

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

**Report on the Recovery of Medical
Costs for Asbestos Diseases (Wales)
Bill**

March 2013



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

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Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

In accordance with Standing Order 17.48, Mark Drakeford AM substituted for Julie James AM.



Mark Drakeford
Welsh Labour
Cardiff West

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The Committee's conclusions and recommendations

Conclusion 1: We are generally content that the Bill strikes the right balance between what is included on the face of the Bill and what is left to be dealt with through subordinate legislation. (Page 13)

Recommendation 1: We recommend that the Member in charge considers tabling amendments to permit the list of excluded services in section 3(6) to be amended in the future by regulations and to apply the affirmative procedure to their scrutiny. (Page 14)

Recommendation 2: We recommend that the Member in charge considers tabling an amendment to apply the affirmative procedure to regulations made under section 4(3). (Page 16)

Recommendation 3: We recommend that the Member in charge considers tabling an amendment to apply the affirmative procedure to the first regulations made under section 10(7). (Page 21)

Recommendation 4: We recommend that the Member in charge considers tabling an amendment to apply the affirmative procedure to all regulations made under sections 14(1) and 14(3). (Page 22)

Recommendation 5: We recommend that the Member in charge considers tabling an amendment to ensure that the regulation making power contained in section 15 is subject to the affirmative procedure. (Page 23)

Recommendation 6: We recommend that the Member in Charge clarifies, during the Stage 1 debate, why the power in section 15(4) of the Bill is required at all, and if it is required, why it is limited to insurers rather than applying to all compensators. (Page 23)

Recommendation 7: We recommend that the Member in charge tables an amendment specifically excluding commencement orders from the scope of section 18(2) of the Bill. (Page 24)

1. Introduction

1. On 3 December 2012, Mick Antoniw AM introduced the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill ('the Bill') and accompanying Explanatory Memorandum.¹
2. The National Assembly's Business Committee referred the Bill to the Health and Social Care Committee for consideration on 13 November 2012, setting a deadline of 8 March 2013 to report on its general principles.
3. The Constitutional and Legislative Affairs Committee considered the Bill at its meeting on 28 January 2013, taking evidence from the Member in charge, Mick Antoniw AM and Lesley Griffiths AM, the Minister for Health and Social Services.

The Committee's remit

4. The Constitutional and Legislative Affairs Committee's ("the Committee") remit is to carry out the functions of the responsible committee set out in Standing Order 21² and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
5. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
6. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

¹ Mick Antoniw AM, *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Explanatory Memorandum incorporating the Regulatory impact Assessment*, December 2012

² National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, December 2012

2. Background

Purpose of the Bill

7. The Explanatory Memorandum explains that the aim of the Bill:

“... is to enable the Welsh Ministers to recover from a compensator ... certain costs incurred by the NHS in Wales in providing care and treatment to the victim of the asbestos-related disease.”³

8. A compensation payment to a victim of an asbestos-related disease covers payments made by or on behalf of the person liable, or alleged to be liable, such as an employer or insurance company.⁴

9. The Explanatory Memorandum draws attention to similar legislation in respect of road traffic accidents, namely the *Road Traffic (NHS Charges) Act 1999*.⁵ It also notes that Part 3 of the *Health and Social Care (Community Health and Standards) Act 2003* 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.⁶

Legislative Competence

10. In terms of the National Assembly’s legislative competence to make the Bill, the Explanatory Memorandum states that it:

“... 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.”⁷

³ Explanatory Memorandum, paragraph 1

⁴ Explanatory Memorandum, Annex A – Explanatory Notes, paragraph 8

⁵ Explanatory Memorandum, paragraph 6

⁶ Explanatory Memorandum, paragraph 7

⁷ Explanatory Memorandum, paragraph 4

11. The Explanatory Memorandum adds that:

“The Bill is concerned with the recouping of care and treatment costs 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.”

Overview of the Bill

12. The Bill comprises 21 sections and a Schedule. Section 1 provides an overview of the Bill setting out its main provisions, namely to:

- 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;
- make provision for the certification of the amount of the charges to be paid, for the payment of the charges, for review and appeal and about information; and
- extend insurance cover of liable persons to their liability to pay the charges.

3. Legislative Competence

Background

13. Paragraphs 10 and 11 of this report set out the provisions of Schedule 7 to the *Government of Wales Act 2006*, identified by the Member in charge, Mick Antoniw AM, which enable the Bill to be made by the National Assembly.

