



Northern Ireland  
Assembly

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**COMMITTEE FOR  
FINANCE AND PERSONNEL**

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**OFFICIAL REPORT  
(Hansard)**

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**Draft Damages (Asbestos-related  
Conditions) Bill (Northern Ireland) 2010**

15 September 2010

**NORTHERN IRELAND ASSEMBLY**

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**Draft Damages (Asbestos-related Conditions) Bill  
(Northern Ireland) 2010**

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**Members present for all or part of the proceedings:**

Ms Jennifer McCann (Chairperson)

Mr David McNarry (Deputy Chairperson)

Dr Stephen Farry

Mr Paul Frew

Mr Paul Girvan

Mr Simon Hamilton

Mr Daithí McKay

Mr Mitchel McLaughlin

Mr Adrian McQuillan

Mr Declan O'Loan

Ms Dawn Purvis

**Witnesses:**

Mr Oswyn Paulin ) Departmental Solicitors Office

Mrs Laura McPolin )

**The Chairperson (Ms J McCann):**

I welcome Oswyn Paulin, head of the Departmental Solicitor's Office, and Laura McPolin, who is a legal policy adviser in the same office. Please provide a brief overview, after which I will open the floor for members' questions.

**Mr Oswyn Paulin (Department of Finance and Personnel):**

It might be helpful for new Committee members if we outline the background to the consultation paper on the Draft Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010.

In October 2007, the House of Lords made a decision in the Johnson case on compensation for pleural plaques. Pleural plaques are growths on the lungs that result from the inhalation of asbestos fibres. The ruling dealt with pleural plaques that did not cause any symptoms: in other words, they did not cause shortness of breath or impairment of lung function. The House of Lords decided that those asymptomatic pleural plaques did not give rise in the law to a cause of action for negligence: in other words, compensation was not available for them. That decision, depending on one's point of view, applied long-standing legal principles to this condition, or alternatively, it reversed the approach of the courts over many years to it. Members will find more information about that case on page 6 of the consultation document.

The ruling gave rise to considerable controversy. It concerned a matter that would be legislated on separately in Northern Ireland, Scotland, and in England and Wales, although the judgement applied to all those jurisdictions.

The Scottish Government decided at an early stage to legislate to reverse the decision. In England and Wales, the Lord Chancellor, who is the responsible Minister, decided to consult on the issues arising from the decision. In Northern Ireland, the responsibility fell to the Department of Finance and Personnel, and the Minister decided that a consultation exercise should take place to consider the various options.

That consultation took place and, after considering its results, the Minister, with the agreement of the Executive, decided that legislation should be drafted to reverse the effect of the decision of the House of Lords in Northern Ireland. A second consultation exercise, this time on the draft legislation, has taken place, and it closed on 6 September. My colleague, Mrs McPolin, has, in the very short time between 6 September and this meeting, analysed the responses to the consultation, and her paper summarising that analysis has been presented to the Committee. I do not intend to rehearse the detail of the responses, subject to your direction, Madam Chairman.

However, I hope it will be helpful to provide a brief update in relation to the positions in Scotland and in England and Wales.

In relation to Scotland, the Committee may recall that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 came into force on 17 June 2009. Its aim is to ensure that the decision in the Johnston case does not take effect in Scotland. In May 2009, several large insurance companies challenged that Act by way of judicial review proceedings on a number of grounds, including the ground that it interfered with their property rights, contrary to article 1 of protocol 1 of the European Convention on Human Rights, and the ground that it contravened article 6 of the Convention, which establishes the right to a fair trial.

The judicial review proceedings concluded on 22 October 2009. On 8 January 2010, Lord Emslie published his written judgement, which revealed that the insurance companies' challenge to the legislation had failed. However, the insurers have appealed, and the appeal was heard in July of this year. That decision has not yet been given.

With regard to England and Wales, in February 2010 the Secretary of State for Justice announced that he had determined that the decision in the Johnston case should stand, but that he would introduce a limited extra-statutory payment scheme. The scheme, which was duly launched on 2 August 2010, allows for a one-off payment of £5,000 to people who, prior to the Johnston case, had commenced but not concluded a claim for pleural plaques. Applications for payment under the scheme must be received by 1 August 2011. To be eligible, an applicant must show that, prior to 17 October 2007 — the date of the judgement in the Johnston case — he: issued a claim form that has brought court proceedings; sent a letter of claim; named a defendant or insurer; or approached a lawyer or trade union representative and received confirmation that the case was being taken on. In other words, applicants must show that they have taken a number of steps prior to the judgement.

I hope that that is a useful summary of recent developments. Subject to questions or directions from the Committee, I am happy to present our summary of the consultation on the Bill and speak to any issues arising from it.

**Mr McNarry:**

You are very welcome. The Bill is expected to go to the Executive for approval on 4 November 2010, move to its Second Stage on 23 November and have its Final Stage on 22 March 2011. Do you expect that to be the movement of the Bill as regards the first stage of Executive approval?

There is an interesting piece in the information packs from a Dr Shepherd. Are any other Dr Shepherds with similar opinions floating about? Furthermore, how was Dr Shepherd's opinion received, and what recognition was taken of it in your work?

In his foreword to the consultation, the Minister wrote:

“The judgment of the House of Lords has been the subject of much criticism throughout the UK and, within Northern Ireland, there have been calls for the law to be changed. Most of the people who have developed pleural plaques have been exposed to asbestos during the course of their employment. Those people believe their employers have got off ‘scot free’ and that the judgment of the House of Lords is unfair and unjust.”

That is the specific view of the Minister on this issue. Taking account of his opinion, which is a pretty bold statement, I would like to know whether there are serious cost ramifications. Have you anticipated, analysed and prepared for that, and do you have sufficient information about what the compensation levels will be?

**Mr Paulin:**

We will try to share the answer.

**Mr McNarry:**

Just give us the answers. It does not really matter how we get them.

**Mr Paulin:**

Dr Shepherd responded to the first consultation. He also responded to this consultation. Something strange happened, in that his letter is dated before the end of the consultation period but we did not receive it until after the end of the consultation period. We received it only yesterday, after the analysis was prepared. However, we thought it best to draw it to the attention of the Committee.

We were not able to include it in our analysis because of when it was received. However, we are aware of the points that Dr Shepherd made to the previous consultation, which are replicated in points that insurance companies and the Forum of Insurance Lawyers made. Therefore, the points that Dr Shepherd made about the condition are points that we took on board during the first consultation and in the analysis of this consultation.

