



The Scottish Parliament
Pàrlamaid na h-Alba

Published 18 December 2020
SP Paper 894
24th Report, 2020 (Session 5)

Health and Sport Committee

Stage 1 Report on the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

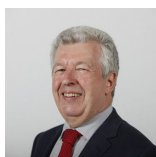
All documents are available on the Scottish
Parliament website at:
[http://www.parliament.scot/abouttheparliament/
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Overview of scrutiny and purpose of the Bill	1
Background to the Bill	2
Overall views on the Bill	3
Defining and identifying industrial disease	4
Definition	4
Identification of industrial disease	5
Administration of the scheme	7
Responsibility	7
Financial implications	8
Appeals and reviews	10
Settlement of claims	11
Insurance premiums	12
Working conditions and health and safety	14
Finance and Constitution Committee, and Delegated Powers and Law Reform Committee Consideration	16
Overall conclusion	17
Annexe A	18
Extracts from the Minutes of the Health and Sport Committee Meetings	18
Annexe B	20
Written evidence	20
Supplementary written evidence	20
Official Reports of meetings of the Health and Sport Committee	20
Bibliography	22

Committee Membership



Convener
Lewis Macdonald
Scottish Labour



Deputy Convener
Emma Harper
Scottish National Party



George Adam
Scottish National Party



Donald Cameron
Scottish Conservative
and Unionist Party



Alex Cole-Hamilton
Scottish Liberal
Democrats



David Stewart
Scottish Labour



David Torrance
Scottish National Party



Sandra White
Scottish National Party



Brian Whittle
Scottish Conservative
and Unionist Party

Introduction

Overview of scrutiny and purpose of the Bill

1. The Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill ¹ was introduced in the Scottish Parliament on the 9 March 2020 by Stuart McMillan MSP, the Member in Charge. The Bill was accompanied by a Policy Memorandum (PM) ², Explanatory Notes ³ and Financial Memorandum (FM). ⁴ The Non-Government Bills Unit also produced an Equality Impact Assessment. ⁵
2. The Bill was referred to the Health and Sport Committee on 18 March 2020. Both the Finance Committee (in relation to the FM) and the Delegated Powers and Law Reform Committee consider aspects and their views are reported later in this report.
3. It seeks to amend Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 (the 2003 Act) to bring NHS costs incurred in treating industrial diseases within its scope, allowing Scottish Ministers to recover these costs from those whose negligence caused these diseases.
4. As set out in the PM, ⁶ the Bill's aims are—
 - to reduce the burden on the tax-payer-funded NHS (freeing up resources for others in need of treatment) and to incentivise employers to improve working conditions particularly in hazardous industries;
 - to take a more precautionary approach in respect of working conditions that could in the future turn out to be the cause of industrial diseases.
5. The Bill contains the following sections—
 - Section 1 of the Bill aims to extend the scope of section 150 of the 2003 Act, to expressly include industrial disease, while continuing to exclude other diseases. This section also includes a main definition of industrial disease;
 - Section 2 aims to create a mechanism to allow industrial disease treatment costs to be recovered in cases where the period of exposure spans the date of commencement. This is a measure to ensure that the Bill has no retrospective effect;
 - Section 3 of the Bill aims to amend Section 164(1) of the 2003 Act. 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;
 - Section 4 states the procedure applicable to any orders or regulations made under the Act, the first set of regulations made under the new power are to be by affirmative procedure, with subsequent regulations subject to negative procedure;

- The last two sections deal with commencement and short title.
6. We launched a call for views on Bill which ran from 12 August 2020 until 30 September 2020 and received sixteen responses.⁷ The Scottish Government produced a memorandum⁸ on the Bill following its introduction, and SPICe published a background briefing.⁹
7. We took evidence at our meetings on 3 and 10 November 2020 from the following witnesses—
- 3 November
- Professor Andrew Watterson, Occupational and Environmental Health Research Group, University of Stirling;
 - Alan Rogerson, Chair, Forum of Scottish Claims Managers;
 - David Short, Secretary, Association of Personal Injury Lawyers (APIL) Scotland;
 - Laura Blane, Lung Disease Team, Thompsons Solicitors Scotland.
- 10 November
- Minister for Public Health, Sport and Wellbeing, Joe FitzPatrick MSP;
 - Member in charge of the Bill, Stuart McMillan MSP.
 - Andrew Mylne, Clerk Team Leader, Non-Governmental Bills Unit
8. We would like to thank all those who provided oral and written evidence as part of our consideration of this Bill.

Background to the Bill

9. The Member in Charge lodged his first draft proposal for a Member's Bill on Recovery of Medical Costs for Asbestos Diseases on 5 January 2015.¹⁰ The consultation received sixty-six responses although no summary of those consultation responses is available.
10. At this time, an equivalent Bill passed in Wales had been referred to the Supreme Court who decided it was outside the Assembly's legislative competence and could not become law. The PM for the Bill before us explained that the Court decided it 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)." It stated 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.

