

Committee for Finance and Personnel

**Report on the Damages
(Asbestos-Related Conditions) Bill
(NIA 10/10)**

Together with the Minutes of Proceedings of the Committee
relating to the Report, Written Submissions, Memoranda and the Minutes of Evidence

Ordered by The Committee for Finance and Personnel to be printed 16 February 2011
Report: NIA 45/10/11R Committee for Finance and Personnel

Committee Remit, Powers and Membership

Powers

The Committee for Finance and Personnel is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Assembly Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Finance and Personnel and has a role in the initiation of legislation.

The Committee has the power to;

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee Stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on matters brought to the Committee by the Minister of Finance and Personnel.

Membership

The Committee has eleven members, including a Chairperson and Deputy Chairperson, with a quorum of five members. The membership of the Committee during the current mandate has been as follows:

Mr Daithí McKay (Chairperson)¹
Mr David McNarry (Deputy Chairperson)²

Dr Stephen Farry
Mr Paul Frew³

Mr Paul Girvan4
Mr Simon Hamilton
Ms Jennifer McCann
Mr Mitchel McLaughlin
Mr Adrian McQuillan
Mr Declan O'Loan
Ms Dawn Purvis

1 Mr Daithí McKay replaced Ms Jennifer McCann as Chairperson on 19 January 2011, having replaced Mr Fra McCann on the Committee on 13 September 2010. Ms McCann replaced Mr Mitchel McLaughlin as Chairperson on 9 September 2009.

2 Mr David McNarry was appointed Deputy Chairperson on 12 April 2010 having replaced Mr Roy Beggs on the Committee on 29 September 2008.

3 Mr Paul Frew joined the Committee on 13 September 2010; Mr Ian Paisley Jr left the Committee on 21 June 2010 having replaced Mr Mervyn Storey on 30 June 2008.

4 Mr Paul Girvan replaced Mr Jonathan Craig on 13 September 2010; Mr Jonathan Craig had been appointed as a member of the Committee on 13 April 2010. Mr Peter Weir left the Committee on 12 April 2010. Mr Peter Weir had replaced Mr Simon Hamilton as Deputy Chairperson on 4 July 2009. Mr Simon Hamilton replaced Mr Mervyn Storey as Deputy Chairperson on 10 June 2008.

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Report

1. The Damages (Asbestos-Related Conditions) Bill was introduced to the Northern Ireland Assembly on Tuesday 14 December 2010. Following a pre-introductory briefing on 8 December, the Committee for Finance and Personnel agreed that, given the delay in the Bill being brought to the Assembly and the limited time remaining in the current mandate, it would do all in its power to facilitate the Bill's passage through Committee Stage within the nominal timeframe of 30 working days, as set out in Standing Order 33(2). This included an early call for written evidence, and beginning oral evidence sessions prior to formal Committee Stage. At that time, however, members noted that it may be necessary to seek an extension to the Committee Stage to ensure proper scrutiny is afforded to the Bill.

2. At its meeting on 12 January 2011, prior to Second Stage of the Bill on 17 January, the Committee agreed that it would not be feasible to complete the evidence gathering within the required short timeframe and that, in order to afford the Bill full and proper scrutiny, consideration would be given to requesting an extension to the Committee Stage of the Bill. The Committee also agreed, at this stage, to maintain an open position with regard to the principles of the Bill. The Committee Stage of the Bill commenced immediately following Second Stage being agreed by the Assembly.

3. Alongside the written evidence received, following its call for evidence between 12 January and 2 February, the Committee heard oral evidence from the following:

- Legal representatives acting on behalf of clients who have pleural plaques;
- Insurance industry representatives on potential liabilities and human rights issues;
- Legal representatives acting on behalf of insurance industry clients;
- Northern Ireland Human Rights Commission on matters relating to human rights, which had been brought to the Committee's attention.

4. The Committee subsequently considered a number of options on how it might proceed with Committee Stage at its meeting on 2 February 2011. A number of gaps in the evidence base were identified including:

- Expert medical advice on the nature of pleural plaques and any associated physical or psychological harm (from both supporters and opponents of the approach taken in the Bill);
- Information on potential public liabilities relating to Harland and Wolff;
- Legal briefing on the law of tort and negligence, including any potential implications which the Bill might have in this area;
- Representation from the business sector; and
- Personal testimony from persons with pleural plaques.

5. Members therefore agreed to "extend Committee Stage to ensure a full and proper scrutiny of the Bill"; and to invite further evidence from identified key stakeholders. The Committee also agreed to table a Committee Motion for plenary debate, seeking approval from the Assembly to extend the Committee Stage of the Bill until 23 March 2011.

6. The Committee began to receive the further evidence on 9 February 2011, with an oral hearing from medical experts who opposed the approach taken in the Bill.

7. The extension motion was debated in the Assembly on 14 February 2011 and was subsequently negatived. In light of this decision by the Assembly, at its meeting on 16 February 2011, the Committee agreed that it is not in a position to report its opinion on the Bill or on the provisions contained therein, as provided for in Standing Order 33(2). This has not been possible because the evidence received to date is incomplete and there is insufficient time to collect and consider all of the further evidence required to enable the Committee to reach a fully informed position.

8. The Committee will, therefore, not be taking the remaining evidence on this Bill, beyond that which has been scheduled up to 23 February 2011^[1]. However, the written submissions, research papers and Official Reports of oral evidence that the Committee has received to date have been appended to this report for Members' information. Also appended are the Minutes of Proceedings and Memoranda relating to the Committee's deliberations to date.

[1] The Official Reports of the evidence sessions held on 16 February 2011 (public liabilities relating to Harland and Wolff); 23 February 2011 (personal testimony and medical evidence in support of the approach taken in the Bill); and associated papers will be made available on the Committee website: http://archive.niassembly.gov.uk/finance/2007mandate/finhome_07.htm

Appendix 1

Minutes of Proceedings

Wednesday, 16 September 2009 Room 152, Parliament Buildings

Present: Jennifer McCann MLA (Chairperson)
Peter Weir MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Simon Hamilton MLA
Fra McCann MLA
Mitchel McLaughlin MLA
David McNarry MLA
Adrian McQuillan MLA
Declan O'Loan MLA
Ian Paisley Jr MLA
Dawn Purvis MLA

In Attendance: Shane McAteer (Assembly Clerk)
Kathy O'Hanlon (Assistant Assembly Clerk)
Karen Jardine (Assistant Assembly Clerk)
David McKee (Clerical Supervisor)

Apologies: None

10. Correspondence received up to 9 September 2009

The Committee noted the following correspondence:

- Association of British Insurers: Pleural Plaques in NI;

Agreed: that the correspondence will be forwarded to DFP requesting the Department's view on the issues raised and an update on the current position.

**Jennifer McCann, Chairperson,
Committee for Finance and Personnel.
23 September 2009**

[Extract]

Wednesday, 7 October 2009 Room 152, Parliament Buildings

Present: Mr Peter Weir (Deputy Chairperson)

Dr Stephen Farry MLA

Simon Hamilton MLA

Fra McCann MLA

Mitchel McLaughlin MLA

David McNarry MLA

Adrian McQuillan MLA

Declan O'Loan MLA

Ian Paisley Jr MLA

Dawn Purvis MLA

In Attendance: Shane McAteer (Assembly Clerk)

Kathy O'Hanlon (Assistant Assembly Clerk)

Karen Jardine (Assistant Assembly Clerk)

David McKee (Clerical Supervisor)

Kevin Marks (Clerical Officer)

Apologies: Jennifer McCann MLA (Chairperson)

5. Consultation Responses on Pleural Plaques: Evidence from DFP

The Committee took evidence from Oswyn Paulin, Director, Departmental Solicitors Office and Laura McPolin, Legal Policy Advisor. The session was recorded by Hansard.

Agreed: that the DFP officials will provide information as requested by the Committee during the evidence session.

11.24am Mr Hamilton left the meeting.

11.25am Mr McQuillan left the meeting.

11.38am Mr McCann left the meeting.

11.40am Mr McCann returned to the meeting.

11.47am Mr Hamilton returned to the meeting.

11.55am Mr Paisley Jr joined the meeting.

12.05pm Mr McQuillan returned to the meeting.

12.09pm Mr O'Loan left the meeting.

The Committee discussed its position with regard to DFP's proposal to bring forward legislation to facilitate civil claims for symptomless pleural plaques, and the recommendation not to introduce a register of those with pleural plaques.

Agreed: to notify DFP that, on a majority basis, the Committee is supportive of the proposal for legislation, subject to the Department taking account of developments in Scotland on this issue. However, DFP will also be advised that the Committee sees merit in the introduction of a register of those with pleural plaques.

**Peter Weir, Deputy Chairperson
Committee for Finance and Personnel
14 October 2009**

[Extract]

**Wednesday, 4 November 2009
Room 135, Parliament Buildings**

Present: Jennifer McCann MLA (Chairperson)
Peter Weir MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Simon Hamilton MLA
Fra McCann MLA
Mitchel McLaughlin MLA
David McNarry MLA
Adrian McQuillan MLA
Declan O'Loan MLA
Ian Paisley Jr MLA
Dawn Purvis MLA

In Attendance: Shane McAteer (Assembly Clerk)
Karen Jardine (Assistant Assembly Clerk)
Kathy O'Hanlon (Assistant Assembly Clerk)
David McKee (Clerical Supervisor)
Kevin Marks (Clerical Officer)

10.09am The meeting commenced in open session.

9. Correspondence

The Committee noted the following correspondence:

- DFP: follow up to evidence session on Pleural Plaques on 7 October 2009.
- Association of British Insurers: Response to the evidence session on Pleural Plaques on 7 October 2009.

Jennifer McCann
Chairperson, Committee for Finance and Personnel
11 November 2009

[Extract]

Wednesday, 9 December 2009
Room 135, Parliament Buildings

Present: Jennifer McCann MLA (Chairperson)
Dr Stephen Farry MLA
Simon Hamilton MLA
Mitchel McLaughlin MLA
Declan O'Loan MLA
Ian Paisley Jr MLA
Dawn Purvis MLA

In Attendance: Shane McAteer (Assembly Clerk)
Karen Jardine (Assistant Assembly Clerk)
Kathy O'Hanlon (Assistant Assembly Clerk)
David McKee (Clerical Supervisor)
Kevin Marks (Clerical Officer)

Apologies: Peter Weir MLA (Deputy Chairperson)
David McNarry MLA
Fra McCann MLA

10.10am The meeting commenced in open session.

8. Committee Work Programme

Members considered the current draft of the Committee work programme until February 2010 and its key priorities until summer recess 2010.

Agreed: that DFP officials will be requested to provide an update on Pleural Plaques following developments in other jurisdictions.

Jennifer McCann
Chairperson, Committee for Finance and Personnel
6 January 2010

[Extract]

Wednesday, 8 September 2010
Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA

Mr Simon Hamilton MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

Apologies: Mr Fra McCann MLA

10.05am The meeting commenced in open session.

8. Correspondence

The Committee considered the following correspondence:

- DFP: Consultation on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010;
- DFP: Damages (Asbestos-Related Conditions) Bill Timetable;

Agreed: to request the attendance of Assembly Research during the briefing at next week's meeting.

Jennifer McCann, Chairperson Committee for Finance and Personnel 15 September 2010

[Extract]

Wednesday, 15 September 2010 Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)

Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

10.05am The meeting commenced in open session.

4. Outcome on Consultation on Draft Damages (Asbestos–Related Conditions) Bill (NI) 2010 - DFP Evidence Session

The Committee took evidence from the following DFP officials: Oswyn Paulin, Head of Departmental Solicitors Office; and Laura McPolin, Legal Policy Advisor, Departmental Solicitors Office. The evidence session was recorded by Hansard.

Agreed: that the DFP officials will provide the full consultation responses to the Committee, together with a report analysing the issues raised by respondents and setting out the Department's position on each issue.

Agreed: to commission Assembly Research to investigate the number and costs of previous and potential claims; and to examine whether pleural plaques is a compensatable condition in other jurisdictions.

Agreed: the Secretariat will prepare a list of issues for Committee consideration and subsequent DFP response in advance of the formal introduction of the Bill.

Jennifer McCann, Chairperson Committee for Finance and Personnel 29 September 2010

[Extract]

Wednesday, 20 October 2010 Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithi McKay MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

10.05am The meeting commenced in open session.

4. Pleural Plaques: Numbers, Costs and International Approaches – Research Briefing

The Committee received a briefing from Assembly Research on the Research paper, Pleural Plaques: numbers, costs, and international approaches.

10.17am Mr McQuillan joined the meeting.

Agreed: to forward the issues identified to DFP for written response in advance of the pre-introductory briefing on the Draft Damages (Asbestos-Related Conditions) Bill, which is scheduled for 10 November.

Jennifer McCann, Chairperson Committee for Finance and Personnel 3 November 2010

[Extract]

Wednesday, 3 November 2010 Senate Chamber, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

10.10am The meeting commenced in open session.

7. Committee Work Programme

Damages (Asbestos-Related Conditions) Bill

The Committee noted correspondence from DFP requesting a postponement to the pre-introductory briefing of the Damages (Asbestos-Related Conditions) Bill.

Agreed: to write to DFP expressing concern over the continued delay in bringing the Bill to the Assembly and the difficulty this creates in terms of ensuring that the Bill completes its passage through the House before dissolution; and to write to the key stakeholders advising them of the delay.

**Jennifer McCann, Chairperson
Committee for Finance and Personnel
10 November 2010**

[Extract]

**Wednesday, 10 November 2010
Room 30, Parliament Buildings**

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

10.07am The meeting commenced in open session.

9. Correspondence

The Committee agreed to consider the correspondence requiring decisions at its next meeting on 17 November. The following items of correspondence were noted:

- DFP: Draft Damages (Asbestos-Related Conditions) Bill (NI) 2010

**Jennifer McCann, Chairperson
Committee for Finance and Personnel
17 November 2010**

[Extract]

**Wednesday, 24 November 2010
Room 30, Parliament Buildings**

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA

Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

Apologies:

10.07am The meeting commenced in open session.

10. Committee Work Programme

Minister of Finance and Personnel: Damages (Asbestos-Related Conditions) Bill (NI) 2010

The Committee noted that a pre-introductory briefing will be provided by DFP officials on 1 December, subject to Executive agreement regarding the introduction of the Bill.

David McNarry, Deputy Chairperson Committee for Finance and Personnel 1 December 2010

[Extract]

Wednesday, 8 December 2010 Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

Mr Gareth Brown (Bursary Student)
Mr Colin Pidgeon (Assembly Research)

Apologies: Mr Simon Hamilton MLA
Mr Adrian McQuillan MLA
Ms Dawn Purvis MLA

10.22am The meeting commenced in open session.

5. Damages (Asbestos-Related Conditions) Bill – Pre-Introductory briefing

The Committee received a briefing from the following DFP officials: Oswyn Paulin, Departmental Solicitor's Office and Neil Lambe, Departmental Solicitor's Office.

11.16am Mr McNarry left the meeting.

11.47am Mr McKay left the meeting.

11.53am Mr O'Loan joined the meeting.

Agreed: the Committee will do all in its power to facilitate the Bill's passage through Committee Stage within the timeframe set out in Standing Order 33(2); however, members noted that it may be necessary to seek an extension to the Committee Stage to ensure proper scrutiny is afforded to the Bill.

Agreed: to issue a public call for evidence following the First Stage of the Bill and to actively inform key stakeholders of the opportunity to provide evidence.

Agreed: to seek clarification on the scope of the powers of Assembly statutory committees in their scrutiny role.

Jennifer McCann, Chairperson
Committee for Finance and Personnel
15 December 2010

[Extract]

Wednesday, 12 January 2011

Senate Chamber, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Daithi McKay MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA
Mr Mitchel McLaughlin MLA
Mr Simon Hamilton MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)
Mr Colin Pidgeon (Assembly Research)

10.07am The meeting commenced in open session.

3. Matters Arising

Damages (Asbestos-Related Conditions) Bill

Agreed: arising from previous DFP evidence on the Bill on 8 December 2010, to write to the Minister requesting that he share any advice which he has received from the Attorney General in respect of the Bill with the Committee and the Assembly. In making this request, the Committee will also highlight a recent precedent in which another Minister outlined in Assembly plenary the Attorney General's advice on a Bill.

10.10am Ms Purvis joined the meeting.

6. Damages (Asbestos-Related Conditions) Bill: Evidence Session – Legal Panel

The Committee considered a Secretariat paper on progress made in advance of the Second Stage of the Bill.

Members noted that the Committee had previously raised concerns at the delay by DFP in bringing the Bill to the Assembly. It was also noted that all the remaining written and oral evidence relating to the Bill would need to be received during week commencing 17 January, in order for Committee Stage to be completed in time to ensure that the Bill stands a reasonable chance of passing all subsequent stages before the Assembly's dissolution.

Agreed: that it would not be feasible to complete the evidence gathering in such a short timeframe and that, in order to afford the Bill full and proper scrutiny, the Committee will consider requesting an extension to the Committee Stage of the Bill.

Agreed: the Committee will maintain an open position with regard to the principles of the Bill at this time.

The Committee took evidence from Oonagh McClure, Thompson & McClure Solicitors and Martin Hanna, Francis Hanna & Co. Solicitors.

1.25pm Mr McKay joined the meeting.

1.41pm Mr McNarry returned to the meeting.

Agreed: to seek a written response from Thompson & McClure Solicitors with regard to setting fixed tariffs to compensate those with symptomless pleural plaques.

1.45pm The meeting was suspended.

**Jennifer McCann, Chairperson
Committee for Finance and Personnel
19 January 2011**

[Extract]

**Wednesday, 19 January 2011
Senate Chamber, Parliament Buildings**

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithi McKay MLA
Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

10.18am The meeting commenced in open session.

12.47pm The meeting resumed with Ms McCann, Dr Farry, Mr Frew, Mr Hamilton and Mr O'Loan present.

8. Damages (Asbestos-Related Conditions) Bill: Evidence Session

The Committee was due to take evidence from Justice for Asbestos. However following further communication the group has advised that they will not be in a position to provide written or oral evidence at this time.

9. Damages (Asbestos-Related Conditions) Bill: Evidence Session

The Committee took evidence from Mr Nick Starling, Director of General Insurance and Health, Association of British Insurers; Mr Dominic Clayden, Director of Technical Claims, Aviva; Mr Neal Brown, Commercial Operations Manager, Royal Sun Alliance; and Mr Stephen Boyles, Business Manager, Zurich (NI). The evidence session was recorded by Hansard.

1.00pm Mr O'Loan left the meeting.

1.02pm Mr O'Loan returned to the meeting.

1.05pm Mr McKay returned to the meeting.

1.06pm Mr McLaughlin returned to the meeting.

1.11pm Mr Frew left the meeting.

1.12pm Ms Purvis returned to the meeting.

1.27pm Dr Farry left the meeting.

1.30pm Mr McKay left the meeting.

Agreed: that the witnesses will provide further information as requested by the Committee.

10. Damages (Asbestos-Related Conditions) Bill: Evidence Session

The Committee took evidence from Ms Amanda Wylie, Partner, Kennedys Law. The evidence session was recorded by Hansard.

Agreed: that the witness will provide further information as requested by the Committee.

Daithí McKay, Chairperson Committee for Finance and Personnel 26 January 2011

[Extract]

Wednesday, 26 January 2011 Room 30, Parliament Buildings

Present: Mr Daithí McKay MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

Apologies: Ms Jennifer McCann MLA
Ms Dawn Purvis MLA

10.10am The meeting commenced in open session.

9. Damages (Asbestos-Related Conditions) Bill: Consideration of Issues Outstanding

The Committee considered a number of issues currently outstanding in relation to the Damages (Asbestos-Related Conditions) Bill.

Agreed: that a paper on the options for the way forward will be prepared for consideration at next week's meeting.

Agree: that, subject to any decisions taken on the way forward at next week's meeting, the Committee would wish to seek additional evidence, including from the medical community and from people who have pleural plaques.

Daithí McKay, Chairperson
Committee for Finance and Personnel
2 February 2011

[EXTRACT]

Wednesday, 2 February 2011
Room 30, Parliament Buildings

Present: Mr Daithí McKay MLA (Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

Apologies: Ms Jennifer McCann MLA
Mr David McNarry MLA (Deputy Chairperson)
Mr Adrian McQuillan MLA

10.14am The meeting commenced in open session.

10.21am The meeting moved into closed session.

4. Damages (Asbestos-Related Conditions) Bill – Options on the way forward

The Committee considered a secretariat paper outlining options on how the Committee could proceed with the Damages (Asbestos-Related Conditions) Bill given the time constraints.

Members considered the following option:

"That the Committee reports its position within the 30-day statutory period (by 28 February) based on evidence received to date, which might be regarded as incomplete".

Agreed: that members do not wish to proceed with this option.

Mr Girvan proposed the following option:

"That the Committee terminate Committee Stage within the 30-day statutory period and agree a short report explaining that the Committee is unable to complete its work adequately in the time available."

Question put.

The Committee divided: AYES 3; NOES 4; ABSTENTIONS 0

AYES:

Mr Frew, Mr Girvan and Ms Purvis

NOES:

Mr McKay, Mr McLaughlin, Mr O'Loan MLA and Dr Farry

ABSTENTIONS:

None

Question accordingly negatived.

The Chairperson sought further options from members.

Dr Farry proposed the following option:

"That the Committee extend Committee Stage to ensure a full and proper scrutiny of the Bill."

Question put.

The Committee divided: AYES 4; NOS 3; ABSTENTIONS 0

AYES:

Mr McKay, Mr McLaughlin, Mr O'Loan MLA and Dr Farry

NOES:

Mr Frew, Mr Girvan and Ms Purvis

ABSTENTIONS:

None

Agreed: that the Committee proceed with this option and invite further evidence from key stakeholders as identified.

Agreed: to table a Committee motion in the Business Office seeking approval from the Assembly to extend the Committee stage of the Bill until 23 March 2011.

11.00am Dr. Farry left the meeting.

11.00am The meeting reopened.

5. Damages (Asbestos-Related Conditions) Bill - NI Human Rights Commission

The Committee took evidence from the following individuals from the Northern Ireland Human Rights Commission: Professor Monica McWilliams, Chief Commissioner; Mr Ciarán Ó Maoláin, Head of Legal Services, Policy and Research; and Mr Daniel Holder, Policy Worker. The evidence session was recorded by Hansard.

11.07am Dr Farry returned to the meeting.

11.17am Mr Frew left the meeting.

11.26am Mr Girvan left the meeting.

Agreed: to write to the Minister for Finance and Personnel regarding the value of greater consultation with the NI Human Rights Commission at an earlier stage in the legislative process.

Agreed: to publish the written responses received to date, following the Committee's call for evidence, on the Committee web pages.

Daithí McKay, Chairperson Committee for Finance and Personnel 9 February 2011

[EXTRACT]

Wednesday, 9 February 2011 Senate Chamber, Parliament Buildings

Present: Mr Daithí McKay MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

Apologies: Ms Jennifer McCann MLA
Mr Adrian McQuillan MLA

10.10am The meeting commenced in open session.

6. Damages (Asbestos- Related Conditions) Bill

The Committee took evidence from Professor Anthony Seaton, University of Aberdeen and Dr Richard Shepherd, Consultant Respiratory Physician (recently retired from practice at Belfast City Hospital).

Agreed: a draft press release which could be published in the event that the Assembly agrees to extend Committee Stage of the Damages (Asbestos-Related Conditions) Bill on Monday 14 February 2011.

Daithí McKay, Chairperson Committee for Finance and Personnel 16 February 2011

[EXTRACT]

Wednesday, 16 February 2011 Room 29, Parliament Buildings (Unapproved)

Present: Mr Daithí McKay MLA (Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Simon Hamilton MLA
Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

Apologies: Ms Jennifer McCann MLA
Mr Adrian McQuillan MLA

10.50am The meeting commenced in open session.

3. Matters Arising

Damages (Asbestos-Related Conditions Bill)

The Committee considered how it should proceed on this matter in light of the Assembly's decision on 14 February 2011 not to grant an extension to Committee Stage of the Bill, which the Committee had sought in order to ensure that it could undertake a full and proper scrutiny of the Bill. Members also discussed a draft Committee report which outlined: the work that the Committee had undertaken on the Bill since it was introduced to the Assembly; the evidence which remained to be taken; and the reason why the Committee was unable to report on the Bill, or on the provisions contained therein, in the nominal timeframe provided for in Standing Order 33(2), which expires on 28 February 2011.

11.04am Mr O'Loan left the meeting.

11.05am Mr O'Loan returned to the meeting.

Agreed: to undertake formal consideration of the Committee's draft Report on the Damages (Asbestos-Related Conditions) Bill during this meeting and to take no further evidence on the Bill after the next scheduled Committee meeting on 23 February 2011.

Agreed: that witnesses providing the evidence scheduled up until 23 February 2011 would be advised that their evidence could no longer be used to inform a Committee position on the Bill.

The Committee undertook paragraph-by-paragraph consideration of its draft Report on the Damages (Asbestos-Related Conditions) Bill.

Agreed: that paragraphs 1 – 6 stand part of the Report;

Agreed: that paragraph 7, as amended, stands parts of the Report;

Agreed: that paragraph 8 stands part of the Report, with a minor consequential amendment being required to reflect the decision to take the scheduled evidence on 23 February 2011;

Agreed: that the Appendices stand part of the Report;

Agreed: that the extract of the unapproved Minutes of Proceedings of today's meeting is checked by the Chairperson and included in the appendices to the Report.

Agreed: that the Report, as amended, be the Second Report of the Committee for Finance and Personnel to the Assembly for session 2010/11;

Agreed: that the Report on the Damages (Asbestos-Related Conditions) Bill, as amended, be printed.

6. Damages (Asbestos-Related Conditions) Bill – DETI Evidence Session

The Committee took evidence from the following officials from the Department of Enterprise, Trade and Investment (DETI): Mr Trevor Cooper, Head of DETI Finance and EU Programmes Division and Mr Iain McFarlane, Accountant, DETI Finance Accounts Branch. The evidence session was recorded by Hansard.

11.37am Mr Hamilton joined the meeting.

11.38am Dr Farry returned to the meeting.

Agreed: the DETI officials will provide the Committee with follow up information as requested during the evidence session.

12.02pm Mr Frew left the meeting.

**David McNarry, Deputy Chairperson
Committee for Finance and Personnel
23 February 2011**

[EXTRACT]

Appendix 2

Minutes of Evidence

7 October 2009

Members present for all or part of the proceedings:

Mr Peter Weir (Deputy Chairperson)
Dr Stephen Farry
Mr Simon Hamilton
Mr Fra McCann
Mr Mitchel McLaughlin
Mr David McNarry
Mr Adrian McQuillan
Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:

Ms Oswyn Paulin
Mrs Laura McPolin Department of Finance and Personnel

1. The Deputy Chairperson (Mr Weir): I welcome Oswyn Paulin from the departmental solicitor's office and Laura McPolin, legal policy adviser. There will be a Hansard report of this session. Please give the Committee a brief presentation on pleural plaques, and members will then ask questions.

2. Mr Oswyn Paulin (Department of Finance and Personnel): I will update the Committee on what has happened since we were last here. Members will recall that pleural plaques are growths in the lung caused by exposure to asbestos. Under consideration are plaques that do not cause any symptoms.

3. On the last occasion I was here, I explained the background to the cases in the House of Lords, which established that an action in negligence could no longer be brought in respect of symptomless pleural plaques. I also set out the background to the Department's consultation

exercise on the decision in the Johnston case, which was the House of Lords' decision that changed the law. At that stage, a preliminary read out of the consultation exercise had been prepared, and the Department was about to commence discussions on available policy options.

4. The corresponding consultation exercise in England and Wales concluded on 1 October 2008, but there had been no announcement on the way forward. Scotland had already decided to legislate to overturn the House of Lords' decision, and the Scottish Parliament were considering a Bill on the subject. That legislation, the Damages (Asbestos-related Conditions) (Scotland) Bill 2009, received Royal Assent on 17 April 2009, and the Act came into force on 17 June. It means that an action in negligence in respect of pleural plaques can now be brought in Scotland.

5. However, the new Act is the subject of a judicial review in the Scottish courts. The challenge was brought by several leading insurance companies, and I understand that actions relating to pleural plaques are being adjourned — the term "sisted" is used — in Scotland pending the outcome of the judicial review. Proceedings are due to come before the court again on 20 October, and four days have been set aside for the hearing. It is hoped that the parties will complete their final submissions during that time, and that judgement will be given shortly after.

6. Members may be aware that the UK Government stated that they would announce the outcome of the consultation in England and Wales prior to the summer recess. However, on 21 July, the Lord Chancellor and Secretary of State for Justice announced that the UK Government will give further consideration to compensation for people diagnosed with pleural plaques, and publish a final response to their consultation after the summer recess. The House of Commons is in recess until 12 October, and we are therefore looking to an announcement after that date.

7. I mentioned that discussions were to take place in the Department on the available policy options. At the conclusion of those discussions, Nigel Dodds, the then Minister of Finance and Personnel, announced that he would recommend a change to the law to allow those who have been negligently exposed to asbestos and have been diagnosed with pleural plaques to claim compensation. Since then, there has been a change of Minister, and Sammy Wilson has reflected on the submissions made during the consultation exercise and post-consultation developments, and has decided to recommend a change to the law. The recommendation will be considered by the Executive in due course. In the meantime, the Minister has submitted the draft analysis of the responses to the consultation to the Committee for consideration.

8. Subject to direction from the Committee, I do not propose to rehearse the detail of the responses to the consultation exercise, which are set out in the draft analysis. Mrs McPolin and I will try to provide any further explanation required, or assist in any other way with the Committee's deliberations.

9. The Deputy Chairperson: Thank you. The summary of responses is a very comprehensive document.

10. Ms Purvis: Your submission states that the Minister's decision was taken through a sense of justice and fairness, as well as being in compliance with health and safety laws, and ensuring that employers comply with relevant legislation.

11. I have a number of questions about the timing. When will the recommendations be put to the Executive? Moreover, will the proposed change in legislation be retrospective? In other words, will it date back to the House of Lords' ruling on the Johnston case on 17 October 2007?

12. Mr Paulin: When the proposals will be put to the Executive is very much in the Minister's hands. However, we have to work up legislative proposals and instruct legislative counsel. That has not yet happened. We need more detail about what form the policies in the legislation will

take. Thereafter, it must fit in with the Executive's general legislative programme, and the Executive have to agree to it. Therefore, we are at an early stage.

13. Whether the legislation will be retrospective is a policy consideration that will have to be examined. It must be informed by the outcome in Scotland. The Scottish courts are close to reaching a decision, and the retrospective aspect will be important in deciding on the policy and approach of the legislation.

14. Ms Purvis: The insurers claim that, given previous settled arrangements, the decision contravenes the European Convention on Human Rights. Will the outcome of the judicial review affect the drafting of the Bill?

15. Mr Paulin: Given that a judgement is so close, it would be useful to await the decision before making a final policy decision on how to frame our Bill. However, if it becomes apparent that there will be a considerable delay, we will not suggest that the Minister waits until that decision is finalised. There is always a risk that, if either party is dissatisfied with the court's decision in the first instance, they could, ultimately, appeal to the House of Lords, or the Supreme Court as it is now known.

16. Ms Purvis: This question is probably too hypothetical: however, if the outcome is that previously settled arrangements remain, is there another way to legislate for people who had sought to claim prior to the Johnston case but who were refused? Justice and fairness are supposed to be the heart of the matter, and people were able to claim compensation for almost 20 years before it was stopped. If the change in legislation is made within the next few years to allow people to claim again, some people will have been disallowed in the interim. To my mind, that is unfair and unjust. Will there be some way to look after those people?

17. Mr Paulin: We could do so by making the legislation retrospective.

18. Mrs Laura McPolin (Department of Finance and Personnel): Ms Purvis is asking what will happen if the decision in Scotland rules out the retrospective aspect; because there is always a possibility that it could be allowed but in a forward-looking manner. It is a difficult matter to assess at this stage. We will need to examine the detail of the judgement. However; if the court were to rule again on the retrospective aspect, that would be a critical consideration for us to take into account when determining the shape of the legislation in Northern Ireland.

19. Mr McNarry: You are very welcome. This is a complicated and complex issue that affects many of my constituents in Strangford and, obviously, Dawn's constituents in East Belfast. Does the question of legal aid arise, so that people can have proper representation?

20. Mr Paulin: If people meet the requirements, they will be entitled to legal aid to pursue their case, although there may have been some change in relation to legal aid and personal injuries; I am not entirely up to date with that. My whole practice has been against people who are using legal aid, so I do not know very much about the legal aid rules, and I do not know if there have been changes. I think that most people who have brought cases have been assisted by their trade unions. However, there may be people who do not fall into those categories.

21. Mr McNarry: If you do not know the answer, will you find out for the Committee?

22. Mrs McPolin: Certainly; part of the difficulty in relation to legal aid, as Mr Paulin said, is that there have been changes to the rules, and additional changes are being considered. At this stage, it is very difficult to predict what the legal aid rules will be at a particular point in the future. We can make enquiries as to current practice and report back to the Committee.

23. Mr McNarry: That is fine. Some of my constituents feel that they are little boys fighting against big boys. They might need a bit more support. I have a few technical questions, which are partly due to my ignorance and not fully understanding the matter. In making pleural plaques a compensatable condition, what exactly is the compensation for?

24. Mr Paulin: As I understand it, the House of Lords' decision was that pleural plaques do not amount to a personal injury. Although they represent a change to the lungs, pleural plaques are not classified as a personal injury because there are no symptoms. New legislation would make them a compensatable injury, saying that because something has changed in the body, it is an injury, even though there are no symptoms.

25. Mr McNarry: Is that something new or is there precedent for making such a condition compensatable?

26. Mr Paulin: I am not aware of any precedent, other than what has happened in Scotland, where the same issue is being dealt with.

27. Mr McNarry: Is there any analysis of how the Department of Enterprise, Trade and Investment (DETI) might be exposed given that Harland and Wolff was in public ownership for a period of time?

28. Mr Paulin: If the legislation is changed, there is no doubt that DETI will be exposed. As I understand it, there is also a problem concerning the insurance of Harland and Wolff. If pleural plaques are made compensatable, the public purse will be exposed.

29. Mr McNarry: Is it too soon to quantify that?

30. Mr Paulin: We do not have figures for that.

31. The Deputy Chairperson: The problem is that there is an element of hypothesis in this. The Committee received a letter from the Association of British Insurers (ABI), suggesting that the cost to the public purse would be £10 million. I do not know whether you are in a position to comment on that, or whether that is a hypothetical situation.

32. Mr Paulin: We are not really in a position to comment on that. As people do not have symptoms, they do not know that they have pleural plaques. It is only when someone goes for a chest x-ray for some other purpose that the radiologist will see the pleural plaques. The person will then work out how he or she could have got them. A group of people cannot be identified as having pleural plaques and we cannot establish what percentage of people will have them. Therefore, we cannot say who can claim. The level of damages is also now uncertain. It would be extremely difficult to quantify what the exposure to DETI would be.

33. Ms Purvis: I recall that when Sir Reg Empey was Minister of Enterprise, Trade and Investment, he was asked about asbestos-related diseases when Harland and Wolff was in public ownership and what the cost may be. His answer was given in a Hansard report.

34. The Deputy Chairperson: Was that £10 million?

35. Mr McNarry: It may be a hypothetical situation, but my constituents, who feel that they are involved in this, are asking searching questions, and I am trying to help them with some answers. I suppose that we are all hoping that we will get some answers.

36. Mrs McPolin: I do not know where the ABI got the figure of £10 million; it may have been from its own knowledge within its remit. Having discussed the matter with colleagues in DETI, I understand that they were not consulted to provide any information to produce that figure.

37. Harland and Wolff, in its response to the consultation exercise, said that it felt that an actuarial report would be needed to determine its prospective liability. The figures cited previously may no longer be relevant. We must consider where we stand at any given point in time.

38. Mr Paulin: Asbestos-related illnesses include much more than pleural plaques.

39. Mr McNarry: Where did the impetus for the policy come from? It is a priority now; but, to many people, it has always been a priority. Is pressure being applied on this issue? Is it the case that people wanted the issue to go away and that it is not going away? You mentioned the judicial review that is under way in Scotland and that the Minister might be minded to move forward if that process is delayed. Where has the pressure come from?

40. Mr Paulin: In November 2007, a decision was made in the House of Lords to change the law. The ruling was that something that the courts had been compensating for the past 20 years should not be compensated for. Immediately after that, those who were affected detrimentally by that decision raised concerns and wrote to Ministers, including the Minister of Finance and Personnel and almost every other Minister in the Executive. It often took a while for people to realise that, in Northern Ireland, the issue was the responsibility of the Department of Finance and Personnel.

41. In addition, a private Member's Bill was tabled at Westminster, and the Scottish Government decided to legislate. All of this contributed to the impetus of the issue. The Department of Finance and Personnel issued a consultation paper less than a year after the decision was made in the House of Lords.

42. There has been constant movement on the issue, and the Minister has received many letters from constituents about it. I do not know whether that has been organised, but I suspect that people who are in trade unions are taking advice and that that is contributing to the numbers who have raised concerns with Ministers.

43. Mr O'Loan: The issue is obviously very important, and one can only have enormous sympathy when the serious effects of exposure to asbestos in the workplace are considered. Many people have died, and many others are living with serious, often terminal, illness. Their families are exposed to all of the anguish around that. One of many comments in the consultation report states: "We were never at anytime warned or told of the dangers of asbestos, we were never given any safety clothing or masks. The owners of the shipyard never enlightened us at any time of the dangers of the illness we would suffer in later life."

44. Public policy must be soundly based and evidence-based. Therefore, I have many concerns about the fact that the previous Minister of Finance and Personnel gave his view that he would move to introduce legislation on the matter before the consultation report saw the light of day. I am also concerned that the current Minister of Finance and Personnel is expressing the view that he will move to legislation without having heard from the Committee.

45. It would be very wise to move with a degree of caution. First, we must consider all the evidence and what will make for good public policy. We should look at the outcomes from the judicial review in Scotland and the final decisions on the matter in England and Wales.

46. My understanding is that the fundamental principle of compensation is that there should be actual loss or damage. Pleural plaques, to my knowledge, do not lead to any loss of lung function. Although the condition is absolute evidence of exposure to asbestos, it does not, of itself, make a sufferer more likely to develop symptoms of asbestosis than someone who worked in the same occupation and was exposed to asbestos. In the legal sense, there is no actual loss or damage against which compensation could be obtained, which was the basis of the Johnston case. What, therefore, is the legal basis for such legislation?

47. Mr Paulin: First, the previous Minister made his statement after he received the results of the consultation.

48. Mr O'Loan: The consultation paper had not seen the light of day: it is only coming to us now.

49. Mr Paulin: As far as the legal basis for compensation is concerned, the Assembly can legislate to compensate anyone for anything. However, if we consider the philosophy behind the legislation, then one of the judges who was in the minority in the Court of Appeal — I think it was Lady Justice Smith — made an interesting remark. She said that most ordinary people would conclude that pleural plaques represented real harm to the body, which was neither trivial nor undeserving of compensation. That is one of a number of views.

50. Our law is fairly pragmatic. Today, people receive compensation for things that would not have been compensated for in the past. Legislation has intervened to change the basis of compensation in all sorts of ways, and we have got used to that. Therefore, in this case, the legislation would be just another example of that.

51. Mr O'Loan: You referred to a 20-year period in which compensation was paid for the condition. I take it that the underlying legal principles for compensation were the same then as they are now. What was different then? Was there a different understanding of the medical implications of pleural plaques?

52. Mr Paulin: Only a brave person would say that the legal framework has remained unchanged. The norm is to be compensated for damage, and the question here is whether something that changes your body amounts to damage to your body even though it does not interfere with its function. Some people might say that a growth under the skin of the arm that produces a lump is damage, and some might not. The decisions that led to compensation being awarded in the past were made in the lower courts: they were never challenged in higher courts, such as the House of Lords. That may have something to do with it, or it may be that attitudes have changed; attitudes change, even among judges.

53. Dr Farry: I am a sceptic on the matter. I will pick up on the point that Declan made about actual damage: is there medical consensus that there are no symptoms arising from pleural plaques or are we talking about a majority/minority situation?

54. Mr Paulin: There is consensus. However, I presume that a person could have so many pleural plaques in his or her lungs that the lung function is reduced, and there would be symptoms. However, we are talking about pleural plaques that do not produce symptoms. If there are symptoms, there is no doubt that a person could be compensated. It is not the case that this is a condition for which no compensation will ever be available. If a person has a condition that has no symptoms, he or she would not get compensation.

55. Dr Farry: Therefore, the legal system works fine where there are symptoms resulting from pleural plaques; there is no problem with the system as it stands?

56. Mr Paulin: That is my understanding.

57. Dr Farry: So, are we seeking to legislate to provide compensation for a condition that causes no physical harm?

58. Mr Paulin: I do not like to say this, but it depends on what is meant by physical harm. It is a physical change.

59. Dr Farry: I appreciate the argument about the invasion of personal integrity. However, the loss that a person suffers as a result of his or her state of health is negligible.

60. Mr Paulin: There should not be any change in a person's health; otherwise, he or she would be compensated under a different heading.

61. Dr Farry: I see difficulties with this issue, and I appreciate that it is an emotive subject. It has the potential to open a hornets' nest of precedents. I presume that pleural plaques are a potential marker for wider problems, including asbestosis. However, it would comprise a subset of people who have pleural plaques, rather than everyone with pleural plaques.

62. The Deputy Chairperson: Before you answer that, Declan wanted to make a point.

63. Mr O'Loan: I am glad that Stephen qualified what he said. There are people who develop asbestosis or mesothelioma who do not exhibit pleural plaques, and there are people with pleural plaques who live long lives and die of other causes. People with pleural plaques cannot be regarded as having a pre-disposition to more serious conditions. Pleural plaques are absolute evidence of exposure to asbestos.

64. Mr Paulin: Yes; a person could be exposed to asbestos and not have pleural plaques but have something much more serious. Conversely, one could be exposed to asbestos and have no ill effects.

65. Dr Farry: Going back to precedents, would people be able to sue for over-exposure to passive smoking?

66. Mr McNarry: Who would they sue?

67. Mr Hamilton: They would sue you, David. [Laughter.]

68. Mr McNarry: Get a grip of yourself. [Laughter.]

69. Dr Farry: In a situation in which there is no evidence of physical harm, there would be the potential for compensation to be sought. However, there are people who have been exposed to danger and for whom the medical evidence shows that there is potential for harm. If a person could sue for exposure to passive smoking, the courts would be packed and insurers would be broke.

70. Mr Paulin: We are proposing a legislative change, and the legislation will be specific to this condition. It will not, therefore, enunciate a wider principle that one does not need to have suffered damage to one's physical capacity in order to sue.

71. The Deputy Chairperson: I am sorry for interrupting. If we go down the route of legislation to provide compensation, can we set tariffs? There are related arguments about whether there should be the right to sue in circumstances where a condition is symptomless but where there are effects on a person's body to be considered. One potential way around that would be to say that where bodily changes have occurred, compensation should be paid, but that there is also

the realisation that because the condition is symptomless, the level of compensation should be quite low. Could tariffs be included in the legislation, or are they a matter for the courts?

72. Mr Paulin: In normal circumstances, it would be left to the courts to work out the damages; and, presumably, those would be based on past awards. However, it is open to the legislature to set tariffs in legislation. This is an odd matter: it falls under law reform, and that is why it is with the Department of Finance and Personnel. However, there are also damages and the powers of the courts to be considered, which are, at present, a reserved matter. One assumes that the legislation would go through the Assembly, with the consent of the Secretary of State, and deal with what the courts should and should not do. It would be up to the Assembly to decide whether a tariff system should be included in the legislation. However, it would be anomalous in that we do not have tariffs in any other personal injury legislation.

73. The Deputy Chairperson: I am not advocating tariffs as being a good or bad idea; I am checking whether there is the competence for them to be included. I can see that being offered, for instance, as a compromise at one level. If there were concerns about whether the legislation should go through, it would be one element in allaying some of those concerns.

74. Mr Paulin: It would be subject to the Assembly's competence to legislate in relation to the powers of the court.

75. The Deputy Chairperson: I understand that.

76. Mr Paulin: I assume that that would be sorted out.

77. Dr Farry: What is the scope of the judicial review that is taking place in Scotland? Could the Scottish courts, and, ultimately, the UK Supreme Court, strike down the legislation as being a breach of the European Convention on Human Rights?

78. Mr Paulin: Yes, because it is devolved legislation.

79. Dr Farry: If the courts were to strike down the legislation in its entirety, I assume that we would not proceed with the legislation here.

80. Mr Paulin: We would not proceed with it, unless we thought that the Scottish courts were wrong and we thought that we had some way around their decision. That would be for Ministers to decide.

81. Dr Farry: It would be a brave thing to do: especially if the legislation were struck down by the Supreme Court. Am I right in saying that the UK Government are minded against this?

82. Mr Paulin: We do not know what they are minded to do; they are playing their cards close to their chests.

83. Dr Farry: Have any other jurisdictions in the EU decided to make pleural plaques compensable?

84. Mr Paulin: The jurisdiction that uses the system most similar to our system is the Republic of Ireland; it has our system of common law damages, and so on. I do not know the position there, but the rest of Europe does not compensate people for what we call general damages for pain and suffering. They compensate for financial loss. Therefore, this is not an issue in the rest of Europe.

85. The Deputy Chairperson: Therefore, we are not comparing like for like.
86. Dr Farry: Is there pain and suffering associated with having benign pleural plaques?
87. Mr Paulin: We categorise it as general damages; and that, supposedly, is for pain and suffering. That is why the decision has been made.
88. Dr Farry: What pain and suffering does the victim endure, apart from the notion of the invasion of his or her personal integrity?
89. Mr Paulin: It has been argued that people who are X-rayed and become aware that they have pleural plaques, become worried that it will lead to something else. They are concerned about having pleural plaques.
90. Dr Farry: Therefore, the impact is psychological.
91. Mr Paulin: Yes.
92. Dr Farry: That could be addressed through proper information, rather than legislation.
93. Mr Paulin: That is true, but the reach is always a problem.
94. Dr Farry: We will be setting a dangerous precedent, if, due to a misunderstanding about a suspected health issue, we legislate and almost confirm people's erroneous conceptions, rather than focus on public information.
95. Ms Purvis: I am aware of a number of cases being pursued around employers' liability and negligence with regard to asbestos exposure. I want to pick up on Stephen's point.
96. Are you aware of any cases that are being pursued with the European Court of Human Rights regarding the breach of the right to bodily integrity? My question follows on from what Stephen said about there being a breach of bodily integrity and the harm being mental anguish. To use what is probably the wrong analogy: in cases of rape, bodily integrity has been breached and there may not be any physical or physiological harm but there may be mental anguish for which people can receive compensation. Are you aware of any cases being pursued along those lines in the European Court in relation to pleural plaques?
97. Mr Paulin: No.
98. The Deputy Chairperson: Mitchel McLaughlin will be the final member to ask a question.
99. Mr McLaughlin: As we have seen, the barristers have been feeding on this issue for quite a time. I am wondering whether we have been set up to consider the question of compensation. Clearly, there are anxiety-related issues that should be addressed. I also think that there is a significant impact on the employability of people who have been diagnosed with pleural plaques. To describe pleural plaques as symptomless is a bit of a misnomer, in so far as there is obviously anxiety that they may lead, as they do in some cases, to asbestos-related terminal disease. Employers will be very concerned about employing a person who has been diagnosed with pleural plaques because it may make them vulnerable to subsequent prosecution.
100. Rather than concentrating on the question of compensation at this stage, although I would like to come back to it, I would like us to examine the merits or demerits of having a register at the point of confirmed diagnosis of pleural plaques. That would be an opportunity to establish it

for the record. In some instances, asbestosis or other diseases do not become manifest until some considerable time later; at which point it is difficult to produce evidence to sustain a damages claim. A register at the point of diagnosis would at least provide a reference point should there be subsequent health detriments that could be and, in my opinion, should be, actionable.

101. As regards damages, the system of tariffs that the Deputy Chairperson suggested could be considered either in the context of a physiological change that has occurred as a result of exposure, negligent or otherwise, to asbestos in employment. There will be degrees of anxiety; some people will be more susceptible, and others will find themselves virtually unemployable because of their medical record. That may not be the most significant compensation regime, but it may effectively be a passport for people and their families affected by the emergence of asbestos-related diseases that has caused the death of a household's wage earner.

102. Is that informing our approach? Is employability being reflected? It is neither in the questions nor, as far as I can see, the responses. I wonder whether we are having a false fight — a bun fight — about damages. Compensation in relation to pleural plaques can be defined as being a consequence of exposure to asbestos that is not going to drive people out of business but provides some basis for those who have to pursue claims on the grounds of another person's death as a result of asbestos-related exposure.

103. Mr Paulin: I will make two points in response to that. As I understand it, all employers are conscious of the dangers of asbestos, and any work with asbestos takes place under highly-controlled conditions. It should be the case that no one is sustaining injury as a result of exposure to asbestos. In addition, people who have developed pleural plaques will have that condition detailed on their medical record. Regarding your point that employers may refuse to employ people because of the risk; there should be no risk because there should be no further exposure to asbestos. Furthermore, it strikes me that if a person were told that by an employer, he would have good grounds for bringing proceedings against that employer. No employer should turn down anyone for employment because of a symptomless injury. A person who has pleural plaques is capable of doing whatever work is set him, all other things being equal. Therefore he should not be turned down for employment.

104. Mr McLaughlin: Most councillors have stories about demolitions that were carried out in conditions that do not meet the strictly licensed and controlled circumstances that you have described. I know what the law says and the level of awareness of asbestosis, but we all know stories about buildings that were protected in one way or another and others that had asbestos content that were not dismantled or demolished in the licensed manner. In those circumstances, not just workers but people in the vicinity were clearly exposed.

105. Mr McNarry: Are you saying that it is guaranteed that there is no exposure to asbestos?

106. Mr Paulin: I am not saying that it is guaranteed, but my understanding of the health and safety legislation is that people should not be exposed to asbestos.

107. Mr McNarry: Even those who remove asbestos for disposal?

108. The Deputy Chairperson: There should be a proper level of protection.

109. Mr Paulin: There are huge protection masks.

110. The Deputy Chairperson: If I understand you correctly, we should now have a closed list of sufferers of asbestosis and pleural plaques. There are no absolute guarantees and there may be some abuse of the system, but anyone who contracts those conditions now will be suffering at a

very minimal level and will have contracted them as a result of complete disregard for the regulations in place. Is that correct?

111. Mr McNarry: So, we are relying on the health and safety regulations?

112. The Deputy Chairperson: There is now much greater knowledge and more action has been taken to prevent those conditions, but we can never be 100% sure that the regulations will be respected. It is always possible that someone will ignore them. However, the number of new cases arising should be very low, because there is better protection. We are therefore dealing with a wide range of people who have been damaged in the past.

113. Mr McLaughlin: The issue is wider than that, and it is complex.

114. Let me cite the case of a well-known school that was demolished and has recently been replaced. During preparation for the construction of the replacement building, it was discovered that a significant amount of asbestos had been used in the old building, which was built about 40 years ago. No one was aware of that at the time. Generations of schoolchildren, and people who are now in employment, were present during remedial works and alterations to the building which took place over the course of the school's history. They did not know that asbestos was there. Teachers and children were exposed. If any of the cohort of students from that school is diagnosed as having contracted pleural plaques, a historical connection with the school can be established. That has an effect, not just on the anxieties of the family and person involved, but also on the person's employability.

115. There may be no other employment-related circumstance of exposure to asbestos. However, there is a possibility that an individual will develop a terminal condition as a result of being exposed to asbestos during his or her school days. Therefore, the register is an inherent protection, and a good idea. I am not particularly concerned about the compensation issue, although I understand the argument. Compensation is a matter for judicial guidance and the tariff mechanism. If there is a progression to terminal disease, it might be very important to be able to make connections and references, because the time span involved can be 30 or 40 years or longer.

116. The Deputy Chairperson: I will take that as a comment rather than a question.

117. Mr McLaughlin: My point is that the register is a good idea.

118. The Deputy Chairperson: I thank the officials for the evidence that they have given to the Committee today. It will inform our discussions and any action that we may take.

15 September 2010

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
Mrs Laura McPolin Departmental Solicitors Office

119. 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.

120. 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.

121. 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.

122. 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.

123. 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.

124. 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.

125. 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.

126. 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.

127. 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.

128. 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.

129. 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?

130. 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?

131. 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."

132. 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?

133. Mr Paulin: We will try to share the answer.

134. Mr McNarry: Just give us the answers. It does not really matter how we get them.

135. 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.

136. 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.

137. 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?

138. 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.

139. 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.

140. 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.

141. 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?

142. 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 —

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

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

145. Mr McNarry: Many of us have family members in this situation.

146. 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.

147. 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.

148. Mr McNarry: That is what we will have to legislate for.

149. 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.

150. 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.

151. 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.

152. 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.

153. 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?

154. 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.

155. 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.

156. 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.

157. 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.

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

159. Mr Paulin: Yes.

160. 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.

161. 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.

162. 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.

163. 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.

164. 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.

165. 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.

166. 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.

167. 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.

168. 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.

169. 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.

170. 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.

171. 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.

172. 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.

173. 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?

174. 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.

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

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

177. Mr Hamilton: I wonder why.

178. 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?

179. 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.

180. Mr McQuillan: Why do you think that is?

181. 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.

182. Mr McQuillan: Is it the case that there is reluctance to provide them, or is it that nobody has any such figures?

183. 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.

184. Mr McQuillan: Under the draft Bill, do the employers get off scot-free?

185. 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.

186. 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.

187. 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.

188. 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.

189. 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?

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

191. Mr McLaughlin: Did it accept that they were a consequence?

192. 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.

193. 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.

194. 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.

195. 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?

196. 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.

197. 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.

198. 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.

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

200. 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.

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

202. Ms Purvis: Yes, but it is only one of a multitude of employers.

203. 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?

204. 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.

205. 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?

206. 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.

207. 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?

208. 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.

209. Mr McKay: Has it responded at all?

210. 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.

211. 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.

212. 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?

213. 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.

214. 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.

215. 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.

216. 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.

217. 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.

218. Mr McKay: What did they say exactly?

219. 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.

220. 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.

221. 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?

222. 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.

223. Dr Farry: Is there any reason for us to rush? What will be the consequences of us not proceeding hastily?

224. 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.

225. 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?

226. Mr Paulin: That takes us into the definition of damage or injury.

227. Dr Farry: Definition is at the heart of legislation.

228. 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.

229. Dr Farry: What you are saying then is that there is no damage or injury but that the intrusion is compensational.

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

231. Dr Farry: Does it constitute damage or injury in medical terms?

232. 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.

233. Dr Farry: What do you mean by the term "by and large symptomless"? That is a very loose term.

234. 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.

235. 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.

236. 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.

237. 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.

238. 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.

239. 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?

240. 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.

241. Dr Farry: Would it be fairly notional?

242. 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.

243. 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?

244. 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.

245. 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.

246. 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.

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

248. 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.

249. 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.

250. Dr Farry: How would people know that they have pleural plaques?

251. Mr Paulin: They would know because they would have had a chest x-ray.

252. Mrs McPolin: They would have had a chest x-ray incidentally for other medical reasons.

253. 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.

254. Dr Farry: Finally, from a legal perspective, is this a fundamental change to the basis of tort law?

255. 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.

256. 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.

257. 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.

258. 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.

259. 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?

260. 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.

261. 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?

262. Mrs McPolin: It depends what you mean by special law.

263. 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?

264. 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.

265. 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.

266. 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.

267. 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.

268. 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?

269. 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.

270. 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.

271. 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.

272. 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.

273. 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?

274. Mr McNarry: All the time. [Laughter.]

275. 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.

276. Mr McLaughlin: That sounds like a politician's answer.

277. 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.

278. 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.

279. 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.

280. 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?

281. 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?

282. 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?

283. 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.

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

285. 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.

286. 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.

287. 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.

288. 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?

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

290. Mr McNarry: Then I give you the opportunity to correct that.

291. 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.

292. 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.

293. Mr Paulin: No.

294. 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 —

295. 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.]

296. 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.

297. 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.

298. 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.

299. Mr McNarry: I hope that insurance companies are cognisant of that.

300. 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?

301. 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.

302. 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.

303. Mrs McPolin: What you are really asking for is an analysis of the responses.

304. The Chairperson: Yes, the Department's response —

305. 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.

306. The Chairperson: Thank you very much. You have been very patient.

8 December 2010

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 Neil Lambe
Ms Oswyn Paulin Departmental Solicitor's Office

307. The Chairperson (Ms J McCann): I welcome Oswyn Paulin and Neil Lambe from the Departmental Solicitor's Office. If you would make a few opening remarks, members will ask you questions. I remind members that we had a discussion earlier about the timetabling of Bills, although some members were not here for it. After we have heard the witnesses' evidence, I will ask the Committee Clerk to take us through the timetable for the benefit of members who were not here for the first discussion.

308. Mr Oswyn Paulin (Departmental Solicitor's Office): Thank you, Madam Chairman. Officials from the Department of Finance and Personnel last attended the Committee on 15 September when we had a lengthy session on the Department's proposals for legislation. My comments will be very brief this morning.

309. The Department subsequently published the analysis of the consultation on the Bill and its response, 'The Proposed Way Forward', is at the end of that document.

310. In addition, as the Chairman mentioned, the Executive have given the Minister permission to introduce the Bill, which he proposes to do on 14 December. The Second Stage will take place in the new year. It will be a considerable challenge to bring the Bill through all its legislative stages before the Assembly is dissolved towards the end of March.

311. Since we last attended the Committee, the Assembly Research and Library Services produced a paper on numbers, costs and international approaches. I will not comment on the paper, except to say something about the costs. The paper attempts to estimate the costs of the change. It should be borne in mind that, until three years ago, pleural plaques were a recognised head of claim of damages. If the calculations are correct, the sums referred to were the savings made as a result of the House of Lords decision that removed that entitlement. The assumption that everyone who has pleural plaques will claim is not entirely reasonable. There will always be people who are entitled to claim but who do not, and there will be people who have the condition but do not know it and therefore take no steps to have it diagnosed. I am happy, with the assistance of my colleague Mr Lambe, to respond to the Committee's questions.

312. Dr Farry: I am somewhat of a sceptic about the Bill, but I want to focus primarily on timetabling. The Committee has been circling this issue for quite some time, and now the First Stage will be before Christmas. After Christmas, the Bill is expected to go through all the remaining stages, including Committee Stage, with the prospect of passage before the dissolution of the Assembly in March.

313. In discussing the Construction Contracts (Amendment) Bill and the Civil Registration Bill, the Committee found the Department's pace in coming back to us with amendments and in taking things through to Consideration Stage and Final Stage at best leisurely. Bearing in mind that we have been discussing the issue for so long, I am at a loss why, all of a sudden, the "go" button is being pushed in Assembly's final stages. In essence, we are being asked to do a Committee Stage in the formal six-week period whereas virtually every other Bill in this Assembly mandate has had its Committee Stage extended.

314. Furthermore, we must bear in mind that the legislation is not straightforward in that virtually all the Bills that the Committee has dealt with have not been contentious but have had broad support. The Confederation of British Industry (CBI) and the insurance industry have both

expressed considerable concerns, and there is near unanimity in the medical profession that although pleural plaques may be a condition, it is not harmful. However, we are being told that we must push ahead at full pace with a relatively short Committee Stage despite considerable contention. There is uncertainty over the financial implications of the Bill, but, again, we are being asked to legislate in haste. Moreover, the equivalent legislation in Scotland is under legal challenge, yet, despite everything, we are being asked not to wait to see how that develops before we commit to a Bill that may, in practice, turn out not to be legally sustainable.

315. The Department's approach of pushing the Bill vigorously at the last minute when we have had so much time and in light of the opposition and all the obstacles is bewildering. I appreciate, Mr Paulin, that that is not necessarily your call, but I am happy to hear your response from a departmental perspective.

316. Mr Paulin: The Bill is undoubtedly controversial for insurance companies. We have been over this ground quite a few times in the Committee. I referred to the meeting of 15 September, but I recall being here on other occasions. The issues have not changed very much. We have consulted twice, on the issue in general and on the proposals in the Bill. Ultimately, Ministers decide whether they want to pursue a Bill while the Assembly decides a Bill's priority.

317. Dr Farry: The decision over the timing was a political one. However, you make a valid point: the Bill today is no different, in any shape or form, from the version that we saw in September. If it is no different, why was a decision not taken in September to proceed with it? At least that would have allowed the Committee to scrutinise the Bill for more than a narrow six-week period. That would have been useful, particularly bearing in mind the very complex issues that the Bill throws up.

318. Mr Paulin: As you know, once the consultation was completed and the results of the consultation and the Department's response to them published, it was necessary to get Executive agreement for the Bill to proceed. It is no secret that that can take quite a long time, and it has taken a long time in this case.

319. Although the Bill is controversial, it is quite straightforward. There are fairly simple choices to be made. The Bill is not enormously complicated, lengthy or technical; it is quite straightforward. The issue of principle is clear, and it is a decision for the Assembly.

320. Dr Farry: If it is straightforward, can you tell me what the financial implications of the Bill will be for the public purse and for the private sector? If the equivalent law in Scotland is overturned by the courts, what will be the implications for anything that the Assembly passes?

321. Mr Paulin: I will deal with the last question first. In Scotland, the case has been heard by a judge at first instance, who found that the Bill is within the competence of the Scottish Parliament. As you know, the Scottish Parliament's competence is exactly the same as the Northern Ireland Assembly's. Therefore the Scottish court has pronounced the Bill okay.

322. The insurance companies have appealed, and we are awaiting a judgement. We are not sure when that will happen, but it will be during the Bill's passage through the Assembly. If that appeal goes against the Scottish Government, our Bill can be looked at again; there will be time to do that as it goes through the Assembly.