**Mr McNarry:**

I appreciate that similar comments would be made by insurance companies. I am really asking whether there are any other people with similar backgrounds to Dr Shepherd and who offered similar views?

**Mrs Laura McPolin (Department of Finance and Personnel):**

Insurance companies, when submitting their responses, have quoted professors of medicine who make the point that pleural plaques are a symptomless condition. They echo the point raised by Dr Shepherd, by the insurance companies, and by the insurance industry as a whole, that the focus should be on educating people and explaining that pleural plaques do not deteriorate into more serious asbestos-related conditions, but that the medical profession accepts that they are a very clear and definitive marker of exposure to asbestos. The medical profession puts forth the view that the condition itself does not deteriorate, albeit that it may be a marker of a slightly higher risk of developing an asbestos-related disease.

**Mr McNarry:**

Is that not where we are? In a sense, this is part of the Committee's dilemma in weighing up the evidence that is has. Without being too disparaging about insurance companies, they will obviously protect their backs. However, I am trying to get at the contrary medical evidence and at where the Bill is going, how safe it will be, and how judgemental you or the Department would be on the balance of the evidence that you have. In other words, I do not believe for one minute that you would dismiss that type of opinion. However, at some point, you must have to discount it.

**Mr Paulin:**

As I understand it, the Johnston case proceeded on agreed medical evidence, which was that these pleural plaques are symptomless. In other words, we are dealing with a condition that does not have any other effects. It is similar to having a lump on part of the body which cannot be seen. The question for the House of Lords was whether people should get compensation for that. A person's body has been changed by something that is not their fault. On the other hand, that person does not suffer as a result of it. Many people will have the condition without knowing it. That was the dilemma. The issue was not about the nature of pleural plaques: that has been agreed. The whole process has proceeded on the basis that it is a condition that causes people no difficulty. Nonetheless, the argument is that because, through the fault of someone else, there has been a change to a person's body, that person should receive compensation.

**Mr McNarry:**

Do you see my point? Let me take you back to what the Minister said. I am not saying that I disagree with it, but his bold statement is that:

“people believe their employers have got off ‘scot free’”.

From what have they got off scot free?

**Mr Paulin:**

I think that the Minister is saying that that is what is felt by people who have the condition and know that they have the condition. He is not necessarily saying that that is what he thinks. He is dealing with the correspondence that he receives —

**Mr McNarry:**

If you want to speak for the Minister, you go on ahead. I most certainly would not attempt that.

**Mr Paulin:**

That is how I interpret the words. There is no doubt that many MLAs have received letters from people who are —

**Mr McNarry:**

Many of us have family members in this situation.

**Mr Paulin:**

And those family members are no doubt very exercised and upset by the fact that the law has changed, as they see it, to their detriment.

**Mrs McPolin:**

When talking about the medical evidence it is important to understand that there is a differential between the medical sphere and the legal sphere. The medical sphere has come to a particular conclusion. However, there is an interface between the two spheres. The question with regard to the legislation is whether the legal sphere should determine that there should be legal accountability for the condition. The Bill looks completely at the legal sphere and asks whether a court of law should, in applying the principles of negligence, hold that pleural plaques constitute damage under the law of negligence. The legal sphere is not evaluating whether the condition will deteriorate and so on. As Oswyn said, the courts accept the level of medical knowledge that is being applied, but the legal question for the Bill is whether pleural plaques should be regarded as damage under the law of negligence.

**Mr McNarry:**

That is what we will have to legislate for.

**Mrs McPolin:**

The Executive have indicated that they wish to recognise that point as a matter of law in order to bring the Bill forward. That feeds into the issue of accountability that was raised by the Minister.

You are right about speaking for other people and for ordinary members of the public. If someone performs an action that has a consequence for another person, the issue is whether the former should be held accountable for what their action has done. That is the crux of the question. Ordinary members of the public perceive that to be a just system of law; that if person A does something that harms person B, person A is accountable. Most people agree with that. That is generally what happens under criminal and civil law.



**Mr McNarry:**

OK, that is very helpful. Is the passage of the Bill on schedule? Is it likely to end up around 22 March 2011? That is quite a key date.

**Mr Paulin:**

It would be a brave person who gave anything other than a general commitment to that. However, that is our aim. The fact that the Committee has met early on the subject assists the timetable. We remain hopeful that we can meet that timetable.

**Mr McLaughlin:**

Will you help us to understand how the law on negligence approaches these issues? Establishing negligence is one judgement, but the question arising from the House of Lords ruling is whether someone can be negligent and get away with it. If negligence is established, is there a separate process for assessing the damage that was caused so as to graduate or calculate the award of damages? Does the House of Lords ruling set that aside, in effect?

A negligence claim could be processed under the particular heading of pleural plaques, and negligence could be established, but there could then be a discussion, because it may vary from individual to individual. I imagine that, for instance, the stress of knowing that they had been exposed to asbestos and had related symptoms would affect someone's well-being as well as the fact that their body has changed. That is the issue that we have to address, because the question of damages is a matter to be assessed based on establishing negligence and then assessing the impact on any individual who is before the court in those circumstances.

**Mr Paulin:**

I will start with the issue of negligence. There must be a duty of care to a person. We do not all have a duty of care to each other; it depends on particular relationships. However, an employer clearly has a duty of care to his employee. If the employer acts in breach of that duty of care, negligence is established, subject to there being an injury or a consequence for the employee.

In effect, the case was about the effect of asbestos on people's lungs causing symptomless

growths. The essential point of the case was establishing whether that is an injury. The question is whether damage flows from negligence as a result of a failure on the employers' part to protect employees from asbestos fibres. That is where the House of Lords took a different view from that of other judges. The House of Lords decided that it was not an injury, it was not damage, and therefore it was not compensatable. The House of Lords did not say there was no negligence; just that it did not constitute damage.

This Bill will reverse that and say that it does constitute damage. People will still have to establish that their employers failed to protect them in a way that they should have, that employers have a duty of care, and so on. The Act will say that that does constitute damage. It will then be up to the courts to decide how much to award depending on severity, and so on.

**Mr McLaughlin:**

Is it an immutable linkage to establish evidence and then establish that there was injury? Is that how the law operates elsewhere?

**Mr Paulin:**

Yes.

