

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

Explanatory Memorandum  
incorporating the Regulatory Impact Assessment

December 2012

# **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.

## **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

3 December 2012

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# 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 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.
4. 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.
5. The Bill is concerned with the recoupment 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.

### *Relationship with existing legislation*

6. 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

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

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.

7. 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.
8. 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)).
9. 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).
10. The 2003 Act contains various provisions to enforce the liability to make a payment of recoverable NHS charges, where the compensator 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.
11. 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

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

(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.

12. 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*

13. 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.
14. 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.
15. 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 around 4,500 deaths a year in the UK.<sup>3</sup>
16. 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>
17. 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***

18. 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.
19. 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 2,321 in 2009.<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 £2 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 in about 2016.
20. 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>8</sup>.

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

21. 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.
22. 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.
23. The 1931 regulations were revoked by the Asbestos Regulations 1969 (“the 1969 regulations”) which aimed to give the first quantitative

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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

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

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.

24. 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.
25. 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.
26. 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.
27. 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.
28. 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).
29. 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.
30. The cost of treating asbestos-related disease imposes a considerable financial burden on the NHS in Wales, at least £2million per annum based on current incidence rates and sample cost data. 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 many cases ultimately palliative care.

31. 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>9</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).
32. 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***

33. 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.
34. 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 compensation for personal injury is recovered from the third party employers/insurers.

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<sup>9</sup> See section 150(5) of the 2003 Act

35. 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.
36. 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.
37. 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. It is possible that the treatment of asbestos related disease may involve more complex packages of treatment when considered against average costs of care.

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

38. 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).
39. 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***

40. 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). That approach is considered too prescriptive in the context of this Bill. Instead the recovered sums will be returned to the Welsh Ministers to be retained. Within the Annual Budget Motion, allocation of income for the recovered costs to the Department for Health, Social Services and Children Main Expenditure Group (MEG) would be sought, and for allocation of resources to the same MEG for the provision of services to asbestos victims and their families. Allocation of the resources recovered will cover the costs of administration of the scheme and could provide for funding for the general benefit of asbestos victims and their families, including support for palliative care and other treatment. Such funding would represent a contribution to the future costs to the NHS in Wales.
41. There is some research evidence available relating to the costs of treating mesothelioma cases. Watterson et al<sup>10</sup> looked at the costs to the NHS of treating mesothelioma cases in Scotland in 2000 and found that the cost of treatment for the 100 deaths in which mesothelioma was the main cause or a contributory factor was approximately £942,000. The 100 cases involved a total of 103 days of treatment as an outpatient and 3,285 days of inpatient treatment. This equates to approximately 1 day of outpatient care and 33 days of inpatient care per case on average and an average cost of treatment of £9,420 per case. It should be noted that the treatment of mesothelioma cases is

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<sup>10</sup> Watterson, A., Gorman, T., Malcolm, C., Robinson, M. and Beck, M. The Economic Costs of Health Service Treatments for Asbestos-Related Mesothelioma Deaths. *Annals New York Academy of Science* 1076: 871–881 (2006).

likely to have changed to some extent since 2000 and that treatment costs will almost certainly have increased.

## 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 significant 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 majority of the detail 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 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
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

<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 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
Section 10(7)	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 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

<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 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
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. 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).
  - 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. It is assumed that there will be 80 cases each year for which NHS treatment costs can be recovered (based on CRU data for mesothelioma claims and settlements in Wales).
69. 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.
70. The main costs resulting from this Bill relate to the administration of the scheme and the costs for organisations liable for paying 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.
71. 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 will be available to the Welsh Ministers to be invested in care and research into the treatment of sufferers from asbestos related diseases. This is expected to result in better treatment and care of existing and future sufferers.
72. The majority of the costing estimates included in this Impact Assessment are based on 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.