323. My recollection is that the Scottish appeal court completed its hearing of the case as long ago as September, so a decision might have been anticipated before now; best estimates suggest that a decision may not be made until the end of January or the beginning of February 2011. If the decision is an adverse one for the Scottish Government, our Bill can still be amended as it goes through the Assembly.

324. The decision could go either way, but my expectation is that the court of appeal will uphold the original decision. If we wait until that decision is taken, do we wait until the case goes to the Supreme Court and a decision is made there? Regardless of the outcome of the appeal, there is a strong likelihood that one or other party will appeal to the Supreme Court. However, even that will not produce finality, because there is a very strong likelihood that a case will be taken to the European Court of Human Rights in Strasbourg. Strasbourg takes quite a long time to make decisions, so we could be waiting three, four or five years for absolute finality from the courts on the Scottish legislation. Therefore it seems appropriate to proceed with the draft Bill now rather than wait until the courts make a final decision.

325. Dr Farry: The perceived urgency did not produce a Bill earlier. What consideration was given to tabling the Bill in June and allowing for a proper Committee Stage? The Bill deals with controversial issues, as can be seen by the fact that the Scottish legislation may go the whole way to Strasbourg.

326. Mr Paulin: If the Executive want to bring forward the draft Bill, why not do it now rather than wait until June?

327. Dr Farry: Why was it not introduced six months ago?

328. Mr Paulin: You may ask that question, but I cannot answer it.

329. Dr Farry: What will the implications be for the public and private sectors?

330. Mr Paulin: I touched on the implications earlier, and, at the meeting in September, we went into them in great detail. There is no clear answer and no one can predict what the implications will be. However, figures were produced.

331. Dr Farry: That is why I dispute your use of "straightforward." The Assembly is being asked to sign a blank cheque when private and public sectors are under considerable financial and budgetary pressures.

332. Mr Paulin: I made the point in my opening remarks that people received compensation until the House of Lords changed the law. The House of Lords and the courts generally approach things by declaring what the law always was. However, in this case, no one knew what the law was until the Court of Appeal and the House of Lords decided it, and until then everyone thought that the law was that people were entitled to compensation. Therefore the Bill will not create totally new expenditure in an area in which there had been none previously; rather it will reinstate what used to be. The resources that were available in the past will, no doubt, become available again.

333. Dr Farry: Would that not provide an accurate baseline to answer the question of what it will cost in future? If we can extrapolate from the past, it should be possible to give a definitive answer and assure people like me who are wary of signing a blank cheque.

334. Mr Paulin: Even the Assembly Research and Library Service was unable to come up with an appropriate methodology for doing that.

335. Dr Farry: With respect, you gave me two contradictory answers. You said that it will not be blank cheque, because this happened in the past and it was an ongoing expenditure; yet when I asked whether we can use past expenditure to work out what the likely expenditure will be, you tell me that no one knows.

336. Mr Paulin: I hope that I have not contradicted myself. Compensation was available in the past, and it did not bring about a catastrophe. If it is reinstated, I cannot see that it will do so this time.

337. Mr Neil Lambe (Departmental Solicitor's Office): One of the difficulties is that insurance companies and public-sector employers in Northern Ireland did not keep a record of how much compensation was paid or how many claims were settled solely in respect of claims for a diagnosis of pleural plaques. Ossie is saying that we know that those claims were settled, because that was the accepted law at the time. However, the reports produced by the audit teams for public-sector employees were never so detailed that they showed that a certain amount of money was given out in any one year for those specific claims; they showed, rather, the total damages that were paid out for personal injury claims.

338. Dr Farry: Ultimately, we do not know; therefore, the legislation cannot be straightforward. I will leave it there.

339. Mr McLaughlin: The witnesses will be familiar with the answers to the Committee's questions. On the rationale for proceeding, we must recognise that legislation was examined by the courts and that it was challenged and pronounced upon. In this instance, the Scottish Parliament is ahead of us.

340. We are proceeding in the knowledge that those legal processes are in train. Indeed, the Department has discussed the fact that it could end up at the European Court. In the answer to question 1, we are told that it will take some considerable time to exhaust the court process and that the Department does not think it desirable to defer the Bill and deny relief for what could be a lengthy period.

341. What does "relief" mean, and what are the consequences of giving people access to relief if the Bill is, for whatever reason, found by the European Court not to be competent?

342. Mr Paulin: I think that "relief" in those circumstances means damages; in other words, people do not have entitlement to apply for compensation under that heading. "Relief" means what would be available if the Bill were passed. You are asking me what would happen —

343. Mr McLaughlin: Sorry, just to be absolutely clear: does "relief" mean the award and receipt of damages or that you have a recorded claim to be concluded after the legal process is concluded?

344. Mr Paulin: I think that "relief" is being used quite loosely, but in the end it means the remedy that is supplied by the court; that is, damages. You go to the courts seeking relief. It is a rather odd expression, but you are seeking damages or an order for the court to stop somebody doing something or to make somebody do something. That is generally called relief. I do not know why; it seems an odd expression.

345. Mr McLaughlin: OK, I am not discussing why; I just want to know the practical effect. Does it mean that people get compensation even though there is a legal process that the insurers are involved in?

346. Mr Paulin: The legal process that the insurers are involved in is in Scotland. I do not want to speculate about what the insurers may do in Northern Ireland.

347. Mr McLaughlin: It would not take much speculation.

348. Mr Paulin: I do not want to give them any encouragement.

349. Mr McLaughlin: Have they not told us what they will do?

350. Mr Paulin: They said that they might do various things.

351. Mr McLaughlin: That is a lawyer's answer. [Laughter.]

352. Mr Paulin: However, if things go badly for them in Scotland, that may make them less enthusiastic. I do not know. You would need to ask the insurers that.

353. Mr McLaughlin: I am examining the logic of proceeding when there could be either a positive or negative outcome for the Scottish legislation. A negative outcome would raise serious questions here, particularly if claims had proceeded in the full knowledge of a process in Scotland that would have implications here. Would that logic not be challenged in hindsight?

354. Mr Paulin: I do not want to speculate about what insurance companies may do here, but I do not think that that would necessarily happen. The danger in not legislating is that the longer you leave the gap between the House of Lords decision and legislating, the more difficult it is to —

355. Mr McLaughlin: If we proceed and pass the legislation and claims are made, adjudicated on, and awarded — notwithstanding an ongoing legal challenge in Scotland or the right of insurers here to challenge — would they have to pay out those awards?

356. Mr Paulin: It depends on what they do. If an insurance company or employer says, "I will defend this case in court rather than challenge the legislation", and the arguments are made, and the court makes an award, the insurance company can go through its various appeals. However, if the award is paid to the person, I cannot see how the insurance company can recover it.

357. If a court orders damages to be paid to someone who then receives those damages, I would say that that is an end of the matter as far as that person is concerned.

358. Normally, if someone is awarded damages and the other party appeals, the order of the court that those damages be paid is stayed. In other words, the order is stopped until the appeal process is dealt with.

359. Mr McLaughlin: OK. That is what I was trying to get at.

360. Mr Paulin: I am sorry that it took so long.

361. Mr McLaughlin: No; that is fine.

362. Mr Lambe: The analogous situation is that the 2007 ruling of the House of Lords that asymptomatic pleural plaques were not an actionable cause in negligence did not result in insurers going back over all the claims that they had settled in the previous 20 years and asking for their money back because the claims had been settled on a misunderstanding of the law.

363. Mr McLaughlin: No, but is there an exposure here, given that there is an almost parallel process involving the courts in Scotland? Despite 20, 30, or 40 years' accepted practice, we are enacting legislation while there is an ongoing challenge to exactly similar legislation. A question

arises about timing. Since the legislation might be judged incompetent by the Supreme Court, the European Court or some other court, why are we proceeding?

364. Mr Paulin: It is up to the Assembly whether it proceeds, but its position is defensible. Waiting until the decision on a challenge to a similar provision had been finalised would be a very simple way of preventing the Assembly from legislating on almost anything. Someone could simply produce a challenge in another court.

365. Mr McLaughlin: Your previous answer dealt with the consequences as far as the courts are concerned; they may take account of imminent decisions and stay an order.

366. Mr Paulin: They may, but only at the instance of one of the parties before the court.

367. Mr McLaughlin: Absolutely. I imagine that everyone looks after their interests in those circumstances.

368. The Committee asked what advice had been sought from the Attorney General. The interesting answer was that it is not the practice to comment on whether advice has been sought from the Attorney General. The Committee found it interesting and important enough to ask that question, so what advice has been sought from the Attorney General? We did not get an answer. As you probably noticed, we got an answer to a different question. Was that because of the lawyers again? I thought that it was politicians who did that. [Laughter.]

369. Mr Paulin: I am afraid, to be honest, that I am not going to give you an answer today. There is a long-standing convention in government that we do not answer questions about whether the Attorney General's advice has been sought.

370. Mr McLaughlin: Does that relate to the detail of his advice or whether you have even —

371. Mr Paulin: At all. That is enshrined in the Freedom of Information Act.

372. Dr Farry: You cannot speculate then. [Laughter.]

373. Mr McLaughlin: Question 4 relates to the consequential of cases that had been lodged or commenced.

"Following the House of Lords ruling the defendants were entitled to apply for those stayed cases to be struck out or discontinued, or to insist that they were withdrawn".

Will cases that were previously lodged be regarded as determined cases or could they be dealt with under the draft Bill?

374. Mr Paulin: Such cases could be revived if the legislation goes through. Proceedings that have not been struck out can be brought back to court and the person can ask to proceed with a case. If the proceedings have already been struck out, it would be a matter of bringing new proceedings. Generally, all the cases have been adjourned until —

375. Mr McLaughlin: OK, but the answer states that the Department sought the views of Legislative Counsel on whether those cases are regarded as determined.

376. Mr Lambe: The issue was also raised by Thompsons McClure Solicitors in its response. The Department will have to look at that issue a little more closely as it is a very technical area. It would be useful for us to consult the judiciary on what it regards as "determined", meaning for

the purposes of claims that may have been lodged and then withdrawn by the plaintiff solicitor once the House of Lords ruling was made and to find out whether those fall within the definition of determined. It is worth looking again at that issue.

377. Mr McLaughlin: Is that not germane to the decision to proceed with the legislation in the absence of that information?

378. Mr Paulin: That is a detail. I hesitate to be so confident, but I would be very surprised if many claims have been withdrawn.

379. Mr McLaughlin: I know that.

380. Mr Paulin: I do not think that that is what people would do knowing what is going on. There is a consultation on the legislation, so why would anyone withdraw their claim because they do not think that the Assembly would ever legislate on that? I think that everyone would take their chance because it costs nothing to leave it there. I do not think that the insurance companies have implied that they would strike out all those things. That is certainly not the information that we received during the consultation.

381. Mr McLaughlin: Therefore it is a theoretical situation. It is not that cases lapsed or were withdrawn as such, and even in those circumstances the door is not closed, although you are still seeking advice.

382. Mr Paulin: I think that we will go back to the Office of the Legislative Counsel and take further advice.

383. Mr Frew: I know that we do not have a figure, but the document states that one-off payments of £5,000 were handed out in England and Wales. There is no doubt that people who have been exposed to asbestos and have conditions, symptomless or not, are entitled to something. However, it strikes me that — to use a flippancy term — throwing money at them will do nothing to assuage their health concerns. Five thousand pounds could be better spent on an enhanced health stream for people with such a condition so that, when they realise that they have been exposed to asbestos, they will be put in a health stream that will react to their needs. That is a better way of assuaging concern rather than giving them compensation. I believe that Japan has such a system. How practical is that? Would that change the Bill completely or even require new legislation?

384. Mr Paulin: It would be a very radical approach. Generally, the National Health Service is provided free to people. They are entirely separate issues. If my legs were broken in a road accident, I would be treated by the National Health Service; however, I could also sue the driver of the car that caused the injury, provided that I can establish that he was negligent and that it was not my fault. There would be issues if people received additional healthcare instead of being compensated because, if I broke my legs and it was my fault, I would get less healthcare than if it was someone else's fault. Similarly, if I had growths on my lungs that were due to smoking, I would not get the same treatment as someone who had growths in their lungs due to asbestos from their employer. People need to be given the best possible healthcare, regardless of the causation of their problems. Those are very separate issues.

385. Mr Frew: Therefore it would not be practical.

386. Mr Paulin: I cannot see it being practical in our system. Japan is a different country with a different culture; I am sure that there are many things to commend it. Pulling out one condition — pleural plaques — and treating it differently from all other injuries would be a major change to the legislation. I do not know how we could do it, particularly since the condition does not have

symptoms. A person would have to have a certain number of sessions with a counsellor telling them that there was nothing much wrong with them.

387. Mr Frew: What concerns people is realising that they have suffered exposure. I do not know how compensating people at that stage assuages their concerns.

388. Mr Paulin: That is quite a deep philosophical question. [Laughter.]

389. Mr Girvan: Thank you for your presentation. There is a threat of insurance companies taking a legal challenge with a human rights-based approach if the Bill were to proceed. Since no decisions have yet been made on the Scottish cases, what is the Department's view on where we stand legally by introducing the legislation without giving due consideration to the outcome of the Scottish case?

390. Mr Paulin: There has been an outcome in the Scottish case in that the judge who heard it said that the legislation is within the competence of the Scottish Parliament. There has not yet been an outcome from the appeal; however, as I said earlier, if we were to wait for the appeal process in Scotland to be exhausted, we could be waiting for many years. The Assembly can legislate; it is then up to the insurance companies to decide what to do. The Assembly cannot be criticised for legislating.

391. Mr Girvan: There are concerns about the cost implications of going forward with the legislation. There are too many variables, and no one can give exact numbers on the people who will take action because they say that they have suffered. We can pull all sorts of figures out of the air, but no conclusive work has been undertaken to identify exact numbers. Some may be diagnosed with pleural plaques — or not; that is the point. People can live quite normal lives even after being diagnosed with the condition. It does not necessarily limit their life. We have to make a judgement.

392. Similarly, people might say that they worked in an environment that caused them to suffer a nervous breakdown because of stress. Some Committee Clerks might say that they were under such pressure that they suffer from job-related stress. We could say, therefore, that we should protect them, and there could well be some truth in that.

393. Are you saying that there is nothing from a perceived challenge to us from the European courts to preclude us from taking forward the Bill? Are we sure that the legislation does not contravene any European human rights legislation?

394. Mr Paulin: The Assembly is entitled to legislate, and others are entitled to challenge the legislation, but they can challenge it only when the legislative process is complete.

395. Mr Girvan: Having seen the draft of what we are proposing, the insurance companies believe that they could take a human rights case. We rely on guidance from professionals to tell us whether they have anything to stand on.

396. Mr Paulin: It would be a brave man who said that there is absolutely nothing in their case. All I can tell you is that the court in Scotland has rejected it. If the court of appeal in Scotland says that the legislation is OK, will the insurance companies accept that and say that the matter is over with. Who knows?

397. Dr Farry: Can I just clarify one legal issue? Is there a distinction between a challenge on whether a Bill is competent in relation to the Scottish Parliament and whether it is consistent

with the Human Rights Act or the European convention, or, in essence, are they one and the same?

398. Mr Paulin: No; "competent" is wider than the convention, but convention rights come into it.

399. Dr Farry: Therefore if the Scottish court says that the Bill is competent, that means, by definition, that it is competent, including consistent with the Human Rights Act in the view of that court.

400. Mr Paulin: That is right.

401. The Chairperson: Thank you very much, Neil and Oswyn; there are no more questions. If there are any issues outstanding, we will write to you. I will ask Shane to take us through the timetable of the Bill and some other issues.

402. Mr McLaughlin: Before we do that, there was an interesting answer to one of my questions. I propose that we get advice on the powers of the Committee to get answers to questions that we think are relevant to our work. As I understand it, the Committee has power to call for persons or papers. I think that those powers could go beyond freedom of information entitlements, which the ordinary public has access to.

403. Mr Girvan: Are you thinking about the Attorney General?

404. Mr McLaughlin: I am, yes. We might invite him to speak to the Committee on this issue.

405. The Chairperson: We will get some clarity on that. The Committee Clerk will take us through the draft timetable.

406. Mr McLaughlin: That was very quick, Paul; well done, my friend. [Laughter.]

12 January 2011

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 Martin Hanna Francis Hanna and Co Solicitors
Ms Oonagh McClure Thompson McClure Solicitors

407. The Chairperson (Ms J McCann): I welcome Ms Oonagh McClure from Thompson McClure Solicitors and Mr Martin Hanna from Francis Hanna and Co Solicitors. You may make an opening statement, after which I will open the meeting up for questions.

408. Ms Oonagh McClure (Thompson McClure Solicitors): Members may have a copy of the response to the consultation paper that Thompson McClure submitted. We felt that perhaps the Bill did not cover all the people intended and that that should be addressed before the Bill becomes law.

409. Mr O'Loan: What is your rationale for supporting the legislation? Apparently Thompson McClure Solicitors previously questioned the value of a campaign to inform people about the nature of pleural plaques in order to allay concerns. The Ministry of Justice in London is of a mind to issue such information. I would not be surprised if the relevant Departments here did the same.

410. Ms McClure: I will deal with the information campaign first. That opinion was expressed as a direct response to whether we thought that such a campaign would be an answer to the situation that arose after the House of Lords decision. Information is available, although perhaps there is not as much as there should be. However, we did not feel that it was sufficient to deal with what we consider now to be the injustice that was being caused to people who were suffering from the disease. In our response we said that any information would be helpful. However, it would not ultimately be any better than what we propose, which is that the Bill be passed with some amendments.

411. Mr O'Loan: Would a public information campaign allay concerns?

412. Ms McClure: To be honest, from personal experience, I do not believe so. I have clients, as does Martin, who have been told that pleural plaques are asymptomatic and that they have nothing to worry about. However, they are very worried. They do not believe that they are safe, because they know people who have suffered from other asbestos-related diseases and they think that that is what will happen to them.

413. Mr O'Loan: OK. What is your fundamental rationale for supporting the Bill?

414. Ms McClure: Before the Court of Appeal decision, people in Northern Ireland received compensation for pleural plaques. The judiciary in Northern Ireland recognised that pleural plaques are a personal injury; they were not de minimis, and, therefore, should be compensable.

415. Mr O'Loan: My second question is about the financial consequences of the Johnston case. I believe that Thompson McClure previously told the Department of Finance and Personnel (DFP) that it had commissioned a firm of accountants to produce a report on the financial consequences of that case. Have you done so? Do you have any information about the possible financial consequences of the Bill? The Association of British Insurers told us that the Department of Enterprise, Trade and Investment (DETI) has made provision for more than £31 million over the forthcoming four-year Budget period in relation to asbestosis and pleural plaques. I have not seen that sum subdivided between the two conditions, which would be a very important matter. That is a significant sum of money.

416. Ms McClure: Not for Northern Ireland. The accountants' response was in relation to the position in England and Wales when there was lobbying in that regard. I know what our caseload is. I know about the number of pleural plaques cases that we stayed and subsequently withdrew after the House of Lords decision. I know what the average value of those cases would have been had it not been for the House of Lords decision. I can do only a very basic calculation.

417. Mr O'Loan: How many cases is your firm dealing with?

418. Ms McClure: I had 80 cases, which had to be withdrawn, discontinued or abandoned following the House of Lords decision; of that number, 10 have become asbestosis or mesothelioma cases. At present, I have 60 or 70 cases, allowing for the possibility that some of those people may have passed away for other reasons.

419. Mr O'Loan: Is your firm one of the local specialists in that area of work?

420. Ms McClure: There are possibly four such firms of solicitors: Francis Hanna and Co, ourselves, Agnew Andress Higgins, and Hollywood Higgins Deazley.

421. Mr McLaughlin: I want to examine the issue of tariffs. Your company responded to the DFP consultation by supporting the payment of a fixed sum. Will you elaborate on that? I presume that you know the departmental position or do you need me to quote it to you?

422. Ms McClure: Sorry; I am not following you.

423. Mr McLaughlin: We asked the Department about tariffs, and the reply was that the level of compensation is usually determined by the court or negotiated by experts in the insurance/legal field. It recognised that there have been instances where a legislator has prescribed a particular level of damages and gave the example of the Fatal Accidents (Northern Ireland) Order 1977, which prescribes the level of bereavement damages, conceding that it is therefore technically possible to set a ceiling. However, the ceiling would have to be adjusted periodically and will not take account of individual circumstances.

424. Therefore the Department argues that damages should be set by the courts on the basis of submissions by experts in the field. You argued for fixed compensation. Do you want to elaborate on that? My information is that your response to the consultation supported the payment of a fixed sum in every case. Is that your position?

425. Ms McClure: I think that that is in relation to the position in England and Wales.

426. Mr McLaughlin: It does not say that here. It says that it was in response to the policy consultation, so it is our legislation that we are talking about. Perhaps the best thing would be for you to respond to us. It would be helpful for the Committee to know the counter-arguments. If you are not prepared for it today, we would be happy to receive it in writing.

427. Ms McClure: It is not that. We had some discussion about it. Perhaps Martin wants to address the issue. There is a 'Judicial Studies Guidelines' booklet.

428. Mr Martin Hanna (Francis Hanna & Co Solicitors): I think that that was Thompson's position in England. I am from a separate firm, Francis Hanna & Co Solicitors. In Northern Ireland it has been established practice for 30-plus years, before the decision of the House of Lords, that pleural plaques were a compensable condition. The damages arrived at in those cases were always dictated by the judiciary. Myriad factors are taken into consideration when determining the value of a pleural plaques case: the age of the individual, his life expectancy, other relevant conditions — asbestos or non-asbestos — and the level of anxiety.

429. When we talk about a campaign to advise people in that area, we forget that most of those people get that diagnosis in their twilight years — in their 60s, 70s or sometimes 80s — and many of them cannot be reassured. They are simply told that they have asbestos on the lungs, and they may have simple pleural plaques that merely witnessed exposure. However, they may

also have asbestosis or more serious asbestos-related lung conditions. That is a very relevant point, which we, as practitioners, see at the coalface in that area of litigation.

430. The courts recognise all those factors. The legislation will not introduce something new but will re-establish what had been established practice for 30-plus years in this jurisdiction. Asbestos has been a significant aspect of this part of the world, particularly because of the shipyard, the power stations, the construction industry, and all the other industries that used asbestos. For such a small part of the world, the incidence of asbestos-related conditions — from plaques to malignant mesothelioma — is incredible. The courts in this jurisdiction have always been sympathetic to victims of pleural plaques as well as of all the other conditions. Numerous judgements have been handed down over many years setting the tariffs, and those judgements differed in every case depending on the circumstances of an individual.

431. Mr McLaughlin: It would not be the North, where there are four companies and possibly four different positions. I suggest that we invite a written answer to that question to help the Committee to address the matter, because there is a strong argument in relation to the local experience. That last point was particularly telling for me. We may need to be able to say that we looked at both sides of the argument. It is not so critical that we need to have an answer today, but we will write to you if that is OK, and you can respond.

432. Mr Hanna: Absolutely.

433. Mr Frew: In your response, you said that you are concerned that the Bill will not cover those cases that, post-Johnston, were struck out by the courts, discontinued or withdrawn. You also suggest an amendment to clause 3. Will you elaborate on that?

434. Ms McClure: The 80 cases to which I am referring were commenced before the High Court decision. The High Court decision in England was successful, so all was well and good for the cases that had been settled before the Court of Appeal decision. However, the Court of Appeal decision went against the plaintiff, so we stayed many of those cases pending the House of Lords decision.

435. In point of fact, during that period, some cases became statute-barred, as it were, and in most cases we sought the consent of the defendant company not to issue proceedings because we did not want to incur expense on behalf of our clients. After the House of Lords decision, there was no indication, as there was in Scotland, that something would be done about it. Cases were then either withdrawn or discontinued, depending on what stage they had got to. In some cases, proceedings had been issued; in others, a letter of claim had gone out; while in others, nothing had been done. People came in and said: "I have this condition." We told them: "I am sorry, but we do not know what the situation is at the moment. However, as soon as we have the House of Lords decision, we will get in touch."

436. Following that, we were under pressure to finalise the cases concerned, so we had to withdraw, discontinue or abandon them. We are concerned that this legislation may mean that those cases are regarded as having been determined. I understand that if a case has been settled and determined properly before a court, it cannot be touched. However, we are afraid that discontinued or withdrawn cases will be regarded as having been determined in a strict interpretation of the legislation.

437. Ms Purvis: The response from the Department said:

"The Bill may cover claims which were withdrawn or discontinued on foot of the Johnston case as well as future claims."

It also said:

"However, as a subsection 1(b) of the Bill makes clear, the clock has only stopped in respect of an action which has been commenced but not determined. For example, if a claim was already out of time before the Johnston case, the Bill will not adjust the position in respect of that claim, and it cannot be resurrected."

438. That seems to say that there would not be any difficulty in bringing back an outstanding claim.

439. Ms McClure: On the contrary, I think that it says that if a case has been determined, we are stuck with that. In fact, I was going to suggest that instead of the date in the Bill going back to the House of Lords decision, it should probably, to avoid any doubt or argument, go back to the Court of Appeal decision, which was made on 26 January 2006.

440. Clause 3(2) states:

"For the purposes of Articles 7 and 9 of the Limitation (Northern Ireland) Order 1989 (NI 11) (special time limits for actions in respect of personal injuries and actions under the Fatal Accidents (Northern Ireland) Order 1977), the period beginning with 17 October 2007 and ending with the day on which this section comes into operation is to be left out of account."

441. That should go back to the Court of Appeal decision, because there will have been cases that became statute-barred between the Court of Appeal decision and House of Lords decision.

442. Mr Purvis: Is it the definition of "determined"?

443. Ms McClure: Yes. Even for settlements, the interpretation of "determined", for the purposes of this Bill, will not include cases that were withdrawn or discontinued.

444. Mr Hanna: The difficulty that this legislation will arguably pose to everybody is that there was a defined period of years where individuals were told that they had pleural plaques but, similarly, were not told whether they were eligible for compensation. If the Bill becomes law, those individuals will lose out because of how the legislation is drafted and will be prejudiced because they received their diagnosis beyond the three-year period before the legislation's coming into force. Thompson McClure is proposing that that gap be plugged so that people have at least the right to get advice.

445. Mr Hamilton: Other evidence to the Committee suggested that legislating to allow for compensation for pleural plaques could open the floodgates and create a precedent whereby others who have been exposed to a whole range of toxic substances could claim that the anxiety caused by such exposure should now be compensable. That is something of which the Committee and this legislature should be very mindful. One could argue that there is a difference between being exposed to a toxic substance and pleural plaques, which, although asymptomatic, are nonetheless a physical change. What is your perspective on the argument that allowing for compensation for pleural plaques might allow others to come forward with similar arguments about the anxiety and concern that exposure to certain things in the course of work or daily life causes?

446. Ms McClure: If the Bill became law, it would be an acceptance that pleural plaques are not *de minimis*. The law is that if an injury is *de minimis* — that is, insignificant — it should not be compensable. That has always been the legal position. The High Court decision was that, because pleural plaques cannot be seen and do not have any symptoms, they should be

regarded as de minimis. Obviously, that is a medical point. However, it is our position that if you can see it on an x-ray and if someone has little scars on their lungs, it is very hard to tell that person that they do not have the condition. It follows, therefore, that if it is accepted that someone has a physical condition they are entitled to any anxiety that relates to that physical condition and its development. That is a different position from someone saying that they are worried that in the future — which is what happened in the House of Lords — they may contract a disease and want compensation because of that anxiety. There is no connection between the two. Therefore, I cannot envisage any other cases to which the legislation could be expanded.

447. Mr Hamilton: I understand your argument. However, in many ways, this hinges on the anxiety point. It was raised in earlier evidence that it is the existence of anxiety almost as much as, if not more so, than a physiological change that is the trigger point.

448. Mr Hanna: There are all sorts of legal principles as to what is compensable and what is not. Before the House of Lords decision, the physical manifestation of asbestos on the lung, the anxiety of the person involved and the risk of pleural plaques developing into something more serious was very much part of pleural plaques litigation. Pleural plaques litigation was all about those three strands. It was not just about anxiety; it was about the physical presence of asbestos on a person's lung, the anxiety of having it and what it may develop into.

449. Mr Hamilton: There is medical conjecture around what pleural plaques may develop into. Much of the evidence suggests that pleural plaque does not develop and is not a sign that someone will get anything else.

450. Mr Hanna: I do not want to cross into the medical field. However, we deal with medical reports day and daily and know what doctors and consultant chest physicians say in this area. There is a very small chance — less than 10% — of somebody with asbestos-related pleural plaques developing something more sinister. Without crossing into the medical field — essentially, I am just saying what the medical reports in those cases say — there is a risk, and, before the House of Lords decision, compensation claims dealt with and paid off that risk.

451. Mr Hamilton: Some of what you said delves into the medical side. It is not pleural plaques that cause other developments; it is the exposure to asbestos.

452. Mr Hanna: Yes, but pleural plaques are an indicator that someone has been exposed.

453. Mr Hamilton: We are getting into the finer points. It is not pleural plaques that cause —

454. Mr Hanna: I am coming back to your point about somebody approaching a firm of solicitors to say that they want to pursue a claim for anxiety. They cannot do that. They have to have the physical presence of a physical condition, and there may be anxiety on top of that.

455. Plenty of people who had pleural plaques were not worried and, because of that, they were not compensated. It is another aspect of the case. A person cannot simply say that they have been exposed to a carcinogenic substance and are worried and, therefore, have a claim. The law is very particular that a person has to have the physical condition before an anxiety claim can be compensable.

456. Ms McClure: Lord Justice Girvan's 2002 decision broke it down by awarding £11,000 for the physical injury and £7,500 or so for the anxiety. Therefore, he accepted that there was a physical injury. That is why if a person of a young age were to come to a firm of solicitors and did not want to rule out the possibility of bringing a claim in future, we would have entered into a provisional damages claim and, hopefully, obtained for them compensation of about £11,000

or £12,000. That ruled out anxiety, because, if they developed something in the future, they could come back. There was that division.

457. Dr Farry: I welcome our guests. If someone had a mole on their skin and had been exposed to a carcinogenic substance, should they be compensated if they were anxious about developing skin cancer?

458. Ms McClure: No, because the mole would be regarded as de minimis; it would be regarded as being so insignificant that it should not be compensable.

459. Dr Farry: How, therefore, does the presence of a pleural plaque on the lung differ from a mole on the skin?

460. Ms McClure: Before the House of Lords decision, the courts' view was that pleural plaques was not de minimis because it could be seen in an X-ray and the damage to someone's lungs could be seen.

461. Dr Farry: Damage to lungs implies that something is affecting the lung.

462. Ms McClure: Scarring on a person's lung is not visible to them.

463. Dr Farry: Does the scarring on the lung affect its ability to function?

464. Ms McClure: No.

465. Dr Farry: Therefore, it is not damage to the lung.

466. Ms McClure: The lung of a person with pleural plaques does not look the same as that of someone without pleural plaques.

467. Dr Farry: What is your definition of damage then?

468. Ms McClure: It is an area of fibrosis and slight marks on the lung. That is the position of the courts.

469. Dr Farry: It could be argued that a mole on the skin is damage to the skin.

470. Mr Hanna: The issue is that individuals at work were exposed to a carcinogenic substance — asbestos. Twenty or 30 years later, they are diagnosed with pleural plaques as a consequence, so there is a link to their work. Where and to what would one need to have exposure to get a mole?

471. Dr Farry: Someone who worked in Sellafield might develop a mole.

472. Mr Hanna: There would need to be a recognised medical body of opinion to say that a person who is exposed to something will develop a certain condition.

473. Dr Farry: Where is the medical evidence that suggests that pleural plaques are damage?

474. Mr Hanna: The issue has been debated in the courts for decades across the world. In Northern Ireland pleural plaques was always a recognised actionable injury; that was established by our judiciary.

475. Dr Farry: If something has been the case in the past, does that mean that it should always be the case in the future?

476. Mr Hanna: Not necessarily, but I respectfully suggest that pleural plaques should be a recognised compensable condition.

477. Dr Farry: Why?

478. Mr Hanna: People went to work at the shipyard and were exposed to terrible conditions and horrible environments.

479. Dr Farry: If that is the starting point of what you are saying, the basis of the compensation is the exposure. Therefore, we have shifted from whether it is damage or injury to the lung, and the associated anxiety, to arguing that people should be compensated for exposure alone.

480. Mr Hanna: No. I am making the link between their terrible working conditions and the fact that, some 30 years later in their twilight years, they are advised that they have asbestos on the lung, which may or may not develop into something more serious. They are anxious about it, and you cannot say anything to them to make it any better because they were at the funeral the week before of their friend who died of mesothelioma, and they do not know the difference between the spot of —

481. Dr Farry: To be clear: are we talking about compensation for the fact a person was exposed, that they were anxious, that there is a risk of something else or because there is some asymptomatic change to the lung? Which of the four?

482. Mr Hanna: They are being compensated because of the presence of asbestos plaques in their lungs.

483. Mr McLaughlin: Is that a consequence of their employment?

484. Mr Hanna: It is a consequence of their employment and the anxiety that goes with it.

485. Dr Farry: Therefore it is all four.

486. Mr Hanna: There has to be a link to their work, their working conditions, what they were exposed to, the fact that they were not protected and whether there was a duty of care.

487. Dr Farry: Does either of your firms employ medical experts to back up your arguments?

488. Mr Hanna: In every case, we obtain consultant physician reports, lung function test reports and consultant radiology reports.

489. Dr Farry: Are they factual reports on the physiological state of the person concerned?

490. Mr Hanna: Yes.

491. Dr Farry: Do you employ a medical opinion on the wider argument about whether the presence of pleural plaque should be compensated?

492. Mr Hanna: That is a legal not a medical issue. A radiologist can report only on what he sees on a high-resolution CT scan; a consultant chest physician can report that the complaint will not cause the patient any symptoms, per se, but that there is a risk of progression.

493. Dr Farry: However, you do not dispute what we view, or what I view, as the medical consensus that pleural plaques of themselves are not harmful.

494. Mr Hanna: I do not think that anyone would disagree with that.

495. Ms Purvis: It therefore relates to the employer's duty of care to the employee and the exposure to the asbestos. That is when the harm is done.

496. Mr Hanna: Yes.

497. Ms Purvis: In your submission, you said that you thought that the Bill was human-rights compliant. In their submissions, others said that they feel that the Bill is in breach of the European Convention on Human Rights, with regard to employers' and insurers' rights. Why are you so definite that it is human-rights compliant?

498. Ms McClure: They are taking that stance because if the Bill were passed it would be retrospective. There is always a legal argument about whether retrospective legislation is human-rights compliant. We are of the view that this has been tested before and that there was legislation in the past that managed that. Therefore we did not feel that this was in contravention of human rights.

499. Ms Purvis: One of the arguments is that, since the House of Lords ruling, it is not within the legislative competence of the Assembly to make this legislation. Do you have a view on that?

500. Ms McClure: It has been debated in the Scottish Parliament, and it is of the view that there are arguments both ways. That was tested, and the Scottish Parliament felt that it did have the competence. Our view is that the Assembly also has the competence to deal with it.

501. Mr Hanna: The best example is probably the Barker case of the House of Lords, which related to malignant mesothelioma. The Labour Government of the time passed the Compensation Act 2006 to say that that was unfair. The basis was that if an individual was employed in five places of employment and exposed at those five places, he could pursue only one employer or one occupier. The case failed because the individual could not sue all the individuals or all the companies or occupiers. That was a tremendously onerous situation for cancer victims, and the Compensation Act 2006 said that individuals are entitled to pursue anyone whom they can pursue and that they are entitled to 100% of the compensation.

502. Ms Purvis: It related to an employer's duty of care.

503. Mr Hanna: Yes.

504. The Chairperson: There are no more questions. I have just been made aware that you were waiting outside since 11.20 am; I was not aware of that when you came in. That was too long to wait, and I apologise for it.

505. Mr Hanna: I appreciate that such things happen.

506. The Chairperson: The issue will come before the Committee again, so will it be OK to write to you with any further questions?

507. Mr Hanna: It is an emotive issue, so both of us will be happy to answer further questions. We will probably reply jointly, if that is ok.

508. The Chairperson: Thank you. Again, I am sorry that you had to wait so long. I thank the DFP officials for attending and apologise that you were not called. We will write to you if we require clarification.

19 January 2011

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 Declan O'Loan
Ms Dawn Purvis

Witnesses:

Mr Neal Brown	Royal Sun Alliance (NI)
Mr Stephen Boyles	Zurich Insurance
Mr Dominic Clayden	Aviva
Mr Nick Starling	Association of British Insurers
Amanda Wylie	Kennedys Law

509. The Chairperson (Ms J McCann): I welcome the following representatives from the insurance industry: Nick Starling, director of general insurance and health at the Association of British Insurers; Dominic Clayden, director of technical claims at Aviva; Neal Brown, commercial operations manager at Royal Sun Alliance; and Stephen Boyles, business manager at Zurich (NI). Gentlemen, after your opening statement we will move to questions.

510. Mr Nick Starling (Association of British Insurers): Good afternoon, Madam Chairman, and thank you for inviting us to give evidence today. I will make just a few opening remarks.

511. The position of the insurance industry is clear: we are fundamentally opposed to the Bill. Insurers are absolutely committed to paying claims for genuine illnesses caused by negligent exposure to asbestos; our members pay about £200 million a year for mesothelioma and other asbestos-related illnesses.

512. We oppose the Bill for several reasons. First, pleural plaques are not a disease; they are symptomless, benign and do not lead to more serious conditions. The principle of liability is harm. If the legislation were passed, it would overturn the principle that harm is the basis for the payment of liability claims and could open the way for a wide variety and number of claims based on exposure and anxiety but not actual harm. That would fundamentally change the law of negligence and so undermine business confidence. There has to be an expectation that when a company or an individual goes to court, the court's decision will be upheld and not overturned, especially retrospectively. We believe that the best way to deal with the anxiety experienced by people with pleural plaques is through information and guidance.

513. We therefore urge the Committee to scrutinise the Bill, the medical evidence, and the compatibility of the Bill with the European Convention on Human Rights very carefully and to look at the substantial potential costs.

514. Mr Hamilton: I have carefully studied your correspondence to the Committee over the past months. On one level if pleural plaques were a genuinely compensable condition, I would not care that insurers had to pay out. If that is the law and the established position, that is how it is. However, I care in the sense that somebody ultimately has to pay the insurance premiums and that businesses and, more important, my constituents will be hit in some way.

515. There are two issues that I want to ask you about. There has been conjecture about the likely cost. In some ways my question is akin to asking "How long is a piece of string?". You say that the Department of Enterprise, Trade and Investment has set aside about £31 million in the draft Budget to cover possible liabilities but that that figure might be conservative. What might the figure for pleural plaques be in Northern Ireland?

516. If the Assembly were to pass the legislation in what's left of this mandate or in future, notwithstanding the Scottish case that is going through the legal process, would insurers challenge the legislation in the courts?

517. Mr Starling: Costs are extremely difficult to calculate. You said that it was as long as a piece of string; however, another appropriate quotation is Donald Rumsfeld's "known unknowns". Since pleural plaques are symptomless, people find out about them via other interventions. It is extremely difficult to calculate just how many people could present with them, although there are estimates that can be used. One is that for every case of mesothelioma there are between 20 and 50 cases of pleural plaques.

518. We have not put together estimates; however, the Ministry of Justice in Westminster has. It calculated that, for the UK as a whole, there could be an enormous range of between £3.7 billion and £28.6 billion. Factoring in comparable populations, a figure is reached for Northern Ireland of between £111 million and £858 million. It is extremely difficult to calculate where the figure might be on that basis. The problem with any government-sanctioned compensation scheme is that it encourages people to come forward. For example, it was expected that there would be 150,000 claimants for the British Coal chronic obstructive disease scheme; the actual figure was just short of 600,000 — a factor of four. If legislation were passed and people were encouraged to make claims, the numbers and compensation figures would be extremely difficult to calculate.

519. A large proportion of the figures for Northern Ireland falls on the state rather than on insurance companies. For pleural plaques alone up to 2015, you are looking at a cost of about £39.5 million. However, that is subject to a whole range of factors; it could be more.

520. Mr Hamilton: Would insurers challenge the legislation in court?

521. Mr Dominic Clayden (Aviva): Before I answer your question, I would like to say something about payment, as the two are interdependent. Ultimately, insurance is a cost borne by premium-paying policy holders. Many factors go into a price, but, fundamentally, claims costs feed into premiums. Therefore an element of those inevitably falls back onto premium-paying policy holders.

522. However, there is a broader issue that I ask the Committee to consider: insurers' very real concern about interventions after a judgement by the highest court on what the law is. It would create even greater concern and would increase the risk of "allocating capital", as insurers say, where we view the risk globally. It would make Northern Ireland a riskier place simply because we could not be certain that when we went to court there would not be a subsequent

intervention and that a loading would follow. There would be an additional cost because we would be unsure whether the Executive would intervene again.

523. Your comment that you do not care whether insurers pay disappoints me.

524. Mr Hamilton: My point was that if you have a liability, I do not care. The general point is that if, by whatever means, the law establishes that there is a liability, that does not bother me. I was following on from the concerns that I have.

525. Mr Clayden: The precursor to that becomes: should the Executive intervene to legislate? It is public knowledge that insurers have challenged similar legislation in Scotland in the belief that there has been a breach of articles 1 and 6 of the European Convention on Human Rights and possibly a common-law breach on the grounds of irrationality. Therefore, although there is a wide margin for the Executive's legislative position, there is potential for a challenge, which is the position that we have taken in Scotland. To answer your question in short, we would look closely at the legislation. The precedent has been set in Scotland, so although I do not want to prejudge anything, we would be very uncomfortable with making pleural plaques compensable and with the broad principle of courts retrospectively intervening in legislation.

526. Mr Frew: Thank you, Chairperson, for letting me in, as I have to leave soon. I have a couple of questions. You stated that you do not believe that pleural plaques are a disease. Would you say that they are an injury, and, if so, how does it sit with you that they occurred when people were at work, having been instructed to work in that environment? Pleural plaques would not exist if people had not had to do work that exposed them to asbestos. What do you feel about pleural plaques being an injury rather than a disease?

527. You believe that the Bill contravenes the European Convention on Human Rights. Will you go into more detail on why you feel that to be the case? The Minister said that he believes that the Bill meets all the criteria.

528. Mr Starling: I will answer the first part, and then, if I may, I will pass to Mr Clayden for the second. The medical evidence is clear: pleural plaques are not a disease or an injury; they are a benign condition, although one caused solely by exposure to asbestos. That is not denied, and, of course, such exposure might mean negligence. However, the key point is that it is a benign condition that does not lead to a more severe condition. In effect, it is the body's protective scarring, which seals in invasive fibres.

529. Mr Frew: What account do you take of the fact that an acknowledgement or proof of exposure to asbestos increases anxiety greatly?

530. Mr Starling: It is the account that the courts take that matters. Insurers pay on what the courts decide, and the courts decide on the basis of actual physical harm. There are some cases where pleural plaques are so extensive that there is discomfort in the lungs, and those people can be paid compensation. In addition, there have been cases involving clinical psychiatric conditions resulting from that, and compensation can be payable there. However, the principle of liability is that you do not pay compensation for anxiety or in circumstances in which there is no actual physical harm.

531. Mr Clayden: The first instance hearing in Edinburgh on the European Court arguments went on for 21 days — although it felt longer — so I can only give you a précis. Nevertheless, we believe that, under article 1, corporate bodies, like individuals, are entitled to the quiet enjoyment of possessions. Therefore, telling insurers and employers to make payments for sub-clinical anxiety to what would be, in effect, a special class that would be carved out would be unique and not a reasonable balance of ours or of employers' rights of entitlement to the quiet

possession of property. We struggle to see why anxiety for pleural plaques should be carved out as a special case.

532. I can give you examples that make us query the suggested approach. First, it is not entirely clear why some people who are exposed to asbestos develop pleural plaques while others do not. I do not seek in any way to justify exposure to asbestos. I deal with mesothelioma claims; mesothelioma is a horrible disease and a horrible way to die. However, for two people working in the same employment, both knowing that they have been exposed to asbestos — as is the nature of a great deal of employment — the nature of the Bill would be that if one person develops pleural plaques and one does not, both would have a similar degree of sub-clinical anxiety. Therefore, it is anomalous and difficult to understand why you would carve out legislation to say that one group gets a payment and one does not.

533. The second feature in carving out a group such as that is that there are other circumstances in which people are aware that they are at increased risk of developing a condition or disease. In balancing the rights of the parties, why carve out one group over another? You may say that those are trivial examples, but they should be explored. We are worried about the principle. For example, exposure to sunlight and sunburn increases the risk of developing skin cancer. Should you consider compensating people who worked on building sites who were exposed to sunlight by not wearing a shirt or by not being provided with sun lotion? Should those who are at greater risk of heart disease and other conditions when suffering withdrawal from drugs be compensated? Those issues create anxiety, but they are not compensable. Carving out those who have pleural plaques calls into question the appropriateness of the suggested approach. The balance raises serious questions in our minds about the proposed legislation.

534. Thirdly, the other factor is article 6. The issue has gone to trial and, subsequently, the legislative process seeks a closure of access to courts.

535. That is a brief summary. In trying to summarise 21 days and a great deal of lawyers' time, those are the headlines.

536. Mr Frew: You did well.

537. The Chairperson: During the debate it was mentioned that the compensation scheme is available in England and Wales. There is no legislation there either, but there is almost an acceptance that compensation should be paid, although the compensation looked at a different form of financing. What are your views on the scheme that operates in England and Wales?

538. Mr Starling: The government in England and Wales have decided to pay compensation for people who submitted claims that were stayed because of the Rothwell judgement. That was done on the basis that people had a reasonable expectation of getting some compensation. We are neutral on that. If the government choose to pay people under those circumstance, that is their right.

539. The Chairperson: However, you are not saying that those people should not be compensated. You said earlier that you do not think that pleural plaques are a compensable injury.

540. Mr Starling: The argument is the same as before: there is no formal liability because there is no injury. I believe that the Government paid compensation on the basis of reasonable expectation that people were going to receive some compensation. Those were their fairly narrow reasons for doing so.

541. Dr Farry: I want to pick up on that. You will be conscious that there is considerable public interest in the issue and public demand for compensation. Whether or not that is justifiable is a different issue. If the Assembly tried to address the issue by means of a fixed payment to avoid opening the floodgates to open-ended compensation, would the insurance industry be prepared to consider making a contribution to a fund as an alternative to the provisions in the Bill?

542. Mr Starling: No; it would not. If government decided to pay compensation from their coffers, that would come out of general taxation to which the insurance industry already contributes. Therefore the industry would not put its money into such a fund.

543. Dr Farry: Our Minister has argued that insurers were routinely paying out for pleural plaques claims before the Johnston case and that had it not been for that pesky little judgment, that would still be the status quo. In that sense, there is no material difference between that situation and the one that insurers would face if the Assembly passed the legislation.

544. Mr Starling: That is how the courts work. Insurers have often paid compensation for new circumstances that they were not aware of before. In the case of pleural plaques, insurers were paying compensation on the basis of premiums that were collected decades before they became compensable in the first place. However, we started to see a very substantial increase in the number of claims and began to get different medical evidence. We had been paying compensation for claims based on uncertain medical evidence and on a concern that pleural plaques were potentially malignant. However, the medical evidence changed, and the challenge was, therefore, made. That challenge was initially made by the Westminster Government and was supported by insurers, because it was felt that the decision needed to be tested in a court of law. It was tested in a court of law, and the outcome is before us.

545. Mr Clayden: There was uncertainty from a medical position about what was actually going on with pleural plaques when the first claims were paid. In the first instance, cases were low in number, and when they were tested the courts said that claims had to be paid. However, it became apparent that there was an absolute alignment of pretty much all the medical profession that pleural plaques themselves do not go on to cause any of the other nasty asbestos-related conditions.

546. One of the features of the Rothwell case was absolute agreement between the claimant's and the defendant's medical experts. In fact, part of the reason for that challenge was that the world had moved on and there was clarity. It should be borne in mind that a significant body of medical opinion believes that, in that situation, paying compensation would be counterproductive for someone who has been told that they have pleural plaques. Emeritus Professor Seaton, who gave evidence in Edinburgh, said that the message should be that plaques will not lead to something else but are a mark that a person has been exposed to asbestos.

547. Dr Farry: I have one final question to tease this out. I appreciate and understand your point that pleural plaques are not an injury in the sense that they do not have any symptoms, they do not harm or inhibit lung function and do not, in themselves, necessarily indicate any higher risk of exposure to asbestos. Equally, however, someone could argue that, notwithstanding the lack of direct consequences, there has nevertheless been a violation of bodily integrity, because a substance is on that person's lungs that is not on the lungs of other people. If someone in the workplace got covered in paint, they would not experience a direct physical consequence from that, but they would nevertheless experience a change to their body.

548. Mr Starling: That is the point at which the courts decide, which they did in the Rothwell case. I emphasise that insurers follow courts' decisions on whether they have to pay compensation. We are neither doctors nor experts in medical conditions; we have to go by what the courts decide

549. Dr Farry: You said that the legislation, perhaps wrongly, accentuates people's sense of anxiety about pleural plaques and that an alternative government response would be to invest in public health information to explain to people that it is not a problem. Would the ABI be prepared to partner the government in funding such a campaign to address people's misconceptions about pleural plaques? Would that be viewed as a more reasonable way of addressing people's concerns?

550. Mr Starling: We are prepared to work with government, and we are doing so with the government in England and Wales. We have put our money towards research into mesothelioma. Members have put £3 million towards research to find a cure or treatment for mesothelioma. That is a good use of our funds, but we would certainly work with the government to get the message across. Our sense is that people will listen more closely to advice from doctors and other people.

551. Mr O'Loan: I understand the points that you make. Stephen has asked questions that I was going to ask about the Minister's view that you were collecting premiums over the years, so I will not delve into that. Stephen also asked about the compensation scheme, which I will pursue further. Is there a precedent for the insurance industry to short-circuit a claim area by creating a scheme or no-fault-admitted concession to defuse a situation rather than every case being subjected to a test?

552. Mr Starling: I am not aware of any. I am thinking of the Motor Insurers' Bureau, which has a slightly different approach that covers uninsured drivers.

553. Mr Clayden: There have been schemes over the years, including one that operated for a company called Turner & Newall. I cannot remember the full circumstances, but it involved a US company acquiring a UK company only to find later that it had insufficient funds to meet all claims. However, a scheme was agreed whereby the funds that were available were dealt with under the terms of an agreement to reduce legal costs, etc, so that the people who suffered got as much as possible.

554. A scheme was introduced as a result of miners' claims for chronic obstructive pulmonary disease. Although the government paid for most of the miners' compensation out of general taxation, there were complexities; there was privatisation, part privatisation, and bits were hived off the mining industry over the period. An insurance element followed the same scheme, and, from memory, it was in the low percentages. Schemes have been used in the past.

555. Mr Starling: These are circumstances in which there is injury and liability. I am answering from the point of view of a scheme where there was no liability.

556. Mr O'Loan: Those are interesting examples. Even if the Bill became law, a person who developed pleural plaques would not automatically get compensation; negligence would have to be tested and proven. In other words, there would have to be failure on the part of an employer to exercise a duty of care to an employee.

557. What happens in asbestos cases? Was there a particular point when the medical information, as happened with tobacco, became absolutely clear that asbestos was a dangerous substance? From which point were employers under a clear duty to operate in the light of that new information?

558. Mr Starling: I shall answer the general point first. My understanding is that, in most cases, if it is clear that there has been negligent exposure to asbestos, liability is fairly straightforward. There is a great deal of discussion about the point at which employers should have realised. As was mentioned at the beginning, insurers are paying out £200 million a year because they

recognise that there is liability due to negligent exposure; that is usually relatively straightforward to establish.

559. Mr O'Loan: Is all exposure now treated simply as negligent exposure?

560. Mr Clayden: No, unfortunately. I wish that lawyers made life that easy. The issue is similar to industrial deafness and some other industrial conditions to which various factors contribute, such as the state of knowledge at the time —

561. Mr O'Loan: That is the particular point that I raised.

562. Mr Clayden: From memory, the governing legislation started off with dust, so it was not related specifically to asbestos. Legislation on dust began in the 1920s or 1930s; I would not want to be held on the dates, but it goes back a long way. It was updated over time, and it varies according to how much asbestos a company was using and whether the company was large or small. A series of cases revolved around compensation not being awarded because there was no negligence for spouses. In the 1950s and 1960s, typically, a male worker would go home and dust out his overalls, so there are cases in which, unfortunately, wives or children developed mesothelioma. The state of knowledge of what an employer was required to do at that time meant that it was not compensable. I am afraid that it is a complex area.

563. Mr McLaughlin: I apologise for missing the beginning of your presentation. In the answers that I have heard so far there was discussion about the fact that the world and science have moved on and that there is new medical evidence. Was there a time before Johnston when you dealt with cases involving pleural plaques on the same basis as those involving asbestos exposure? Given what we are discussing, what is the history of the matter?

564. Mr Starling: Claims started to be payable from the early 1980s. As always in these matters, a particular court case triggered it, on the basis of which, where there was negligence and where there were pleural plaques, compensation was paid until a case was brought that overturned it.

565. Mr McLaughlin: Did the products that you were selling or the premiums that you were collecting distinguish between asbestosis, other asbestos-related diseases and pleural plaques? Was there any specification?

566. Mr Starling: In that case, many of the premiums were collected decades ago; to be honest, long before anyone considered asbestos compensation at all, let alone for pleural plaques.

567. Mr McLaughlin: I know that, in your view, medical evidence is paramount. Does new medical evidence completely contradict or supersede previous evidence on pleural plaques or are the two juxtaposed while the courts decide on a judgement?

568. Mr Clayden: Medical knowledge has simply moved on over time. One of the features of the Rothwell/Johnston cases was that claimants' and defendants' medical experts agreed; the courts were not left to choose which they preferred. That part of the case was accepted entirely by all parties. There will always be someone — although I have not come across them — who does not accept that, but mainstream medical evidence agrees that pleural plaques are benign and will not go on to cause any nasty asbestos-related diseases. That is where medical science is.

569. One of the views expressed by the House of Lords was that if medical evidence moved on, the decision would have to be looked at again.

570. Mr McLaughlin: If you are not prepared for this question, you may need to correspond with us on it. Are there any asymptomatic conditions that you accept responsibility for?

571. Mr Clayden: I cannot think of any, but we will write to you to confirm that.

572. The Chairperson: We have heard in the medical evidence that pleural plaques are a longer-term condition, but if two people are exposed to asbestos and one of them develops pleural plaques, do they have a greater risk of developing other diseases and illnesses? In the longer term, is the person who has pleural plaques more likely to develop other illnesses, such as lung cancer, than the person who does not have pleural plaques?

573. Mr Clayden: My understanding is that the loading exposure of asbestos is the same. Hypothetically speaking, if two people work on adjoining benches, the exposure is exactly the same, and my understanding is that the long-term statistical chance of developing lung cancer, mesothelioma or asbestosis is identical. I have not seen a specific study on that, but my understanding is that the risk is the same.

574. The Chairperson: In the longer term, is the person who has developed pleural plaques more likely to develop other illnesses?

575. Mr Clayden: I believe that the risks are exactly the same. Part of our concern relates to the arbitrary nature of the issue.

576. Ms Purvis: I apologise for missing the start of your presentation. This is about employers' negligence and a breach of a duty of care. If an employer is found to be negligent, do you believe that an employee can pursue a personal injury claim against that employer?

577. Mr Starling: There need to be two components. There needs to be negligence, and the employee needs to have the disease or the injury. Our contention of the judgement on Rothwell is that there was absence of harm; therefore, it was not compensable.

578. Ms Purvis: This legislation that we are examining would redefine pleural plaques as an injury. Therefore, employees could pursue compensation claims through the courts.

579. Mr Starling: That is my understanding of what the legislation seeks to do.

580. Ms Purvis: If my employer was negligent, and I ended up with a tiny scar on my finger due to an injury at work, I could pursue a claim for that injury through the courts. Pleural plaques are tiny scars on the lungs, which, in my mind, prove that there was exposure to asbestos and, therefore, they are an injury to the lung. Like a scar on a finger, they may not develop into a long-term illness or terminal disease, but they are still an identification of an injury. That is the purpose of the Bill. You said that you would abide by the courts' decision. The Bill will free people up to pursue personal injury claims from employers through the courts, so what is the problem?

581. Mr Starling: There are a number of layers here. I will pass over to someone who pays the claims in a moment, but the fundamental principle is that courts in this country decide what constitutes liability and what constitutes personal injury. That has always happened, and it is unprecedented for Governments and Assemblies to step in and redefine that personal injury. That is how the system has always worked.

582. Ms Purvis: Sorry, did that not happen when people were able to pursue claims before the Johnston case? Did the courts not step in and decide otherwise?

583. Mr Starling: The courts decided, but the courts evolve. They are looking all the time at what constitutes personal injury. Historically, the courts have made more things claimable for than not. However, that case went the other way. When I say that we abide by the courts, I mean that we abide by the courts' decision of what constitutes harm and injury. There is always going to be a slightly grey area in some cases, and that is why the courts are there to arbitrate. They clearly did that in the case of pleural plaques. In the early 1980s, when the courts determined that pleural plaques should be compensable, insurances companies started paying out compensation, and when they decreed in the Rothwell case that they were not compensable, insurers stopped paying out. That is the principle that we follow.

584. Mr Clayden: The issue has been looked at in the House of Lords and in Scotland. Lord Rogers, sitting in the House of Lords, indicated that there is a triple test. First, has there been a breach of duty? With asbestos cases generally, that is not really an issue. Secondly, has there been an injury to the claimant's body? Thirdly, has there been a material damage as a result? The judges clearly held that a material damage is not caused as a result pleural plaques.

585. In Scotland, Lord Uist subsequently looked at the issue, and his view was that pleural plaques do not cause de minimus harm, and that, in fact, they cause no real harm at all. Compare a person with a scarred finger with a person who does not have anything visibly wrong with them when viewed externally. Pleural plaques are totally asymptomatic. The courts approach to the possibility of carving out pleural plaques as a separate category was that it would be departure from the approach taken to injury as a whole, and they were not prepared to do that.

586. Ms Purvis: Those people are not medical experts; they are legal experts.

587. Mr Clayden: Ultimately, we are dealing with the law. In the Rothwell case, medical evidence was heard from the claimant and the defendant's experts, and that was the consensus view.

588. Ms Purvis: However, the medical experts also had a consensus view that pleural plaques are an indication of exposure to asbestos and that they are small, scar-like adhesions on the lungs.

589. Mr Clayden: That is right.

590. Ms Purvis: I am not a medical expert either. However, I am in favour of the legislation, because I believe that that exposure to asbestos means that an employer has been negligent and in breach of its care of duty to an employee and that the very fact that pleural plaques are on a person's lungs is an indication of an injury, because the plaques would not be there had the person not been exposed to asbestos.

591. I do not see the difficulty with legislation that allows people to pursue compensation claims that they were previously allowed to pursue prior to the Johnston case. It is wholly unfair that cases were stayed or stopped and that people were from prevented from pursuing claims that they were allowed to pursue previously. It is the job of legislators, particularly those in this Assembly, to do what is right and fair and to help people to improve their quality of life. However, a court will ultimately decide on compensation claims, not the Assembly.

592. The Chairperson: No other members have indicated that they wish to ask any further questions. If we need to clarify any more issues, we will write to you. Thank you very much for coming along.

593. The Chairperson (Ms J McCann): I welcome Amanda Wylie, partner from Kennedys Law. Normally, we ask witnesses to make a short opening statement, before opening up the meeting for members' questions.

594. Ms Amanda Wylie (Kennedys Law): Thank you, Chairperson, for your invitation to appear before the Committee this afternoon. I am in a slightly different position, because I am a defence lawyer. Last week, you heard from claimant lawyers, and I am afraid that you will be hearing from the other side of the fence today. My clients are mostly insurers and self-insured bodies and companies. I will speak on their behalf today; more particularly, on behalf of self-insured companies. My second hat is that I am the area representative on the Forum of Insurance Lawyers, but any mistakes or opinions in the submission are entirely my own.

595. I am happy to outline the bullet points in my written submission that I think may be relevant or to take members' questions, whichever is convenient.

596. Mr McLaughlin: Welcome, Amanda, and thank you for your paper. I have only one question, that which I put to the previous witnesses. In section 3.1 of the paper, you made reference to other asymptomatic diseases. Will you give us an indication of the diseases that you are thinking about?

597. Ms Wylie: Not to be trite, but, in relation to workplace-related type injuries, one need only think back relatively recently to the smoking ban that came into workplaces. People working in offices may have been exposed to smoke and may see, for instance, a higher increase in lung cancer but, at the minute, be asymptomatic. Potentially — not to use the old adage of the floodgates — that is something for which people may seek compensation, because they may say that that may result in injury, even if it is asymptomatic at present.

598. Mr McLaughlin: Are there any other examples?

599. Ms Wylie: I have no other examples offhand, but I am quite happy to do some research in that area if the Committee would like me to.

600. Mr McLaughlin: Are there any examples in which insurance liability was accepted for asymptomatic diseases or conditions?

601. Ms Wylie: Not to my knowledge or in my experience. Getting back to the principle of actual harm or injury or, as we colloquially call it, damages, if a claim is brought before the court in respect of a breach of duty of care to an individual that has resulted in injury, there are two purposes of the damages or awards of the court. First, it compensates for general damages, which is pain and suffering. That goes back to the point about asymptomatic conditions; if there is no pain and suffering, how can that be compensable? Secondly, it provides compensation for special loss, which is loss of wages or any other loss that may be sustained as the result of an accident.

