where asbestos exposure may have taken place for individuals in a range of occupations working in premises containing asbestos. For example in schools or public buildings. There is the potential for cases in future related to exposure through these instances, which due to the scale of the public sector as an employer, and the range of public buildings operated could lead to a change in the pattern of cases involving the public sector as the compensator.
169. However, conclusive evidence for future patterns of liability for asbestos-related disease claims which would indicate whether there will be an increased incidence of public sector liability in future has not been established.

### ***Summary of the three administrative options for change***

170. The tables 3 to 5 below present the net present value of each option compared to the do nothing option. Each option has a negative net present value showing that the costs to society of the proposed legislation outweigh the financial benefits. The negative NPV reflects

the transitional and administrative costs of the scheme. Although each option has a negative NPV, the general acceptance of the ‘polluter pays’ principle indicates that making the liable party pay mesothelioma victims’ treatment costs represents a more equitable outcome than the NHS having to meet the costs.

171. The cost to businesses (the liable employers or insurance companies) and the benefit (the treatment costs recovered) are the same in each of three options.

172. Despite the higher initial system development costs, the lower administrative costs that are incurred in the ‘CRU Option’ means that the NPV for Option 2.i is the least negative. Option 2.i is therefore the preferred option for change to provide a more equitable outcome.

Table 3 Option 2.i – CRU administers the scheme

£ '000	2013-14	2014-15	2015-16	2016-17	2017-18	Total	NPV
<b>Administrative Cost</b>							
<u>Transition Costs</u>							
System Development	82.5					82.5	82.5
Training	5.0					5.0	5.0
<u>Recurrent Costs</u>							
CRU		7.9	8.1	8.3	8.3	32.6	29.9
LHB		11.7	12.1	12.6	12.6	49.0	44.9
First Tier Tribunal Appeals		5.0	2.0	2.0	2.0	11.0	10.2
<b>Business Cost</b>							
Transition Costs	10.0					10.0	10.0
Recurrent Costs		14.1	14.6	15.2	15.2	59.0	54.1
NHS Cost Repayment		871.5	901.0	931.0	931.0	3,634.5	3,334.2
<b>Total Cost</b>	<b>97.5</b>	<b>910.2</b>	<b>937.7</b>	<b>969.1</b>	<b>969.1</b>	<b>3,883.6</b>	<b>3,570.8</b>
<b>Benefit - Recovered Income</b>		<b>871.5</b>	<b>901.0</b>	<b>931.0</b>	<b>931.0</b>	<b>3,634.5</b>	<b>3,334.2</b>
<b>Net Benefit</b>	<b>-97.5</b>	<b>-38.7</b>	<b>-36.8</b>	<b>-38.1</b>	<b>-38.1</b>	<b>-249.1</b>	<b>-236.7</b>

*Note: System development costs are based on assumptions outlined at (82) above, if fewer system amendments were required this cost would reduce substantially.*

Table 4 Option 2.ii – Welsh Government administers the scheme

£ '000	2013-14	2014-15	2015-16	2016-17	2017-18	Total	NPV
<b>Administrative Cost</b>							
<u>Transition Costs</u>							
System Development	5.0					5.0	5.0
Training	2.5					2.5	2.5
<u>Recurrent Costs</u>							
LHB		11.7	12.1	12.6	12.6	49.0	44.9
WG		38.1	38.1	38.1	38.1	152.4	139.9
First Tier Tribunal Appeals		5.0	2.0	2.0	2.0	11.0	10.2
<b>Business Cost</b>							
Transition	10.0					10.0	10.0
Recurrent		14.1	14.6	15.2	15.2	59.0	54.1
NHS Cost Repayment		871.5	901.0	931.0	931.0	3,634.5	3,334.2
<b>Total Cost</b>	<b>17.5</b>	<b>940.4</b>	<b>967.7</b>	<b>998.9</b>	<b>998.9</b>	<b>3,923.4</b>	<b>3,600.9</b>
<b>Benefit - Recovered Income</b>		<b>871.5</b>	<b>901.0</b>	<b>931.0</b>	<b>931.0</b>	<b>3,634.5</b>	<b>3,334.2</b>
<b>Net Benefit</b>	<b>-17.5</b>	<b>-68.9</b>	<b>-66.8</b>	<b>-67.9</b>	<b>-67.9</b>	<b>-288.9</b>	<b>-266.7</b>