**Mr Hamilton:**

Mitchel's line of questioning about stripping it away from the particulars of pleural plaques makes it easier to grasp why one might take a decision to go down the line of introducing the Bill to allow for compensation and action in the courts. It is easy to understand at that level. Initially, some of the Bill poses huge difficulties for me. We hear complaints regularly about the courts making things actionable. People say that things have gone haywire and that the floodgates have opened. In this case, we are contributing to nudging those floodgates a little further open. That is why I have some concerns.

I do not have a concern about the issue of action being taken when negligence has caused injury. However, I have a severe concern — and I do not think that David's point about cost was addressed — that we are being asked to legislate to allow pleural plaques to be actionable in the courts and, potentially, to allow compensation to be paid. That will have consequences for

business and probably more of an impact on the public sector. We all know that a lot of cases in which asbestos has been found have been in public sector buildings. It would be irresponsible to proceed without an understanding of the scale of what we are getting into.

That does not mean that we should not proceed, but we need to know whether you have modelled the potential cost on the basis of examples from elsewhere. There must be a rough idea of what it might mean in legal aid. I know that that cannot be calculated exactly, but I am concerned about providing a blank cheque for this. That does not mean that I disagree entirely. I understand the points that have been made, particularly about how this matter can be actionable, but it would be better for us to understand the potential cost and to proceed on that basis. I think that it will have a particularly negative effect on the public sector.

**Mr Paulin:**

I will let Mrs McPolin answer most of that question. However, I will start with the point about the public sector, which is of course, the cost to Government. There is a cost to Government and a cost to the private sector. We do not have a lot of information about the cost to Government, because a lot of the people who have the condition do not know that they have it, because there are no symptoms.

Mr Hamilton mentioned asbestos in public sector buildings. My impression is that most of the claims that we know about are from people who work in heavy industry, particularly Shorts and Harland and Wolff. There is a lot of knowledge about that. As I understand it, the liability for claims from Harland and Wolff rests on the public purse, namely with the Department of Enterprise, Trade and Investment (DETI). We have approached DETI to discuss the matter. I would be surprised if a large number of people have gotten pleural plaques as a result of asbestos in public sector buildings. As you know, over the years, there has been a growing consciousness of the problems that arise from asbestos.

Everybody is extremely cautious now. The problem arises when asbestos is being removed from a building, but huge precautions are taken when doing that. I worked in a building in which asbestos was being removed, but it was done when nobody was about, and people wore considerable protective clothing and so on.

As far as the public purse is concerned, the major impact will be the Harland and Wolff cases. As far as the impact on the private sector is concerned, the liability for pleural plaques existed until 2007. Therefore, people were insured for it to that point, and they continue to be insured for it. That may modify the impact on the private sector, but I just do not know. I think that Mrs McPolin has some information. However, we must be frank about the fact that we do not have much information on costs.

**Mrs McPolin:**

Oswyn is right. The last time that we appeared before the Committee, we indicated that there is no requirement to record a diagnosis of pleural plaques. There is, therefore, no way of estimating, in any kind of accurate manner, how many possible cases there are. The only asbestos-related disease for which future projections are actually known is mesothelioma. However, even then, there is no guarantee that the figures are accurate because they are only estimates. We have no way of knowing how many cases there are. We also indicated to the Committee that the Ministry of Justice had provided estimations, but those were in huge bands. The estimations started from x number of billion pounds, and then there was a huge span between that figure and the end. Therefore, it was anybody's guess.

When the Scots were producing their legislation, at first they based their estimates on the number of mesothelioma cases. My view is that that was not helpful, because, as we said earlier, the medical evidence is that pleural plaques do not deteriorate into mesothelioma. Therefore, the Scots were not comparing like with like.

Obviously, cost was a big issue for the Scots when their legislation was going through, and they revisited that issue. They were very lucky because they were able to get detailed information, for example, on the number of cases at local government level and the number backed up with solicitors. They were then able to work out a projection on the basis of how much individual cases cost, including compensation and the defendants and the plaintiffs' costs. Unfortunately, despite valiant attempts, we do not have information that is in any way comparable to that. As Oswyn said, the only indicator that we have had comes partly from DETI, and, even then, it is not detailed in respect of the complaints concerned. We have very limited

information. We did not get any information from solicitors, and we got only limited information from insurance companies about the number of cases involved. We were not given any detailed information about costs.

When we put out the draft Bill, we repeated the request for any information. However, we did not get very many responses. That is why we do not have much information to go on. The best that we could come up with was to look at the Scots model and at the amount that they determined as the financial impact on their jurisdiction. We then looked at the comparable population in Northern Ireland and tried to work out an estimate. On that basis, I suggested that the cost impact may be from £2 million to £3 million. The Association of British Insurers (ABI) said that it felt that those figures were not accurate, that we should not be relying on the Scots model and that the Ministry of Justice figures were more realistic, even though there is a huge differential between the figures that have been given. Therefore, in answer to your question, there is no definitive statement about the likely impact of costs. It is unlikely that we will ever be able to get a model through which we can determine any kind of accurate estimate.

That said, there are two important points, one of which Oswyn has already made. You are right, Mr Hamilton, that concerns could be expressed. However, it is worth bearing in mind that this was an existing liability for over 20 years, and it was being dealt with in the industry on that basis. The second point is that the number of cases is expected to peak by around 2015 — that is the last date given — and to decline thereafter, because people are much more careful now that they are aware of asbestos. Asbestos-related diseases are long-tail diseases, so we cannot even guarantee that that will be the peak. That is as much as we can say. I know that that is not entirely helpful for calculating costs, but it is as far as we can take it.

**Mr Hamilton:**

I appreciate the difficulties in getting an accurate figure. I am trying to be careful when phrasing my criticisms lest they be seen as heartless or unconcerned about the effects of asbestos; that is not the case at all. I am concerned because too much of the issue is ambiguous and too difficult to nail down. It is a symptom-free physiological change. Therefore, we do not know how many people have it. People do not even know that they have it. We do not know the cost implications. There is a lot that we just do not know. We are legislating for something about

which we do not have a lot of hard and fast information.

You said that England and Wales are looking at a completely different route, which is a one-off payment. Perhaps they have a bit more information, so they may well be making a calculation that doing that keeps it neat and tidy, gets it to bed pretty quickly and, perhaps, costs a lot less. Have we looked at that option as well, or is it impossible to compare it because we do not have that data?

