

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

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill introduced in the Scottish Parliament on 9 March 2020. It has 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);
  - Explanatory Notes (SP Bill 65–EN).

### Policy objectives of the bill

3. The purpose of the Bill is to allow the Scottish Government to recover the cost of treating industrial diseases in National Health Service hospitals in cases where there is already a “compensator” – that is, someone who has made a compensation payment in respect of the disease. The Bill builds on the principle, already well-established in cases of personal injury, that where a person requires hospital treatment as a result of the

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negligence of another party, it is that other party – rather than the taxpayer – that should cover the cost to the NHS.

4. The objective is both to reduce the burden on the taxpayer-funded NHS (freeing up resources for others in need of treatment) and to incentivise employers to improve working conditions, particularly in hazardous industries, and to take a more precautionary approach in respect of working conditions that could in future turn out to be the cause of industrial diseases.

## Background

5. The principle of cost recovery was first established in relation to social security. The Law Reform (Personal Injuries) Act 1948<sup>1</sup> instructed the courts to take account of benefits received and reduce damages awards accordingly – on the basis that benefits should not be regarded as “double compensation” to the victim. But the result was that the taxpayer, in effect, subsidised the negligent party. To address this, the Social Security Act 1989<sup>2</sup>, and later the Social Security Administration Act 1992<sup>3</sup>, allowed the UK Government to recover from compensators the amount of benefit payments made to victims of an accident, injury or disease. A Compensation Recovery Unit (CRU) was established within the then Department for Social Security to manage the process, collecting the deductions from compensators. This system was further revised by the Social Security (Recovery of Benefits) Act 1997<sup>4</sup>, which ensured that compensators would always repay the full amount of any benefit payments, while restricting their ability to pass the cost on to victims (through corresponding reductions in awards)<sup>5</sup>. The upshot was to shift the burden

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<sup>1</sup> Available at: <http://www.legislation.gov.uk/ukpga/Geo6/11-12/41/contents>

<sup>2</sup> Available at: <http://www.legislation.gov.uk/ukpga/1989/24/contents>

<sup>3</sup> Available at: <http://www.legislation.gov.uk/ukpga/1992/5/contents>

<sup>4</sup> Available at: <http://www.legislation.gov.uk/ukpga/1997/27/contents>

<sup>5</sup> For example, amounts paid in respect of most benefits could only be deducted from compensation paid for loss of earnings; other benefits were linked to compensation paid for cost of care, or loss of mobility. Awards under some “heads of compensation”, such as pain and suffering, could not be reduced in respect of any benefit payments.

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(of recompensing the taxpayer) from victims to compensators (or, in practice, their insurers).

6. The Road Traffic (NHS Charges) Act 1999<sup>6</sup> introduced a similar approach for recovering the NHS hospital costs of treating injuries sustained in road traffic accidents. Before then, the right to recover these charges from compensators lay with individual hospitals and implementation was described as “patchy”.<sup>7</sup> Under the new legislation, responsibility for recovery was transferred to the Secretary of State – although, in practice, the scheme was to be administered by the existing CRU. As was the case already with benefits payments, compensators were required to apply (to the CRU) for a certificate of the amounts recoverable.

7. The scheme established by the 1999 Act was expanded by Part 3 of the Health and Social Care (Community Health and Standards) Act 2003<sup>8</sup> to cover “any injury, whether physical or psychological”. However, injury is defined to exclude any disease (other than diseases attributable to the injury – section 150(5) and (6)). The compensator must apply to the Scottish Ministers (or the Secretary of State in relation to treatment in a hospital in England or Wales) for a certificate of the charges incurred – which (in a departure from the 1999 Act) can also cover ambulance services to take the injured party to an NHS hospital. In practice, as was the case with the 1999 Act, administration of the scheme is carried out (on behalf of both the Secretary of State and the Scottish Ministers) by the CRU.

