

Bill summary

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

January 2013

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Enquiry no: 12/2962

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January 2013

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Paper number: 13 / 005

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Contents

1. Introduction	1
2. Background	3
2.1. Asbestos related diseases	3
2.2. The Bill proposal	4
2.3. Welsh Government views	4
2.4. Mick Antoniw's consultation	5
3. Existing legislative provisions	7
3.1. Road Traffic (NHS Charges) Act 1999	7
3.2. Health and Social Care (Community Health and Standards) Act 2003 ...	7
3.3. Legal liability for asbestos diseases	8
4. Policy context	9
5. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill	11
6. Response to the Bill	13

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill¹

1. Introduction

Introduction date: 3 December 2012

Member in charge: Mick Antoniw AM.

Assembly Committee undertaking Stage 1 scrutiny of the Bill: Health and Social Care Committee

The Committee issued a **call for evidence** which closed on **10 January 2013**.

Stage 1 reporting deadline: 8 March 2013.

On 21 March 2012, Mick Antoniw AM was successful in a ballot held under Standing Order No. 26.87 for the right to seek leave to introduce a Bill relating to the recovery of the costs of medical treatment and care provided to patients in Wales who have suffered asbestos-related disease. On 16 May 2012, after a debate in Plenary, the National Assembly agreed unanimously that the AM could proceed with laying a Bill.

Introducing the Bill, Mr Antoniw explained its purpose:

The purpose of the Bill is simple. In cases where compensation has been paid in respect of a victim of an asbestos-related disease, with or without an admission of liability, the Welsh Government will be entitled to recover the cost of the medical treatment provided. The Bill does not create any new legal entitlement to compensation. It merely says that where compensation has been paid, the cost of medical treatment can be recovered by the Welsh Government with the intention that the costs recovered will be used to provide additional medical support and assistance to asbestos victims and their families. As Members will see from the Bill and the explanatory memorandum, the Bill could recover costs of just over £2 million each year. It is intended that that would be used, for example, to provide additional nursing and hospice care, support and counselling for families and other medical assistance. In this way, I believe that the Bill can make a real difference to the quality of life of asbestos victims who have been so cruelly smitten by this terrible occupational disease, and also to their families.²

Both the Member in charge and the Presiding Officer state that the Bill is in the competence of the National Assembly for Wales under Schedule 7 to the *Government of Wales Act 2006*³, subject 9, Health and Health Services. However, the Presiding Officer wrote to the chairs of the Health and Social Care Committee and the Constitutional and Legislative Affairs Committee stating:

¹ [Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill as introduced \[accessed 9 January 2013\]](#)

² [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

³ [Government of Wales Act 2006 \[accessed 9 January 2013\]](#)

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

However, my decision in this case is not straightforward. I have received advice that credible arguments can be made that a number of provisions of the Bill may not be within the Assembly's legislative competence. The decision I have made is, therefore, a finely balanced one in these areas.⁴

⁴ [Letter from the Presiding Officer to Chair of the Health and Social Care Committee, 3 December 2012 \[accessed 9 January 2013\]](#)

2. Background

2.1. *Asbestos related diseases*

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.

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.

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.

Exposure to asbestos can cause four main diseases:

- **Mesothelioma** - a cancer of the lining of the lungs; it is always fatal and is almost exclusively caused by exposure to asbestos;
- Asbestos-related **lung cancer** - which is almost always fatal;
- **Asbestosis** - a scarring of the lungs which is not always fatal but can be a very debilitating disease, greatly affecting quality of life;
- **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.

It can take anywhere between 10 and 60 years for symptoms to develop after exposure to asbestos.