14. Under section 110 of the 2006 Act, the Presiding Officer must on or before introduction of the Bill, decide whether or not it is within the Assembly's legislative competence and to state that decision.

15. The Presiding Officer stated that the Bill was within the National Assembly's competence⁸ but wrote to us (and the Health and Social Care Committee) to say that her decision was not "straightforward" adding:

"I have received advice that credible arguments can be made that a number of provisions of the Bill may not be within the Assembly's legislative competence. The decision I have made is, therefore, a finely balanced one in these areas."⁹

16. The letter, which included a summary of the issues considered by the Presiding Officer in reaching her views, is included in the Annex.

Evidence on legislative competence

17. Mick Antoniw AM explained that issues of competence had been a consideration from the early stages of the Bill's development and that discussions with Government officials had not led to any negative feedback.¹⁰ He told us that:

"Within the state of the constitutional relationship and legal relationship between the Welsh Government and the UK Government, there are always potential questions that can be asked. However, when you look at it in the round, and within

⁸ <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=241099&ds=12/2012>

⁹ Letter from the Presiding Officer to Chair of the Constitutional and Legislative Affairs Committee, 3 December 2012

¹⁰ CLA Committee, *RoP [paragraph 17]*, 28 January 2013

the devolved health responsibility, you will find that this is very much focused within that. The function is very clearly within competence, and any other matters where question marks may be raised are more to do with the incidental consequence that is the implementation of the achievement of the main function.”¹¹

18. He added that a copy of the Bill and Explanatory Memorandum had been sent to the Secretary of State for Wales but that no response had been received, although he would follow up on this point.¹² He added that as his was a Member Bill, discussions with the Secretary of State would probably not be a normal occurrence, with Government-to-Government contact more likely.¹³

19. Section 17 of the Bill binds the Crown and was an issue considered by the Presiding Officer as part of her assessment of competence. When asked for his view about whether the provisions that bind the Crown are within competence, Mick Antoniw AM told us:

“The issue of binding the Crown is a sort of incidental consequence. It is not a function of this. I think that that is the point of view that is ultimately taken by the Presiding Officer. That fits very much within the decision in the bye-laws judgment.”¹⁴

20. The Minister re-iterated her support for the policy intentions of the Bill, believing that “we have the necessary competence”,¹⁵ a point confirmed by her legal adviser.¹⁶

21. When asked whether the Welsh Government had had any discussions with the UK Government, the Minister said:

“No, not at the moment. Again, it is probably too early to have those detailed discussions. Members will be aware that the explanatory memorandum is available, and certainly there has been no contact made by Whitehall officials or by Ministers to

¹¹ CLA Committee, *RoP [paragraph 17]*, 28 January 2013

¹² CLA Committee, *RoP [paragraph 15]*, 28 January 2013

¹³ CLA Committee, *RoP [paragraph 19]*, 28 January 2013

¹⁴ CLA Committee, *RoP [paragraph 21]*, 28 January 2013

¹⁵ CLA Committee, *RoP [paragraph 107]*, 28 January 2013

¹⁶ CLA Committee, *RoP [paragraph 104]*, 28 January 2013

me. The only discussions, really, are the preliminary discussions ... with the compensation recovery unit.”¹⁷

Our view

22. We note that the Member in charge and the Minister consider that the Bill is within the legislative competence of the National Assembly.

23. We also note that while the Presiding Officer stated her opinion that the Bill was within the National Assembly’s legislative competence, she considered it important to draw to our attention certain difficult issues that she had to consider in reaching her decision.

24. We recognise that this represents a new approach and one which might be repeated in the future.

25. We note that there do not appear to have been any meaningful discussions to date between either the Member in charge or the Welsh Government and the UK Government.

26. We recognise that as a Member Bill, it is difficult for the Member in charge to engage in discussions about competence with the UK Government and agree with him that such discussions must be undertaken on a Government-to-Government basis.

27. We consider that the issues identified by the Presiding Officer are potentially contentious. Subject to the general principles being agreed to, given that these issues have been highlighted at the start of the legislative process and prior to the amending stages, we would expect any potential difficulties to be addressed (and where possible resolved) by Government-to-Government contact in a timely manner, to ensure that the legislative process is expedited in the most efficient way possible.