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<sup>6</sup> Available at: <https://www.legislation.gov.uk/ukpga/1999/3/contents>

<sup>7</sup> Road Traffic (NHS Charges) Act 1999, Explanatory Notes, paragraph 4. Available at: <http://www.legislation.gov.uk/ukpga/1999/3/notes/contents>.

<sup>8</sup> Available at: <http://www.legislation.gov.uk/ukpga/2003/43/contents>

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## **The 2015 proposal and the Welsh Bill**

8. In January 2015, Stuart McMillan lodged a draft proposal<sup>9</sup> for a Recovery of Medical Costs for Asbestos Diseases (Scotland) Bill.<sup>10</sup> As the title suggests, this proposal was limited in scope to asbestos-related diseases (such as mesothelioma and asbestosis), and was to include provision to ensure that the liability of compensators (e.g. former employers of people suffering from asbestos-related diseases) to repay NHS costs was transferred to their insurers.

9. At the time this proposal was lodged, an equivalent Bill<sup>11</sup> had already been passed by the National Assembly for Wales, but had been referred to the Supreme Court by the Counsel General (the Welsh Government's principal law officer). The Supreme Court decided, in February 2015, that the Bill was outside the Assembly's legislative competence and so could not become law.<sup>12</sup> The majority view of the Court was that the Bill was outside competence both because it was not sufficiently related to a devolved subject-matter, and because its provisions on insurance breached the rights of insurers to the "peaceful enjoyment of their possessions" (Article 1 of Protocol 1 of the European Convention of Human Rights). This was, in part, related to the retrospective nature of the Bill's provisions, which would have made insurers liable for costs associated with exposure to asbestos that long pre-dated the commencement of the legislation. The effect of the Court's decision was to prevent the Bill receiving Royal Assent, and it fell at the end of the Fourth Assembly (May 2016).

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<sup>9</sup> Lodging a draft proposal is the first step an MSP must take in order to gain the right to introduce a Member's Bill in the Scottish Parliament.

<sup>10</sup> Available on the Parliament's website:

<https://www.parliament.scot/parliamentarybusiness/Bills/85164.aspx>

<sup>11</sup> Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

Information about the Bill is available on the Assembly website:

<http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?IId=4837>.

<sup>12</sup> The Supreme Court judgment is available on its website:

<https://www.supremecourt.uk/cases/uksc-2014-0043.html>.

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## **The proposal for the current Bill**

10. The draft proposal for the current Bill was lodged by Stuart McMillan on 28 March 2018.<sup>13</sup> It differs from his 2015 proposal in two key respects. Firstly, its scope has been extended from asbestos-related disease to all industrial disease. Secondly, it proposes a Bill that is entirely non-retrospective and that does not include any provision directly about insurance (a reserved matter). In this way, the new proposal takes into account the Supreme Court judgment on the Welsh Bill.

11. In the consultation document, Mr McMillan gave various reasons for lodging the proposal, including the Parliament's record of support for victims of asbestos-related disease, the context of financial austerity and the prospect of additional costs on negligent employers incentivising improvements to workplace safety.

12. According to the consultation document, the proposed Bill would cover all the industrial diseases listed as such in guidance issued by the UK Government's Department for Work and Pensions (DWP) in the context of eligibility for Industrial Injuries Disablement Benefits.<sup>14</sup> The scheme for NHS cost recovery would be the same as that already provided in relation to injury under the Health and Social Care (Community Health and Standards) Act 2003. Mr McMillan stated his preference for it to be administered by the DWP's existing Compensation Recovery Unit (CRU), but he acknowledged that this would depend on an agreement being reached between the Scottish and UK Governments.

13. A final proposal was lodged on 1 February 2019, and received the level of cross-party support required to give Mr McMillan the right to

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<sup>13</sup> The draft proposal and consultation document are available on the Parliament's website:

<https://www.parliament.scot/parliamentarybusiness/Bills/108147.aspx>.