11. The Member in Charge then lodged a new proposal, which gave rise to the current Bill, on 28 March 2018 and his consultation closed on 22 June 2018. This proposal differs from his 2015 proposal as its scope has been extended from asbestos related disease to all industrial disease and has no retrospective element. Sixteen responses to the consultation were received. Half of the respondents supported the principle of the proposal, one was fully opposed, one was neutral and five were unsure. A summary of consultation responses is available on the Scottish Parliament website.¹¹
12. The PM explains the current Bill also takes into account the Supreme Court judgement on the Welsh Bill as it proposes a Bill that is entirely non retrospective and that does not include any provision directly about insurance which is a reserved matter.

Overall views on the Bill

13. Most submissions to our call for views were supportive of the Bill with a number, including the Law Society of Scotland, commenting that the legislation is in line with the “polluter pays” principle and that NHS charges should be recoverable in cases where a “compensator” has been identified.¹² Unite Scotland thought costs arising from negligence by employers should be paid by them while API agreed indicating it should not be the tax payer who pays treatment costs.¹³ Thompsons Solicitors thought the principle applying to accident costs should equally apply here with those who are negligent liable.
14. However, a few submissions raised concerns about potential unintended consequences, such as delaying claims for compensation and increased insurance premiums for businesses in Scotland.
15. During oral evidence, Alan Rogerson from the Forum of Scottish Claims Managers said that the Bill as currently drafted could have many unintended consequences and that “the practicalities of recovering money for the NHS might be a lot harder than they first appear.”¹⁴ David Short from the Association of Personal Injury Lawyers supported the Bill indicating “if we can get money into the NHS, particularly at this time, that should be done”.¹⁵
16. The Scottish Government, in its memorandum, raised a number of concerns around the administration of the scheme and apportioning liability and said that more evidence was needed on how the scheme will work in practice.¹⁶ The Minister for Public Health, Sport and Wellbeing (“The Minister”) reiterated the Scottish Government's view that, although sympathetic to the intention behind the Bill, it believes that there are a number of points requiring further clarity.¹⁷

Defining and identifying industrial disease

Definition

17. The Bill amends the 2003 Act so that, in Scotland, the existing system of NHS cost recovery applying to injury cases is extended to cover cases of industrial disease. Industrial disease is defined in Section 1 as —
 - arising out of the employment of the injured person;
 - arising out of the employment of any person associated with the injured person;
 - includes diseases that confer eligibility for employment injury assistance, as defined under regulations made by the Scottish Ministers under section 33 of the Social Security (Scotland) Act 2018ⁱ.
18. The PM explains that the Bill would cover all industrial diseases as listed in guidance issued by the UK Government’s Department for Work and Pensions (DWP) in the context of eligibility for Industrial Injuries Disablement Benefits.¹⁸
19. We heard discussion around the appropriateness of the definition proposed in the Bill and its use in identifying industrial disease. The University of Stirling Occupational and Environmental Health Research Group, in their written evidence, considered that the definition used in the Bill was constructive and that broadening out what is understood by industrial diseases is an important step forward.¹⁹
20. Laura Blane did not have any major concerns regarding the definition although did point out that the word industrial was a bit out of date and it might be more appropriate to use the term “disease or long-term injury from employment.” She pointed out however that the wider definition, in which the phrase “arising out of the employment” is used, would be wide enough to capture any potential disease that arises from modern employment²⁰. This view was echoed by the University of Stirling Occupational and Environmental Health Research Group.
21. Questions arose regarding Covid-19 related illnesses and mental health illnesses and whether they would be captured by the definition of industrial disease in the Bill. The University of Stirling Occupational and Environmental Health Research Group, in their written evidence, felt that they would be and told us that they thought the Bill was especially timely.²¹
22. Professor Watterson representing the Occupational and Environmental Health Research Group at the University of Stirling pointed out that Belgium already

ⁱ Section 33 of the Social Security (Scotland) Act 2018 relates to employment injury assistance. This is assistance given by the Scottish Ministers to an individual on account of the individual, or another individual, having suffered an injury, or contracted a disease, in the course of employment. Section 33 of the 2018 Act is not yet in force (as at October 2020).

recognises Covid-19 as an occupational disease for healthcare workers and told us "It is sobering to note that the UK has a very short list of prescribed industrial diseases, whereas the list is longer in France and Germany, although they use the same science." ²²

23. The Occupational and Environmental Health Research Group at the University of Stirling commented in their written evidence, that the mental health of individuals can be affected by occupational diseases and that the Bill will need to consider this when calculating NHS treatment costs. ²¹
24. Professor Watterson, reiterated the view that mental health should also be considered under the definition of industrial disease but that it was a "difficult area" and reflected that it is covered in some countries ²³. Laura Blane said that mental health issues do not have to appear on a list of prescribed diseases before the legal compensation route is open to individuals but pointed out that—

” It is a difficult matter because stress cases, as they are widely known, are difficult to establish; it certainly would not be impossible for the existing law to be made wide enough to include those issues in the definition of industrial disease.