¹⁷ CLA Committee, *RoP [paragraph 100]*, 28 January 2013

4. Powers to make subordinate legislation – general observations

Evidence

28. The Explanatory Memorandum explains that:

“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 majority of the detail to subordinate legislation, in a similar way to the 2003 Act.”¹⁸

29. The 2003 Act in question is the Health and Social Care (Community Health and Standards) Act 2003.

30. When questioned, Mick Antoniw AM expanded on the approach adopted:

“A large chunk of the Bill sets the framework for regulations and the actual implementation of the scheme ... on the main principles of the Bill and what it aims to achieve ... I think that that is quite clear on the face of the Bill ... What it does is set the framework, but the final technical regulations for implementation are almost impossible to determine at this stage because they are dependent to some extent ... on the Government completing negotiations with the compensation recovery unit for implementation ... on balance, although there is quite a lot of technical detail in there already, the technical administrative elements are effectively by negative resolution and the remaining bits, particularly where they are related to amounts of compensation, are by affirmative resolution.”¹⁹

¹⁸ Explanatory Memorandum, paragraph 62

¹⁹ CLA Committee, *RoP [paragraph 9]*, 28 January 2013

31. When discussing the procedures generally, Mick Antoniw AM added that:

“We have mirrored, as closely as possible, the 2003 Act. So, you will find that the drafting of this has mostly followed a particular line. We regarded the 2003 Act as a precedent. The affirmative side is significant in helping us to determine the amounts, caps and anything like that, but because so much of the remainder is very technical and administrative, the negative resolution is appropriate for efficiency and tweaking because it does not conflict with any of the substantive objectives of the Bill. So, it does not challenge the criteria of the Bill.”²⁰

32. The Minister was content that:

“the balance between the provisions contained in the Bill and the provisions to be made by subordinate legislation are appropriate to enable the proposed cost-recovery scheme to operate efficiently.”²¹

33. In terms of the general appropriateness of the procedural controls in relation to the exercise of the delegated powers, the Minister’s legal advisor told us:

“We are content that the proposed Assembly procedures for each of the subordinate legislation-making powers are appropriate. They very much follow the Health and Social Care (Community Health and Standards) Act 2003, and this proposed scheme very much replicates the scheme under that 2003 Act. Much of the information in the subordinate legislation will be detail, detailing different scenarios regarding when a disease has been incurred, and, for example, if someone has had a compensation payment, whether it was an interim payment or a final payment. A lot of it is mathematics and about making sure that all the figures are correct and covering all of the different scenarios. I think that is best suited to being in subordinate legislation under the negative procedure. For the two key provisions that are to be set out

²⁰ CLA Committee, *RoP [paragraph 64]*, 28 January 2013

²¹ CLA Committee, *RoP [paragraph 98]*, 28 January 2013

under the affirmative procedure, we are content that that is the most appropriate procedure for those two sections.”²²

Our view

34. We note the views of the Member in charge regarding the way in which the Bill has been structured and that the Minister raised no objections.

35. We consider that adopting broadly the same approach as the *Health and Social Care (Community Health and Standards) Act 2003* is a sensible one as it is a proven system and will allow for administrative efficiency.

Conclusion 1: We are generally content that the Bill strikes the right balance between what is included on the face of the Bill and what is left to be dealt with through subordinate legislation.

36. However, we believe that some regulation making powers would benefit from a greater level of scrutiny through the affirmative procedure and these are identified in Section 5.

²² CLA Committee, *RoP* [paragraph 114], 28 January 2013

5. Powers to make subordinate legislation – observations on specific powers

37. Section 5 of the Explanatory Memorandum describes the provisions of the Bill that provide powers to make subordinate legislation. A table is included that summarises the powers and for each provision, states the appropriateness of the delegated power and the reasons for the chosen procedure.

38. The delegated powers contained in the Bill are considered below.

Section 3 – Meaning of main terms

39. Section 3 sets out the meaning of the main terms used in the Bill and does not contain any delegated powers. However, we asked Mick Antoniw AM about the possibility of including a power for Welsh Ministers to amend the list of “excluded services” contained in subsection (6) that currently excludes primary medical care from the scope of the Bill. The intention would be to futureproof the Bill against the time when more services are moved out of secondary care into the primary and community setting.