<sup>14</sup> Department for Work and Pensions, "Industrial Injuries Disability Benefits: technical guidance (updated 28 September 2018). Available at: <https://www.gov.uk/government/publications/industrial-injuries-disablement-benefits-technical-guidance/industrial-injuries-disablement-benefits-technical-guidance>. See in particular Appendix 1 (List of diseases covered by Industrial Injuries Disablement Benefit).

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introduce a Bill.<sup>15</sup> In his commentary on the consultation process, Mr McMillan reported his attempts to secure agreement in principle that NHS cost-recovery for industrial disease, if provided for by the Bill, could be administered by the CRU, but that these had so far been inconclusive.

## **How the Bill works**

14. The Bill amends the 2003 Act so that (in Scotland) the existing system of NHS cost-recovery is extended to cover cases of industrial disease in addition to injury cases. “Industrial disease” is defined quite broadly to include any disease arising out of a person’s employment, but also a disease arising out of another person’s employment, so long as there is a causal connection between the disease and that employment. The definition also includes diseases that confer eligibility for employment-injury assistance, as defined by forthcoming regulations under the Social Security (Scotland) Act 2018. This is on the understanding that such assistance will supersede in Scotland the existing UK-wide industrial injuries disability benefit, and will cover a similar list of industrial diseases to those in the DWP list that was referred to in the consultation document (see paragraph 12).

15. Part 3 of the 2003 Act (as amended by the Bill) will apply in any situation where a person has received treatment at a NHS hospital in Scotland (and/or received ambulance services to take him or her to such a hospital) for an industrial disease and where another person (the compensator) has made a compensation payment to (or on behalf of) the first person in consequence of that disease (see section 150 of the 2003 Act).

16. When the 2003 Act was passed, it applied only to injuries sustained after the date it came into force – thus ensuring that the liability on compensators to repay NHS charges was not retrospective in effect. For the same reason, where an industrial disease is attributable to a specific incident (or exposure to a hazard), the Bill does not allow recovery of the NHS charges if the incident (or all of that exposure) occurred before the Bill comes into force.

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<sup>15</sup> The final proposal and list of supporters are available on the Parliament’s website (see footnote 10).

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17. However, in many cases, industrial diseases cannot be so straightforwardly attributable. Some diseases may be triggered by a single incident but in a context where it is difficult or impossible to establish retrospectively when that incident occurred (where the nature of a person's employment means that they may be routinely exposed to the risk of such an incident and an incident may not be noticeable at the time). This is particularly the case where the disease is known to have a long latency period – that is, where there may be a long period between exposure and the development of symptoms. In other cases, the disease may be attributable to repeated exposure to a hazard over an extended period – that is, where it is the cumulative effect of damage caused throughout the period of exposure that requires treatment, rather than damage caused by a specific incident or incidents during that period.

18. To ensure that there is no retrospective effect in such cases, the Bill makes the employer liable only to the extent that exposure to the industrial hazard occurred after the date of commencement of the Bill. So, for example, if the person with the industrial disease worked for the compensator for a 10-year period, of which five years were post-commencement, it would only be damage attributable to that latter period that would be taken into account in assessing the employer's liability to repay the NHS costs. If, for example, the cumulative damage attributable to that five-year period was reckoned at half the total risk or damage, the employer's liability would amount to half of the NHS costs.

19. In some cases, a person with an industrial disease might have had multiple employers, and there may therefore be a number of compensators involved (each liable for a share of the total damages). If all the relevant periods of employment post-dated commencement, liability for NHS costs could be allocated on the same basis; otherwise a separate allocation would be required, reflecting the employers' respective shares of the post-commencement exposure. Injury cases to which the 2003 Act currently applies will also sometimes involve multiple compensators, and it is assumed that the CRU normally deals with a lead compensator (typically an insurer) and that the total amount (of NHS costs) calculated by the CRU is allocated among the various compensators by mutual agreement.