Table 5 Option 2.iii – Local Health Boards administer the scheme

£ '000	2013-14	2014-15	2015-16	2016-17	2017-18	Total	NPV
<b>Administrative Cost</b>							
<u>Transition Costs</u>							
System Development	5.0					5.0	5.0
Training	2.5					2.5	2.5
<u>Recurrent Costs</u>							0.0
LHB		43.6	44.0	44.5	44.5	176.4	161.9
First Tier Tribunal Appeals		5.0	2.0	2.0	2.0	11.0	10.2
<b>Business Cost</b>							
Transition	10.0					10.0	10.0
Recurrent		14.1	14.6	15.2	15.2	59.0	54.1
NHS Cost Repayment		871.5	901.0	931.0	931.0	3,634.5	3,334.2
<b>Total Cost</b>	<b>17.5</b>	<b>934.2</b>	<b>961.5</b>	<b>992.6</b>	<b>992.6</b>	<b>3,898.4</b>	<b>3,577.9</b>
<b>Benefit - Recovered Income</b>		<b>871.5</b>	<b>901.0</b>	<b>931.0</b>	<b>931.0</b>	<b>3,634.5</b>	<b>3,334.2</b>
<b>Net Benefit</b>	<b>-17.5</b>	<b>-62.7</b>	<b>-60.5</b>	<b>-61.6</b>	<b>-61.6</b>	<b>-263.9</b>	<b>-243.7</b>

The figures in these tables have been rounded to the nearest hundred pounds. Totals may not sum due to this rounding.

Figures in these tables span the 5 year period to the proposed first evaluation date of the scheme, administration costs for the scheme would continue beyond this date for as long as the scheme continues, but could vary post evaluation.

173. Recovered income relates to mesothelioma, asbestosis and pleural thickening cases. As set out in paragraph 129, the evidence to support the inclusion of recoverable amounts for asbestos-related lung cancer is insufficient, therefore this has been excluded from both the income and the cost basis. This income relates to income that will be collected for redistribution and will be collected from organisations liable for compensation claims.

174. As noted in paragraph 166 above, between £78,000 and £140,000 may be recovered from public sector bodies, however, this has no impact on the Net Present Value (NPV) calculations for the three options or the choice of the preferred option.

### ***Risks and assumptions***

175. The difference in the NPV of Options 2.i and 2.iii is relatively small (approximately £7,000). The result that Option 2.i is the preferred option is particularly sensitive to an increase in the CRU system development costs or a reduction in the annual LHB administrative costs.

176. The calculation of treatment costs recovered is based upon a number of assumptions, in particular, the number of cases, the treatment received and the tariff charge. In addition, the tariff is adjusted annually to reflect inflationary pressures and so the actual amount recovered will differ from that presented above. However, it is worth noting that changing any of these assumptions will impact on each option equally.

The choice of the preferred option is therefore not sensitive to changes in the assumptions regarding the number of cases and tariff charges.

177. As noted above, employers and insurance companies who are or who could potentially become involved in a mesothelioma case in Wales will need to familiarise themselves with the legislation and the processes involved. This is expected to impose a legal and administrative cost on the businesses. The size of these costs is unknown, however, an indicative figure of £10,000 has been included in the assessment. Similarly, it has been assumed that the additional recurrent costs for businesses would be relatively small with a nominal figure of £100 per case assumed and a further legal cost of £100 in 50% of the cases. The same figures for businesses have been included in each of the three options and so while altering these assumptions would change the level of business costs it would not affect the choice of the preferred option.

## ***Cumulative Impacts***

178. In the Queens Speech on 8<sup>th</sup> May 2013 the Mesothelioma Compensation Bill was announced. The bill is designed to help people who suffer from Mesothelioma as a result of exposure to asbestos. It establishes a payment scheme for those people who cannot trace their employer or their employer's insurance company, where the employer was responsible for the asbestos exposure. Anyone diagnosed with mesothelioma from 25 July 2012 will be able to make a claim.
179. The scheme proposed by the Bill will be funded by a levy on insurance companies, and will apply to the whole of the UK. In contributing to the funding for the scheme the insurance industry will incur additional costs.
180. The introduction of the scheme for cases where no liable party can be traced may impact on the number of mesothelioma claimants in Wales.
181. If the Mesothelioma Compensation Bill and the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill both become law, consideration will need to be given by the Welsh Ministers whether to add a payment made to a victim under the proposed UK scheme to the list of 'excluded payments' featuring in the Schedule to this Bill. There is provision within the Bill to do this via regulations under section 4(2).