**Mr Paulin:**

They have said that only people who brought a claim, in some way or other, before the judgement can get money under their scheme. That is not what ours would be, which is an open-ended scheme that changes the law. They say that the law stands as it is, but, because a lot of people have worked on the basis that they would get compensation, they will have their scheme. As I understand it, their scheme will be totally funded from public funds. I think that it is £5,000 for each claim. They may not know how many claims are in the pipeline, but they would have a reasonable idea that it is a manageable figure. Certainly, it is more manageable than changing the law entirely. We did not consider that particular option, but, as I remember, we considered something similar.

**Mrs McPolin:**

We did not consider that particular model. The option of an extra statutory scheme was included in the original policy consultation.

**Mr Paulin:**

The hope was that the insurance companies might contribute to that, but they seemed reluctant to do so.

**Mr Hamilton:**

I wonder why.

**Mr McQuillan:**

Simon touched on questions I had about the estimated number of people and the estimated cost.

Is the Department just writing a blank cheque? A figure cannot be put on how many people have pleural plaques and the estimated cost. To date, how many claimants have there been? How many people have come forward and said that they have the disease and have had it confirmed by a doctor?

**Mr Paulin:**

We do not have figures on that; we do not know. We have asked for indications from those who represent individuals and those who represent insurance companies, but there has been a reluctance to provide us with that information.

**Mr McQuillan:**

Why do you think that is?

**Mrs McPolin:**

We also asked the courts. The Scots were able to access court records and to know how many cases were in the pipeline. Unfortunately, we could not drill down into our system and ascertain those figures.

**Mr McQuillan:**

Is it the case that there is reluctance to provide them, or is it that nobody has any such figures?

**Mr Paulin:**

There may be reluctance. It may be that solicitors do not classify their cases in a way that enables them to produce information on the number of pleural plaques cases that they have. It may be that they do not have that information. It may be the same with the insurance companies. We just do not know why they have not produced the information. It would have been helpful. Scotland has more information, but it does not have definitive information. There will never be definitive information.

**Mr McQuillan:**

Under the draft Bill, do the employers get off scot-free?

**Mr Paulin:**

If the legislation goes through, employers will have to pay up, through their insurance companies, if they are shown to have been negligent in that respect.

**Mr Girvan:**

It is difficult to work on something when there are no numbers to work to. This could open a floodgate of people going to their doctors to find a condition for which they have no symptoms. They could say that they do not know whether there is anything wrong with them but they just want to have a scan. It could create a problem for the Health Service, never mind anything else. There are people who have the condition, and no one knows what the long-term effects will be.

Negligence is another point that has been brought out. I have a difficulty in determining what that is because, in a lot of cases, people did not realise that there was anything wrong with working with asbestos. I know that because I come from Ballyclare, which had an asbestos factory that produced asbestos sheeting. Guys worked there without masks and were unaware that there was such a condition as asbestosis, never mind anything else that could be associated with it. There was a total ignorance of the danger back then. The floodgates could be opened, so we have to be very careful about the way in which we go down this route.

**Mrs McPolin:**

I will pick up on a point that Mr McQuillan made as well, which is an important point to make about the legislation. There is a misunderstanding out there that the legislation will automatically confer an entitlement to compensation and that all you have to do to get compensation is to say that you have pleural plaques. That takes us back to what Mr McLaughlin said about the law of negligence; you will still have to go through the steps. All that the legislation does is to impact on one of those steps. As Oswyn mentioned earlier, you still have evidential issues that you have to take to the court, and you have to establish who was responsible, that the exposure was due to negligence, and that there have been certain consequences and effects. So, I want to re-emphasise that people will not move automatically to an entitlement to compensation; there will still be a court process. We do not know how many cases there will be.



**Mr McLaughlin:**

I am sorry if I am going back over the obvious, but, if we establish negligence, is the next consideration whether there was a consequence of that negligence or an injury? Is there a distinction between the two in law? If we accept that there is a consequence — having pleural plaques is a consequence — does the law eliminate that as an injury?

**Mr Paulin:**

Essentially, that is what the House of Lords' decision did when it said that pleural plaques were not an injury.

**Mr McLaughlin:**

Did it accept that they were a consequence?

**Mr Paulin:**

Yes. First, you have to establish that there was negligence and, secondly, that something happened as a result. All those things were established. As I understand it, it was agreed in the Johnston case that the pleural plaques were due to asbestos and that that was due to the employer. However, the court said that the pleural plaques did not constitute an injury or damage. All that the legislation is doing is reversing that narrow part of the decision and saying that pleural plaques do constitute damage. It is proposed that the legislature will say that pleural plaques, in our view, constitute damage and injury and, therefore, are grounds for compensation. As Laura said, you still have to go through the process of establishing the duty of care, the failure in carrying out that duty and the injury as a result. The only thing that has changed is that that injury is now considered to be damage, rather than “not damage” as the House of Lords decided.

**Mrs McPolin:**

As Oswyn said, once you have established the constituent elements of negligence, you move on to the assessment of damages process, which involves looking at the impact on the individual and assessing and quantifying it in monetary terms.

**Ms Purvis:**

I welcome the draft Bill, given the lobbying that I did on behalf of many of my East Belfast

constituents who worked in Harland and Wolff and Shorts. I am delighted to see the draft Bill getting to this point.

There was a challenge to Scottish law by the insurers under article 1 and article 6 — the right to a fair trial — of the European Convention on Human Rights. In the reinstatement of liability, which is what the law does, what were the findings of the European court? Was it that, just because negligence was re-established, the insurers still had a right to a fair trial because of the damages process and the case having to be proven?

**Mr Paulin:**

First, this was a decision of the Scottish court; it has not reached Europe. I do not know whether it will ultimately go to Europe. If the insurers succeed, it will not go to Europe. If they do not succeed, it is their decision as to whether they want to take it to Europe. As I understand it, the point about article 6 was that the courts have pronounced on this, and Parliament is changing it, and that is not the way in which these things should be dealt with; a court should decide on rights and liabilities. That may be an oversimplification.

**Mrs McPolin:**

I think that what the insurance companies were arguing is the view that I mentioned earlier — that changing the law automatically removes any kind of process and forces the court to decide in a particular way. That is not necessarily the case, because there are a number of factors that the court has to decide, albeit that this is one constituent element that is being provided for. Under the legislation, there will still be a process. That was the basis on which that argument was not sustained.