2.2. *The Bill proposal*

On 16 May 2012 the Assembly agreed that Mick Antoniw could introduce a Member-proposed Bill on *Asbestos (Recovery of Medical Costs)*. Following a debate, 54 Members voted for, 0 voted against and 0 abstained. Though all Members who spoke in the debate supported the principle of the Bill, concerns were raised, including the following:

- The lack of analogous activities within NHS Wales that could provide a template for implementation, or an indication of the likely costs of implementing such a scheme;
- The difficulty of identifying treatment costs when this takes place over a lengthy period, and variation between different cases can be high;
- Difficulties caused by the long latency between exposure and diagnosis with asbestos-related diseases;
- Issues of current and past residency, and cross-border issues;
- The balance between the costs recovered by the scheme and the cost of administering such a scheme;
- What would happen if the Government was the compensating employer;
- What the relevant costs will be, who will calculate them, and how;
- How the money raised would achieve Mick Antoniw's stated aim – to support the treatment of asbestos-related diseases;
- Which other conditions (such as vibration white finger or chronic obstructive pulmonary disease) could be subject to the principle of recovering NHS costs from negligent parties.⁵

2.3. *Welsh Government views*

Lesley Griffiths AM, Minister for Health and Social Services, expressed the Welsh Government's support for the Bill in the plenary debate. Among other comments, she stated:

The ambition behind Mick's proposed Bill, that the NHS costs associated with treatment of these diseases should be recovered, is therefore something that we should all welcome. Of course, there are practical and legal issues that will have to be resolved. There are currently no directly comparable activities within NHS Wales that could provide a template for implementation or an indication of the likely cost of administering a scheme. Existing arrangements under the injury cost recovery scheme legislation are administered by the Department for Work and Pensions. I also understand that Mick intends the Bill to include provision for all costs to be recovered, including primary and community care costs. I note

⁵ [RoP 16 May 2012](#) [accessed 9 January 2013]

this, but we need to be mindful of the potential practical difficulties in identifying the treatment that has been received over a lengthy period. We will also need to think about issues around current and past residency, where people received their treatment, and whether this affects the recovery of costs. So, there are plenty of issues that need further consideration and examination, and I know that Mick is aware of them. However, I strongly believe that we should not be put off, but rather should work hard to identify solutions to those issues. For that reason, the Welsh Government supports the principle of the proposed Bill, and will support this motion today.⁶

The Minister mentions Mick Antoniw's intention to "include provisions for all costs to be recovered, including primary and community care costs". The Bill limits this scope slightly, by excluding:

- Primary medical (e.g. GP provided care), dental or ophthalmic services; and
- Accommodation and services provided for private patients (including in NHS facilities).⁷

2.4. Mick Antoniw's consultation

In May 2012, Mick Antoniw AM conducted a consultation exercise to seek opinions on the general principles behind his Bill and its intended purpose. He contacted 31 organisations, of which 13 responded. Of these, the following 12 organisations were in support of the Bill:

- Asbestos Awareness and Support Cymru;
- 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;
- GMB;
- Mesothelioma UK; and
- Unite.

Beyond a general endorsement of the Bill's intended purpose, the following points were among those raised by supporters of the Bill:

⁶ [RoP, 16 May 2012](#) [accessed 9 January 2012]

⁷ [Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment, November 2012](#) [accessed 9 January 2013]

- Commending the intended use of the funds raised to help asbestos victims and their families, and seeking clarity on how this will be done;
- Support for the “polluter pays” principle apparently borne out in this Bill.

The only group who opposed the Bill was the Association of British Insurers (ABI). Points made by the ABI included:

- The NHS has already received funding for treatment costs through the claimants’ own National Insurance contributions;
- The practical and material disadvantages of extending the existing NHS costs recovery scheme to diseases outweighs the potential benefits (a point they claim has been previously supported by the Law Commission);
- Questioning whether the Bill falls within the scope of the Assembly’s competence. In the ABI’s reading this Bill could fall within the field of “financial services” as opposed to “health and health services”, as suggested in the Explanatory Memorandum.

3. Existing legislative provisions

As stated in the Explanatory Memorandum, 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.

This principle already underpins other existing legislation in the UK.⁸ However, the comparable legislation that the Explanatory Memorandum discusses limits this ‘harm’ to **injuries** rather than, as is the case with the Bill, **diseases**.