## 8. Competition Assessment

182. A competition filter has been applied to assess the impact of the Bill on business, charities and/or the voluntary sector. The table below summarises the result –

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some businesses/organisation substantially more than others?	Yes
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

183. Only those employers and insurance companies liable to pay compensation to victims of asbestos-related disease will be directly affected by this Bill. For the majority of businesses in Wales there will be no direct impact as a result of this Bill.

184. The proposed legislation is not expected to have any impact on competition or place any restrictions on new or existing suppliers.

## 9. Post Implementation Review

185. Although a matter for the Welsh Government, the Minister for Health & Social Services has stated during the Assembly's consideration of the Bill that, as with all newly introduced policy and programme areas, it would be appropriate to undertake a periodic evaluation of the effectiveness and appropriateness of the scheme. It is considered appropriate that the first review would take place 5 years after introduction.
186. Such evaluation will include a separate and specific element to consider whether the experience of the scheme introduced by this Bill indicates that the principles could be applied in relation to a wider scheme covering other industrial diseases. It would then be for any Government at the time to assess the evaluation and decide whether it wishes to introduce legislation to take this forward.

## **Annex A - Explanatory Notes**

1. These Explanatory Notes relate to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, introduced into the National Assembly for Wales on 3 December 2012 and amended at Stage 2.
2. They have been prepared to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the National Assembly for Wales.
3. The Explanatory Notes need to be read in conjunction with the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision or part of a provision does not seem to require any explanation or comment, none is given.

### **OVERVIEW OF THE BILL**

4. The Bill comprises 21 sections and a Schedule. As set out in section 1 of the Bill the main provisions –
  - a) impose liability on persons by whom or on whose behalf compensation payments are made to or in respect of victims of asbestos-related diseases to pay charges in respect of National Health Service services provided to the victims as a result of the diseases;
  - b) make provision for the certification of the amount of the charges to be paid, for the payment and recovery of the charges, for review and appeal and about information; and
  - c) extend insurance cover of liable persons to their liability to pay the charges

### **COMMENTARY ON SECTIONS**

#### **Section 2 – Liability to pay charges**

5. This subsection sets out the circumstances in which the Welsh Ministers can recover NHS costs. Where a compensation payment is made to or in respect of a victim of an asbestos-related disease, the person by or on whose behalf the payment is made will also be liable to pay the Welsh Ministers the costs of relevant NHS services provided to the victim as a result of the disease. The amount of the costs will be specified in a certificate issued to the person liable to pay the costs (see section 3(4)).

### Section 3 – Meaning of main terms

6. This section sets out the meaning of the main terms used in the Bill.
7. Subsections (1) and (2) define compensation payment. The definition is a broad one which covers payments made (after the section is in force) in relation to an asbestos-related disease by or on behalf of the person liable, or alleged to be liable, for the disease (such as an employer or insurance company). The definition will encompass not only a final payment of damages but also an interim payment or a payment of costs only. Subsection (2) provides that a ‘compensation payment’ includes not just payments of money but also payment of money’s worth (which might include adaption to a persons home).
8. However, certain payments, known as “excluded payments”, will not be compensation payments; further detail is set out in section 4 (see below).
9. Subsection (3) lists the diseases which are to be considered as asbestos-related diseases for the purposes of the Bill. It does not matter whether the disease was caused or discovered before or after the coming into force of section 3.
10. The charges which may be recovered (referred to as ‘appropriate charges’) are the amount(s) set out in a certificate issued to the person who makes the compensation payment in respect of the victim (subsection (4)). The procedure for applying for certificates is set out in section 5.
11. The charges which may be recovered relate to the provision of ‘relevant Welsh NHS services’ which, as set out in sub-sections (5) and (6), are services that are commissioned, provided, secured or funded under the National Health Services (Wales) Act 2006. This includes therefore, services provided by LHBs, NHS Trusts and the Welsh Ministers (if applicable), including in-patient and out-patient care. However, the services do not include the “excluded services” listed in subsection (6), for example –
  - a) primary medical (e.g. GP provided care), dental or ophthalmic services; and
  - b) accommodation and services provided for private patients (including in NHS facilities).
12. Sub-section (7) enables the Welsh Ministers to amend the meaning of ‘excluded services’ by making regulations. This would allow, for example, the costs of additional services (such as primary care services) to be recovered under the scheme, should future changes in the pattern of service provision make it desirable to do so.