602. Mr O'Loan: You say in your submission that:

"The intent of this Bill is to circumvent or usurp a decision of the highest court which binds the Northern Ireland Judiciary and is therefore inconsistent with its stated aim of maintaining and supporting an independent judiciary in which the public may have confidence."

603. That is a very strong statement.

604. Ms Wylie: I say again that that is my own opinion.

605. Mr O'Loan: If we had a written constitution, I dare say that we could test that in court. I suppose that it is being tested in the Scottish legal challenge.

606. Ms Wylie: That is correct.

607. Mr O'Loan: Surely, legislatures do that all the time. They respond to decisions made in the courts and sometimes think that the law needs revision. The mere fact of disputing a court decision and introducing legislation that would change it is hardly unprecedented. I would have thought that that would be commonplace.

608. Ms Wylie: I accept that the legislator has the right to make a law that represents the will of the voting public. What the Bill is trying to do is in a slightly different context because the legislator is trying to define what personal injury is, and I do not believe that that is the responsibility of the legislator. The judges have the facts in front of them, and they have the benefit of expert medical evidence. They can come to a decision on the status of the law and the status of the facts as presented to them. As an officer of the court, I may be seen as being biased, but to overturn what is really a legal precedence would be contrary to maintaining the separation of the judiciary and the state. In other words, just because there is an unpopular decision, the state should step in. After all, the decision came down in 2007, and it is now 2011, so there has been some passage of time.

609. Mr O'Loan: That ties in with the point that I made in the plenary sitting about whether we are challenging the fundamental principles of the law. I do not think that we are; we are addressing the question. Is this particular issue so different that the well-established general principles of the law cannot satisfactorily deal with it? That is our debate.

610. Ms Purvis: In your response to the Committee, you said that the Bill may be in contravention of the Human Rights Act 1998. However, during Monday's debate, the Minister said that in light of all the information that is available, he was happy to say that the Bill is legally competent. What evidence did you use to conclude that the Bill is in possible contravention?

611. Ms Wylie: It is for the Committee to get its own legal advice in relation to whether the matter is human rights compliant, but I believe that there may be recourse to the Human Rights Commission on the point. My reason for putting forward the opinion as stated is that the Bill is supposed to be retrospective, and I know from Monday's debate that the Minister thought that that might be dealt with by not making it retrospective. However, to me, the argument then is circular. If the Bill is not retrospective, the Act will not be retrospective. Are you not going to be in the position whereby all claims between the Johnston case and the Bill becoming law will not be dealt with in any event?

612. In addition, in relation to the point about article 6 of the European Convention on Human Rights, anybody has a right to a fair trial. With the passage of time, and it is only human nature, memories fade and tracing employers becomes more difficult. If you do not mind, I will take the point wider. I act for self-insured companies. With such companies, whatever happens comes off their bottom line. They do not look to insurers. They look to their bottom line and to what they may have to pay out.

613. Should the Bill become law, a company would have to pay out on the basis that pleural plaques are designated as an injury. As you heard from the previous witnesses, usually liability is not generally in dispute in asbestos-related cases, and it would not now be in dispute for pleural plaques. Therefore, they face money coming off their bottom line.

614. Historically, premiums have been collected in relation to insurers and the adage is that insurance companies have broad backs and they can take it, but one should bear in mind that there are self-insured companies that may be insured only up to a certain point. Insurance companies have become insolvent over the years, for example, Iron Trades; therefore, they are not immune. If pleural plaques are going to be an additional source of compensation payouts, the surviving insurers, self-insured companies or uninsured companies will have to bear that loss. That is a wider business point in relation to attractiveness for investment in Northern Ireland. No one doubts that the Bill is well intentioned, but it needs careful scrutiny before you decide to make it law.

615. Ms Purvis: I have some sympathy with employers that were not aware of the consequences of exposure to asbestos and were found to be liable after the fact. However, if an employer has breached its duty of care, and an employee is entitled to claim compensation, the employer should pay that compensation.

616. Ms Wylie: No one is arguing against that. I suppose that this is where maybe there is a separation of language. No one doubts that anyone who has been injured as a result of an employer's negligent breach of their duty of care and who experiences pain and suffering should be compensated. No one denies that. However, I go back to your earlier analogy about the scar on your finger, which you likened to scars and pleural plaques on lungs. You are well in tune now with the idea that the joint medical position in the Johnston case was that pleural plaques are a benign condition. However, for you to have sustained that scarring on your finger, even if it is a small scar, you would have to have suffered a laceration, perhaps followed by stitches, and you would have been presented with a cosmetic defect, for which you would have been compensated based on general damages for your pain and suffering. This case is slightly different, because pleural plaques can only be detected radiologically, and, based on medical evidence — again, I concede that I am a lawyer and not a medical expert — they do not produce pain and suffering, and there is no cosmetic defect, because, generally, people do not even know that they are there —

617. Ms Purvis: They are still a defect on their lung.

618. Ms Wylie: But if you are thinking about scarring, the general basis on which compensation is awarded for scarring is cosmetic defect.

619. Ms Purvis: In my mind, they are still a defect and, therefore, an injury. If we could move on —

620. Ms Wylie: But there is no pain and suffering.

621. Ms Purvis: I do not accept that, because constituents who are suffering pain as a result of pleural plaques have come to me. I see them all the time, and whether their suffering is related to their condition or to other conditions, I see the very real toll that it is taking on them —

622. Ms Wylie: From a psychological point of view?

623. Ms Purvis: No, from a physical point of view. If the Bill does not go through and does not apply retrospectively, would we be in potential breach of the Human Rights Act, because we would not be allowing individuals to have access to justice? If people — I know that you were talking about employers, but I am thinking about employees — are allowed to pursue compensation claims, but the Bill does not relate back prior to the Johnston case, would we be denying them access to justice?

624. Ms Wylie: If you mean that the Bill is not retrospective and that you are dealing only with a few claims going forward, arguably, you would fall back on the position that the state of the law at that time was that pleural plaques were not compensable and, therefore, when the Bill is enacted, any claims going forth would be compensable. Potentially, everything is open to challenge, but whether such a challenge would be successful is another matter.

625. Ms Purvis: In your presentation, you talked about the cost of access to justice and the potential pressures on the courts system arising from the introduction of the Bill. Surely that is a matter for the Department of Justice?

626. Ms Wylie: Indeed, it is a matter for the Department of Justice. I know that the buzz words are "ensuring access to justice for all", but I agree that that is a matter for the Department of Justice, and probably not for this Committee. Nevertheless, the decision may impinge on another Department's position.

627. Ms Purvis: Nonetheless, in introducing the Bill, it is up to us to ensure that people have access to justice. Whether the Court Service can cope with that, including the bill for legal aid, is certainly not something that we consider when we go through clause-by-clause scrutiny, although I know that the Department of Justice may look at it. However, if we were to look at every Bill in terms of its financial considerations and the stresses and strains that it will cause elsewhere, we would probably not bring legislation through the Assembly at all.

628. Ms Wylie: I appreciate that. I do not mean this as a trite statement, but are we dealing with people who are seeking access to justice on the basis of an Act that declares that the condition that they have, which medical people have decided is benign and asymptomatic, is now a personal injury and, because liability is generally not in dispute, it is more or less a slam dunk for compensation?

629. I thoroughly accept that you may have constituents who have symptoms and, clearly, everything will turn on a case-by-case basis. Rather than a windfall for insurance companies or lawyers, as people may say, we may end up with a windfall for the worried well. In other words, people who are worried but who are physically well and asymptomatic.

630. Ms Purvis: Why not then have a compensation programme similar to the one that they have introduced in England and Wales? That would cut out the pressure on the court system and the legal aid bill.

631. Ms Wylie: Again, that is clearly a matter for the public purse and the Executive. I am subject to correction, but I believe that the scheme in England and Wales applies only to cases that had more or less reached a standstill in agreement and had been put to one side pending the decision in the House of Lords. The scheme does not apply to new cases. Therefore, a finite amount of time is involved, and there is a cap on expenditure. However, given that the legacy of asbestos and asbestos-related diseases is still very much with us and probably will be with us for at least the next 10 years, you are looking at something that could be very open-ended.

632. Ms Purvis: It seems a very unfair system in which some people are recognised as having an injury and others are not.

633. The Chairperson: Amanda, you mentioned employers who do not have insurance. Surely, all employers have to have some sort of liability insurance?

634. Ms Wylie: To clarify, employers' liability (EL) insurance is compulsory, but some insurers may have a large excess on that policy, should that be £50,000 or £250,000. Effectively, up to that limit, employers are self insured. Historically, most cases, particularly those in relation to

pleural plaques before the Johnston case, came under a decision in which Mr Justice Girvan was quoted, whereby damages were awarded of £11,000 plus £7,500 for psychiatric illness. That would fall within the excess of the company, and so would come off the company's bottom line. Anything over a certain limit would refer to the insurance company. I am sorry if I did not make that clear.

635. The Chairperson: Thank you very much. Those are all the questions that we have. If we need clarity on anything, can we write to you?

636. Ms Wylie: Certainly, I would be delighted to help.

637. Mr McLaughlin: Will you get back to us on the asymptomatic conditions?

638. Ms Wylie: Yes. Thank you.

2 February 2011

Members present for all or part of the proceedings:

Mr Daithí McKay (Chairperson)

Dr Stephen Farry

Mr Paul Frew

Mr Paul Girvan

Mr Mitchel McLaughlin

Mr Declan O'Loan

Ms Dawn Purvis

Witnesses:

Mr Daniel Holder

Professor Monica McWilliams Northern Ireland Human Rights Commission

Mr Ciarán Ó Maoláin

639. The Chairperson (Mr McKay): I welcome the Human Rights Commission representatives to the meeting. Professor Monica McWilliams is the chief commissioner, Mr Ciarán Ó Maoláin is head of legal services, policy and research, and Daniel Holder is a policy worker. I invite Monica to give the presentation.

640. Professor Monica McWilliams (Northern Ireland Human Rights Commission): Thank you, Chairperson. As you are probably aware, the Commission has a statutory function to advise on the compatibility of legislation with the European Convention on Human Rights (ECHR) incorporated under the Human Rights Act 1998. We welcome the opportunity to do that. We understand that the main issue is contestation over the insurance industry issue and that the Bill might unduly interfere with the rights to property. Therefore, if it were incompatible with the convention rights, it would not be within the competence of the Assembly to legislate.

641. We deal briefly with the issues that the insurance companies raise in our written evidence. We will not go into that, as Members have copies of it. We feel that we have dealt with them in relation to article 1, protocol 1 of the convention, which is on the right to the "peaceful enjoyment of possessions"; in other words, the right to property. We have concentrated on the test that would be met to ensure that there was no violation of that article. Ciarán and Daniel will focus on the different parts of our submission. I will hand over to Daniel to focus briefly on the key points that we make about the compatibility test.

642. Mr Daniel Holder (Northern Ireland Human Rights Commission): I will focus on outlining the test for the right to property and whether there has been a violation of that, given that that is what the insurance industry representations focus on. There are, basically, three stages to the test; the first stage is to define whether what is being referred to qualifies as being possessions or property. The general resources of insurance companies can count as possessions. It is much more tenuous an assertion that an immunity from claims could somehow represent a possession in its own right.

643. The second stage of the test, having established that the possession in question exists, is to ask whether the Bill would impact on the possession in question in a manner that would constitute interference for the purposes of the article. There are two main types of interference. The first is referred to as a "deprivation" of property, which is generally when a property is expropriated — for example, when a house is vested to build a road — or when assets are transferred directly. "Deprivation" of property is very difficult to establish in this scenario. Another form of interference that is recognised under that right are any measures that "control" the use of property, including rent controls, planning controls, fishing licences and so on. It is more likely that any challenge to the Bill would focus on that. Such a challenge would assert that the Bill is a "control", and, potentially, a court may accept that, or it may not accept that the measure constitutes an interference at all. In the Scottish judicial review, it was found that the impact on insurers' finances was too remote to constitute any sort of interference.

644. It is worth going through all of the stages, and if a court were to determine that a Bill constituted an interference in property rights, that does not mean that the right is violated. The legislature is permitted to intervene in property rights under particular circumstances, which are quite broadly drafted.

645. There are three main elements to the final stage of the test, which is, effectively, a test of whether the interference is permitted. First, the interference must have a proper basis in law, and, in this instance, it is set out in law. As long as the law is sufficiently clear and precise, it should have no difficulty in meeting that test. The second element of the test is: is the interference in the general or public interest? It is worth noting that states have particular discretion in deciding what matter constitutes a general or public interest. They need to ensure that their position is not "manifestly without reasonable foundation", to quote a court ruling.

646. The final stage of the test is the proportionality test. The measure is to strike a fair balance between the general interest and the individual property rights of the complainant. In this instance, that is the insurance companies, and, again, the legislature has significant discretion in making that determination. Effectively, the court grants discretion so long as the measure does not constitute what is referred to as an "individual and excessive burden" on an individual party.

647. That sets out the elements of the test, and, clearly, it is beneficial for scrutiny of the Bill that the specific points on general interest and proportionality are addressed.

648. Professor McWilliams: We are trying to be helpful to the committee in its scrutiny. As Daniel has shown, it falls to you to have that clarity in the legislation, but it also falls to you to show that, in your decision-making, you have given consideration to those human rights issues. Where we can be helpful on any questions that you might have, we are happy to do that.

649. Ms Purvis: Thank you for your presentation and your paper. Paragraph 20 and footnote 23 of your paper refers to the case of *Pine Valley and others v Ireland*. In that case, the court, noting that: "applicants were engaged on a commercial venture which, by its very nature, involved an element of risk",

650. found no violation of article 1, protocol 1. Could the same be said for insurance companies? I foresee that, if any challenge were to be made to the legislation, it would come from insurance companies.

651. Mr Ciarán Ó Maoláin (Northern Ireland Human Rights Commission): The Pine Valley case was slightly different in that that company had been granted planning permission, was facing revocation of that planning permission and had a claim. Insurance companies do not have a claim to make but are trying to protect themselves against claims by other parties. It could be said that, before the Johnston case in the House of Lords, people who had been diagnosed with pleural plaques had the basis for a claim. The insurance companies, on the other hand, are not able to make a claim and are the potential defendants in a claim. It is, of course, true that insurance is based on a negotiation of risk against reward, but it is a legitimate commercial enterprise. The facts in the Pine Valley case are too different to be directly relevant to the situation of insurance companies.

652. Mr Holder: I want to go back to the test. The test is to see whether there is an individual and excessive burden. Pine Valley is an example of one case where there was retrospective legislation, and the court determined that it was not an individual and excessive burden. There have been other cases, such as the Provincial Building Society v the UK, where the building society thought that it could keep money because it had found a tax loophole. The legislature decided to close that tax loophole and to take the money from them. Although that was considered to be an interference in the sense that it was a control of property, it was held to be entirely legitimate and proportionate in the circumstances.

653. There were other cases in which the court looked at retrospective legislation and found a violation. Again, however, that was because it was determined that it provided an individual and excessive burden on the claimants. None of those claimants in the examples that we have looked at have been insurance companies; they have been individual victims. One example that we mentioned was Lecarpentier v France, in which the consumer code was changed retrospectively. Some applicants had won damages from a mortgage lender, and they were to be paid. The legislature changed the law, and, subsequently, the mortgage lender appealed and took the money off them. The court regarded that the impact that that had on those individuals was excessive.

654. There is another case, which refers to negligence claims, but it is the other way round as it was an affected individual. The case was Draon v France. That state intervened retrospectively to stop people claiming compensation for medical negligence in particular circumstances and deprived them of an established claim that they had a legitimate expectation to. That was found to be individual and excessive and, hence, a violation. The fact that an individual had a claim and a legitimate expectation to it is not the same as an insurance company arguing that it, somehow, has immunity from claims. That would seem to be a very different circumstance. It is not necessarily the case that the court would find a violation when it is done the other way round. The proportionality test is different between the circumstances of an individual and the circumstances of a large company with resources, etc.

655. Ms Purvis: If the Bill was not to apply retrospectively, would there be a case for those who had lodged previous cases or whose cases were not heard to challenge the legislation? Say, for example, that the legislation will say that pleural plaques is an injury and that people can, therefore, sue and make a compensation claim. Will those who made their cases prior to the Johnson case have a case to pursue, if that body of individuals is excluded from the legislation?

656. Mr Holder: I refer to the answer that Ciarán gave earlier. It is more or less a question of whether the victims could have a similar right to property. It would be difficult for them to establish that. Remember that the right to property protects only the property that exists or

property that there is a legitimate expectation of receiving. If, for example, a court awards you money, you have a legitimate expectation that that money will be received. It tends not to be counted as property when the matter is still under dispute in the courts. In other cases, such as *Anheuser-Busch v Portugal*, the so-called Budweiser case, it was found that the legitimate expectation or right to property of those individuals cannot be said to arise when there is a dispute going on and until that dispute has been determined by the courts. The fact that the House of Lords made that judgement at that point extinguishes the right to property and the legitimate expectation that the individuals had. It would be difficult to argue that.

657. Professor McWilliams: Ciarán will clarify the issue of retrospection.

658. Mr Ó Maoláin: The key point with the Bill is that retrospection is not a problem, per se, in respect of convention compliance. The convention abhors criminal legislation that creates offences that apply retrospectively before the passage of the law. However, in respect of civil matters, it is entirely within the discretion of a legislature to pass legislation that has retrospective effect, as far as the civil rights of the parties are concerned.

659. There would be no particular reason to pass the law without making it retrospective other than to protect the interests of insurers or other carriers of liability. In this case, that might be the Department of Enterprise, Trade and Investment (DETI). However, there is no objection in convention law to retrospective application of the measure. If that were not done, there would be a small class of people whose claims arose during the period between the Johnston case and the passage of the law who would be denied remedy, and that would create, on the face of it, an injustice.

660. Ms Purvis: Finally, the Scottish Parliament passed similar legislation, which is now undergoing a legal challenge. Have you looked in detail at that legal challenge?

661. Professor McWilliams: Yes.

662. Ms Purvis: What is your assessment of that to date?

663. Mr Holder: The challenge made in the judicial review in Scotland was made on the basis of article 1, protocol 1 of the convention. Article 6 of the convention was thrown in as well. In that instance, the judge decided that the legislation was compatible with the convention and used a lot of the elements of the test that we have set out. That judgement is subject to appeal, and could again be subject to an appeal to the Supreme Court and, ultimately, the European Court. Therefore, if insurers seek to continue to appeal, it could be quite a long process.

664. Mr Ó Maoláin: Lord Dempsey's judgement on the Scottish case was quite lengthy and disposed entirely of the three grounds that the insurance companies advanced. The insurance companies claimed that they had sufficiently close involvement with the pleural plaques litigation, but the judgement held that they did not have sufficiently close involvement to give them party status. Secondly, they claimed that the outcome of the pleural plaques actions should be deemed to constitute decisions in relation to the insurance companies' civil rights and obligations. Again, the judge rejected that argument. Thirdly, insurance companies claimed that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 interfered with judicial determination of those proceedings, but Lord Dempsey held that none of those points could be sustained. He particularly held that there was no basis from the convention to say that legislation could not be introduced that upset an existing court decision or that impacted on ongoing litigation, so there was no bar to either the Scottish Parliament — or this Assembly — passing legislation purely because of the existence of decided case law. The legislature is free to change the law at any time, and if it had to bow to the courts on every occasion, the legislative process would be impossible.

665. Mr O'Loan: A fundamental point around the Bill is whether it is for the courts or for a legislature to determine whether pleural plaques are damage that might be open to remedy through compensation in law. I suppose one could regard that as a constitutional point. Bearing that in mind, is the ECHR the sole test that one might use around the matter, or are there any other potential tests? I know that your remit is exclusively human rights, but you also have considerable legal experience. Is there any other law that might be invoked in relation to a discussion of that constitutional point?

666. Mr Ó Maoláin: As the Human Rights Commission, we can only comment on human rights law, but I am sure that the Committee and Assembly will want to consider the medical evidence, including the evidence of people who have been diagnosed with pleural plaques and who say that they have suffered psychological injury. However, we can only comment from the point of view of human rights law.

667. Mr O'Loan: So, the ECHR is the sole test of human rights law?

668. Mr Ó Maoláin: It is the only instrument that can be litigated in our courts at present.

669. Mr Holder: As to what the right to a fair trial under article 6 of the European Convention provides for, some case law would protect against the direct intervention of a legislature to change the result of an ongoing case, effectively an intervention in that case, unless the court has held that there is a "compelling ground of general interest" for it to do so. That would not stop a legislature ever changing the law on a policy or matter that is being dealt with by a court, otherwise it would be impossible to legislate in a way that did not impact on ongoing litigation.

670. The first question is whether the Bill constitutes any direct involvement in an ongoing case. It does not appear to do so, but, if it did, the onus would be to demonstrate that there was a compelling ground of general interest to do that, which is the human rights test. Other arguments were brought into the Scottish case. Those were not human rights arguments but related to whether the measures were rational and reasonable in the context of the common law. Those were rejected by the court there, but that is not for us to comment on.

671. Mr McLaughlin: It is good to see you again, Monica. Thank you for your presentation. I want to address the issues of what is understood to be in the general or public interest, the Assembly's expertise or ability to have a view on that in this region and proportionality. Given that there are current and threatened legal processes on those critical issues, have you had the opportunity to consult with or advise the Department on them?

672. Professor McWilliams: We were invited to comment.

673. Mr McLaughlin: You are advising the Committee, but my question was whether you had advised the Department.

674. Professor McWilliams: We did not. Our advice is to you.

675. Mr Holder: The Committee's was the first request for advice that we received.

676. Mr McLaughlin: That is sufficient, because that advice is now on the record. Given that the issue is fraught and that there are significant and sensitive issues to be decided, it is incumbent on the Assembly and its Ministers and Departments to be sure-footed on the issues that they need to take advice on and be clear on. Having heard the evidence, I am convinced that there are issues of justice and damage — whether psychological, asymptomatic or otherwise — that must be addressed. It is as clear as day that the issue will be fought tooth and nail. We must

take a close look at all the options, and, if we are to succeed, we must ensure that our system is robust enough to stand up to the most intense scrutiny.

677. Professor McWilliams: We look forward to the legislation providing that clarity. In another aspect of our work, we assist victims. Individuals have come to us in the past, and we have not had that clarity.

678. Mr Ó Maoláin: There is no better forum to determine what the public or general interest is than a democratically elected legislature. When the European Court of Human Rights talks about the "margin of appreciation" that is given to states, it always looks to the opinion of its democratic representatives. Although we may offer our view of what the general interest constitutes, as long as the view of the Assembly is measured, reflects all the evidence before it and expresses whether it believes the Bill is in the general or public interest, that will weigh heavily in any future challenge to the legislation.

679. Mr O'Loan: Following on from Mitchel's point, the explanatory and financial memorandum states that:

"The provisions of the Bill are considered to be compatible with the European Convention on Human Rights."

680. Do all Bills that come before us carry that statement?

681. Professor McWilliams: Yes.

682. Mr O'Loan: Most Bills originate in Departments. Do Departments come to you in some or most cases before they write that statement, or do they form their own view on that?

683. Professor McWilliams: It is interesting that you should raise that point, because we have raised it also. We would very much like to be involved at the earlier stages, before that statement is made. However when we get a Bill, that statement is written on it already. We are then asked to comment, unless there is a consultation. If there is a consultation prior to the legislation, we will engage in that, and we prioritise our work by looking to see what pieces of work from the Assembly fit in with our key priorities. We do that because we have a limited number of staff, and we are commenting on that relationship with the Assembly for when it produces more legislation in the future.

684. The Speaker writes to me and sends any future legislation and asks the commission to comment. Much of what we might receive may not have any human rights implications. We then decide which pieces have human rights implications, and we respond by making a submission. Sometimes, we are interested to know why some of our points have not been taken on board as often as we want to know why they were taken on board. This is the opportunity at which we are able to come to the Committee, and the advantage of having the Committee's scrutiny is that that is where we can add our voice.

685. Mr Ó Maoláin: There is no very good reason why that statement on Bills should not be accompanied by some discussion in the explanatory notes. It is easy to write that a Bill is convention compatible, but, in Bills such as this, where there are clear issues around the competing retrospective rights of insurers, other liability carriers and potential claimants, it would be at least useful to the legislative process if the people who came to the view that the Bill was convention compatible could address those issues and at least set out the grounds of their reasoning.

686. Mr McLaughlin: It could state in the explanatory and financial memorandum that the Human Rights Commission agrees with the opinion that the legislation is convention compatible.

687. Professor McWilliams: At least that would show that it is not just a standard statement and that someone has been asked to consider that and has set it out. The legal adviser to the Joint Committee on Human Rights at Westminster has advised that scrutiny Committee, which has sent forward the opinion that similar legislation should not just have that statement on it. That advice has been acted on. The view was that, in future, some consideration would be given to elaborating on that very point in the explanatory document. Otherwise, it is seen as a standard statement and a stamp rather than an explanation.

688. Mr McLaughlin: That is the only weight that is attached to it.

689. Professor McWilliams: If the explanatory and financial memorandum is to be a true explanatory document, it would not take much consideration to add a further explanation of what convention compatibility means in relation to the Bill.

690. Mr Ó Maoláin: There is, perhaps, not enough transparency in the process, due to the convention of not sharing legal advice. That is a matter that came up in the debates. Clearly, the Department's legal advisers will have considered in some detail the Bill's implications. The Speaker's Office also has to come to a judgement on whether the Bill should be admitted as convention compatible. The Bill will have been subjected to at least two sets of legal scrutiny already, and you do not have that information before you. It would be in the gift of the Minister or the Speaker to perhaps open up some of that advice to discussions.

691. Mr McLaughlin: It is especially important if we know that the legislation will be contested.

692. Ms Purvis: Monica talked about providing clarity in the law, particularly for victims. I want to put on record my disappointment that, unfortunately, due to the Minister's tabling of the Bill so late, it does not look as though the Bill will complete its passage in this mandate. Not only am I disappointed, I am sure that others who work with victims are disappointed. The Committee has not been given enough time for full and proper scrutiny of the Bill.

693. The Chairperson: Monica, thank you for your presentation. As the Committee Stage progresses over the next number of weeks, we will probably seek further written evidence from you.

694. Professor McWilliams: We will be happy to provide that.

695. Mr McLaughlin: Taking on board what Dawn said, perhaps the Committee should write to the Minister about the value of discussion and consultation with the Commission.

696. Professor McWilliams: Thank you very much.

9 February 2011

Members present for all or part of the proceedings:

Mr Daithí McKay (Chairperson)

Mr David McNarry (Deputy Chairperson)

Dr Stephen Farry

Mr Paul Girvan

Mr Simon Hamilton

Mr Mitchel McLaughlin
Ms Dawn Purvis

Witnesses:

Professor Anthony Seaton University of Aberdeen
Dr Richard Shepherd Consultant Respiratory Physician

697. The Chairperson (Mr McKay): I welcome Professor Anthony Seaton from the University of Aberdeen and Dr Richard Shepherd, who is a consultant respiratory physician. Professor Seaton has given evidence to the Scottish Justice Committee on the equivalent legislation and has presented evidence to the Ministry of Justice in England. Dr Richard Shepherd recently retired from practice at Belfast City Hospital. Gentlemen, I invite you to make a few short opening remarks.

698. Professor Anthony Seaton (University of Aberdeen): Thank you for inviting me, Chairman. In the interests of time, I will not make a statement. I have written down what I believe to be the truth about these matters. I apologise, because my paper was written for the Ministry of Justice in England; however, it is very similar to what I wrote for the Scottish Justice Committee. I have not adapted it for Northern Ireland, but if there are questions specifically about the population in Northern Ireland, I will try to address them.

699. Dr Richard Shepherd: I do not have anything to say at the moment, unless members have particular questions on definitions, as those sometimes cause confusion in asbestos-related disease.

700. The Chairperson: Some of the medical evidence that the Committee received suggests that people with pleural plaques who have been heavily exposed to asbestos at work have a risk of contracting mesothelioma that is more than 1,000 times greater than risk to the general population. In your submission, Dr Shepherd, you note that the plaques are a marker of exposure to asbestos and therefore a marker of a small degree of risk of developing asbestos-related disease in future. Statistically, does a person with pleural plaques have any greater chance of developing a more serious asbestos-related condition than someone who has been exposed to asbestos but who has not developed the plaques?

701. Secondly, what is your assessment of the risk of someone with pleural plaques developing other asbestos-related conditions?

702. Dr Shepherd: The risk of developing asbestos-related disease relates to the degree of exposure to asbestos. Take, for example, two workers who worked at the same job for the same length of time and who were exposed to the same amount of asbestos. Even if one of them develops pleural plaques and the other does not, their risks of developing asbestos-related disease are the same.

703. The risk of someone with pleural plaques developing other asbestos-related conditions depends on the degree of asbestos exposure; it is a product of the concentration and intensity of asbestos exposure and the length of time that they were exposed to it. Moreover, for mesothelioma in particular, the time from initial asbestos exposure is a factor. You require all that information before you can formulate what you reckon a person's risk of developing mesothelioma might be.

704. Professor Seaton: What you said, Chairman, was correct: a person with pleural plaques has a much greater risk of developing a serious asbestos-related disease than someone who has not

been exposed to asbestos, which is most of the general public. Pleural plaques are simply an indication that someone has been exposed to asbestos. Their absence is not a terribly reliable indicator that someone has not been exposed to asbestos. In other words, even if you were exposed to asbestos, you may well not develop pleural plaques.

705. The diagnosis of pleural plaques is not as simple as one might think. A radiograph will not show a lot of pleural plaques in a person who may have them; it may show things that look like pleural plaques but are not. That causes some of the medical difficulties. To be sure that someone has pleural plaques, you do a CT scan, which gives a person — and a population — considerable radiation.

706. Asbestos exposure, not pleural plaques, causes the risk of those horrible diseases. As well as mesothelioma, there is an increased risk of lung cancer. Lung scarring, which is called asbestosis, is rare nowadays. Asbestos exposure, not the manifestation of pleural plaques, causes the risk.

707. The Chairperson: Do pleural plaques have any effect on lung function?

708. Professor Seaton: No; they are completely benign. They are very common. I remember early in my career, in the early 1970s, a pathologist who had studied the problem showed me his figures. In Cardiff, where I worked at the time, one in 10 of the male population had pleural plaques. It simply reflected the fact that many people had been exposed to asbestos over the war and post-war periods.

709. The reason that I give evidence on this subject, apart from the fact that I have studied it for many years, is that it became very difficult for us to manage people with pleural plaques once it became a subject of litigation. When you have to write a report on someone who has pleural plaques, the lawyers want you to say what his risk is of x or y, and, inevitably, that brings to the forefront of someone's mind the risk of dying of a very serious disease. Unfortunately, the process of litigation does not help. It does not reduce anxiety; it seems to increase it.

710. We used to explain to people that pleural plaques are harmless, but the fact that they have been exposed to asbestos, which they by and large knew, implied other risks. Those risks could then be put into perspective. However, that became almost impossible to explain convincingly once people were involved in litigation; that is why I welcomed the House of Lords opinion. It seemed to persuade the English Government, whereas the Scottish Government, on hearing the same evidence, took a completely different view.

711. Mr McLaughlin: The Committee is wrestling with the issues that you have been dealing with for a long time during your career. Dr Shepherd's submission indicates that pleural plaques do not normally cause symptoms, nor do they interfere with lung function. You argue that unless asbestos-related disease occurs, pleural plaques in themselves do not give rise to symptoms or cause any interference with lung function. Given your experience and study, can you say that they never cause any symptoms?

712. Dr Shepherd: It is true to say that they virtually never do. There are reported stories that people sometimes notice a little scratchiness, for want of a better word. However, I have never known anyone to have symptoms related to pleural plaques; they do not become breathless or have pain in their chest. We do not know whether the scratchiness is related to plaques or to some other asbestos-related inflammation that can cause a pleural effusion that we may notice. However, it is generally medically accepted that pleural plaques do not cause symptoms and do not interfere with lung function.

713. Professor Seaton: I support that: I have never seen pleural plaques cause symptoms of any sort. The problem is that there is a different condition called diffuse pleural fibrosis and another condition called acute asbestos pleural effusion, which can sometimes be confused with pleural plaques. Those conditions cause symptoms. In medicine we say "never say never", and I suppose that it is conceivable that something could happen. However, the reason that I can say with confidence that they do not cause symptoms is that they are not on the lung; they are underneath the ribs, and they do not invade the tissues. They simply sit on the pleural membrane, not the pleural membrane that covers the lungs, but the pleural membrane that goes inside the ribs and round the heart and diaphragm.

714. Pathologically, they are simply scars, and over the surface of the scar is a lining of normal pleura; they are lubricated just as the pleura is lubricated and so do not interfere with movement in any way. That is different from diffuse pleural thickening, which is a response of the other lining of the pleura, that is, the lining over the lung. It also interferes with the lung and can often cause adhesion of the pleura so that the lung does not move smoothly in the chest wall. In those circumstances, people can sometimes have inflammation, pain and a reduction in the ability of the lung to move, which makes lung capacity smaller. The two conditions are quite distinct. Medically, the more important is diffuse pleural thickening, for which compensation is available.

715. Mr McLaughlin: Are you aware of medical opinion that differs from the conclusions that you have drawn?

716. Professor Seaton: No. If you look at any text book, you will find that what we say is supported. However, since I wrote some of the text books, that is probably not surprising. Perhaps people who write text books copy from other text books.

717. Mr McLaughlin: At least you have read your own books.

718. Professor Seaton: I read my own books regularly to remind myself of what I said. [Laughter.] I have heard it said that some people have described the occasional case, but that does not really make a story. Things happen that can make people feel that what a patient had was due to a pleural plaque in an individual case. However, epidemiologically, wearing my other hat as one who studies populations, there is no evidence that they cause problems, although there is evidence that they are associated with asbestos exposure. To that extent, they are important and require careful medical explanation when we see patients.

719. When we see patients with those conditions it is almost always as a result of an incidental finding on an X-ray: the patient will have had a cough, gone to their doctor, had an X-ray and pleural plaques were found. That is the usual reason. Increasingly, however, it comes through litigation, with people being referred by their lawyers.

720. Dr Shepherd: I agree totally. A huge body of medical literature says that pleural plaques do not cause symptoms and do not interfere with lung function; they are simply a marker of previous asbestos exposure.

721. Dr Farry: Welcome, gentlemen, and apologies again for keeping you waiting. Is there a consensus in the medical community that pleural plaques are asymptomatic?

722. Dr Shepherd: Definitely; it is unanimous. Investigations were done in the UK, and the Industrial Injuries Advisory Council has looked at the issue on several occasions, and all came to the conclusion that there is no evidence to suggest that pleural plaques cause symptoms or interfere with lung function.

723. Dr Farry: One of the arguments put to us is that because it was a compensable condition before the Johnson ruling, we need to redress what is now seen as an injustice in the sense that what was once compensable is no longer so. Will you give us the background to the medical thinking and consensus? Is it a relatively recent consensus or has it been around since the 1970s or 1980s but was not really taken into account by the courts?

724. Professor Seaton: I have been through the process since I was a consultant in 1970. The asbestos story has developed on my watch, as it were.

725. No one even considered any sort of compensation for patients with pleural plaques in the 1970s and 1980s because we knew that they were harmless; it arose originally because of the interests of certain legal firms. There were rich pickings in the business: I calculated that probably a million people in England and Wales, and perhaps 22,000 in Northern Ireland, had pleural plaques. That was the start of it. After that, it became difficult medically to explain to people. I remember being told by a lawyer in Glasgow that when we saw someone with pleural plaques, we must tell them that they were entitled to sue. On the industrial injuries benefit side, there has been no equivocation at all: pleural plaques have never been accepted as a condition for which someone should claim industrial injuries benefit for the very good reason that they do not cause any harm.

726. Dr Farry: Finally, another argument that can be advanced is that we are ultimately compensating people for their exposure to asbestos. In that respect, is the presence of pleural plaques a reliable way of capturing that population? Of the people who have been exposed to asbestos, what percentage — is it 90%, 50% or 10% — are likely to develop pleural plaques? If we go down that line, is there a potential major injustice of losing a significant number of people who have been exposed to asbestos?

727. Professor Seaton: The simplest way of finding out whether someone has been exposed to asbestos is to ask them. A very high proportion of people who have been exposed will never get pleural plaques because it depends entirely on how much asbestos they have been exposed to. I have been exposed to asbestos, but it is unlikely that I have pleural plaques — they have never been seen on my chest X-rays — because I have not been exposed to much of it. Most people of my generation were exposed to some asbestos. We studied the lungs of people who did not know that they had been exposed to asbestos and found asbestos in small amounts.

728. You are right: the proposed law would compensate people for exposure to asbestos, but it would compensate a small minority who had been exposed. It would perhaps catch some of the people who have been most exposed. However, there is an unfairness because many people who were equally exposed do not have pleural plaques.

729. On the other side — and this is important — when people claim compensation, which can be substantial sums of money to the average person, many investigations are done. X-rays may reveal things that look like plaques but which turn out not to be when a CT scan is done; they may turn out to be fat pads under the chest wall. CT scans show abnormalities in a surprising number of people. That causes worry, and the person could end up being bronchoscoped or having a thoracoscopy and undergoing all sorts of investigations. It usually turns out to be nothing very serious, but it causes a great deal of anxiety. There are negatives as well as positives in doing that. That is another reason that I feel strongly about it.

730. Ms Purvis: Thank you, gentlemen; you are very welcome. I am struggling a wee bit, because I have met quite a number of my constituents in east Belfast who have been exposed to asbestos through working in the shipyard and who have pleural plaques. That is why I struggle with the view that pleural plaques never interfere with lung function because, having met those people, it is clear that they have severely restricted lung function. I wonder how easy it is to

misdiagnose pleural plaques with some of the more serious things that you spoke about. For example, what is the difference between pleural effusion, pleural fibrosis, asbestos-related pleural thickening and asbestosis? Could those people be suffering from something more serious but have been diagnosed with pleural plaques?

731. Dr Shepherd: That is one of the problems that occur, because patients, and sometimes other doctors, are confused about the various asbestos-related terminology. When patients have a chest X-ray that shows pleural plaques, they may often be told that they have asbestos on their chest X-ray and they immediately think the worst. They may think that they have asbestosis or have heard of asbestos-related cancers and think that they have one of them.

732. Medically, the different conditions are easily distinguishable. Pleural plaques are easily distinguishable from diffuse pleural thickening, pleural effusions — whether asbestos-related or not — and fibrosis in the lungs, which is asbestosis. As Professor Seaton said, pleural plaques are not actually in or on the lungs but on the internal surface of the chest wall. Pleural plaques are easily medically distinguishable from the other asbestos-related diseases.

733. Professor Seaton: Many people who have pleural plaques also have impaired lung function. There is no doubt about that. In those cases, the impaired lung function is due to something else, most commonly smoking-related emphysema or chronic bronchitis. However, those are distinguishable from pleural plaques, which have no effects.

734. I expect that you also have constituents who worked in the shipyards who do not have pleural plaques and who have bad chests. They will, of course, wonder why their mate got compensation when they did not. That is an issue that you have to face when you dichotomise and pay compensation to some people but not to others, because if you pay compensation to people with pleural plaques you are, in fact, paying them for having been exposed to asbestos.

735. Dr Shepherd: You are paying compensation to some of those who were exposed to asbestos; you are not paying compensation to those who do not have pleural plaques but who have similar degrees of risk.

736. Ms Purvis: I am concerned that some of the constituents whom I met only have a diagnosis of pleural plaques, because I asked them whether it was related to some other impairment of their lungs and they do not have a diagnosis of anything else. I can see clearly that they are breathless and in distress, so I am just trying to get it clear in my head. Could there have been a misdiagnosis?

737. Professor Seaton: Yes, unquestionably.

738. Dr Shepherd: There are other causes of breathlessness: if they have heart disease, they may become breathless; if they are overweight, they may be breathless from exertion. It depends too on their fitness. If they are anaemic they may be breathless. There are many causes of breathlessness; it is not necessarily a form of lung disease.

739. Ms Purvis: The first thing that I asked was whether there were any other underlying health conditions that might have caused their lung condition.

740. Professor Seaton: I would ask them to see their GP and get them referred to — well, Richard is retired now, but they could see someone else. A chest physician would have no difficulty in sorting that kind of thing out.

741. Dr Shepherd: Given the information that people with pleural plaques have and their understanding of what is going on, they merit referral to an experienced chest physician so that they can have an explanation of what pleural plaques are and what they mean and so that the risks of developing an asbestos-related disease in future can be put into perspective. It is very common, initially, for people to think the worst. However, when you explain that they only have pleural plaques, they immediately say "Thank you very much, doctor; I feel so much happier now, because I thought that it was inevitable that something was going to happen to me."

742. Ms Purvis: Professor Seaton, in your submission you referred to pleural effusion and pleural fibrosis, suggesting that they are more serious than pleural plaques and that, in those cases, compensation is not in dispute. Are those conditions compensable in England and Wales?

743. Professor Seaton: Yes.

744. Ms Purvis: Clause 2 specifies two other asymptomatic conditions: asbestos-related pleural thickening and asbestosis. Do —

745. Professor Seaton: I am sorry to interrupt, but they are not asymptomatic. They are symptomatic and important conditions. In essence, compensation for an industrial disease is paid for the pain and suffering that an individual has suffered as a result of tortious injury. If you add up the pain and suffering of someone with pleural plaques, medical opinion would always be that there is none and that any symptoms that the person may have are unrelated to the pleural plaques but related to some real condition. That, in essence, is what it is all about.

746. Asbestosis is potentially a very serious disease, although nowadays, as I said, we do not often see it. In Northern Ireland, there are about 40 cases a year, which is rather a lot. However, they are mostly the mild form of asbestosis, resulting from heavy exposures in the 1940s and 1950s in people who are now old. The old form of asbestosis, which I saw in my younger days, has disappeared. It just does not happen, because you require daily exposure to heavy doses of asbestos for years to get it.

747. Ms Purvis: Do you have a view on clause 2, which would make provision for paying compensation for the conditions listed?

748. Professor Seaton: If anyone has an occupational disease that causes them impairment in some way or, obviously, loss of life, they are fully entitled to claim for it in the courts. However, it depends on the seriousness of the condition. Doctors do not regard pleural plaques as a disease; they regard them as an anatomical abnormality of the chest wall, which, strictly speaking, is what they are.

749. Dr Shepherd: What you are getting at is that, as Professor Seaton said, when we see asbestosis now, it is mild and usually non progressive. In some cases, insurers have tried to argue — on the basis of what is done in England and Wales, where pleural plaques are not compensable — that having very mild asbestosis or mild pleural thickening may not give rise to any symptomatology. Courts award damages for disability. If someone has some very minor CT scan changes that might suggest mild interstitial fibrosis, but there are no other physical signs on examination and their lung function tests are normal, insurance companies will try to argue that that person does not have a disability and should not, therefore, be compensated.

750. At some stage, we must ask what distinguishes a sub-clinical disease from a clinical one. However, in general, if you have an asbestos-related disease such as diffuse pleural thickening, asbestosis and mesothelioma and a disability as a result of them, you will be compensated.

751. Professor Seaton: I would not want to appear unsympathetic to those who have been exposed to asbestos. I have seen many patients over the years with mesothelioma and asbestos-related lung cancer; they are terrible diseases and they attract appropriate compensation. The halfway house of unpleasant diseases such as pleural fibroses also attract compensation for the disability, pains and suffering that a patient experiences.

752. It is difficult to explain clearly to those with pleural plaques that the condition is not, in itself, harmful. It is equally difficult to explain to those who do not have pleural plaques but who have been exposed to asbestos the implication of exposure to asbestos. I have tried for many years to estimate how much asbestos patients have been exposed to and tell them roughly their risks of contracting those serious diseases. I do it better now, because the data are better. The worst instances in trades with a heavy exposure to asbestos have a 10% risk of mesothelioma, which initially sounds frightening. It means that one in 10 people like the patient will get mesothelioma, which would frighten you and me. I then ask them what they think their chances are of getting cancer. I ask the Committee that same question today. I know that it is not for me to quiz you, but the Chairman could probably take a guess.

753. The Chairperson: Is it one in three?

754. Professor Seaton: Yes; that is correct. Therefore, we all have this horrible great thing looming over us that one in three of us will get cancer. Mesothelioma shifts the odds of the type of cancer you may get, but it shifts the odds of your getting cancer at all only slightly. Funnily enough, people generally find such an explanation helpful, as it stops them thinking that they will get mesothelioma and worrying about that horrible disease. It is a horrible disease and so is lung cancer.

755. There is much confusion in people's minds about mesothelioma, pleural plaques and asbestosis. It is complicated; people think that if they have pleural plaques they will die of asbestosis. That is the usual thing now, although it was not the case in the past. You can handle pleural plaques medically, but it becomes much more difficult in litigation, because litigation focuses the mind, and a doctor writing a report may emphasise the risks to help to maximise the settlement or vice versa. We are not meant to do that, but some doctors do.

756. Ms Purvis: At present, people can pursue compensation for asbestos-related pleural thickening and asbestosis as symptomatic conditions. Clause 2 specifies the same conditions for which people can pursue compensation as asymptomatic. Am I right that you are saying that the cut-off point for being able to pursue compensation is decided by the level of disability?

757. Dr Shepherd: Courts assess damages on the effect that a condition has on the individual.

758. Professor Seaton: It is a legal issue; it is not for us doctors to tell the courts how they should do things. We can give advice. The House of Lords decision was very well argued; it is a logical statement of the legal situation.

759. Ms Purvis: What would your view be if clause 2 were to name those two conditions as asymptomatic and, therefore —

760. Professor Seaton: I am sorry, but which two conditions do you mean?

761. Ms Purvis: Asbestos-related pleural thickening and asbestosis.

762. Professor Seaton: Those are not asymptomatic.

763. Ms Purvis: I am taking that from what Dr Shepherd said.

764. Dr Shepherd: People may not have noticeable breathlessness. What I said was that the insurance industry is trying to argue that people whose lung function is normal should not get compensation because although they may have the disease they have no disability. That is very difficult to argue simply because the tests assess lung function while a person is static; they do not assess people's lung function when exercising. People will have lost some lung reserve, but it may not yet be apparent through marked breathlessness. It is then an argument of what is a disability. From my point of view, virtually everyone who has been diagnosed with asbestosis or diffuse pleural thickening will have some degree of disablement or loss of lung reserve.

765. Professor Seaton: I was not aware that the insurance industry is arguing that people who have those conditions should be prohibited from taking legal action. That is completely wrong. Someone may have acute pleurisy, for example, as a consequence of asbestos exposure; it is very painful, but it may not impair lung function. Pleurisy is a recognised medical condition. People who have recognised medical conditions that cause symptoms or serious prognosis — or even those without symptoms — should be entitled to compensation. They should certainly not be prohibited from taking legal action. That would be quite wrong.

766. There were some subtleties about what is a disease, and the House of Lords decided that pleural plaques are not a disease. I agree: pleural plaques do not cause disease. The argument continued about whether they cause anxiety. Of course, many things cause anxiety. The fact that people worked with asbestos and read newspaper reports causes anxiety, but paying people compensation will not cure their anxiety. From many discussions with patients, I have found that the investigation process makes people more anxious.

767. There are serious asbestos-related conditions; in Northern Ireland, there have been 44 mesothelioma cases per annum over the past nine years. I am afraid that there is nothing that we can do to prevent or cure such cases at the moment, and there will probably be nothing that we can do in the foreseeable future. That is a terrible legacy of an industrial era that has now largely finished, thank goodness. However, there is a long tail of people who have been exposed and who will develop those diseases, and some of them have pleural plaques.

768. Mr Hamilton: I was going to ask about misdiagnosis, but Dawn raised that and I am happy with the responses.

769. The Chairperson: Gentlemen, I thank you for your evidence to the Committee, and, once again, I apologise for the delay.

Appendix 3

Memoranda and Papers from DFP

Pleural Plaques - Draft Analysis of Policy Consultation



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Mr Shane McAteer

Clerk

Committee for Finance and Personnel

Room 419

Parliament Buildings

Stormont 1 October 2009

Dear Shane

**Pleural Plaques:
Correspondence from Association of British Insurers and Request for
Update**

Thank you for your letter of 18 September, which set out the Committee's requests for comments on the correspondence from the Association of British Insurers ("ABI") and an update on pleural plaques.

As you know, the Department undertook a consultation exercise on pleural plaques, which concluded on 12 January. A draft analysis of responses, which sets out all of the points raised during the consultation and the developments post-consultation, has been prepared. The analysis includes the counter-arguments to the points raised by the ABI and, rather than set those arguments out separately, I have attached a copy of the draft analysis for the Committee's consideration.

We would welcome any comments which the Committee would wish to make on the analysis.

Yours sincerely,



Norman Irwin

**DFP - Analysis of Responses to Consultation Paper
on Pleural Plaques**

Background

On 13 October 2008 the Department of Finance and Personnel ("the Department") issued a consultation paper which considered the House of Lords' decision in *Johnston v NEI International*

Combustion Ltd and conjoined cases [2007] (known at earlier stages as Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)).

In the Johnston case, the Law Lords upheld a decision of the Court of Appeal in England and Wales that symptomless pleural plaques do not constitute actionable or compensatable damage for the purposes of the law of negligence.

Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. Earlier decisions had allowed for an award of damages for negligent exposure to asbestos which resulted in pleural plaques. However, following the decision in the Johnston case, it was no longer possible to bring a claim in negligence for the condition.

The decision in the Johnston case was welcomed by the insurance industry. However, several early day motions, which called for the decision to be overturned, were set down in the UK Parliament and the matter was the subject of adjournment debates. During the debates, many MPs spoke in favour of the decision being overturned by legislation.

A similar desire for legislative change was evident when the matter was debated in the Scottish Parliament and, on 29 November 2007, the Scottish Government announced that it would legislate to reverse the decision in the Johnston case and re-establish asbestos-related pleural plaques as an actionable personal injury.

The then Minister for Finance and Personnel undertook to consult on the issues relating to the Johnston case and the purpose of the consultation paper was to elicit views on the range of options available post-Johnston and to secure any available information on the prevalence of pleural plaques and the costs of claims which had arisen when the condition was actionable (both in terms of settlement figures and associated legal costs).

The identified options were:

- increased support, help and information for people with pleural plaques (e.g. by publishing information leaflets);
- the creation of a register to record a diagnosis of pleural plaques;
- changing the law to overturn the decision in the Johnston case;
- financial support in the form of a no-fault payment scheme.

Methodology

The consultation paper was placed on the Department's website and was also distributed to a wide range of consultees, including political parties, MPs, MLAs, members of the legal profession, district councils, faith groups and churches, voluntary groups, trade unions and individual members of the public who had expressed an interest in the issues. A list of the consultees is set out in Annex A.

The publication of the consultation paper was also highlighted by way of a press release and the placing of public notices in the Belfast Telegraph, News Letter and Irish News.

The paper contained 10 questions, which are set out in Annex B. The responses from representative organisations, insurance companies and solicitors tended to be more detailed, although not all addressed the 10 questions posed. Individual respondents tended to focus on the issue of legislative change and whether the decision in the Johnston case should be overturned,

although some also recounted how their circle of friends and colleagues had been diminished by asbestos-related diseases ("ARDs").

The Department would wish to record its thanks to all those who took the time to respond to the consultation paper.

In this analysis the responses have been grouped together, rather than set out under the various questions. Where appropriate, relevant comments have been highlighted.

Please note that this analysis does not rehearse the facts or conclusions in the Johnston case or the detail of the various options, all of which are set out in the consultation paper.

Submissions received

The consultation period concluded on 12 January 2008 and 94 responses were received. Of those responses, 1 came from Disability Action, 1 came from a Government Department, 1 came from Harland & Wolff plc, 4 came from insurance companies, 1 came from Larne Borough Council, 5 came from the legal profession, 2 came from medical professionals, 1 came from the Methodist Church in Ireland, 2 came from political parties, 4 came from representative organisations, 1 came from the Southern Health and Social Services Board, 3 came from unions and 68 came from individuals.

A list of the respondees is attached at Annex C[1].

Disability Action

The response from Disability Action does not include specific comments on the issues raised. It does, however, say that the organisation would "support responses from Voluntary/Community and Trade Union sectors".

Government departments

Likewise, the response from DSD does not include specific comments on the issues raised. It does, however, highlight paragraph 26 of the consultation paper, which refers to an earlier report from the Industrial Injuries Advisory Council ("IIAC"). That report had concluded that there was insufficient evidence that pleural plaques cause impairment of lung function sufficient to cause disability and merit inclusion in the list of prescribed diseases for industrial injury disablement benefit.

The response from DSD notes that the IIAC was due to report on the issue again and the Department undertook to highlight the publication of the IIAC report in due course. That report has now issued and is discussed further at page 28.

Harland and Wolff plc

The response from Harland and Wolff plc calls for "a comprehensive actuarial report which would consider the wider financial impact for Northern Ireland" of any decision to reverse the effects of the decision in the Johnston case or introduce an alternative for the benefit of those suffering from pleural plaques.

It also suggests that all of the Northern Ireland departments and the Northern Ireland Office should undertake a review of likely costs.

The response goes on to say that Harland and Wolff plc relies on funding from DETI and notes that, if legislative change is pursued, DETI will have to bid for additional in-year funding and future financial cover.

Insurance companies

The responses from the insurance companies tended to mirror the responses from the CBI and ABI (discussed below), expressing support for an awareness campaign and opposition to the creation of a register or legislative change.

The response from AXA Insurance UK plc ("AXA") notes that it is a major provider of employers' liability insurance and that it handles a significant volume of claims arising from employment-related exposure to asbestos. Prior to the Johnston case, it was a contributing insurer in between 300 to 500 claims per year in respect of pleural plaques.

AXA says it would not wish the decision in the Johnston case to be overturned because it would —

- change the operation of the law of negligence on a retrospective basis;
- de-stabilise the system and create uncertainty for employers' and insurers' assessment of future risks to business; and
- create a precedent for further changes to the law in respect of symptomless conditions.

In AXA's view, the legal duty to pay under employers' and public liability policies arises "as a result of a legal duty upon their policy holder to pay damages under the laws of negligence." It suggests that a requirement that insurers fund a payment scheme "notwithstanding the cover provided by the insurance policies sold to their customers would constitute a serious disturbance to the rights of insurers and is likely to be in breach of the European Convention on Human Rights" ("ECHR").

AXA supports the introduction of information leaflets. It recognises that those who have been exposed to asbestos have anxieties and believes the provision of "unambiguous information" via leaflets and "better trained" GPs, nurses and healthcare specialists will be of great value.

AXA does not support a register, partly because the burdens would outweigh the benefits, but also because it would send out a mixed message (i.e. if there is nothing wrong, why is there a need to register?).

AXA asserts that it is "quite clear from the medical evidence that only a small proportion of those who are diagnosed with pleural plaques subsequently, and separately, develop mesothelioma or other symptomatic asbestos-related conditions."

In its view, "[i]nitiating legislation in relation to pleural plaques would signal an intention to support a potentially wide expansion in the categories of person who can pursue a claim for compensation – at a high future cost to industry and the taxpayer."

It also believes the long-term consequences of overturning the Johnston decision "to both business, and indeed the whole Northern Ireland Executive itself are simply unquantifiable, but nevertheless wholly real".

AXA emphasises that it remains committed to fulfilling policyholders' obligations to pay compensation to those who "sustain symptomatic asbestos-related conditions". It notes that it

has paid out £10m since the decision in the Johnston case (i.e. between October 2007 and January 2009) and is working to speed up the claims process, especially in relation to those diagnosed with mesothelioma.

The response from AXA also raises the issue of "run-off companies and solvent defendants with insolvent insurers". It believes such companies are likely to have limited assets to meet asbestos liabilities and suggests that any available resources should be used to pay claims for mesothelioma and other symptomatic conditions, rather than pleural plaques.

The response from Royal Sun Alliance Insurance plc ("RSA") commences by saying that RSA has always been clear that "where individuals have suffered physical harm as a result of exposure, they should be entitled to compensation". RSA does not, however, believe that compensation should be paid "where there are no physical symptoms" and it will "strongly oppose any proposal to overturn the House of Lords' judgment or to introduce a no-fault compensation scheme".

RSA believes the anxiety levels of those diagnosed with pleural plaques would be heightened by the payment of compensation and it quotes Dr Richard Butland MA MD FRCP, who has said —

"the ending of compensation for pleural plaques has carried a clear message...that pleural plaques are of no consequence. I have seen this from my own experience and indeed reassure patients that pleural plaques are not actionable because they are unimportant. I would find it very difficult to tell patients that they are eligible for compensation but that pleural plaques were benign and unimportant. Patients would naturally think that if they are eligible for compensation, pleural plaques must be harmful. Thus the provision of compensation would create needless anxiety."

Dr Butland was instructed by RSA to prepare a report to answer various questions relating to pleural plaques. However, the response from RSA emphasises that Dr Butland's report is an objective, expert report.

RSA believes "people appreciate having their practical concerns dealt with, rather than just an anonymous financial pay out" and it supports awareness-raising, with improved guidance for GPs and specialist units. In this regard, it proposes a Government sponsored website, or one hosted by a medical body, as it believes information on the web is "inconsistent and inaccurate".

RSA would have less difficulty with a register than it would with legislative change. However, like others, it recognises that the burdens associated with maintaining a register could outweigh any potential benefits.

RSA believes legislative change would increase "potential confusion" and "unnecessary concern". It also believes it would undermine the fundamental principles of the law of negligence and be "inconsistent with the established medical evidence in the vast majority of cases".

RSA distinguishes between earlier legislative provisions which have overturned legal decisions relating to mesothelioma and the issue of pleural plaques. In its view, the "terrible effects of [mesothelioma] and the right of sufferers to compensation have never been in doubt". In contrast, it believes it would be wrong to provide compensation for "a symptomless condition". It goes on to say that the establishment of a right to compensation for anxiety relating to pleural plaques could give rise to calls for compensation for other anxiety conditions. In this regard, RSA suggests that those occupationally exposed to sunlight could be anxious about the possibility of developing skin cancer.

Like others, RSA raises the concern that money will be diverted away from symptomatic asbestos-related conditions and it suggests that similar concerns have prompted a number of

States in the US to enact legislation which prevents claims from those with symptomless pleural plaques.

The response from the Norwich Union ("NU") states that it is the UK's largest general insurer, with a 14% market share. It also notes that it was one of the insurers which funded the Johnston case.

NU believes awareness-raising would help to reduce the worry associated with a diagnosis of pleural plaques. It goes on to say that, not only do a tiny fraction of people with pleural plaques develop mesothelioma, most mesothelioma sufferers do not have pleural plaques.

Like others, NU believes a register would contradict any assurances given and could not be justified on a cost/benefit analysis. It goes on to suggest that a register of those with pleural plaques would be a database for those who will not develop any disease.

The response from NU highlights 3 sources of statistical information, namely –

- a report of 10 November 2004 by Dr Moore Gillon which states that, for every person who develops mesothelioma in any given period, there will be 20 to 30 people who develop pleural plaques. The estimated level of pleural plaques within the UK is 30,000 to 75,000 cases per annum;
- an autopsy study of males over 70 near Glasgow, which revealed an incidence rate for pleural plaques of 51.2 %; and
- Professor Tony Newman Taylor's assessment that between 1/3 to 1/2 of those occupationally exposed to asbestos will have calcified pleural plaques 30 years after the first exposure. The Professor is a previous chair of the IIAC.

The NU suggests that it is impossible to actually predict the likely number of claims following a change to legislation. By way of comparison, it notes that, at the outset of the British Coal Chronic Obstructive Pulmonary Disease Scheme, 150,000 cases were expected. However, at the close of the scheme 592,000 claims had been registered. This was despite the availability of data with greater accuracy than that available in relation to pleural plaques.

Like the other insurers, NU does not believe it would be appropriate to overturn the House of Lords' decision. Such a response would, it suggests, send out a message that pleural plaques are more serious than they are and would, therefore, increase anxiety levels.

NU's response also refers to the undermining of business confidence and concerns about fundamental changes to the law of negligence are also repeated.

NU believes a change would "erod[e] the integrity of a large area of common law" and open the floodgates for other claims which are not currently actionable. This would expose defendants to significant costs and impact on insurance premiums and the economy. The suggestion that retrospective legislation would be contrary to the ECHR is also repeated, the argument being that the legislation would interfere with "settled arrangements".

The NU response concludes that legislative change would label a class as injured, even though "they have not been injured, are not unwell and have not suffered any damage".

On the creation of a no-fault scheme, the NU believes that would send a further confusing message that pleural plaques is a condition for which compensation is required.

The response from Zurich Insurance plc ("Zurich") states that it helped to action the test case on pleural plaques and that it has conducted 5 years of research and liaison with medical experts which culminated in the decision in the Johnston case. It also reveals strong support for education and increased access to appropriate information. However, in keeping with the other insurance companies, Zurich opposes legislative change on the basis that it sends out the wrong message about the nature of pleural plaques, will undermine business confidence and will fundamentally change the law of negligence. It also opposes the creation of a register on the basis that "only a tiny fraction of people with pleural plaques develop mesothelioma", so "the vast majority of the people on such a database would not, therefore, develop any disease".

In rejecting the option of legislative change, Zurich quotes the Royal College of Physicians in its submission to the Scottish Justice Committee^[2]

"...there is little doubt that patients can be confused and anxious about "asbestosis" in general and categorise pleural plaques within this group. The College understands this but the medical evidence is clear and competent and knowledgeable physicians should be in a position to allay those fears. Lawyers seeking to support patients in compensation claims must not be allowed to undermine the medical evidence."

Zurich also raises the prospect of claims farmers "who have a vested interest in generating referral fees, encourage people to have unnecessary and possibly harmful x-rays and put extra pressure on the national health system."