3.1. *Road Traffic (NHS Charges) Act 1999*⁹

This Act (“the 1999 Act”) requires that where a person has received treatment in an NHS hospital for injuries sustained in a road traffic accident, and receives compensation for these injuries, the person making the compensation payment is liable to pay the appropriate NHS charges to the Secretary of State in respect of the treatment.

Prior to the 1999 Act, hospitals were able to collect charges. The 1999 Act transferred collection to the Secretary of State, who issues certificates of the charges which are due. This is undertaken, on behalf of the Secretary of State, by the Compensation Recovery Unit (CRU), which is part of the Department for Work and Pensions.

3.2. *Health and Social Care (Community Health and Standards) Act 2003*¹⁰

The *Health and Social Care (Community Health and Standards) Act 2003* (“the 2003 Act”) broadens the recovery of costs scheme outlined in the 1999 Act. As a result of the 2003 Act, any person who makes a compensation payment in consequence of an injury, whether physical or psychological, will also be liable to pay NHS charges for treatment received by the injured person at a health service hospital as a result of the injury and/or for the provision of NHS ambulance services provided to the injured person as a result of the injury.

As with the 1999 Act, the 2003 Act provides for the amount recoverable to be set out in a certificate of NHS charges. The amount for which the certificate is to be issued is calculated in accordance with regulations.

⁸ [Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment, November 2012](#) [accessed 9 January 2013]

⁹ [Road Traffic \(NHS Charges\) Act 1999](#) [Accessed 7 November 2012]

¹⁰ [Health and Social Care \(Community Health and Standards\) Act 2003](#) [Accessed 7 November 2012]

Treatment received as a result of a free-standing disease, such as asbestosis, is outside the scheme, whereas treatment received as a result of a disease linked specifically to the injury suffered – for example, septicaemia resulting from a broken leg – would be within it.

The 2003 Act provides that where an insurer is liable under their insurance policy for the injury, they are also liable to pay for any recoverable NHS charges (though the amount can be limited by regulations).

3.3. Legal liability for asbestos diseases

The association between asbestos and fibrosis of the lungs was made during the early decades of the twentieth century and led to the introduction of the first regulations to control asbestos in 1931 (*The Asbestos Industry Regulations 1931* – these have since been followed by further legislation, the most recent being the *Control of Asbestos at Work Regulations 2006*). The Explanatory Memorandum to the Bill goes into further detail regarding the existing legislation regulating the use of asbestos, as well as more general duties required by the *Health and Safety at Work Act 1974*. Furthermore, asbestos-related diseases may also give rise to action against the employer for breach of the common law duty of care (negligence).

The Explanatory Memorandum notes that “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”. It is worth noting that **the Bill does not create any new entitlement to compensation where a claim would not already exist.**

4. Policy context

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.

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), 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

The Explanatory Memorandum to the Bill provides information about its purpose and intended effect:

- 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).
- 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.¹¹

Mick Antoniw has previously stated his intention that “the medical costs recovered will be allocated by the Health Minister annually for the general benefit of asbestos victims and their families including support for palliative care and other treatment.”¹²

The Bill is, however, not this prescriptive when it comes to the matter of where the recovered medical costs go. The Bill states that the money will go to the Welsh Ministers, with the Explanatory Memorandum explaining:

¹¹ [Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment, November 2012](#)

¹² Mick Antoniw AM’s website, [Asbestos Bill](#) [Accessed 15 November 2012]

[...] 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.

Though the Explanatory Memorandum states that the recovered costs could be used “for the general benefit of asbestos victims and their families”, there will be no compulsion for this to happen. However, 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.

5. Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

The Bill comprises 21 sections and a Schedule.

Section 1 provides an **overview** to the Bill. In summary the Bill:

- imposes 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;
- makes provision for the certification of the amount of the charges to be paid, for the payment of the charges, for reviews and appeals and about information;
- extends insurance cover of liable persons to their liability to pay the charges.

