Institute and Faculty of Actuaries

Proposed recovery of medical costs for industrial diseases in Scotland

IFoA response to Stuart McMillan, MSP

22 June 2018

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The Institute and Faculty of Actuaries is the chartered professional body for actuaries in the United Kingdom. A rigorous examination system is supported by a programme of continuous professional development and a professional code of conduct supports high standards, reflecting the significant role of the Profession in society.

Actuaries' training is founded on mathematical and statistical techniques used in insurance, pension fund management and investment and then builds the management skills associated with the application of these techniques. The training includes the derivation and application of 'mortality tables' used to assess probabilities of death or survival. It also includes the financial mathematics of interest and risk associated with different investment vehicles – from simple deposits through to complex stock market derivatives.

Actuaries provide commercial, financial and prudential advice on the management of a business' assets and liabilities, especially where long term management and planning are critical to the success of any business venture. A majority of actuaries work for insurance companies or pension funds – either as their direct employees or in firms which undertake work on a consultancy basis – but they also advise individuals and offer comment on social and public interest issues. Members of the profession have a statutory role in the supervision of pension funds and life insurance companies as well as a statutory role to provide actuarial opinions for managing agents at Lloyd's.

Institute and Faculty of Actuaries

Stuart McMillan MSP
26 Grey Place
Greenock
PA15 1YF

22 June 2018

Dear Stuart McMillan,

Consultation on proposed recovery of medical costs for industrial diseases in Scotland

1. The Institute and Faculty of Actuaries (IFoA) welcomes the opportunity to respond to the Proposed Recovery of Medical Costs for Industrial Disease (Scotland) Bill. Members of the UK Deafness and Asbestos working parties, established by the IFoA to conduct research in the fields of deafness and asbestos related disease claims for the UK insurance industry, have led the drafting of this response. Our comments are set out below.

Future exposure only

2. The proposal set out in the consultation would only cover diseases from exposures after the Bill's inception, and would not be retrospective. We appreciate the reasoning behind this, and that the proposal has taken lessons from the experience of a similar bill in the Welsh Assembly. However, removing the retrospective element is likely to severely limit the amount recuperated under the proposed scheme for many years.

3. 'Exposure', in the context of disease claims, means the period or periods that the individual was exposed to the causes of their disease, and not the point at which they develop the disease. For the most common industrial diseases, 'latency' means that any cases arising from new exposures are unlikely to appear for decades and that reductions in exposure means that the likely volume of cases will be very small.

4. Asbestos related diseases for example generally develop many years after an individual's exposure to asbestos. Mesothelioma in particular takes many years to become apparent, with diagnosis typically occurring at least 20 years after the exposure. As a result, it could be many years before any mesothelioma claims result in the recovery of medical costs if the Bill was to become law.

5. Furthermore, for asbestos-related diseases, the exposure to asbestos in 2018 and thereafter is much reduced compared to the past levels of exposure in the 1950s to 1970s.

6. The Health and Safety Executive (HSE) estimates that deaths as a result of mesothelioma in Great Britain will have peaked around 2016[1]. The reduction in mesothelioma deaths is due to the reduction in asbestos use in the second half of the 20th century. Some of the key events are as follows:

    - 1967 – Voluntary industry ban on import of blue (crocidolite) asbestos
    - 1985 – Import of brown (amosite) and blue asbestos banned
    - 1999 – Import of white (chrysotile) asbestos banned, although use is permitted until 2005

7. Similarly the majority of industrial deafness cases seen today arise from exposures in the second half of the 20th century when safety regulations were less stringent and less well-enforced. This is because industrial deafness arising from chronic exposure typically only becomes apparent when it is combined with age-related deafness. In the most recent insurance industry survey carried out by the UK Deafness working party, we saw that the average age of industrial deafness claimants for notification year 2012 was around 63 and increasing compared to previous notification years.[2]

8. The number of industrial deafness cases arising from recent exposure is much lower than that arising from earlier periods due to the implementation of the following key pieces of regulation:

    - 1963 – The Ministry of Labour published *Noise and the Worker* which recommended that employees should not be exposed to a noise of over 90dB over an eight-hour working day. This effectively set the date of knowledge for noise induced hearing loss claims for many employers at 1963.
    - 1990 – The *Noise at Work Regulations 1989* set two action levels at 85dB and 90dB above which employers needed to take action.
    - 2006 – The *Control of Noise at Work Regulations 2005* gave protection against lower levels of noise exposure of 80dB and 85dB.