Like the NU and AXA, it believes "[r]etrospective legislation...would be contrary to the European Convention on Human Rights on the basis that the legislation interferes with settled arrangements and could only be justified on the grounds of compelling public interest. In this instance, the public interest is best served by allowing the courts to rule on a fundamental interpretation of the common law."

Once again, the impact on the business sector and employer liability premiums is raised and Zurich asserts that amending legislation will "increase costs and divert resources for businesses, Government, local authorities and insurers. There would be added pressure on the health system, with increased demand for x-ray and CT scans, including costs for medical staff time, training and operation of equipment."

Larne Borough Council

The response from Larne Borough Council expresses support for an awareness campaign and legislative change. In its view "those responsible for negligent exposure should be called to account". However, it also suggests that systems and procedures should be put in place to allow compensation claims to be dealt with quickly and cheaply and to "relieve the burden placed upon the courts and the legal system".

Legal Profession

Two firms of solicitors replied, both of which represent claimants. In addition to calling for legislative change, the response from RobinsonMurphy Solicitors states that the insurance companies are applying the Johnston case more widely and either completely denying compensation to those with pleural thickening and asbestosis, which, it is said, may "initially be symptomless", or requiring evidence of "a disability of more than 10%". The response goes on to say that RobinsonMurphy would be bringing four test cases relating to asbestosis before the Newcastle Upon Tyne County Court. However, the firm was unable to say when judgment would

be given and anticipated that, even if judgment was favourable to its clients, the insurance companies would appeal.

RobinsonMurphy believes the Johnston case has had a much greater impact than was originally envisaged and it suggests that insurers are using the case on a day to day basis to "try to drive a coach and horses through the entire compensation regime for those suffering from asbestos-related disease."

The response concludes with an interesting assessment of the issue of unanimity. Some commentators have suggested that the legislature should be slow to overturn the Johnston case because it was a unanimous decision of the House of Lords. However, clearly, RobinsonMurphy does not regard unanimity as a deterrent to legislative change. In its view, the Law Lords have merely reached a unanimous decision on the law as it stands – that is their job. RobinsonMurphy goes on to say, however, that it is for the Government to decide whether the current law "[j]ustly serves its purpose or not". In its view, and given the "different constitutional roles undertaken by the House of Lords and by Government", unanimity "poses no problem whatsoever for elected representatives wishing to change the law".

The response from Thompsons/Thompsons McClure Solicitors ("Thompsons") notes that it is a leading Trade Union and personal injury law firm and that it acted on behalf of Unite, the Union in the lead test case in Johnston.

Thompsons recognises that the UK Government has demonstrated concern for asbestos victims by re-dressing the decision in the Barker case^[3] and introducing lump sum payments for mesothelioma victims. However, it calls for further action, saying there are "strong moral and political reasons" why people with pleural plaques should be compensated.

Thompsons regards pleural plaques as a violation of bodily integrity and it notes that the importance of that principle was recognised by Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* 2002 (discussed below).

Thompsons believes the House of Lords' decision in the Johnston case overlooked established legal practice, separating pleural plaques from the risk of malignancy and anxiety in order to conclude that "as separate entities they were not significant in their own right".

Thompsons suggests that "erudite legal reasoning does not make the problem go away" and goes on to say that the "Law Lords' intellectual reductionist sophistry has deprived people with pleural plaques of a remedy and left them feeling angry, powerless and belittled".

Thompsons favours plain English information, but its response questions the effectiveness of previous information campaigns. There is also a concern that information campaigns should be part of a wider response, which restores compensation, and not used to discourage claims under a restored right to compensation or otherwise.

Clearly, Thompsons regards a register as a distraction, but it supports the creation of an Employers' Liability Insurance Bureau ("ELIB"), which guarantees victims of workplace accidents and occupational disease compensation where the employer is uninsured or insured, but can't be traced. It notes that the Motor Insurance Bureau ("MIB"), which was established in 1946, meets liability in personal injury claims under the terms of the MIB Uninsured Drivers Agreement and Untraced Drivers Agreement. Companies selling motor insurance must sign MIB Agreements. Thompsons also notes that the EC Directive on Motor Insurance requires all Member States to operate similar funds.

Thompsons recognises that employer's liability insurance is a statutory obligation, but says that, if an employer goes out of business or is uninsured/can't be traced, there is no fund of last resort to meet the employer's liability to compensate an injured worker. The problems of uninsured employer/untraced insurers is, it says, particularly prevalent in "long tail" diseases and is likely to get worse, given that the Government recently repealed regulation 4(4) of the Employers' Liability (Compulsory Insurance) Regulations 1998, which required employers to retain copies of insurance certificates for 40 years.

Thompsons argues that an ELIB would have a nil cost for Government and should not present problems for the insurance industry, given that the industry has claimed that it wants to plough the savings from pleural plaques cases into compensation for serious ARDs. It also believes an ELIB could reduce the demand on courts and distress to families.

Thompsons' believes the decision in the Johnston case has allowed employers to evade liability for the harm evidenced by pleural plaques. It goes on to say -

"The House of Lords declared the law but that is not the same as deciding what is fair and just. Where there is a divergence between the common law and justice it is the responsibility of Parliament to remedy it."

In its view, the decision is a licence to employers to take risks with workers' health. It also believes that employers' liability insurers have benefited financially and have been "emboldened in the strategy to erode the rights of asbestos victims and other workers." This is, it says, evidenced in the case of Owen v Esso Exploration and Production UK Ltd, where a claim for symptomless asbestosis and asbestos-related pleural thickening was successfully challenged in the Liverpool County Court.

Thompsons says that, rather than clarifying the law, the decision in the Johnston case has created instability by precipitating satellite litigation. Legislative change would, it suggests, restore equilibrium.

On the issue of a privileged class of claimant, Thompsons considers that such a suggestion is insulting and adds that there is nothing privileged about being exposed to asbestos.

Thompsons has commissioned a firm of accountants to produce a report on the financial consequences of the Johnston case. The report concludes that the incurred, but not yet reported reserve (i.e. the pot of money for claims not yet made) will be reduced to zero and released as profit.

Thompsons suggests that the insurance industry will try to hide behind the current financial crisis. However, it believes the industry should not be allowed to soften the blow of lean times by paying dividends with reserves that should be used to compensate asbestos victims.

Only and only if there is no prospect of legislative change would Thompsons support a no-fault scheme. The scheme should, it suggests, be funded by the insurance industry with a pro rata contribution from Government Departments to the extent that they have liability as employers to workers exposed in former nationalised industries.

Thompsons goes on to say that the payment should be a fixed sum in every case and cites a figure of £17,500, which, it says, is based on the mid-point of the second edition of the Judicial Studies Board Guidelines for the Assessment of General Damages for Personal Injury Cases in Northern Ireland and which is subject to an annual RPI increase.

In common with the GMB, Thompsons believes touting for claims should be banned. In its view, the use of "scan vans" and the activities of claims farmers should be a criminal offence. This is because free scans are offered as a way of generating a substantial number of claims, which then attract a referral fee for solicitors, after the event insurance and a deduction from a successful claim. Thompsons believes the activities of claims farmers was instrumental in precipitating the challenge from defendants and insurers and it offers to assist in any investigation into such activities.

Ultimately, Thompsons concludes that employers have a duty to protect employees and suggests that, if they fail to do so, the resulting cost should not be a factor in deciding the future compensation for pleural plaques sufferers.

The response from the Committee of the Personal Injuries Bar Association expresses "unanimous support for legislation to overturn the decision in the Johnston case". In its view, the funding and regulation of any payment scheme could present "very considerable practical and political problems in setting up the scheme and formulating the criteria for entitlement". It also urges caution in separating compensation from fault, suggesting that such an approach could "shift the burden of payment away from the negligent wrongdoer and his insurer onto the public purse".

The response from Charles Hill QC suggests there is a technical difficulty in telling a patient that pleural plaques do not cause mesothelioma, asbestosis or cancer, but are a marker of asbestos exposure which could cause any one of those diseases.

Mr Hill has been dealing with claims for many years and he believes the best way to deal with pleural plaques is by way of an award of damages. He goes on to say that the "matter requires to be dealt with as comprehensively as possible by legislation". In his view, there are other aspects of asbestos exposure which will fall to be considered. By way of example, Mr Hill highlights an ongoing dispute as to whether or not dependents of a deceased person who died as result of exposure to asbestos can bring their own financial claim for loss of dependency. In addition, he cites the case of *Maguire v Harland and Wolff*, which was heard in Liverpool. In that case, the wife was thought to have been exposed to asbestos on her husband's clothes. She subsequently developed mesothelioma and died. However, the Court of Appeal in England has ruled that the development of the disease was too remote. Mr Hill recognises that the decision is not binding in Northern Ireland. However, he anticipates that the point may be argued and need to go up to the House of Lords. In his view, it would be unnecessary to incur such a delay, because, as a matter of logic, if the employer would have been liable to the husband, it should have also been liable to wife and legislation should establish that point.

A response was also received from a member of the judiciary, in his personal capacity. He favoured adopting the Scottish approach.

Medical Profession

Dr Shepherd is a Consultant Respiratory Physician with extensive experience of ARDs, particularly those resulting from asbestos exposure in the shipyard environment. His response highlights the lack of knowledge among individuals. He believes people do not understand the difference between ARDs and pleural plaques and that, as a result, they fail to appreciate that pleural plaques do not interfere with lung function or become cancerous, but are a marker of exposure and "of a small degree of risk of possibly developing asbestos related disease in the future".

In his view, it would be useful to have information leaflets which set out the difference between pleural plaques and ARDs and put the risks in context with other risks which patients accept during their life, such as cigarette smoking or the risk of a road traffic accident.

Like other respondents, Dr Shepherd does not support the creation of a register, largely because he feels it would have no clear purpose and is unlikely to be comprehensive or maintained.

From a medical perspective, Dr Shepherd does not believe pleural plaques cause any injury and, on that basis, does not feel that legislative change would be justified.

He is concerned that, if pleural plaques are designated as compensatable, there will be a risk of medically unjustified CT scans being carried out.

He recognises that the absence of legislative change will produce two "populations", one of which has had civil compensation for pleural plaques (i.e. up to the decision in the Johnston case) and one of which has not. However, he goes on to say that it seems "sensible that compensation should be for a disability, rather than a future risk of possibly developing a disability".

The response from the Chief Medical Officer for Northern Ireland supports any measure which would ensure a better understanding of pleural plaques for both the public and the medical profession. He notes that the IIAC is undertaking a review and that the Chief Medical Officer for England and Wales has also been asked to conduct an independent review. He looks forward to the outcome of both reviews, but, in the meantime, was unable to identify figures for the prevalence of pleural plaques.

Methodist Church in Ireland

The covering letter to the response from the Methodist Church reports that the Church has had, and continues to have, members, both male and female, who have been employed in industries which have made use of asbestos. Against that background, the Church feels that information leaflets on pleural plaques would be "absolutely essential".

The Church does not support the creation of a register, largely on the basis that it would be of no real value.

Although the Church believes the decision in the Johnston case has "introduced inequity into this area", it favours a payment scheme over legislative amendment, which it feels could set an unhelpful precedent.

The Church hopes that new health and safety procedures will help to reduce future "asbestos related injury". Taking that factor and projected incubation periods into account, the Church believes a payment scheme could be time limited. However, in terms of equal treatment, it recognises that much would depend on the level at which payments are set. So, it suggests that, if a payment scheme is established and the payment rate is set below the previous rate of compensation payments, there could be a continuing degree of inequity.

Political parties

The response from the Alliance Party ("AP") notes that there has been considerable interest in the issues, but that the interest is "limited to certain groups (e.g. men who worked in industry) and certain locations (e.g. East Belfast)".

It does not explicitly state that the AP is opposed to legislative change. Rather, it makes the point that, in choosing to legislate in this area, the Scottish Government has chosen how to prioritise its budget. AP believes priority funding should go to mental health issues, which would cover any anxiety associated with pleural plaques, and does not believe people in Northern Ireland would be at a disadvantage to those in Scotland.

The response from AP goes on to express strong support for an awareness campaign, provided it is carefully targeted and taken forward with the "utmost care" (to avoid raising anxiety levels).

Like other respondees, AP is opposed to the creation of a register, largely on a cost/benefit basis, but also because it would wish to avoid stigmatisation or increased anxiety. However, it would support "substantive research concerning the impact of a diagnosis with pleural plaques".

The response from the Progressive Unionist Party ("PUP") accepts that the House of Lords' decision was right in law. However, it goes on to say that it is for elected representatives to change the law if that law is "found to be immoral or to be failing our citizens".

In the PUP's view, the situation post-Johnson is "unacceptable and action to right this wrong should be taken swiftly". It believes pleural plaques can be attributed to negligent employers and that "those responsible for this negligent exposure should be held to account".

The PUP goes on to suggest that the moves by the Scottish Government to reinstate compensation creates "an unjust hierarchy" and states that "all citizens of the United Kingdom who have developed pleural plaques as a consequence of their employment should have access to the same level of compensation."

The PUP would also support an awareness-raising campaign.

Representative organisations

The response from the CBI expressed "strong support" for increased support and information, but opposed "in the strongest terms the idea of either overturning the House of Lords' decision... or a no-fault payment scheme which would involve ignoring overwhelming scientific evidence".

In its view, the payment of compensation sends the message that a condition is serious and would, therefore, "perpetuate the confusion". It also believes that legislative change would "undermine the stability of the legal environment" and business confidence, result in increased levels of litigation and impact on insurance premiums. Legal instability would, it said make Northern Ireland a less attractive investment option and increase the costs for business, government, local authorities and insurers.

On the issue of precedent, the CBI concludes by saying that there are many agents which have now been classified as having the potential for long-term effects and it asks if compensation for concern alone will increase levels of compensation.

The welcome for increased support, help and information is echoed in the response from the Association of British Insurers ("ABI"), as is the opposition to legislative change and a no-fault payment scheme. The response also expresses concern about "claims farmers" who have an interest in generating referral fees and who encourage "unnecessary and possibly harmful x-rays".

ABI's response also echoes the CBI's comments about legal stability, investment and increased costs and suggests that legislative change could result in compensation for other non-

compensatable conditions and "detrimentally affect the economic rights and interests of insurers, in breach of the European Convention on Human Rights".

Clearly, ABI believes that the earlier system of compensation payments was problematic and it quotes Professor Anthony Seaton, Emeritus Professor at the University of Aberdeen, who has said:

"The change in the caselaw that led to individuals with pleural plaques receiving money for a non-disease caused problems in their management. While giving appropriate reassurance and explaining the risks of other asbestos-related diseases in relation to the risks of much more likely diseases, we were obliged to advise them to consult a lawyer – a mixed message with the obvious consequence of causing anxiety. The main beneficiaries have been lawyers and expert witnesses, such as me. I believe we have better things to do, to prevent real disease."

The response from ABI echoes the earlier responses which refer to additional pressures on the health system, in terms of increased demands for x-rays or CT scans.

The response from the British Insurance Brokers Association ("BIBA") supports the call for education and information, but proposes that the information should also be distributed among lawyers, Trade Unions and the press, not just potential claimants.

BIBA emphasises the need for care, to ensure that the dissemination of information does not compound the problems by causing panic, increased anxiety or pressure on the NHS for x-rays or investigations. It advocates a two level approach. Level 1 information, which would be restricted to GPs, hospitals and NHS Direct, would contain detailed technical explanations, a prognosis and appropriate medical references. BIBA believes the level 1 information would be of particular assistance to non-specialist medical professionals, who may not fully understand the issues. Level 2 information would contain an overview for the general public and be distributed via the Citizens' Advice Bureaux and other outlets.

BIBA does not favour the introduction of a register on the basis that it would be "unwieldy, expensive and ultimately of little utility".

BIBA confirms that it has no information on figures, but goes on to suggest that legislative change would set a precedent and expose the insurance market to unpredictable claims, where there is no reserve of funding. In BIBA's view, the Law Lords' analysis of the criteria for negligence is sound and constitutes the "bedrock of the common law". It believes legislative change could create a "seismic shift", the results of which could be "unexpected, unsuccessful and unwanted".

The response from BIBA highlights the danger of cross-border forum shopping and the possibility of claiming for other symptomless conditions, even those unrelated to asbestos exposure.

BIBA does not support the introduction of a payment scheme, saying that "[c]ommercial insurers would not fund a payment scheme where the underlying issue is not actionable in law. Hence it would be a straightforward drain on general taxation". Any attempt to force contributions could, it says, destabilise the liability insurance market and result in the costs being quickly passed on to the insured.

In BIBA's view, it is unfair to compensate those who have not suffered an injury and not compensate those who have suffered an injury, but are unable to prove negligence or are faced with an insolvent employer or unknown insurer.

BIBA believes it would be impossible to limit the legislative change to pleural plaques and "impossible at present to forecast how far the effects of any such change would spread". It also believes there is "every likelihood that the number of people affected in small firms has been underestimated."

Ultimately, BIBA states that it would not support a different compensation culture or legislation for different parts of the UK, which could lead to insurance costs being different in different parts of the UK.

The response from the Association of Personal Injury Lawyers ("APIL") welcomes "any proposals to raise awareness" (even though it acknowledges the difficulties associated with allaying very personal concerns), opposes the creation of a register (on the basis that it would undermine any awareness-raising campaign and make people "feel stigmatised") and a payment scheme, and advocates legislative change, which would apply on a retrospective basis, thus ensuring equality. APIL also supports the extension of any amending legislation to asymptomatic pleural thickening and asbestosis and states that claims which have become statute barred since the Court of Appeal decision in the Johnston case should be covered by any amending legislation.

On the issue of a payment scheme, APIL believes, in principle, "that the polluter must pay" and states that it is "fundamentally wrong for the State to be responsible where there is an identifiable wrongdoer." Having noted that insurance premiums have already been collected, it states that "it is entirely right and proper that the negligent party should make recompense for its negligence."

APIL recognises that the biggest obstacle facing any individual is the tracing of employers or insurers many years later. The difficulties associated with tracing those responsible prompts APIL to call for a statutory central database of employers' liability insurance policies and a fund of last resort for those suffering injury and occupational disease, similar to that operated by motor insurers.

APIL notes that, in the Johnston case, there was no question that there was a duty of care or that that duty was breached. Rather the claims were resisted on the basis that there was no damage. In APIL's view, pleural plaques constitute a "physiological change to the body signifying the permanent introduction of asbestos" and it cites the following quotes in support of its call for amending legislation —

"The right to bodily integrity is the first and most important of the interests protected by the law of torts"^[4].

" I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society"^[5]

"The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached."^[6]

The response from APIL also —

- raises the spectre of forum shopping where there are cross-border issues;
- argues that "asbestos victims are a special category in highly exceptional circumstances" and that they should, therefore, be able to "obtain full and just compensation"; and

- expresses support for the enforcement of the regulations relating to the use of x-rays and CT scans and argues that the regulations should be strengthened to prevent claims management companies introducing their own scan vans.

Southern Health and Social Services Board

The response from the SHSSB records support for the concept of information leaflets on pleural plaques, but not the introduction of a register. Although the Board recognises that, in themselves, pleural plaques are benign, it believes the exposure to asbestos carries risks and suggests that, if people have been put at risk, they should be compensated.

Unions

The response from GMB states that it is Britain's third largest trade union, with over 600,000 members, 13,000 of which are in Northern Ireland. The response goes on to say that GMB has significant membership in areas of heavy industrial exposure to asbestos and that GMB members have witnessed "first hand the devastating effects of [ARDs]".

The GMB believes that the decision in the Johnston case was wrong and "appears to have been heavily influenced by evidence provided by the insurance industry, motivated by potential savings of £1.4 bn." In its view, that sum was created by premium payments and its retention represents a "windfall profit for the British Insurance Industry".

GMB is not convinced by the general call for more information. It recognises that clear factual information at the time of diagnosis may help to reduce uncertainty, but it does not believe it will provide reassurance "to a great degree".

Although the response from GMB initially states that a person diagnosed with pleural plaques may have an "incorrect, but entirely natural, assumption" that s/he will develop mesothelioma, it later refutes the suggestion that there is no link between pleural plaques and mesothelioma and goes on to say that 1 in 3 members of the GMB Heat and Frost Branch have developed pleural plaques and subsequently been diagnosed with mesothelioma. The response also highlights the torment associated with visits to the GP, which, GMB suggests, raise the possibility of a diagnosis of mesothelioma.

Clearly, GMB favours a proactive risk-based approach, which will allow for those who have had contact with asbestos through work to be prioritised for screening and follow-up treatment. The pro-active approach would require a GP to ask if his/her patient had worked with asbestos and, if there is a positive response, to record that response and arrange for regular screening to be undertaken. The requirement to record the response is interesting, given that the GMB does not favour the creation of a register for people with pleural plaques.

Ultimately, the GMB believes it is "absolutely appropriate, correct and necessary to legislate to overturn the [Johnston] decision". It regards pleural plaques as a violation of the right to physical integrity and states that "[t]he previous system of small amounts of compensation for the development of the condition was, therefore, absolutely correct and sound".

The response from GMB makes the following key points in support of the case for legislative change —

- the payment of compensation for pleural plaques would provide a means of establishing liability "before the onset of mesothelioma or other asbestos-related terminal conditions";

- the benefits to society in passing an amending law would "far outweigh the potential costs";
- the payment of compensation would avoid double standards, whereby external scarring is compensated, regardless of impairment of function, or payments are made for hurt feelings or loss of reputation (i.e. in defamation cases); and
- the payment of compensation would ensure that all UK citizens are equal before the law and avoid a "postcode lottery for the receipt of compensation".

If legislative change is forthcoming, GMB would wish to see the cases which were suspended due to the Johnston case being prioritised, but not distinguished over and above others. The GMB would also support the introduction of a criminal offence, to deal with those who tout for claims.

If legislative change cannot be secured, GMB, like Thompson's, would support the introduction of an ELIB (which is discussed in more detail above). It would also countenance a payment scheme alongside the ELIB. However, the scheme would have to have an independent board, adopt a benchmark figure for compensation and make flat single payments, regardless of extent of the pleural plaques. In addition, payment from the scheme should not preclude further legal action if the claimant develops mesothelioma.

The GMB suggests that the scheme could be funded by the insurance industry, negligent employers and companies which produced/manufactured asbestos products on a 70%, 25% and 5% ratio. A 3 year limitation period from the date of diagnosis is proposed.

One issue which is discussed at some length in GMB's response is the dearth of research, publicity and guidance on pleural plaques. In its view, guidance material should be available to the general public at hospitals, health centres, GPs surgeries and online. It would like communications to be informed by cutting edge knowledge and is keen to expand on what is known about the health effects of pleural plaques, mesothelioma and other ARDs.

GMB compares the work being undertaken at an international level with the work being undertaken in Britain and highlights the lack of Government funded research. The work of the Barts Mesothelioma Research Group is welcomed, but, as GMB notes, is reliant on donations. GMB also notes that the Australian National Research Centre for Asbestos Related Diseases ("ANRCARD") receives statutory funding, which, it believes, is critical to the development of research, testing, treatment and informed policy-making. According to the GMB, ANRCARD receives funding of about £.1.2m per annum. GMB notes that the British insurance industry received £31bn in premiums in 2006 and suggests that it should provide funds for a British National Research Centre. The sum suggested is £3m per annum, index linked.

The GMB response refers to the "appalling record" of the Association of British Insurers' voluntary arrangements for dealing with employer liability compulsory insurance ("ELCI") claims. It suggests that, in 2005/6, the voluntary arrangements could only trace 28% of the insurers who were being sought. GMB asserts that the highest trace rate since the inception of the voluntary code in 1999 is 41%.

FDA is a professional association and union for the UK's senior public servants and professionals. It has a growing membership of 18000 and is comprised of senior managers, tax and legal professionals and other professionals working across government and the NHS.

The response from the Northern Ireland Senior Officers' Section of the FDA ("NISOS") expresses support for a general awareness campaign, but concern about the creation of a register. The concerns largely centre on the issues of costs and data protection. However, NISOS also

suggests that it would be unfair to provide for the registration of one symptomless condition, but not others.

Ultimately, NISOS favours the introduction of amending legislation, partly on the basis that it would be unfair if people in Scotland could continue to raise an action for damages, but people in Northern Ireland could not. On the issue of setting an unhelpful precedent, it suggests each case should be judged on its own merits and, in this instance, it believes amending legislation would be justified.

The response from Unite expresses concern about the Johnston case and welcomes the "progress being made in Scotland". Unite is particularly concerned that the lack of a financial penalty, in terms of compensation, could result in employers taking risks with workers' health. In its view, the promotion of a healthy and safe working environment is not solely due to legislative initiatives or even employers' goodwill, but also due to a desire to avoid increased insurance premiums as a result of litigation. It would, therefore, support amending legislation along the lines of that proposed for Scotland.

Individual respondents

As, mentioned above, the responses from individuals tended to simply contain calls for legislative change.

Three forms of standard letters were submitted and, in the initial stages of the consultation, it was thought that this heralded the start of a sizeable campaign. However, in the event, such letters account for just over 25% of the individual responses (25 in all).

The first of the standard letters refers to people who have been "negligently exposed to the dangers of asbestos and —

- asserts that the decision by the House of Lords is "completely wrong and should be overturned by our Assembly";
- notes that previous claimants have received compensation;
- states that no-one can say how long it takes for pleural plaques to "develop into full blown asbestosis";
- refers to ongoing anxiety;
- refers to annual scans at a cost of £500 to see if the pleural plaques has "deteriorated, possibly to full blown asbestosis";
- asserts that the overturning of the House of Lords' decision would be "the right decision...for the good of those suffering with this disease in Northern Ireland";
- asserts that the law says "the disease was caused by unlawful exposure and the companies were negligent" so "the claims should be allowed to go ahead".

The second of the standard letters —

- notes that it has been "recommended" that the writer enlist the support of his/her local MP;
- notes that insurance companies had initially paid compensation to those with pleural plaques;
- notes that the decision in the Johnston case does not mention Northern Ireland;

- asserts that pleural plaques are the "first stage of cancer", cause anxiety and require access to an inhaler for breathlessness;
- suggests that those with pleural plaques suffered "similar, if not identical symptoms, regardless of where they live";
- highlights the decision in Scotland to overturn the decision in the Johnston case;
- advocates equal access to compensation throughout the UK, "with no differentiation being made and without bias"; and
- urges "Stormont" to strive to overturn the decision "by government legislation".

The third of the standard letters —

- notes that, if the decision in the Johnston case is allowed to stand, claimants will feel they are being "unfairly and blatantly discriminated against and this would be totally unacceptable.";
- expresses support for a general awareness campaign and further help and information for "sufferers of pleural plaques", but queries the potential benefits of creating a register;
- suggests that a payment scheme with "restrictions on eligibility and the possibility of future impact on compensation payments" also amounts to "discrimination against "post-Johnston cases";
- suggests that the overturning of the decision in the Johnston case is "the only acceptable way forward, in that it would call to account those responsible for negligence, not impact on future claims for more serious diseases resulting from pleural plaques and also put [claimants] on an equal legal footing with those in Scotland who are able to register claims regarding pleural plaques."

Most of the other responses were short, hand written notes, although some respondees did include their medical reports and accounts of how they came to be diagnosed.

It is clear from the accounts given that many of the respondees have lived with a high level of anxiety post-diagnosis and have suffered greatly in terms of losing their friends and colleagues to ARDs or witnessing their struggle with such diseases —

"Where does it start and end?"

"Our friends are in a bad way in terms of their health when does it start for me?"

It is also clear from the responses that the decision in the Johnston case has provoked a strong sense of injustice and a desire to secure redress and a proper consideration of the issues —

"I feel betrayed and hurt by the House of Lords' decision on pleural plaques, which I think is totally wrong....I feel this is a cost-saving exercise. I hope this obscene judgment will be overturned by our Assembly and ensure justice is done."

"I find it very unfair after 20 years the English Courts have overturned the payment of compensation for this illness. The court itself admitted the employers exposed their workers to asbestos. I would ask the consulting committee to bear in mind the Scottish parliament's decision to overturn this law. "

"Through my ex-employer's negligence and failure to 1/ protect me from exposure and 2/ to warn me of the possibility of exposure, I have been placed in a position of harm...I find that

having an avenue of redress taken from me is fundamentally wrong and goes against what is right. Describing pleural plaques as an injury or a disease is, in my opinion, in this case immaterial and missing the point".

"I hope that when this matter is debated that I and others in the same position will receive the consideration that I believe we are entitled to before we too pass away. "

"Some great men have died at the hands of this negligence who will never get the chance to voice their opinion as I am doing now and therefore I feel that myself and those who have suffered with this illness deserve a proper investigation with the aim of compensation."

Some of the responses recount how the exposure occurred —

"We had to sit on the ships and eat our lunch and dinner and the dust was everywhere which we now know was asbestos dust".

"I started to work in Belfast Shipyard in 1950: I was 14 years of age. I worked until the late 1970s as a welder. I worked in the boiler rooms and engine rooms where the asbestos was mixed by pipe coverers and it came down like a snowstorm."

"many pipe coverers have died as a result of cancers related to asbestos and, although I was not employed in this activity, the dust from the asbestos covering was evident in the workplace."

Other responses record the length of service and highlight what are perceived to be lax safety conditions—

"I was employed as a welder in Harland & Wolff shipyard for forty years. I commenced my employment in 1959 and, in those days, health and safety regulations were non-existent. Neither myself nor my colleagues were ever informed or advised as to the damage we could be doing to our health by working in the proximity of certain materials.

The consultant described it to me as a sleeping timebomb, which may or may not explode. This news has had a devastating effect on my life and, in that respect, I believe that I am deserving of compensation."

"We were never at anytime warned or told of the dangers of asbestos, we were never given any safety clothing or masks. The owners of the shipyard never enlightened us at any time of the dangers of the illness we would suffer in later life."

"I believe that part of the contract of employment included "Health and Safety issues". I do not believe this was adhered to and therefore the company would be in breach of contract or negligent in providing proper safety equipment and information on the dangers of breathing asbestos dust."

"We never had any education or information about asbestosis so we didn't even have the chance to protect ourselves"

"Personal protection equipment was not up to standard it was just a dust mask"

Several of the responses contained a strong call for wrongs to be righted or expressed a determination to see those responsible held to account —

"All my life I have been taught if you do something wrong you had to pay for it. These people took the profit, but do not want to take responsibility for their actions."

"We're not going away until we get what we deserve."

"The Johnston case cannot be accepted and should be contested by whatever means available and the negligent people called to account".

One respondent stated that, "[a]s a matter of public policy, pleural plaques should be viewed as harm". Others called for equal treatment to those who had already received compensation or who lived in Scotland —

"I think we should be treated the same way as the men who have been awarded compensation. The men who have been denied compensation worked in the same conditions as those who have been awarded financially."

"It would be unjust if people in Scotland could claim compensation and people from Northern Ireland could not."

"Scotland has a tradition in shipbuilding not unlike Northern Ireland. I would ask the Executive that the people of Northern Ireland be treated with equality".

" I feel having been diagnosed with pleural plaques that I am entitled to the same compensation as sufferers in Scotland. For too long the people of Northern Ireland have been treated less favourably in many aspects of life. This is an opportunity for those of us who were exposed in this way to be acknowledged by our elected Assembly and the same system as Scotland should be adopted here."

Some respondents who responded collectively felt it was a "basic human right to receive ...compensation", as they had been "affected the same way as the people that ha[d] already received compensation. " This group also criticised the insurance industry, saying —

"We know the insurance companies have saved money on the people that have died already, never mind the people that are living."

Summary of points made during consultation

It will be clear from the foregoing that the main subject of discussion during the consultation exercise was the availability of compensation for pleural plaques and the overturning of the decision in the Johnston case. The option of legislative change commanded the most support. However, there was also general support for awareness raising and information gathering/sharing, provided such activities are undertaken in a careful and sensitive way.

The option of a register did not find favour, largely because of concerns about the cost of creating and maintaining the register, but also because of concerns about its intrinsic value and the danger of stigmatisation.

The creation of a no-fault payment scheme was also generally opposed, although some respondents were willing to countenance such a scheme if legislative change is not forthcoming.

As was perhaps to be expected, there is a clear split of opinion between the business/insurance sector and individuals and their representatives.

Essentially, the business/insurance sector, which is opposed to legislative change, makes the following points—

- the House of Lords reached a unanimous decision in the Johnston case on the basis of undisputed medical evidence;
- it has been recognised that the House of Lords' decision was in keeping with the established principles of the law of negligence;
- the precedent value of a change to the law should not be underestimated: there is a real danger of an ever-widening range of claims for which there is no reserve of funding (e.g. for anxiety alone or for other "injuries" which have no symptoms);
- in the absence of detailed information on the prevalence of pleural plaques it is impossible to predict the full financial implications of legislative change;
- public funding should be prioritised and that funding could be spent in other areas, such as mental health, which would also be beneficial to those with pleural plaques;
- the payment of compensation sends the message that pleural plaques in and of itself is a serious condition. This causes further confusion and anxiety to those who have been diagnosed with the condition;
- legislative change would undermine the stability of the legal environment and business confidence, result in increased levels of litigation and impact on insurance premiums;
- legal instability will make Northern Ireland a less attractive investment option;
- legislative change will increase the costs for business, government, local authorities and insurers;
- legislative change will lead to "claims farmers" who have a vested interest in encouraging people to seek a diagnosis of pleural plaques;
- legislative change could increase the pressure on the health system, in terms of increased demands for x-rays or CT scans;
- legislative change could result in "forum shopping";
- legislative change would divert resources away from symptomatic conditions, such as mesothelioma; and
- retrospective legislation would breach the ECHR and will be challenged in the courts.

On the other hand, individuals and their representatives, who support legislative change, make the following points—

- exposure to asbestos carries risks and, if people have been put at risk, they should be compensated;
- those responsible for negligent exposure should be called to account;
- all citizens of the United Kingdom who have developed pleural plaques as a consequence of their employment should have equal rights and access to compensation;
- the payment of compensation for pleural plaques would provide a means of establishing liability before the onset of mesothelioma or other asbestos-related terminal conditions;
- the benefits to society in passing an amending law would far outweigh the potential costs;
- the payment of compensation would avoid double standards, whereby external scarring is compensated, regardless of impairment of function, or payments are made for hurt feelings or loss of reputation;

- pleural plaques constitute a violation of the right to physical integrity;
- the lack of a financial penalty could undermine the health and safety at work message and result in increased risk taking by employers;
- the activities of "claims farmers" can be regulated by the criminal law or the enforcement of the existing regulatory regime;
- legislative change would reduce the need to "forum shop";
- asbestos victims are a special category of claimant in highly exceptional circumstances and should, therefore, be able to obtain compensation;
- legislative change would prevent the wider application of the decision in the Johnston case and the consequent distortion of the compensatory framework;
- judicial unanimity should not be seen as a barrier to legislative change;
- there is a moral case for legislative change and any such change would restore the equilibrium of the justice system;
- the civil law should right wrongs and reflect public opinion;
- legislative change will reduce the need for satellite litigation and thereby reduce the pressure on the justice system; and
- legislative change would prevent an unjust windfall for employers' liability insurers.

Developments post-consultation

Before we consider the way ahead, it might be helpful if we highlighted what has happened elsewhere in the UK, post-consultation.

Scotland

It was noted earlier that the Scottish Government had given an undertaking to legislate to ensure that the decision in the Johnston case did not have effect in Scotland.

In February 2008 the Scottish Government initiated a consultation on a partial regulatory impact assessment of the proposed legislative change and, on 23 June 2008, the Damages (Asbestos-Related Conditions) (Scotland) Bill was duly introduced into the Scottish Parliament.

The Bill provided for asbestos-related pleural plaques to be a non-negligible personal injury for which damages could be recovered. As it was possible that the courts might look to the Johnston case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions^[7], the Bill also provided that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, should continue to give rise to a claim for damages.

The Bill completed its final stage in the Scottish Parliament on 11 March 2009, received Royal Assent on 17 April and came into force on 17 June. Accordingly, people in Scotland who have been negligently exposed to asbestos and have then been diagnosed with certain asbestos-related conditions will still be able to sue for compensation, despite the decision in the Johnston case.

The provisions of the new Act (copy attached in Annex D) take effect from the date of the House of Lords' judgment, 17 October 2007. This means the Act will cover people who had raised a claim prior to the Johnston case, but whose cases had not been settled or determined by a court before the House of Lords gave judgment and that, for the purposes of the limitation of actions,

the period between the judgment and the commencement of the Act will not be taken into account^[8].

On 27 April 2009 five insurance companies (Axa General Insurance Limited, Axa Insurance UK plc, Norwich Union Insurance Limited, Royal and Sun Alliance Insurance and Zurich Insurance plc) launched a judicial review of the new Act. The companies are seeking a declaration that the Act is incompatible with their rights under Article 6 of, and/or Article 1 of the First Protocol to, the ECHR. They are also seeking a declaration that the Act is the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament.

The companies tried to prevent the Act from coming into force by arguing that it should be held in abeyance until the judicial review proceedings were over. However, the Court rejected the application and, as stated earlier, the Act came into force on 17 June 2009.

England and Wales

On 9 July 2008 the UK Government issued a consultation paper on pleural plaques. The consultation period concluded on 1 October, but the summary of responses has not yet issued.

On 21 July 2009 the Secretary of State for Justice and Lord Chancellor, Jack Straw, was asked when the Government would publish the outcome of the consultation exercise. In reply, Mr Straw noted that the Government had published to the House of Commons two reports on the medical aspects of pleural plaques, one from the Chief Medical Officer's expert adviser and a second from the IIAC. Mr Straw undertook to reflect on the reports and to return to the Commons after the summer recess with final recommendations.

Mr Straw said the UK Government was considering measures to—

- make the UK a global leader in research on the alleviation, prevention and cure of asbestos-related diseases; and
- help speed up compensation claims for those who develop serious asbestos-related diseases, such as mesothelioma.

He also said the Government was examining the process for tracking and tracing employment and insurance records, as well as the support given to individuals who are unable to trace such records.

On 26 January 2009, Andrew Dismore MP introduced a Private Members Bill, the Damages (Asbestos-Related Conditions) Bill, to the UK Parliament. The Bill, which essentially follows the Scottish legislation, was read for a second time on 24 April 2009 and completed its Committee stage, without amendment, on 1 July.

The Report stage of the Bill, which purports to extend to Northern Ireland and is attached at Annex E, is scheduled for 16 October 2009.

IIAC

The IIAC is a scientific advisory body which provides independent advice to the Secretary of State for the Department for Work and Pensions and the Department for Social Development in Northern Ireland on matters relating to the Industrial Injury Disablement Benefit Scheme ("IIDB scheme"). This is the scheme by which employed earners in the UK receive benefits for industrial accidents or certain occupational diseases, which are referred to as "prescribed diseases".

The IIAC is comprised of 17 members who are appointed by the Secretary of State. The members include specialists in occupational medicine, epidemiology and toxicology, lawyers, representatives of employers and representatives of employees.

On the 11th June 2008, the Secretary of State asked the IIAC to explore the issue of pleural plaques and, in particular, to consider—

- the prevalence of pleural plaques;
- the occupational causation of pleural plaques currently found in the population;
- the likelihood of disability arising from pleural plaques;
- the likelihood of other more severe complications of asbestos exposure arising amongst those currently having plaques, and
- whether compensation through the IIDB scheme would be appropriate for people diagnosed with the condition.

The work on pleural plaques was taken forward by the IIAC's Research Working Group. The Group conducted a literature search, consulted with leading experts in respiratory research and asbestos-related diseases and invited evidence via its website and mail shots to occupational specialists.

The IIAC's position paper on pleural plaques was published on 30 June 2009. The paper notes that "representative population-based screening data ha[s] not been collected within the UK" and that there is "no direct or precise estimate of the current prevalence of pleural plaques in the UK". The paper states, however, that the condition is likely to be common, with one expert suggesting that as many as 36,000 to 90,000 people a year may develop plaques.

The paper goes on to say that pleural plaques do not alter the structure of the lungs or restrict their expansion. It notes that the consensus amongst medical experts is that any loss of lung function is likely to be small or non-existent and well below the level required by the IIDB scheme. It also notes that "most authorities hold that pleural plaques rarely cause major symptoms". In this regard, it quotes a survey from Sweden, which found that nearly all of the 827 subjects were "symptom free at the time their plaques were discovered. "

The paper states that, although plaques do not "become cancerous", they are a "marker of future risk of lung cancer and mesothelioma, because they are a marker of exposure to asbestos". However, the paper recognises that "the predictive information about future risks is limited and imprecise". Likewise, it notes that there is no evidence about the resulting scale and severity of any psychological ill-health.

The paper concludes by noting that the IIAC did not recommend the prescription of pleural plaques when it last considered the issue in 2005 and that its latest inquiry has not prompted it to revise that opinion.

The paper does, however, emphasise that the IIAC was focusing on prescription for the purposes of the IIDB scheme and recognises that "different considerations may apply" in civil proceedings.

The full report can be accessed on the IIAC's website at www.iiac.org.uk

Report to the Chief Medical Officer for England and Wales

In July 2008 the Chief Medical Officer for England and Wales asked Professor Robert Maynard to prepare a report on the medical aspects of pleural plaques.

In his report^[9] Professor Maynard states that "there is no evidence to show that the presence of pleural plaques is a reliable predictor of the risk of mesothelioma". The Professor goes on to say that the "generally accepted position seems to be that plaques, per se, do not produce significant changes in lung function" nor do they affect life expectancy. Having reviewed various research the Professor concludes that it is impossible to say whether pleural plaques are a "reliable predictor of serious lung disease". In his view, the plaques are a "pathological response to a foreign body: asbestos fibres". However, although they could be described as damage in "an anatomical sense", the Professor does not consider that, in the great majority of cases, they represent damage in a "physiological sense". He believes the law as it currently stands requires proof of damage "in a physiological sense" and, although he accepts that the current law could be subject to criticism, he ultimately concludes that providing compensation "to those who develop pleural plaques would be costly and unfair to those who do develop serious disease but who do not develop plaques".

The Way Ahead

The Department has carefully reflected on the submissions made during the consultation exercise and has closely monitored developments since the consultation exercise closed.

It has noted the general desire to increase the support, help and information which is available to people with pleural plaques and believes there is merit in exploring the issue further. In the coming months, the Department hopes to work in partnership with medical experts in Northern Ireland and other departments, both locally and across GB, with a view to exploring how access to information and support networks can be improved.

The IIAC's position paper confirmed the shortage of UK-specific data on pleural plaques and the Department encountered this first-hand when it was preparing its consultation paper. The paper specifically asked for information on previous settlement figures and associated legal costs or any estimates regarding:

- the number of people currently diagnosed with pleural plaques;
- the future number of people who will develop pleural plaques;
- the future distribution of pleural plaques cases;
- the period of time over which people will develop pleural plaques; or
- the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation.

The responses from the insurance industry highlight a number of medical studies/assessments. However, the GMB has suggested that the figures for pleural plaques have been over-estimated by the insurance industry. It estimates that 1-2% of males over 50 and a much lower number of males and females under 50 would be affected. In terms of round figures GMB suggests 100,000 to 200,000 people may be affected, of which the vast majority will never be diagnosed.

The response from Thompsons suggests that the Surveillance Work-Related and Occupational Respiratory Disease Project (SWORD) is the only reliable source of data on occupational respiratory diseases. Thompsons notes that SWORD has produced an estimate of 900 new cases of pleural plaques per year.

Thompsons' own database shows that between 2004 and 2008 it received instructions in 1582 pleural plaques cases. The peak of business occurred in 2005, when it received 617 cases^[10].

Given the uncertainty around the available figures, it could be argued that a register of those with pleural plaques would be useful. The Department has, however, noted the concerns raised during the consultation exercise, particularly those regarding the cost of creating and maintaining a register. The Department recognises that, from a data collection perspective, a register would only be effective if it is very carefully and systematically managed. At this stage, the Department has decided not to pursue the creation of a register. It has, however, noted the comments referred to earlier from Mr Straw and will be exploring how Northern Ireland can assist the UK Government in any research initiatives in relation to ARDs.

Turning to the option of a no-fault payment scheme, the Department has noted the opposition to the scheme and, in particular, the suggestion that insurance companies would be unwilling to participate in any such scheme. The Department considers that the active involvement of the insurance industry would be critical to the success of any payment scheme and that it would be unfair to expect the costs of any such scheme to be met purely from Government resources. The Department has, therefore, concluded that the option of a no-fault payment scheme is not viable.

This brings us to the final and, for many, the most critical option, namely the option of legislative change. The Department has set out above the principal arguments which have been made for and against legislative change and has carefully considered the weight which should be attached to the arguments on either side of the debate.

The Department does not propose to set out a critical analysis of each of those arguments. It does, however, believe that the issue of unanimity merits particular comment. The Department recognises that the House of Lords' decision in the Johnston case was a unanimous decision and accepts that that is a strong factor to be considered when determining the preferred policy option. However, the Department notes that the decision in the Barker case was also a strong decision, with only one dissenting judgment. Nevertheless, the UK Government determined to overturn that decision and enacted the Compensation Act 2006. The Department accepts the argument that legal unanimity cannot act as a bar to legislative action. Moreover, over the full course of the legal proceedings in the Johnston case, there were differing judicial views. In particular, and as was noted in the consultation paper, Lady Justice Smith gave a strong dissenting judgment in the Court of Appeal.

In the course of her judgment, Smith LJ said—

"most people on the Clapham omnibus would consider that workmen who have been put in the position of these claimants have suffered real harm. I do not think that they regard these consequences of asbestos exposure as trivial and undeserving of compensation."

The Department believes that view carries force.

The Department also regards the history of liability for the condition as significant. The fact that liability for the condition was established in a series of cases in 1984 and compensation appears to have been paid in such cases for 20 years until the insurers decided to mount a challenge to the long-established practice has undoubtedly given rise to a sense of grievance on the part of those who have been adversely affected by the House of Lords' decision. In addition, those affected have sustained damage to their lungs, albeit there are no physical symptoms of that damage other than the plaques themselves.

Having weighed up all the arguments for and against legislative change, the Department has, on balance, decided to recommend that legislation to restore symptomless pleural plaques as an actionable condition be brought forward. The Department believes a change in the law will hold employers to account and this is in keeping with most people's sense of justice and fairness and should encourage compliance with health and safety requirements. In addition it will provide people in Northern Ireland with the same rights as people in Scotland.

In terms of the form which any amending legislation should take, the Department has noted the terms of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 and Andrew Dismore's Damages (Asbestos-Related Conditions) Bill and believes the amending legislation should also ensure that symptomless pleural thickening and asbestosis remain actionable.

Conclusion

The Department will be making the following recommendations to the Executive —

- that the support, help and information which is available to people with pleural plaques be further explored, in partnership with medical professionals and other departments;
- that a register of those with pleural plaques should not be introduced;
- that a no fault payment scheme for pleural plaques should not be introduced; and
- that legislation be introduced to ensure that civil claims for symptomless pleural plaques, pleural thickening and asbestosis can be brought in Northern Ireland.

Annex A

List of Consultees

- Action Mental Health
- Advice NI
- Age Concern
- Al Nur Craigavon Asian Association
- Amalgamated Engineering & Electrical Union
- Association of British Insurers
- Association of Personal Injury Lawyers
- Axa Insurance UK plc
- Bar Council
- British Medical Association
- CARE in Northern Ireland
- Carers NI
- CBI
- Chief Medical Officer for Northern Ireland
- Chinese Welfare Association
- Citizens Advice Regional Office
- Council of County Court Judges

- Construction Employers Federation
- Disability Action
- District Councils
- Dr Richard Shepherd
- Engineering Employers Federation
- Equality Commission
- Farset Youth and Community Development Ltd.
- FDA
- GMB
- Health and Social Services Boards
- Health and Social Care Trusts
- Help the Aged
- Institute of Directors
- Institute of Professional Legal Studies
- Irish Congress of Trade Unions
- Justice for Asbestos Victims
- Law Centre
- Law Commissions
- Law Society
- Lord Chief Justice's Office
- Members of the House of Lords
- MLAs
- MPs
- Mr Conlane
- Mr Crothers
- Mr Doole
- Mr Duff
- Mr Hayes
- Mr McLaughlin
- Mr Mitchell
- Mr Williams
- National Federation of Self-Employed and Small Businesses Ltd.
- NIACAB
- NI Association for Mental Health
- NI Chamber of Commerce and Industry
- NICVA
- NI Court Service

- NI Departments
- NI faith groups and churches
- NI Human Rights Commission
- NI Local Government Association
- NI Magistrates' Association
- NI MPs
- NI MEPs
- NIPSA
- NI Solicitors Associations
- Political parties in Northern Ireland
- Professor Tony Newman-Taylor
- Royal Hospital
- The Queen's University of Belfast
- Transport & General Workers Union
- UNISON
- UNITE
- University of Ulster
- Women's Forum NI
- Women's Information Group
- Women's Resource and Development Agency
- Women's Support Network
- Youth Council for NI
- Youthnet

Annex B

Questions Posed in the Consultation Paper on Pleural Plaques

Question 1: Do you think information leaflets on pleural plaques would be useful? if not, why not?

Question 2: Would you support the creation of a register? Please give reasons for your answer.

Question 3: Do you have any information on settlement figures and associated legal costs or any estimates regarding:

- the number of people currently diagnosed with pleural plaques;
- the future number of people who will develop pleural plaques;
- the future distribution of pleural plaques cases;
- the period of time over which people will develop pleural plaques; or

- the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation.

Question 4: Do you think legislation should be introduced to overturn the decision in the Johnston case?

Question 5: If you do think legislation should be introduced, would you favour legislation which —

(a) restricts claims to those who had been diagnosed with pleural plaques before the Johnston case?;

(b) allows anyone who has been diagnosed with pleural plaques to claim?;

(c) follows the bill in Scotland by covering pleural plaques, pleural thickening and asymptomatic asbestosis?

Question 6: Do you think there is a danger that legislation will create a privileged class of claimant or set an unhelpful precedent?

Question 7: Do you support the option of a payment scheme for pleural plaques? if so, how would you see the scheme working? In particular, what level of payment would be appropriate and should a limitation period be applied?

Question 8: Would any of the identified options lead to a higher or lower level of participation or uptake by the section 75 groups or have a differential impact on the groups? Please give reasons for your answer.

Question 9: Do you have any information about how a change to the law would impact on the business sector?

Question 10: Do you have any comments on the impact assessments prepared for England and Wales or Scotland?

When answering the above questions, please give reasons for your views.

Annex C

List of Respondees

- Alliance Party
- Association of British Insurers
- Association of Personal Injuries Lawyers
- Axa Insurance UK plc
- British Insurance Brokers' Association
- CBI
- Charles Hill QC
- Committee of the Personal Injuries Bar Association

- Department for Social Development
- Dr Michael McBride Chief Medical Officer for Northern Ireland
- Dr DRT Shepherd
- Disability Action
- Farset Youth & Community Development Ltd
- FDA
- GMB
- Harland and Wolff plc
- Larne Borough Council
- Methodist Church in Ireland
- Mr Ashe
- Mrs Bailie
- Mr Benson
- Mr Brown
- Mr Browne
- Mr Caruthers
- Mr Caughey
- Mr Coghlan
- Mr Colwell
- Mr Corbett
- Mr Corkil
- Mr Currie
- Mr J English
- Mr W English
- Mr Farr
- Mr Fisher
- Mr Flaherty
- Mr Gaur
- Mr W H N Gorman
- Mr G N Gorman
- Mr Hayes
- Mr Honeyford
- Mr Hume
- Mr Irwin
- Mr Kirpatrick
- Mr Lyons
- Mr Martin

- McCread
- Mr McDowell
- Mr McFarlane
- Mr and Mrs McFaul
- Mr McGregor
- Mr D McKeown
- Mr W McKeown
- Mr McNeill
- Mr Meek
- Mr Mitchell
- Mr Passmore
- Mr Perry
- Mr Proctor
- Mr Purdy
- Mr Robinson
- Mr Roy
- Mrs Russell
- Mr Simms
- Mr Spiers
- Mr Spratt
- Mr Stevenson
- Mr Stewart
- Mr Terry
- Mr Williams
- Mr Wilson
- Ms Barkley
- Norwich Union
- Progressive Unionist Party
- RobinsonMurphy Solicitors
- Royal and Sun Alliance Insurance plc
- SHSSB
- Thompsons and Thompsons McClure Solicitors
- Unite
- Zurich Insurance plc

Annex D

Damages (Asbestos- related Conditions)(Scotland) Act 2009

2009 asp 4

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 11th March 2009 and received Royal Assent on 17th April 2009

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

1 Pleural plaques

- (1) Asbestos-related pleural plaques are a personal injury which is not negligible.
- (2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.
- (3) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent it has that effect.
- (4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.

2 Pleural thickening and asbestosis

- (1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused and is not causing impairment of a person's physical condition is a personal injury which is not negligible.
- (2) Those conditions are—
 - (a) asbestos-related pleural thickening; and
 - (b) asbestosis.
- (3) Accordingly, such a condition constitutes actionable harm for the purposes of an action of damages for personal injuries.
- (4) Any rule of law the effect of which is that such a condition does not constitute actionable harm ceases to apply to the extent it has that effect.
- (5) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.

3 Limitation of actions

- (1) This section applies to an action of damages for personal injuries—
 - (a) in which the damages claimed consist of or include damages in respect of—

(i) asbestos-related pleural plaques; or

(ii) a condition to which section 2 applies; and

(b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.

(2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 Commencement and retrospective effect

(1) This Act (other than this subsection and section 5) comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

(2) Sections 1 and 2 are to be treated for all purposes as having always had effect.

(3) But those sections have no effect in relation to—

(a) a claim which is settled before the date on which subsection (2) comes into force (whether or not legal proceedings in relation to the claim have been commenced); or

(b) legal proceedings which are determined before that date.

5 Short title and Crown application

(1) This Act may be cited as the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

Annex E

Damages (Asbestos-Related Conditions) Bill

A

B I L L

T O

Provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Pleural plaques

(1) Asbestos-related pleural plaques are a personal injury which constitute actionable damage.

(2) A person who has pleural plaques may recover damages in respect of them from a person liable for causing them.

(3) Any rule of law the effect of which is that asbestos-related pleural plaques are not a personal injury or constitute actionable damage ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable for causing (or materially contributing to the development of) a personal injury.

2 Pleural thickening and asbestosis

(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition is a personal injury which constitutes actionable damage.

(2) The conditions referred to in subsection (1) are—

(a) asbestos-related pleural thickening; and

(b) asbestosis.

(3) It is not necessary for a person seeking damages in respect of asbestos-related pleural thickening or asbestosis to prove that it has caused, is causing or is likely to cause impairment of that person's physical condition.

(4) But where a person seeking damages claims, in relation to the amount of damages sought, that the thickening or asbestosis has caused, is causing or is likely to cause such impairment, it remains for that person to prove those matters.

3 Limitation of actions

(1) This section applies to an action of damages for personal injuries—

(a) in which the damages claimed consist of or include damages in respect of—

(i) asbestos-related pleural plaques; or

(ii) a condition mentioned in section 2(2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition; and

(b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.

(2) For the purposes of sections 11 and 12 of the Limitation Act 1980 (c. 58) (special time limit for actions in respect of personal injuries) and (special time limit for actions under Fatal Accidents legislation), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 Commencement and retrospective effect

(1) This Act (other than section 5) comes into force on such day as the Secretary of State shall by order appoint.

(2) Sections 1 and 2 are to be treated for all purposes as having always had effect.

(3) But those sections have no effect in relation to—

(a) a claim which is settled before the date on which section 1 comes into force (whether or not legal proceedings in relation to the claim have been commenced); or

(b) legal proceedings which are determined before that date.

5 Short title, Crown application and extent

(1) This Act may be cited as the Damages (Asbestos-Related Conditions) Act 2009.

(2) This Act binds the Crown.

(3) This Act extends to England and Wales and Northern Ireland only.

[1] Not all of the individual respondees are listed, as some of the signatures on the responses could not be made out

[2] The Committee was tasked with undertaking close scrutiny of the Scottish legislation, which is discussed further below.

[3] In that case, the House of Lords ruled that, where more than one employer had negligently exposed a claimant to asbestos and the claimant went on to develop mesothelioma, each employer should only be held liable to the extent that his breach of duty increased the risk of the claimant contracting the disease. Accordingly, the decision avoided the burden of full liability falling on a dwindling number of employers who happen to be traceable and solvent or insured, but potentially reduced the amount of compensation claimants could expect to recover in such cases. After the decision, there were calls for the ruling to be reversed and the Compensation Act 2006 was duly introduced. The Act reverses the effects of the Barker judgment to enable claimants, or their estate or dependants, to recover full compensation from any liable person. It is then open to the person who has paid the compensation to seek a contribution from other negligent persons.

[4] per Lady Hale in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 at 284

[5] per Lord Steyn in *Chester v Afshar* [2004] UKHL 41, at paragraph 25

[6] per Lord Hope in *Chester v Afshar*, at paragraph 87

[7] In January 2009 it was reported that a case relating to whether asymptomatic asbestosis should be compensated was to be heard in Newcastle.

[8] Although claims can be lodged, most cases are being sisted (adjourned) pending the outcome of the judicial review proceedings.

[9] *The Medical Aspects of Pleural Plaques: A Review for the Chief Medical Officer*, Sir Liam Donaldson

[10] The response from Thompsons emphasises that none of the cases were referred by claims farmers or scan vans.

Pleural Plaques Response



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Mr Shane McAteer

Clerk

Committee for Finance and Personnel

Room 419

Parliament Buildings

Stormont 26 October 2009

Dear Shane

Pleural Plaques

Thank you for your letter of 9 October, which recorded majority support within the Committee for legislative change and set out the request for further information on the option of a register of those with pleural plaques.

The main arguments for and against a register were rehearsed in the responses to the consultation exercise. Essentially, there were concerns about the costs which would attach to a register and the perceived limited benefits which would flow from it. There were also concerns about data protection and the possibility that those required to register would feel anxious or stigmatised.

Leaving aside the running costs of a register or the likely impact on those required to register, perhaps the biggest argument against a register is the argument about who would be responsible for maintaining it. Given the link to the medical diagnosis, it could be argued that it should come within the remit of the DHSSPS or the Chief Medical Officer. On the other hand, it could be argued that, because DSD already has a role in relation to some asbestos-related diseases, it should also take charge of the register.

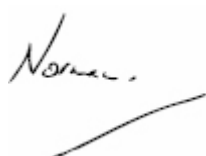
The Department considers that it is unlikely that either of those Departments would be willing to take responsibility for a register. This is largely because they would, understandably, fear that they would be sucked further into the claims system, either in terms of being responsible for raising the funds to meet Government-related claims or being expected to co-ordinate the settlement of claims.

The Department considers that, even with the best will in the world, it would not be appropriate or possible for DFP to take the lead on a register and, in the absence of a role for DFP, it is difficult to see who would be both willing and able to undertake the necessary work on the register, including the burden of arranging the initial set-up.

The Department has reflected on the suggestion in Committee that a register would provide a useful point of reference for determining who might be liable for the exposure to the asbestos. The Department believes, however, that that issue can be as easily addressed by referring to the record of the individual medical notes.

The Department has concluded that, for the reasons stated above, a register of those with pleural plaques would not be a viable option.

Yours sincerely,



Norman Irwin

Consultation on Draft Damages (Asbestos-Related Conditions) Bill (NI) 2010



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Mr Shane McAteer

Clerk

Committee for Finance and Personnel

Room 419

Parliament Buildings

Stormont 7 July 2010

Dear Shane

Consultation on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

Please find attached the consultation paper on The Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010 the closing date for which is 6 September.

A session has been provisionally scheduled with officials on the outcome of the consultation for 29 September.

Yours sincerely,



Norman Irwin

Consultation by the Department of Finance and Personnel on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

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Foreword

For many years people have been aware that exposure to asbestos can cause life-threatening diseases and other conditions. One such condition is pleural plaques. These are small areas of scarring which appear on the membrane surrounding the lungs post-exposure.

Up to October 2007, a claim for compensation could be made by people who had been negligently exposed to asbestos and who had developed pleural plaques. However, at that point the House of Lords ruled that, in law, pleural plaques do not constitute damage and no further claims have been made.

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.

My Department consulted on the issues relating to the judgment and, following the consultation, recommended that the right to claim compensation should be re-instated. The Northern Ireland Executive Committee has carefully considered and endorsed that recommendation.

A draft Bill has been prepared to ensure that the House of Lords' decision does not have effect in Northern Ireland. The purpose of this consultation is to seek views on the terms of the Bill, with a view to ensuring that it meets its agreed policy objective.

The Northern Ireland Executive Committee would wish to encourage as many people as possible to comment on the Bill and we look forward to hearing each person's views.

Sammy Wilson MP MLA

Minister for Finance and Personnel

Responding to this Consultation

This is a consultation on the draft Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010. This paper explains the background to the draft Bill, which is designed to ensure that certain asbestos-related conditions remain actionable in Northern Ireland.

We would welcome comments on the provisions of the draft Bill and on the specific points which are highlighted in the Consultation Issues section. If you would like to submit comments we

would be grateful if you would do so as soon as possible. The closing date for comments is 6 September 2010.

Please send all responses to:

Mrs Laura McPolin
Civil Law Reform Division
Departmental Solicitor's Office
Department of Finance and Personnel
Victoria Hall, 12 May Street,
Belfast BT1 4NL

E-mail: Laura.McPolin@dfpni.gov.uk

This document is also available for download from the Department's website at www.dfpni.gov.uk/latest-news.htm. It can also be made available in an alternative format. If you want to discuss an alternative format or how you can be helped to get your views known please telephone 028 902512 77.