**Ms Purvis:**

I take your point about the perception of fairness in the justice system in that, up until 2007, people were able to challenge and to make claims for compensation but the Johnston case overturned that. This legislation will reinstate people's right to pursue those claims again, even though it does not automatically mean that those claims will be successful.

I was interested to note that most of the consultation responses came from insurers rather than

employers.

**Mrs McPolin:**

I think that that was because the supporters of the draft Bill thought that they were heading where they wanted to go and were content. However, one plaintiff law firm wrote in, and there were two responses from individual members of the public.

**Mr Paulin:**

Ms Purvis, you said that employers were not responding, but the Confederation of British Industry (CBI) responded.

**Ms Purvis:**

Yes, but it is only one of a multitude of employers.

You said earlier that employers would have been insured. Therefore, it would have been the insurers that paid compensation. Given the outcome of the Johnston case, would those employers continue to be insured for fear of the risk of being sued for negligence?

**Mr Paulin:**

I am not familiar with employer liability insurance, but my impression is that employers would insure for all risks, not simply certain risks. Presumably, there is an effect if a liability, which was a major liability for a particular company, disappears. One would assume that that company's insurance is reduced and that, when the liability is reinstated, the insurance premiums are increased. I am afraid that I know very little about the insurance industry.

**Ms Purvis:**

The CBI makes a claim and acknowledges that having pleural plaques increases the risk of developing other asbestos-related diseases. It says:

“If the claimant then proceeds to settle their claim and subsequently develops mesothelioma, this would result in a gross under-compensation.”

Would an individual with pleural plaques, who is compensated for that condition, be precluded

from making a further claim if he or she develops mesothelioma?

**Mrs McPolin:**

It depends on the basis on which they settled their claim. Most lawyers would be sensible enough — they are familiar with the subject and know that there is a possibility of other diseases arising from asbestos exposure — to build that into the settlement. It is highly unlikely that it would be a full and final settlement. There would be an understanding that the settlement can take account of the fact that further issues may arise. That means that the potential for further disease has to be provided for in the compensation, which is where the industry is saying that someone is overcompensated if he or she does not go on to develop that disease, or allowance has to be made for the fact that the issue can be revisited and it is a provisional award.

**Mr McKay:**

My questions relate primarily to the consequences of implementing the legislation, although, obviously, I will not get too many answers. How many claims came forward prior to the 2007 decision by the House of Lords? Do we have any figures for that from the Health Department?

**Mrs McPolin:**

The Health Department does not keep those figures, because there is no requirement on the NHS to record incidences of the condition. The only body that would be able to give a good indication is, presumably, the insurance industry, because it settled claims prior to 2007.

**Mr McKay:**

Has it responded at all?

**Mrs McPolin:**

It has responded, but we have not got any detailed figures for how much was being paid out prior to 2007 and, therefore, if reinstated, the amount likely to be paid out thereafter.

**Mr McKay:**

If the Committee is to go ahead, and I am absolutely sympathetic to those affected, we need to have as full a picture as possible. It is unfortunate that so many people are not coming forward

with information so that we can understand where the process will lead to.

The European Union was referred to. What has the experience been in the United States and Australia? I noticed that the Association of British Insurers (ABI) referred to those countries. Furthermore, how has the South handled cases?

**Mrs McPolin:**

The ABI's argument is that those jurisdictions have done the opposite in that they have legislated to prevent pleural plaques claims. That said, we have not been able to identify any such legislation. The ABI makes references to legislative interventions in other jurisdictions, but, although we have looked, we cannot find anything. Having looked again following the most recent consultation exercise, we found at least one Australian law firm listing pleural plaques as a condition for which compensation could possibly be claimed, but I do not know the detail. As you will appreciate, the United States is made up of individual jurisdictions, so there may be particular provisions that apply in one state but not in another. Although there are references to the fact that other jurisdictions have rejected pleural plaques claims, we have not been given definitive evidence that that is the case.

It is for each jurisdiction to determine what is appropriate for its jurisdiction. There are many areas in which our law differs from that in other places. For instance, France has a very highly developed privacy law, whereas privacy law in the UK and, indeed, Northern Ireland is not as developed, although we are starting to move along those lines with the application of *[Inaudible]*. The answer to your question is that we do not know definitively the position in Australia and the US. The ABI has referred to it, but it has not provided details of the legislative provisions to which it is referring.

**Mr McKay:**

I return to the point that many insurance companies are not providing information on the number of claims. What are we to assume? We should put pressure on those companies to respond and to provide a fuller picture; otherwise, the Committee might assume that it is not a major problem.

**Mr Paulin:**

That is to do with the consultation process, during which we ask people to tell us what they want to tell us. We suggest areas that we are particularly interested in hearing about, and we have done that. However, in the end, it is up to them to respond. We do not have any powers to compel them to do so.

**Mrs McPolin:**

The industry has provided limited figures, but, as I said, they are not comprehensive. Individual insurers that responded did not give figures or an indication of previous claim levels.

**Mr McKay:**

What did they say exactly?

**Mrs McPolin:**

They just made vague references. I think that £10 million was quoted at one stage. Unless we get definitive statements from key players across the board, we cannot make a dent in what we are trying to get at.

**The Chairperson:**

I suggest that we look to Research Services to provide some additional information on that. Perhaps we could look at that when the session is over. Members have quite a lot of unanswered questions, particularly as regards the situation in other countries and so on.

**Dr Farry:**

Would we not be wiser to wait for the outcome of the case in Scotland before proceeding, particularly bearing in mind that the appeal decision will have an impact on whether we can declare this as compliant with the Human Rights Act?

**Mr Paulin:**

One of the problems with that is that court decisions often take quite some time. I am not too familiar with the names of the Scottish courts, but whatever way the Scottish equivalent of our Court of Appeal decides, there is a fair chance that one or other party will then appeal to the

Supreme Court. I do not want to predict what insurance companies might do. However, if the Supreme Court decides in favour of the Scottish Government, it is quite possible that those companies will go to the European Court of Human Rights in Strasbourg, given that most of their case is based on the European Convention on Human Rights.

**Dr Farry:**

Is there any reason for us to rush? What will be the consequences of us not proceeding hastily?

**Mr Paulin:**

It is up to the Ministers. However, quite elderly people write to MLAs stating that they do not have very long to live and that their claim has been stopped because of the decision of the House of Lords. Nearly three years has elapsed since that decision, and they ask what Ministers are doing about it. That puts pressure on Departments and Ministers to respond.