Section 2 deals with the **liability to pay charges** and the amount to be paid.

Section 3 defines the **meaning of main terms** in the Bill.

Section 4 makes provision for **excluded payments** which are listed in **Schedule 1**.

Section 5 deals with persons paying compensation **applying for certificates** from Welsh Ministers.

Section 6 provides **Information** that should be contained in certificates.

Section 7 makes provision for the **timing for payment of charges**.

Section 8 makes provision for the **recovery of charges** by Welsh Ministers.

Section 9 provides for **reviews of certificates**.

Section 10 deals with **appeals against certificates and waiver decisions**.

Section 11 provides for **appeals to tribunal**.

Section 12 deals with the **provision of information**. 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.

Section 13 deals with the **use of information**.

Section 14 enables regulations to be made by the Welsh Ministers in respect of the treatment of **lump sums, periodical payments, interim payments**.

Section 15 makes provision in respect of the **liability of insurers**. It 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.

Section 16 sets out that the Welsh Ministers must, in allocating the reimbursed charges, **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**.

Section 17 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 makes general provision about powers in the Bill that enable subordinate legislation, in the form of orders or regulations, to be made.

Section 19 provides the meaning of various terms used throughout the Bill.

Section 20 deals with **commencement** of the provisions in the Bill.

6. Response to the Bill

In his plenary statement introducing the Bill, Mick Antoniw stated:

When I spoke on the original motion seeking leave to introduce the Bill, a question was validly asked as to how much it would cost to administer such a scheme. As can be seen from the explanatory memorandum and the research that has been carried out so far and is continuing, using the existing compensation recovery unit system—which already exists for the recovery of medical costs following road traffic accidents—the cost of administration will be minimal. Ultimately, the recovery system to be implemented is a matter for the Welsh Government. However, using the compensation recovery unit and applying a tariff system similar to that in use for the recovery of road traffic accident medical costs, total costs can be kept to less than £50,000 per annum, which I consider to be a very modest cost compared to the potential benefit of the recovery of the medical costs.¹³

The Minister for Health and Social Care, Lesley Griffiths AM said:

The proceeds of the proposed cost recovery would enable the NHS in Wales to fund improved services for asbestos victims and their families. I welcome Mick's views on the impact that the Bill might have on the care and treatment available to victims, and on how the provisions within his Bill that grant powers to Welsh Ministers to make subordinate legislation might best be exercised to give full effect to his intentions. I would also like to take the opportunity to reiterate the Welsh Government's supportive position regarding Mick's Bill, and we look forward to working co-operatively to produce good law on this issue.¹⁴

Nick Ramsey AM for the Conservatives welcomed the Bill but sought clarification on a number of issues:

In May, my colleague Darren Millar raised cross-border issues that need further work. Therefore, following on from the issues that were raised, could you clarify whether the Welsh Government will release guidance on situations where people have lived and received treatment in both England and Wales? We need to know what will happen in cases where people have contracted their illness when working over the border [...] People have spoken of concerns about the knock-on effects of the legislation for insurance and other illnesses. You have touched on the issue of insurance, and it has been raised extensively at the briefings that we have been to. What consideration have you given to the possibility that insurance premiums might rise, as insurers become more aware of potential higher pay-outs for customers in Wales?¹⁵

Mr Antoniw replied:

With regard to where liability will occur, I can say that this only relates to medical costs that have been incurred by the Welsh NHS, whether the asbestos exposure has occurred in Wales or in England. With regard to insurance premiums, a lot of this liability, because asbestos has a latency period of between 10 to 60 years, relates to exposure that has already occurred, for which insurance premiums have already been paid. Therefore, there will be no impact in respect of those cases that will come forward from the past and for the immediate

¹³ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

¹⁴ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

¹⁵ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

future. In respect of future premiums, I think that my answer will be that, first, this is the right thing to do for the victims and their families, and, secondly, the best way in which an employer can avoid any future liability and keep their premiums down is to ensure that they have adequate systems of protection and monitoring of asbestos exposure for the future.¹⁶