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

73. 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***

74. Options 2.i, 2.ii and 2.iii all include the same system of calculation, recovery and reapportionment 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.
75. 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***

76. 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.
77. 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***

78. If the scheme were to be administered by the CRU, due to the extensive automated systems used for the current recovery schemes, significant 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:
- Changing the automated tariff calculations;
  - Developing a new electronic data collation form and;
  - Ensuring that the relevant payments are made direct to Welsh Ministers.
79. 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 be £82,500 to cover all the potential changes cited above. However, this initial outlay is expected to deliver a more efficient system and lower recurrent costs (compared to options 3 and 4) in later years.
80. 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.
81. 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. Initial discussions have been held with the CRU regarding the practical aspects of coordinating this scheme. Based on those discussions, the annual processing charge is assumed to be £5,000, 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 £7,000 per annum.
82. 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. For the purposes of this RIA it is assumed that the average mesothelioma case will require at most one working day at a cost of approximately £125. Given the anticipated workload of 80 cases per annum, the total LHB and NHS Trust cost associated with this option is approximately £10,000 per annum.

### ***Business<sup>11</sup> Costs***

83. 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.
84. 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 £100. The additional recurrent cost to employers or insurers of the proposed legislation is therefore £12,000 per annum.
85. 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.
86. 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.

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<sup>11</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 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.

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.

87. It is proposed that the CRU would deal with any appeals and challenges, although these should be minimal due to the fact that compensation claims will have been agreed and a standard tariff will be used. The estimate of money recovered has been reduced by one per cent each year to reflect the cost of appeals and assumed non-collection.

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

88. 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.
89. 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***

90. 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.
91. 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.

92. 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 £10,000, per annum giving an overall recurrent cost of £48,100 per annum.

### ***Business Costs***

93. 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 £12,000.
94. 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***

95. 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).
96. 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***

97. Transition costs are expected to be similar to those identified for Option 2.ii and are assumed to be £7,500
98. This option significantly increases the annual cost incurred by the LHBs. Unlike the previous two options in which the LHBs simply responded 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.

99. 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 £10,000 cost per annum for the LHBs to generate the data on the treatment received in each case. Total recurrent costs for administering the scheme are therefore expected to be approximately £41,850 in this option.

### ***Business Costs***

100. 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 £12,000.
101. The average cost recovery for NHS treatment itself (which represents a cost to business) is covered in 'The Tariff System' section below (110).

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

102. Estimating the amount of money that will be recovered through this scheme (and paid for by the liable employer/insurance company) requires some consideration of the proposed tariff system and the relevant treatment pathways.
103. 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.
104. Research has been undertaken (set out at Table 2) looking 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 is limited at this time into mesothelioma.

105. It has been seen that the incidence of lung cancer arising from asbestos is of a similar order<sup>12</sup>. Additionally there are other conditions including asbestosis and pleural thickening which result from exposure to asbestos. These are not necessarily life threatening but still present a substantial cost to the NHS. Further work is to be commissioned to assess the NHS costs involved in the treatment of these diseases to inform the tariff regulations. The cost of this policy research is not included in this Explanatory Memorandum.

106. To fully assess the actual costs of treating mesothelioma cases, detailed medical case files have been provided in respect of 12 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 has chest X Ray at local hospital where potential diagnosis is made.
- Patient has further scans including CT at local hospital.
- To confirm diagnosis patients referred to specialists at tertiary centres where they undergo biopsies and procedures to relieve symptoms.
- Patients depending on their medical condition are offered cycles of chemotherapy.
- Patient's conditions can often deteriorate with stays in hospital particularly when breathing is very difficult.
- Patients may stay at home with support from primary care teams.
- Patients may need palliative care in local hospice, with any NHS element dependent on circumstances.
- Death usually within 12 to 18 months of diagnosis.

107. It can be seen that these patients will depend on many clinical interventions provided in different clinical settings including in more than one LHB and/or NHS Trust. This can lead to considerable complications in coordinating the patient's case file and the subsequent assessment of costs. In the case of mesothelioma the outcome is invariably terminal within a relatively short period of time.

