



FACULTY OF ADVOCATES

RESPONSE

by

THE FACULTY OF ADVOCATES

to

CONSULTATION BY STUART MCMILLAN MSP

on a

PROPOSED RECOVERY OF MEDICAL COSTS (SCOTLAND) BILL

Questions

**Q1 Do you support the general aims of the proposal as outlined above?
Please indicate yes/no/undecided and outline your reasons for your response.**

Yes:

Undecided:

No: **X**

Reasons for response:

It would be inappropriate for us to comment on matters of policy in this case. The reasons why we do not support the general aims of the proposal are based on legal and practical considerations, and they are several. First, we consider that the proposal would be incompatible with the rights of

compensators and insurers under article 1 of Protocol No 1 of the European Convention of Human Rights (hereafter referred to as “A1P1 rights”). On 9th February 2015 the Supreme Court issued its judgement in Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3. That case concerned the challenge referred to in the Consultation document to the Welsh Bill relating to the recovery of costs of medical treatment and care provided to patients in Wales who have sustained asbestos related disease. In like manner as the proposals in the present consultation, document section 2 of the Welsh Bill made persons “*by whom or on whose behalf*” compensation payments are made to victims of asbestos-related diseases (“*compensators*”) liable to the Welsh Ministers for the cost of NHS services provided to such victims. Section 14 of the Bill extended the scope of the compensators’ liability insurance to cover the sums which they would be required to pay under section 2. The Supreme Court unanimously held that the Bill was outside the legislative competence of the Welsh Assembly. Three of the five Justices (Lords Mance, Neuberger and Hodge) held that the Bill was outside the legislative competence of the Welsh Assembly in that it did not relate to any of the matters in respect of which legislative competence was bestowed on the Welsh Assembly in terms of the Government of Wales Act 2006 (the “GOWA 2006”). Importantly for present purposes however they held that, even apart from the question of construction of the GOWA 2006, the Bill was outside the legislative competence of the Welsh Assembly as it was incompatible with the A1P1 rights of compensators and insurers to the peaceful enjoyment of their possessions. This was because the new financial liabilities of compensators and insurers would arise from asbestos exposure and liability insurance policies which long pre-dated the Bill, which was therefore of retrospective effect. Applying ECHR jurisprudence the retrospective effect of the Bill required special justification which was not present. Lord Thomas and Lady Hale held that, based on their interpretation of the GOWA 2006, the Bill was beyond the competence of the Welsh Assembly, but for narrower reasons than those given by the majority. However both Lord Thomas and Lady Hale also held, in common with the other the Justices, that, in whatever way it was drafted, the effect of section 14 of the Bill was to retrospectively amend any policy which the employer has to indemnify the employer against his liability for asbestos-related disease by extending it to provide indemnity for payments made to Ministers for charges payable to the Welsh NHS and that was incompatible with the A1P1 rights of insurers to the peaceful enjoyment of their possessions. The unanimous reasoning of the Supreme Court on that matter (ie pertaining to the rights of insurers) applies equally to the proposals in the present consultation document. The reasons given by the majority of the Justices in holding that the Bill was incompatible also with the A1P1 rights of compensators apply equally to the proposals in the consultation document. In short the proposals in the consultation document are incompatible with the A1P1 rights of insurers and compensators.

Secondly, we foresee that unintended consequences of the proposed legislation would be that in some cases insurers would contest liability more vigorously than they might otherwise have done, for example in cases where the insurers might otherwise have settled claims for pragmatic or economic reasons without an admission of liability.

Thirdly, the increased financial burden which would be imposed on insurers by what would be, in effect, retrospective amendment of their policies if the proposals became law, raises the real possibility of some insurance companies becoming insolvent. Such an occurrence would obviously be to the potential detriment of the interests of claimants and the public generally.

Q2 Do you agree that legislation is a necessary and appropriate means of addressing the issues identified?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes

Undecided

No **X**

Reasons for response:

We refer to our answer to Question 1 above.

Q3 Do you think that the administrative, review/appeal and enforcement objectives in my proposal will work and that the Compensation Recovery Unit will be able to adequately deal with the extended role imposed upon them?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes

Undecided

No **X**

Reasons for response:

Standing our response to question 1 above and our lack of knowledge about the detailed working of the Compensation Recovery Unit we are not in a position to respond meaningfully to this question.

Q4 Do you agree that the Scottish Ministers should have the power to create excluded payments by regulation?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes

Undecided

No **X**

Reasons for response:

Standing our response to question 1 we are not in a position to respond meaningfully to this question.

Q5 Do you agree that liability to repay NHS charges should extend to insurers and the best way to achieve this is by expressly extending liability on the face of the Bill?

Please indicate yes/no/undecided and outline your reasons for your response.

Yes

Undecided

No

Reasons for response:

We refer to our answer to Question 1 above.

Q6 Do you agree that the money recovered be paid into the general health budget and allocated to the appropriate Health Board or do you consider it more appropriate that the money be allocated for asbestos related care, including research?

Please indicate which option you consider more appropriate and outline the reasons for your response;

Standing our response to question 1 we are not in a position to respond meaningfully to this question. The question in any event raises matters of policy upon which it would have been inappropriate for us to comment.

Q7 How will the proposal change what organisations do? What is your assessment of the likely financial implications (if any) of the proposed Bill to you or your organisation? Please provide specific examples as to the impact the proposal will have on your organisation, if any.

We do not consider that this is a question we can meaningfully respond to.

Q8 What is your assessment of any implications for equality?

We do not consider that this is a question we can meaningfully respond to.

Q9 Do you have any views on whether the proposal will fall within the legislative competence of the Scottish Parliament? Please answer as fully as possible.

We refer to our answer to Question 1.

Q10 Do you have any other views or comments you would like to make on this proposal?

No.