Consultation Responses: Confidentiality and Freedom of Information

The Department of Finance and Personnel will publish a summary of responses following the completion of the consultation process. Responses to this consultation may be placed on our website: this means your response may be disclosed. Any automatic confidentiality disclaimer generated by your IT system will be taken to apply only to information for which confidentiality has been specifically requested by you. The Department may only refuse to disclose information in exceptional circumstances. Before you submit your response, please read the paragraphs below on the confidentiality of consultations. They will give you guidance on the legal position about any information given by you in response to this consultation.

Freedom of Information Act 2000

The Freedom of Information Act 2000 gives the public the right of access to information held by a public authority – in this case, the Department. This right of access to information includes information provided in response to a consultation. The Department cannot automatically consider as confidential information supplied to it by you in response to a consultation. However, it does have the responsibility to decide whether any information provided by you in response to this consultation, including information about your identity, should be made public or treated as confidential. If you do not wish information about your identity to be made public please provide an explanation in your response.

This means that information provided by you in response to the consultation is unlikely to be treated as confidential, except in very particular circumstances.

The Code of Practice on the Freedom of Information provides that:

- Departments should only accept information from third parties in confidence if it is necessary to obtain information in connection with the exercise of any of the Department's functions and it would not otherwise be provided.
- Departments should not agree to hold information received from third parties "in confidence" which is not confidential in nature.

- Acceptance by Departments of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.

For further information about confidentiality of responses please contact the Information Commissioner's Office (or see website at www.informationcommissioner.gov.uk)

Consultation Criteria

This consultation is being conducted in line with the following consultation principles, which have been adopted across Government:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked, and the time scale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your Department's effectiveness at consultation, including through use of a designated consultation co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment.

If you have queries about the manner in which this consultation has been carried out you should contact the Department of Finance and Personnel at the same address given for commenting on the draft Bill.

The Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010.

Background

Asbestos

1. Asbestos is a naturally occurring mineral, which, in the past, was extensively used in the UK, largely because of its heat resistant and insulating qualities. Asbestos is traditionally associated with heavy industries, such as shipbuilding. However, it has had an extensive reach and has been used in building products, such as cement and insulating boards, and household products, such as ironing boards and oven gloves.

2. It would appear that people may be exposed to low amounts of asbestos in the atmosphere with no ill effects. However, it is well established that asbestos fibres and dust can cause serious diseases, or lesser conditions, if they are inhaled in high concentrations over a period of time. The symptoms of the diseases/conditions may not appear until 20 or 30 years after the exposure occurred. However, by then the damage is already done. There are five asbestos-related diseases/ conditions, namely mesothelioma, lung cancer, asbestosis, diffuse pleural thickening and pleural plaques.

Pleural Plaques

3. Pleural plaques are small areas of scarring on the pleura (the membrane surrounding the lungs). They are generally regarded as an indicator of exposure to asbestos in someone with an appropriate occupational history, but do not usually cause symptoms or disability. They do not cause, or develop into, an asbestos-related disease, such as asbestosis or mesothelioma, although they may signify an increased lifetime risk for developing such a disease.

4. Pleural plaques can only be detected on x-ray or CT scan and are usually diagnosed coincidentally, during the course of medical investigations. There is no requirement to record a diagnosis of pleural plaques and there is, therefore, no accurate record of how many cases are diagnosed each year within the UK. Indeed, mesothelioma is the only asbestos-related disease for which projections of the future burden are available.

5. In the 1980s the actionability of pleural plaques was considered in three court cases and the court ruled in the claimants' favour. However, the reasoning of the court was not entirely consistent. In one case, it was accepted that a plaque constituted damage and was caused as a result of a breach of duty. In another case, it was stated that a "symptom-free physiological change", such as a plaque, could not be an actionable injury. However, the plaques, together with the risk of future disease and anxiety, could add up to a cause of action. The latter reasoning became known as the "theory of aggregation", but, regardless of the theory or the underlying rationale for the judgments, it is clear that, from the 1980s to the early 2000s, compensation, on foot of claims in negligence, was awarded or agreed for pleural plaques.

Johnston V NEI International Combustion Ltd and Conjoined Cases

6. In 2004, the insurance industry decided to challenge the position and ten test cases were brought before the High Court in England and Wales. In February 2005, Holland J. gave judgment in favour of the claimants. However, in seven of the cases, the insurers appealed to the Court of Appeal, which, in 2006, reversed the decision of the High Court. Four of the claimants appealed to the House of Lords and, on 17 October 2007, the House of Lords ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of negligence.

7. The essence of the judgment in the Johnston case is that, in order to establish a cause of action in tort for the recovery of damages for negligence, a claimant must have suffered non-negligible damage. Essentially, the House of Lords decided that none of the following, either on their own or together, is sufficient to constitute actionable damage –

- the development of asymptomatic pleural plaques;
- anxiety produced by some negligent act or omission, but falling short of a clinically recognisable psychiatric illness; or
- a risk, produced by a negligent act or omission, of an adverse condition arising at some time in the future.

Scotland

8. The Johnston case reversed over 20 years of precedent and practice and, as soon as the judgment issued, there were calls for it to be overturned. Their Lordships did leave open the possibility of a claim in contract for asymptomatic pleural plaques. However, although there was talk of testing the law in this regard, it would appear that no case has proceeded on that basis.

9. On 29 November 2007 the Scottish Government announced that it would introduce a Bill which would ensure that the Johnston case did not have effect in Scotland. The provisions of the Bill would apply from the date of the House of Lords' judgment.

10. On 23 June 2008 the Damages (Asbestos-related Conditions) (Scotland) Bill was duly introduced into the Scottish Parliament. The Bill provided for asbestos-related pleural plaques to be a non-negligible personal injury for which damages could be recovered. As it was possible that the courts might look to the Johnston case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Bill also provided that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, should continue to give rise to a claim for damages. The Bill did not, however, raise the issue of quantum (the amount that is paid in damages), which remains subject to the customary rules.

11. The Bill completed its final stage in the Scottish Parliament on 11 March 2009, received Royal Assent on 17 April 2009 and came into force on 17 June 2009. Accordingly, people in Scotland who have been negligently exposed to asbestos and have then been diagnosed with certain asymptomatic asbestos-related conditions are still able to claim, in negligence, for compensation, despite the judgment in the Johnston case.

12. The provisions of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") take effect from the date of the House of Lords' judgment (17 October 2007). The 2009 Act also ensures that, for the purposes of the limitation of actions, the period between the judgment and the commencement of the Act will not be taken into account. This means the Act will cover people who had raised a claim prior to the Johnston case, but whose cases had not been settled or determined by a court before the House of Lords gave judgment.

13. On 27 April 2009 five insurance companies (Axa General Insurance Limited, Axa Insurance UK plc, Norwich Union Insurance Limited, Royal and Sun Alliance Insurance and Zurich Insurance plc) launched a judicial review of the 2009 Act. The companies sought a declaration that the 2009 Act is incompatible with their rights under Article 6 of, and/or Article 1 of the First Protocol to, the ECHR. They also sought a declaration that the 2009 Act was the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament.

14. The insurance companies tried to prevent the 2009 Act from coming into force by arguing that it should be held in abeyance until the judicial review proceedings were over. However, the Court rejected the application and, as stated earlier, the Act came into force on 17 June 2009.

15. The first hearing in the petition for judicial review concluded on 22 October 2009 and, on 8 January 2010, Lord Elmslies' written decision, which dismissed the companies' petition, was published. The companies have lodged an appeal against the decision, which has been set down for July 2010.

England and Wales

16. On 9 July 2008 the UK Government issued a consultation paper on pleural plaques. The consultation period concluded on 1 October 2008. However, the summary of responses did not immediately issue and, on 26 January 2009, Andrew Dismore MP introduced a Private Members' Bill, the Damages (Asbestos-Related Conditions) Bill, to the UK Parliament. The Bill largely followed the 2009 Act.

17. Mr Dismore's Bill fell in November 2009. On 19 November 2009 Baroness Quin introduced a Damages (Asbestos-Related Conditions) Bill, which again followed the 2009 Act, into the House

of Lords. On 6 January 2010 Mr Dismore re-introduced his Bill into the House of Commons under the title "Damages (Asbestos-Related Conditions) (No.2) Bill". However, both Bills fell when the 2009-2010 Parliament was prorogued in anticipation of the General Election.

18. On 25 February 2010, Jack Straw announced that, following on from the earlier consultation exercise, the law in England and Wales would not be amended. He went on to say that the UK Government had decided to introduce an extra-statutory scheme, which would make payments of £5000. However, the payments would only be available to individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the Law Lords' ruling in October 2007.

19. On 23 March 2010 the Ministry of Justice published the analysis of the responses to its consultation exercise on pleural plaques. The analysis shows that there were 224 responses to the consultation and that those responses revealed a division of opinion about a no-fault payment scheme and majority support for a change to the law.

Northern Ireland

20. On 13 October 2008 the Department of Finance and Personnel issued a consultation paper which considered the impact of the House of Lords' decision in Johnston and raised the following options –

- increased support, help and information for people with pleural plaques;
- the introduction of a register of those with pleural plaques;
- the introduction of a no fault payment scheme for pleural plaques; and
- the introduction of amending legislation to "restore" civil claims in negligence for asymptomatic pleural plaques. The legislation would also cover asymptomatic pleural thickening and asbestosis.

Preferred Option

21. The consultation period concluded on 12 January 2008 and 94 responses were received. Having considered those responses, the Department decided to recommend that legislation be introduced to ensure that, under the law of negligence, civil claims for asymptomatic pleural plaques, pleural thickening and asbestosis can continue to be brought in Northern Ireland.

22. On 25 March 2010 the Executive accepted the Department's recommendation and endorsed the introduction of legislation to ensure the decision in the Johnston case does not have effect in Northern Ireland.

Section 1

Consultation Issues

23. The draft Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010 is set out in Section 2 of this document and Annex A contains the explanatory notes on the Bill.

24. As stated above, the aim of the Bill is to ensure that claims for asymptomatic pleural plaques, pleural thickening and asbestosis can continue to be brought in Northern Ireland.

do you think the Bill will achieve that objective? if you do not think the Bill will achieve that objective please give reasons.

25. In addition to securing future claims in respect of the above-named asymptomatic conditions, the Bill also seeks to ensure that claims which could not be brought or progressed because of the Johnston case and which might be time-barred can still be brought.

Do you think the Bill will achieve that objective? If you do not think the Bill will achieve that objective please give reasons.

26. A provision will be outside the legislative competence of the Northern Ireland Assembly if it is incompatible with certain rights provided for in the European Convention on Human Rights. The Department has considered the rights, which are set out in section 1 of the Human Rights Act 1998^[1], and has concluded that the provisions in the Bill are not incompatible with them.

Do you think the provisions in the Bill are human rights compliant? if you do not, please give reasons.

27. In accordance with its obligations under Section 75 of the Northern Ireland Act 1998 and its approved Equality Scheme, the Department of Finance and Personnel has considered the equality impacts of the draft Bill. Annex B contains the Department's equality impact screening form, which sets out the Department's thinking with regard to section 75. Following the screening exercise the Department has concluded that the draft Bill does not need to be subject to an equality impact assessment ("EIA").

Do you agree with the department's conclusion that the provisions in the Bill are section 75 compliant and that an eia is not required? if you do not, please give reasons.

28. As stated earlier, asbestos has been used for a wide variety of purposes. Exposure to asbestos may, therefore occur in a broad range of settings. Against that background, the Department recognises that the provisions in the draft Bill have the potential to impact on other Government departments, district councils, schools, hospitals, businesses, charities and the voluntary sector.

29. Given the paucity of available information, there is no way of determining precisely what that impact will be. The Department has, however, endeavoured to assess the likely impact by reference to the estimated figures which were produced by the Scottish Government in relation to the 2009 Act. The regulatory impacts are set out at Annex C and comments are invited.

Do you agree with the department's conclusions about the likely impacts of the bill? if you do not, please give reasons.

Summary of Consultation Issues

Do you think the bill achieves the objective of ensuring that the decision in the Johnston case does not have effect in Northern Ireland? If you do not think the bill will achieve that objective please give reasons.

Do you think the bill will prevent claims from being time-barred? If you do not think the bill will achieve that objective please give reasons.

Do you think the provisions in the bill are human rights compliant? If you do not, please give reasons.

Do you agree with the department's conclusion that the provisions in the bill are section 75 compliant and that an eia is not required? If you do not, please give reasons.

Do you agree with the department's conclusions about the likely impacts of the bill? If you do not, please give reasons.

Section 2

Annex A

Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010 Draft Explanatory Notes

Introduction

1. These Explanatory Notes have been prepared by the Department of Finance and Personnel in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a provision of the Act does not seem to require any explanation or comment, none is given.

The Act

3. In *Johnston v NEI International Combustion Ltd*, published on 17 October 2007^[2], the House of Lords ("HoL") ruled that asymptomatic pleural plaques (an asbestos-related condition) do not give rise to a cause of action because they do not signify damage or injury that is sufficiently material to found a claim for damages in tort. The judgment is binding in Northern Ireland.
4. The purpose of the Act is to ensure that the HoL's judgment in the Johnston case does not have effect in Northern Ireland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. As it is possible that the courts might look to the Johnston case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Act also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Northern Ireland. The Act does not affect the law on quantum (the amount that is paid in damages). Where a person sustains a physical injury which is compensatable the compensation they receive can include sums for e.g. anxiety and risk of the person's condition deteriorating in the future.

Section 1 – Pleural plaques

5. This section addresses the central reasoning of the judgment in Johnston by providing that asbestos-related pleural plaques are actionable damage. Subsections (1) and (2) provide that pleural plaques can be the subject of a claim for damages. In other words, pleural plaques are material damage that is not de minimis for the purposes of a claim in negligence. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston case, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining liability.

Section 2 – Pleural thickening and asbestosis

6. This section prevents the ruling in the Johnston case from being applied in relation to asymptomatic pleural thickening or asbestosis (because the courts may consider that the ratio (principles of law underlying and justifying the decision) in Johnston provides authority in these cases). Subsections (1) and (2) provide that asbestos-related pleural thickening and asbestosis, which have not and are not causing physical impairment, constitute actionable damage. In subsection (1) the phrase "for the avoidance of doubt" is used because there is, in fact, no authoritative decision to the effect that asymptomatic pleural thickening and asbestosis are not actionable. Subsections (3) and (4) are consistent with subsections (2) and (3) of section 1. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston judgment, to the extent that their application would result in asymptomatic pleural thickening or asbestosis being considered non-actionable. Subsection (4) ensures that section 2 does not otherwise affect the operation of statutory or common law rules for determining liability.

Section 3 – Limitation of actions

7. To ensure that claims do not become time-barred during the period between the date of the judgment (17 October 2007) and the date the Act comes into force, this section provides that this period does not count towards the three-year limitation period for raising an action for damages in respect of the three conditions covered in the Act. Subsection (1)(a) addresses the kinds of claims to which this section applies, that is, claims involving the asbestos-related conditions covered by sections 1 and 2. This includes claims that have been raised in the courts before the Act comes into force, as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date the Act comes into force, this section will apply only if they are ongoing at that date. The effect of this section is to address cases that may be at risk of being dismissed by the courts on time-bar grounds, e.g. a person who developed pleural plaques in December 2004 and whose case could be considered time-barred by December 2007 might have delayed raising their case thinking they had no right of action under the Johnston judgment. The person may then have lodged a claim because of the Department of Finance and Personnel's announcement that it was recommending a change to the law. Without this provision, which will stop the time-bar clock running from October 2007 until the date the Act comes into force, that person's claim could be dismissed as having been raised beyond the three-year limitation period.

Section 4 – Commencement and retrospective effect

8. This section sets out the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Act will come into force on a date appointed by the Department of Finance and Personnel by Commencement Order. The remaining subsections explain the retrospective effect of the provisions of the Act. Subsection (2) provides that sections 1 and 2 of the Act are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the judgment in Johnston, because an

authoritative statement of the law by the HoL is considered to state the law as it has always been. Subsection (3) qualifies the effect of subsection (2) by providing that sections 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Act comes into force. The effect of subsections (2) and (3) is that claimants in cases which have not been settled, or determined by a court, before the Act comes into force will be able to raise, or continue, an action for damages.

Section 5 – Short title and Crown application

9. This section gives the short title of the Act and provides that the Act binds the Crown.

Annex B

Equality Impact Screening

The Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

Section 75 of the Northern Ireland Act 1998 requires the Department of Finance and Personnel ("the Department") to ensure that it carries out its functions having due regard to the need to promote equality of opportunity between:

- Persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- Men and women generally;
- Persons with a disability and persons without;
- And persons with dependants and persons without.

Without prejudice to the obligations set out above, the Department is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

1.1 Title of policy to be screened

The draft Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010.

1.2 Description of policy to be screened

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

1.3 Aims of the policy to be screened

The aim of the policy is to ensure that the judgment in the case of Johnston v NEI International Combustion Ltd and conjoined cases does not have effect in Northern Ireland. This means that claims in negligence in respect of symptomless pleural plaques, pleural thickening and asbestosis can be brought in Northern Ireland.

1.4 Responsible Directorate

Responsibility for legislation relating to the law of tort lies with the Department of Finance and Personnel.

1.5 Responsible Officer

Mrs Laura McPolin is responsible for this screening exercise. She can be reached at Civil Law Reform Division, Departmental Solicitor's Office, Department of Finance and Personnel, Victoria Hall, 12 May Street, Belfast BT1 4NL: Tel: 028 90251277 or E-mail: Laura.McPolin@dfpni.gov.uk

2. Evidence of higher or lower participation or uptake by different groups or evidence of differential needs between groups.

The draft Bill will apply across the board and claimants will, therefore, come from all walks of life, with a variety of family and personal circumstances.

2.1 Who can use the legislation?

Anyone who has been negligently exposed to asbestos and who wishes to submit a civil claim for compensation.

2.2 Consultations

The Department intends to consult on the draft Bill. This screening exercise will itself form part of the consultation process and views will be sought about the likely impact of the proposals on the section 75 categories. A wide range of bodies will be consulted in accordance with the Department's Equality Scheme.

3.1 Equality Impact Assessment recommendation

Exposure to asbestos is most often associated with heavy industries, where, traditionally, men are more likely to have been employed. However, the ability to make a claim will apply across the equality groupings and the proposed legislation is, therefore, considered to be section 75 compliant. There is no evidence that belonging to a particular faith, or holding a particular political opinion or being a member of a particular ethnic or racial group is a relevant factor in the claims process. Likewise, there is nothing to suggest that the Bill will impact in a differential way on those who have a disability or those who do not have a disability or those with dependants or those without dependants.

3.2 Is an Equality Impact Assessment required?

Based on the available information, the Department has concluded that an Equality Impact Assessment is not required.

Annex C

Regulatory Impact Assessment

1. Title of Proposal

Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010.

2. Purpose of Regulatory Impact Assessment (RIA) ,

(i) Objective

This Assessment relates to the draft Damages (Asbestos-related Conditions) Bill (Northern Ireland). The purpose of the Bill is to ensure that judgment of the House of Lords ("HoL") in *Johnston v NEI International Combustion Ltd* (published on 17 October 2007) does not have effect in Northern Ireland. The judgment ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of negligence. The purpose of this assessment is to try and identify the impact which the Bill will have on central and local government, the business community, the community/voluntary sector and other bodies.

(ii) Background

Pleural plaques are small areas of scarring on the pleura (the membrane surrounding the lungs). They do not generally cause symptoms or disability, nor do they cause or develop into an asbestos-related disease, such as asbestosis or mesothelioma. They are, however, a marker of exposure to asbestos and they may signify an increased lifetime risk of developing such a disease.

Johnston v NEI International Combustion Ltd

From the early 1980s to the early 2000s, compensation for pleural plaques, on foot of a claim in negligence, was regularly awarded or agreed. However, in 2004, insurers challenged the position by bringing ten test cases to the High Court in England and Wales. Mr Justice Holland gave judgment in February 2005 in favour of the claimants, but reduced the amount they were able to claim. In seven of the cases the insurers appealed to the Court of Appeal in England and Wales. In 2006 the Court of Appeal reversed the decision of the High Court. The Court of Appeal's decision in relation to four of the cases was then challenged in the HoL and the HoL unanimously ruled that the presence of pleural plaques, whether or not combined with a risk of developing an asbestos-related disease and anxiety about that risk, could not form the basis of a claim in negligence.

The HoL's judgment in *Johnston* reversed over twenty years of precedent and there were immediate calls for the judgment to be overturned.

Scotland

On 29 November 2007 the Scottish Government announced that it intended to introduce a Bill to ensure that the HoL's judgment did not take effect in Scotland.

On 23 June 2008 the Damages (Asbestos-related Conditions) (Scotland) Bill was duly introduced into the Scottish Parliament. The Bill provided for asbestos-related pleural plaques to be a non-negligible personal injury for which damages could be recovered. As it was possible that the courts might look to the *Johnston* case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Bill also provided that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, should continue to give rise to a claim for damages.

The Bill completed its final stage in the Scottish Parliament on 11 March 2009, received Royal Assent on 17 April 2009 and came into force on 17 June 2009. The Act is presently the subject of a legal challenge from the insurance industry.

England and Wales

On 9 July 2008 the UK Government issued a consultation paper on pleural plaques. The consultation period concluded on 1 October 2008. On 25 February 2010, Jack Straw, the then Lord Chancellor and Secretary of State for Justice, announced that, following on from the consultation exercise, the law in England and Wales would not be amended. There would, however, be an extra-statutory scheme, which would make payments of £5000 to individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the Law Lords' ruling (i.e. 17 October 2007).

In the period between the conclusion of the consultation exercise in England and Wales and the prorogation of the 2009-2010 Parliament there were several attempts to introduce legislation similar to that which had been introduced in Scotland. However, none of those attempts succeeded.

Northern Ireland

On 13 October 2008 the Department of Finance and Personnel ("the Department") issued a consultation paper which considered the impact of the House of Lords' decision in Johnston and raised the following options –

- increased support, help and information for people with pleural plaques;
- the introduction of a register of those with pleural plaques;
- the introduction of a no fault payment scheme for pleural plaques; and
- the introduction of amending legislation to "restore" civil claims in negligence for asymptomatic pleural plaques. The legislation would also cover asymptomatic pleural thickening and asbestosis.

The consultation period concluded on 12 January 2008 and 94 responses were received. Most of the responses focused on the availability of compensation for pleural plaques and, as was perhaps to be expected, there was a clear split of opinion between the business/insurance sector and individuals and their representatives. The option of legislative change commanded the most support. However, there was also general support for awareness raising and information gathering/sharing, provided such activities are undertaken in a careful and sensitive way.

The option of a register did not find favour, largely because of concerns about the cost of creating and maintaining the register, but also because of concerns about its intrinsic value and the danger of stigmatisation.

The creation of a no-fault payment scheme was also generally opposed, although some respondents were willing to countenance such a scheme if legislative change is not forthcoming.

Options

Given the concerns expressed about a register, the Department determined not to pursue that option. However, it has determined to explore the possibility of providing additional information

and assistance. Post-consultation, the main substantive options were to do nothing, to legislate to overturn the judgment in the Johnston case or to introduce a no-fault payment scheme.

Option 1: Do nothing

This would mean that the HoL's judgment in Johnston would stand and claims in negligence in respect of asymptomatic pleural plaques (and possibly asymptomatic pleural thickening and asymptomatic asbestosis) would be dismissed by the courts.

Advantages of option 1

This option would not benefit people with pleural plaques. Current employers, former employers and insurers would benefit from this option, as they would no longer have to meet pleural plaques claims in Northern Ireland, and might not have to meet claims for other asymptomatic asbestos-related conditions.

Disadvantages of option 1

People in Northern Ireland who have developed pleural plaques would not be compensated and their position would compare unfavourably with their counterparts in Scotland. If those people went on to develop a more serious asbestos-related condition, such as mesothelioma, any compensation paid in respect of that condition would not cover the anxiety suffered by the person from the time of the diagnosis of pleural plaques.

Also, accountability is an important driver in securing compliance with health and safety requirements and there is a danger that, if the Johnston case stands, employers will think they can act with impunity.

This options fails to take account of the financial windfall for insurance companies.

It is unfair for some people to be compensated for having developed pleural plaques through negligent exposure to asbestos, whilst others are precluded from doing so.

Option 2: Introduce a no-fault payment scheme

There are various ways in which a payment scheme could be set up. However, on a practical level, a scheme would essentially "side-step" the judgment in the Johnston case, by providing for some measure of compensation at an administrative level, albeit that the level of compensation does not match that previously awarded or agreed on foot of a legal claim.

Advantages of option 2

Those who had an expectation of receiving compensation would have that expectation realised and would have certainty in terms of a fixed payment.

As payments would be made on a no fault basis, there would be no need to prove liability and the compensation process would, therefore, be speedier and more straightforward.

The simpler evidential requirements of the scheme would reduce the associated legal costs.

Disadvantages of option 2

In the absence of firm figures about the likely number of claims it is difficult to predict the likely drains on the scheme. Experience in other spheres, such as the coalmining industry, has highlighted the dangers of under-estimating the likely number of claimants.

There is the risk that the introduction of a no fault scheme in this area could create a precedent and lead to calls for the introduction of no fault schemes in a range of other areas.

It had been envisaged that any scheme would be funded by insurers and Government on a pro-rata basis. However, insurers have said they would not contribute to the funding of any scheme on a voluntary basis. A requirement to pay would require primary legislation. Otherwise the burden of funding would fall solely on the Executive and that would be unfair, given that the insurance industries may have levied insurance premiums.

The imposition of a requirement to fund could result in higher insurance premiums.

Option 3: Legislate to ensure that the decision in the Johnston case does not have effect in Northern Ireland

Under this option, those diagnosed with pleural plaques as a result of negligent exposure to asbestos would again be able to claim compensation through the civil courts in Northern Ireland. To ensure that all those affected by the Johnston case could receive compensation, the legislation would need to be retrospective and apply to all cases where there had been no judgment or settlement prior to the HoLs' judgment.

Advantages of option 3

The restoration of the pre-Johnston position would ensure that all those who have developed pleural plaques are treated equally.

Holding employers to account would be in keeping with most people's sense of justice and fairness and encourage compliance with health and safety requirements.

The introduction of legislation would ensure that people in Northern Ireland have the same rights as people in Scotland.

Any legislation would not be retrospective in the true sense, in that it is not imposing a completely new burden of liability.

There have been previous instances of retrospective legislation, such as the Compensation Act 2006.

Disadvantages of option 3

Although there have been examples of retrospective legislation, they are generally seen as exceptional measures.

There is considerable uncertainty over the potential number of claims and the cost of claims. It is, therefore, impossible to predict the financial consequences of a change to the law. Figures relating to the previous number of claims are of no help, either because they relate to individual industries (e.g. shipbuilding) and do not, therefore, provide a full picture, or because the publicity surrounding the Johnston case is likely to have raised awareness about pleural plaques and could therefore, result in an increased number of claimants.

The reinstatement of the right to claim could result in higher insurance premiums.

Legislative change could encourage activity amongst claims management companies and the increased use of scanning facilities.

Legislative change could undermine business confidence.

Sectors & Groups affected

Traditionally, pleural plaques are associated with exposure to asbestos within the construction, steel and shipbuilding industries, including the former nationalised industries. However, as asbestos has been widely used, there is potential for exposure to have occurred outwith those industries and end users of asbestos products, as well as those who manufactured the products, may be at risk.

3. Costs

Option 1 would not attract any costs. Employers, insurers and other bodies would realise savings as a result of not having to meet pleural plaques claims in Northern Ireland.

Options 2 and 3 would result in costs. However, as there is no accurate record of how many cases of pleural plaques are diagnosed each year in Northern Ireland, there is no way of definitively stating what those costs would be.

Under option 2 the costs would fall on the Northern Ireland Executive because, as stated above, the insurance industry is unwilling to contribute to a no-fault payment scheme.

Under option 3 the costs would fall on defendants in pleural plaques cases (e.g. employers and former employers, including small businesses, their insurers, the Northern Ireland Executive, district councils). A change to the law could also impact on legal aid.

The Scottish Government was able to determine how many cases had "backed up" in the run-up to the judgment in the Johnston case. It was also able to estimate the future number of cases by reference to figures supplied by solicitors. On the basis of total costs and compensation of £25,000 per case, it estimated that the cost to business of dealing with outstanding cases would be £17,125,000. The annual cost would be around £5,450,000, likely to rise to £6,540,000 when cases are expected to peak.

The Scottish Government also identified –

- 3 ongoing cases against the Scottish Government, which were likely to cost £75,000. Looking ahead, it was estimated that there would be one such case per year;
- 37 backed up Scottish cases raised against the Ministry of Defence (MoD). The average reserve placed on each claim by MoD is £14,000 (including legal costs). Therefore settlement of these Scottish cases is likely to cost around £518,000. On the basis of the 37 cases being backed up over 3 years, the Scottish Government assumed, with caution, that there would be 12 pleural plaques cases raised against MoD each year with an annual cost of £168,000;
- 136 cases backed up with the then Department for Business, Enterprise & Regulatory Reform (BERR). The cost of settling these cases, including legal costs, was estimated to be in the region of £1,200,000. BERR's overall liability in Scotland, going forward to a peak in 6 to 8 years time, was likely to be in the region of £5,300,000;

- an annual figure of 20 claims, and a backlog of 40 claims (including cases involving asymptomatic pleural thickening and asymptomatic asbestosis), against local authorities. The cost of settling the annual claims was estimated to be £500,000 per annum, peaking to around £600,000, and the cost of settling the backlog of claims was estimated to be £1,000,000.;
- no significant costs to individuals; and
- the estimated administrative cost to the court of settling the backlog of cases as being in the region of £261,000.

During the consultation exercise in Northern Ireland the Department asked for information on the number of cases "backed up" and the costs associated with those cases. Very little information was forthcoming, making it difficult to predict the likely impact of a change to the law. It might, however, be possible to estimate the likely financial burden in Northern Ireland of legislative change by reference to population. In 2008, the population of Northern Ireland was stated to be 1.775 million. The population in Scotland is around 5.2 million. This means the population in Northern Ireland is about 1/3 of that in Scotland. On that basis, the annual cost to business for pleural plaques cases in Northern Ireland could be estimated to be £1,816,666. However, it has to be borne in mind that the level of payments of compensation in Northern Ireland are higher than in Scotland. An annual estimate of £2,500,000 might, therefore be more realistic.

However, when considering the likely costs, it is worth bearing in mind, that a change to the law would bring about a reinstatement of a liability, rather than the creation of a wholly new liability. It could, therefore, be argued that the costs to business are costs which would, but for Johnston, have already arisen.

4. Preferred option

During the consultation exercise the Department received submissions about the detrimental impact arising from a diagnosis of pleural plaques. In light of those submissions, the Department has decided to reject the "do nothing" option.

Turning to the option of a no-fault payment scheme, the Department has noted the opposition to the scheme and, in particular, the suggestion that insurance companies would be unwilling to participate in any such scheme. The Department considers that the active involvement of the insurance industry

would be critical to the success of any payment scheme and that it would be unfair to expect the costs of any such scheme to be met purely from Government resources. The Department has, therefore, concluded that the option of a no-fault payment scheme is not viable.

This brings us to the final and, for many, the most critical option, namely the option of legislative change. The Department has carefully considered the principal arguments which have been made for and against legislative change and the weight which should be attached to the arguments on either side of the debate.

Having weighed up all the arguments for and against legislative change, the Department has, on balance, decided to go with option 3, which will restore symptomless pleural plaques as an actionable condition. The Department believes a change in the law will hold employers to account and this is in keeping with most people's sense of justice and fairness and should encourage compliance with health and safety requirements. In addition it will provide people in Northern Ireland with the same rights as people in Scotland.

On 25 March 2010 the Executive accepted the Department's recommendation and endorsed the introduction of legislation to overturn the decision in the Johnston case.

5. Other Impact Assessments

An Equality Impact Screening Exercise has been conducted (see Annex B)

6. Monitoring and Review

In accordance with good practice, the Department of Finance and Personnel will keep the operation of the proposed legislation under review.

7. Consultation

(i) Within Government

As stated above, the proposed policy has been discussed and agreed by the Northern Ireland Executive.

(ii) Public Consultation

The policy underpinning the draft Bill has already been consulted upon at a general level by the Department. In addition, the draft Bill and this consideration of possible regulatory impacts is being circulated to a wide range of organisations and individuals representing the professions, business and consumer interests in Northern Ireland.

8. Summary and Recommendation

The Department has concluded that options 1 and 2 should not be pursued. Ultimately the option of legislative change (option 3) was considered as the most appropriate, fair and just way of dealing with the issue of exposure to asbestos and a diagnosis of pleural plaques.

9. Declaration

The Department will amend this assessment to take account of any comments made during the consultation on the draft Bill.

For further information on the draft Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010 contact Mrs Laura McPolin, Civil Law Reform Division, Departmental Solicitor's Office, Department of Finance and Personnel, Victoria Hall, 12 May Street, Belfast BT1 4NL; Tel 02890 90251277 or e-mail: Laura.McPolin@dfpni.gov.uk

[1] The rights are those set out in -

- (a) Articles 2 to 12 and 14 of the European Convention on Human Rights, ,
- (b) Articles 1 to 3 of the First Protocol, and
- (c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.

[2] <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

Damages (Asbestos-Related Conditions) Bill

CONTENTS

1. Pleural plaques [j6]
2. Pleural thickening and asbestosis [j7]
3. Limitation of actions [j8]
4. Commencement and retrospective effect [j9]
5. Short title and Crown application [j10]

A

B I L L

TO

Provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Pleural plaques [j6]

1.—(1) Asbestos-related pleural plaques are a personal injury which constitutes actionable damage for the purposes of an action for damages for personal injuries.

(2) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable damage ceases to apply to the extent it has that effect.

(3) But nothing in this section otherwise affects any statutory provision or rule of law which determines whether and in what circumstances a person may be liable for damages in respect of personal injuries.

(4) In this section and in section 2 “statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33).

Pleural thickening and asbestosis [j7]

2.—(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused and is not causing impairment of a person’s physical condition is a personal injury which constitutes actionable damage for the purposes of an action for damages for personal injuries.

(2) Those conditions are—

- (a) asbestos-related pleural thickening; and
- (b) asbestosis.

(3) Any rule of law the effect of which is that such a condition does not constitute actionable damage ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any statutory provision or rule of law which determines whether and in what circumstances a person may be liable for damages in respect of personal injuries.

Limitation of actions [j8]

- 3.—(1) This section applies to an action for damages for personal injuries—
- (a) in which the damages claimed consist of or include damages in respect of—
 - (i) asbestos-related pleural plaques; or
 - (ii) a condition to which section 2 applies; and
 - (b) which, in the case of an action commenced before the date this section comes into operation, has not been determined by that date.
- (2) For the purposes of Articles 7 and 9 of the Limitation (Northern Ireland) Order 1989 (NI 11) (special time limits for actions in respect of personal injuries and actions under the Fatal Accidents (Northern Ireland) Order 1977), the period beginning with 17 October 2007 and ending with the day on which this section comes into operation is to be left out of account.

Commencement and retrospective effect [j9]

- 4.—(1) This Act (other than this subsection and section 5) comes into operation on such day as the Department of Finance and Personnel may by order appoint.
- (2) Sections 1 and 2 are to be treated for all purposes as having always had effect.
- (3) But those sections have no effect in relation to—
- (a) a claim which is settled before the date on which subsection (2) comes into operation (whether or not legal proceedings in relation to the claim have been commenced); or
 - (b) legal proceedings which are determined before that date.

Short title and Crown application [j10]

- 5.—(1) This Act may be cited as the Damages (Asbestos-related Conditions) Act (Northern Ireland) 2010.
- (2) This Act binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.

Summary of responses to the consultation on the draft Damages (Asbestos-Related Conditions) Bill 2010

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Background

On 13 October 2008 the Department of Finance and Personnel ("the Department") issued a consultation paper which considered the House of Lords' decision in *Johnston v NEI International Combustion Ltd* and conjoined cases [2007] (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd* (and conjoined cases)).

In the *Johnston* case, the Law Lords upheld a decision of the Court of Appeal in England and Wales that symptomless pleural plaques do not constitute actionable or compensatable damage for the purposes of the law of negligence.

Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. Earlier decisions had allowed for an award of damages for negligent exposure to asbestos which resulted in pleural plaques. However, following the decision in the *Johnston* case, it was no longer possible to bring a claim in negligence for the condition.

The decision in the *Johnston* case was welcomed by the insurance industry. However, several early day motions, which called for the decision to be overturned, were set down in the UK Parliament and the matter was the subject of adjournment debates. During the debates, many MPs spoke in favour of the decision being overturned by legislation.

A similar desire for legislative change was evident when the matter was debated in the Scottish Parliament and, on 29 November 2007, the Scottish Government announced that it would legislate to reverse the decision in the *Johnston* case and re-establish asbestos-related pleural plaques as an actionable personal injury. That promise was duly fulfilled and, on 17 April 2009, the *Damages (Asbestos-related Conditions)(Scotland) Act 2009* ("the 2009 Act"), received Royal Assent.

Following the Department's consultation exercise the Department recommended that the law should be changed to ensure that the decision in the *Johnston* case did not take effect in Northern Ireland. That recommendation was accepted by the Northern Ireland Executive and the required legislation – the *Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010* ("the draft Bill") – was duly drafted. A copy of the draft Bill and the draft Explanatory Notes is attached at Annex A.

Consultation on the Draft Bill

On 9 July 2010 the Department issued a consultation paper which sought views on the draft Bill.

The paper was placed on the Department's website and was also distributed to a range of consultees, including members of the legal profession, the insurance industry and trade unions.

The publication of the paper was also highlighted by way of a public notice in the Belfast Telegraph, News Letter and Irish News.

The paper contained 5 questions, which are set out in Annex B.

Submissions received

The consultation ran until 6 September 2010 and produced just 12 substantive responses– 1 from the Association of British Insurers ("ABI"), 1 from the Confederation of British Industry ("CBI"), 1 from the Forum of Insurance Lawyers ("FOIL"), 2 from individual members of the public, 3 from individual insurance companies, 2 from members of the legal profession and 1 from the Royal College of Physicians.

The Department would wish to record its thanks to all those who took the time to respond.

The responses are summarised below. Please note, however, that this summary does not rehearse the facts of, or conclusions in, the Johnston case, which are set out in the consultation paper.

ABI

ABI is generally regarded as the "voice" of the insurance industry. It states that its members constitute around 90% of the insurance market in the UK and 20% across the EU.

Although ABI would support increased help and information, both for those with pleural plaques and the wider public, it is fundamentally opposed to the draft Bill. This is largely because it feels the payment of compensation will send out the wrong message and result in people viewing pleural plaques as a more serious condition than it actually is. ABI would wish to emphasise that "pleural plaques are harmless and do not lead to other conditions" and it quotes Professor Anthony Seaton, Emeritus Professor at the University of Aberdeen and the Royal College of Physicians, who share that view.

The response from ABI reiterates the concerns which it raised during the earlier consultation on the Johnston case, namely that a change to the law will-

- undermine business confidence;
- result in a rise in "unnecessary x-rays and perpetuat[e] confusion and distress among those with pleural plaques". This would, in turn, impact on healthcare resources and "lead to a rise in "claims farmers", who may encourage people [who] would probably never have known they had pleural plaques, to get tested";
- fundamentally change, on a retrospective basis, the law of negligence and allow for further erosions of that law by creating a precedent for claims from people who may have been exposed to risk, but who do not have any symptoms. This could, ABI says "open up a potential floodgate of claims based on circumstances where no actionable damage has occurred and, even more widely, claims for risk of an illness occurring or for worry that something might happen. This potentially increases the level of litigation and likelihood of spurious claims...";
- undermine the stability of the legal environment, thereby making Northern Ireland a less attractive place for investment; and
- increase costs for, and divert resources from, businesses, government, local authorities and insurers.

ABI believes the decision to compensate pleural plaques goes "against the accepted medical knowledge and legal experience". In its view "the Northern Irish Executive is out of step with

most countries in aiming to compensate pleural plaques. This includes the US and Australia". The response from ABI notes that the UK Government did not pursue, legislative change, following on from advice provided by the Chief Medical Officer for England and Wales. It also notes that the decision to legislate in Scotland to "make pleural plaques compensatable" is currently being challenged in the courts.

ABI is particularly concerned about the likely financial impact of the Bill and it believes the Bill will "lead to unjustified costs on Northern Irish insurers and taxpayers". In its view "the costs of the Bill are unquantifiable". ABI acknowledges that exposure to asbestos has taken place both in large industries and across a range of smaller businesses. For that reason, it believes "the full extent of the exposure is unknown". ABI goes on to say that, of those who have been exposed, it is unknown how many "will develop pleural plaques...make a claim, and how the cost of a claim might increase over time."

Whilst conceding that the full costs are unknown, ABI does go on to suggest that they "are likely to be very high". On the basis of the estimates which the UK Ministry of Justice produced for England and Wales during its consultation exercise on pleural plaques (between £3.7 billion – 28.6 billion), ABI estimates that the Northern Ireland population of 1.75 million "could expect to bear 2.9% relative to [that] cost" (between £111 million - £858 million).

ABI states that the imposition of those costs on "Northern Irish insurers and self-insured businesses would be unjustified". It believes insurers want to pay "all valid claims as fairly and quickly as possible" and it notes that around £200 million a year is currently paid to sufferers of mesothelioma and other asbestos-related conditions. However, it also believes that the imposition of liability for "a harmless condition would deplete resources available to pay the valid claims, and would cause a substantial interference with the property rights of insurers and those businesses that self-insure". ABI is concerned that insurers and self-insured businesses could become insolvent or "be placed at a competitive disadvantage in their market". It also believes that, "in reality many former employers of these claimants will no longer exist, leaving the cost to the insurance industry".

A further concern is that the Bill will create an inequitable situation across the UK, with the possibility of people with pleural plaques being compensated in some areas and not in others. ABI would like the NI Executive to produce leaflets, similar to those which the UK Department of Health is in the process of developing. However, it believes any reassurances in the leaflets would be undermined by the drive toward compensation payments.

In ABI's view, the departure from "established principles" will alter the nature of liability insurance and create further uncertainty in the liability market. Ultimately, it believes the Bill will "reduce [the] funds available to pay claims for mesothelioma and other symptomatic asbestos-related conditions".

Although ABI accepts that the exposure to asbestos went beyond heavy industries, it emphasises the role of DETI with regard to asbestos claims in the shipbuilding industry and, in light of that role, suggests that the Bill will "divert taxpayers' money away from more important causes". Having noted that "the block grant funding for Northern Ireland has been reduced by £128m a year and [that] government departments are being asked to save a further £398m a year", ABI suggests that "taxpayers' money should not be diverted unnecessarily from core needs, such as child and pensioner benefits".

Turning to the specific question of whether the Bill will achieve its objective of ensuring that the decision in the Johnston case does not have effect in Northern Ireland, ABI suggests that there is "a misunderstanding of the situation pre-Johnston". It queries whether there was a "practice of settling claims" and says that the fact that claims may have been settled prior to Johnston

"represents no more than a commercial decision taken by employers and/or their insurers to pay claims at a time when the medical evidence was uncertain". ABI goes on to say that "Johnston was brought precisely because the medical evidence had developed to demonstrate that pleural plaques were a harmless condition, and there was therefore no longer any basis in law for paying claims."

ABI also states that the retrospective aspect of the Bill could "encounter specific legal problems" by "arguably" infringing the rights of employers and insurers under the European Convention on Human Rights ("ECHR"). In its view "retrospective legislation should be regarded as being appropriate only in exceptional cases". ABI suggests that Clause 4(2) of the Bill will result in the reconfiguration of "past insurance policies so that [insurers will] respond to claims, thereby rendering [them] liable for these claims". This would "arguably be contrary to the ECHR, as it would interfere with settled arrangements and could only be justified on the grounds of compelling public interest." In this instance, ABI believes the public interest is best served by "allowing the courts to rule on a fundamental interpretation of the common law".

ABI goes on to say that "it is also doubtful whether sufficient funds would be available to compensate all cases of asymptomatic pleural plaques". While it again acknowledges that the costs of the legislation would be "uncertain" it states that the number of claims is expected to be "vast".

In relation to question 2, ABI is unwilling to be drawn on whether the Bill will prevent claims from being time-barred. However, it does suggest that it could "result in under- and over-compensation of claimants". The argument here is that, if claimants are required to raise claims within three years of the diagnosis of pleural plaques, they may "settle their claim....either on a full and final or provisional basis. The former would represent gross under-compensation if the person was subsequently to develop mesothelioma, and the latter might equally represent over-compensation if the claimant does not develop a more serious condition."

On question 3 and the issue of human rights compliance, ABI suggests that "the Bill is likely to be in breach of employers' and insurers' rights under Article 1 Protocol 1 and Article 6 "of the ECHR. The argument here is that "the Bill would make employers and their insurers liable for a condition for which they would not otherwise have any liability". This would interfere with employers' and insurers' rights to property under Article 1 of Protocol 1 of the ECHR, and this could only be justified on the grounds of compelling public interest and where it could be shown to be a proportionate response". ABI believes that "compensating those who have an asymptomatic condition is not a legitimate policy goal and, even if it were, the benefits of doing so are not sufficient to justify such a substantial interference with the property rights of employers and insurers".

ABI goes on to suggest that "the retrospective effect of the Bill is further compounded by the delay of 2 years between the Johnston decision having been issued and this consultation exercise."

Article 6 of the ECHR is concerned with fair process and, in this regard, ABI suggests that, by introducing legislation which overrules a legal ruling "in the highest UK court", the NI Executive will "arguably" be removing the right of an employer or insurer to have a decision impacting on their business decided by an "independent and impartial tribunal".

On the issue of compliance with section 75, ABI suggests that the Bill may be non-compliant on the ground that it decreases the funds which are available to compensate people "with more serious conditions", (who would arguably be deemed to have a disability), thereby "denying them equality of opportunity to claim".

Turning to the RIA, ABI does not agree with the conclusions "about the likely impacts of the Bill, or the assumptions made. In its view, policy option 1 (do nothing) would be the most proportionate option, "in that it will help those with pleural plaques the most, and have the least impact on the business, legal and medical communities in Northern Ireland, and come at the least cost to the Northern Irish taxpayer". Moreover, as this option raises the prospect of providing additional information and assistance to those with pleural plaques, ABI believes it would "benefit people with pleural plaques, as they would be reassured about the benign nature of pleural plaques and would be disabused of the misconception that pleural plaques will develop into lung cancer or mesothelioma".

ABI also disputes the suggestion that the Johnston case produced a "windfall" for the insurance industry. It accepts that "active insurers" may have set aside billions of pounds to meet the anticipated liabilities for those with compensatable asbestos-related conditions. However, it goes on to say that "in pricing premiums for employers' liability insurance before 1980, insurers did not take, and could not have taken, account of the number and quantum of asbestos-related claims, since these could not reasonably have been anticipated". Accordingly, "employers who negligently exposed their employees to asbestos have ...contributed only marginally to th[e] reserve. It is not practicable for insurers now to seek to cover the deficit by increasing current employers' liability insurance premiums".

Finally, ABI does not accept the argument that it would be unfair for some people with pleural plaques to have received compensation whilst others do not and, again, it refers to the non-availability of compensation in the US, Australia, England and Wales.

AVIVA

The response from AVIVA opens by saying that it is the UK's number one and the world's fifth largest insurer, with a 15% share of the UK insurance market. In 2009, it handled over 75,000 claims for personal injury.

Like ABI, AVIVA believes that, despite the settled medical evidence, there is continuing confusion and concern about what a diagnosis of pleural plaques "really means". It also echoes ABI's comments about the need for education, the risk of undermining business confidence and of fundamentally changing the law of negligence, the likely impact on healthcare resources and the likelihood of increased costs to business and the taxpayer.

ABI's arguments regarding the ECHR are also reiterated, as are the comments about the Northern Irish Executive being "out of step with most other countries in the world".

Having highlighted the need to focus on "serious asbestos related diseases, such as mesothelioma" and entered a commitment to pay claims "as quickly as possible", AVIVA goes on to highlight its continuing work with the UK Government, including its work –

- on an improved mesothelioma claims handling process, which is designed to "speed up compensation";
- on the establishment of an industry wide Employers' Liability Tracing Office.

It also highlights a £3 billion donation to the British Lung Foundation to allow for grants for medical research regarding the prevention, cure and alleviation of asbestos-related conditions.

AVIVA believes the Bill is seeking to "controvert an established state of fact". In its view, "the fact that pleural plaques do not constitute damage remains unassailable".

Like ABI, AVIVA also seeks to emphasise that compensation was paid out at a time when the medical evidence was less advanced. It argues that, by identifying the benign nature of pleural plaques and stopping compensation, the law of negligence is operating in a consistent manner.

Having followed ABI by citing the estimated cost range in England and Wales and the likely cost range in Northern Ireland, AVIVA goes on to say that the costs in NI are likely to "be towards the top end of [the] range as damages and legal costs are higher than those in England and Wales".

On the five specific questions posed in the consultation, the response from AVIVA essentially follows the response from ABI, which is set out above.

CBI

The CBI is a national body which represents the UK business community. Its members include 80 of the FTSE 100, some 200,000 small and medium-sized firms, over 20,000 manufacturers and over 150 sectoral associations.

At the outset, the response from the CBI suggests that the "campaign to make pleural plaques compensatable [was] based on a general lack of understanding of pleural plaques".

Like ABI, the CBI would like more support and information. However, it too believes a change to the law will undermine the stability of the legal environment and create a dangerous precedent. This would, it says, lead to uncertainty and increased costs for business, central government and local authorities and would also reduce the attractions of the UK from a business perspective.

In its view, the overturning of the decision in the Johnston case would, for the first time, result in compensation being payable "on the basis of something other than injury".

The CBI echoes ABI's concerns about over and under-compensating, the ECHR and a possible differential in treatment under section 75. It also raises concerns about–

- the possible knock-on effects on Disability Living Allowance and sick pay; and
- the possibility of forum shopping.

Having reiterated the various concerns expressed by ABI and AVIVA, the CBI goes on to suggest that –

- the Bill will result in "costly judicial reviews" which will lead to "increased legal costs" and create "further uncertainty for individuals and business"; and
- the increased legal burden and operational costs will undermine the drive to grow the private sector in Northern Ireland and impede inward investment.

FOIL

The response from FOIL endorses the response from ABI and states that FOIL's main concern is that the Bill seeks to "circumvent due process" and a decision which was reached on the basis of "the facts and legal arguments presented".

In FOIL's view it is "vital for the independence of the judiciary and legal system that the Northern Ireland Assembly [does] not seek to influence or interfere with the Court's position."

It believes the Bill represents an "attack on the foundation of precedent" and regards the attempt to set aside the doctrine of the limitation of actions as unhelpful. In its view, if a condition becomes symptomatic, the court will be able to address the issue of limitation under its own general discretion, without the need for legislative intervention.

In relation to the ECHR, FOIL feels that the option of a fair trial will inevitably be compromised in these cases, due to the passage of time and the possible loss of witnesses. Nevertheless, it believes the retrospective element of the Bill "adds to the lack of fairness of hearing".

On the question of section 75, FOIL feels that the Bill may not be compliant because it is "actively discriminating" in favour of one group of claimants.

Ultimately, FOIL would wish the decision in the Johnston case to stand and it closes by asking whether any decision which is considered "politically unattractive" will be subject to amending legislation and whether it is now proposed that Northern Ireland should not follow precedents set by the House of Lords.

Individual Members of the Public

The responses from individual members of the public endorsed the Bill, believing it is section 75 and human rights compliant and that it will achieve the stated policy objective.

One states that "it is good to see Health and Safety at work issues now being considered" and, having called for society to recognise and respond to "harmful work conditions which may contribute to years of life lost", hopes for a speedy passage of the Bill through the Assembly.

Another notes that the number of asbestos-related diseases is expected to "peak and then subside", meaning that the financial impact of the legislation will lessen.

Kennedys Law LLP

The response from ABI was also fully endorsed by the Occupational Disease Unit in Kennedys Law LLP. Kennedys notes that the "compelling points" made by ABI were submitted to, and accepted as persuasive by, the UK Government.

In its view, "[c]aselaw which has evolved over the centuries should not be swept away at the whim of the Executive or because of pressures brought upon it by trade unions and others with a vested interest. A Claimant should only be compensated for an injury which causes him actual physical or psychological harm. It makes no sense, morally or economically, to take money from what is a finite "pot" which is required to meet the future needs of "real" victims of asbestos related diseases, so as to provide a "windfall" to a person with no measurable physical or psychological injury".

Kennedys goes on to say that no-one can predict the number of future cases of mesothelioma and that it is vital for the insurance industry to survive and meet those claims, thereby avoiding any burden to the Exchequer.

Royal College of Physicians ("RCP")

The response from the RCP simply recognises the "confusion that surrounds the medical implications of pleural plaques" and highlights the information leaflet for clinicians, which is being prepared by the British Thoracic Society and the Department of Health in England and Wales.

Royal Sun Alliance ("RSA")

The response from RSA states that it transacts business in some 130 countries, has over 20 million customers and is the UK's largest commercial insurer.

Like ABI, RSA does not believe the Bill will achieve its objective and is concerned that it is not ECHR compliant. The arguments about interfering with employers' and insurers' rights are reiterated, as is the suggestion that the Bill will make insurers "liable for a condition that they would not otherwise be liable for".

Concerns about proportionality and the legitimacy of the policy goal are also echoed.

On section 75, RSA reiterates the ABI's comments about diverting resources away from those with a disability and suggests that "this was one of the concerns that prompted a number of US States to enact legislation preventing claims from being brought by those with symptomless asbestos-related conditions".

The response from RSA goes on to query the decision to rely on the figures produced by Scotland. In its view the figures produced by England and Wales are more reliable.

Overall, the response from RSA echoes the response from ABI, raising concerns about likely confusion, the overruling of the fundamental principles of the law of negligence, setting an unhelpful precedent and the diversion of resources.

Thompsons/ Thompsons McClure Solicitors

The response from Thompsons opens by saying it is the UK's most experienced trade union and personal injury law firm, with a network of 28 offices across the UK. Thompsons only acts for TU members or victims of injury and it has acted in almost every major asbestos test case in the UK.

Thompsons welcomes the proposed Bill and the decision to "restore symptomless pleural plaques as an actionable condition". In its view, the Bill's publication "will be a relief to the many people in Northern Ireland for whom pleural plaques represents a physical marker of irreversible asbestos-induced damage to their lungs".

However, Thompsons is concerned that the Bill will not cover those cases, which, post-Johnston, were struck out by the courts or discontinued or withdrawn. This is on the assumption that someone may endeavour to argue that such cases were "determined" and therefore excluded from the protection of the Bill.

To remedy this, Thompsons suggests a slight modification to Clause 3(1)(b) of the Bill.

Zurich Insurance plc

The response from Zurich notes that it is an insurance-based financial services provider with a global network of subsidiaries serving customers in over 170 countries.

It goes on to say that Zurich was "one of the two lead insurers that brought the test litigation on pleural plaques" and that it has invested "five years of research, resources, legal expertise and liaison with medical experts towards" that litigation. It also notes that Zurich is one of the petitioners who raised the judicial review proceedings in Scotland in respect of the 2009 Act.

Just as Zurich is opposed to the 2009 Act, so it is opposed to the Bill. In its view, the decision in the Johnston case was reached on the basis of "agreed medical evidence applied to fundamental principles of the law of negligence".

Zurich repeats the argument that the payment of compensation for "anxiety rather than a recognised medical illness" will set a "dangerous" precedent and open the "floodgates". It also echoes the warnings about "higher costs being passed on to consumers by way of higher insurance premiums" and about Northern Ireland being at a "commercial disadvantage" to its competitors.

It goes on to reject the suggestion that the Bill is not retrospective in the true sense. In its view the Bill will "create a new kind of liability, going beyond the established law of tort". This would, it says, raise a "serious question about the legal framework in Northern Ireland" and result in queries as to whether that framework is founded on "stable and equitable principles that can be relied on".

On a general level, Zurich echoes the ABI's comments about perpetuating confusion about the true nature of pleural plaques, the risk of fundamentally changing the law of negligence and the undermining of business confidence.

Turning to the specific questions posed in the consultation, Zurich states that it has "serious reservations" about whether the Bill will achieve the intended objective and says that, should the Bill become law, it will be "subject to detailed legal review".

Zurich believes that "measured objectively, pleural plaques are at the very edge of the spectrum of what counts as an injury in medical terms". It also believes that the Johnston case simply restated the "long established rules of law for the recovery of damages in negligence" and that the Bill will, therefore, introduce an "entirely new right of action for an asymptomatic condition where no such right existed before." Zurich is concerned that this could lead to "unintended consequences for the future development of the law in Northern Ireland" and it repeats ABI's warning about the creation of a dangerous precedent.

Zurich goes on to ask for "further rationale" for compensating those with pleural plaques above others who have some "non-asbestos but potentially harmful exposure" who may also be worrying about "future disease".

In Zurich's view, the "Northern Ireland Executive is arguably setting out to change the facts to which the legal principles were applied, rather than the legal principles themselves."

Zurich goes on to reiterate ABI's comments about reconfiguring past policies, the possibility of "claims farmers" and the increased use of x-rays or CT scans.

On the issue of claims being time-barred, Zurich repeats the concerns about retrospectivity and suggests that comparisons with the Compensation Act 2006 are misplaced. This is because the 2006 Act dealt with asbestos-related mesothelioma, which is a "fatal disease". ABI's concerns about over and under compensation are also echoed.

With regard to the issue of human rights, Zurich also raises Article 1 of Protocol 1 to the ECHR, arguing that "an obligation to expend funds to meet..claims " constitutes an interference with the peaceful enjoyment of property and possessions. It goes on to say that "the sovereignty of Parliament and the Northern Ireland Executive in such matters" is not fettered".

In Zurich's view, there is no justification for taking the money of one private party (namely the insurer) and giving it to another private party who has a symptomless condition. Zurich notes that, in order to satisfy the requirements of the ECHR, the Bill must be both appropriate and proportionate. In Zurich's view, it is neither.

Article 6 of the ECHR is also raised and Zurich warns that the "legality of [the Bill] will be closely examined, as evidenced by our willingness to challenge the Damages (Asbestos-related Conditions) (Scotland) Act [which was] introduced on the same flawed logic by the Scottish Parliament".

Zurich declined to be drawn on the issue of section 75 or the likely impacts of the Bill.

In conclusion, Zurich repeated the call for more support and information, emphasised the "significant and negative impact on business confidence and stability" and reiterated the warning about possible legal action.

Annex A

Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

Draft Explanatory Notes

Introduction

1. These Explanatory Notes have been prepared by the Department of Finance and Personnel in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a provision of the Act does not seem to require any explanation or comment, none is given.

The Act

3. In *Johnston v NEI International Combustion Ltd*, published on 17 October 2007^[1], the House of Lords ("HoL") ruled that asymptomatic pleural plaques (an asbestos-related condition) do not give rise to a cause of action because they do not signify damage or injury that is sufficiently material to found a claim for damages in tort. The judgment is binding in Northern Ireland.
4. The purpose of the Act is to ensure that the HoL's judgment in the Johnston case does not have effect in Northern Ireland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. As it is possible that the courts might look to the Johnston case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Act also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Northern Ireland. The Act does not affect the law on quantum (the amount that is paid in damages). Where a person sustains a physical injury which is compensatable the compensation they receive can include sums for e.g. anxiety and risk of the person's condition deteriorating in the future.

Section 1 – Pleural plaques

5. This section addresses the central reasoning of the judgment in Johnston by providing that asbestos-related pleural plaques are actionable damage. Subsections (1) and (2) provide that pleural plaques can be the subject of a claim for damages. In other words, pleural plaques are material damage that is not de minimis for the purposes of a claim in negligence. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston case, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining liability.

Section 2 – Pleural thickening and asbestosis

6. This section prevents the ruling in the Johnston case from being applied in relation to asymptomatic pleural thickening or asbestosis (because the courts may consider that the ratio (principles of law underlying and justifying the decision) in Johnston provides authority in these cases). Subsections (1) and (2) provide that asbestos-related pleural thickening and asbestosis, which have not and are not causing physical impairment, constitute actionable damage. In subsection (1) the phrase "for the avoidance of doubt" is used because there is, in fact, no authoritative decision to the effect that asymptomatic pleural thickening and asbestosis are not actionable. Subsections (3) and (4) are consistent with subsections (2) and (3) of section 1. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston judgment, to the extent that their application would result in asymptomatic pleural thickening or asbestosis being considered non-actionable. Subsection (4) ensures that section 2 does not otherwise affect the operation of statutory or common law rules for determining liability.

Section 3 – Limitation of actions

7. To ensure that claims do not become time-barred during the period between the date of the judgment (17 October 2007) and the date the Act comes into force, this section provides that this period does not count towards the three-year limitation period for raising an action for damages in respect of the three conditions covered in the Act. Subsection (1)(a) addresses the kinds of claims to which this section applies, that is, claims involving the asbestos-related conditions covered by sections 1 and 2. This includes claims that have been raised in the courts before the Act comes into force, as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date the Act comes into force, this section will apply only if they are ongoing at that date. The effect of this section is to address cases that may be at risk of being dismissed by the courts on time-bar grounds, e.g. a person who developed pleural plaques in December 2004 and whose case could be considered time-barred by December 2007 might have delayed raising their case thinking they had no right of action under the Johnston judgment. The person may then have lodged a claim because of the Department of Finance and Personnel's announcement that it was recommending a change to the law. Without this provision, which will stop the time-bar clock running from October 2007 until the date the Act comes into force, that person's claim could be dismissed as having been raised beyond the three-year limitation period.

Section 4 – Commencement and retrospective effect

8. This section sets out the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Act will come into force on a date appointed by the Department of Finance and Personnel by Commencement Order. The remaining subsections explain the retrospective effect of the provisions of the Act. Subsection (2) provides that sections

1 and 2 of the Act are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the judgment in Johnston, because an authoritative statement of the law by the HoL is considered to state the law as it has always been. Subsection (3) qualifies the effect of subsection (2) by providing that sections 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Act comes into force. The effect of subsections (2) and (3) is that claimants in cases which have not been settled, or determined by a court, before the Act comes into force will be able to raise, or continue, an action for damages.