20. Before making the compensation payment, the compensator should apply to the Scottish Ministers for a certificate of the NHS charges that

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apply (see section 151 of the 2003 Act). The amounts of charges that apply are calculated initially in accordance with regulations made under the 2003 Act (see section 153(2)). Those regulations make allowance for a range of circumstances, such as where the person has been treated at more than one hospital, or where there is more than one compensator in respect of the same industrial disease. These initial amounts must be reduced in certain circumstances, for example to reflect court orders or agreements between the parties (see section 153(3)). As a result of the Bill, there will in future (but only in industrial disease cases) be scope for further reductions to be made in order to discount periods of exposure to industrial hazards that pre-dated commencement of the Bill – as explained in paragraph 18 above.

21. The compensator must pay the amounts set out in the certificate within 14 days of the compensation payment being made, or (if the certificate is not issued until after the compensation payment is made) within 14 days of the certificate being issued (see section 154). If a certificate is not applied for, or if payment is not made within the period allowed, a demand may be issued for immediate payment, failing which the amount may be recovered through court action (see section 155). Where a court orders a reduction in damages after a certificate of the applicable NHS charges has been issued (or where the parties agree a reduction in damages, after a certificate has been issued), Ministers are required to review the certificate and reduce the amounts accordingly (see section 156).

22. Provision is also made for compensators to appeal a certificate to the First-tier Tribunal (Social Security and Child Support Tribunal, Her Majesty's Courts and Tribunals Service<sup>16</sup>). Compensators must make the payments required by a certificate before appealing against it, unless this

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<sup>16</sup> Compensation Recovery Unit appeals are submitted to the Social Security and Child Support Tribunal, under HM Courts and Tribunals Service (i.e. not the Scottish Courts and Tribunals Service):  
<https://www.gov.uk/appeal-benefit-decision> and  
<https://www.gov.uk/government/publications/form-sscs4-notice-of-appeal-against-a-decision-of-the-department-for-work-and-pensions-recovery-of-nhs-charges>



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requirement is waived by Ministers; but a decision by Ministers not to waive this requirement may also be appealed to the First-tier Tribunal (see sections 157 and 158).

23. The Scottish Ministers must pay the amounts received from compensators to the relevant hospital (in respect of hospital treatment) or to the Scottish Ambulance Service (in respect of ambulance services) (see section 162).

24. As a matter of drafting convention, the 2003 Act refers throughout to the Scottish Ministers (or, in relation to England and Wales, the Secretary of State) – for example in the context of issuing certificates and making payments to hospitals. In practice, these tasks are delegated to the Compensation Recovery Unit (CRU) within the UK Government's Department of Work and Pensions.

## Alternative approaches

25. Stuart McMillan's original proposal (in 2015) was for a Bill limited to asbestos-related diseases, but which would have had retrospective effect and would have had direct implications for insurers. This option was abandoned after it became clear, from the Supreme Court decision in relation to the Welsh Bill (see paragraphs 8 and 9 above), that such a Bill would have been outside the Scottish Parliament's legislative competence.

26. It would have been an option to remove the retrospective element but retain the focus on asbestos-related diseases. However, although it was the particular legacy of asbestos that had prompted Mr McMillan to seek changes to the law, he also recognised that other industrial diseases could also have devastating consequences and significant cost implications for the NHS. A broader focus would also help offset the reduction in the Bill's application that was the inevitable result of removing any retrospective element.

27. The Bill works by extending the existing 2003 Act provisions to cover cases of industrial disease that are treated in Scotland. An alternative would have been to make fresh provision making equivalent or similar provision (without amending the 2003 Act). However, this would have been a much more complex exercise and would only have been worth

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considering if the scheme established by the 2003 Act was considered unsuitable for the new purpose. Mr McMillan's view is that the existing scheme works well and that it makes sense to retain a single piece of legislation that covers all NHS cost-recovery cases, both in Scotland and in England and Wales.

28. The main practical question is whether the CRU will take on the role of administering the 2003 Act scheme for Scottish industrial disease cases, after those have been added in by the Bill, or whether it will be necessary for the Scottish Government to establish its own equivalent body. This remains an outstanding issue and will need to be resolved, should it become clear that the Bill is likely to be passed, by negotiation between the Scottish and UK Governments. However, as the 2003 Act does not refer directly to the CRU, and can operate equally well on either scenario, it has not been necessary to resolve this matter prior to introduction of the Bill.

