

This document relates to the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill (SP Bill 65) as introduced in the Scottish Parliament on 9 March 2020

Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill, introduced in the Scottish Parliament on 9 March 2020. They have been prepared by the Parliament's Non-Government Bills Unit on behalf of Stuart McMillan MSP, the member who introduced the Bill.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 65–LC);
 - a Financial Memorandum (SP Bill 65–FM);
 - a Policy Memorandum (SP Bill 65–PM).
3. The Explanatory Notes are intended 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 Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

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The Bill

4. The Bill amends Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 so as to bring within its scope NHS costs incurred in treating industrial diseases, allowing Scottish Ministers to recover those costs from those whose negligence caused those diseases.

5. The Bill has six sections. The first four make changes to the 2003 Act, while the last two deal with commencement and short title.

Commentary on sections

Section 1 – Liability for relevant NHS charges

6. Under section 150 of the 2003 Act, where an injured person requires treatment at an NHS hospital in Scotland and/or ambulance services to take them to such a hospital, any person who compensates that person for the injury is also liable to pay Scottish Ministers “relevant NHS charges” in respect of those hospital and ambulance costs. The “relevant NHS charges” are calculated on the basis of a standardised list of charges set out in regulations made under section 152 of the 2003 Act.

7. At present, section 150(5) and (6) of the 2003 Act define “injury” to exclude disease, other than a disease that is attributable to the injury. Currently, therefore, the 2003 Act does not generally allow for the recovery of the NHS treatment costs associated with cases of “industrial disease” (normally understood to mean diseases contracted in the course of a person’s employment, for example as a result of workplace exposure to hazardous substances).

8. Section 1(2) of the Bill extends the scope of section 150 by expressly including industrial disease, while continuing to exclude other diseases.

9. Section 1(3) adds five new subsections into section 150 of the 2003 Act. The first of these, (5A), provides the main definition of “industrial disease”, while the second, (5B), expands on that definition. Under paragraphs (a) and (b) of new subsection (5A), read with (5B), a disease is “industrial” if it arises out of a person’s employment, whether that is the injured person’s own employment or the employment of someone else associated with that person, so long as there is a causal link between the disease and the associated person’s employment. An example of the latter

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would be a disease contracted by an industrial worker's spouse as the result of hazardous substances brought home from work on the worker's clothing.

10. Section 33 of the Social Security (Scotland) Act 2018 enables the Scottish Ministers to prescribe eligibility rules for "employment-injury assistance" – that is, assistance given "to an individual on account of the individual, or another individual, having suffered an injury, or contracted a disease, in the course of employment". Should that power be exercised, any disease which makes the person suffering it eligible for that assistance would automatically qualify as an "industrial disease" under paragraph (c) of subsection (5A).

11. New subsections (5C) and (5D) ensure that there is no retrospective liability to pay NHS charges in respect of an industrial disease. Under (5C), there is no liability to pay such charges if the hospital treatment or ambulance services were provided before the date on which new subsection (5A) comes into force. Under (5D), there is no liability to pay such charges if the harmful events that gave rise to the industrial disease all took place before that date. New subsection (5A) comes into force on the day that section 1 of the Bill – which inserts that subsection into the 2003 Act – is brought into force, that (in turn) being one year after the Bill receives Royal Assent (see section 5 of the Bill).

12. New subsection (5E) ensures that, in interpreting subsection (5D), the "harmful events" in question include not just events causing direct harm (such as a worker's injury by a corrosive substance) but also events exposing the worker to a material risk of harm (such as breathing fumes that might cause damage), so long as the risk in question is recognised in the law of delict or tort as a basis for a claim for compensation.

13. New subsection (5E) mirrors the special legal rules created to deal with some industrial diseases like mesothelioma. In diseases like this, even a very short exposure to the harmful substance may cause the disease, but the disease may not generate symptoms until many years later. This means that when an employee has been exposed to a harmful substance by more than one employer it is not usually possible to prove which period of exposure caused the employee's illness. In such cases, it may be enough to make an employer legally liable that they increased the risk the employee might suffer from the disease.

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Section 2 – Liability for NHS charges: further provision

14. Section 2 adds to the 2003 Act a mechanism that applies in any situation where the commencement date (that is, the date on which subsection (5A) is added to section 150 of the 2003 Act) occurs during the period of exposure to harmful events. In such a situation, the amount of NHS charges that the compensator is liable to pay is reduced to reflect the proportion to which the harmful events occurred before that date. This is a further measure to ensure that the Bill has no retrospective effect – that is to say, that it does not penalise compensators (or their insurers) for exposure caused before the Bill became law.

15. Under section 151 of the 2003 Act, a compensator must apply to the Scottish Ministers for a certificate. Under section 153(1), the certificate must specify the amount (or amounts) that the compensator is liable to repay. The rest of section 153 sets out how each amount is to be calculated. The first step is to calculate the amount of the relevant NHS charge, by reference to regulations made under section 153(2); the second step is to reduce that amount if any of the circumstances listed in section 153(3) applies – including, for example, that a court has ordered a reduction in damages, or that the parties have agreed such a reduction to reflect the injured person's responsibility for the injury. So if a particular NHS charge is £1,000 but a court has ordered that the damages payable to the injured person are to be reduced by 25%, then the compensator's liability to repay that NHS charge is also reduced by 25% (i.e. reduced to £750).

16. Section 2 of the Bill adds to section 153 a second set of circumstances in which the amounts of NHS charges that compensators would otherwise be liable to repay may be reduced. This is achieved by inserting new subsections (3A) to (3D) and including cross-references to (3A) into existing subsections (2) and (6). The result is that, if the conditions in subsection (3B) are met, the amounts in certificates are to be reduced from what they otherwise would be by the amount mentioned in subsection (3C).