Elin Jones AM, for Plaid Cymru, also welcomed the Bill but queried why the recovered costs should not be paid to Local Health Boards:

Your intention in the Bill is for the funds raised to go to the Government and the Minister for Health and Social Services, rather than to the health boards where the expenditure has been incurred. Would it not be better to create a system whereby, if an individual in Cardigan used the NHS in the Hywel Dda LHB, the funds would go back in that case to the NHS in the Hywel Dda board? If I understand it correctly, under the compensation recovery system in relation to car accidents, the cost is reimbursed to the individual health boards. Why, therefore, decide to go down this route of the funds going back to Government, rather than the money being reimbursed to the individual health boards?¹⁷

Mr Antoniwi responded:

The purpose of that is to provide a clear expression of intent that the aim in recovering this money is to make specific provision to help asbestos victims and their families. We did not want it to go into the black hole, as it were, of local health board finances, but for there to be a very identifiable product at the end of it. For that reason, it was felt that the way to look at it was at how the maximum benefit can be achieved from it as a collective sum. If it were given to the health boards, one health board might not have many cases, and a small amount might not make much impact. It may be the case that that is, effectively, what happens in the end, but this was to give an opportunity to use the collective benefit of the full amount to achieve the maximum impact for all asbestos victims and their families.¹⁸

Kirsty Williams AM, for the Welsh Liberal Democrats, expressed support for the Bill but raised some further issues of clarification:

However, there was one particular point, in addition to the points already raised, that I would like to refer to. My reading of it is that this legislation reflects only the costs incurred in the NHS. Undoubtedly, that is probably where the majority of the costs will occur, but I am sure, Mick, from your experience of working with the families affected, you know that they are also very often reliant upon services that are not provided by the NHS, such as traditional social services provided by an individual local authority, or services provided by a hospice movement that is not in receipt of funding directly from our Welsh Government, or local health board or other support services that may be advantageous to that individual and their family. Could you clarify whether that is the case and whether you feel that it is necessary to limit the liability to costs related to the NHS rather than costs to the entire public purse, which seemed to be your motivation in bringing this forward in the first place?

Given that it is your intention to pool resources—I can understand why you would do that, because there may be very few cases in one local health board and the recovery of that cost may not make a particular difference—could you give us an idea as to what you expect the

¹⁶ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

¹⁷ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

¹⁸ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

money to be used for and how those services or investments may be put on a sustainable footing, given that we are uncertain, or do not have a great deal of clarity, as to the number of cases that would come forward and be successful in claiming money back?¹⁹

Mr Antoniwi clarified:

Thank you for those helpful comments. You are correct that I have, in discussions that I have had with a variety of individuals and organisations, looked carefully at the totality of the costs. The initial starting point was how to ensure that you cover them all. For example, you will be aware that the intention is to omit primary care costs from the tariff system. The reason for that is to keep the system as simple and as close to the road traffic scheme as possible, because the moment you start to look into all sorts of variations of cost, which can be quite considerable with these types of cases, you start to create a realm of potential bureaucracy and additional staffing and you could end up in a situation in which you are spending £1 to recover 1p. So, for the sake of simplicity and to be able to say to this Assembly that this is an efficient system that involves minimal bureaucracy and in which the overwhelming majority of the money will go to benefit the families, we have had to cut certain areas away from it. It would be sad if I came here saying that we can recover so much, but 50% or 60% of it will go on administration. That is why we have worked on this in the way that we have.

You are right about the sustainability of the system. It will need to be looked at carefully. We do know that there are some fairly predictable patterns in respect of the treatment of asbestos victims, particularly those with asbestos-related lung cancer, asbestosis and mesothelioma. We can certainly identify areas where there is clear need for additional support.²⁰

¹⁹ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)

²⁰ [RoP, 5 December 2012 \[accessed 3 January 2013\]](#)