40. In response Vaughan Gething AM, who accompanied Mick Antoniw AM, said “we have an open mind and will consider it.”²³ Mick Antoniw AM said that such a regulation-making power would need to be subject to the affirmative procedure.²⁴

Our view

41. We see considerable merit in futureproofing the Bill by allowing the list of excluded services in section 3(6) to be amended by regulations.

Recommendation 1: We recommend that the Member in charge considers tabling amendments to permit the list of excluded services in section 3(6) to be amended in the future by regulations and to apply the affirmative procedure to their scrutiny.

²³ CLA Committee, RoP [paragraph 91], 28 January 2013

²⁴ CLA Committee, RoP [paragraph 92], 28 January 2013

Section 4 – Excluded payments

42. 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 section 4.

43. Under subsections 4(2) and (3), the Welsh Ministers may, by regulations, amend the Schedule by removing, modifying or adding a new payment. Regulations which remove or modify a payment are subject to the affirmative procedure; regulations which add in payments are subject to the negative procedure.

44. According to the Explanatory Memorandum, in relation to regulations to be made under section 4(2):

“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.”²⁵

45. According to the Explanatory Memorandum in relation to regulations to be made using the negative procedure under section 4(3):

“Adding payments to the excluded list will generally be an administrative/technical function which would not impose any additional financial liabilities on a compensator”.²⁶

46. The points made in the Explanatory Memorandum were reinforced by Mick Antoniw AM and his legal adviser.²⁷

Our view

47. We note that Regulations made under section 4(2) and 4(3) will amend provisions in the Schedule. It is good practice for regulations that would amend primary legislation to be subject to the affirmative procedure.

²⁵ Explanatory Memorandum, Table, page 16.

²⁶ Explanatory Memorandum, Table, page 16.

²⁷ CLA Committee, *RoP [paragraphs 24 -28]*, 28 January 2013

48. We are therefore content that regulations made under section 4(2), which would remove or modify an excluded payment, are subject to the affirmative procedure in accordance with section 18(5).

49. We therefore believe that, in principle, regulations made under section 4(3), which would add excluded payments to the Schedule and therefore amend primary legislation, should also be subject to the affirmative procedure. However, should it be the case that regulations under this section would need to be made frequently each year, we consider that a case might be made for the negative procedure to be retained, to ensure that plenary meetings of the National Assembly are not overloaded with continual debates and votes on these issues.

Recommendation 2: We recommend that the Member in charge considers tabling an amendment to apply the affirmative procedure to regulations made under section 4(3).

Section 5 – Applications for certificates

50. Subsection 5(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 5(2) provides that the compensator must apply to the Welsh Ministers for a certificate if he or she has not already been issued with a certificate, or any previously issued certificate has expired, or no application has been made for a certificate. An application for a certificate in the circumstances set out in subsection (2) must be made within the period prescribed in regulations.

51. All applications for certificates are to be made in the manner set out in regulations made by the Welsh Ministers under subsection 5(8).

52. Regulations made under section 5 are subject to the negative procedure and the Explanatory Memorandum explains that this is because the “content will be technical / administrative in nature”.²⁸

53. The legal adviser to Mick Antoniw AM re-iterated that the application process was dealt with through subordinate legislation because “it is purely an administrative manner” adding that “it was not

²⁸ Explanatory Memorandum, Table, page 16.

something that would usually appear on the face of the Bill”.²⁹ Mick Antoniw AM indicated that given the administrative nature of these issues, the use of the negative procedure “is the most efficient way of proceeding.”³⁰

Our view

54. We note the comments of the Member in charge and consider that the negative procedure, in accordance with section 18(6), is appropriate.

Section 6 – Information contained in certificates

55. Section 6 deals with the information that is to be included in the certificates. Subsection (1) provides that the amount of the appropriate charges for NHS services must be specified in the certificate; the amount will be as set out or determined in accordance with regulations to be made by the Welsh Ministers under subsection (2). These regulations will be subject to the affirmative procedure in the first instance, with any subsequent regulations made under the negative procedure.

56. 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 by the same proportion as the reduction to the compensation except in circumstances prescribed in regulations.

57. Subsection (5) sets out particular matters which may be covered by regulations made under subsection (2), while subsection (8) provides for regulations to specify the information that a compensator can, on receipt of a certificate of charges, request from the Welsh Ministers as to how the amount specified has been determined.