Source: Health and Sport Committee 03 November 2020 [Draft], Laura Blane, contrib. 61²⁴

25. David Short argued that the definition of industrial disease should not be limited to employment and the workplace and that it should be broadened to capture instances where someone has contracted a disease from product exposure or harmful exposure outwith the workplace. ²⁵
26. The Minister confirmed that he had no concerns regarding the definition of industrial disease as set out in the Bill although indicated that, if the Bill were to proceed to the next stage, the Scottish Government would consider whether any amendments were necessary. ²⁶
27. The Member in Charge explained industrial disease was broadly defined to include any diseases arising out of a person's employment provided there is a connection between the disease and the employment. Adding that the definition was such as to also cover diseases covered by employment injury assistance, under the Social Security (Scotland) Act 2018. ²⁷

Identification of industrial disease

28. A number of submissions raised concerns in relation to identifying industrial disease. The Forum of Scottish Claims Managers highlighted in their written evidence that industrial diseases may only appear a significant time after exposure and that there are potential difficulties with identifying the exposure which directly leads to industrial disease. It said that— ²⁸

” In many cases, it will be impossible to attribute or apportion the NHS treatment to individual causes for the purpose of the Bill...The treatment of individuals with industrial disease is by no means as straightforward as it can be for accident victims where there is a clear date upon which the injury occurs and clear evidence of the injury sustained to identify the NHS treatment given as a result.

29. During evidence, Alan Rogerson explained further why he felt that there were practical difficulties surrounding the identification of industrial diseases and their subsequent treatment in co-morbid cases. He explained that in those situations, clinicians would have to decide whether a person's condition is due to industrial disease, and therefore cost recoverable, or due to an existing health condition or lifestyle choice. He said that this would mean that clinicians' time would be taken away from treating patients which could be an unintended consequence of the Bill.
29

30. On whether the Bill would capture future industrial diseases, such as Covid, which have not yet been identified, Professor Watterson told us that he was content that it would saying—

” Knowledge will grow over the years and some occupational diseases may drop off, but new ones will come in and the bill will be well able to cater for that. Therefore, the definition of “industrial disease”, which has been broadened out, is very positive.

Source: Health and Sport Committee 03 November 2020 [Draft], Professor Watterson, contrib. 34³⁰

31. We believe it is positive that any future Covid-19 related illness and mental health illnesses would be covered under the Bill and are content the definition of industrial disease as set out in the Bill would capture these illnesses.

32. We note the evidence in relation to the complexities involved in identifying industrial diseases, particularly in relation to co-morbid cases and have concerns this could result in unintended consequences.

Administration of the scheme

Responsibility

33. The PM suggests, subject to agreement being reached between the Scottish and UK Governments, cost recovery should preferably be the same as already exists for personal injuries under the 2003 Act. With a preference for administration also by the Department for Work and Pensions (DWP) existing Compensation Recovery Unit (CRU).
34. Others however had different views. In their written evidence, the University of Stirling Occupational and Environmental Health Research Group thought that the UK Compensation Recovery Unit (CRU) would not be appropriate and it should only be administered by a Scottish Government department reflecting the new Social Security powers given to Scotland.³¹
35. Professor Watterson argued for a new approach to address reported problems with the operation of the CRU. He suggested starting with “a blank sheet” was a good idea offering “opportunities as well as challenges for Scotland.”³²
36. The Association of British Insurers however suggested a separate recovery scheme operated by the Scottish Government would be more expensive, complex and less efficient.³³ In agreeing with the Member in Charge, Laura Blane indicated the CRU operates an existing system which everybody understands. She thought it made more sense to use that scheme with modifications than make different arrangements.²⁴
37. The Member in Charge confirmed his preference to use the DWP's CRU although he did say 'the Bill would still be worthwhile if a Scottish equivalent of the CRU had to be established.'³⁴
38. We tried to identify what engagement had taken place with DWP following a letter from the Member in Charge in October 2018. In its response to the Scottish Government, the DWP confirmed that no discussions had taken place on the administration of the proposed scheme and that any formal approach 'would need to be considered by DWP officials which would include a full impact assessment through our change governance process'.³⁵
39. It appears that no discussions have taken place. It is unclear why this is the case and understandable that the DWP would want a full impact assessment before being in a position to provide a view or costs of administration.
40. The Minister told us the Scottish Government had no preference on who should administer the scheme while suggesting a need for clarification before the Bill could be completed. The Minister subsequently confirmed DWP had responded to an earlier request for input as indicated above.