17. The first condition is that the certificate relates to a claim for compensation for an industrial disease. This ensures there is no reduction in other personal injury cases even if the second condition is satisfied. The second condition is that the compensation payment relates, in part, to

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harmful events occurring before subsection (5A) of section 150 is brought into force by the Bill – that being the date on which compensators first became liable to repay NHS charges for industrial disease. Where both conditions apply, it is necessary to calculate (by reference to a method that will be set out in regulations) the extent to which the compensation payment relates to harmful events that occurred before that date – and to reduce the amounts that would otherwise be included in certificates by that proportion.

18. As an example, consider a worker (W) who is exposed to an industrial hazard over a five-year period; section 1 of the Bill (and hence new subsection (5A) of section 150) comes into force two years into this period, leaving a three-year period during which (by virtue of the Bill) the employer (E) is liable to repay the NHS charges for W's treatment. Assume also that E has agreed to pay compensation of £10,000 to W, and that, using the method set out in regulations made under new subsection (3C), it is calculated that £3,500 of the compensation payment was attributable to harmful events that occurred during the two-year pre-commencement period. Accordingly, under new subsection (3A) of section 153, the relevant NHS charges must be reduced by an amount reflecting that proportion (i.e. 35%). (The proportion in any particular case would depend on the method specified in the regulations and on the circumstances of the case.)

19. So, if the certificate would otherwise have included a charge of £1,000 for a particular NHS treatment that W received, this amount would be reduced (by 35%) to £650.

20. The reduction in accordance with new subsection (3A) may need to be combined with a reduction under existing subsection (3) (of section 153 of the 2003 Act). For example, using the example given in paragraph 14, a court may have ordered a 25% reduction in damages to reflect contributory negligence. In those circumstances, the original amount of £1,000 (the standard charge for a particular type of NHS treatment) would first be reduced (under subsection (3)) by 25% to £750. That reduced amount would then be the starting-point for the calculation under new subsection (3A), being the "amount that would be ... specified [in the certificate], *apart from this subsection*". So, under (3A), the £750 would be further reduced by 35% to give a final amount, to be included in the certificate, of £487.50.

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21. As already noted, the provisions added to the 2003 Act by section 2 of the Bill only apply to industrial disease cases where the harmful events occurred both before and after the relevant date (i.e. the date on which new subsection (5A) of section 150 is brought into force). In any situation where the harmful events all occur after that date, the compensator will be liable to pay the relevant NHS charges in full (subject only to any reductions under existing section 150(3) – for example, because a court has ordered the damages to be reduced by 30%). In any situation where the harmful events all occurred before that date, there will be no liability on the compensator to repay any NHS charges (even if the injured person was treated after that date).

Section 3 – Exclusion of effect on contracts of insurance

22. Section 164(1) of the 2003 Act provides that, to the extent that someone’s liability to pay compensation for a personal injury is covered by an insurance policy, the policy “is also to be treated as covering any liability of that person under section 150(2) [i.e. the liability to repay NHS charges]”. Later subsections of section 164 go on to provide that the liability so imposed on the insurer “cannot be excluded or restricted” (subsection (2); subsection (3) further defines “excluded” and “restricted”) and applies to insurance policies issued before (as well as after) section 164 came into force (subsection (5)). As a result, section 164 relates directly to insurance law (over-riding in some cases the terms agreed between insurance companies and their customers) and does so, in some cases, with retrospective effect.

23. Section 3 of the Bill amends section 164 so as to disapply it entirely in industrial disease cases. This ensures that the Bill, in extending liability to pay NHS charges to those cases, has no impact on the law relating to insurance (which is a “reserved matter” under Schedule 5 to the Scotland Act 1998) and does not import (into the law relating to industrial disease cases) the retrospective application of section 164.

24. The effect of this is that an industrial employer who wishes, in future, to be insured not just against liability to pay compensation for industrial disease but also against liability to repay NHS charges for treating such disease, will need to take out additional insurance; they will not be able to rely on the 2003 Act overriding the terms of their policies and making their insurers liable, either prospectively or retrospectively.

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Section 4 – Regulations

25. Section 195 of the 2003 Act specifies the procedure applicable to any orders or regulations made under the Act. Of those that may be made by the Scottish Ministers, some (under subsection (7)) are subject to the affirmative procedure – meaning that they cannot be made until a draft has been laid before the Parliament and approved by resolution; while most of the others (under subsection (8)) are subject to the negative procedure – meaning that they must be laid before the Parliament and are then subject, for 40 days, to annulment by resolution of the Parliament.

26. Section 4 of the Bill adds into section 195(7) a reference to the new regulation-making power created under subsection (3C) of section 153 (inserted by section 2 of the Bill).

27. The effect is that the first regulations made under the new power are subject to the affirmative procedure, while any subsequent regulations are subject to the negative procedure. As a result, the opportunities for parliamentary scrutiny of regulations under section 153(3C) will be identical to those already provided for regulations under section 153(2).

Section 5 – Commencement

28. Section 5 of the Bill provides a one-year lead time for the main provisions of the Bill to come into force. This is primarily to enable the Scottish Ministers to put in place administrative arrangements for handling requests by compensators for certificates (of their liability to repay NHS costs in respect of industrial disease), whether by negotiation with the UK Government's Department for Work and Pensions' Compensation Recovery Unit or otherwise. It is also to allow industrial employers time to adjust their insurance arrangements (and for insurers to calculate the additional premiums).

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