58. Regulations made under sections 6(3) and 6(8) are subject to the negative procedure.

59. According to the Explanatory Memorandum, setting the initial tariff in relation to regulations made under section 6(2) requires the affirmative procedure because:

²⁹ CLA Committee, *RoP [paragraph 34]*, 28 January 2013

³⁰ CLA Committee, *RoP [paragraph 36]*, 28 January 2013

“... 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.”³¹

60. Regulations made under sections 6(3) and 6(8) are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.³²

61. In terms of the differential approach for dealing with regulations made under section 6(2), a legal adviser accompanying Mick Antoniw AM explained that:

“In drafting, it mirrors the provisions that are in the Health and Social Care (Community Health and Standards) Act 2003, which deals with recoverable NHS costs where there has been an injury or an accident. That also provides for the first setting of the amount to be done by way of the affirmative procedure, and, thereafter, by the negative procedure. The first time that it is done is the important time, because it sets the benchmark; thereafter, Welsh Ministers may need flexibility to change it quickly, to respond to market forces, or to changes in other legislation. The negative procedure gives that flexibility.”³³

62. Mick Antoniw AM explained that section 6(8) allows a person to whom a certificate is issued to seek an explanation of how the NHS costs for which they are liable have been broken down³⁴ and added that:

“... section 6(8) is about ensuring that the individual, when they are given a certificate, can get all the information that they might require to consider either a review or, ultimately, an appeal.”³⁵

63. Information related to, for example, certain details of hospital stays, could also be requested.³⁶ Mick Antoniw AM argued that it is

³¹ Explanatory Memorandum, Table, page 17

³² Explanatory Memorandum, Table, page 17

³³ CLA Committee, *RoP [paragraph 40]*, 28 January 2013

³⁴ CLA Committee, *RoP [paragraph 47]*, 28 January 2013

³⁵ CLA Committee, *RoP [paragraph 51]*, 28 January 2013

³⁶ CLA Committee, *RoP [paragraph 55]*, 28 January 2013

difficult to put that sort of detail on the face of a Bill.³⁷ When asked, given the potential for cross-border issues, if not having this on the face of the Bill, might lead to false claims or claims where competence could be extended too far by regulation, Mick Antoniw AM said he didn't think so.³⁸ Vaughan Gething AM, who accompanied Mick Antoniw AM, said that:

“... these regulations extend only to Welsh NHS-funded treatment. So, I do not think that we are in danger of extending beyond the powers of the Assembly.”³⁹

64. Mick Antoniw AM felt that the negative procedure for regulations used to deliver these requirements was appropriate because it is “essentially a very technical and administrative matter”.⁴⁰

Our view

65. We note the comments of the Member in charge in relation to section 6.

66. As regards regulations to be made under section 6(2), we consider it be appropriate for the first set to be made using the affirmative procedure and for subsequent regulations to be made using the negative procedure, in accordance with sections 18(5) and 18(6) respectively.

67. As regards Regulations to be made under sections 6(3) and 6(8), we consider the negative procedure, in accordance with section 18(6) to be appropriate.

Section 9 - Reviews of Certificates

68. Section 9 provides for the internal review of certificates by Welsh Ministers. Subsection (2) provides that Welsh Ministers may review an issues certificate, either on an application by the compensator or on their own initiative, with regulations to be made specifying the timing of such reviews and the circumstances or cases in which they may take place.

³⁷ CLA Committee, RoP [paragraph 55], 28 January 2013

³⁸ CLA Committee, RoP [paragraph 57], 28 January 2013

³⁹ CLA Committee, RoP [paragraph 58], 28 January 2013

⁴⁰ CLA Committee, RoP [paragraph 60], 28 January 2013

69. Regulations made under section 9 are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.

Our view

70. We consider that the negative procedure, in accordance with section 18(6), is appropriate.

Section 10 - Appeals against Certificates of Charges

71. Section 10 provides for appeals against certificates of charges and waiver decisions to be heard by the First-tier Tribunal.

72. Subsection (1) 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 for the requirement for prior payment to be waived, and allow the Welsh Ministers to grant such a waiver (“a waiver decision”) only where it appears to them that requiring payment would cause exceptional financial hardship.

73. Subsection 10(7) establishes that the timing, manner and procedure for appeals against certificates and waiver decisions, and for enabling an appeal against a certificate to be treated as a review, will be set out in regulations to be made by the Welsh Ministers.