## **Section 4 – Excluded payments**

- 13 As noted above (paragraph 11, certain payments (known as excluded payments) are not to be counted as compensation payments for the purposes of this Bill. These are set out in the Schedule to the Bill, introduced by this section.
14. Under subsections (2) and (3), the Welsh Ministers may, by regulations, amend the Schedule by removing, modifying or adding a new payment.

## **Section 5 – Applications for certificates etc**

15. Section 5 deals with applications for certificates.
16. Subsection (1) provides that a person (for example, an insurance company) may apply to the Welsh Ministers for a certificate before they make a compensation payment to the victim. When a compensation payment has been made subsection (2) provides that the compensator must apply to the Welsh Ministers for a certificate if –
- a) he or she has not already been issued with a certificate, or
  - b) any previously issued certificate has expired,
- and he or she has not applied for a certificate during a period to be prescribed in regulations.
17. When the Welsh Ministers receive an application for a certificate, they must (subsection (3)) arrange for the certificate to be issued “as soon as is reasonably practicable”. This will depend on what is involved in the process of gathering information from NHS Trusts and LHBs, which will vary according to the circumstances of each victim.
18. Subsection (4) deals with the length of time for which a certificate is to remain in force. This can be until a specified date, which might be appropriate where there is ongoing treatment; until the occurrence of a specified event – for example, any further admission to hospital; or indefinitely, which would be appropriate for example where no charges are payable under the certificate or a certificate where the maximum recoverable amount (i.e. the cap set in regulations made under section 6(5)(a) had already been reached).
19. Subsection (5) permits applications for fresh certificates to be made. Under subsection (6), a fresh certificate does not have to be issued until the current certificate expires. Where a certificate has expired, subsection (7) provides that the Welsh Ministers may issue a fresh certificate without a further application being made.

20. All applications for certificates are to be made in the manner set out in regulations made by the Welsh Ministers under subsection (8).

## **Section 6 – Information contained in certificates**

21. Section 6 deals with the information that is to be included in certificates. Subsections (1) and (2) provide that the amount of the appropriate charges which the recipient of the certificate is liable must be specified in the certificate, and that the amount will be as set out or determined in accordance with regulations to be made by the Welsh Ministers. Regulations may be made so as to apply to any certificate issued after the date on which the regulations come into force, except a certificate where the related compensation payment was made before that date.

22. Subsection (3) provides that where the compensation paid to the victim of the asbestos-related disease has been reduced to take account of contributory negligence, the amount set out in the certificate will be reduced in the same proportion, except in circumstances prescribed in regulations.

23. Where a victim has received no NHS treatment covered by the scheme (for example, because the victim received only primary medical services which are excluded under the Bill), the Welsh Ministers must issue a certificate of charges stating that no payment is due (subsection (4)).

24. Subsection (5) sets out particular matters which may be covered by regulations –

- a) a cap on the overall amount of NHS charges payable under a certificate (subsection (5)(a));
- b) different amounts to be specified for different circumstances – for example out-patient or in-patient treatment, or ambulance services (subsection (5)(b));
- c) provision for cases where a person receives NHS treatment at more than one place (subsection (5)(c)), for example, at different hospitals or hospitals within different LHB areas;
- d) provision (which can include a modification of the Bill; see subsection (6)) for the apportionment of the liability to pay costs of relevant NHS treatment, where more than one person is making the compensation payments to or in respect of the same victim in respect of the same disease (subsection(5)(d));
- e) provision for cases where a fresh certificate is issued or a certificate revoked as a result of a review or appeal (subsection (5)(e)); and

f) provision for the Welsh Ministers to determine any matter which requires determination under or in consequence of the regulations (subsection (5)(f)).