**Dr Farry:**

I turn then to the wider issue of the legislation's purpose. Does the Department accept that there is not a damage or injury that is caused by pleural plaques?

**Mr Paulin:**

That takes us into the definition of damage or injury.

**Dr Farry:**

Definition is at the heart of legislation.

**Mr Paulin:**

People do not need to be experts to say that something has happened to their lungs, that they are different from what they were and that it is due to asbestos, which, in turn, is due to their employer. The question is not really whether there is damage or injury; it is whether employers should compensate people for the growths in their lungs that are without symptoms. There are only two possible answers to that question — yes or no — and one could fall on the side of either.

**Dr Farry:**

What you are saying then is that there is no damage or injury but that the intrusion is

compensational.

**Mrs McPolin:**

What we are saying is that the legislation will provide that it constitutes damage in legal terms.

**Dr Farry:**

Does it constitute damage or injury in medical terms?

**Mrs McPolin:**

I do not think that the medical profession really talks in terms of damage or injury. It talks in terms of a condition and then managing that condition. We have not had any discussion as to whether it constitutes damage or injury in medical terms. In their replies, the medical experts emphasise that it is, by and large, symptomless.

**Dr Farry:**

What do you mean by the term “by and large symptomless”? That is a very loose term.

**Mrs McPolin:**

The House of Lords itself accepted that, on occasion, there may be people with the condition who suffer physical symptoms. However, the House of Lords said that, by and large — that phrase is used in its judgement — it is symptomless. For the most part, it is symptomless.

**Dr Farry:**

Accepting the “by and large” aspect, what are the few exceptions when there are symptoms? I have not seen any medical evidence that suggests that there is a symptom, but you suggest that there is in excepted cases.

**Mrs McPolin:**

I am not suggesting that. I am saying that the House of Lords accepted the possibility that there may be cases out there that have symptoms but that the medical evidence agreed by the parties and accepted by the House of Lords was that, by and large, it is a symptomless condition. That is not my statement; that is the medical evidence.



**Dr Farry:**

In essence, it is accepted that this does not cause harm to people. However, what is being caused is a sense of anxiety, in that there may be problems with asbestosis, but that that, in itself, does not constitute harm; it constitutes anxiety.

**Mrs McPolin:**

There are differing legal views on what should constitute harm. It is important to focus on the legal argument, which is what should constitute harm or damage for the purpose of the law. There is a difference even in the courts, because, at the Court of Appeal, Lady Justice Smith was of the view that it did constitute harm. If I were to get a scar on my arm, the court would not question that that was damage and that I would be entitled to compensation. In the case of pleural plaques, it is scar tissue due to the body dealing with asbestos fibres. It is hidden from view, and the court determined that it did not constitute damage, but Lady Justice Smith determined that it did. It is possible to have differing views from a legal perspective. However, the legislation will say that for the purposes of the law pleural plaques constitute actionable damage.

**Dr Farry:**

That opens the gates for compensation. If a court is going to assess the level of compensation for someone, on what will that compensation be based?

**Mr Paulin:**

The court will look to how it assessed it previously. There will not be a high level of damages. That is fairly clear.

**Dr Farry:**

Would it be fairly notional?

**Mr Paulin:**

I would not say that it would be notional, but it will not be a huge amount for individual claims. The Judicial Studies Board has developed a booklet setting out the level of damages for various injuries; so, no doubt, they will look at that again.

**Dr Farry:**

As regards risk, am I right in thinking that the presence of pleural plaques does not enhance the risk of asbestosis, but that its presence is an indicator that the person may be at risk of developing asbestosis?

**Mrs McPolin:**

You are going into the medical side of things. Dr Shepherd says that pleural plaques:

“are simply a marker of previous asbestos exposure and, therefore, are a marker of a small degree of risk of possibly developing asbestos-related disease in the future.”

Therefore it is a marker. One cannot measure exposure in a vacuum, but in this case there is clear evidence of exposure because the body has reacted to it.

**Dr Farry:**

I appreciate that people are being lobbied on this issue by constituents; but there is another way of looking at it. Attention to the issue, counter-productively, can actually enhance people’s sense of anxiety that they are going to get asbestosis or that they are going to suffer from ill health, when, in practice, the medical evidence says that this is only a marker of that potential and that the risk is quite small.

**Mrs McPolin:**

That is what the insurance industry and some medical experts have said. Their concern is that if the condition is reinstated as being compensatable, people’s level of anxiety will be exacerbated. However, that assumes that if people do not have a claim in law, they should not worry, which is not necessarily the case. Most people are so afraid of asbestosis that, as soon as the term is mentioned, they have a very understandable and real fear of what is ahead of them. Because there is such long-tail development, people look many years into the future, and they may worry about every little symptom that they have and whether it is an indication of a deterioration in their condition.

**Dr Farry:**

If people have those symptoms at the minute, there is no cause for worry unless we start building up those fears.

**Mrs McPolin:**

You are linking the process of worrying to evidence of some kind of disabling factor, and I do not think that that is a fair linkage.

**Mr Paulin:**

If people have no symptoms and do not know that they have pleural plaques, they do not worry, but those who have no symptoms and know that they have pleural plaques may well worry.

**Dr Farry:**

How would people know that they have pleural plaques?

**Mr Paulin:**

They would know because they would have had a chest x-ray.

**Mrs McPolin:**

They would have had a chest x-ray incidentally for other medical reasons.

**Mr Paulin:**

Some people will worry about a condition for which they can get compensation. When they get compensation, the worry goes. That is well recognised in the area of nervous shock, for example. One contributing factor to the ending of psychiatric conditions after some traumatic incident is the closure of the claim that arises from it.

**Dr Farry:**

Finally, from a legal perspective, is this a fundamental change to the basis of tort law?

**Mrs McPolin:**

No. The insurance industry's argument is that the draft Bill distorts fundamental principles.

However, it is more important to look at it as an acknowledgement of the fundamental principles of tort as enunciated and applied. Therefore, the draft Bill nestles, as it were, in overall tort law; it does not introduce any new thing or concept. As I said, there still has to be constituent elements in order to establish negligence.