74. Regulations made under section 10 are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.⁴¹

Our view

75. On balance, we consider that the first set of regulations to be made under section 10(7) should be subject to the affirmative procedure given that they will form a key part of the establishment of the appeals process. We consider that it would then be appropriate for subsequent regulations to be subject to the negative procedure.

⁴¹ Explanatory Memorandum, Table, page 17

Recommendation 3: We recommend that the Member in charge considers tabling an amendment to apply the affirmative procedure to the first regulations made under section 10(7).

Section 12 - Provision of information

76. The system for recovery of NHS charges is reliant upon information being provided by the various parties involved in the chain of events from the disease being identified to payment of compensation. The nature of that information, the manner and time period in which that information is to be provided, will be prescribed in regulations to be made by the Welsh Ministers under subsections (1) to (3).

77. Regulations made under section 12 are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.⁴²

Our view

78. We consider that the negative procedure, in accordance with section 18(6), is appropriate for Regulations made under section 12.

Section 14 - Regulations governing lump sums, periodical payments etc

79. 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 and interim payments which a court orders to be repaid and payments into court for the purposes of the Bill.⁴³

80. Regulations made under section 14 are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.⁴⁴

81. Mick Antoniw AM indicated he was confident that the regulation-making power provided to Welsh Ministers would avoid any perverse

⁴² Explanatory Memorandum, Table, page 17

⁴³ Explanatory Memorandum, Annex A – Explanatory Notes, paragraph 37

⁴⁴ Explanatory Memorandum, Table, page 18

incentives for insurance companies to make a small, early, interim payment that would stop the clock as far as NHS cost recovery is concerned.⁴⁵ He explained that this was because:

“... under the existing 2003 Act and regulations that are in force there, an interim payment does not qualify as a settlement or judgement. We are clear about what the defining moment is when the trigger occurs.”⁴⁶

82. He added that the negative resolution procedure was appropriate for reasons of “flexibility and efficiency” and “practical and effective implementation”.⁴⁷

Our view

83. We note the comments of the Member in charge and in particular his view that the regulation-making powers provided under section 14 would facilitate the process of NHS cost recovery.

84. We consider that regulations made under section 14 will form an important part of the fabric of the system to be put in place. and would benefit from being subject to the affirmative procedure so that the Assembly can satisfy itself that the principles of the Bill will be applied effectively. In reaching this view, we are also taking into account the fact that the regulations could modify primary legislation.

Recommendation 4: We recommend that the Member in charge considers tabling an amendment to apply the affirmative procedure to all regulations made under sections 14(1) and 14(3).

Section 15 – Liability of insurers

85. Section 15 establishes that where a compensation payment made is covered, to any extent, by a policy of insurance, 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. Subsection (4) allows the Welsh Ministers to make regulations which may limit the extent of that liability

⁴⁵ CLA Committee, *RoP [paragraphs 76-77]*, 28 January 2013

⁴⁶ CLA Committee, *RoP [paragraph 77]*, 28 January 2013

⁴⁷ CLA Committee, *RoP [paragraph 79]*, 28 January 2013

86. Regulations made under section 15 are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.⁴⁸

87. When asked why Welsh Ministers needed the regulation power provided by section 15, Mick Antoniw AM said:

“In the 2003 Act, relating to road traffic, there is a cap. There is no cap on the face of the Bill here, although there is reference to a cap in the explanatory memorandum. The purpose of that is to give the power to the Welsh Government to determine what the cap should be and its purpose is to give power to the Welsh Government to determine what that cap will be. The purpose of having a cap is the desirability of giving a degree of certainty to the insurance industry in terms of it managing its potential liabilities in the future.”⁴⁹

Our view

88. We consider that this section provides Ministers with a significant power and one which could potentially be used to undermine the purpose of the Bill if set too low.

Recommendation 5: We recommend that the Member in charge considers tabling an amendment to ensure that the regulation making power contained in section 15 is subject to the affirmative procedure.

89. However, when considering our report it became obvious that we were unclear as to the justification for the power to limit the amount of liability in section 15(4). Whilst it appears to be a power limited to the liability of insurers, there is in fact a power in section 6(5)(a) to limit the liability generally under the Bill.

Recommendation 6: We recommend that the Member in Charge clarifies, during the Stage 1 debate, why the power in section 15(4) of the Bill is required at all, and if it is required, why it is limited to insurers rather than applying to all compensators.