Financial implications

41. The FM³⁶ sets out how the current NHS cost-recovery system works for personal injury claims and explains there is an overall cap, which is reviewed each financial year, on the amount that can be recovered in NHS charges for any one injury, which from 1 April 2019 is £53,278. The FM acknowledges that it is impossible to estimate the amount of NHS costs that would arise from any individual claim under the proposed scheme but that the upper limit would be limited to the cap.³⁷
42. The FM estimates that number of industrial disease claims that would be registered annually is 514³⁸ and if three (full-time equivalent) staff were required to administer the scheme this would cost around £66,000 a year.
43. The FM based its figures on DWP's CRU operating costs incurred in administrating the NHS Injury Cost Recovery and estimated the number of Scottish industrial disease claims, where a compensation payment is made, from information on such cases provided by Thompsons Solicitors. The FM explained the CRU provided operating costs incurred in administrating the NHS Injury Cost Recovery Scheme but did not provide any information regarding how many staff it employs, or how many claims are processed by each member of staff. The FM estimated staff costs based on Social Security Scotland's staff costs.³⁹
44. We wanted to understand the financial implications of the scheme and in particular whether costs recovered would exceed administration costs to ensure the Bill would achieve its aim of reducing the burden on the NHS. The Scottish Government was unclear whether or not 'the funds that would be recouped through this new scheme would be proportionate in relation to the time, effort and resource that would need to be spent on it.'⁴⁰
45. There were mixed views on this. Thompsons Solicitors said they thought significant sums would be raised and Andrew Watterson thought that administration costs would be low but neither provided any figures in support.
46. Other respondents, including the Forum of Scottish Claims Managers raised concerns regarding the amount of money that would be recovered under the legislation compared to the cost of administering the scheme. When asked if the staff costs of £66,000 for administering the scheme as set out in the FM were realistic, Alan Rogerson said that it seemed reasonable to use three members of staff however he said—

” The estimate takes no account of the administration time for the NHS, or of the time of treating clinicians, if we ask them questions about treatment that is being administered or what that person was in hospital for. It is impossible to put a cost on all those hidden charges, but it puts the £66,000 in perspective.

Source: Health and Sport Committee 03 November 2020 [Draft], Alan Rogerson, contrib. 67⁴¹

47. Alan Rogerson provided supplementary evidence⁴² on his cost benefit analysis of the Bill and stated that more information was needed on the following—
 - the average exposure periods for different types of diseases;

- the time period between exposure and when the injured person will (i) seek treatment for the disease and thereafter (ii) make a claim for compensation.
48. In his analysis, he estimated that over 12 years, there would be a shortfall of approximately £0.5 million between the costs of administering the scheme and the amounts recovered.
49. A number of respondents highlighted that industrial diseases claims were often much more complex than injury claims and this may result in delays and a potential increase in the cost of administering the system. The Forum of Insurance Lawyers warned—⁴³
- ” There is the potential for both the defendant compensator, CRU and the NHS to become involved in ancillary litigation-type activity with disputes over diagnosis, potentially requiring detailed investigation, additional medical tests and expert reports, and time-consuming appeals, absorbing financial and human resource which should be committed to the pursuer and the general provision of medical care.
50. The Minister emphasised the Scottish Government's view that more evidence was needed regarding the anticipated level of revenue that the bill could recover and the cost of administering the scheme. He said 'It is important that the scheme should not run at a loss due to the potentially low number of cases.'⁴⁴
51. The DWP, in their response to the Scottish Government, highlighted that a potential difficulty for those administering the scheme would be determining if the hospital treatment is for the industrial disease and therefore cost recoverable. It said⁴⁵ —
- ” The person may be having treatment for a specific condition but what if they also have to have treatment for another condition at the same time? Will it be obvious to be able to separate out what treatment is directly for the industrial disease?
52. The Scottish Government asked the DWP what input it had into the calculation of costs attributed to it for running the proposed scheme and it confirmed that it had not been involved to date. It said—
- ” In terms of costs, there would have to be clear forecasts of potential claims to inform any impact assessment as part of our change governance process. With any new work, there will be need to be a defined customer journey, including any IT development implications and all of this would have to be impacted through any change proposal.
53. The Member in Charge acknowledged preparing the FM had been challenging and 'trying to get a figure for the number of cases to put forward has been difficult'. He said—
- ” I believe that 514 is a rough estimate; as time goes on, the real figure will clearly differ from that, including in relation to industrial diseases that we do not yet know about.

Source: Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 41⁴⁶

54. When asked about Alan Rogerson's evidence in which he estimated that, over 12 years, there would be a shortfall of approximately £0.5 million between the costs of administering the scheme and the amounts recovered, The Member in Charge said—

” I saw the figures, and I can see why the insurance industry has suggested them, but I would point to data from the compensation recovery unit that shows that £66.8 million was recovered from employers from 90,219 settlements. That means that, on average, £740.80 was recovered per case. If that figure was applied to the estimated 514 industrial disease cases, that could generate more than £380,000 for NHS Scotland.