Section 5 – Short title and Crown application

9. This section gives the short title of the Act and provides that the Act binds the Crown.

Annex B

Summary of consultation issues

Do you think the bill achieves the objective of ensuring that the decision in the Johnston case does not have effect in Northern Ireland? If you do not think the bill will achieve that objective please give reasons.

Do you think the bill will prevent claims from being time-barred? If you do not think the bill will achieve that objective please give reasons.

Do you think the provisions in the bill are human rights compliant? If you do not, please give reasons.

Do you agree with the department's conclusion that the provisions in the bill are section 75 compliant and that an eia is not required? If you do not, please give reasons.

Do you agree with the department's conclusions about the likely impacts of the bill? If you do not, please give reasons.

[1] <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

Damages (Asbestos-Related Conditions) Bill

CONTENTS

1. Pleural plaques [j6]
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3. Limitation of actions [j8]
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5. Short title and Crown application [j10]

A

BILL

TO

Provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Pleural plaques [j6]

1.—(1) Asbestos-related pleural plaques are a personal injury which constitutes actionable damage for the purposes of an action for damages for personal injuries.

(2) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable damage ceases to apply to the extent it has that effect.

(3) But nothing in this section otherwise affects any statutory provision or rule of law which determines whether and in what circumstances a person may be liable for damages in respect of personal injuries.

(4) In this section and in section 2 “statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33).

Pleural thickening and asbestosis [j7]

2.—(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused and is not causing impairment of a person’s physical condition is a personal injury which constitutes actionable damage for the purposes of an action for damages for personal injuries.

(2) Those conditions are—

- (a) asbestos-related pleural thickening; and
- (b) asbestosis.

(3) Any rule of law the effect of which is that such a condition does not constitute actionable damage ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any statutory provision or rule of law which determines whether and in what circumstances a person may be liable for damages in respect of personal injuries.

Limitation of actions [j8]

- 3.—(1) This section applies to an action for damages for personal injuries—
- (a) in which the damages claimed consist of or include damages in respect of—
 - (i) asbestos-related pleural plaques; or
 - (ii) a condition to which section 2 applies; and
 - (b) which, in the case of an action commenced before the date this section comes into operation, has not been determined by that date.
- (2) For the purposes of Articles 7 and 9 of the Limitation (Northern Ireland) Order 1989 (NI 11) (special time limits for actions in respect of personal injuries and actions under the Fatal Accidents (Northern Ireland) Order 1977), the period beginning with 17 October 2007 and ending with the day on which this section comes into operation is to be left out of account.

Commencement and retrospective effect [j9]

- 4.—(1) This Act (other than this subsection and section 5) comes into operation on such day as the Department of Finance and Personnel may by order appoint.
- (2) Sections 1 and 2 are to be treated for all purposes as having always had effect.
- (3) But those sections have no effect in relation to—
- (a) a claim which is settled before the date on which subsection (2) comes into operation (whether or not legal proceedings in relation to the claim have been commenced); or
 - (b) legal proceedings which are determined before that date.

Short title and Crown application [j10]

- 5.—(1) This Act may be cited as the Damages (Asbestos-related Conditions) Act (Northern Ireland) 2010.
- (2) This Act binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.

Response to Committee queries on the Draft Damages (Asbestos-Related Conditions) Bill



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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont Our Ref: CFP77/10

4 November 2010

Dear Shane,


Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

Thank you for your letter of 22 October 2010, which set out a series of questions which the Committee had raised with regard to the above-named Bill.

The response to each of the questions is set out in Annex A to this letter.

Please do not hesitate to contact me if you require any further assistance.

Yours sincerely,



Norman Irwin

Annex A

Question 1

The Scottish Executive has passed an Act making pleural plaques compensatable in Scotland. However this decision has been the subject of Judicial Review and a subsequent appeal.

- What consideration has the Department given to postponing the introduction of legislation here until the position in Scotland has been finally clarified?
- What advice has been sought from the Attorney General in this regard?

Response to question 1

As was mentioned during the evidence session before the Committee on 15 September, the decision in the "Scottish appeal" is awaited. However, if that decision is also unfavourable to the

insurers, it is likely that there will be a further appeal to the Supreme Court, which is the final appeal court in the UK for civil cases. Thereafter, the insurers could apply to the European Court of Human Rights in Strasbourg, which provides legal recourse of last resort for individuals who feel that their human rights have been violated by a contracting party to the ECHR.

It could take some considerable time to exhaust the court process and the Department does not think it would be desirable to defer the Bill and deny relief for what could be a lengthy period.

It is not the practice to comment on whether advice has been sought from the Attorney General.

Question 2

The insurance companies that responded to the DFP consultation have suggested that any attempt by the Assembly to introduce this legislation will be challenged in the courts.

- What assessment has the Department given to the possibility of legal challenge and the associated costs should this legislation be introduced?
- Will a mechanism be built into the legislation to ensure that any delays in its implementation as a result of legal challenge will be of no detriment to those who wish to pursue claims?

Response to question 2

The threat of legal action was raised as soon as the Department began to consider the options post-Johnston and was reiterated by the insurance industry during various meetings. Given that fact and given that the insurance industry has initiated legal action in Scotland, the possibility of a legal challenge has been assessed as "high".

It is often the case that one side or other on the policy debate will propose legal action should its preferred policy not be adopted. However, departments simply have no way of assessing the level of the "associated costs". This is because the costs will inevitably be determined by a range of factors (e.g. what are the grounds of the challenge; the time involved in defending the challenge, the outcome in terms of costs, will the complainant or the department appeal and how far any appeals will be taken).

On the issue of "no detriment", the Department, considers that there are two possible outcomes to a challenge. If the challenge was successful, then no compensation would be payable under the legislation. Clearly, this would be a detriment to those who wished to pursue claims, but that is the purpose of the challenge. At that stage the Department would have to consider options in the light of the court's decision. However If the challenge is unsuccessful and there has been a delay to claims because of the challenge, then interest on the damages may be payable and this would mitigate the loss resulting from the delay.

Question 3

A number of respondents to the DFP consultation suggested that the proposed legislation is not Section 75 compliant on the belief that it does not "create equality of opportunity between persons with a disability and persons without" (CBI Response 6 Sept 2010). The CBI response and others (Royal Sun Alliance, Association of British Insurers and Aviva) suggest that compensating people for symptomless pleural plaques may decrease funds available to compensate those with more serious, symptomatic asbestos-related conditions.

A second equality issue is raised by Belfast Health and Social Care Trust which states that it is previous exposure to asbestos, not the pleural plaques, that gives rise to the increase in risk of possibly developing asbestos-related diseases in the future. BHSCCT goes on to argue that "it may in fact be discriminatory against workmen with asbestos exposure but without pleural plaques to compensate only those with pleural plaques". [On this argument, however, it is noted that the compensation would not be for asbestos exposure per se but the fact that pleural plaques have developed and that is treated by law as actionable damage.]

On what basis has the Department ruled out undertaking a full Equality Impact Assessment of the proposed legislation?

Response to question 3

The comments from the insurance industry and the CBI prompt two questions, namely–

- will there be a shortfall in funding for asbestos-related conditions?
- if, there is such a shortfall, will that shortfall have been caused by the Bill?

The answer to the first question is "possibly". The answer to the second question is "no". This is because it is for the insurance industry to determine what funds should be set aside for meeting its commitments with respect to asbestos-related conditions and, presumably, its calculations in that regard will have been a factor when determining the level of its employer liability insurance premiums. The proposed Bill does not interfere with that process.

On the general issue of disability, it is worth noting that the Industrial Injuries Advisory Council ("IIAC"), which reported on pleural plaques at the request of the Secretary of State for Work and Pensions, did not conclude that pleural plaques never cause disability. Rather, the IIAC determined that, in most cases, the level of disability fell short of the level of disability set for the purpose of the Industrial Injuries Disablement Benefit Scheme. Indeed, the IIAC recognised that, although it was difficult to determine the number of people affected, extensive pleural plaques could lead to disability and breathlessness by restricting lung expansion. The IIAC also referred to instances of a grating sensation in the chest while breathing and to studies which have recorded breathlessness, although the IIAC recognised that that breathlessness might be attributable to other factors, such as age.

The second issue was raised by Dr DRT Shepherd, a retired consultant respiratory physician, rather than the Belfast Health and Social Care Trust. In this regard, the Department would wish to emphasise that it has always rehearsed the accepted medical view and has never suggested that pleural plaques "degenerate" into a more serious asbestos-related condition.

The Department considers that the medical position was neatly summed up by the IIAC in its report of 2009, which states as follows:

"Despite an initial case report that raised the concern (Lewinsohn 1974), it is now well established that pleural plaques do not in themselves become malignant. Neither are they a cause of cancer of the pleura or at other sites, such as the lung.

However, plaques have been linked with a greater future risk of these cancers, and this is unsurprising. The incidence of lung cancer increases with asbestos exposure, as does the probability of pleural plaques. Therefore, a statistical link can be expected between plaques and lung cancer. However, it is well established that lung cancers do not arise out of the malignant transformation of plaques, the lung and lung lining being anatomically and histologically distinct."

The IIAC report also noted that the development of pleural plaques following asbestos exposure tended to be related to the cumulative level of exposure and, as such, was dependent on the patterns, levels and timings of exposure at earlier periods of employment.

In the Department's view, pleural plaques constitute a bodily change and concrete evidence of exposure to asbestos and the Department accepts the IIAC's conclusion that, with that bodily change, comes "a greater future risk of...cancer". The Department considers, therefore, that there is a very real distinction between those who have been exposed to asbestos and who have developed pleural plaques and those who may have been exposed to asbestos, but have not developed pleural plaques. As the Department has stated previously, the proposed change to the law is not about widening the law to take account of exposure alone, but is about determining what should constitute damage for the purpose of the law of negligence.

The Department has concluded that an equality impact assessment is not required because the new law will apply across the board, without differentiating between any of the equality groupings.

Question 4

In its response to the DFP consultation Thompsons McClure Solicitors suggests that "in NI pleural plaques claims on which court proceedings had been commended prior to the Court of Appeal decision in January 2006 were stayed pending the House of Lords appeal. Following the House of Lords ruling the defendants were entitled to apply for those stayed cases to be struck out or discontinued, or to insist they were withdrawn... It could be argued that the NI cases which were struck out, discontinued or withdrawn were (as per part 3(1)(b) of the draft Bill) 'determined' and are therefore exclude from the protection of the Bill".

On what basis can the Department be satisfied that this situation will not arise?

Response to question 4

The Department is fairly confident that a discontinuation or withdrawal would not constitute a determination. There is an outside possibility that a court could rule that a case which has been struck out has been "determined". However, it is much more likely that "determined" will be interpreted as "determined on a substantive basis". That said, the Department has sought the views of Legislative Counsel on this point.

Question 5

Despite the efforts of DFP to date and of the recent Assembly research, there is still uncertainty about what the financial impact of this Bill might be.

Has the Department considered making a direct approach to community sector organisations, in particular any support groups for those with asbestos-related conditions, to try to get some clarity on figures?

Response to question 5

During the consultation process the Department endeavoured to reach a range of people, including those in the community sector and those in individual support groups (e.g. Justice for Asbestos Victims). This was done via targeted letters and more general publicity for the consultation process in the local press. However, no information has been forthcoming and it is unlikely that a further approach would be any more successful. In any event, the number of

people who contact a support group is likely to be very small and any available information is likely, therefore, to be extremely patchy and of limited assistance.

The Department remains of the view that most of the relevant information sits with the insurance industry, the legal profession and the courts. However, the Department has been unable to access much of that information (as was mentioned previously, the insurance industry has provided some limited figures).

Question 6

In previous evidence sessions the Committee has asked DFP officials about the potential to introduce tariffs to determine the levels of compensation payable. There is no provision for setting tariffs within the draft legislation.

What consideration has the Department given to providing for compensation levels/ceilings within the legislation, what potential exists in this regard and are there any legal barriers to doing so?

Response to question 6

In negligence cases, the level of compensation is usually determined by the court or negotiated by experts in the insurance/legal field. There have been instances, however, where the legislature has prescribed a particular level of damages. For example, the Fatal Accidents (Northern Ireland) Order 1977 prescribes a level of bereavement damages.

It is, therefore, technically possible to set "a ceiling". However, the ceiling will then have to be adjusted periodically and will not take account of individual circumstances.

All things considered, the Department believes that it is best to leave the level of damages to the discretion of the court/ other experts, as that approach is long established and well respected.

Damages (Asbestos-Related Conditions) Bill-Response to Query Regarding Delay in Introducing Legislation

From the Office of the
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Our reference: COR/952/2010

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19 November 2010

A handwritten signature in black ink, appearing to read "Sammy Wilson".

Thank you for your letter of 8 November 2010 regarding the delay in introducing the Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010.

I share your concerns about the pressures on the legislative timetable. However, as you know, there are a number of pre-introductory steps which must be completed, and one of those steps is the final "sign off" by the Executive Committee. The Executive meeting on 4 November was cancelled and we must, therefore, look to today's meeting. I would wish to assure the Committee that I am using my best endeavours to ensure that the Bill is considered.

In the meantime, I know my officials have briefed the Committee on the consultation on the Bill and that the Committee has had sight of the responses to the consultation. I trust that the briefing has been of assistance to the Committee and that it will provide a good grounding for the Committee's detailed scrutiny of the Bill.

Before I close I would wish to say that I am very grateful for the time that the Committee has already afforded to the Bill, both in terms of assessing the underlying policy and in terms of exploring the issues which have been raised. The Bill may be small in size, but I think it is an important Bill and I appreciate the careful consideration which, to date, has been given to its terms.

Yours sincerely

A handwritten signature in black ink, appearing to read "Sammy Wilson".

SAMMY WILSON MP MLA

Pre-Introductory Briefing

Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

From: Norman Irwin (Dalo)
Date: 6 December 2010

Summary

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Pre-introduction consideration of the Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010

Restrictions: Restricted – Papers embargoed until introduction of the Bill

Action Required: The Committee to note that the Bill is to be introduced in the Assembly on 14 December 2010

1. Officials last briefed the Committee on 15 September on the response to the Department's Consultation Paper on the draft Damages (Asbestos-related Conditions) Bill which was published at the beginning of the summer. At earlier briefings officials had explained to the Committee the background to the proposals and the Department's intention to consult on a draft Bill.

2. I attach for the Committee's consideration an advance copy of the Damages (Asbestos-related Conditions) Bill and its accompanying Explanatory and Financial Memorandum. It is expected that the Bill will be introduced into the Assembly on 14 December 2010.

3. The Bill, as agreed by the Executive, is in identical terms to the draft Bill which was published for consultation earlier in the year. I also attach a copy of the summary of responses to the July 2010 consultation on the draft Bill. This is a more up-to-date version than the version sent to the Committee at the end of September.

Norman Irwin

Full Analysis of Responses to the Consultation on the Draft Damages (Asbestos-Related Conditions) Bill 2010

Published by:

The Department of Finance and Personnel
Balloo Annex
Rathgael House
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Background

On 13 October 2008 the Department of Finance and Personnel ("the Department") issued a consultation paper which considered the House of Lords' decision in *Johnston v NEI International Combustion Ltd* and conjoined cases [2007] (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd* (and conjoined cases)).

In the *Johnston* case, the Law Lords upheld a decision of the Court of Appeal in England and Wales that symptomless pleural plaques do not constitute actionable or compensatable damage for the purposes of the law of negligence.

Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. Earlier decisions had allowed for an award of damages for negligent

exposure to asbestos which resulted in pleural plaques. However, following the decision in the Johnston case, it was no longer possible to bring a claim in negligence for the condition.

The decision in the Johnston case was welcomed by the insurance industry. However, several early day motions, which called for the decision to be overturned, were set down in the UK Parliament and the matter was the subject of adjournment debates. During the debates, many MPs spoke in favour of the decision being overturned by legislation.

A similar desire for legislative change was evident when the matter was debated in the Scottish Parliament and, on 29 November 2007, the Scottish Government announced that it would legislate to reverse the decision in the Johnston case and re-establish asbestos-related pleural plaques as an actionable personal injury. That promise was duly fulfilled and, on 17 April 2009, the Damages (Asbestos-related Conditions)(Scotland) Act 2009 ("the 2009 Act"), received Royal Assent.

Following the Department's consultation exercise the Department recommended that the law should be changed to ensure that the decision in the Johnston case did not take effect in Northern Ireland. That recommendation was accepted by the Northern Ireland Executive and the required legislation – the Damages (Asbestos-related Conditions) Bill (Northern Ireland) 2010 ("the draft Bill") – was duly drafted.

Consultation on the Draft Bill

On 9 July 2010 the Department issued a consultation paper which sought views on the draft Bill.

The paper was placed on the Department's website and was also distributed to a range of consultees, including members of the legal profession, the insurance industry and trade unions.

The publication of the paper was also highlighted by way of a public notice in the Belfast Telegraph, News Letter and Irish News.

The paper contained 5 questions, which are set out in Annex A.

Submissions Received

The consultation ran until 6 September 2010 and produced just 12 substantive responses– 1 from the Association of British Insurers ("ABI"), 1 from the Confederation of British Industry ("CBI"), 1 from a retired consultant respiratory physician, 1 from the Forum of Insurance Lawyers ("FOIL"), 2 from individual members of the public, 3 from individual insurance companies, 2 from members of the legal profession and 1 from the Royal College of Physicians.

The Department would wish to record its thanks to all those who took the time to respond.

The responses are summarised below. Please note, however, that this analysis does not rehearse the facts of, or conclusions in, the Johnston case, which are set out in the consultation paper.

ABI

ABI is generally regarded as the "voice" of the insurance industry. It states that its members constitute around 90% of the insurance market in the UK and 20% across the EU.

Although ABI would support increased help and information, both for those with pleural plaques and the wider public, it is fundamentally opposed to the draft Bill. This is largely because it feels the payment of compensation will send out the wrong message and result in people viewing pleural plaques as a more serious condition than it actually is. ABI would wish to emphasise that "pleural plaques are harmless and do not lead to other conditions" and it quotes Professor Anthony Seaton, Emeritus Professor at the University of Aberdeen and the Royal College of Physicians, who share that view.

The response from ABI reiterates the concerns which it raised during the earlier consultation on the Johnston case, namely that a change to the law will-

- undermine business confidence;
- result in a rise in "unnecessary x-rays and perpetuat[e] confusion and distress among those with pleural plaques". This would, in turn, impact on healthcare resources and "lead to a rise in "claims farmers", who may encourage people [who] would probably never have known they had pleural plaques, to get tested";
- fundamentally change, on a retrospective basis, the law of negligence and allow for further erosions of that law by creating a precedent for claims from people who may have been exposed to risk, but who do not have any symptoms. This could, ABI says "open up a potential floodgate of claims based on circumstances where no actionable damage has occurred and, even more widely, claims for risk of an illness occurring or for worry that something might happen. This potentially increases the level of litigation and likelihood of spurious claims...";
- undermine the stability of the legal environment, thereby making Northern Ireland a less attractive place for investment; and
- increase costs for, and divert resources from, businesses, government, local authorities and insurers.

ABI believes the decision to compensate pleural plaques goes "against the accepted medical knowledge and legal experience". In its view "the Northern Irish Executive is out of step with most countries in aiming to compensate pleural plaques. This includes the US and Australia". The response from ABI notes that the UK Government did not pursue, legislative change, following on from advice provided by the Chief Medical Officer for England and Wales. It also notes that the decision to legislate in Scotland to "make pleural plaques compensatable" is currently being challenged in the courts.

ABI is particularly concerned about the likely financial impact of the Bill and it believes the Bill will "lead to unjustified costs on Northern Irish insurers and taxpayers". In its view "the costs of the Bill are unquantifiable". ABI acknowledges that exposure to asbestos has taken place both in large industries and across a range of smaller businesses. For that reason, it believes "the full extent of the exposure is unknown". ABI goes on to say that, of those who have been exposed, it is unknown how many "will develop pleural plaques...make a claim, and how the cost of a claim might increase over time."

Whilst conceding that the full costs are unknown, ABI does go on to suggest that they "are likely to be very high". On the basis of the estimates which the UK Ministry of Justice produced for England and Wales during its consultation exercise on pleural plaques (between £3.7 billion – 28.6 billion), ABI estimates that the Northern Ireland population of 1.75 million "could expect to bear 2.9% relative to [that] cost" (between £111 million - £858 million).

ABI states that the imposition of those costs on "Northern Irish insurers and self-insured businesses would be unjustified". It believes insurers want to pay "all valid claims as fairly and

quickly as possible" and it notes that around £200 million a year is currently paid to sufferers of mesothelioma and other asbestos-related conditions. However, it also believes that the imposition of liability for "a harmless condition would deplete resources available to pay the valid claims, and would cause a substantial interference with the property rights of insurers and those businesses that self-insure". ABI is concerned that insurers and self-insured businesses could become insolvent or "be placed at a competitive disadvantage in their market". It also believes that, "in reality many former employers of these claimants will no longer exist, leaving the cost to the insurance industry".

A further concern is that the Bill will create an inequitable situation across the UK, with the possibility of people with pleural plaques being compensated in some areas and not in others. ABI would like the NI Executive to produce leaflets, similar to those which the UK Department of Health is in the process of developing. However, it believes any reassurances in the leaflets would be undermined by the drive toward compensation payments.

In ABI's view, the departure from "established principles" will alter the nature of liability insurance and create further uncertainty in the liability market. Ultimately, it believes the Bill will "reduce [the] funds available to pay claims for mesothelioma and other symptomatic asbestos-related conditions".

Although ABI accepts that the exposure to asbestos went beyond heavy industries, it emphasises the role of DETI with regard to asbestos claims in the shipbuilding industry and, in light of that role, suggests that the Bill will "divert taxpayers' money away from more important causes". Having noted that "the block grant funding for Northern Ireland has been reduced by £128m a year and [that] government departments are being asked to save a further £398m a year", ABI suggests that "taxpayers' money should not be diverted unnecessarily from core needs, such as child and pensioner benefits".

Turning to the specific question of whether the Bill will achieve its objective of ensuring that the decision in the Johnston case does not have effect in Northern Ireland, ABI suggests that there is "a misunderstanding of the situation pre-Johnston". It queries whether there was a "practice of settling claims" and says that the fact that claims may have been settled prior to Johnston "represents no more than a commercial decision taken by employers and/or their insurers to pay claims at a time when the medical evidence was uncertain". ABI goes on to say that "Johnston was brought precisely because the medical evidence had developed to demonstrate that pleural plaques were a harmless condition, and there was therefore no longer any basis in law for paying claims."

ABI also states that the retrospective aspect of the Bill could "encounter specific legal problems" by "arguably" infringing the rights of employers and insurers under the European Convention on Human Rights ("ECHR"). In its view "retrospective legislation should be regarded as being appropriate only in exceptional cases". ABI suggests that Clause 4(2) of the Bill will result in the reconfiguration of "past insurance policies so that [insurers will] respond to claims, thereby rendering [them] liable for these claims". This would "arguably be contrary to the ECHR, as it would interfere with settled arrangements and could only be justified on the grounds of compelling public interest." In this instance, ABI believes the public interest is best served by "allowing the courts to rule on a fundamental interpretation of the common law".

ABI goes on to say that "it is also doubtful whether sufficient funds would be available to compensate all cases of asymptomatic pleural plaques". While it again acknowledges that the costs of the legislation would be "uncertain" it states that the number of claims is expected to be "vast".

In relation to question 2, ABI is unwilling to be drawn on whether the Bill will prevent claims from being time-barred. However, it does suggest that it could "result in under- and over-compensation of claimants". The argument here is that, if claimants are required to raise claims within three years of the diagnosis of pleural plaques, they may "settle their claim....either on a full and final or provisional basis. The former would represent gross under-compensation if the person was subsequently to develop mesothelioma, and the latter might equally represent over-compensation if the claimant does not develop a more serious condition."

On question 3 and the issue of human rights compliance, ABI suggests that "the Bill is likely to be in breach of employers' and insurers' rights under Article 1 Protocol 1 and Article 6 "of the ECHR. The argument here is that "the Bill would make employers and their insurers liable for a condition for which they would not otherwise have any liability". This would interfere with employers' and insurers' rights to property under Article 1 of Protocol 1 of the ECHR, and this could only be justified on the grounds of compelling public interest and where it could be shown to be a proportionate response". ABI believes that "compensating those who have an asymptomatic condition is not a legitimate policy goal and, even if it were, the benefits of doing so are not sufficient to justify such a substantial interference with the property rights of employers and insurers".

ABI goes on to suggest that "the retrospective effect of the Bill is further compounded by the delay of 2 years between the Johnston decision having been issued and this consultation exercise."

Article 6 of the ECHR is concerned with fair process and, in this regard, ABI suggests that, by introducing legislation which overrules a legal ruling "in the highest UK court", the NI Executive will "arguably" be removing the right of an employer or insurer to have a decision impacting on their business decided by an "independent and impartial tribunal".

On the issue of compliance with section 75, ABI suggests that the Bill may be non-compliant on the ground that it decreases the funds which are available to compensate people "with more serious conditions", (who would arguably be deemed to have a disability), thereby "denying them equality of opportunity to claim".

Turning to the RIA, ABI does not agree with the conclusions "about the likely impacts of the Bill, or the assumptions made. In its view, policy option 1 (do nothing) would be the most proportionate option, "in that it will help those with pleural plaques the most, and have the least impact on the business, legal and medical communities in Northern Ireland, and come at the least cost to the Northern Irish taxpayer". Moreover, as this option raises the prospect of providing additional information and assistance to those with pleural plaques, ABI believes it would "benefit people with pleural plaques, as they would be reassured about the benign nature of pleural plaques and would be disabused of the misconception that pleural plaques will develop into lung cancer or mesothelioma".

ABI also disputes the suggestion that the Johnston case produced a "windfall" for the insurance industry. It accepts that "active insurers" may have set aside billions of pounds to meet the anticipated liabilities for those with compensatable asbestos-related conditions. However, it goes on to say that "in pricing premiums for employers' liability insurance before 1980, insurers did not take, and could not have taken, account of the number and quantum of asbestos-related claims, since these could not reasonably have been anticipated". Accordingly, "employers who negligently exposed their employees to asbestos have ...contributed only marginally to th[e] reserve. It is not practicable for insurers now to seek to cover the deficit by increasing current employers' liability insurance premiums".

Finally, ABI does not accept the argument that it would be unfair for some people with pleural plaques to have received compensation whilst others do not and, again, it refers to the non-availability of compensation in the US, Australia, England and Wales.

Aviva

The response from AVIVA opens by saying that it is the UK's number one and the world's fifth largest insurer, with a 15% share of the UK insurance market. In 2009, it handled over 75,000 claims for personal injury.

Like ABI, AVIVA believes that, despite the settled medical evidence, there is continuing confusion and concern about what a diagnosis of pleural plaques "really means". It also echoes ABI's comments about the need for education, the risk of undermining business confidence and of fundamentally changing the law of negligence, the likely impact on healthcare resources and the likelihood of increased costs to business and the taxpayer.

ABI's arguments regarding the ECHR are also reiterated, as are the comments about the Northern Irish Executive being "out of step with most other countries in the world".

Having highlighted the need to focus on "serious asbestos related diseases, such as mesothelioma" and entered a commitment to pay claims "as quickly as possible", AVIVA goes on to highlight its continuing work with the UK Government, including its work –

- on an improved mesothelioma claims handling process, which is designed to "speed up compensation";
- on the establishment of an industry wide Employers' Liability Tracing Office.

It also highlights a £3 billion donation to the British Lung Foundation to allow for grants for medical research regarding the prevention, cure and alleviation of asbestos-related conditions.

AVIVA believes the Bill is seeking to "controvert an established state of fact". In its view, "the fact that pleural plaques do not constitute damage remains unassailable".

Like ABI, AVIVA also seeks to emphasise that compensation was paid out at a time when the medical evidence was less advanced. It argues that, by identifying the benign nature of pleural plaques and stopping compensation, the law of negligence is operating in a consistent manner.

Having followed ABI by citing the estimated cost range in England and Wales and the likely cost range in Northern Ireland, AVIVA goes on to say that the costs in NI are likely to "be towards the top end of [the] range as damages and legal costs are higher than those in England and Wales".

On the five specific questions posed in the consultation, the response from AVIVA essentially follows the response from ABI, which is set out above.

CBI

The CBI is a national body which represents the UK business community. Its members include 80 of the FTSE 100, some 200,000 small and medium-sized firms, over 20,000 manufacturers and over 150 sectoral associations.

At the outset, the response from the CBI suggests that the "campaign to make pleural plaques compensatable [was] based on a general lack of understanding of pleural plaques".

Like ABI, the CBI would like more support and information. However, it too believes a change to the law will undermine the stability of the legal environment and create a dangerous precedent. This would, it says, lead to uncertainty and increased costs for business, central government and local authorities and would also reduce the attractions of the UK from a business perspective.

In its view, the overturning of the decision in the Johnston case would, for the first time, result in compensation being payable "on the basis of something other than injury".

The CBI echoes ABI's concerns about over and under-compensating, the ECHR and a possible differential in treatment under section 75. It also raises concerns about–

- the possible knock-on effects on Disability Living Allowance and sick pay; and
- the possibility of forum shopping.

Having reiterated the various concerns expressed by ABI and AVIVA, the CBI goes on to suggest that –

- the Bill will result in "costly judicial reviews" which will lead to "increased legal costs" and create "further uncertainty for individuals and business"; and
- the increased legal burden and operational costs will undermine the drive to grow the private sector in Northern Ireland and impede inward investment.

Dr DRT Shepherd FRCP

Dr Shepherd is a retired consultant respiratory physician.

In his response, Dr Shepherd notes 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." He emphasises, however, that the risk relates to the asbestos exposure and not to the development of the pleural plaques.

He goes on to say that, as the pleural plaques do not impair lung function or cause symptoms "it seems inappropriate that they in themselves should be compensatable". Like ABI, he believes Northern Ireland is out of step with other jurisdictions in allowing for compensation for pleural plaques. He also believes that it is potentially discriminatory to compensate those who have developed pleural plaques, but not those who have been exposed to asbestos, but who have not developed that condition.

Dr Shepherd echoes the concern about sending out mixed messages about the true nature of pleural plaques and he emphasises the need to correct misunderstandings and put the degree of risk in context.

Having noted that pleural plaques may be picked up on chest x-rays and, more commonly, on CT scans, Dr Shepherd raises the prospect of repeat scans to establish whether pleural plaques are present and the possibility of a "claims culture".

From a medical perspective, Dr Shepherd does not believe it is justifiable to compensate "pleural plaques in themselves". He would wish to focus on improved education and information, thereby ensuring that funds are retained for "patients who develop asbestos-related diseases".

Ultimately he does not favour the overturning of "a decision of the highest court in the land" and he fears that the Bill may result in "more cases" and "regular CT scans", which, in light of the radiation used, may result in an increased risk of "developing cancer".

FOIL

The response from FOIL endorses the response from ABI and states that FOIL's main concern is that the Bill seeks to "circumvent due process" and a decision which was reached on the basis of "the facts and legal arguments presented".

In FOIL's view it is "vital for the independence of the judiciary and legal system that the Northern Ireland Assembly [does] not seek to influence or interfere with the Court's position."

It believes the Bill represents an "attack on the foundation of precedent" and regards the attempt to set aside the doctrine of the limitation of actions as unhelpful. In its view, if a condition becomes symptomatic, the court will be able to address the issue of limitation under its own general discretion, without the need for legislative intervention.

In relation to the ECHR, FOIL feels that the option of a fair trial will inevitably be compromised in these cases, due to the passage of time and the possible loss of witnesses. Nevertheless, it believes the retrospective element of the Bill "adds to the lack of fairness of hearing".

On the question of section 75, FOIL feels that the Bill may not be compliant because it is "actively discriminating" in favour of one group of claimants.

Ultimately, FOIL would wish the decision in the Johnston case to stand and it closes by asking whether any decision which is considered "politically unattractive" will be subject to amending legislation and whether it is now proposed that Northern Ireland should not follow precedents set by the House of Lords.

Individual Members of the Public

The responses from individual members of the public endorsed the Bill, believing it is section 75 and human rights compliant and that it will achieve the stated policy objective.

One states that "it is good to see Health and Safety at work issues now being considered" and, having called for society to recognise and respond to "harmful work conditions which may contribute to years of life lost", hopes for a speedy passage of the Bill through the Assembly.

Another notes that the number of asbestos-related diseases is expected to "peak and then subside", meaning that the financial impact of the legislation will lessen.

Kennedys Law LLP

The response from ABI was also fully endorsed by the Occupational Disease Unit in Kennedys Law LLP. Kennedys notes that the "compelling points" made by ABI were submitted to, and accepted as persuasive by, the UK Government.

In its view, "[c]aselaw which has evolved over the centuries should not be swept away at the whim of the Executive or because of pressures brought upon it by trade unions and others with a vested interest. A Claimant should only be compensated for an injury which causes him actual physical or psychological harm. It makes no sense, morally or economically, to take money from what is a finite "pot" which is required to meet the future needs of "real" victims of asbestos

related diseases, so as to provide a "windfall" to a person with no measurable physical or psychological injury".

Kennedys goes on to say that no-one can predict the number of future cases of mesothelioma and that it is vital for the insurance industry to survive and meet those claims, thereby avoiding any burden to the Exchequer.

Royal College of Physicians ("RCP")

The response from the RCP simply recognises the "confusion that surrounds the medical implications of pleural plaques" and highlights the information leaflet for clinicians, which is being prepared by the British Thoracic Society and the Department of Health in England and Wales.

Royal Sun Alliance ("RSA")

The response from RSA states that it transacts business in some 130 countries, has over 20 million customers and is the UK's largest commercial insurer.

Like ABI, RSA does not believe the Bill will achieve its objective and is concerned that it is not ECHR compliant. The arguments about interfering with employers' and insurers' rights are reiterated, as is the suggestion that the Bill will make insurers "liable for a condition that they would not otherwise be liable for".

Concerns about proportionality and the legitimacy of the policy goal are also echoed.

On section 75, RSA reiterates the ABI's comments about diverting resources away from those with a disability and suggests that "this was one of the concerns that prompted a number of US States to enact legislation preventing claims from being brought by those with symptomless asbestos-related conditions".

The response from RSA goes on to query the decision to rely on the figures produced by Scotland. In its view the figures produced by England and Wales are more reliable.

Overall, the response from RSA echoes the response from ABI, raising concerns about likely confusion, the overruling of the fundamental principles of the law of negligence, setting an unhelpful precedent and the diversion of resources.

Thompsons / Thompsons McClure Solicitors

The response from Thompsons opens by saying it is the UK's most experienced trade union and personal injury law firm, with a network of 28 offices across the UK. Thompsons only acts for TU members or victims of injury and it has acted in almost every major asbestos test case in the UK.

Thompsons welcomes the proposed Bill and the decision to "restore symptomless pleural plaques as an actionable condition". In its view, the Bill's publication "will be a relief to the many people in Northern Ireland for whom pleural plaques represents a physical marker of irreversible asbestos-induced damage to their lungs".

However, Thompsons is concerned that the Bill will not cover those cases, which, post-Johnston, were struck out by the courts or discontinued or withdrawn. This is on the assumption that someone may endeavour to argue that such cases were "determined" and therefore excluded from the protection of the Bill.

To remedy this, Thompsons suggests a slight modification to Clause 3(1)(b) of the Bill.

Zurich Insurance plc

The response from Zurich notes that it is an insurance-based financial services provider with a global network of subsidiaries serving customers in over 170 countries.

It goes on to say that Zurich was "one of the two lead insurers that brought the test litigation on pleural plaques" and that it has invested "five years of research, resources, legal expertise and liaison with medical experts towards" that litigation. It also notes that Zurich is one of the petitioners who raised the judicial review proceedings in Scotland in respect of the 2009 Act.

Just as Zurich is opposed to the 2009 Act, so it is opposed to the Bill. In its view, the decision in the Johnston case was reached on the basis of "agreed medical evidence applied to fundamental principles of the law of negligence".

Zurich repeats the argument that the payment of compensation for "anxiety rather than a recognised medical illness" will set a "dangerous" precedent and open the "floodgates". It also echoes the warnings about "higher costs being passed on to consumers by way of higher insurance premiums" and about Northern Ireland being at a "commercial disadvantage" to its competitors.

It goes on to reject the suggestion that the Bill is not retrospective in the true sense. In its view the Bill will "create a new kind of liability, going beyond the established law of tort". This would, it says, raise a "serious question about the legal framework in Northern Ireland" and result in queries as to whether that framework is founded on "stable and equitable principles that can be relied on".

On a general level, Zurich echoes the ABI's comments about perpetuating confusion about the true nature of pleural plaques, the risk of fundamentally changing the law of negligence and the undermining of business confidence.

Turning to the specific questions posed in the consultation, Zurich states that it has "serious reservations" about whether the Bill will achieve the intended objective and says that, should the Bill become law, it will be "subject to detailed legal review".

Zurich believes that "measured objectively, pleural plaques are at the very edge of the spectrum of what counts as an injury in medical terms". It also believes that the Johnston case simply restated the "long established rules of law for the recovery of damages in negligence" and that the Bill will, therefore, introduce an "entirely new right of action for an asymptomatic condition where no such right existed before." Zurich is concerned that this could lead to "unintended consequences for the future development of the law in Northern Ireland" and it repeats ABI's warning about the creation of a dangerous precedent.

Zurich goes on to ask for "further rationale" for compensating those with pleural plaques above others who have some "non-asbestos but potentially harmful exposure" who may also be worrying about "future disease".

In Zurich's view, the "Northern Ireland Executive is arguably setting out to change the facts to which the legal principles were applied, rather than the legal principles themselves."

Zurich goes on to reiterate ABI's comments about reconfiguring past policies, the possibility of "claims farmers" and the increased use of x-rays or CT scans.

On the issue of claims being time-barred, Zurich repeats the concerns about retrospectivity and suggests that comparisons with the Compensation Act 2006 are misplaced. This is because the 2006 Act dealt with asbestos-related mesothelioma, which is a "fatal disease". ABI's concerns about over and under compensation are also echoed.

With regard to the issue of human rights, Zurich also raises Article 1 of Protocol 1 to the ECHR, arguing that "an obligation to expend funds to meet..claims " constitutes an interference with the peaceful enjoyment of property and possessions. It goes on to say that "the sovereignty of Parliament and the Northern Ireland Executive in such matters" is not fettered".

In Zurich's view, there is no justification for taking the money of one private party (namely the insurer) and giving it to another private party who has a symptomless condition. Zurich notes that, in order to satisfy the requirements of the ECHR, the Bill must be both appropriate and proportionate. In Zurich's view, it is neither.

Article 6 of the ECHR is also raised and Zurich warns that the "legality of [the Bill] will be closely examined, as evidenced by our willingness to challenge the Damages (Asbestos-related Conditions) (Scotland) Act [which was] introduced on the same flawed logic by the Scottish Parliament".

Zurich declined to be drawn on the issue of section 75 or the likely impacts of the Bill.

In conclusion, Zurich repeated the call for more support and information, emphasised the "significant and negative impact on business confidence and stability" and reiterated the warning about possible legal action.

Summary of Points Made During Consultation

It will be clear from the foregoing that the majority of the respondents registered strong opposition to legislative change. The main points made by those respondents, some of which were made during the earlier general policy consultation, can be summarised as follows—

- the House of Lords reached a unanimous decision in the Johnston case on the basis of undisputed medical evidence and in accordance with the established principles of the law of negligence;
- that medical evidence has been accepted by the UK Government's medical advisor and the UK Government has, in light of that medical evidence, rejected legislative change;
- by choosing to compensate pleural plaques, the Northern Ireland Executive is out of step with most countries, including Australia and the US;
- the decision to legislate in Scotland to "make pleural plaques compensatable" is currently being challenged in the courts and, if the Northern Ireland Executive follows the Scottish lead, it will be subjected to a similar challenge;
- the burden of compensation costs could lead to businesses becoming insolvent or being placed at a competitive disadvantage;
- the law of the UK will be distorted and this will create inequality, with some people with pleural plaques being compensated, whilst others are not;
- a change to the law could result in under or over-compensation;
- there could be a reduction in the funds available to meet serious conditions, resulting in a loss of "equality of opportunity";

- the precedent value of a change to the law should not be underestimated: there is a real danger of an ever-widening range of claims, for which there is no reserve of funding;
- a change to the law could impact on Disability Living Allowance and sick pay;
- a change to the law could result in "forum shopping";
- the Northern Ireland Assembly should not seek to influence or interfere with the Courts;
- the increased legal burden and operational costs will undermine the drive to grow the private sector in Northern Ireland and impede inward investment;
- in the absence of detailed information on the prevalence of pleural plaques it is impossible to predict the full financial implications of legislative change, but those implications are likely to be vast and the financial estimates produced for England and Wales should be preferred over the financial estimates produced for Scotland;
- given the pressures on public finances, expenditure must be prioritised and directed to core needs;
- the payment of compensation sends the message that pleural plaques in and of itself is a serious condition. This will cause further confusion and anxiety to those who have been diagnosed with the condition;
- the focus should be on increased help and information, not compensation;
- legislative change would undermine the stability of the legal environment and business confidence, result in increased levels of litigation and increase the costs for business, government, local authorities and insurers;
- legislative change will lead to "claims farmers" who have a vested interest in encouraging people to seek a diagnosis of pleural plaques;
- legislative change could increase the pressure on the health system, in terms of increased demands for x-rays or CT scans;
- the imposition of compensation costs are unjustified and will divert resources away from symptomatic conditions, such as mesothelioma; and
- retrospective legislation would breach the ECHR.

Proposed Way Forward

The Department has reflected carefully on all of the above points and, having done so, it remains of the view that legislative change is the most fair, just and equitable way of dealing with the competing rights and interests which come into play in this area. Several key considerations have influenced the Department's latest deliberations and the Department would, by way of assistance, wish to set out those considerations.

The Department recognises that there has been particular concern about the likely number of claims and the financial implications of those claims. It has noted that there seems to be an assumption that legislative change will automatically lead to compensation payments and a consequent drain on public/private finances. In this regard, the Department believes that it is important to remember that the Bill will not create an entitlement to compensation or, indeed, a presumption in favour of compensation. Rather, the Bill will allow for claims for pleural plaques to once again be raised under the law of negligence. Accordingly, a claimant will still have to prove his/her case, establishing that there was a duty of care, a breach of that duty and the consequences flowing from the breach. Should a claimant "come up to proof", it will be for the court decide, or the claims negotiator to agree, the appropriate level of compensation.

A subsidiary concern on the financial side is that there will be a rush to secure a diagnosis of pleural plaques, resulting in pressure on healthcare facilities. However, for many years the law allowed for a claim for pleural plaques and, during those years, there was no suggestion that healthcare facilities were being used primarily for the purpose of establishing a possible legal claim. There is, therefore, no reason to assume that a different approach will be adopted this time around. In any event, there are rules governing the use of ionising radiation and those rules apply equally to the NHS and the private sector. More, importantly, the Department believes that it should not be assumed that anyone is in a hurry to receive confirmation of exposure to asbestos. Ultimately, a proportion of people are likely to determine that "ignorance is bliss".

Moving on to the issue of medical opinion, the Department is aware of the current thinking in the medical world. However, the Department's primary focus is not on the medical consequences of a diagnosis of pleural plaques, but whether, in law, pleural plaques should be actionable. The Department believes that most people will recognise that, whilst there may be an interface between the medical and legal spheres, they remain separate and are each dealing with different issues.

Turning to the matter of business confidence and inward investment, some of the responses to the consultation exercise seemed to suggest that there is an expectation within the business community that, once a court has pronounced on a matter, that matter will not be re-visited. However, the Department believes that members of the business community are much more astute than that and, not only do they appreciate that there are many laws which impinge on their businesses, they also accept that, with time, those laws may evolve or change. There have been previous instances where the legislature has introduced a legislative provision which overturns a court decision and the business community has taken that change to the law in its stride. An obvious example is the Compensation Act 2006 ("2006 Act"), which overturned a decision of the House of Lords regarding the concept of joint and several liability in mesothelioma cases.

The 2006 Act is not only relevant in terms of how the business community accommodates change, it also feeds in to the issues of retrospectivity and the overturning of court decisions. Whilst it is accepted that legislation is, for the most part, forward-looking, it is important to remember that there is no absolute prohibition on retrospective legislation and the legislature has, on previous occasions, introduced such legislation^[1]. It is also important to remember that, whilst the courts are afforded an appropriate degree of autonomy, the legislature is, subject to certain fundamental considerations, free to "make law", including a law which sets aside a court ruling.

It has been suggested that the decision to legislate to allow for claims for pleural plaques is out of step with other jurisdictions. This might be taken to imply that other States have done the opposite, and, with that in mind, the Department asked ABI if it was aware of legislative provisions in other jurisdictions which prohibit claims for pleural plaques. In response, ABI very kindly shared a research report^[2] which, not only looks at the history of asbestos and attempts to control/restrict its use, but which also provides an "overview of the various compensation methods that have developed over a period of many years".

The report reveals that, historically, States have adopted differing approaches. Some operate a system of workers' compensation, which "indemnifies occupational illnesses". Others have opted for employers' liability insurance, which results in "the most intensive involvement of the private insurance sector". Practice in the US is said to be "entirely atypical, as compensation is based almost completely on product liability", whilst several countries, such as France, Belgium, Japan and Slovenia, are now moving toward specific compensation funds. The report also reveals that, in or about 2005, the US contemplated the introduction of an administrative compensation system, which was to be funded by the corporate and insurance sectors. However, although the

proposal cleared "a key committee and was sent to the floor of the US Senate", it ultimately collapsed.

The report examines eight countries to "show how the different social-law parameters in each country influence liability in practice". However, with the exception of the UK and the Republic of Ireland, it does not appear to address in detail how pleural plaques cases are handled by each of those countries. As might be expected, the section on the UK duly refers to the Johnston case. However, the section on the Republic of Ireland suggests that there is one case, which, if followed, could produce a different outcome to that in Johnston.^[3] The US is not included as one of the eight countries. However, the body of the report does include a passing reference to pleural plaques, which suggests that, in that jurisdiction, "the legal definition of "injury" was friendlier to plaintiffs: in most states up until recently pleural plaques and scarring qualified as "injuries" for legal purposes, meaning that a person with signs of asbestos exposure but no functional impairment could file a legal claim for compensation". However, no further detail is given.

Despite the absence of a detailed discussion on pleural plaques, the Department believes the report is useful, in that it reinforces an essential point - namely that comparisons with other jurisdictions are not entirely helpful. This is because, as the report notes, a system of workers' compensation "makes the question of the employer's negligence and of the employee's contributory negligence irrelevant". Any comparison will, therefore, not be a comparison of like with like. More importantly, leaving aside whether comparisons are possible, the Department believes that it is for each jurisdiction to identify the best system for its citizens, taking account of local needs and interests, and that that principle applies not only within the cross-border context but also within the constituent jurisdictions of the UK. Indeed, some would argue that the devolution process necessarily contemplates different arrangements within the different jurisdictions. In this regard, concerns about "forum-shopping" should be kept to a minimum, given that there are established rules relating to where a claim may be brought.

With regard to the constituent jurisdictions of the UK, the Department would wish to explain why it referred to the figures produced for Scotland when it consulted on the draft Bill, rather than the figures produced for England and Wales. The projected figures for England and Wales, which cover a significant range, were included in the original policy consultation on pleural plaques as a prompt for discussion. It was hoped that, during that consultation, detailed information would emerge with regard to the likely number of claims, and the cost of those claims, in Northern Ireland. That hope was not met and further calls for specific information have produced sparse details. In contrast, colleagues in Scotland were, in the context of the 2009 Act, able to produce fairly specific information from a range of sources, including central and local government and the legal profession. That information was then used to produce projections about the likely financial impact of the 2009 Act. Given that the draft Bill follows that Act and, given that Scotland has had a similar industrial experience to Northern Ireland, it was considered more appropriate to look at Scotland's figures and to try to identify any possible read across.

Picking up on the cost of claims, the Department has noted the concerns which have been expressed about possible over or under-compensation. Over the years, the legal system has devised settlement schemes which endeavour to balance the needs of plaintiffs with the interests of defendants. The Department believes those schemes offer sufficient protection and lawyers/negotiators are well able to effect appropriate settlements. In particular, the Department has noted the option of provisional damages, which allows for future developments.

Turning to the issue of equality, the Department believes that the Bill is section 75 compliant, in that it allows for claims across the board, covering all of the equality groupings.

Finally, two particular concerns were raised regarding possible claims for state benefits and the funding for claims for mesothelioma. On the former, it would appear that there is a mistaken assumption that the payment of civil compensation is a qualifying factor in the allocation of State benefits. The Department would wish to emphasise that the entitlement criteria for such benefits are specified in law and an award of benefits will only be made if the criteria are met. On the latter, the Department acknowledges that the insurance industry has worked closely with the UK Government to address mesothelioma claims and to speed up the claims handling process. The Department welcomes this ongoing work and the industry's commitment to drive forward best practice.

Conclusion

Following on from the consultation, the Department will be seeking Executive agreement to introduce the Bill to the Assembly.

Annex A

Summary of consultation issues

Do you think the bill achieves the objective of ensuring that the decision in the Johnston case does not have effect in Northern Ireland? If you do not think the bill will achieve that objective please give reasons.

Do you think the bill will prevent claims from being time-barred? If you do not think the bill will achieve that objective please give reasons.

Do you think the provisions in the bill are human rights compliant? If you do not, please give reasons.

Do you agree with the department's conclusion that the provisions in the bill are section 75 compliant and that an eia is not required? If you do not, please give reasons.

Do you agree with the department's conclusions about the likely impacts of the bill? If you do not, please give reasons.

[1] See the War Damage Act 1965, the Northern Ireland Act 1972, the Education (Scotland) Act 1973 and the National Health Service (Invalid Direction) Act 1980

[2] Asbestos Anatomy of a Mass Tort © Munchener Ruckversicherungs-Gesellschaft

[3] Philip v Ryan [2004] 4 IR 241

Response to Query on Determined Cases



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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont 11 January 2011

Dear Shane,

The Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010


On 8 December the DFP Committee conducted the pre-introduction evidence session with regard to the above-named Bill and we undertook to provide further information on when an action would be "determined" and, therefore, excluded from the terms of the Bill.

Ultimately it is for the court to decide when an action has been determined and when a party is, therefore, barred from proving or denying a material fact. The legal term for the doctrine on barring is "estoppel" and estoppel can be proved in a number of ways. The most obvious form of estoppel is "estoppel per rem judicatum". This will occur when a competent court finally adjudicates on the issue in dispute. Clearly, the Bill will not allow for the resurrection of claims for pleural plaques which have already been heard and which have failed or for the re-opening of claims which have previously been settled.

Ordinarily, a judgment dismissing a claim on procedural grounds, a discontinuance or a strike out before trial will not give rise to an estoppel. However, it is worth bearing in mind that, if a discontinuance or withdrawal of an action is made by leave of the court, it may be subject to terms. The court has a wide discretion with regard to the imposition of terms and it may impose terms in relation to costs or the bringing of subsequent actions.

The Bill does not affect the established principles of law and, accordingly, unless estoppel per rem judicatum applies or the court has imposed terms, there should not, subject to the following qualification, be any difficulty in bringing an outstanding claim back into the justice system.

Clearly, therefore, the Bill may cover claims which were withdrawn or discontinued on foot of the Johnston case, as well as future claims. However, as subsection (1)(b) of the Bill makes clear, the clock is only stopped in respect of an action which had been commenced, but not determined. So, for example, if a claim was already out of time before the Johnston case, the Bill will not adjust the position in respect of that claim and it cannot be resurrected.



Norman Irwin

From the Office of the
Minister for Finance & Personnel



Jennifer McCann MLA
Chairperson
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Your reference:
Our reference: COR/962/2011

A handwritten signature in black ink, appearing to read "Dear Jennifer".

24 January 2011

Thank you for your letter of 14th January. As you will be aware section 44(9) of the Northern Ireland Act provides:-

A person is not obliged under this section to answer any question or produce any document which he would be entitled to refuse to answer or produce in proceedings in a court in Northern Ireland.

Legal advice received by my Department whether from departmental legal advisers, from the Attorney General or from any other source is privileged and so the Committee is not entitled to require its production. I am also conscious of the longstanding convention in government that Ministers do not disclose whether advice has been sought from the Attorney General on the content of any such advice.

I note your reference to the Energy Bill. It is not without precedent for the fact that the Attorney has been consulted and his advice to be put in the public domain. Nonetheless, there is a strong convention that this should not be done and I intend to abide by that convention.

I am aware of the correspondence between the Committee and my Department in which this issue was first raised. On that occasion the issue was the timing of the Bill in the light of the challenge to similar legislation in Scotland.

You will recall that it is my responsibility to state when I seek to introduce a Bill whether I believe it is within the legislative competence of the Northern Ireland Assembly. I have stated that I consider that this Bill is within the Assembly's competence. I am fortified in this view by the decision by Lord Emslie in the Axa Case where similar provisions in Scottish legislation were held to be within the legislative competence of the Scottish Parliament. That case is under appeal and a decision is expected in February. If the Appeal Court decides that the provisions are outside competence, I will reconsider this bill and, if necessary, seek Executive approval to propose amendments.

Response to Query on Advice from the Attorney General

Yours sincerely



SAMMY WILSON MP MLA

Ministerial Correspondence - Proposed Extension to Committee Stage

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Your reference:
Our reference: INV/65/2011

Mr Daithí McKay
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Committee for Finance and Personnel
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11 February 2011

Dear Daithí

DAMAGES (ASBESTOS-RELATED CONDITIONS) BILL

Further to our telephone conversation I would be grateful if you could seek approval from the Committee to amend the extension to the Committee Stage of the above Bill from 23 March to 9 March to enable it to go through the legislative process before the end of this Assembly's mandate.

As you are aware this legislation is designed to assist those who have been negligently exposed to asbestos and who have developed pleural plaques and would if enacted reinstate the law as it was before the decision of the House of Lords in the Johnston case. Many of those who write to the department urging this measure are elderly and delay may result in some never being compensated. I am also concerned that if the Bill is not enacted during this mandate the delay may be used by the insurance companies to challenge the legislation if enacted.

Yours sincerely

Sammy Wilson MP MLA

Appendix 4

Memoranda and Papers from Others

Association of British Insurers

Ms Jennifer McCann MLA
Northern Ireland Assembly
Parliament Buildings
Stormont
Belfast
BT4 3XX

Dear Ms McCann

Pleural Plaques in Northern Ireland

I am writing on behalf of the Association of British Insurers (ABI), the representative body for the insurance industry in the UK, in regard to a briefing that the Finance and Personnel Committee is due to hear from departmental officials on the issue of pleural plaques, currently scheduled for 30 September 2009.

We understand that the Minister for Finance and Personnel is considering making pleural plaques a compensatable condition in Northern Ireland. We also understand that this is an important issue in Northern Ireland and that the Committee will be giving the matter careful consideration.

We are writing to explain our opposition to this proposal and would very much welcome a meeting with you in your capacity as Chair of the Finance and Personnel Committee to discuss this matter.

Pleural plaques are small areas of fibrosis or scarring on the lungs. They are indicators of exposure to asbestos but are symptomless and do not cause asbestosis-related disease. Independent experts have confirmed that there is no medical or legal case to make plaques a compensatable condition and that this kind of legislation will not benefit people who have previously been exposed to asbestos and come to harm as a result. We also believe that doing so could have a significant detrimental impact on the cost and availability of insurance in Northern Ireland and on the Executive's own resources.

We wish to highlight the main reasons why we oppose legislating in this matter:

1. Medical evidence: The overwhelming medical consensus is that pleural plaques do not affect quality of life, life expectancy, or lead to asbestos-related diseases such as mesothelioma. The Chief Medical Officer in England and the Industrial Injuries Advisory Committee have both recently confirmed this in their recent reports to the UK Government and NI Executive.
2. Implications for the law: Such a change in the law could set a dangerous precedent that could lead to a flood of 'exposure only' claims. That is to say, people may seek compensation for exposure to toxic substances, based on the anxiety this has caused them, rather than any actual harm caused.
3. Implications for Northern Ireland business: Making pleural plaques compensatable would have serious implications for the insurance market in Northern Ireland and, as a consequence, potentially affect businesses seeking Employers' Liability insurance.
4. Costs to NI Executive: Harland and Wolff was in public ownership from 1975-1986. In 2002, DETI estimated that H&W asbestos-related claims would be just under 3,000 by 2050. ABI believe that there could be significant cost implications for DETI if this condition were to become compensatable.

We have attached a briefing paper that explores these issues in greater detail and would very much welcome an opportunity to meet with you to discuss these issues and any others you might have. If suitable it may be convenient to arrange a joint meeting with party colleague Mitchel McLaughlin MLA. We will be in touch over the coming days in the hope that we can arrange a date for a meeting at your convenience.

Yours sincerely



Association of British Insurers:

Briefing Paper

Pleural Plaques in Northern Ireland

The ABI is the voice of the insurance and investment industry. A number of its members operate in Northern Ireland, and its members constitute over 90 per cent of the insurance market in the UK, and 20 per cent across the EU. They control assets equivalent to a quarter of the UK's capital. They are the risk managers of the UK's economy and society. Through the ABI their voice is heard in Government and in public debate on insurance, savings, and investment matters. The ABI has worked closely with various NI departments over the last ten years to improve customers' experience of the industry, to raise standards of corporate governance in business and to provide services for people affected by crime, injury or accident.

Insurers are committed to paying fast, fair and efficient compensation to people who are injured or made ill as a result of their employer's negligence, and the industry pays out £1.5bn in Employers' Liability (EL) claims every year in the UK.

Background

In June 2009, the then Finance & Personnel Minister Nigel Dodds MLA MP recommended a change to the law in Northern Ireland which would allow people with pleural plaques to claim compensation. The Finance & Personnel Committee of the Assembly will shortly be considering proposals from DFP on this issue.

Pleural plaques are small areas of fibrosis or scarring on the lungs. They are harmless in themselves but are indicators of previous exposure to asbestos. They do not cause illness nor develop into more serious asbestos-related conditions such as asbestosis.

The ABI would oppose any such move towards changing legislation to allow pleural plaques to become a compensatable disease for the following reasons:

1. It is not the best way to help people with pleural plaques. The overwhelming medical consensus is that pleural plaques do not qualify as a compensatable condition, as they do not affect quality of life, life expectancy, or lead to asbestos-related diseases such as mesothelioma. The view that pleural plaques are not a disease was confirmed in a recent report from the Chief Medical Officer for England and a report from the Industrial Injuries Advisory Council^[1] to the DWP and DSD on the Industrial Injuries Disablement Benefit.

Indeed, medical opinion argues that reassurance to those with pleural plaques - that they would not suffer any symptoms - would be undermined if they could then receive compensation. Therefore legislating to make compensation payable for anxiety rather than a recognised medical illness will only add to the confusion and anxiety for people with pleural plaques. Raising awareness about the benign nature of pleural plaques is the best way to help those diagnosed with them. We have consistently argued for Government action to focus on targeted public information reassuring people with pleural plaques that they will not develop into a disease like lung cancer or mesothelioma. In the very rare cases where people with pleural plaques do have symptoms, they will continue to be able to receive compensation.

2. It sets a legal precedent with wide implications: Creating rights based on exposure and/or anxiety about the prospect of a future illness, rather than damage itself, would set a dangerous precedent that could lead to a flood of 'exposure only' claims. It would be extremely difficult, both politically and legally, to restrict this to asymptomatic asbestos-related conditions only, and people in future may seek compensation for exposure to a wide range of toxic substances based on the anxiety this has caused them rather than any actual harm.

3. Implications for businesses in Northern Ireland: Making pleural plaques compensatable would have serious implications for the insurance market in Northern Ireland and, as a consequence, for businesses. Insurers rely on a stable legal framework. If insurers cannot be confident that the law will remain broadly consistent, it is possible that insurers will seek to limit their exposure in the Northern Ireland market or that they will have to increase premiums to cover for this risk.

This general risk is exacerbated by the fact that it is particularly difficult to produce future forecasts for pleural plaques claims because it is very difficult to know how many people will develop pleural plaques and will claim - studies have estimated that pleural plaques are found in as many as 50% of asbestos-exposed workers^[2]. Insurers therefore have to reserve adequate funds for a wide range of scenarios.

In the current climate, this uncertainty could have a particular impact on premiums for small and medium sized businesses and local authorities. The particular vulnerability of the Northern Ireland employers' liability insurance market as a largely SME-based economy was recognised in the 2003 Office of Fair Trading report on the UK liability insurance market.^[3]

4. Implications for NI Executive: It is also worth noting that making pleural plaques compensatable could create substantial liabilities for the Executive. As you will know, Harland and Wolff was in public ownership from 1975-1986. DETI is responsible for funding many of the historic liabilities for Harland & Wolff and we understand that introducing compensation for pleural plaques could cost DETI some £10m in one-off cost and more over time.

While we understand that the legacy of shipbuilding and manufacturing in Northern Ireland makes this an emotive issue, legislating to make pleural plaques a compensatable condition will not benefit people who have previously been exposed to asbestos and come to harm as a result. Indeed, there is no medical or legal case to support making pleural plaques compensatable. However, such a move could have a significant detrimental impact on the cost and availability of insurance in Northern Ireland and on the Executive's own budget. The best way to help people with pleural plaques is to provide reassurance that they are benign and will not cause them any harm.