⁴⁸ Explanatory Memorandum, Table, page 18

⁴⁹ CLA Committee, *RoP [paragraph 88]*, 28 January 2013

Section 20 – Commencement

90. Section 20 provides that apart from section 1, section 20, section 21 and the powers conferred by the Act to make regulations, the Act will come into force in accordance with commencement orders made by Welsh Ministers. Such orders will be subject to no procedure in accordance with normal legislative practice.

91. Commencement orders made under section 20 also come under the scope of section 18(2)(b), which provides that any order or regulations made under the Act “may make incidental, supplementary, consequential, transitory or transitional provision”.

Our view

92. It is standard practice that no procedure is prescribed for commencement orders and we are content with this approach.

93. However, it is a consistent theme of our scrutiny of delegated powers to make subordinate legislation that such legislation should be subject to an appropriate degree of scrutiny by the Assembly.

94. Section 18(2)(b) allows commencement orders to be used for the purpose of making substantive provision. We do not consider this to be appropriate given that commencement orders are correctly subject to no procedure and as such are not scrutinised by the Assembly. We therefore consider that incidental, supplementary, consequential, transitory or transitional provisions, permitted by virtue of section 18(2), should be made (and therefore scrutinised) under the many substantive regulation-making powers contained in the Bill.

Recommendation 7: We recommend that the Member in charge tables an amendment specifically excluding commencement orders from the scope of section 18(2) of the Bill.

Schedule 1, paragraph 4

95. The Schedule lists a number of payments which are not to count as a “compensation payment” for the purposes of the Bill. Under paragraph 4 this would include payments made by trusts prescribed in regulations.

96. It is envisaged that this power would be used by Welsh Ministers 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.⁵⁰

97. Regulations made under paragraph 4 of the Schedule are subject to the negative procedure because, according to the Explanatory Memorandum, their “content will be technical / administrative in nature”.⁵¹

Our view

98. We consider that the negative procedure, in accordance with section 18(6), is appropriate.

⁵⁰ Explanatory Memorandum, Annex A – Explanatory Notes, paragraph 45

⁵¹ Explanatory Memorandum, Table, page 18



David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Your ref:
Our ref:

3 December 2012

Dear David

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

I have written today to Mick Antoniw to confirm my view that, in accordance with section 110(3) of the Government of Wales Act 2006 (GoWA), the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, is within the legislative competence of the Assembly and I intend to make a statement to that effect upon the Bill's introduction.

However, my decision in this case was not straightforward. I have received advice that credible arguments can be made that a number of provisions of the Bill may not be within the Assembly's legislative competence. The decision I have made is, therefore, a finely balanced one in these areas.

I enclose for your information a summary of the issues I considered in reaching my view on legislative competence. I feel it is appropriate, and important, to share this with you, so as to recognise and facilitate the role of Assembly Members on your Committee in scrutinising the Bill. The lawyer and Clerk supporting the Committee in that scrutiny will be able to provide more detailed information on the issues.

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This is the first time we have taken the approach of revealing difficult issues of competence considered by me. It is also the first case that has thrown up such issues since the recent Supreme Court judgment. There are undoubtedly sensitivities arising from how the Assembly debates matters of legislative competence during the progress of a Bill. The staff supporting your committee will be able to advise you on these and I would, of course, be happy to discuss in person.

In the meantime, I am writing in similar terms to Mark Drakeford as Chair of the Health and Social Care Committee.

I must stress that the advice I have received, and on which I have based my decision, is that the provisions of the Bill can legitimately be determined as being within the legislative competence of the Assembly. Nevertheless, I wish to ensure that the issues I have considered are shared with Committees so that further consideration can be given to them during scrutiny of the Bill, if Members so wish.

A handwritten signature in cursive script that reads "Rosemary".

Rosemary Butler AM, Presiding Officer

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

Summary of Legislative Competence Issues

Background

1. The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill has been submitted to the Presiding Officer by the Member in charge of the Bill, Mick Antoniw AM, to enable the Presiding Officer to state her view on whether the Bill is within the legislative competence of the Assembly. In accordance with section 110(3) of the Government of Wales Act 2006 (GoWA), and Standing Order 26.4, this statement must be made on or before the Bill being introduced.

2. After receiving advice from the Assembly's legal advisers, the Presiding Officer has decided that, in her view, the Bill is within competence. However, the Presiding Officer considers it appropriate to bring certain issues relating to competence, which she considered in reaching her view, to the attention of the Committees that will be scrutinising the Bill, so that they can decide whether or not to probe these issues further as part of the scrutiny process.