## Consultation

29. Stuart McMillan lodged his first draft proposal for a Member's Bill (on Recovery of Medical Costs for Asbestos Diseases) on 5 January 2015, and the consultation ran until 30 March 2015. Sixty-six individuals and organisations responded. As no final proposal was lodged, a summary of consultation responses is not available.

30. The draft proposal that gave rise to the current Bill was lodged on 28 March 2018 and the consultation closed on 22 June 2018. Sixteen responses were received, from a mixture of representative organisations, an NHS board, insurance companies, law firms and private individuals. Half of the respondents supported the principle of the proposal, one was fully opposed, one was neutral and five were unsure.<sup>17</sup>

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<sup>17</sup> The consultation document and summary of responses are available on the Scottish Parliament website: <https://www.parliament.scot/parliamentarybusiness/Bills/108147.aspx>. The summary includes a link to where the individual responses may be viewed online.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### **Equal opportunities**

31. The Bill is not expected to have any differential impact according to people's protected characteristics (race, sex, sexual orientation etc.). Victims of industrial disease are more likely to be male (because of the traditional male-dominance of industrial employment) and older (because of the latency periods of many industrial diseases); but the Bill does not directly affect those victims, who will continue to access NHS treatment as they do currently.

### **Human rights**

32. One of the aims of the Bill is to uphold the principle that those who are at fault should be held liable for the costs that result from their actions. Another aim is to incentivise employers to improve workplace safety standards, thus enhancing their employees' right to work in a safe environment. Nothing in the Bill affects the principle underpinning the NHS, that treatment for all is based on need and is free at the point of delivery. As already noted, the Bill is designed to be non-retrospective in its application to ensure there is no breach of Convention rights (specifically, the right to peaceful enjoyment of possessions protected under Article 1 of Protocol 1 of the European Convention on Human Rights).

### **Island communities**

33. No specific issues arise in relation to island communities. The sort of industry that has historically been associated with exposure to industrial hazards has mostly been found in Scotland's central belt, but workers may be exposed to relevant hazards in any community, however remote.

### **Local government**

34. The Bill imposes no specific duties on local authorities and does not rely on any action by local authorities to implement. Local authorities may themselves be employers whose workers are sometimes exposed to industrial hazards and which may become compensators liable, under the Bill, to repay NHS costs.

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## **Sustainable development**

35. The Bill supports a range of United Nations Sustainable Development Goals (SDG) including—

- SDG 3: Good health and well-being;
- SDG 10: Reduced inequalities; and
- SDG 12: Responsible consumption and reduction.

36. The member considers that the Bill can be delivered sustainably as it requires no unsustainable financial or other resource input to implement and maintain and will make a positive social contribution. The member also considers that the Bill will make a positive long-term impact on sustainable development.

37. The Bill aims to address the human needs and improve the well-being of workers and their families by incentivising employers to reduce or eliminate exposure to occupational hazards that may cause an industrial disease.

38. The Bill also seeks to ensure equity by allowing NHS funds currently used to treat industrial diseases to be reallocated to other areas of the NHS budget, which could improve people's health and wellbeing.

39. The Bill is not expected to have a significant impact on the environment but, as one of the aims of the Bill is to reduce employers' use of hazardous substances, this should lead to reductions in the amount of those substances requiring disposal or released into the environment.

40. The Bill may have a limited impact on the economy. The NHS costs recovered through the Bill are likely to be paid, on behalf of the negligent employers, by their insurers – who will, in turn, recover those amounts through additional premiums. The extra cost to employers of paying those premiums may fall, ultimately, on their shareholders. Compared with the present situation, however, where the burden falls on taxpayers generally (who fund the NHS), this should still represent a (very minor) redistribution in favour of the less well-off in society.



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## Policy Memorandum

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