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<sup>12</sup> Health & Safety Executive estimates

108. The detailed treatment records of individual patients have been examined by the Finance Departments of the Cardiff and Vale and Aneurin Bevan Local Health Boards to identify where possible all the medical and surgical interventions with actual costs assigned to each element of care and the total cost calculated.
109. The actual cost of NHS treatment in 11 of the 12 cases is summarised in Table 1. The patient - ref 12, was treated in the Cwm Taf Health Board area and was not included in the costing analysis.

Table 1 – Summary of actual costs for the eleven patients

	<b>TOTAL COST (£)</b>
Patient 1	£32,961
Patient 2	£24,102
Patient 3	£18,198
Patient 4	£40,074
Patient 5	£18,445
Patient 6	£18,886
Patient 7	£18,720
Patient 8	£6,870
Patient 9	£53,035
Patient 10	£10,000
Patient 11	£15,000
Patient 12	CANNOT IDENTIFY
<b>TOTAL</b>	<b>£256,291</b>

Source: Research undertaken by the Welsh Institute for Health and Social Care in 2012

110. The average cost for the 11 cases is £23,299, however, this falls within a significant range with the highest cost at £53,035 and the lowest £6,870. 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 8, the patient had 6 days inpatient stay costing £5,521 amounting to 80% of the total cost.<sup>13</sup>
111. The other material costs include chemotherapy and other outpatient attendances. There are incidences of patients who have received care at hospices but this has not been included in the costings above as the financial analysis did not reflect an NHS cost for these services.
112. 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

<sup>13</sup> Research undertaken by the Welsh Institute for Health and Social Care in 2012



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.

113. Given that the inpatient stay is such a dominant factor in these cases, it would be useful to test the actual costs 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>14</sup> (Note these tariffs are uplifted for Hospital and Community Health Services inflation each year). Table 2 shows the comparison of the estimated cost using the standard tariff and the actual cost for the 11 patients.

Table 2 Comparison between Standard Tariff and Actual Cost

<b>ASBESTOS COST REVIEW</b>		
<b>Ref</b>	<b>STANDARD TARIFF</b>	<b>ACTUAL COST</b>
Patient 1	£46,018	£32,961
Patient 2	£25,165	£24,102
Patient 3	£10,785	£18,198
Patient 4	£30,198	£40,074
Patient 5	£16,537	£18,445
Patient 6	£35,231	£18,886
Patient 7	£12,223	£18,720
Patient 8	£4,314	£6,870
Patient 9	£61,834	£53,035
Patient 10	£11,504	£10,000
Patient 11	£25,165	£15,000
<b>TOTAL</b>	<b>£278,974</b>	<b>£256,291</b>
<b>AVERAGE</b>	<b>£25,361</b>	<b>£23,299</b>

Source: Research undertaken by the Welsh Institute for Health and Social Care in 2012