25. Subsections (6) and (7) provide further examples of provisions which may be made by regulations.

26. Subsection (8) provides that a person receiving a certificate can require the Welsh Ministers to provide information (as prescribed in regulations) as to how the amount specified in the regulations has been determined.

### **Section 8 – Recovery of charges**

27. This section sets out the powers of Welsh Ministers to recover charges where a compensation payment has been made but either no application has been made for a certificate as required or full payment has not been made in respect of a certificate by the relevant due date. Subsection 2 provides for the Welsh Ministers to issue a new or duplicate certificate, as applicable, and a demand for immediate payment. Subsections (3) to (4) set out the procedures to be used to enforce payment. Subsections (5) and (6) specify the evidence required to show that an amount is recoverable.

### **Section 9 – Reviews of certificates**

28. Section 9 provides for the review of certificates by the Welsh Ministers.

29. The Welsh Ministers must review an issued certificate if they are notified of a subsequent finding, settlement or agreement of contributory negligence (subsection (1)). In addition, subsection (2) makes provision for regulations to specify periods, cases and circumstances in which the Welsh Ministers may review any certificate, either on their own initiative or where requested to do so. Where the Welsh Ministers review a certificate, they may confirm, vary or revoke it.

### **Sections 10 and 11 – Appeals against certificates and waiver decisions; Appeals to tribunal**

30. Sections 10 provides a right of appeal against certificates of charges and waiver decisions.

31. Subsection (1) of section 10 sets out the grounds upon which a compensator may appeal against a certificate, and subsection (2) provides that no appeal may be made until the claim to which the compensation payment relates has finally been disposed of and the amount set out in the certificate has been paid. However, subsections (4) and (5) enable compensators to apply to the Welsh Ministers for the requirement for prior payment to be waived. The Welsh Ministers can grant such a waiver

only if requiring prior payment would cause exceptional financial hardship.

32. Subsection (7) enables the Welsh Ministers to make regulations about the timing, manner and procedure for appeals made to them against certificates and waiver decisions. Regulations may also enable an appeal against a certificate to be treated as a review.
33. Section 11 requires the Welsh Ministers to refer appeals to the First-tier Tribunal for consideration and decision. Subsection (2) requires the Tribunal to take into account relevant court decisions, and subsections (3) and (5) set out the Tribunal's options when deciding an appeal. Subsection (4) requires the Welsh Ministers to implement the Tribunal's decision.

### **Section 12 – Provision of information**

34. The system for recovery of NHS charges is reliant upon information being exchanged by the various parties involved in the chain of events from the disease being identified to payment of compensation. Subsection (1) sets out the classes of persons who must provide information to the Welsh Ministers. The nature of that information, and the manner and time period in which it is to be provided, will be as prescribed in regulations made by the Welsh Ministers. Subsection (3) makes clear that the information required may include information about Welsh NHS services provided to a victim of an asbestos-related disease for the treatment of that disease.

### **Section 13 – Use of information**

35. This section allows information held for the purposes of the Social Security (Recovery of Benefits) Act 1997 to be used for the purposes of this Bill. .

### **Section 14 – Regulations governing lump sums, periodical payments etc**

36. Liability for payment of NHS charges is triggered by any payment of compensation, whether it is a single payment, an interim payment or a second or subsequent payment of compensation. Section 14 enables regulations to be made by the Welsh Ministers in respect of the treatment of lump sums, periodical payments, interim payments which a court orders to be repaid and payments into court for the purposes of the Bill. Subsection (2) gives examples of the provision the regulations may make in relation to multiple lump sum payments.
37. Subsection (3) enables regulations to be made to deal with the particular situation of payments into court and the circumstances in which such payments – which are made to the court rather than to the victim – are to

count as compensation payments. It allows regulations to modify the application of the scheme in relation to such cases.

### **Section 15 – Liability of insurers**

38. Section 15 provides that where a compensation payment is made and the associated asbestos-related liability is covered (to any extent) by an insurance policy, that policy will also cover any liability to pay appropriate charges in respect of any NHS services provided to the victim as a result of the disease. This addition to cover cannot be restricted or excluded. Subsection (4) also allows the Welsh Ministers to make regulations which may prescribe the circumstances in which the amount of that liability may be limited. Subsection (5) establishes that this section applies to policies of insurance issued before, as well as after, the coming into force of this section.