Overview of the Bill

3. The purpose of the Bill is to ensure that a person who pays compensation to a „victim“ of an „asbestos-related disease“ also has to reimburse the Welsh Ministers for costs incurred by the NHS in Wales in providing care to the „victim“. The same applies if the compensation is paid by someone else on behalf of the person responsible for the harm to the „victim“, including insurance companies.

Competence Issues considered by the Presiding Officer

4. The first issue concerns section 15 of the Bill. This deals with the liability of insurers to pay the new charges which the Bill introduces. Schedule 7 to GoWA contains an exception from competence drafted in these terms: „Financial services, including ... insurance“. This exception is set out under Heading 4, „Economic Development“, whereas the provisions of the Bill relate to Subjects listed under Heading 9, „Health and Health Services“. However, exceptions from competence apply equally to all the Subjects listed in Schedule 7. This document may contain legal advice supplied in confidence to the National Assembly for Wales and may be subject to legal professional privilege.

5. The Presiding Officer considers, on balance, that section 15 is within competence, on the grounds that it is incidental to the other provisions of the Bill, or appropriate to make the Bill fully effective.

6. The second issue concerns section 17 of the Bill. This provides that the Bill binds the Crown. As such, it will affect UK Government Departments. The question arises whether, in doing so, it will modify a function of a Minister of the Crown, or impose a new function on such a Minister, or merely create a liability to which such Ministers will become subject in certain circumstances..

7. Paragraph 1 of Part 2 of Schedule 7 to the GOWA 2006 prohibits a Bill from modifying a pre-commencement function of a Minister of the Crown. These are functions held by a Minister of the Crown since before 5th March 2011. The paragraph also prohibits a Bill from imposing a function on a Minister of the Crown. However, a Bill can do any of these things if the Secretary of State consents. Alternatively, a Bill can modify a function (but not impose one) if to do so would be incidental on, or consequential to, another valid provision of the Bill.

8. The Presiding Officer considers that section 17 should not be seen as outside competence, given that there are credible arguments that it does not modify a function of a Minister of the Crown or impose a new function on such a Minister; or that, if it does modify a function of a Minister of the Crown, the modification is incidental to other provisions of the Bill.

9. The third issue concerns whether section 2, the core provision of the Bill, relates sufficiently closely to one or more Subjects listed in Schedule 7 to GoWA.

10. Paragraph 4 of Part 2 of the Explanatory Memorandum cites heading 9 (Health and health services) in Schedule 7 to GoWA as providing the legislative competence to permit the National Assembly to pass this Bill. The subjects that appear under that heading, and that are potentially relevant to the Bill, are:

“Prevention, treatment and alleviation of disease, illness, injury [and] disability ... Provision of health services... Organisation and funding of national health service.”

11. The decision as to whether a provision of a Bill “relates to” a Subject is to be made primarily by reference to the “purpose” of the provision.

12. None of the Bill’s provisions have as their purpose the „prevention, treatment and alleviation of disease (etc)“. The same applies to the Subject “provision of health services”. This document may contain legal advice supplied in confidence to the National Assembly for Wales and may be subject to legal professional privilege.

13. However, the Presiding Officer considers that all the provisions of the Bill do, on balance, “relate to” the subject „Organisation and funding of national health service”. This is because the purpose of section 2, and therefore of the whole Bill, is to reimburse the Welsh Ministers – the funders of the Welsh NHS – for the cost of funding certain asbestos-related NHS services. This is a sufficiently close relationship with the Subject to bring section 2, and therefore the whole Bill, within competence.

14. In reaching her decision that the provisions of the Bill were within competence, the Presiding Officer also considered all the other tests for competence set out in GoWA: compatibility with the Convention rights; compatibility with EU law; protection of certain other enactments; protection of the position of the Comptroller and Auditor General; and the test that the Bill must not have a prohibited effect on the Welsh Consolidated Fund. She was satisfied that the Bill clearly met all these tests.

15. Finally, the Presiding Officer considered whether it would be necessary for the consent of Her Majesty the Queen and of the Duke of Cornwall would be required for the Bill to be passed by the Assembly. She concluded that these consents may be necessary and the Member in Charge has been asked to address this issue before Stage 3 of the Bill. This is not an issue of legislative competence as such.