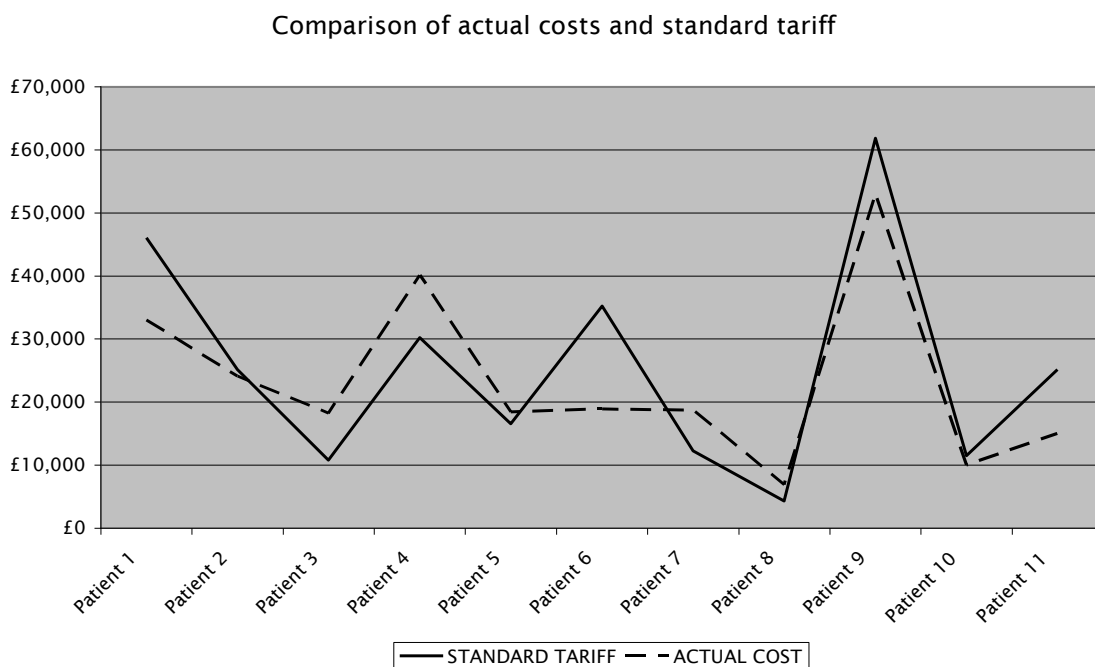
114. The average cost for the standard tariff is £25,361 whereas the average for the actual cost is £23,299, a difference of £2,062 or 8.8% in favour of the standard tariff. However, at the individual case level there is significant (greater than 10%) variation between the actual cost of treatment and the figure calculated by using the standard tariff in the

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

majority of the 11 cases. The variability shown at the case level is reflective of the small data sample available for analysis. Although the analysis demonstrates the tariff basis recovers a slightly higher NHS cost than actual costs in this small sample, the cost recovery calculation excludes all primary care costs, which – based on the care pathways above , if included would increase the actual costs incurred per case. The standard tariff calculation above does not include the application of a cap on charges. If the April 2010 CRU scheme cap were applied, the total recoverable would be £ 257,120, an average of £23,374 per case, a difference of £75 per case, less than 1% in favour of the standard tariff. The consideration of an appropriate cap will form part of the development of the standard tariff arrangements.

115. A graphical view of the comparison is shown in the chart 1 below. This shows the degree of correlation for each of the eleven cases between the 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

116. Two further points of caution need to be made in considering this result and the appropriateness of using the standard tariff.

- a. The comparison is only based on 11 cases. Given the relatively small sample, it is not clear 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.
117. 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 that the first review would take place 5 years after introduction. Costings for such evaluation are not included within this Explanatory Memorandum.
118. Taking the anticipated activity of 80 cases each year (based on CRU data for mesothelioma claims and settlements in Wales) and the average cost of treatment estimated above (£25,361 using the standard tariff), the gross annual recovery would be approximately £2.03 million. The current CRU injury scheme experiences appeals in @0.1%-0.2% of cases, making an allowance of 1% for disputes and other non-payment issues, the net recovered sum would be approximately £2.01 million. This figure only relates to mesothelioma cases and would increase if lung cancer cases were also included.
119. The recovered NHS treatment costs represent a benefit, 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 (£2.01 million) is the same for options 2, 3 and 4.
120. 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.

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

121. 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.

122. 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.

123. 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.