Source: Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 52⁴⁷

55. The Member in Charge acknowledged that there are complexities in calculating the cost of NHS treatment in individual personal injury claims but referred to the fact that the CRU already operates a tariff system, with a cap that sets the maximum amount that could be claimed from any compensator .⁴⁸

Appeals and reviews

56. As set out in the PM, 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 for an industrial disease and where the compensator has made a compensation payment to the person in consequence of that disease. Before making the compensation payment, the compensator should apply to the Scottish Ministers for a certificate of the NHS charges that apply. The PM explains that the DWP guidance provides for review requests to be made to the CRU if a compensator thinks the information on the Certificate of NHS charges is wrong. If the compensator still believes that the certificate is wrong, after review, they can make an appeal to the First-tier Tribunal under Her Majesty's Courts and Tribunals Service.

57. The PM points out that the compensator must make the payments required by a certificate before appealing against it, unless this requirement is waived by Ministers; but a decision by Ministers not to waive this requirement may also be appealed to the First-tier Tribunal. The FM makes reference to the cost of reviews and appeals and enforcing payment. It notes there is no data for the cost of reviews and appeals but considers the number is likely to be very low.

58. BML commented that the complexities of industrial disease cases are likely to mean the administrative burden on NHS Boards is greater than that with which they are presently accustomed. The nature of disease cases means data provided by NHS Boards would likely be challenged more frequently than accident-related data.⁴⁹ It goes on to highlight there may be the potential for dispute on diagnosis, impact of co-morbidities, allocation of liability, and cases where there may have been exposure in Scotland and in one or more other jurisdiction. Noting⁴⁹ —

” These issues are also likely to give rise to a greater proportion of requests for reviews and appeals against NHS charges certificates in industrial disease cases than in accident-related cases.

59. In their written evidence, the Forum of Scottish Claims Managers considered the hidden costs associated with appeals and reviews and believe that the new scheme may give rise to more reviews and a possible delay to the person receiving compensation. Alan Rogerson also indicated he thought the Bill will give rise to more appeals as it would be difficult to say where treatment is directly related to an industrial disease. This would also increase costs and lengthen the process.⁵⁰
60. The Scottish Government asked the CRU if it had made any assessment of the potential difficulties posed by the differences between recovering NHS costs under the existing legislation (for injuries) and under the proposed scheme for industrial related diseases. The CRU replied saying there could be questions around how they would know if the compensation payment was in relation to an industrial disease as defined in the Bill and provided the following example —

” Person A develops a condition through exposure to radiation in the power plant where they work. Person B develops a condition because they live next door to the power plant and they were exposed to radiation too. They both claim compensation from the power plant owner. It appears that under this proposal recovery of charges would apply to person A but not person B. Presently the compensator isn't required to make a distinction between the type of claim so how would any administrator of this legislation be sure, unless it was a requirement in the legislation? This could result in many of the cases requesting mandatory reconsiderations and appeals.

61. The Member in Charge noted as set out in the PM, Compensators must make the payments required by a certificate before appealing against it, unless this requirement is waived by Ministers; but in effect, payments must happen first before any appeal. He said it was difficult to determine whether there would be more or fewer appeals but said 'The key point is that the compensators must make the payments before appealing'.⁴⁸ He went on to say—

” I do not see how the bill could lead to compensators delaying making payments in industrial disease cases any more than they do in accidental injury cases. I see no effect on that from the outcome that we want the bill to deliver.

Source: Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 71⁵¹

Settlement of claims

62. The FM explains that 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). In these cases, it states that⁵² —

” If all the relevant periods of employment post-dated the relevant provisions coming into force, 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.

63. Some written submissions highlighted a potential unintended consequence in relation to insurance companies delaying compensation settlements due to the

obligation to pay NHS costs for industrial disease. The Association of Personal Injury Lawyers, in relation to multiple defender cases, argued that the proposals in this Bill could delay the settlement of claims while insurers determine who is most liable.⁵³

64. This was also highlighted as a potential issue by the Forum of Insurance Lawyers and the Law Society of Scotland, who were concerned to ensure safeguards were in place to avoid prejudice to the Pursuer should there be disputes over liability or amounts.⁵⁴

65. A point echoed by David Short who raised the issue when there are multiple defenders with liability to contribute to the NHS charges. He warned us—

” There are enough arguments going on between defenders already, and I worry that the bill will add another layer of complication, which could delay litigation for victims.

Source: Health and Sport Committee 03 November 2020 [Draft], David Short, contrib. 41⁵⁵

Insurance premiums

66. The FM points out that it is expected that compensators will recover any additional costs from their insurers. It being assumed insurance companies will have to carry out further actuarial calculations, in order to incorporate the recovery of NHS charges into their premium calculations applying to industrial employers.⁵⁶

67. Most respondents believed that insurance companies would develop products that would provide cover for the eventuality of an employer becoming liable for NHS costs under the Bill and that insurance premiums may rise.

68. Some respondents made the point that the legislation could result in differences in the insurance premiums paid by businesses in Scotland and the rest of the UK. The Forum of Scottish Claims Managers thought this could make “Scotland a less attractive and more expensive place to do business.”⁵⁷

69. The Scottish Government commented in its memorandum that, as the rest of the UK has no plan to introduce a similar scheme, this may cause confusion within the insurance industry.