**Mr O'Loan:**

Of course, there is natural sympathy for people who suffer from asbestos-related diseases and, by connection, those who have pleural plaques. If the draft Bill is to go through, it will be because of that natural feeling and, as has been mentioned, what might be described as anger towards companies whose work situations are now known to have been shocking. Whether they were known to be shocking at the time is another question.

If the draft Bill goes through, it will be because that sympathy overwhelms more rational discussion. We are being asked to say that the law relating to compensation for injury due to negligence is flawed in this particular regard. We would be saying that although the law might be perfectly good in most, or perhaps all, other cases, and be based on sound principles, it is not well-founded with regard to pleural plaques. That is a stern test to put before the draft Bill. I will put one argument in the context of questioning; in addition to the sympathy argument, which, I believe, is the dominant one. I should add that the fact that the condition was compensatable up to 2007 weighs on our minds.

Page 5 of the consultation paper states that pleural plaques:

“do not cause, or develop into, an asbestos-related disease...although they may signify an increased lifetime risk for developing such a disease.”

That is, perhaps, the first time that I have seen that phrase used in that context. I remember that it was in previous documentation that we have seen. I take that to mean that if there are 1,000 people with pleural plaques and another 1,000 people who are identical but have no pleural plaques, one might, in the long run, expect more people in the first group to develop asbestos-related diseases.

I suppose that if I were suffering from pleural plaques, that would cause me some concern. That makes me think it might be compensable. Of course, the House of Lords were aware of that

and did not regard it as an injury that merited compensation. At least, it raises a possibility that if the law, which, at present, is defined by the House of Lords, is applied as it stands, that might create an injustice. How do you react to that?

**Mr Paulin:**

I suppose that the rationale behind the draft Bill is the feeling that the House of Lords decision has resulted in an injustice. That is why proposals for change have been put forward.

**Mr O'Loan:**

Is there any other area where special law has been found to be necessary with regard to compensation for injury on grounds of negligence?

**Mrs McPolin:**

It depends what you mean by special law.

**Mr O'Loan:**

Let me be very clear. There is a perfectly well-formed, or completely formed, law around compensation for injury due to negligence. The draft Bill is saying that that law is inadequate in this instance. Are there any other instances in which that is the case?

**Mr Paulin:**

To say that there is a complete and well-formed law on compensation for personal injuries as a result of negligence is to be in a fairly difficult position. Most of the law in this area is the result of rulings by courts. It develops and changes; and this case, which went to the House of Lords, is an example of that. There is not a code of compensation for what are and are not classed as injuries at work. From time to time, there will be changes in legislation. For instance, there has been quite a lot of legislation on vaccine-related injuries. Laura is more of an expert on that area than me.

**Mrs McPolin:**

What Oswyn said was the point that I was going to make. The law of negligence is a common-law concept. It is not as though there is a statute on the law of negligence showing its constituent elements; it has been developed by the courts. Oswyn made the valid point that the courts

intervene periodically and adjust the law.

**Mr O’Loan:**

As regards quantifying the consequences of the Bill, the CBI paper states that between 36,000 and 90,000 people a year may be developing plaques. When this was compensated for in the past, the level of compensation was not high; a figure of £5,000 was mentioned for intermediate cases that were in progress when the judgement was made. If the CBI’s lower estimate of 36,000 people were to receive compensation payments of £5,000, the total payment due would be £180 million. If the CBI’s estimate is accurate, we are talking about serious amounts of money. I suppose that you are going to tell me that you do not know where the CBI got its figures from and whether they are accurate.

**Mrs McPolin:**

There have been some studies to project figures. They look at the incidences of plural plaques, as far as those are known. When a consultation exercise was being carried out in England and Wales, research was commissioned, and no definitive figures were given from the industrial injuries compensation scheme or the Chief Medical Officer for England and Wales. I suppose that the answer is to pick a figure and work accordingly.

**Mr O’Loan:**

Stephen mentioned the situation in Scotland. If what became a sequence of appeals in Scotland were eventually to result in the Scottish legislation’s being found to be in breach of the European Convention on Human Rights, what would be the consequence for our new Act?

**Mr Paulin:**

That would depend on the basis on which the legislation was challenged. The likelihood is that if the legislation in Scotland were found to be in breach of the European Convention on Human Rights, the legislation here would similarly be found to be in breach, unless our courts were to take a different view. Our courts are not bound by the decisions of the Scottish courts, but such a finding would be highly persuasive. First, our courts could say, having looked at the legislation, that they did not think that the Scottish courts were correct. Secondly, we could present different arguments to those presented in Scotland, and that might lead to a different outcome.

Undoubtedly, a finding against legislation in Scotland would have a major impact and bring concerns here.

**Mrs McPolin:**

If the medical evidence were to change again, we would be back to square one. The fact that the medical evidence changed was a factor in Johnston case, and medical experts accept that, in due course, they may determine again that there is a connecting factor between plural plaques and other asbestos-related diseases.

**Mr Frew:**

I am aware of the time. It seems to me that we are asking questions, but, through no fault of the witnesses, we are not getting answers because they are not there, because we cannot obtain them or because they cannot be answered. It strikes me that we are trying to consider something on which we do not have much substance.

We have a responsibility for businesses. There are a lot of small businesses, especially in the construction industry, and subcontractors to heavy industry have already been mentioned, who would not have been educated or would not have known what they were sending their employees into at any given time. That negligence must be factored in somewhere. We must be careful about what we do with the current business community and the effect that it could have on their insurance premiums and on their approach to forward planning.

On the flip side, there would be real anxiety and stress on anyone going for a check-up for one condition and being told that they had this condition. It would give the person the realisation and the confirmation that they have been exposed to asbestos. They might have suspected it, and many people in the construction have that concern. However, to be told by their GP or consultant that they have this condition would have a horrific affect on people. I am not sure whether throwing money at the condition — a small amount of money for each individual — will help them. We should be going along the lines of an enhanced health programme to monitor those at risk. To me, there is a real fear and evidence that being exposed to asbestos, and having that exposure realised and confirmed, could lead to a serious disease in 20 or 30 years. It is hard to measure the stress and anxiety that that would cause. Has legislation been brought forward that

has had such a vagueness of background and unanswered questions?

**Mr McNarry:**

All the time. *[Laughter.]*

**Mrs McPolin:**

There are two aspects to that question: one can sometimes think that one knows what the legislation will do, and sometimes when it is in place it does a completely different thing, or the courts may determine that it does a completely different thing. Very often, that would be the case.