### **Section 16 – Use of amounts reimbursed**

39. Section 16 (1) sets out that the Welsh Ministers must, in allocating the reimbursed charges received under the Act, consider allocating an equivalent amount for the purpose of research into, treatment of, or other services relating to, asbestos-related diseases.

40. Subsection (2) requires the Welsh Ministers to report annually to the Assembly on the way in which an amount equivalent to that recovered under the scheme has been disbursed.

### **Section 17 - Crown application**

41. This section provides that Bill applies to the Crown (i.e. the Queen and Government Departments).

### **Section 18 – Orders and regulations**

42. This section makes general provision about powers in the Bill that enable subordinate legislation, in the form of orders or regulations, to be made. Such legislation is to be made by statutory instrument. Subsection (2) is a technical provision which ensures that the powers in the Bill to make such subordinate legislation are wide enough to enable the legislation to cater for the scenarios it may be expected to encounter. Subsection (5) provides that regulations arising from sections 3(7) and 4(2) and the first set of regulations under sections 6(2) and 10(7) must be approved in draft by the National Assembly for Wales before they can be made. Subsection (6) provides that all other regulations made under the Bill do not need to be approved in draft, but can be annulled by a resolution of the Assembly after they have been made.

## Section 19 – Interpretation

43. This section provides the meaning of various terms used throughout the Bill.

### Schedule – Excluded payments

44. The Schedule, which is introduced by section 4 of the Bill, lists a number of payments which are not to count as a ‘compensation payment’ for the purposes of the Bill. These include –

- a) Payments made under the Pneumoconiosis etc (Workers’ Compensation) Act 1979;
- b) Part 4 of the Child Maintenance and Other Payments Act 2008. These are Government schemes under which the state provides compensation to sufferers of certain asbestos-related diseases, or their dependents, in certain circumstances, for example, where the relevant employer is no longer in business.
- c) Payments made to or for the victim under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (compensation orders against convicted persons). Where a court convicts a person of a criminal offence and makes a compensation order to their victim, the compensation is funded by the convicted person as opposed to an employer or insurer.
- d) Discretionary payments made from property held subject to a trust where the person making the compensation payment to the victim has provided no more than 50 per cent of the capital contributed to the trust, directly or indirectly.
- e) Payments made by trusts prescribed in regulations. This power could be used, for example, to prescribe trusts such as those set up to provide compensation to asbestos-related disease sufferers where former employers have ceased trading, and the residue of assets is used to provide compensation payments.
- f) Any payment made in fulfilment of a contract of insurance between the victim and their insurer (for example, personal health insurance).
- g) Any payment to the extent that it is made in consequence of the Fatal Accidents Act 1976, or in circumstances where, had an action been brought, it would have been brought under that Act. Under that Act, a claim for compensation can be brought following a fatal accident by the deceased’s estate on behalf of his family and financial dependants. Certain claimants can receive a fixed bereavement award, and dependants who have suffered financially because of the death and

who are reasonably likely to suffer financially in the future, are entitled to seek compensation that reflects the loss of that financial support or the value of lost services.

## **Annex B - Consultees**

Asbestos Awareness and Support Cymru  
Asbestos Victims Support Groups' Forum UK  
ASLEF  
Association of British Insurers (ABI)  
Association of Personal Injury Lawyers Wales (APIL)  
British Lung Foundation Wales  
British Medical Association (BMA) Wales  
Cardiff Business Club  
Clydeside Action on Asbestos  
Confederation of British Industry  
Confederation of British Industry Wales  
Confederation of Community Health Councils  
Fire Brigades Union (FBU)  
Forum of Insurance Lawyers  
GMB  
GMB South Western Region  
Institute of Directors Wales  
Law Society Wales  
Macmillan Wales  
Marie Curie  
Mesothelioma UK  
NASUWT Cymru  
NHS Confederation Wales  
NUT Cymru  
PCS Wales  
National Union of Rail, Maritime and Transport Workers (RMT)  
Tenovus  
TUC Wales  
Union of Construction, Allied Trades and Technicians (UCATT)  
UNISON Cymru  
Unite Cymru