9. Please note that we have focussed on deafness cases arising from chronic exposure to noise, as these are the most common. There are however also deafness cases that occur due to acute exposure to noise arising from an accident at work. These cases behave similarly to non-disease workplace injuries and as such do not typically have a long delay between exposure and diagnosis.

Divisibility of costs

10. The proposed Bill is unclear in how it would treat exposure periods that cross its commencement date, for mesothelioma or any other disease claim. The intention of the Bill is that it would not be retrospective. We suggest that the Bill is explicit regarding the treatment of exposure periods which span the commencement date to reduce the risk of unintended retrospective effects on insurers who provided cover to employers for industrial disease claims for these periods. Industrial disease cover is already provided by insurers and they would not need to develop a new class of insurance.

11. The Compensation Act 2006 ensures that mesothelioma sufferers can recover full compensation from whichever responsible party (employer or insurer) can be traced.

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[1] http://www.hse.gov.uk/statistics/causdis/asbestos.htm

[2] https://www.actuaries.org.uk/practice-areas/general-insurance/research-working-parties/uk-deafness-claims

Effectively, all parties who increased the risk of the claimant developing mesothelioma are jointly and severally liable. However, in IEG v. Zurich [2015] UKSC 33, the Supreme Court ruled that a compensator was entitled to seek contributions from other parties. That is mesothelioma is indivisible when compensating the mesothelioma sufferer but is divisible when compensators recover from each other.

12. The recoveries could also be lower than expected, if recoveries are prorated over the exposure periods for each disease. This is particularly true for mesothelioma claims with their long exposure periods and given that the majority of current mesothelioma claims relate to exposure in the 1950s to 1970s.

Estimated recovery uncertainty

13. The estimation of the future costs of deafness and asbestos related diseases is inherently uncertain, given the lack of exposure information. This uncertainty is increased when attempting to estimate the future cost relating for future periods of exposure only. We know of no study that focuses on disease claims from exposure periods 2018 and beyond for Scotland. Similarly, the difficulties associated with estimating the impact of inflation over a long time period would add an additional layer of uncertainty to any estimation of future costs.

14. We consider that the following evidence could be used in evaluating the cost-effectiveness of the proposed Bill:

    - The HSE reports there are around 185 mesothelioma deaths a year in Scotland which is about 7.5% of the mesothelioma deaths in Great Britain;
    - The HSE exposure assumption, used in their current projection model, has 2% of total exposure that relates to 2018 and beyond (based on exposure up to 2050). Effectively the HSE assumes that current asbestos exposure levels to be less than 1% of exposure levels at their peak in the 1960s;
    - Of the approximately 57,000 deafness claims received by the insurance industry in the years 2010-2012 where the exposure information is available, 95% were from exposure prior to 2000, with only 5% having post-2000 exposure.

15. Based on the above we would expect the recoveries made in the year after commencement are likely to be very small for deafness and almost zero for asbestos-related diseases. It may take several years before cases due to future exposure are significant.

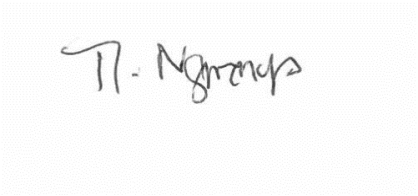
Costs to implement

16. The proposal does not cover any of the costs involved in setting up and administrating the recovery of medical costs for industrial diseases in Scotland. Given the proposed Bill focuses on future exposures only, the running cost involved are likely to be higher than the recoveries made in the initial years.

17. We agree with the conclusion in the consultation that the repayment of NHS treatment costs would, in reality, be met by the negligent party's insurance provider and that this would result in higher premiums. The increase in premiums would most likely happen close to the commencement date whereas, as discussed above, the recovery of medical costs may not be significant for several years. Depending on how insurers implement their premium increases this additional cost to businesses might not just fall to those likely to cause the harm.

Should you wish to discuss any of the points raised in further detail please contact Catherine Burtle, Senior Policy Analyst (catherine.burtle@actuaries.org.uk / 0207 632 1471) in the first instance.

Yours sincerely,



Marjorie Ngwenya
President, Institute and Faculty of Actuaries