#### 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	79.7
Training	5.0					5.0	4.8
<u>Recurrent Costs</u>							
CRU		7.0	7.0	7.0	7.0	28.0	24.8
LHB		10.0	10.0	10.0	10.0	40.0	35.5
<b>Business Cost</b>							
<u>Transition Costs</u>	10.0					10.0	9.7
<u>Recurrent Costs</u>		12.0	12.0	12.0	12.0	48.0	42.6
NHS Cost Repayment		2,008.6	2,008.6	2,008.6	2,008.6	8,034.4	7,128.2
<b>Total Cost</b>	<b>97.5</b>	<b>2,037.6</b>	<b>2,037.6</b>	<b>2,037.6</b>	<b>2,037.6</b>	<b>8,247.9</b>	<b>7,325.3</b>
<b>Benefit - Recovered Income</b>		<b>2,008.6</b>	<b>2,008.6</b>	<b>2,008.6</b>	<b>2,008.6</b>	<b>8,034.4</b>	<b>7,128.2</b>
<b>Net Benefit</b>	<b>-97.5</b>	<b>-29.0</b>	<b>-29.0</b>	<b>-29.0</b>	<b>-29.0</b>	<b>-213.5</b>	<b>-197.1</b>

*Note: System development costs are based on assumptions outlined at (83) above, if fewer system amendments were required this cost would reduce substantially.*

#### 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	4.8
Training	2.5					2.5	2.4
<u>Recurrent Costs</u>							
LHB		10.0	10.0	10.0	10.0	40.0	35.5
WG		38.1	38.1	38.1	38.1	152.5	135.3
<b>Business Cost</b>							
<u>Transition</u>	10.0					10.0	9.7
<u>Recurrent</u>		12.0	12.0	12.0	12.0	48.0	42.6
NHS Cost Repayment		2,008.6	2,008.6	2,008.6	2,008.6	8,034.4	7,128.2
<b>Total Cost</b>	<b>17.5</b>	<b>2,068.7</b>	<b>2,068.7</b>	<b>2,068.7</b>	<b>2,068.7</b>	<b>8,292.3</b>	<b>7,358.5</b>
<b>Benefit - Recovered Income</b>		<b>2,008.6</b>	<b>2,008.6</b>	<b>2,008.6</b>	<b>2,008.6</b>	<b>8,034.4</b>	<b>7,128.2</b>
<b>Net Benefit</b>	<b>-17.5</b>	<b>-60.1</b>	<b>-60.1</b>	<b>-60.1</b>	<b>-60.1</b>	<b>-258.0</b>	<b>-230.2</b>

## 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	4.8
Training	2.5					2.5	2.4
<u>Recurrent Costs</u>							
LHB		41.9	41.9	41.9	41.9	167.4	148.5
<b>Business Cost</b>							
Transition	10.0					10.0	9.7
Recurrent		12.0	12.0	12.0	12.0	48.0	42.6
NHS Cost Repayment		2,008.6	2,008.6	2,008.6	2,008.6	8,034.4	7,128.2
<b>Total Cost</b>	<b>17.5</b>	<b>2,062.4</b>	<b>2,062.4</b>	<b>2,062.4</b>	<b>2,062.4</b>	<b>8,267.3</b>	<b>7,336.2</b>
<b>Benefit - Recovered Income</b>		<b>2,008.6</b>	<b>2,008.6</b>	<b>2,008.6</b>	<b>2,008.6</b>	<b>8,034.4</b>	<b>7,128.2</b>
<b>Net Benefit</b>	<b>-17.5</b>	<b>-53.8</b>	<b>-53.8</b>	<b>-53.8</b>	<b>-53.8</b>	<b>-232.9</b>	<b>-208.0</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.

124. Recovered income only relates to mesothelioma cases. This income relates to income that will be collected for redistribution and will be collected from organisations liable for compensation claims. Once other cases in relation to asbestos are included this recovered income figure will be higher, recurrent processing costs would also slightly increase.

125. Further work will need to be commissioned to examine the treatment pathways and costs of treating lung cancer cases and the other asbestos related diseases. In the first instance it is recommended that lung cancer cases are included in the standard tariff as the clinical pathway will probably be similar to mesothelioma cases. As regards the remaining cases of asbestosis and pleural thickening, it may be necessary to do further to work into the clinical pathway and developing a standard tariff.