70. Alan Rogerson said that, because of the way in which insurance policies work, the long term impact of having a different law in Scotland compared to the rest of the UK is unknown and that they are currently doing further work on this.⁵⁸

71. The Member in Charge pointed out that, as the Bill will encourage employers to introduce better health and safety measures, he would expect the reverse to happen with a long-term reduction in insurance premiums. He said —

- ” It would be unavoidable that premiums would rise in the short term, particularly as soon as the act came into force; employers would be liable for a new category of cost and sensible employers would extend their insurance to cover that risk. However, in the longer term, costs would certainly reduce.

Source: Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 39⁵⁹

72. We note the differing views on how the scheme should be administered and note that the DWP have said that an impact assessment would have to be undertaken before any decision could be made regarding their role in administering the scheme. We share the views of the Minister that this aspect of the Bill needs to be clarified in order to understand more fully the costs associated with the Bill.
73. We understand the difficulties the Member in Charge has had in obtaining accurate information in relation to the FM. However, more work is required to fully quantify the potential impacts and if this Bill is to proceed we expect the Scottish Government and the Member in Charge to work together to obtain more robust information with regard to the financial implications of the Bill.
74. We have concerns in comparing the costs of this proposed scheme with the existing scheme noting that the existing scheme must consist of many small claims given the average recovery is £740. This gives us reservations about using estimates from that scheme in looking at costs of industrial disease recovery.
75. In relation to the Member in Charge’s observation about payments being required before an appeal can be made, we consider the key point is whether the appeal is ultimately successful or not as that will determine whether the compensation is ultimately payable. That will also impact on the costs of running the scheme.

Working conditions and health and safety

76. The second stated aim of the Bill is to incentivise employers to improve working conditions, particularly in hazardous industries, and to take a more precautionary approach in respect of working conditions thus avoiding, in future, industrial diseases.

77. A number of respondents believed the legislation will contribute to improved working conditions. Unite Scotland said—⁶⁰

” Employers must be held financially responsible for their negligence, if anything to force them to recognise the responsibility they have for the health and safety of their workers and to enforce change in behaviour that can lead to avoidable incidents or accidents..... Unite believes that the proposals and subsequent additional financial implications, could help to focus employers attention on health and safety practices which would lead to safer workplaces.

78. However, by contrast, some respondents including the Faculty of Advocates, the Forum of Scottish Claims Managers, BML and the Forum of Insurance Lawyers considered the Bill would not necessarily have a positive impact on working conditions and preventing industrial diseases given existing health and safety legislation already does this.

79. The Forum of Insurance Lawyers highlighted the current personal injury claims regime places a heavy responsibility on employers to introduce safe working practices and ensure they are adhered to adding, “the introduction of a further financial liability will have no additional effect.”⁴³

80. We were interested in understanding if the Bill should hold former directors of companies responsible for payments for any compensation or NHS costs, David Short told us that it should not be extended to include directors’ responsibility, as did Laura Blane who explained in relation to limited companies—

” I do not think that the bill that we are discussing should go that far. Legal responsibility rests with the corporate entity, which is the limited company, under the current law. The bill is not the mechanism to change that legal principle.

Source: Health and Sport Committee 03 November 2020 [Draft], Laura Blane, contrib. 23⁶¹

81. Laura Blane said there was no guarantee the Bill would provide an additional incentive to improve health and safety practices in the workplace but that it would “reposition health and safety as a serious issue for employers of all sizes.” She pointed out that, in addition to considering the financial burden they may have to bear, “employers must also focus on health and safety practice in order to prevent these diseases developing.”⁶²

82. Alan Rogerson however did not believe the Bill would have as much impact on workplace conditions than improved inspection and enforcement action would have.⁶³

83. We asked if any consideration had been given to how the changes to liability resulting from the Bill would be publicised, particularly in relation to providing information to SMEs. The Member in Charge said he had not given this any consideration but told us there would need to be a media campaign by the Scottish Government and involvement with key organisations in publicising liability changes to SMEs.

Finance and Constitution Committee, and Delegated Powers and Law Reform Committee Consideration

84. The Finance and Constitution Committee received no responses to their call for views on the estimated financial implications of the Bill. The Delegated Powers and Law Reform Committee considered the delegated powers in the Bill and published its report on the Bill on 17 September 2020. We have nothing further to add to their report.⁶⁴

Overall conclusion

85. We support the general aims of the bill to reduce industrial diseases and compensate victims. We however have concerns in relation to the scheme proposed for collection and consider there remains a need for further detailed costings before the Bill can be passed.

Annexe A

Extracts from the Minutes of the Health and Sport Committee Meetings

[19th Meeting, 2020 \(Session 5\) Tuesday 11 August 2020](#)

3. Liability of NHS Charges (Treatment of Industrial Disease) (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1.

[28th Meeting, 2020 \(Session 5\) Tuesday 3 November 2020](#)

1. Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Professor Andrew Watterson, Occupational and Environmental Health Research Group, University of Stirling;
- Alan Rogerson, Chair, Forum of Scottish Claims Managers;
- David Short, Secretary, Association of Personal Injury Lawyers (APIL) Scotland; and
- Laura Blane, Lung Disease Team, Thompsons Solicitors Scotland.

6. Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill (in private): The Committee considered the evidence heard earlier in the meeting.

[29th Meeting, 2020 \(Session 5\) Tuesday 10 November 2020](#)

1. Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Joe FitzPatrick, Minister for Public Health, Sport and Wellbeing;
- Isabel Hinds, Governance and Finance Accountant, Directorate of Health Finance; and
- Julie McKinney, Head of Internal Financial Performance, Directorate of Health Finance, all Scottish Government;

and then from—

- Stuart McMillan, Member in charge of the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill;
- Andrew Mylne, Head of Non-Government Bills Unit;
- Kenny Htet-Khin, Solicitor; and
- Seonaid Knox, Researcher for Stuart McMillan MSP, all Scottish Parliament.

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

private): The Committee considered the evidence heard earlier in the meeting.

[34th Meeting, 2020 \(Session 5\) Tuesday 15 December 2020](#)

12. Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill (in private): The Committee considered and agreed a draft Stage 1 report.

Annexe B

Written evidence

- [NHS Tayside](#)
- [NHS Grampian](#)
- [Faculty of Advocates](#)
- [Thompsons Solicitors](#)
- [Sandy Carmichael](#)
- [University of Stirling Occupational and Environmental Health Research Group](#)
- [Unite Scotland](#)
- [Forum of Scottish Claims Managers](#)
- [Association of Personal Injury Lawyers \(APIL\)](#)
- [The Forum of Insurance Lawyers \(FOIL\)](#)
- [BLM Law](#)
- [Association of British Insurers](#)
- [Zurich Insurance plc](#)
- [University of Strathclyde](#)
- [The Law Society of Scotland](#)
- [NHS Ayrshire & Arran](#)

Supplementary written evidence

- [Letter from Alan Rogerson, Chair, Forum of Scottish Claims Managers - 4 November 2020](#)
- [Letter from the Minister for Public Health, Sport and Wellbeing - 20 November 2020](#)

Official Reports of meetings of the Health and Sport Committee

- [Tuesday 3 November 2020](#) - evidence from expert witnesses.

- [Tuesday 10 November 2020](#) - evidence from the Scottish Government and Member in Charge.

- [1] The Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill and supporting documents.. (n.d.) Retrieved from <https://www.parliament.scot/parliamentarybusiness/Bills/114648.aspx>
- [2] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill Policy Memorandum. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/policy-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [3] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill Explanatory Notes. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/explanatory-notes-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [4] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill Financial Memorandum. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [5] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill Equality Impact Assesment. (n.d.) Retrieved from https://www.parliament.scot/S5_HealthandSportCommittee/General%20Documents/EQIA_document.pdf
- [6] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill Policy Memorandum, paragraph 4.. (, undefined). Retrieved from https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65PMS052020.pdf
- [7] Responses to the call for views.. (n.d.) Retrieved from <https://yourviews.parliament.scot/health/industrialdisease/>
- [8] Scottish Government Memorandum on the Bill. (n.d.) Retrieved from https://www.parliament.scot/angiestest/Liability_for_NHS_Charges_-_AGREEMENT_OF_GOVERNMENT_POSITION_FOLLOWING_INTRODUCTION_-_MEMO.pdf
- [9] SPICe Briefing SB 20-68. (n.d.) Retrieved from <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/10/13/Liability-for-NHS-Charges--Treatment-of-Industrial-Disease---Scotland--Bill/SB%2020-68.pdf>
- [10] Recovery of Medical Costs for Asbestos Diseases (Scotland) Bill . (2015). Retrieved from http://www.parliament.scot/S4_MembersBills/20150105_consultation_final.pdf
- [11] Summary of Consultation Responses. (n.d.) Retrieved from https://www.parliament.scot/S5MembersBills/20190131_Consultation_Summary_final.pdf
- [12] Written Submission from the Law Society of Scotland. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent

- [13] Written submission from Association of Personal Injury Lawyers. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [14] Health and Sport Committee. Official Report, 3 November 2020 Col 2. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [15] Health and Sport Committee. Official Report, 3 November 2020 Col 2.. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [16] Scottish Government Memorandum on the the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill. (n.d.) Retrieved from https://www.parliament.scot/angiestest/Liability_for_NHS_Charges_-_AGREEMENT_OF_GOVERNMENT_POSITION_FOLLOWING_INTRODUCTION_-_MEMO.pdf
- [17] Health and Sport Committee. Official Report, 10 November 2020, Col 1. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12930&mode=pdf>
- [18] 4 Department for Work and Pensions, "Industrial Injuries Disability Benefits: technical guidance (updated 28 September 2018).. (n.d.) Retrieved from <https://www.gov.uk/government/publications/industrial-injuries-disablementbenefits-technical-guidance/industrial-injuries-disablement-benefits-technical-guidance>.
- [19] Written submission from University of Stirling Occupational and Environmental Health Research group. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [20] Health and Sport Committee. Official Report, 3 November 2020, Col 7. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [21] Written submission from The University of Stirling Occupational and Environmental Health Research Group. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/view_respondent?uuld=508594446
- [22] Health and Sport Committee. Official Report, 3 November 2020, Col 10. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [23] Health and Sport Committee. Official Report, 3 November Col 16. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [24] Health and Sport Committee 03 November 2020 [Draft], Laura Blane, contrib. 61, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290533>
- [25] Health and Sport Committee. Official Report, 3 November Col 11. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [26] Health and Sport Committee. Official Report, 10 November 2020, Col 6. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12930&mode=pdf>
- [27] Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 44, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12930&c=2293120>