ABI

August 2009

[1] http://www.iac.org.uk/pdf/pos_papers/pp23.pdf

[2] Chapman, SJ et al Benign Asbestos Pleural Disease, *Curr Opin Pulm Med* 2003;9(4), 266-271

Association of British Insurers: Response to Committee Decision



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23 October 2009

Pleural plaques

On behalf of the Association of British Insurers, I would like to express my sincere concern at both the intention of the Minister of Finance and Personnel to legislate to compensate people in Northern Ireland with pleural plaques and also the Committee's reported position at its meeting on 7 October 2009 that a majority of its Members are persuaded towards legislation.

As we explained in our briefing paper to the Committee, legislation is not the best way to help or reassure people with benign pleural plaques. Indeed it may cause undue anxiety and worry to people with a benign condition that has no symptoms.

It would also be a fundamental change in the law. The *Rothwell* judgment did not change the law, as officials incorrectly said in their evidence session. The Law Lords do not of course have the power to change the law; they simply interpret it. In the *Rothwell* judgment, the Law Lords applied the existing law that symptomless conditions are not compensatable to the new medical consensus that plaques are benign and therefore concluded that compensation is not payable for plaques. By contrast, introducing compensation for a symptomless condition such as plaques would be a radical change in the law.

Legislation is not only likely to result in significant liabilities for the insurance industry, but it will also bring considerable cost to the Northern Ireland Executive (through inherited liabilities of Harland and Wolff).



A move towards legislation will also be extremely unhelpful in keeping a stable operating environment for insurance providers. We fear that it is likely to impact on consumers in terms of higher premiums. Northern Ireland is already a very small market for large insurance companies. Legislating to compensate symptomless conditions risks making this market less attractive. Unfortunately a reduction in competition will lead to diminishing choice and less value for customers, particularly those customers who are also employers.

We urge the Minister and the Committee to consider this matter very carefully, to take advice on the likely contingent liabilities (through the DETI commitment to H&W), to await the full and final outcome of the Scottish Judicial Review process and the UK Government's deliberations on this issue, and consider the far-reaching implications of legislation.

We are meeting with the Finance & Personnel Minister Sammy Wilson on Thursday 12 November and will be raising these concerns in person.

Cost of insurance in Northern Ireland

We also followed your debate on the cost of insurance in Northern Ireland with interest and have had a chance to consider the issues raised in the Northern Ireland Consumer Council's report. While we have concerns about the robustness of some of its findings, we do support its three recommendations. Indeed, some of this work is already underway.

On the issue of increasing the number of households with appropriate insurance, the ABI has instigated a programme of promotional and educational activity to increase awareness among social landlords and tenants of the benefits of home contents insurance. We have launched a micro-site which provides information for landlords and tenants on how home contents insurance works, how to select the right product, and how to promote it¹. We have also worked with the Financial Inclusion Champions to develop a training tool for housing officers on how to promote home contents insurance to their tenants, and are hoping to visit a number of social landlords in Northern Ireland to raise awareness of our work before the end of the year.

At the same time, it is clear that the disproportionately high legal costs in Northern Ireland are contributing to the higher costs of insurance in some circumstances. This is because all claims arising out of road traffic accidents are excluded from the Small Claims Court. The majority of property damage only compensation claims are relatively straightforward and are generally for small amounts of money - these are successfully handled by the small claims track in England and Wales where fixed costs are recoverable but not the costs of legal representation. In Northern Ireland, these claims

¹ www.abi.org.uk/Access_to_Insurance/Access_to_Insurance.aspx



come within the County Court where the scale costs structure means that costs will automatically attach once a claim is issued, and are particularly disproportionate. For example, once a claim for £100 excess is issued, the claimant's solicitor will claim £ 344.66 costs (+ VAT) even where liability is not in dispute and the claim is paid immediately. Moving these cases to a small claims track could make an important difference to the cost base of insurance in Northern Ireland and could have a positive knock-on effect on the cost of insurance.

A handwritten signature in black ink, appearing to read 'Nick Starling'.

A second handwritten signature in black ink, appearing to read 'Nick Starling'.

Nick Starling
Director of General Insurance and Health

NI 14 10

CBI response to the Department of Finance and Personnel consultation on the draft damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010

The Confederation of British Industry (CBI) is the national body representing the UK business community. It is an independent, non-party political organisation funded entirely by its members in industry and commerce and speaks for some 240,000 businesses that together employ around a third of the UK private sector workforce. The CBI's membership includes 80 of the FTSE 100, some 200,000 small and medium-sized firms, more than 20,000 manufacturers and over 150 sectoral associations.

General Comments

1.1 Pleural plaques are localised areas of fibrosis found within the pleura of the lung and are caused by exposure to low as well as high levels of exposure to asbestos. However, they do not normally impair lung function. The medical evidence supports that pleural plaques are an indication of exposure to asbestos, but that they are not in themselves an injury or disease. It should be noted that in some parts of the world, plaques are endemic in the general population, where they arise from natural or man-made environmental contamination with asbestiform minerals (Hillerdal 1997)¹.

1.2 On 17th October 2007, the House of Lords issued a landmark judgment stating that since pleural plaques are benign and do not themselves constitute any physical impairment for those who have them, they did not constitute the basis for an action in negligence and that therefore they were not damage for which any compensation was due. The judgement suggested that if a person suffers anxiety as a result of pleural plaques, it is caused not so much by the condition as by the fact that he has been told that he has it. The judgement was unanimous and was based on detailed medical evidence that was not disputed by either the claimants or by the defendants (Johnson v NEI International Combustion Ltd and conjoined cases - know earlier as Rothwell v Chemical & Insulating Co Ltd). It has been recognised that the House of Lords' decision was in keeping with the established principles of the law of negligence.

1.3 The campaign to make pleural plaques compensatable is based on a general lack of understanding of pleural plaques. Saying that pleural plaques may be worthy of compensation sends the message that pleural plaques are not benign and are more serious in nature. More needs to be done to allay the concerns of people with pleural plaques – this can be achieved through improving understanding of the condition, which will provide reassurance and reduce anxiety. The best way to raise awareness and understanding is to increase levels of accurate information about pleural plaques, to medical professionals, those diagnosed with pleural plaques and the wider community.



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Consultation Comments

1. Do you think the Bill achieved the objective of ensuring that the decision in the *Johnston* case does not have effect in Northern Ireland? If you do not think the bill will achieve that objective please give reasons.

1.1 Businesses accept that it is essential to increase the level of information available to those with pleural plaques and the wider public – in particular to explain the fact that pleural plaques are benign. However, CBI oppose in the strongest terms overturning the 2007 House of Lords decision in *Johnston v NEI International Combustion Ltd*. Overturning this decision blatantly ignores the overwhelming scientific evidence which it took account of.

1.2 It is our opinion that overturning the judgement in *Johnston v NEI* would lead to a fundamental change to the law of negligence, undermining stability of the legal environment. For the first time, compensation for injury would be payable on the basis of something other than injury. One particular group of people would be identified as injured, even though, according to the principles of what constitutes damage under English common law, they have not been. This would create the potential for the decision to be used as a precedent to argue for compensation in other situations. There are many agents that have been widely used in recent times at work, which are now classified as having potential long-term carcinogenic or mutagenic effects. If it were established that concern about exposure were compensatable, current estimates on compensation would be greatly exceeded. Such an outcome would have the effect of increasing uncertainty for businesses and insurers, as well as lead to a growth in litigation, as it would be more permissible to bring claims for compensation based on perceived or feared injury rather than medical fact. Any increase in legal instability and uncertainty of this type would increase the insurance and operating costs of businesses, central government and local authorities, as well as reducing the attractiveness of the UK as a place to do business.

2. Do you think the Bill will prevent claims from being time-barred? If you do not think the bill will achieve that objective please give reasons.

2.1 The effect of legislating to compensate for asymptomatic pleural plaques may arise that claimants will be required to raise their claims within three years of diagnosis of the pleural plaques. If the claimant then proceeds to settle their claim and subsequently develops mesothelioma, this would result in a gross under-compensation. CBI does not believe that this legislation provides a suitable duty of care for those claimants with mesothelioma and could potentially lead to a financial shortfall for this group by reducing the available fund.

3: Do you think the provisions in the bill are human rights compliant? If you do not, please give reasons.

3.1 Equivalent legislation introduced by the Scottish Parliament - the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 is currently subject to a judicial review in Scotland on various grounds. It is currently being argued that the Bill is likely to be in breach of employers' and insurers' rights under Article 1 Protocol 1 and Article 6 of the European Convention on Human Rights (ECHR). By overturning the House of Lords ruling on asymptomatic conditions, this Bill would make employers and their insurers retrospectively liable for a condition for which they would not otherwise have any liability.

4: Do you agree with the department's conclusion that the provisions in the bill are Section 75 compliant and that an EIA is not required? If you do not, please give reasons.

4.1 Section 75 places a statutory obligation on public authorities in carrying out their various functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity –

- between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without

4.2 CBI believes the payment of compensation for asymptomatic pleural plaques does not create equality of opportunity between persons with a disability and persons without. Given that a person with asymptomatic pleural plaques would not be deemed to have a "disability" and would unfavourably benefit from the ability to claim for compensation. This legislative change would divert invaluable resources away from symptomatic conditions and would disproportionately impact on "disabled persons" who in this instance would be people who are diagnosed with mesothelioma.

4.3 The payment of compensation sends the message that pleural plaques in and of itself is a serious condition. This causes further confusion and anxiety to those who have been diagnosed with the condition and will further reduce the financial support available to those claimants who are suffering with severe disabilities such as mesothelioma.

5: Do you agree with the Department's conclusions about the likely impacts of the bill? If you do not, please give reasons.

5.1 The CBI strongly advocates increasing the support and information for those with pleural plaques and the wider public. However, we do not support overturning the House of Lords decision in *Johnston v NEI International Combustion Ltd* because:

5.2 There is a lack of accurate understanding of pleural plaques and compensation is not the best way to help people who are diagnosed with this condition – paying compensation perpetuates the confusion. More needs to be done to allay the concerns of people with pleural plaques – this can be achieved through improving understanding of the condition. Education on the benign nature of pleural plaques and improving the information available will provide reassurance and reduce unnecessary anxiety.

The best way to raise awareness and understanding is to increase levels of accurate information about pleural plaques, to medical professionals, those diagnosed with pleural plaques and the wider community. For this to be effective, the information given through many sources needs to be consistent. Consistency of messaging is important to allay concerns, and therefore the implementation of a pleural plaques register would not be appropriate or necessary.

5.3 Overturning a House of Lords decision will increase uncertainty and undermine business confidence – overturning the House of Lords decision proposes a fundamental change to the law of negligence, undermining stability of the legal environment and increasing uncertainty. Industry should be able to rely on the certainty of House of Lords decisions, to shape business practices accordingly. Overturning the House of Lords judgement would have the effect of increasing the level of litigation and therefore increasing the level of insurance premiums for employers' liability and public liability policies, as well as other currently unforeseeable consequences. Any increase in legal instability and uncertainty would lead Northern Ireland to become a less attractive place for investment and would increase the costs for business, government, local authorities and insurers. Legislative change will result in increased levels of litigation and will create an unfavourable business environment for the private sector to grow and prosper in Northern Ireland.

5.4 It will fundamentally change the law of negligence – interference with the fundamental principles of law in this way may be used as a precedent to argue for compensation for other currently non-compensatable conditions, further increasing costs. Introducing this legislation will result in one particular group of people being identified as injured, even though, according to the principles of what constitutes damage under UK common law, they have not been injured and have not suffered damage. Furthermore, there would be the potential for the decision to be used as a **precedent** to argue for compensation in other situations. There are many agents that have been widely used in recent times at work, which are now classified as having potential long-term carcinogenic or mutagenic effects. If it were established that concern about exposure were compensatable, current estimates on compensation would be greatly exceeded. It has the potential to lead to "claims farmers" who have a vested interest in encouraging people to seek a diagnosis of pleural plaque and "forum shopping".

5.5 It will place an unnecessary burden on the public sector purse. Given the current strain on public funding with the block grant funding for Northern Ireland being reduced by £128m in 2010/11 and very major cuts expected over the next four years (a reduction of £1.5bn is currently being seriously considered) taxpayers money should be prioritised. Legislative change could inadvertently increase the pressure on the health system, in terms of increased demands for x-rays or CT scans which is the only costly way of diagnosing pleural plaques. In the absence of detailed information on the prevalence of pleural plaques, the value of a change to the law should not be underestimated: there is a real threat that an ever-widening range of claims for which there is no reserve of funding. The industrial injuries advisory council review of pleural plaques suggests that as many as 36,000 to 90,000 people a year may be developing plaques. By granting this privilege to people with pleural plaques, it could raise concerns regarding their right to Disability Living Allowance or sick pay which would result in a further strain on the already over-extended benefit budget for Northern Ireland.

5.6 CBI believes that Option 1 in the RIA is the most appropriate option and would disagree with the assumption that this option is "doing nothing". Option 1 reinforces the wealth of medical evidence which states that pleural plaques does not develop into lung cancer or mesothelioma and provides adequate support for this "benign" condition. It also provides financial protection for the most serious cases of mesothelioma by ensuring that funds are appropriately awarded to the most serious cases.

5.7 CBI believes that Option 3 is not the most preferred method as this will have a detrimental impact on the:

- Most serious cases of mesothelioma by reducing the pot of money available to these people. This will inadvertently result in a potential breach of the equality of opportunity available to "disabled persons" under Section 75 by allowing people without a classified disability to claim from the same fund.
- Increase confusion and uncertainty amongst people who are diagnosed with benign pleural plaques which could result in a further challenging of the Disability Living Allowance or social security entitlements.
- Create a culture of "ambulance chasers" in Northern Ireland whereby "claim farmers" and "forum shoppers" will materialise.
- Add undue pressure to the health system as the marketing engine of "claim farmers" encourage more people to claim for pleural plaque compensation and will increase costly X rays and CT scans which are the only way to properly diagnose asymptomatic pleural plaques.
- Fundamentally change the law of negligence. Interfering with the fundamental principles of law in this way may be used as a precedent to argue for compensation for other currently non-compensatable conditions, which would further increase costs to the government and industry.
- It is likely that the introduction of this legislation will follow similar events in Scotland with costly judicial reviews which have resulted in increased legal costs and created further uncertainty for individuals and businesses.
- In light of plans to encourage the growth of the private sector in Northern, this legislative burden and increased operating cost for businesses will make Northern Ireland a less attractive place for inward investment.

3 September 2010
CBI Northern Ireland

¹ Hillerdal G. Pleural plaques: Incidence and epidemiology, exposed workers and the general population. *Indoor Built Environ* 1997;6:86-95.

Association of British Insurers Briefing - Draft Damages (Asbestos-Related Conditions) Bill

Shane,

Please find attached a briefing from the Association of British Insurers on the Draft Damages Asbestos-Related Conditions Bill outlining their concern with the proposed legislation ahead of the scheduled pre-introductory briefing from departmental officials tomorrow. I have already circulated to Members on the Committee.

Also, the Committee may find of interest a copy of the letter sent by the ABI to the Assembly Speaker, dated 22 November, expressing their concern that the Bill may be in breach of the European Convention of Human Rights. Similar legislation in Scotland is being challenged on this basis. The ABI has asked me to make you aware of this letter.

Regards,

Mark

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Pleural Plaques In Northern Ireland

The ABI is the voice of insurance, representing the general insurance, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has over 300 members, around 90% of premiums in the UK, and a number of its members operate in Northern Ireland. The ABI has worked closely with various Northern Ireland departments over the last ten years to improve customers' experience of the industry, to raise standards of corporate governance in business and to provide services for people affected by crime, injury or accident.

Background

Insurers are committed to paying fast, fair and efficient compensation to people who are injured or made ill as a result of their employer's negligence, and the industry pays out £1.5bn in Employers' Liability (EL) claims every year in the UK. Insurers currently pay around £200 million a year to sufferers of mesothelioma and other asbestos-related diseases, and have paid out £1bn to £2bn over the past 20 years.

The Damages (Asbestos-Related Diseases) (Northern Ireland) Bill aims to allow people with pleural plaques to claim compensation from their former employers, insurers and the NI Executive. Pleural plaques are small areas of fibrosis or scarring on the lungs. They are harmless in themselves but are indicators of previous exposure to asbestos. They do not cause illness nor develop into more serious asbestos-related conditions such as asbestosis. The UK Supreme Court^[1] therefore found in the 2007 Rothwell case that pleural plaques were not a compensatable condition, and did not meet the criteria of a valid liability claim, that there must be a negligent act by the defendant; this must cause an injury to the claimant's body; and the

claimant must suffer material damage as a result. In the very rare cases where people with pleural plaques do have symptoms, they are still able to receive compensation.

The ABI opposes the Damages Bill for the following reasons:

1. It is not the best way to help people with pleural plaques The overwhelming medical consensus is that pleural plaques do not qualify as a compensatable condition, as they do not affect quality of life, life expectancy, or lead to asbestos-related diseases such as mesothelioma. This was confirmed in a recent report from the Chief Medical Officer for England, who concluded 'that the occurrence of pleural plaques does not provide a satisfactory basis for providing compensation to some of those exposed to asbestos. I would thus advise against a change in the law to allow pleural plaques to be considered as grounds for compensation.' This view was also ratified by a report from the Industrial Injuries Advisory Council^[2] to the DWP and DSD on the Industrial Injuries Disablement Benefit.

Indeed, medical opinion argues that reassurance to those with pleural plaques - that they would not suffer any symptoms - would be undermined if they could then receive compensation. Legislating to make compensation payable for anxiety rather than a recognised medical illness will only add to the confusion and anxiety for people with pleural plaques. Raising awareness about the benign nature of pleural plaques is the best way to help those diagnosed with them.

2. It sets a legal precedent with wide implications: Creating rights based on exposure and/or anxiety about the prospect of a future illness, rather than damage itself, would set a dangerous precedent that could lead to a flood of 'exposure only' claims. It would be extremely difficult, both politically and legally, to restrict this to asymptomatic asbestos-related conditions only, and people in future may seek compensation for exposure to a wide range of toxic substances based on the anxiety this has caused them rather than any actual harm.

3. Implications for the NI Assembly and Executive: There is a significant risk that the Bill's provisions (if enacted) would breach employers' and insurers' rights under the European Convention on Human Rights (ECHR). As such, it is outside of the Assembly's 'legislative competence' to pass this Bill. This is especially so because, in our view, the NI Assembly has not considered sufficiently alternative means of reaching policy objectives; for example, the route pursued in England and Wales of offering benefit to those whose claims had commenced before the House of Lords decision in Rothwell. It is particularly important for the Assembly to evaluate this legislation carefully given that the Damages (Asbestos-Related Conditions) (Scotland) Act 2009, on which the Bill is almost entirely based, is at this very moment subject to judicial review in Scotland on the basis of similar legal concerns.

Making pleural plaques compensatable could create substantial liabilities for the Executive. DETI is responsible for funding many of the historic liabilities for the Harland & Wolff shipyards^[3], which was where the majority of exposure to asbestos in NI took place, and we understand that introducing compensation for pleural plaques could cost DETI some £10m in one-off cost and more over time. Given the current budget deficit and expenditure cuts facing the NI Executive, this money could arguably be put to better use.

4. Implications for businesses in Northern Ireland: Making pleural plaques compensatable would have serious implications for the insurance market in Northern Ireland and, as a consequence, for businesses. Insurers rely on a stable legal framework. If insurers cannot be confident that the law will remain broadly consistent, it is possible that insurers will seek to limit their exposure in the Northern Ireland market or that they will have to increase premiums to cover for this risk.

This general risk is exacerbated by the fact that it is particularly difficult to produce future forecasts for pleural plaques claims because it is very difficult to know how many people will

develop pleural plaques and will claim - studies have estimated that pleural plaques are found in as many as 50% of asbestos-exposed workers[4]. In the current climate, this uncertainty could have a particular impact on premiums for small and medium sized businesses and local authorities[5].

While we understand that the legacy of shipbuilding and manufacturing in Northern Ireland makes this an emotive issue, this Bill is not in the best interest of those with pleural plaques, or those with asbestos-related diseases such as mesothelioma. The NI Executive should instead invest in targeted public information reassuring people with pleural plaques that they are benign and will not cause them any harm, and ensuring that those with compensatable diseases are compensated as quickly as possible.

ABI, December 2010

[1] Then the House of Lords.

[2] http://www.iiac.org.uk/pdf/pos_papers/pp23.pdf

[3] As these were in public ownership from 1975-1986.

[4] Chapman, SJ et al Benign Asbestos Pleural Disease, *Curr Opin Pulm Med* 2003;9(4), 266-271

[5] The particular vulnerability of the Northern Ireland employers' liability insurance market as a largely SME-based economy was recognised in the 2003 Office of Fair Trading report on the UK liability insurance market - see http://www.offt.gov.uk/shared_offt/reports/financial_products/oft659b.pdf.



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Speaker of the Northern Ireland Assembly
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22 November 2010

Dear Mr Speaker

Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010

I am writing to you to raise our urgent and substantial concerns about the Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010 (the Bill).

Based on the advice we have received, there are real doubts as to whether the Northern Ireland Assembly can, in terms of its powers under the Northern Ireland Act 1998, pass this proposed legislation. We believe there is a significant risk that the Bill's provisions (if enacted) would breach the European Convention on Human Rights (ECHR). As such, it is outside of the Assembly's 'legislative competence' to pass this Bill. This is especially so because, in our view, the NI Assembly has not considered sufficiently alternative means of reaching policy objectives; for example, the route pursued for England and Wales of offering benefit to those whose claims had commenced before the House of Lords decision in *Rothwell*.

We raised these concerns in response to the Department for Finance and Personnel consultation CP 02/08 on Pleural Plaques. They were subsequently referred to in the Department's consultation on the draft Bill. However, we do not think these concerns have been considered adequately by either the Department in its consultation responses or in the debates in the Finance and Personnel Committee. As such, we believe that if the Assembly proceeds with the legislation there is a substantial risk of future legal challenge.

As noted by members of the Finance and Personnel Committee, it is particularly important for the Assembly to evaluate this legislation carefully given that the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 (on which a number of consultees relied to justify their own support for the Bill) is at this very moment subject to judicial review in Scotland on the basis of similar legal concerns.

Breach of ECHR rights

We believe the Bill (if enacted) will breach the Convention rights (i.e. those rights contained in the ECHR and incorporated into UK law) of those, including employers and insurers, who will bear the burden of the proposed Bill.



We consider that the Bill if passed will breach employers' and insurers' rights under Article 1 Protocol 1 of the ECHR. By making asymptomatic conditions 'compensatable', the Bill would make employers and their insurers liable for a condition for which they would not otherwise have any liability. That liability would be significant in monetary terms and, indeed, at this stage is unquantifiable. Imposing such liability represents an interference with possessions for the purposes of Article 1 of Protocol 1 which could only be justified on the grounds of compelling public interest and where it could be shown to be a proportionate response. Compensating those who have an asymptomatic condition is not a legitimate policy goal and, even if it were, the benefits (if any) of doing so are not sufficient to justify such a substantial interference with the property rights of employers and insurers.

We also believe that the Bill if passed will breach employers' and insurers' rights under Article 6 of the ECHR. The Bill would make employers and their insurers liable retrospectively for a condition for which they would not otherwise have been liable. This would be contrary to Article 6 as it would interfere with settled arrangements. Again this interference could only be justified on the grounds of compelling public interest, which does not exist in this instance. The questionable legality of imposing such retrospective liability is further compounded by the delay of two years since the *Johnston* decision was issued: parties in Northern Ireland have quite properly organised their affairs on the assumption that the decision of the House of Lords was an authoritative and final determination of the question of compensation for pleural plaques.

Conclusion

I would urge you to take comprehensive legal and constitutional advice on the matters raised in this letter and to instruct the Committee considering the Bill to do likewise. As you will appreciate, while legal proceedings remain ongoing in Scotland the legal position is extremely uncertain and it would be in no one's interests for the Assembly to proceed with legislation which might ultimately be found to be *ultra vires*.

We would be happy to meet you to discuss these points further.

Yours sincerely

Maggie Craig
Acting Director General

Association of British Insurers: Introduction of Legislation



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10 January 2011

Dear Jennifer McCann

Draft Damages (Asbestos Related Conditions) (Northern Ireland) Bill 2010

I am writing in regard to the draft Damages (Asbestos Related Conditions) (Northern Ireland) Bill 2010, which the Finance and Personnel Committee is shortly due to consider during Committee Stage of the Bill.

On behalf of our members, I would like to emphasise my sincere concern at the lack of time available for the Committee to properly scrutinise and consider oral evidence on legislation that, if passed, will dramatically affect the way in which the insurance industry operates in Northern Ireland.

Our members welcome the fact that the Committee has called the Association of British Insurers and representatives from the insurance industry to give oral evidence on the Bill, but we are extremely concerned that the Committee will not have time to receive oral evidence from the medical profession, academia or actuarial experts, all who have important views on the need for and impact of this contested Bill.

The Committee is also aware that similar legislation is currently the subject of legal challenge in Scotland and we strongly advise that the Committee seeks independent legal advice on whether the Bill is within the competence of the Northern Ireland Assembly. In addition, we believe that the Bill may breach Articles 1 and 4 of the European Convention of Human Rights and would urge the Committee to seek evidence on this matter.

We are also aware that the Department of Enterprise, Trade and Investment in its recently published spending proposals has provided £31million for state liabilities from asbestosis and pleural plaques. Despite the impact of this costly figure on the DETI budget, we believe it to be a conservative estimate at best and suggest that the Committee should have the proper time and opportunity to consider oral evidence from DETI officials on how this figure was arrived at and the detail of how it is broken down. We do not recollect the Regulatory Impact Assessment associated with the Bill identifying such a cost and would also urge the Committee to seek wider independent evidence on the potential financial impact of the Bill, both to the Northern Ireland Executive and to the insurance industry.



ABI

We recognise that the Committee has an important role in scrutinising this contested legislation, which as it stands, will fundamentally change the law of negligence. We believe that the two oral evidence sessions with outside organisations on 12th and 19th January does not reflect the important and varied views that exist, nor does it give the Members of your Committee adequate scope to properly carry out its function in considering the Bill. We would strongly urge you to consider these matters before proceeding.

Yours sincerely
Nick Starling

Nick Starling
Director of General Insurance and Health

www.abi.org.uk

Appendix 5

Written Submissions

Kennedys Law

**Response to the Northern Ireland
Assembly, Committee for Finance
and Personnel's call for evidence-
Damages (Asbestos-related
conditions) Bill (NIA Bill 10/10)**

Committee Clerk
Room419
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Ballymiscaw
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7 January 2011

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*Kennedys is a trading name of Kennedys Law LLP.
Kennedys Law LLP is a limited liability partnership registered in England and Wales
(with registered number OC353214)*

1. SECTION ONE: INTRODUCTION

The Committee for Finance and Personnel (the Committee) has called for evidence from stakeholders with an interest in the Damages (Asbestos-Related Conditions) Bill (NIA Bill 10/10). This Bill is intended to negate the House of Lords decision in *Johnston v NEI International Combustion Limited and conjoined cases [2007]* which held that asymptomatic and benign pleural plaques do not constitute a compensatable injury. Kennedys act for a wide range of clients who face claims involving asbestos induced injuries, to include, insurers, self insured corporations, health authorities and local authorities. We are uniquely placed to respond to this call for evidence which we note is to be restricted to:

- Suggestions for possible amendments to the Bill; and
- Opposition to specific clauses.

2. SECTION TWO: SUGGESTIONS FOR AMENDMENTS TO THE BILL

We submit that however well intentioned the Committee believes this proposed Bill to be, it is fundamentally at odds both with the upholding of the Rule of Law and is potentially both discriminatory and in contravention of the Human Rights Act. We therefore cannot suggest any amendments to the Bill as we oppose its existence.

3. SECTION THREE: OPPOSITION TO SPECIFIC CLAUSES

Following devolution of policing and justice, the newly formed Northern Ireland Courts and Tribunal Service (NICTS) has, since 12 April 2010, been charged with improving access to justice, promoting confidence in the justice system and supporting an independent judiciary. In order to achieve these aims they rely upon various organisational values which include: integrity, impartiality, openness, professionalism, accountability and fairness.

The intent of this Bill is to circumvent or usurp a decision of the highest court which binds the Northern Ireland Judiciary and is therefore inconsistent with its stated aim of maintaining and supporting an independent judiciary in which the public may have confidence. It is of course accepted that if a person sustains injury and loss by reason of another's negligence or breach of duty, the wrongdoer should compensate the injured party. However, for a person to be compensated in respect of an injury which (a) causes him no pain, (b) causes him no disability and (c) can

only be detected radiologically; is illogical and inconsistent with the principle of awarding damages to compensate an injury.

The Judiciary apply the law to the factual matrix and the inbuilt safety mechanism is the right of appeal to a higher court be it the High Court, Court of Appeal or indeed the Supreme Court (and thereafter in some instances the European Court of Justice). This is so that justice is done and seen to be done by the public who put its confidence in the system.

We have considered the clauses as requested and make the following points.

3.1 Clause 1: Pleural Plaques

This Bill seeks to define what personal injury is (albeit it is apparently restricted to asbestos associated conditions). This is clearly something which is not within the remit of the elected officials to decide. In the Johnston case a joint expert report was prepared by experts who specialised in the area of asbestos related lung conditions. This report concluded after expert consideration of the medical evidence that pleural plaques are:

- Wholly benign;
- They very rarely lead to symptoms of any kind; and
- They do not in any way progress or trigger any other possible asbestos related conditions such as mesothelioma or asbestosis.

The Law Lords therefore concluded on the cogent evidence before them that as pleural plaques were asymptomatic, they did not constitute 'damage' which was compensatable. The position adopted by the Committee in the draft Bill controverts established legal principles of precedent and independence of the judicial system. The Bill also effectively decides upon medical issues; that is, *what constitutes personal injury?* We submit that this is not within the expertise and thus the gift of the Assembly to do.

If it is now to be accepted that asymptomatic diseases constitute personal injury, will this logic extend to other asymptomatic conditions such as personal injury through smoking at work? Otherwise, the Bill is potentially discriminatory against other individuals with asymptomatic diseases. Is it envisioned that the Assembly will enact further legislation to deal with other asymptomatic diseases arising from work related activities?

3.2 Clause 2: Pleural thickening and asbestosis

The points made above in relation to clause 1 are repeated in relation to this clause.

3.3 Clause 3: Limitation of actions.

This clause should not be applied. There is an inherent discretion for any Judge to extend time in any claim provided that it is just to do so. This clause endangers the application of Article 6 of the Human Rights Act for defendants whose right to a fair hearing is incrementally prejudiced by the passage of time especially when there may have already been inordinate delay in the bringing of a claim.

How can legal certainty be achieved if a court decides on all the evidence yet the legislature turn the decision on its head by negating its effect? Claims will be brought where there is no physical symptomology just because it has been deemed to be personal injury.

Claimants will be compensated not on the basis of being put back into the position they would have been in had they not suffered personal injury, pain and suffering; but on the basis that, "I am told that I have a personal injury and whilst I have not suffered any pain and suffering I can still claim even if there is no actual harm caused to me".

To categorise as 'personal injury' conditions which are asymptomatic only serves to promote litigation and will cause unnecessary anxiety to claimants who might otherwise be expected to lead normal healthy lives. Giving a person with an asymptomatic condition the right to bring a claim conveys the wrong message. It makes them focus on the negligible risk that they will one day develop adverse physical symptoms, rather than encourage them to put such risk to the back of their mind and get on and enjoy life.

3.4 Clause 4: Commencement and retrospective effect

We would simply comment that to apply legislation retrospectively does not sit comfortably with the principles of openness and fairness and may contravene the overriding intent of achieving justice between claimants and defendants.

4. ADDITIONAL COMMENTS

4.1 Access to justice and increase in jurisdictional limits

The Assembly Committee seeks to follow the position of the Scottish Assembly in negating the decision of the House of Lords in relation to a condition which is asymptomatic and which by a decision of the courts was not considered to be actionable and therefore not compensatable. The Department of Justice is keen to ensure access to justice in an environment that is seeing changes to the funding of access to justice and in the light of potential increases to the jurisdictional limit of the County Court in Northern Ireland.

The Assembly Committee has not provided any clear and cogent evidence of the amount of claims that may materialise as a result of this legislative negation of the rule of law. The only support provided by the Committee is to say that the population of Northern Ireland is about one third of that of Scotland so that we can simply divide the Scottish number of claims by three. This arbitrary approach to the looming economic realities of government cuts in spending is unnerving. Allowing an unknown number of claims which are likely to require Legal Services Commission backing raises very real implications about the further strain on an already 'stressed out' Legal Aid fund.

4.2 Impact on the Court Service and wider population

Depending on the value of awards that these 'new claims' may attract; it is likely that if the county court limit is raised, these claims will fall within the county court jurisdiction. Whilst efficient at present, these courts may struggle with the added workload, thereby reducing the timely disposal of actions and access to justice of the larger population.

Dear Laura

I attach our response to the Consultation. I hope this will be of assistance.

Yours sincerely
Oonagh McClure

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06/09/2010

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

Response from Thompsons McClure Solicitors

September 2010

About Thompsons and Thompsons McClure Solicitors

Thompsons is the UK's most experienced trade union and personal injury law firm. It has a network of 28 offices across the UK, including the separate legal jurisdictions of Northern Ireland and Scotland.

In Northern Ireland the firm operates as Thompsons McClure Solicitors.

Thompsons and Thompsons McClure act only for trade union members and the victims of injury, never for employers or insurance companies. At any one time, the firm will be running 70,000 personal injury claims.

The firm participates regularly in government consultations on legislative issues.

As a firm Thompsons has acted in almost every major asbestos test case in the UK and at any time we will be acting for hundreds of people and their families claiming compensation for asbestos related disease. In the Pleural Plaques test litigation we were instructed on behalf of Unite the Union in the lead test case of *Johnston v NEI International Combustion Limited* and also represented Mr Grieves, one of the other three appellants in the House of Lords.

The draft Bill

We welcome the decision by the Department of Finance and Personnel to go with option 3 put forward in the 2008 consultation, to restore symptomless pleural plaques as an actionable condition. The publication of the draft Bill will be a relief to the many people in Northern Ireland for whom pleural plaques represents a physical marker of irreversible asbestos induced damage to their lungs and, despite the absence of symptoms, causes very real worry that they may develop a fatal illness.

However, we are concerned that the draft Bill as it stands will leave a finite but important category of claimants without compensation – those whose cases were struck out by the Courts or were discontinued or withdrawn as a result of the House of Lords decision in 2007. We put forward a suggested amendment to the Bill in our response to the consultation questions below.

Consultation issues

1. Do you think the Bill will achieve the objective to ensure that claims for asymptomatic pleural plaques, pleural thickening and asbestosis can continue to be brought in Northern Ireland?

Yes the Bill will achieve the objective going forward, but the way it has been drafted means that it may leave those whose claims were struck out, withdrawn or discontinued after the House of Lords ruling without a remedy.

2. Do you think the Bill will achieve the objective to ensure that claims which could not be brought or progressed because of the Johnston case and which might be time-barred can still be brought?

No.

In Northern Ireland pleural plaques claims on which court proceedings had been commenced prior to the Court of Appeal decision in January 2006 were stayed pending the House of Lords appeal. Following the House of Lords ruling the defendants were entitled to apply for those stayed cases to be struck out or discontinued or to insist they were withdrawn.

The situation in Scotland was different. The Scottish government announced soon after the House of Lords ruling in 2007 that it would introduce a Bill to ensure that the judgment did not take effect in Scotland. Cases issued in the Scottish courts have remained stayed.

It could be argued that the Northern Ireland cases which were struck out, discontinued or withdrawn were (as per part 3(1)(b) of the Bill) "determined" and are therefore excluded from the protection of the Bill. To avoid this unintended consequence for a finite group of pleural plaques sufferers we suggest the following amendment to part 3, **Limitation of actions**:

3. —(1) This section applies to an action of damages for personal injuries—
- (a) in which the damages claimed consist of or include damages in respect of—
- (i) asbestos-related pleural plaques; or
 - (ii) a condition mentioned in section 2(2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition; and
- (b) which, in the case of an action commenced before the date this section comes into force,
- (i) has not been determined by that date, or
 - (ii) has been struck out, withdrawn or discontinued after 17 October 2007 on the grounds that it disclosed no cause of action.

3. Do you think the provisions in the Bill are human rights compliant?

Yes.

4. Do you agree with the department's conclusion that the provisions in the Bill are Section 75 compliant and that an EIA is not required?

Yes.

5. Do you agree with the department's conclusions about the likely impacts of the Bill?

Yes.

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Association of British Insurers

The Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010

Written Evidence from the Association of British Insurers

The UK insurance industry is the third largest in the world and the largest in Europe. It is a vital part of the UK economy, managing investments amounting to 24% of the UK's total net worth

and contributing the fourth highest corporation tax of any sector. Employing over 275,000 people in the UK alone, the insurance industry is also one of this country's major exporters, with a fifth of its net premium income coming from overseas business.

Executive Summary

The ABI is fundamentally opposed to the introduction of the Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010 (the Bill). The Bill would fundamentally alter the law of negligence, by overturning the House of Lords ruling in *Johnston*^[1] and allow people with pleural plaques, an asymptomatic condition, to claim compensation. Our opposition to this Bill is based on the following reasons:

Compensation is not the best way to help people with pleural plaques. Paying compensation for pleural plaques sends the wrong message to people that the condition is serious. Instead the Northern Ireland Executive should reassure people with pleural plaques that they are benign and do not impair quality of life.

There is a significant risk that the Bill's provisions would breach the European Convention on Human Rights (ECHR). This is especially the case as it is based on the Scottish Damages Act which is subject to judicial review. The Department for Finance and Personnel (DFP) has not considered these issues sufficiently, or fully evaluated alternative means of reaching its stated policy objectives.

A robust financial impact assessment of the impact of this Bill has not been produced. The Department for Enterprise, Trade and Industry (DETI) provision of £31 million for state asbestos related claims up to 2015 is likely to be a substantial underestimate of actual liabilities. We consider that the cost for pleural plaques claims alone up to 2015 is likely to be approximately £39.5 million.

Business confidence in Northern Ireland will be undermined. By fundamentally altering the law of negligence the Bill will also undermine general business confidence in Northern Ireland. Any expansion of the law in this way will create a future precedent for claims from people who may have been exposed to risk, but do not have any symptoms.

In addition to these substantive concerns, which we expand on below, the ABI has serious concerns about the time available to the Committee to properly scrutinise this contested Bill. The Committee, as it stands, will not be considering critical evidence, such as medical opinion on pleural plaques, and the Committee has, as far as we understand, not sought legal advice on the complex and substantive issues associated with the compatibility of the Bill with the ECHR. We strongly urge the Committee to give adequate consideration to these important issues before deciding whether to proceed with the Bill.

Detailed Concerns

1. Compensation is not the best way to help people with pleural plaques

1.1 Pleural plaques are not a disease. Pleural plaques are small fibrous discs on the surface of the lungs which indicate exposure to asbestos. They are symptomless in all but a handful of exceptional cases (which are eligible for compensation), and neither lead to, nor increase susceptibility to, any other conditions. They are benign and do not impair quality of life.

1.2 Despite this clear prognosis, there continues to be much confusion and concern among those with pleural plaques and the wider public about what pleural plaques really means for a person's

health. Compensation under the common law system is for disease. Therefore, providing people with pleural plaques compensation, as this Bill will do, will make them think that the condition is more serious than it actually is. As Professor Anthony Seaton, Emeritus Professor at the University of Aberdeen, writes:

"It is understandable that individuals with plaques can be worried about their prognosis if they are given misinformation on their significance. The change in case law that led to individuals with pleural plaques receiving money for a non-disease caused problems in their management. While giving appropriate reassurance and explaining the risks of other asbestos-related diseases in relation to the risks of much more likely diseases, we were obliged to advise them to consult a lawyer – a mixed message with the obvious consequence of causing anxiety. The main beneficiaries have been lawyers and expert witnesses such as me. I believe we have better things to do, to prevent real diseases.

There is a risk that the desirability of raising awareness of the nature of pleural plaques and allaying unnecessary concerns could be undermined by the provision of compensation, as this could send mixed messages about the nature of the condition and increase concerns."^[2]

1.3 Similarly, the Royal College of Physicians noted in their submission to the Justice Committee on the Scottish Government's Damages (Asbestos-related Conditions) (Scotland) Bill that:

"The fatal consequences of asbestos exposure through mesothelioma and lung cancer do not apply to the development of pleural plaques, but there is little doubt that patients can be confused and anxious about "asbestosis" in general and categorise pleural plaques within this group. The College understands this but the medical evidence is clear and competent, and knowledgeable physicians should be in a position to allay these fears. Lawyers seeking to support patients in compensation claims must not be allowed to undermine the medical evidence."^[3]

1.4 Pleural plaques can only be detected on x-ray or computed tomography (CT) scan, so they are usually found incidentally during the course of routine medical investigations. As such, the majority of people with pleural plaques will likely never know that they have them. Paying compensation to those with pleural plaques is likely to lead to an increase in the number of people who will be tested for the condition, causing them unnecessary concern, requiring them to undergo invasive testing procedures and placing an extra burden on the National Health Service. If compensation were introduced, it could lead to a rise in 'claims farmers', who encourage people to undergo unnecessary testing to ascertain if they have the condition.

1.5 It is important to recognise that our opposition to insurers providing compensation for asymptomatic pleural plaques is not about insurers trying to avoid paying asbestos-related claims. On the contrary, insurers want to pay all valid claims for symptomatic asbestos-related conditions, such as mesothelioma, as fairly and quickly as possible. Indeed, insurers pay around £200 million a year in compensation to sufferers of these conditions across the UK.^[4]

1.6 Instead of paying compensation to those with pleural plaques, in our view, the Northern Ireland Executive should be raising awareness of the benign nature of pleural plaques to help allay concerns of those diagnosed with the condition, and the wider public. At the moment, pleural plaques are not well understood; many people wrongly think that they will develop into lung cancer or mesothelioma. The DFP's consultation paper on the Bill recognises that additional information should be provided to those with pleural plaques, a position that was generally supported in responses to the original consultation on pleural plaques. Local medical experts have called for information leaflets that set out the difference between pleural plaques and asbestos-related diseases, and that explain that pleural plaques do not cause any injury to the person concerned.^[5]

1.7 The Northern Ireland Executive could usefully produce leaflets similar to those that the Department of Health for England and Wales is in the process of developing. One leaflet is for medical professionals, including technical literature on the nature of pleural plaques, to be disseminated via professional publications and medical professional bodies. The second leaflet is for those found to have pleural plaques, and for the wider public, on the benign nature of pleural plaques, to be disseminated via GP surgeries, hospitals and so on. However, for the reasons outlined above, there would be little point in aiming to reassure people with pleural plaques that their condition is benign if this reassurance is going to be undermined by compensation payments. For this reason, the Department of Health for England and Wales is only making its leaflets available now that the Westminster Government has confirmed that pleural plaques will not be compensated.

2. Concerns over human rights breaches

2.1 There is a significant risk that the Bill's provisions would breach employers' and insurers' rights under the European Convention on Human Rights (ECHR). Therefore there are real doubts as to whether the Northern Ireland Assembly can, in terms of its powers under the Northern Ireland Act 1998, enact the Bill. We raised these concerns in our consultation responses^[6] and directly with Ministers and officials but do not believe that these concerns have been sufficiently addressed. It is incumbent on the Executive to ensure that this Bill is ECHR compliant and we do not believe that the necessary steps have been taken to ensure this, nor that our stated concerns have been reflected in the Bill's Regulatory Impact Assessment.

2.2 By making an asymptomatic condition 'compensatable', the Bill would make employers and their insurers liable for a condition for which they would not otherwise have any liability. This would interfere with employers' and insurers' rights to property under Article 1 of Protocol 1 of the ECHR, and this could only be justified on the grounds of compelling public interest and where it could be shown to be a proportionate response. In our submission, compensating those who have an asymptomatic condition is not a legitimate policy goal and, even if it were, the benefits, if any, of doing so are not sufficient to justify such a substantial interference with the property rights of employers and insurers.

2.3 In addition, the Bill would make employers and their insurers liable retrospectively for a condition for which they would not otherwise have been liable. This would be contrary to Article 1 of Protocol 1 of the ECHR as it would interfere with settled arrangements. This interference could only be justified on the grounds of compelling public interest which, in our submission, do not exist here. The questionable legality of imposing such retrospective liability is further compounded by the delay of two years between the Johnston decision and this Bill being introduced.

2.4 The Bill might also breach the rights of employers and insurers under Article 6 of the ECHR, which is concerned with fair process. By introducing legislation that overrules a judgment that has progressed through the legal system and has been finally decided in the highest UK court, the Northern Ireland Executive would arguably be removing employers' and insurers' rights to have a decision impacting their business decided finally by an independent and impartial tribunal.

2.5 The Northern Ireland Executive should consider alternative means of achieving its policy objectives. Last year, the Westminster Government announced they would not overturn Rothwell to make pleural plaques compensatable. Although the Scottish Parliament has enacted legislation making pleural plaques compensatable in Scotland, this is being challenged in the courts. Indeed, this Bill is almost entirely based on the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 which is subject to judicial review in Scotland on the basis of the legal concerns outlined above. As the Northern Ireland Assembly report on this Bill notes, the Scottish

Parliament is the only known example of a legislature that has legislated to make pleural plaques compensatable.^[7]

2.6 We urge the Committee to seek legal advice on the complex and substantive issues associated with the compatibility of the Bill with the ECHR. We also recommend that the Committee consider the situation regarding pleural plaques in other countries in more depth.

3. Cost impact on the Northern Ireland Executive

3.1 We have serious concerns that the DFP has not produced a sufficiently robust financial impact assessment of the impact of this Bill. It is very difficult to predict future pleural plaques claims. Of those who were exposed to asbestos, it is unknown how many people will develop pleural plaques, how many of these might make a claim, and how the cost of a claim might increase over time. In 2008, the Ministry of Justice for England and Wales estimated that, based on a combination of the medical estimates, between 1 and 2.5 million people will develop pleural plaques, and between 200,000 and 1.25 million people will be diagnosed with the condition.^[8] There are a number of medical studies which give an indication of the prevalence of pleural plaques:

- In his report of 10 November 2004, Dr Moore Gillon suggested that for every person who develops mesothelioma in any given period, there will be 20-50 people who develop plaques, i.e. 30,000 to 75,000 per year in the UK;^[9]
- A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques;^[10]
- A study by SJ Chapman concludes pleural plaques "are found in as many as 50% of asbestos-exposed workers";^[11]

Professor Tony Newman Taylor, previously chair of the Industrial Injuries Advisory Council, stated that about a third to half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure^[12].

3.2 History shows us that it is very difficult to accurately predict how many claims are likely to arise following changes to legislation: at the outset of the British Coal Chronic Obstructive Pulmonary Disease scheme, 150,000 claims were expected; by the time the scheme closed, 592,000 claims had been registered. This substantial underestimation was despite data with a greater degree of statistical certainty than exists for plaques.

3.3 However, we do know that the costs of the Bill are likely to be very high. Due to the uncertainties outlined above, the Ministry of Justice for England and Wales was only able to estimate a wide range of the potential costs for compensating those with pleural plaques in England and Wales: between £3.7 billion and £28.6 billion.^[13] Based on the Northern Ireland population of 1.75 million, Northern Ireland could expect to bear 2.9% of this cost, meaning costs of between £111 million and £858 million.

3.4 We also know that the majority of claims in the near future would sit with the Northern Ireland Executive given their Harland and Wolff liabilities. DETI recently made provision in its spending proposals for potential liabilities of £31 million up to 2015 in relation to asbestos-related liabilities, estimating about £3 million a year for pleural plaques claims. We believe this to be a substantial underestimate – we estimate that the cost up to 2015 is likely to be approximately £39.5 million for pleural plaques claims alone.

3.5 In the absence of further information from DETI, we have made some basic calculations based on our understanding of Harland and Wolff liabilities. An average of 200 pleural plaques

claims were closed per year between 2006 and 2010. The cost of a pleural plaques claim in 2004 was £11,000, which on a moderately low claims inflation rate of 3% per year would bring the cost in 2011 to £13,800 per claim.^[14] If the claims trend continued on the same basis, this would amount to around £3 million per year in pleural plaques compensation. However, this does not take into account legal costs, which at £14,000 per claim^[15], would amount to an additional £3 million per year. So annual costs would be £3 million in compensation plus £3 million in legal costs. We also understand there are 557 plaques claims outstanding from pre-Johnston. So immediate costs would be £7.7 million in compensation plus £7.8 million in legal costs. In other words, the state could be facing an annual cost of £6 million, plus an immediate cost of £15.5 million, for pleural plaques claims alone i.e. only a part of the overall asbestos-related liabilities.

3.6 At a time when the block grant funding for Northern Ireland has been reduced by £128 million a year and government departments are being asked to save a further £398 million a year, taxpayers' money should not be diverted unnecessarily from other important priorities. We therefore believe that DETI have substantially under budgeted the potential impact of this legislation.

4. Changing the law of negligence: impact on businesses

4.1 Northern Ireland Executive liabilities on pleural plaques are only part of the future possible picture and the full extent of that wider exposure is unknown.

4.2 Apart from the cost factor, the Bill would undermine general business confidence in Northern Ireland. Overturning Johnston represents a fundamental change to the law of negligence, undermining the stability of the legal environment in Northern Ireland. Parties should be able to rely on certainty of House of Lords' decisions, to shape their business practices accordingly. Any expansion of the law in this way, however narrowly drafted, creates a future precedent for claims from people who may have been exposed to risk, but do not have any symptoms. This could open up a potential 'floodgate' of claims based on circumstances where no actionable damage has occurred and, even more widely, claims for risk of an illness occurring or for worry that something might happen. This potentially increases the level of litigation and likelihood of spurious claims, and also exposes the Northern Ireland Executive and defendants to potentially significant costs. The resulting legal instability would make Northern Ireland a less attractive place for investment.

4.3 The Bill would also alter the determination as to whether a particular disease or condition constitutes an injury which is compensatable, which has traditionally been a matter for the courts under common law. The Johnston decision was based on clear medical evidence that pleural plaques do not constitute negligible harm. The consensus of medical opinion has been made even clearer since the Rothwell judgement, with two reports published on behalf of the Chief Medical Officer for England and Wales, by Professor Robert Maynard, and by the Industrial Injuries Advisory Council. Professor Maynard ends his report:

'I conclude that the occurrence of pleural plaques does not provide a satisfactory basis for providing compensation to some of those exposed to asbestos. I would thus advise against a change in the law to allow pleural plaques to be considered as grounds for compensation.'

4.4 The Bill as it stands therefore dismisses the advice of the Chief Medical Officer for England and Wales on pleural plaques and the consensus of medical opinion used in the Johnston decision and since. This includes important medical evidence that has been submitted to DFP consultations on pleural plaques in advance of this Bill. We are concerned that in proceeding with the Bill, due regard is not being given to this clear and uncontested medical evidence.

Association of British Insurers

13 January 2011

- [1] Johnston v NEI International Combustion Limited [2007] UKHL 39
<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>.
- [2] Professor Anthony Seaton, 'Close scrutiny needed on asbestos-related disease' in The Scotsman, 30 October 2007.
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- [15] Ibid.

Royal College of Physicians

From The Registrar
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Karen Jardine
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18th January 2010

Dear Ms Jardine

Re: Damages (Asbestos-Related Conditions) Bill

The Royal College of Physicians (RCP) plays a leading role in the delivery of high quality patient care by setting standards of medical practice and promoting clinical excellence. We provide physicians in the United Kingdom and overseas with education, training and support throughout their careers. As an independent body representing over 25,000 Fellows and Members worldwide, we advise and work with government, the public, patients and other professions to improve health and healthcare.

The RCP is grateful for the opportunity to respond to the Committee for Finance and Personnel's call for written evidence. In so doing, we have liaised with the British Thoracic Society and would like to raise the following issues.

1. Pleural Plaques

Aetiology and prevalence

The cause of pleural plaques is exposure to asbestos fibres, most commonly in an occupational setting. The prevalence is most strongly related to the length of time since first exposure and when detected there is usually a latent period of 20-40 years. Prevalence is also statistically related to the duration of exposure, the level of exposure and the cumulative exposure¹⁻³. Pleural calcification may also be seen in other conditions such as healed pleural tuberculosis and healed thoracic trauma, but these often have characteristics on imaging that distinguish them from asbestos-related pleural plaques.

Pleural plaques are the commonest physical manifestation of asbestos exposure. The detection of pleural plaques varies according to the imaging method used (computed tomography (CT) detects more plaques than chest X-ray); the time since first asbestos exposure (as plaques become calcified over time and are then more readily detectable); and the population studied (those with asbestos exposure have more plaques detected).

In two recent CT screening studies in France the prevalence in 5545 asbestos exposed workers was 15.9% and in a second study, 46.9% of 1011. For both studies the mean latency period was around 40 years^{1,2}. Other estimates indicate that between 5 and 15% of those with occupational exposure will have plaques after a latent period of 20 years, rising as the latent

period increases³⁻⁴. Sophisticated imaging techniques, such as CT, are not indicated to screen for pleural plaques.

Association with other asbestos related conditions

Asbestos exposure is linked to a number of other conditions that may have serious implications on health. It is important not to confuse these conditions with pleural plaques:

- Asbestosis, a form of pulmonary fibrosis that is usually progressive. It may result in severe respiratory disability and often premature death. It is linked to the cumulative exposure to asbestos and type of asbestos.
- Bronchial carcinoma is also linked with the cumulative exposure to asbestos but it is not clear whether a diagnosis of asbestosis is required before bronchial carcinoma can be attributed to asbestos exposure.⁵
- Mesothelioma is a malignancy of the pleura or peritoneum with a poor prognosis and with limited therapeutic possibilities. It is strongly associated with length of latency period but also with cumulative exposure.
- Diffuse pleural thickening is a progressive condition that affects larger confluent areas of pleura than pleural plaques. This condition sometimes causes respiratory disability.
- Pleural effusion may occur in asbestos exposed individuals. This can cause dyspnoea and usually requires investigation to look for mesothelioma, bronchial carcinoma or other causes.

Plaques only indicate that there has been exposure to asbestos. The risk of other asbestos-related conditions is best quantified according to the latency period, duration of exposure, level of exposure, cumulative exposure and type of exposure.

Physiological effects

Pleural plaques are nearly always asymptomatic although the knowledge that pleural plaques are there can engender anxiety that may produce symptoms that include dyspnoea and chest tightness. A grating sensation in the chest is described in less than 1%. There are no physical signs.

In some studies, subjects with pleural plaques have been shown to have a small but statistically significant reduction in lung volumes of around 5% compared with to matched controls⁶⁻⁹. Other studies have not confirmed this after controlling for parenchymal changes representing fibrosis¹⁰. The fact that plaques are present on the parietal pleura means that they have little effect on lung expansion. The lung function changes (if any) are considered too small, in a legal sense, to attract compensation. Extensive and confluent plaques are uncommon but can result in a restrictive ventilatory defect that results in disability¹¹.

Psychological effects

Patients may be aware that they have been exposed to asbestos, but the finding of pleural plaques is evidence to them that the asbestos exposure has had a physical effect. This may increase the anxiety about the risk of other asbestos-related diseases. Patients may also misunderstand the term pleural plaque and may assume they have asbestosis. This requires careful input by the healthcare professional and to this end the British Thoracic Society, in collaboration with the Department of Health, have produced information for healthcare professionals on pleural plaques.

It could also be argued that the knowledge that asbestos exposure confers risk of developing other more serious conditions is, on its own, enough to produce adverse psychological effects. Indeed how much extra distress is caused by the knowledge that pleural plaques are present over and above that of the knowledge of the increased risk of serious disease caused by asbestos exposure is a legal rather than medical debate.

Reduction in life expectancy

Because asbestos exposure causes disease that can shorten life, there will be a reduction in average life expectancy for exposed individuals. Since there is evidence for cumulative exposure increasing the risk of asbestosis, lung cancer and mesothelioma, it follows that the reduction in life expectancy will be linked to level of exposure. This argument has led some European countries to compensate all asbestos-exposed individuals with a certain level of estimated cumulative exposure. The compensation has been in the form of a reduction in the retirement age.

The Evidence for injury caused by pleural plaques has been extensively reviewed in several documents most notably in the Industrial Injuries Advisory Council's Position Paper No. 23 in June 2009 which set out the reasoning behind the Council's decision not to revise the recommendation previously made in 2005 that Pleural plaques should not be a prescribed disease.¹²

2. Asbestosis and pleural thickening without respiratory disability

Some of the arguments that apply to pleural plaques apply to early asbestosis and pleural thickening that has not caused respiratory disability. The main difference is the degree of certainty that these conditions will cause respiratory disability in the future or lead (in the case of asbestosis) to lung cancer. Both of these conditions are likely to progress and thus the chance of distress and psychological harm is likely to be greater. There are several current uncertainties:

Asbestosis


Early asbestosis is now detected on CT (high resolution) and there can be considerable difficulties in making a firm radiological diagnosis. The prevalence in a large high resolution CT screening study of asbestos exposed workers was 6.8%.² Early changes that might indicate asbestosis can persist for years without progression. It is not currently known what proportion of these CT-diagnosed cases do progress to the more familiar form of asbestosis easily recognised on CT and often seen on chest X-ray. Thus, the diagnostic criteria for early asbestosis and the proportion that progress are important if patients are to be accurately informed about prognosis.

Pleural thickening

Diffuse pleural thickening is rare. In the largest CT screening study of asbestos exposed workers the prevalence was 0.9%.² The International Labour Organisation has defined criteria for the diagnosis of diffuse pleural thickening by chest X-ray.¹³ There must be obliteration of one of the costophrenic angles and extension of the pleural thickening onto the lateral chest wall of at least a quarter of the total height of the chest wall. It is further classified into a quarter to a half and over a half of the height of the chest wall. Diagnosis can be difficult and radiologists can disagree, particularly where pleura is <5mm thick.¹⁴ The rate of progression of the condition is variable and may slow down with time for first diagnosis. ¹⁴ CT can be used to clarify the extent of pleural thickening.

Due to the short time-frame with regard to the nomination of an oral evidence giver we would like to apologise that the RCP is unable to send a representative on this occasion. We hope that the written evidence above will be sufficient to inform the Committee's decision.

Yours sincerely



Dr Patrick Cadigan
Registrar

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Damages (Asbestos -related conditions) Bill - CBI submission to the Finance and Personnel Committee

1. CBI welcomes the consultation being undertaken by the Finance and Personnel Committee as part of its consideration of the Damages Bill, which will introduce compensation for pleural plaques.

2. While recognising that the call for evidence is focused at requests for specific amendments to the Bill or opposition to specific clauses, on this occasion the CBI is deeply concerned at the general principles of the Bill, the inadequacy of the Regulatory Impact Assessment which underpins it, and the negative budgetary impact the Bill is likely to create and which we do not believe has been fully assessed.

3. The CBI's key concerns are set out as follows:

- the medical evidence supports the view that pleural plaques are an indication of exposure to asbestos but that they are not in themselves an injury or disease - the House of Lords ruled in 2007 that they are benign and do not themselves constitute any physical impairment on those that have them
- the Bill to overturn this House of Lords judgement will lead to a fundamental change to the law of negligence - for the first time compensation will be payable on the basis of something other than an actual injury. This could create an unwelcome precedent and create additional uncertainty for businesses and insurers
- we recognise the legitimate concerns about the need for better information about pleural plaques - this can best be done through increasing the amount of accurate information about them
- the Bill will create confusion and add to the general lack of knowledge and misunderstanding associated with pleural plaques by saying that pleural plaques should be compensatable and thus indicating that they are a serious condition. This is likely to create more anxiety for those that have been diagnosed with pleural plaques, and also removes the focus on those who have asbestosis, who clearly do need to be compensated
- The financial estimates of the costs of compensation are not rigorous and we believe could seriously underestimate the levels of claims and associated costs. This will impact not just on the business community but on departmental budgets including DETI where £12 million has been allocated over the next four year budget period - this is likely to be a serious underestimate if past trends continue and outstanding claims progress. With legal costs exceeding the compensation costs the total cost of this Bill is likely to be a magnitude higher than has been previously estimated. At a time when the DETI draft budget states that 'good projects will not be able to be supported' and 'the amount of new business that Invest NI can support will be curtailed' the rushed introduction of this Bill is even more surprising
- The Bill is also likely to create demand within the health service by increasing the demand for x-rays and CT scans which are the only way to properly diagnose asymptomatic pleural plaques
- Finally the importance of the Bill and the fundamental change to the law of negligence which it brings is likely to mean the introduction of the legislation will follow similar developments in Scotland with costly judicial reviews - the only winners being the lawyers

4. There are significant uncertainties associated with this Bill, including the estimated cost implications, as well as major points of principle. We understand there are also human rights issues which should be considered. We urge the Committee to be cautious, to fully assess the

major implications of passing this Bill and not to rush to judgement on a piece of legislation which could have significant unintended consequences.

CBI Northern Ireland
20 January 2011

Association of Personal Injury Lawyers

Damages (Asbestos-Related Conditions) Bill From the Association of Personal Injury Lawyers (APIL)

January 2011

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation, formed by pursuers' lawyers with a view to representing the interests of personal injury victims. APIL currently has more than 100 members in Northern Ireland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured people.

The aims of APIL are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this evidence should be addressed, in the first instance, to:

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General Points

APIL welcomes the commitment of the Northern Ireland Executive to this legislation which overturns 2007's House of Lords ruling, which represented a devastating blow for pleural plaques victims.

The fact that pleural plaques are asymptomatic belies the truth that they do represent a physiological change in the body. This fact was raised in an adjournment debate in Westminster Hall on 4 June 2008, when Michael Clapham MP, reading from a letter written by Dr Robin Rudd (consultant physician in medical oncology and respiratory medicine) said:

"People with pleural plaques who have been heavily exposed to asbestos at work have a risk of mesothelioma more than one thousand times greater than the general population."^[1]

"People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. Despite reassurance offered by doctors that the condition is harmless often they know of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques.