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

126. The difference in the NPV of Options 2.i and 2.iii is relatively small (less than £11,000). 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.

127. 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 the 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.

128. 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***

129. DWP working with ABI recently announced a proposed new mesothelioma support scheme (subject to primary legislation) to support mesothelioma victims across the UK who are unable to claim compensation because they cannot trace a liable employer or employers' liability insurer. It is proposed that the scheme will be funded by the insurance industry. Employers' Liability insurers will also be required to join the 'Employers' Liability Tracing Office' (ELTO) to help improve the tracing of liable parties. In contributing to the funding for the scheme the insurance industry will incur additional costs. The introduction of the scheme for cases where no liable party can be traced may impact on the number of mesothelioma claimants in Wales.

## 8. Competition Assessment

130. 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

131. 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.

132. 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**

133. Although a matter for the Welsh Government it is expected 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.

## Annex A - Explanatory Notes

1. These Explanatory Notes relate to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill as laid before the National Assembly for Wales on 3 December 2012.
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.

### List of terms and abbreviations used in the Explanatory Notes

4. The following terms and abbreviations are used in the Explanatory Notes:

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

**LHB** – Local Health Board(s)

### Introduction

#### Overview of the Bill

5. The Bill comprises 21 sections and a Schedule. As set out in section 1 of the Bill (which is not intended to have any legal effect), 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 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

## **Liability to pay for NHS services**

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

6. Subsection (1) sets out the circumstances in which NHS costs can be recovered. 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.

### **Section 3 – Meaning of main terms**

7. This section sets out the meaning of the main terms used in the Bill.
8. Subsection (1) defines compensation payment. The definition is a broad one which covers payments made (after the section is in force) by or on behalf of the person liable, or alleged to be liable, for the asbestos-related disease, such as an employer or insurance company. The definition catches 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 in money’s worth which might include, for example, adaption to a persons home.
9. Under subsection (1), certain payments, known as excluded payments, are not to count as compensation payments; further detail is set out in section 4 (see below).
10. Subsection (3) lists the diseases which are to be considered as asbestos-related diseases for the purposes of the Bill. Such diseases may have been caused or discovered before, as well as after, the coming into force of section 3.
11. 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 (sub-section (4)).
12. 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. It does not, however, include –
  - 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).

#### **Section 4 – Excluded payments**

- 13. As noted above, 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, and dealt with below at paragraph 44.
- 14. Under subsection (2), 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 in the Assembly; regulations which add in payments are subject to the negative procedure.

#### **Certificates of charges**

#### **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 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.
- 17. When the Welsh Ministers receive an application for a certificate, they must – under subsection (3) – arrange for the certificate to be issued “as soon as is reasonably practicable”. A time limit is not prescribed as there will be a process of gathering information from NHS Trusts and LHBS, which can take some time.
- 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 there was a nil certificate of charges or a certificate where the maximum recoverable (i.e. the cap set in regulations made under section 6(5)(a) had already been reached).

19. Where the time-limit of the 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). Such regulations are subject to the negative procedure in the Assembly.

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

21. Section 6 deals with the information that is to be included in the certificates. Subsections (1) and (2) provide that the amount of the appropriate charges for NHS services 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. These regulations will be made subject to the affirmative procedure in the Assembly in the first instance, with any subsequent regulations made under this sub-section being made under the negative procedure. Subsection (9) specifies that regulations may apply to any certificates issued after the date on which the regulations come into force, except for certificates where the related compensation payment was made before that coming into force 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 by the same proportion as the reduction to the compensation except in prescribed circumstances.
23. Where it has been determined that no NHS charges are due (for example, because the victim received only primary medical services which are excluded under the Act), the Welsh Minister must issue a nil certificate of charges showing that no payments are 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 for the apportionment of the liability to pay NHS costs, where more than one compensator is making the compensation

payment to or in respect of the same victim (subsection(5)(d)) (including provision for determining or re-determining the amount due from a compensator)

- 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 that regulations relating to apportionment or to fresh certificates issued or certificates revoked after review or appeal can also include provisions giving credits for amounts already paid, the payment of balances due and the recovery of over-payments.