**Mr McLaughlin:**

That sounds like a politician's answer.

**Mrs McPolin:**

In fairness, there have been instances where the Government have legislated in this area; for example, the Compensation Act 2006. In that case, the House of Lords had ruled on the concept of joint, and several, liability and had determined that one had to go after individual employers and name people. Obviously, that created great difficulties for plaintiffs, and the legislature remedied the situation. It was anybody's guess as to how that was quantified, what the knock-on effect would be, or how it would pan out. Very few pieces of legislation have a definitive understanding of the full ramifications.

**Mr Paulin:**

In a sense, it is like asking whether one can predict the future. Even economic forecasters do not seem to be able to see a major recession coming. We do not know what will happen in the future.

**Mr Frew:**

My point is that legislation needs to be evidence based. We seem to have such a lack of evidence one way or the other in this regard.



**The Chairperson:**

Mitchel and David want to ask questions. I am conscious that we are running almost an hour late. Will you make your comments brief?

**Mr McLaughlin:**

I will make it brief. I am thinking about the possible consequences of the House of Lords' position. Exposure to asbestos causes certain and inevitable death from a number of conditions that can develop. That may happen after people have had a change of career later in life. Very often, the issue of compensation and establishing culpability and negligence falls to the next of kin, and it can be a very distressing and protracted process. Is one of the consequences, intended or otherwise, of the House of Lords' decision on the Johnston case that people, who in later life could develop life-threatening asbestos-related conditions, are being denied the opportunity to identify the source of the contamination or the contact with asbestos, because that line of inquiry is closed off?

**Mr Paulin:**

What you mean is that people would bring a case earlier if they have pleural plaques, whereas if time passes and they develop a more serious illness and have done nothing about it, they will not know who is responsible?

**Mr McLaughlin:**

Yes, but I am also thinking of the next of kin of a victim of an asbestos-related illness which causes death. Culpability would have been established. Therefore one could move straight to the consequences of the exposure. In circumstances in which no record was established prior to the individual falling ill, the family and the individual must cope with the consequences of certain death. The victim may have been given a prognosis and have no time to pursue the issue of compensation. That would come later, when the person has died and the widow or whoever has then to pursue it.

That should be built in to our consideration of the Bill. An early establishment of culpability would help victims of asbestos-related death.

**Mrs McPolin:**

That point was made by supporters of legislative change. As Oswyn said, they stressed the importance of trying to identify it at an early stage, establish that negligent exposure has taken place and establish who is responsible for it. Mesothelioma is fatal, and very often the time between diagnosis and death is very truncated. So it does assist. However, on the general issue of tracing employers, the UK Government is working closely with the insurance industry to try to establish a system, a database, to assist with establishing the employers' liability tracing office. That was the intention previously. Whether it will proceed in the current economic climate is anyone's guess, but that was recognised as an issue to be addressed.

**Mr McLaughlin:**

Yes, but the information, the record and the establishment of negligence are issues that can be more effectively pursued by the individual. Someone who dies may have established a second family or changed career. The affected individual is the custodian of that very personal specific information; for instance, who they worked for, when they worked, et cetera. However, that information does not get passed on after a later relationship or a second family, and then the disease emerges.

**Mrs McPolin:**

You are absolutely right, and it matters with respect to witnesses. The person will know who their work colleagues were or where he or she worked. The person will be able to advise who else should be contacted for the purpose of comparison. It has a bearing from the perspective of evidence. I agree entirely.

**Mr McNarry:**

Earlier, Paul Frew effectively drew attention to the stresses and strains that are bound to affect sufferers. Oswyn, prior to that you said, and I think I wrote it down correctly, that when people got compensation, the worry goes. Where did you pull that from? Are you saying that compensation is a cure?

**Mr Paulin:**

No, I am not saying that. Perhaps I did not put it as definitely as I might have done.

**Mr McNarry:**

Then I give you the opportunity to correct that.

**Mr Paulin:**

When a patient suffers from a psychological illness for which compensation is available, the payment of compensation is one factor in bringing that psychological illness to an end. If compensation is outstanding, the psychiatric illness is likely to be prolonged, but once a person receives compensation, that can be a factor in bringing psychological distress to an end.

**Mr McNarry:**

So, it deals purely with psychological stress. To be honest, I do not know whether you are right or wrong or whether £5,000 will end people's worries. The fact is that they were worrying about having the illness. What we are not saying is that compensation prevents treatment.

**Mr Paulin:**

No.

**Mrs McPolin:**

There are two aspects to what Oswyn said. If it is a psychiatric illness, one would feel the same way. If one constantly has to think about something —

**Mr McNarry:**

I do constantly have to think about things — every day. You have no idea what I have to put up with from these boys. *[Laughter.]*

**Mrs McPolin:**

If someone has to go over things in one's mind and deal constantly with solicitors' letters and so on, it is bound to have an impact on their mental well-being. The other aspect is that once a person gets real recognition that a wrong has been done, and feels that that wrong has been at least partially addressed, there will be an impact on their mental health and well-being.

**Mr McNarry:**

I am just trying to establish that compensation, in itself, is not treatment, and that no punitive action will be taken against someone who has received compensation, and that, if they need particular treatment, they will not have to go through any means testing. In other words; it begins and ends at the same time. That is key to what we deliver for victims.

**Mr Paulin:**

As far as I am concerned, it is a side issue. When someone has a condition that is due, in part, to psychological problems, and compensation is available, the payment of compensation helps to bring closure to the psychological problem.

**Mr McNarry:**

I hope that insurance companies are cognisant of that.

**The Chairperson:**

Do you think that responses to the consultation process for the Bill will lead to amendments, or is there outright opposition to or support for the Bill? Are the issues just to do with improving the Bill?

**Mrs McPolin:**

As the Bill deals with such a net issue, I do not envisage any amendments. The crucial issue is whether we proceed with the Bill.

**The Chairperson:**

So, it is a fundamental issue and not just a matter of tinkering with the Bill. Will you forward to the Committee a full account of the consultation responses, because you have only provided a summary? Normally, when we get consultation responses, we get the Department's position, issue by issue.

**Mrs McPolin:**

What you are really asking for is an analysis of the responses.

**The Chairperson:**

Yes, the Department's response —

**Mrs McPolin:**

You are absolutely right. In the limited time available, we were only able to provide a summary, or assessment, of the points that were made.

**The Chairperson:**

Thank you very much. You have been very patient.