- [28] Written submission from The Forum of Scottish Claims Managers. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [29] Health and Sport Committee 03 November 2020 [Draft], Alan Rogerson, contrib. 35, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290507>
- [30] Health and Sport Committee 03 November 2020 [Draft], Professor Watterson, contrib. 34, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290506>
- [31] Written submission from University of Stirling Occupational and Environmental Health Research Group. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [32] Health and Sport Committee 03 November 2020 [Draft], Professor Watterson, contrib. 60, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290532>
- [33] Written submission from the Association of British Insurers. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [34] Health and Sport Committee. Official Report, 10 November, Col 8. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12930&mode=pdf>
- [35] Supplementary written evidence from the Minister, 20 November 2020. (2020). Retrieved from https://www.parliament.scot/S5_HealthandSportCommittee/General%20Documents/20201120_Ltr_IN_from_MinisterPHSW_re_DWP.pdf
- [36] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill . Financial Memorandum, page 2. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [37] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill . Financial Memorandum, page 15 .. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [38] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill . Financial Memorandum, page 8.. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [39] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill . Financial Memorandum, page 12. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>

- [40] Scottish Government Memorandum on the the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill.. (n.d.) Retrieved from https://www.parliament.scot/angiestest/Liability_for_NHS_Charges_-_AGREEMENT_OF_GOVERNMENT_POSITION_FOLLOWING_INTRODUCTION_-_MEMO.pdf
- [41] Health and Sport Committee 03 November 2020 [Draft], Alan Rogerson, contrib. 67, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290539>
- [42] Supplementary written evidence from Alan Rogerson, 4 November 2020. (n.d.) Retrieved from https://www.parliament.scot/S5_HealthandSportCommittee/General%20Documents/20201104_Ltr_IN_from_Alan_Rogerson_FSCM.pdf
- [43] Written submission from Forum of Insurance Lawyers. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [44] Health and Sport Committee. Official Report, 10 November 2020, Col 1. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12930&mode=pdf>
- [45] Supplementary written evidence from the Minister, 20 November 2020. (2020). Retrieved from https://www.parliament.scot/S5_HealthandSportCommittee/General%20Documents/20201120_Ltr_IN_from_MinisterPHSW_re_DWP.pdf
- [46] Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 41, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12930&c=2293117>
- [47] Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 52, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12930&c=2293128>
- [48] Health and Sport Committee. Official Report, 10 November 2020, Col 12. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12930&mode=pdf>
- [49] Written submission from BML. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [50] Health and Sport Committee 03 November 2020 [Draft], Alan Rogerson, contrib. 71, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290543>
- [51] Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 71, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12930&c=2293147>
- [52] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill . Financial Memorandum, page 5. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [53] Written submission from the Association of Personal Injury Lawyers. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent

- [54] Written submission from Law Society of Scotland. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [55] Health and Sport Committee 03 November 2020 [Draft], David Short, contrib. 41, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290513>
- [56] Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill . Financial Memorandum, page 15. (n.d.) Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill/introduced/financial-memorandum-liability-for-nhs-charges-treatment-of-industrial-disease-scotland-bill.pdf>
- [57] Written submission from the Forum of Scottish Claims Managers. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [58] Health and Sport Committee. Official Report, 3 November 2020, Col 15. (2020). Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [59] Health and Sport Committee 10 November 2020 [Draft], Stuart McMillan, contrib. 39, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12930&c=2293115>
- [60] Written submission from Unite. (n.d.) Retrieved from https://yourviews.parliament.scot/health/industrialdisease/consultation/published_select_respondent
- [61] Health and Sport Committee 03 November 2020 [Draft], Laura Blane, contrib. 23, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=12913&c=2290495>
- [62] Health and Sport Committee. Official Report, 3 November 2020, Col 14. (2020). Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [63] Health and Sport Committee. Official Report, 3 November, Col 14. (n.d.) Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12913&mode=pdf>
- [64] Delegated Powers and Law Reform Committee, Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill: Stage 1. (2020, September 17). Retrieved from <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2020/9/17/Liability-for-NHS-Charges--Treatment-of-Industrial-Disease---Scotland--Bill--Stage-1-1/DPLRS052020R52Rev.pdf>