26. 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.

## **Payment of charges**

### **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) make it clear that a document stating the amount due, signed by an authorised person, is the only proof required that an amount is recoverable.

## **Reviews and appeals**

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

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

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)). The Welsh Ministers may review an issued 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 (subsection (2)).

30. Where the Welsh Ministers review a certificate, they may either confirm or revoke the certificate, or vary it as they consider appropriate by issuing a fresh certificate.

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

31. Sections 10 and 11 provide for appeals against certificates of charges and waiver decisions to be heard by the First-tier Tribunal.
32. 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 for the requirement for prior payment to be waived, and allow the Welsh Ministers to grant such a waiver only where it appears to them that requiring payment would cause exceptional financial hardship.
33. This section further 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 (subsection (7)).
34. Section 11 establishes that the Welsh Ministers must refer an appeal against a certificate or waiver decision to the First-tier Tribunal, and must act in accordance with the tribunal's decision. Subsections (3) and (5) set out the power available to the tribunal on an appeal against a certificate and on an appeal against a waiver decision respectively.

### **Miscellaneous**

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

35. 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 relevant information to the Welsh Ministers. The nature of that information, the manner in which, and the time period in which, that information is to be provided, will be prescribed in regulations to be 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**

36. This section allows information obtained for the purposes of the Social Security (Recovery of Benefits) Act 1997 to be used for the purposes of this Act. This will mean, for example, that in cases involving both NHS and benefit recovery, a single set of information can be used for both purposes.

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

37. 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.

38. Under subsection (2), regulations relating to multiple lump sum payments may give credit for amounts already paid or provide for the payment of balances or recovery of over-payments. For example, regulations might allow the amount of NHS charges due in respect of a later payment to be reduced to take account of earlier payments; or if, as a result of a finding of contributory negligence, the final sum due was less than an earlier payment, they might provide for refund of the overpayment.

39. 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 scheme as it applies in such cases – for example by providing that the period within which a compensator must apply for a certificate under section 5 runs from the date on which any payment is accepted rather than the date on which it is made or that the date of acceptance of the payment is to count as the settlement date for the purposes of section 7.

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

40. 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. This cover cannot be restricted or excluded. Subsection (4) also allows the Welsh Ministers to make regulations which may prescribe the circumstances in which the extent 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 provision.



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

41. Section 16 sets out that the Welsh Ministers must, in allocating the reimbursed charges received under the Act into the Welsh Consolidated Fund, have regard to re-allocating an amount equal to the amount recovered to the NHS in Wales for the purpose of treatment of, or services relating to, asbestos-related diseases.

## **Miscellaneous and general**

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

42. This section provides that the scheme for the recovery of NHS costs will extend to the Crown (i.e. the Queen and Government Departments) except where the payment is an excluded payment as set out in the Schedule to the Bill.

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

43. 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 (1) is a technical provision which ensures that the powers in the Bill to make such subordinate legislation are wide enough to make different provision for different purposes and for certain types of provision to be made, such as supplemental provisions. Subsection (4) establishes that the affirmative resolution procedure is to be used for regulations arising from section 4(2) and the first set of regulations under section 6(2). Subsection (5) applies the negative resolution procedure to all other regulation-making powers.

### **Section 17 – Interpretation**

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

### **Schedule 1 – Excluded payments**

45. 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 would be used 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, where a victim receives any sum in consequence of a private insurance arrangement, for example, personal health insurance. 'EEA' in this paragraph refers to 'European Economic Area'.
- 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