For many the anxiety is ever present. Every ache or pain or feeling of shortness of breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life."^[2]

The Northern Ireland Executive has shown great leadership by introducing this Bill, and attempting to overturn the decision made by the House of Lords. The Northern Ireland Executive, by doing this, has recognised the polluter pays principle: insurance premiums have already been collected and it is right and proper that the negligent party should make recompense for that negligence.

Specific points of clarification

We would like to suggest some amendments to the Bill to ensure that the legislation achieves its purpose.

Clause 3- Limitation of actions

APIL supports the amendment suggested by Thompsons McClure Solicitors in its response to the draft Bill in September 2010, which suggests:

Clause 3 (1 b) should be amended to read:

(b) which, in the case of action commenced before the date this section comes into force,

(i) has not been determined by that date, or

(ii) has been struck out, withdrawn or discontinued after 17 October 2007 on the grounds that it disclosed no cause of action

Rationale: this gives protection under law to those claimants whose cases were struck out following the decision by the House of Lords. This amendment would clarify that those claimants are able to bring an action for damages.

In addition, we suggest that

Clause 3 (2) line 15 should be amended to read:

Beginning with 15 February 2005 and ending with the day on which this section

Rationale: retrospectively it should be the date of the High Court decision rather than the date of the House of Lords as presently drafted. Following this decision, cases may have been stayed, in the knowledge that leave to appeal had been granted. Adding this amendment will provide clarity and certainty in the legislation.

[1] Hansard 4 June 2008: Column 251WH

[2] Hansard 4 June 2008: Column 252WH

Dr Shepherd - Response to Policy Consultation

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7th January 2009

Ms Laura McPolin
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Dear Ms McPolin

Re: Consultation Paper: Pleural Plaques

Thank you for sending me the consultation paper regarding pleural plaques and possible ways forward regarding the law of negligence, no fault financial support and issues regarding understanding and reassurance regarding pleural plaques.

I am a Consultant Respiratory Physician at Belfast City Hospital and, as such, I have extensive experience of asbestos-related disease, usually resulting from asbestos exposure in shipyard environment.

In response to the tabled questions in your consultation paper, I would have the following observations.

Question 1: Do You Think Information Leaflets Would be Useful?

It is common to find patients have been told that there is evidence of asbestos on their chest x-ray or CT scan and they have very little knowledge regarding the differences between asbestos-related diseases (namely mesothelioma, diffuse pleural thickening or asbestosis) and asbestos-related pleural plaques. The plaques are a marker of exposure to asbestos and therefore a marker of a small degree of risk of possibly developing asbestos-related disease in the future, but that the plaques in themselves do not interfere with lung function, nor do they become cancerous.

It would therefore be useful to have information leaflets setting out the difference between pleural plaques and asbestos-related disease and to put the risks of pleural plaques in context with other risks that patients may take and accept during their life, such as cigarette smoking and the risks of road traffic accidents etc.

I do not think that the creation of a register of patients who have pleural plaques would be helpful. I do not understand what purpose it would be put to and it is unlikely that it would be comprehensive or maintained on an up-to-date basis.

As regards Question 3, I do not have any information on settlement figures and associated legal costs for pleural plaques, but no doubt the solicitor's bodies should be able to give an estimate of these figures.

There is no register of the number of people currently diagnosed with pleural plaques, nor the future number of people who are likely to develop pleural plaques. In general, pleural plaques are not usually diagnosed until some 20 years from initial asbestos exposure, at which time they calcify and become more easily visible on chest x-rays. Pleural plaques are not a good measure of intensity of exposure to asbestos.

In response to Questions 4 and 5, I would agree with the medical evidence presented in the Johnston case, namely that pleural plaques do not normally cause any symptoms, nor do they interfere with lung function. Unless asbestos-related disease occurs (mesothelioma, diffuse pleural thickening or asbestosis), pleural plaques in themselves do not give rise to symptoms or cause any interference with lung function and are simply a marker of previous asbestos exposure and a marker for the risks that asbestos exposure conveys.

Medically, therefore, pleural plaques do not give rise to any disability. The knowledge regarding pleural plaques may well give rise to some anxiety if their meaning is not understood. It is for this purpose that information leaflets setting out the meaning of pleural plaques would be useful. From a medical point of view, therefore, pleural plaques do not cause any injury and are simply a marker of some degree of risk of possibly developing asbestos-related disease in the future.

The information that pleural plaques are not compensatable should be made clear in information leaflets for both patients and doctors.

Allowing pleural plaques to be compensatable on legal terms risks development of medically unjustifiable CT scans being carried out, looking to see if asymptomatic pleural plaques are present in those workers who have been exposed or may have been exposed to asbestos in the past.

Medically, therefore, I would not feel that legislation should be introduced to overturn the decision in the Johnston case, that pleural plaques are not compensatable in Civil Legislation.

I realise that this does produce two populations, one of which has had civil compensation for pleural plaques up until the Johnston case and that similar patients following the Johnston case will not get that compensation. It does seem to me, however, sensible that compensation should be for a disability rather than a future risk of possibly developing a disability.

In question 7 you ask, Would I support the option of a payment scheme for pleural plaques?

In view of the fact that pleural plaques do not cause any injury/disability, I would not support a payment scheme for pleural plaques in themselves with the consequent risk of frequent medically unjustifiable CT scans being carried out, looking for pleural plaques that may not be visible on a chest x-ray and may only have minimal plaque disease on CT scanning. I do not have any information as regards how possible legislation would impact on equality questions on the business sector.

In summary, therefore, medically, I do not feel that there is a case for legislation to be introduced to overturn the decision in the Johnston case because pleural plaques in themselves do not cause any disability or impairment of lung function.

Yours sincerely

Dr DRT Shepherd
Consultant Respiratory Physician

Dr Shepherd - Response to Consultation on Draft Legislation

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2nd September 2010

Ms Laura McPolin
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Dear Ms McPolin

Re: Consultation on the draft damages (asbestos-related conditions) (N.I. Bill 2010)

I previously responded to you in January 2009 regarding the consultation paper on pleural plaques. In my response, I stated that, medically, pleural plaques do not give rise to any disability. They 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. This is important to recognise that this risk is not related to the pleural plaques, but is related to their previous asbestos exposure and therefore the risks are the same between two workmen who have worked in the same firm with similar asbestos exposure, one of whom may only have pleural plaques and the other one does not. The workman with pleural plaques is at no greater risk of developing asbestos-related disease than his fellow worker without pleural plaques. It is the previous asbestos exposure, not the pleural plaques, that gives rise to the increase in risk of possibly developing asbestos-related in the future. As pleural plaques in themselves do not impair lung function or cause symptoms, it seems inappropriate that they in themselves should be compensatable and medically it does seem inappropriate that we in N. Ireland are out of step with most of the rest of the world who do not compensate pleural plaques (except possibly in Scotland). It may in fact be felt to be discriminatory against workmen with asbestos exposure but without pleural plaques to compensate only those with pleural plaques.

The provision of compensation for pleural plaques is likely to increase concerns regarding their benign nature and send mixed messages to the asbestos exposed population.

Attempting to allay concerns and misunderstandings of those with pleural plaques and putting in context the degree of risk involved (particularly in relation to other risks that they may take, e.g. of road traffic accidents or smoking-related risks), it seems to me to be important in correcting these misunderstandings.

Pleural plaques may be seen on chest x-rays. They are more frequently seen on more sophisticated examination searching for them, e.g. they are seen more frequently on CT scans

and are seen more frequently than on CT scans at autopsy. Compensation for asymptomatic pleural plaques therefore risks claimants being advised to have repeated CT scans as if they are not present on initial CT scan it is possible they may be found on a later CT scan some years later. This is likely to cause unnecessary concern to the claimants and place an additional burden on investigative facilities. This is also likely to lead to a claims culture, encouraging people to get regularly tested who otherwise would probably never have known they had pleural plaques. Medically, therefore, I do not feel it is justifiable that pleural plaques in themselves should be compensated. Rather, efforts should be made to increase patient awareness and understanding and those patients who do develop asbestos-related diseases should be properly and adequately compensated. It does not seem to me to be sensible that we in N. Ireland seek to overturn a decision of the highest court in the land that has been fully considered and to put N. Ireland in a different position than most of the rest of the world, including England and Wales, in compensating asymptomatic pleural plaques. I think it is likely that the publicity regarding this new bill may unearth more cases of asymptomatic pleural plaques in those who have never known about these and lead to the development of claimants being encouraged to have regular CT scans, looking for pleural plaques. These regular CT scans, of course, have a radiation dose and an increase in radiation dose increases the risk of developing cancer.

Yours sincerely

Dr DRT Shepherd F.R.C.P.
Consultant Physician (retired)

British Insurance Brokers Association

The British Insurance Brokers' Association (BIBA) response to the Northern Ireland Assembly's position on Damages (Asbestos-related conditions) Bill (Northern Ireland) 2010

BIBA is the UK's leading general insurance organisation representing the interests of insurance brokers, intermediaries and their customers.

BIBA membership includes 1,700 regulated firms. Insurance brokers and intermediaries distribute nearly two-thirds of all UK general insurance. In 2007, insurance brokers and intermediaries generated £1.5 billion of invisible earnings and they introduce £22 billion of premium income into London's insurance market each year.

BIBA is the voice of the industry, advising members, the regulators, the Government, consumer bodies and other stakeholders on key insurance issues. BIBA provides unique schemes and facilities, technical advice, guidance on regulation and business support and is helping to raise, and maintain, industry standards. BIBA works closely with the Chartered Insurance Institute to provide training to those working in the industry and actively participates in helping the industry and its customers deal with some of the major issues of the day.

BIBA members provide professional advice to businesses and consumers, playing a key role in identification, measurement, management, control and transfer of risk. They negotiate appropriate insurance protection tailored to individual needs and operate to a very high standard of customer service with the aim of ensuring peace of mind, security, financial protection and the professional advice required.

We thank you for the opportunity of responding to this Bill and would make the point that following the UK courts position that Pleural Plaques is not a claimable condition as there are no symptoms and any guarantee of compensation would create a huge surge in NHS X-ray requests

from all who may have worked with asbestos at some time. Any additional costs incurred by the insurance industry due to an increase in claims made could affect the stability of the Northern Ireland insurance market and potentially force some insurance companies to reduce their activities in Northern Ireland or withdraw completely. The consequences for this are potential customer detriment with reduced availability of cover and the increase in premiums required to pay for the new claims.

Personal injury

We have looked at several Liability Policy documents and we would point out that the wording used by Insurers refers to "injury "- which is defined as bodily injury, death, disease or illness, mental injury, wrongful arrest or false imprisonment. - The term used within the proposed Bill refers to "personal injury " which is not normally used and as such could create uncertainty in relation to an insurance contract between the Insurer and policyholder (Business). It would not however exclude the claim against the policyholder.

We would not want to see a situation develop a situation of legal uncertainty for customers and the insurance industry whereby the court says that injury (which it acknowledges is not really injury)– is called "personal injury" and policyholders will be requested to indemnify to the value of the award by the court but find their Employers' Liability policy is not behind them unless Bodily Injury is proven ??

Conclusion

BIBA believe everyone should have access to justice and compensation where this is due and that the law as it currently stands in England, Northern Ireland and Wales should remain unchanged in order to avoid prices increases and unintended consequences of the reduction in availability of cover.

Thank you for taking the time to consider our response. If you have any further queries please contact Peter Staddon, Head of Technical Services for further information on 0207 397 0204 or staddonp@biba.org.uk or Graeme Trudgill, BIBA's Head of Corporate Affairs on 020 7397 0218 or on trudgillg@biba.org.uk

Yours sincerely

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Kennedys follow up correspondence

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For the attention of Shane McAteer
Clerk to the Committee for Finance and Personnel
Room 419
Northern Ireland Assembly
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Dear Mr McAteer

Kennedys's Response NIA Damages (Asbestos-Related Conditions) Bill NIA Bill 10/10

Kennedys Law: Evidence Session 19 January 2011

Thank you for your letter raising further queries. Our responses are outlined below:

Question

1. In its response to the Committee's call for evidence Kennedy's Law has stated its belief that the Bill is in contravention of the Human Rights Act. The Committee has heard similar concerns from others and is taking steps to become further informed on this issue. During Monday's debate the Minister stated that:

"I am happy to say that, in light of all the information that is available to me, in my view, the Bill is legally competent."

- Can you advise the Committee what evidence you have used to reach your conclusions about the possible contravention of the Human Rights Act?

Answer

1. In relation to the possible contravention of the Human Rights Act the following points occur:

- a. Dealing with the issue of retrospective application; and
- b. The right to a fair Trial.

Retrospective Application

We submit that to apply legislation retrospectively is at odds with the Convention principles of striking a fair balance and being reasonably proportionate. It effectively removes any argument on causation from the remit of the courts and therefore, cannot be considered to be striking a fair balance between the rights of claimants and those of defendants.

The Committee just has to look at the news to see that at present the Financial Services Authority (FSA) is being challenged in the High Court in London at present over compensation for the mis-selling of payment protection insurance (PPI) it appears on the basis that the new FSA Rules were to be applied retrospectively.

The right to a fair Trial under Article 6

On behalf of the actual Defendants, the right to a fair Trial is diminished by the passage of time and the unavailability of witnesses and the recollection of witnesses evidence. Also by removing causation from the courts remit the Act effectively becomes judge and jury, facilitating claimants, (who have no symptoms), recourse to compensation without the need to deal with the common law positions of remoteness of damage and foreseeability.

Question

2. The Kennedy's Law response also poses the question:

"Is it envisioned that the Assembly will enact further legislation to deal with other asymptomatic diseases arising from work related activities?"

- What other asymptomatic diseases arising from work related activities might the Assembly be called upon to legislate for?

Answer

2. As outlined, for example, pre the Smoking Ban, workers may have been exposed to second hand smoke. They may asymptomatic at present but there still may be changes within their lungs that could, on this occasion, give rise to a more serious complaint at a later date such as emphysema and/or lung cancer or other pulmonary related diseases.

Secondly, individuals who may have worked with fine detailed soldering work, for example, in relation to the building of circuit boards may find in later life that they have developed arthritic conditions which may or may not been caused by or contributed to by their working environment a number of years ago.

On our research to date has not shown any asymptomatic conditions being compensated.

Question

3. The response from Kennedy's Law contends that the Bill seeks to define personal injury and this is something that is not within the remit of elected officials to decide.

- Where does responsibility for the definition of personal injury lie?
- How can legislation designed to provide that certain asbestos-related conditions are actionable personal injuries, without defining what those injuries might be?

Answer

3. A Judge on the basis of the factual matrix and application of expert witness evidence from medical practitioners will reach a decision on the basis of all the facts as to whether a personal injury has been sustained. It is therefore a joint legal and medical decision. In *Rothwell v Chemical & Insulating Co Ltd*, it was held that whilst pleural plaques was indicative of the extent to which an individual had been exposed to asbestos, it could not fairly be described as a disease or an impairment of physical condition for the purposes of an action for damages. Lord Hoffmann affirmed the trial judge's finding that the plaques affected neither life expectancy nor lung function and caused no pain or discomfort and thus, in Lord Glennie's characterisation of *Rothwell*, "could not suffice, by themselves, to make negligent exposure to asbestos actionable".

We do not believe that legislation can be designed to provide that certain asbestos related conditions are actionable personal injuries, without defining what those injuries may be.

Question

4. In its response to the consultation on the draft legislation it is reported by DFP that Kennedys Law stated that "It makes no sense, morally or economically, to take money from what is a finite 'pot' which is required to meet the future needs of 'real' victims of asbestos related diseases, so as to provide a 'windfall' to a person with no measurable physical or psychological injury."

- Can you advise the Committee how you have determined who qualifies as a 'real' victim of asbestos related diseases?

Answer

4. A "real" victim of asbestosis related disease is someone who has actually sustained an injury which is symptomatic, has caused pain and suffering, has interfered with their life and amenity, has caused them to require treatment, prevented them from working, enjoying day to day activities and has had a real effect upon their quality of life.

I hope that these comments may be useful to you.

Kind regards.

Yours sincerely

Amanda Wylie

Partner
For Kennedys

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NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Evidence to the Committee for Finance and Personnel on the Damages (Asbestos-Related Conditions) Bill

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including advising on whether a Bill is compatible with human rights.^[1]

Background

1. The Assembly Committee for Finance and Personnel has requested the Commission's views in relation to the compatibility of the Damages (Asbestos-Related Conditions) Bill with the European Convention on Human Rights (ECHR).^[2] The Committee has provided the Commission with copies of the Department of Finance and Personnel analysis of consultation responses on a draft of the Bill along with correspondence and a written submission from the Association of British Insurers (ABI), containing representations querying the ECHR compatibility of the Bill.^[3] This advice will focus specifically on addressing these matters.

2. The purpose of the Bill is to legislate to allow an asbestos-related condition (symptomless pleural plaques) to be considered a personal injury for the purposes of allowing compensation claims against employers. In relation to a number of English test cases the House of Lords, in 2007, interpreted the law as not providing for such claims.^[4] This Bill is intended to remove the legal barrier to claims.

3. For a Bill to be within the legislative competence of the Assembly it must be compatible with the ECHR.^[5] The Minister has stated the Bill is within the legislative competence of the Assembly and indicated that he may have sought the views of the Attorney General and Departmental Solicitors Office in arriving at that view.^[6] The Bill mirrors legislation which was introduced (with a similar requirement of ECHR compatibility) and progressed through the Scottish Parliament to become law on 17 June 2009.^[7] The Scottish legislation was subsequently subject to a failed legal challenge by insurance companies. This judicial review also dealt with the compatibility of the legislation with the ECHR.^[8] The insurance companies have lodged an appeal.

Representations by Insurers

4. The principal challenge set out by insurers' representatives to ECHR compatibility relates to the 'right to property' provided for in Article 1 Protocol 1.^[9]

5. Attention is drawn to the retrospective impact of the Bill in the AIB submission. It is worth highlighting that there is no absolute prohibition on any retrospective legislation within the ECHR. Article 7 provides that no one should be held guilty of a criminal offence which was not an offence at the time it was committed, and is therefore not relevant to civil claims.^[10] The retrospective element can be considered however among other matters in assessing whether any impact on property rights under Article 1 Protocol 1 is proportionate.

6. The ABI submission also argues that the Bill may breach rights to a fair trial protected under ECHR Article 6, in that, by

...introducing legislation that overrules a judgment that has progressed through the legal system and has been finally decided in the highest UK court, the Northern Ireland Executive would arguably be removing employers' and insurers' rights to have a decision impacting their business decided finally by an independent and impartial tribunal.^[11]

7. In certain circumstances the European Court of Human Rights has held that Article 6 would protect against a direct intervention by the legislature in the administration of justice which would prejudice the judicial determination of a case, unless there was a compelling ground of general interest for the legislature to do so. This in itself does not debar the legislature from ever introducing new legislation to change general policy in the future (providing the legislation itself is ECHR compatible):

The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.^[12]

8. The 2007 House of Lords judgment interpreted English law as it stood, and provided a determination of the specific cases at issue. To demonstrate an Article 6 interference in this judgment, insurers would have to demonstrate a specific engagement with their civil rights and obligations in relation to an ongoing case to which they were party.

Protection of property: ECHR Article 1 Protocol 1

9. Most of the ABI arguments focus on whether the Bill will constitute a violation of their right to the peaceful enjoyment of possessions protected under Article 1 of Protocol 1 of the ECHR (often termed the 'right to property'). This reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

10. Human rights provisions often only protect individuals but the above provision explicitly includes 'legal persons' and hence includes companies. The right to property is not absolute and, as is apparent in the text, the restrictions permitted are broad in scope. In order for a violation to be found it would first be necessary to establish whether the matter in question constitutes "possessions". It would then need to be determined whether the state action constituted interference in the "possessions" (amounting to "deprivation", "control" or otherwise). Finally it

would be necessary to consider if this interference was permitted under the Article. These stages are dealt with in turn below.

Nature of "possessions"

11. The term "possessions" in the Article refers not only to physical objects (e.g. land, buildings, primary materials) but also certain other rights and interests constituting assets.^[13] Insurance companies can argue that the resources which they would potentially have to surrender to meet successful claims constitute "possessions" for the purposes of the Article.^[14]

Nature of "interference"

12. The second question is whether there has been a "deprivation", "control" or other interference in the possessions under the terms of the Article.^[15]

13. "Deprivations" of property can be characterised as the extinction of the property rights of the owner through for example the expropriation or destruction of property. ECHR case law has characterised deprivation as when the state 'lays hands' on property - or allows a third party to do so.^[16] Consideration can be given to a de facto expropriation having taken place (in the absence of an explicit transfer of ownership). But for this there should be an extinction of property rights, rather than just an adverse impact.^[17] Deprivations of property are permitted provided that they are adequately set out in law and fall within, and are proportionate to, a legitimate public interest. It is usually expected that compensation should be paid for deprivations as part of the assessment of the proportionality of the intervention.

14. The types of measures held to constitute "control" (rather than a deprivation) of property have encompassed a broad range of matters including rent controls, the temporary seizure of property in criminal and customs proceedings, limitations on fishing rights, planning controls, prohibition of construction, obliging landowners to allow others to hunt on their land, policy postponing the enforcement of evictions of tenants in private housing, and refusals to provide professional accreditation. Controlling property is set out as a right that a state has, provided it is done so in accordance with law and in the general interest.^[18]

15. In any challenge to the present Bill the question would need to be addressed as to whether it constitutes any interference in the property rights of insurers. Notably no assets of insurers will automatically be directly transferred to affected persons as a result of the Bill. Rather, the law would allow affected persons to bring claims for negligence against former employers, and such actions must be successfully pursued; only then might they impact on insurers. It would appear from this that it would be difficult to establish that a 'deprivation' of property would directly result from a measure that merely opens the way for a claim to be made, subject to judicial determination. It is therefore more likely that any challenge to the Bill may focus on whether the legislation constitutes a "control" (or other interference) in the insurers' property rights. In the Scottish Judicial Review it was held, among other matters, that the potential impact of the legislation on insurers' resources was too remote a link to constitute any interference in property rights.

Permitted interference in the right to property

16. Should a court determine that there has been 'control' or some other interference in relation to the insurer's or employer's property rights, the focus is then on whether the interference is permitted under the terms of the Article. The state is entitled to legislate to control the use of property provided it is doing so within the general interest. In practice the test for the legitimacy of all categories of interference with property rights is similar; the state must demonstrate that:

- the interference has a basis in law, and
- is in the general or public interest, and
- is proportionate to that interest striking a fair balance with competing needs.

17. The requirement of a basis in law requires any interference not to be arbitrary and to be clearly set out in law. The law itself must be sufficiently precise in order for its consequences to be clear. In the present matter the intervention would be set out in law in the Act itself.

18. The second requirement is that the interference be in the 'general interest' (or 'public interest' in relation to a deprivation). It should be noted that states have generally been granted significant discretion ('a wide margin of appreciation') in respect of the determination of what constitutes the general or public interest. It is usually a matter for states to determine what constitutes a legitimate aim of public policy, unless this determination is 'manifestly without reasonable foundation':

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest"...The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.^[19]

19. The third requirement is that of proportionality. This means that the measure must strike a fair balance between the general interest and individual property rights. The state enjoys significant discretion in making this determination, provided that it does not impose on affected parties an individual and excessive burden. In relation to measures which constitute 'control' of property the European Court of Human Rights has stated:

It is well-established case-law that the second paragraph of Article 1 of Protocol No. 1 [relating to 'control' of property] must be construed in the light of the principle laid down in the first sentence of the Article [the right to the peaceful enjoyment of possessions]. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. ...[T]here must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.^[20]

20. There are instances of states having legislated in a manner that has a significant financial impact on third parties and it has been held to be legitimate.^[21] It is also worth noting that the issue of compensation may arise in a proportionality test in relation to all types of interference, but a presumption for compensation is only made in relation to 'deprivations'.^[22] The Court has also considered circumstances where there has been a change in policy or legislation, including where there has been a retrospective impact.^[23]

21 The Commission hopes that this appraisal of the requirements of Article 1 Protocol 1 is of assistance to the Committee in its considerations of the Bill. The ECHR jurisprudence continues to develop over time, and there has been a considerable number of cases following the accession of Central and Eastern European states to the ECHR. The Commission can provide further information on these matters if that would assist the Committee. Given the complexities in this area of human rights the Committee may wish to seek a detailed legal opinion in relation to the Bill.

January 2011
Northern Ireland Human Rights Commission

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[1] Northern Ireland Act 1998 s.69(4).

[2] Correspondence of Chairperson, Jennifer McCann MLA to Chief Commissioner, Prof. Monica McWilliams, 14 January 2011.

[3] Analysis of Responses to the Consultation on the Draft Damages (Asbestos –related) Conditions Bill 2010, Department of Finance and Personnel, 2010; Correspondence to Committee Chairperson from Director of General Insurance and Health, ABI-10 January 2011; Written Evidence from the Association of British Insurers to the Damages (Asbestos-related Conditions) Bill 2010, ABI, 13 January 2011.

[4] *Johnston v NEI International Combustion Ltd* [2007] UKHL 39
<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns.pdf> [accessed 21 January 2011] (also referred as the Rothwell decision).

[5] Northern Ireland Act 1998 s.6(2)(c).

[6] The Damages (Asbestos-Related Conditions) Bill: Explanatory Notes and Financial Memorandum, paragraph 22; Hansard 17 January 2011, Minister for Finance and Personnel, Sammy Wilson MLA, Second Stage, 5.30pm.

[7] The Damages (Asbestos-related Conditions) (Scotland) Act 2009.

[8] *AXA General Insurance Ltd and Others, Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009* [2010] CSOH 2
<http://www.scotcourts.gov.uk/opinions/2010CSOH02.html>.

[9] The 10 January 2011 correspondence to the Committee from the Association of British Insurers argues that the Bill "may breach Articles 1 and 4" of the ECHR. Article 1 is an introductory Article and Article 4 deals with prohibition of slavery, hence there is no relevance to the matter at hand. This assertion may therefore indicate a misunderstanding of the ECHR, may simply be a typographical error, or may have intended make some reference to section 1 (ECHR rights) and section 4 (on declarations of incompatibility of legislation) of the Human Rights Act 1998.

[10] This does not include matters considered an offence under international law (treaties, war crimes etc.) in the absence of domestic accountability.

[11] Paragraph 2.4, AIB Written Evidence 13 January 2011.

[12] Zielinski and Pradal & González and Others v France (app. nos. 24846/94; 34165/96; 34173/96) 2001 31 EHRR 19 paragraph 57.

[13] See Gasus Sosier- und Fördertechnik GmbH v the Netherlands (app no. 15375/89) judgement of 23 February 1995; Gratzinger and Gratzingerova v Czech Republic (app. No. 39794/98) admissibility decision of 10 July 2002.

[14] More tenuous and difficult to establish however would be an argument that an effective 'immunity' from claims constitutes a ring fenced "possession" in its own right. This was unsuccessfully argued in the Judicial Review in Scotland. There are a number of cases relating to legal claims to monies that have been awarded or of which there is a 'legitimate expectation' (see for example Ryabykh v Russia (App. No. 52854/99) judgment of 24 July 2003). The consideration of awards resulting from legal claims (or legitimate expectations thereof) does not in itself mean that a theoretical 'immunity' from a particular type of claim by an insurer should or would be treated in the same way in relation to ECHR compliance.

[15] The Court has consistently set out as three rules in relation to the test it applied for engagement of the right to peacefully enjoy possessions: "[Article 1 of Protocol No. 1] comprises three distinct rules. The first rule, which is of a general nature, [enunciates] the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph." This was originally set out in *Sporrong and Lönnroth v Sweden* case A52 (1982) (paragraph 61) and has reappeared in subsequent jurisprudence.

[16] See *Bramelid and Malmström v Sweden* (1982) 29 DR 76, page 82.

[17] For example in *Papamichalopoulos v Greece* where a de facto deprivation was found when the Navy took over land without any formal transfer of ownership (judgment of 24 June 1993, EHRR 440). By contrast *Mellacher v Austria* (judgment of 19 December 1989, 12 EHRR 391 (para. 44), relating to rent controls); and *Bramelid and Malmström v. Sweden* (1982) (App. Nos. 8588/79 and 8589/79; minority shareholders obliged to sell to majority shareholders at fixed price) no deprivation was found.

[18] There has also been a third residual category of 'interference' which neither constitutes control or deprivation but has been considered implicit in the first sentence of the Article that everyone has the right to peaceful enjoyment of possessions. As jurisprudence has developed, in particular that of "control", few cases are considered under this heading. When considering other interferences the same public/general interest and proportionality tests tend to be applied.

[19] *James and others v UK* (App. no. 8793/79), judgment of 21 February 1986 8 EHRR 123, paragraph 46.

[20] *Chassagnou and Others v France* (App. nos. 25088/94, 28331/95 and 28443/95), judgment of 29 April 1999 29 EHRR 615, paragraph 75.

[21] See for example the recent decision by the European Court of Human Rights in relation to a challenge to the ban on hunting with dogs in England and Wales. The *Countryside Alliance and others v UK* applicants had argued, among other matters, that the ban interfered with their property rights. The Court, dismissing the challenge as manifestly unfounded, and whilst not conceding that the ban did constitute a 'control' or other interference in property, stated that even if it had been, the ban could be justified as proportionate to the general interest: "...the

Court considers it unnecessary to establish the extent to which Article 1 of Protocol No. 1 is engaged in the present case since, even assuming that the ban in England and Wales interfered with the property rights of the second applicants in each of the ways they alleged, it considers that the hunting ban served a legitimate aim and was proportionate for the purpose of that Article. [...] [The Court] also observes that the 2004 Act was preceded by extensive public debate... It was enacted by the House of Commons after equally extensive debate in Parliament where various proposals were considered before an outright ban was accepted. In those circumstances, the Court is unable to accept that the House of Commons was not entitled to legislate as it did." *Countryside Alliance and others v the UK and Friend v the UK* (Applications nos. 27809/08 and 16072/06), admissibility decision of 24 November 2009, paragraphs 55-56.

[22] The *Countryside Alliance v UK* decision dealt with the issue of compensation in relation to 'control' of possessions, reiterating that there is generally no right to compensation in this instance. The Court accepted that "a ban on an activity which is introduced by legislation will inevitably have an adverse financial impact on those whose businesses or jobs are dependent on the prohibited activity" but stated that nevertheless: "...the domestic authorities must enjoy a wide margin of appreciation in determining the types of loss resulting from the measure for which compensation will be made. As stated in *C.E.M. Firearms Limited* 'the legislature's judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable'. This applies, a fortiori, to cases where the interference concerns control of the use of property under the second paragraph of Article 1 rather than deprivation of possessions under the first paragraph of the Article. There is normally an inherent right to compensation in respect of the latter but not the former... The Court does not find the absence of compensation in the 2004 Act to be arbitrary or unreasonable. Nor does it find that, in reaching the judgment it did, the United Kingdom upset the fair balance between the demands of the general interest and the requirements of the protection of the applicants' property rights by imposing on the applicants an individual and excessive burden" (Paragraph 57).

[23] For example the *Pine Valley and others v Ireland* case dealt with the impact of revocation of previously-granted planning permission. The Court, noting that the "applicants were engaged on a commercial venture which, by its very nature, involved an element of risk", found no violation of Article 1 Protocol 1 (App. no. 12742/87, judgment of 29 November 1991 14 EHRR 319 paragraph 59). In *Provincial Building Society and others v the UK* the Court upheld retrospective legislation which prevented the exploitation of a tax loophole (resultant from legislation being invalidated in the UK courts due to technicalities). Whilst this was considered an interference amounting to 'control' of property rights, the Court held it to be legitimate and proportionate (App. nos. 117/1996/736/933-935, judgment of 23 October 1997 25 EHRR 127). By contrast in *Lecarpentier v France* the Court found that retrospective changes to the French consumer code which had the impact of obliging the repayment by an individual of a previous court award made before the changes (to a mortgage lender who had appealed the verdict), did constitute a violation of Article 1 Protocol 1. The Court regarded the measure as not having been justified by pressing reasons of general interest and found it to be disproportionate having constituted an "abnormal and excessive burden" on the claimants (App. no 67847/01, judgment of 14 February 2006).

Thompsons McClure Solicitors follow up correspondence 31 January 2011

Mr. Shane McAteer
Committee Clerk
Northern Ireland Assembly
Committee for Finance and Personnel
Committee Office

Room 419
Parliament Buildings
Belfast
BT4 3XX 31st January 2011

Dear Mr. McAteer

Thank you for your letter of 17th January 2011.

We are surprised that you should raise the issue of tariffs to determine the levels of compensation payable for pleural plaques.

The Department of Finance and Personnel's initial consultation, in January 2009, on compensation for people diagnosed with pleural plaques included the option of a statutory payment scheme.

Thompsons opposed a scheme and urged the department to choose option 3 – to restore symptomless pleural plaques as an actionable condition. We did however state that should a scheme be introduced it should be fully funded by the insurance industry and that there should be a fixed sum of compensation paid in every case.

We said the amount should be no less than the £17,500 based on the mid point of the second edition of the Judicial Studies Board (JSB) Guidelines for the Assessment of the General Damages in Personal Injury Cases in Northern Ireland.

We also said that there should be an annual RPI increase in compensation.

As a result of the consultation, the Department chose option 3. We welcomed this decision. This would enable the courts to deal with these cases. The appropriate guidance for the courts should be the JSB (NI) Guidelines, which is based on judicial precedent and is therefore independent.

Had the Department chosen the statutory scheme option, we would have urged it to link the fixed sums of compensation paid, tariffs if you like, to the JSB(NI) Guidelines. We would have opposed a tariff system such as the Civil Injuries Compensation Authority (CICA) Scheme, which is not linked to JSB guidelines, does not allow for flexibility and is in fact significantly lower than the JSB.

But the department has chosen, after full and proper consultation, to reinstate the process of determining compensation for pleural plaques as a matter for the courts to deal with making the issue of tariffs no longer relevant. We do not understand why tariffs are now being raised again. Tariffs represent a significant departure from option 3 and the Bill and would, in our opinion, require the Department to consult again.

Yours sincerely,

Oonagh McClure

Thompsons McClure
Dd 02890890471

**Association of British Insurers follow up correspondence 3
February 2011**



The Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010

Further Evidence from the Association of British Insurers

Responses to questions from the Finance Committee following ABI Evidence Session on January 19th 2011

The UK insurance industry is the third largest in the world and the largest in Europe. It is a vital part of the UK economy, managing investments amounting to 24% of the UK's total net worth and contributing the fourth highest corporation tax of any sector. Employing over 275,000 people in the UK alone, the insurance industry is also one of this country's major exporters, with a fifth of its net premium income coming from overseas business.

1. In its response to the Committee's call for evidence on the Bill the Association of British Insurers states that "pleural plaques are not a disease". However during the debate on the Bill's Second Stage there was a discussion about whether the bodily change in the form of pleural plaques amounts to an injury or should be classed as a disease.

- Can you advise the Committee how you have come to the conclusion that pleural plaques are not a disease?

1.1 The ABI is not a medical body. Our position that pleural plaques are not a disease is entirely based on the medical consensus that emerged before the Johnston decision, and has been reinforced since then by further medical research.

1.2 The medical consensus that pleural plaques are not a disease is based on the fact that they do not demonstrate the characteristics associated with a disease:

- Pleural plaques are symptomless in all but a handful of exceptional case. Dyspnoea (shortness of breath) and chest pain do not occur and abnormal physical signs are not found.^[1] Where small lung decrements are found in patients, these are generally attributed to asymptomatic pulmonary fibrosis (early asbestosis) rather than pleural plaques.^[2] The generally accepted medical evidence is that plaques by themselves do not produce significant changes in lung function. There are relatively few studies of large populations of people with pleural plaques but a large general population survey from Uppsala in Sweden found that practically all of 827 subjects were symptom free at the time that their plaques were discovered.^[3]
- Pleural plaques are benign or non-malignant, and do not lead to anything more serious. Pleural plaques calcify as they age and become more visible on radiography but they are not pre-malignant lesions.^[4] As medical opinion agrees, plaques only indicate that there has been exposure to asbestos.^[5]
- Pleural plaques do not impair quality of life and do not affect life expectancy or give rise to clinical complications.^[6] The fact that pleural plaques are endemic in the general population of some countries, as for example in areas of China, Macedonia, Corsica and

Turkey, lends strength to the assertion that people who are not aware that they have pleural plaques do not suffer any impact on their quality of life.^[7]

1.3 Pleural plaques can therefore be distinguished from asbestos-related diseases which usually do show symptoms^[8]:

- Asbestosis - a form of pulmonary fibrosis, is usually progressive. It may result in severe respiratory disability and often premature death.
- Diffuse pleural thickening - can cause symptoms by virtue of its restrictive effect on lung expansion;
- Pleural effusions - sometimes the earliest sign of an effect of a significant exposure to asbestos and may cause transient symptoms;
- Mesothelioma - a malignant tumour;
- Other rarer pleural tumours, including the localized fibrous mesothelioma.

1.4 As pleural plaques are not a disease, the Law Lords in the similar cases of Rothwell and Johnston, and courts since then, have found that the presence of asymptomatic pleural plaques does not constitute negligent damage. Lord Hoffman clarified that, 'Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change...having no perceptible effect upon one's health or capability.'^[9] Thus, although pleural plaques indicate some change to the lungs, they do not constitute damage as there is no perceptible effect upon health or capability.

1.5 In his response to the Department for Finance and Personnel consultation on Pleural Plaques in 2008, the Chief Medical Officer for Northern Ireland acknowledged two upcoming reports from the Chief Medical Officer for England and Wales and the Industrial Injuries Advisory Council. He said, 'The input from this authoritative body [the IIAC] will I hope prove useful. Likewise I note the independent review which the Chief Medical Officer for England...has commissioned and I look forward to its deliberations. Any effort which can be made to ensure a better understanding of pleural plaques to both the public and the medical profession is likely to be useful.'^[10]

Having reviewed in depth the latest medical evidence, both of these reports concluded that pleural plaques should not be classed as a compensatable disease.

1.6 This Bill would therefore be imposing an interpretation of what constitutes a compensatable disease which is in direct conflict with the medical and legal consensus in both England and Wales, and in Northern Ireland.

2. The ABI has repeatedly advised the Committee that it believes the Damages (Asbestos-Related Conditions) Bill is in contravention of the European Convention on Human Rights, specifically Article 1 and Article 6. The Committee has not taken these concerns lightly and is taking steps to become further informed on this issue. During Monday's debate the Minister stated that: "I am happy to say that, in light of all the information that is available to me, in my view, the Bill is legally competent."

- Can you advise the Committee what evidence you have used to reach your conclusions about the possible contravention of the ECHR?
- Are you willing to share the legal advice that you have received with the Committee?

2.1 Our assertions about the possible contravention of the ECHR are based on the arguments insurers are advancing in the judicial review that has been brought against the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 ('the Scottish Damages Act'), which is very similar to this Bill. Insurers brought the judicial review in Scotland on three grounds: contravention of ECHR Article 1 of Protocol 1 rights, Article 6 rights, and common law irrationality. Initial legal advice from Northern Ireland solicitors indicates that similar arguments would be applicable in Northern Ireland. We are not in a position to share any legal advice with the Committee, but the points below outline the arguments used in the judicial review in Scotland, and which we believe would also apply to this Bill.

2.2 The first issue for any court to consider on a possible contravention of the ECHR is whether the claimant has the standing or the right to bring the case. All entities are able to bring a case against state bodies under the ECHR, from individuals to companies, if their interests are sufficiently impacted by the action of the state. The judicial review of the Scottish Damages Act was heard in the first instance by Lord Emslie in the Outer Court of Session in Edinburgh in September 2009. Lord Emslie allowed insurers standing as he found the Scottish Damages Act impacted on insurers closely enough to make their action competent on both ECHR and common law grounds. Indeed, he said that 'it would be an affront to justice if the insurers weren't able to challenge the 2009 Act...For admissibility purposes, the important elements of the petitioners' claims are (i) in passing the 2009 Act the Parliament deliberately targeted indemnity insurers through the medium of pleural plaques litigation; and (ii) that insurers have a close and controlling involvement in such litigation'.^[11] It is likely therefore that, as this Bill closely mirrors the Scottish Damages Act, insurers would have standing to bring judicial review on ECHR grounds against it.

2.3 The first ECHR ground is that there has been an illegal interference with property rights under Article 1 Protocol 1. This ground requires insurers to demonstrate that (i) there is a possession; (ii) the possession has been interfered with; (iii) the interference is not justified through compelling public interest grounds and is not proportionate. The insurers' possession in the Scottish judicial review was characterised in various ways. It was argued that the Rothwell judgment gave insurers immunity from claims for compensation for asymptomatic pleural plaques; that the capital of an insurance company used to pay compensation for asymptomatic pleural plaques is a possession; and finally, as insurers are obliged by FSA regulations to reserve for anticipated liabilities, that these reserved funds are a possession. The Scottish Government tried to argue that none of these qualified as 'possession' under Article 1 Protocol 1, claiming that they did not have economic value. However, in his judgment, Lord Emslie found that insurers' capital resources did qualify as 'possession'.^[12]

2.4 The argument that insurers 'possession' had been interfered with was based on two counts. First, the Rothwell judgment itself is an asset of economic value which the insurers were deprived of as a result of the Scottish Damages Act. The decision gave insurers immunity from suit and relieved them of any liability to compensate for asymptomatic asbestos-related conditions. The Scottish Damages Act would deprive the insurers of this immunity. Second, the Scottish Damages Act would ultimately deprive the insurers of their capital by forcing them to pay it out in compensation. However, the more immediate effect of the Scottish Damages Act would be to impact on the insurers' regulatory obligation to reserve for anticipated liabilities. The uncertainty surrounding the future costs of asymptomatic asbestos-related claims means that it would be very difficult for insurers to calculate what their future liabilities will be. As a result a significant proportion of insurers' capital would be tied up in reserves, and would be rendered unavailable either for development of the business or for distribution to shareholders. An added element to the argument under breach of Article 1 Protocol 1 is the retrospective nature of the interference in the possession. In regard to this Bill, the interference in insurers' possession is further compounded by the delay of two years between the Johnston decision and the Bill being introduced.

2.5 Finally, an interference with a possession under Article 1 of Protocol 1 can only be justified if it strikes a "fair balance" between the rights of the person or company whose possessions are affected and the general interests of the community. The first step, then, is to decide whether there is any public interest in the proposed interference. The courts will respect Parliaments' judgment about what is in the public interest unless that judgement is 'manifestly without reasonable foundation'. The insurers in the Scottish judicial review argued that the assertion that the Scottish Damages Act was in the public interest was 'manifestly without reasonable foundation', as it reversed a decision of the House of Lords in a manner which was at odds with the ordinary principles of the law of negligence. It also sought to compensate people with asymptomatic conditions who were not in pain, had suffered no physical impairment or disfigurement and were at no greater risk of developing an asbestos-related disease than a person who, having also been exposed to asbestos, had not developed pleural plaques.

2.6 The second step is to demonstrate that, even if there were some public interest, the interference is proportionate, in striking a fair balance between the rights of the insurers and the general interests of the community that are served by the legislation. In the judicial review, the insurers argued that, in enacting the legislation, the Scottish Parliament had not sufficiently considered the fact that it would deprive insurers of a right and would impose on them an unquantifiable, but substantial, financial burden. Rather the Scottish Damages Act focused on the aim of compensating 'victims' of pleural plaques regardless of the consequences. While it is undoubtedly a compelling public interest to ensure that those suffering from asbestos-related diseases are fully and promptly compensated, the same cannot be assumed for those suffering from asymptomatic conditions for which there is no 'harm' as recognised in the ordinary laws of negligence.

2.7 The second ECHR ground relates to rights to fair process under Article 6. In the judicial review, the insurers argued that by introducing legislation that overruled a judgment that had progressed through the legal system and had been finally decided in the highest UK court, the Scottish Parliament had removed employers' and insurers' rights to have a decision impacting their business decided finally by an independent and impartial tribunal.

2.8 Although Lord Emslie found in the judicial review of the Scottish Damages Act that the insurers' case was insufficient on the ECHR grounds, he expressed sympathy with their grounds and said they were not without substance. 'There is clearly room for differences of opinion as to whether the Parliament was right to legislate in the way it did, and it remains to be seen whether the 2009 Act will prove to have adverse legal or political consequences in years to come.'^[13]

2.9 The Scottish judicial review was appealed to the Inner Court of Session in Edinburgh in July 2010. We are now awaiting judgment from the court. As the Northern Ireland Assembly report on this Bill notes, the Scottish Parliament is the only known example of a legislature that has legislated to make pleural plaques compensatable^[14], and the legality of this action is subject to a legal process that will, by its completion, have taken four to five years to resolve.

3. Section 3 of the ABI Paper raises concerns that Department for Finance and Personnel has not produced a sufficiently robust financial impact assessment of the impact of this Bill.

- There are those who believe that the introduction of this Bill is the 'right thing to do'. How do you respond to the suggestion that if it is the 'right' thing to do, then cost should not matter?

3.1 It is difficult to see on what grounds this Bill is the 'right thing to do', or how it could be a legitimate policy aim. The Assembly should consider the proportionality of the legislation, and

take into account vital questions of both state budget capacity and financial impact on the local economy. We have serious concerns that the Department for Finance and Personnel (DFP) has not produced a sufficiently robust financial impact assessment for this Bill. For example, they have not provided a detailed breakdown of cost projections to the Northern Ireland Executive from DETI's continuing Harland and Woolf liabilities, which we estimate form the vast bulk of Northern Ireland asbestos-related exposures. Moreover, we believe that the DFP have not sufficiently considered other means of advancing their policy objective of supporting people with pleural plaques, which would be more helpful to them and would have fewer wide-reaching consequences.

3.2 Following the discussion under question 2 above, there are many reasons why passing this Bill is not 'the right thing to do'. The Bill aims to compensate people with an asymptomatic, painless condition, which will potentially lead to all of those who formerly worked in the shipyards over a 70-80 year period undergoing x-rays, and will add to, rather than reduce, their and their relatives' concern over their own wellbeing. Moreover, it is difficult to see that it is 'right' to compensate for an anxiety that some people may contract an asbestos-related disease, when the medical evidence demonstrates that they have no higher risk of contracting such a disease than those who worked alongside them but do not have pleural plaques.

3.3 The Assembly should consider the disproportionate impact of the legislation on the state budget, especially when compared to the figures involved with other areas of DETI investment.^[15] DETI recently made provision in its spending proposals for potential liabilities of £31 million up to 2015 in relation to asbestos-related liabilities, estimating about £3 million a year for pleural plaques claims. As previously stated, we believe this to be a substantial underestimate – we estimate that the cost up to 2015 is likely to be approximately £39.5 million for pleural plaques claims alone. This includes £6 million a year in pleural plaques compensation plus a backlog of £15.5 million. Leaving aside other investment priorities, this would leave DETI with fewer funds to compensate genuine sufferers, such as those suffering from mesothelioma, asbestos-related lung cancer, and symptomatic asbestosis, especially if DETI projections for these liabilities are similarly underestimated.

3.4 The Assembly should also consider in more depth the impact of the Bill on the wider economy and on private parties. The Bill would impact on insurers', employers' and Local Authority resources, as they would also have to make provisions to pay compensation to those with pleural plaques. In doing so, it again would deplete funds for compensating genuine sufferers from asbestos-related diseases. The diversion of resources away from claimants suffering from a disease we understand to be one of the concerns that prompted a number of US States to enact legislation preventing claims from being brought by those with symptomless asbestos-related conditions.

3.5 The Assembly should also consider that the Bill might well have a long term impact on the insurance market in Northern Ireland. Many factors go into insurers' pricing strategies, but, fundamentally, the cost of paying claims feeds into premiums. Northern Ireland already has levels of damages and costs that are higher than in Great Britain as a whole. This Bill would make Northern Ireland a riskier place to insure businesses as insurers could not be certain that when they went to court, there would not be a subsequent intervention that would entail further costs. Insurers are likely therefore to build this cost into their pricing strategies. Insurers might also withdraw capital capacity from markets where they do not foresee an adequate return. Any uncertainty about the stability of a legal environment could potentially make Northern Ireland a less attractive place for the investment of this capital, which in turn would restrict the availability of insurance in the market, and reduce competitive pressure on prices. At a time when the Executive is seeking ways to develop the private sector in Northern Ireland this may put Northern Ireland businesses at a competitive disadvantage relative to their UK competitors.

3.6 Moreover, the Assembly should consider whether the Executive has sufficiently considered alternative means of achieving its policy objectives. Last year, the Westminster Government announced they would not overturn Rothwell to make pleural plaques compensatable and instead would make payments of £5000 to those claimants who had begun claims in the courts before the Rothwell decision, on the basis of a reasonable expectation of compensation. These payments were limited state payments, and were ex gratia and therefore did not involve any interference with private parties' possessions and did not tamper with the law of negligence.

3.7 Instead of paying compensation to those with pleural plaques, in our view and supported by medical opinion, the Northern Ireland Executive should consider raising awareness of the benign nature of pleural plaques to help allay concerns of those diagnosed with the condition, and the wider public. The DFP's consultation paper on the Bill recognises that additional information should be provided to those with pleural plaques, a position that was generally supported in responses to the original consultation on pleural plaques. Medical experts have called for information leaflets that set out the difference between pleural plaques and asbestos-related diseases, and that explain that pleural plaques do not cause any injury to the person concerned.^[16] Such leaflets have already been produced by the British Thoracic Society and British Lung Foundation for distribution in England and Wales.

4. In your paper you state that "overturning Johnston represents a fundamental change to the law of negligence, undermining the stability of the legal environment in Northern Ireland". However, for others it is seen as the restoration of a previously actionable action.

- How have you come to this conclusion about the potential consequences of overturning the Johnston case?

4.1 Overturning Johnston represents a fundamental change to the law of negligence, which is a central tenant to the common law of tort and has been consistently upheld by the courts. Parties should be able to rely on the certainty of the courts' decisions, to shape their business practices accordingly. Not knowing when the Northern Ireland Executive is going to intervene in legal decisions for disproportionate policy aims, undermines the stability of the legal environment in Northern Ireland. Moreover, changing the law of negligence potentially increases the level of litigation and likelihood of spurious claims. Both of these consequences would make Northern Ireland a less attractive place for businesses to invest in.

4.2 The Bill would alter the determination as to whether a particular disease or condition constitutes an injury which is compensatable, which has traditionally been a matter for the courts to decide. In order for there to be a valid liability claim under common law, there must be a negligent act by the defendant, this must cause an injury to the claimant's body, and the claimant must suffer material damage as a result.

4.3 It is true that pleural plaques claims were paid from the 1980s until the judgment in 2006. However, claims were paid on the basis of the uncertain medical evidence and on the concern that pleural plaques were potentially malignant. As the medical evidence moved towards the current consensus that pleural plaques do not have any symptoms, are non-malignant and do not impair quality of life, the challenge was brought that they should no longer constitute negligible damage. That challenge was initially made in Rothwell by the Westminster Government, supported by insurers, because it was felt that the decision needed to be tested in a court of law. In Rothwell, the medical evidence from both the claimant and defendant parties agreed that pleural plaques were benign, and on this basis the Law Lords found that pleural plaques do not constitute material damage.

4.4 Equally, anxiety is not compensatable in tort law. In Johnston the five Law Lords found that neither the risk of contracting a disease in the future, nor the individual's anxiety that he might do so, were sufficient grounds for a claim in negligence. The Bill would create rights based on exposure and/or anxiety about the prospect of a future illness, rather than any damage, setting a dangerous precedent that could lead to a flood of 'exposure only' claims where no actionable damage has occurred and, even more widely, claims for risk of an illness occurring or for worry that something might happen. For example, exposure to sunlight increases the risk of developing skin cancer, so there could be claims from building site workers that they were not adequately protected from the sun and should be compensated for the anxiety of contracting skin cancer. Those exposed to second hand smoke from their colleagues in the workplace could also claim for the anxiety of contracting lung cancer. It would be difficult to estimate the full consequences of expanding the law of negligence in this way.

4.5 Finally, the Law Lords in Johnston found that even psychiatric illness as a result of concern over the risk of an asbestos-related disease was not compensatable. One of the claimants in Johnston became clinically depressed when he discovered he had pleural plaques. The question was not whether the claimant had suffered damage but whether his employer owed him a duty of care in respect of a psychiatric condition caused by his anxiety at the risk of a future illness. This in turn depended on whether it was reasonably foreseeable that an employee would react in this way to the risk he might contract an asbestos-related disease. In the absence of contrary information, an employer is entitled to assume his employees are persons of reasonable fortitude. Neither the Court of Appeal nor the House of Lords considered it reasonably foreseeable that the risk of an asbestos-related disease would cause psychiatric illness to a person of reasonable fortitude.

4.6 We believe there are no other asymptomatic conditions which are compensated in the way this legislation proposes. The ruling in Johnston has been subsequently tested in cases relating to symptomless or minimally symptomatic asbestosis. In the 2009 cases of Beddoes & Ors v Vinters Defence Systems & Ors^[17], the judge, HHJ Walton, found there is no general formula on asbestosis cases with either no or minimal symptoms, and each case has to be looked at on its own facts. Whether the claimant has suffered material damage is a matter of fact and degree. The judge applied Johnston in finding that, in deciding whether a condition which otherwise does not amount to material injury is actionable damage, the court cannot take into account the possibility that it might, in future, become symptomatic. HHJ Walton applied the same test in the 2010 case of Smith v Deanpast Ltd.^[18]

5. In the ABI letter dated 10 January 2011 concern is expressed that the Committee does not have the appropriate time available to properly scrutinise and consider oral evidence on this legislation.

- Can you outline your concerns about why the Committee needs more time, given that the principles of the Bill have now been agreed by the Assembly?

5.1 Our main concerns are that the Committee has not:

- Sufficiently investigated the cost impact of the Bill, in particular, because no detailed interrogation of DETI figures on asbestos-related liabilities and the specific breakdown for pleural plaques liabilities has been undertaken;
- Sought independent analysis of the cost impact, including actuarial estimates if required, on the potential cost impact of the Bill;
- Sufficiently considered the ECHR implications of the Bill, given the potential for the Bill to be subject to judicial review, the reluctance of the Minister to release legal advice from the Attorney-General, and especially given the ongoing legal case in Scotland.

- Heard oral evidence from independent medical experts, including the Chief Medical officer for Northern Ireland, given the particular relevance of medical opinion to this Bill;
- Sought expert opinion on the likely effect on business of the Bill and any wider ramifications such as potential impacts on the NHS of increased screening.

5.2 In our view, it is not appropriate for a Bill with such wide implications to be rushed through the legislative process, without sufficient time for scrutiny of the detail. This Bill is contested and the Committee has an important role in providing the Northern Ireland Assembly and its Members with an extensive and robust analysis that considers all matters of the Bill and its potential implications. It is this due process that properly allows Members to make an informed decision on whether the Bill should pass or fall.

6. There has been a suggestion from Zurich Insurance and the wider industry that the introduction of this legislation will set a "dangerous" precedent which will "open the floodgates".

- Can you tell the Committee what evidence you have to support this view and how you have reached this conclusion?

Please see our answer to question 4.

8. In its response to the consultation on the draft legislation it is reported by DFP that RSA raised concerns about the proportionality and legitimacy of the policy goal behind the legislation.

- Can you explain these concerns to the Committee?

Please see our answer to question 3.

9. In its response to the consultation on the draft legislation it is reported by DFP that Aviva highlighted the need to focus on "serious asbestos related conditions".

- Can you advise the Committee on the nature of a "serious asbestos related condition" and why you consider pleural plaques does not fall into this category?

8.1 Please see the answer to 1.

Association of British Insurers

03 February 2011

[1] Professor Robert Maynard, The Medical Aspects of Pleural Plaques: A Review for the Chief Medical Officer, Sir Liam Donaldson, 2009
http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_114728.pdf , point 34. Reference to studies Ohlson et al (1985) and McLoud et al (1985) which found no difference in respiratory function in subjects with plaques when compared with normal subjects.

[2] Maynard, point 34. Reference to Jarvholm and Sandén (1986), Schwartz et al (1990), Kilburn and Warshaw (1990), Oliver et al (1988), Fridriksson et al (1981).

[3] Industrial Injuries Advisories Council, Position Paper 23: Pleural Plaques, 2009
http://www.iiac.org.uk/pdf/pos_papers/pp23.pdf, point 10.

[4] Maynard, point 34

[5] In their written evidence to the Finance and Personnel Committee, 2011, the Royal College of Physicians notes that the risk of other asbestos-related conditions is best quantified according to the latency period, duration of exposure, level of exposure, cumulative exposure and type of exposure.

[6] Maynard, point 35. Reference to CMO Parkes, W.R. (1994) Occupational Lung Disorders.

[7] IIAC report, point 36. Reference to (Luo et al 2003) (Rey et al 1994); (Hasanoglu et al 2003) (Sichletidis 1992)

[8] Definitions taken from Maynard report and Royal College of Physicians evidence to Finance and Personnel Committee.

[9] Johnston v. NEI International [2007] UKHL 39.

[10] Department for Finance and Personnel, Analysis of responses to consultation paper on pleural plaques, 2010.

[11] AXA General Insurance Ltd and Others v Lord Advocate and Others [2009] CSOH 2.

[12] AXA General Insurance Ltd and Others v Lord Advocate and Others [2009] CSOH 2.

[13] AXA General Insurance Ltd and Others v Lord Advocate and Others [2009] CSOH 2.

[14] NI Assembly Research and Library Service, Pleural Plaques: numbers, costs and international approaches, NIAR 478-10, October 2010
http://archive.niassembly.gov.uk/finance/2007mandate/research/pleural_plaques.pdf

[15] As outlined in Spending and Savings Proposals within the Department of Enterprise, Trade and Investment, 2011.

[16] Department for Finance and Personnel, Analysis of responses to consultation paper on pleural plaques, May 2010, p13.

[17] Unreported, heard by HHJ Walton in Newcastle County Court, 2009.

[18] Unreported, heard by HHJ Walton in Newcastle County Court, 2010.

Prof. Anthony Seaton Submission Damages Bill

Evidence on Pleural Plaques

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Summary

Pleural plaques are benign lesions caused by past asbestos exposure and are not pre-malignant. They cause no symptoms to the individual, but are a marker of past exposure to asbestos. Anxiety may be prevented by careful explanation of their implications to the subject. This medical process is hindered by the implication of available compensation that they are indeed a significant medical condition. The numbers of individuals currently with pleural plaques may be as many as a million in England and Wales.

Negative implications of their recognition as a tortious condition are an overall increase in anxiety among asbestos-exposed individuals, a significant increase in radiation hazard to the population, an increase in the risk of anxiety related to unnecessary investigations and false positive results requiring further investigation, and increases in public expenditure in defending actions and investigating and treating anxious patients in the NHS. On the positive side, while those well people with plaques may receive a sum of money, law firms and expert witnesses may look forward to significant increases in revenue.

1. The House of Lords has accepted medical evidence that pleural plaques are harmless indicators of past asbestos exposure and not a cause of ill health. They have discussed in extenso the legal issues surrounding compensation for such a condition and have decided that there is no case in law for actions against employers for the condition. I have been asked for my opinion on this issue. My views are those of a physician and researcher who has made a prolonged study of the issues and has looked after many patients with asbestos-related conditions.
2. I agree with the decision of the House of Lords, which is based on generally accepted medical knowledge. Much of the argument revolved around the anxiety felt by individuals as a consequence of receiving information that they had plaques. For the reasons given below, I am of the opinion that this anxiety relates to inability of doctors to reassure patients about the benign nature of the condition in light of legal implications that it is a serious disease. The risks relate to asbestos exposure, not to pleural plaques, and such risks can now be quantified and put into perspective in order to inform and usually reassure the individuals concerned.
3. Asbestos causes a number of different conditions of the lung and its lining (the pleura), some serious and fatal, others less serious, and some trivial but sometimes alarming. The most serious such conditions, mesothelioma and lung cancer are widely known by the public to be fatal, while asbestosis is potentially disabling and fatal. The others, notably pleural plaques, pleural effusion and pleural fibrosis, though not fatal, are often confused in the public (and sometimes medical) mind as "asbestosis". The least serious is the development of pleural plaques. This is however far and away the most common of all the asbestos-related conditions and thus has acquired important financial connotations to companies, lawyers and doctors as well as to workers, out of all proportion to its medical importance.
4. Mesothelioma is universally fatal, almost uniquely attributable to asbestos exposure and relatively common, occurring in some 2000 people per annum in UK. The risk of development is related to the dose of asbestos received (the product of exposure concentration and duration). Asbestosis is now rarely fatal, since its development requires a very high exposure and such exposures are historic in the West. It does however still appear in a slowly progressive or arrested form in some individuals with heavy past exposures and certainly can be disabling. Lung cancer is primarily related to cigarette smoking but asbestos exposure is a well-recognised risk

factor that acts synergistically with smoking. These serious conditions are rightly compensable under civil law and the degree of disablement is assessable in the normal manner.

5. The pleural conditions other than mesothelioma differ in a number of ways. Pleural effusion is usually temporarily disabling by breathlessness and pain and may resolve into pleural fibrosis. It is worrying for the patient, since the alternative diagnosis the doctor considers is always mesothelioma and several investigations and ultimately the passage of time without worsening are necessary to exclude this fatal possibility. There is no dispute about compensation for this. Diffuse pleural fibrosis likewise may be confused with mesothelioma, requires investigation and causes anxiety. In addition, if it is sufficiently extensive it may cause pulmonary impairment and sometimes pain; any dysfunction may be measured easily by lung function testing. Again, compensation is not in dispute. In contrast, pleural plaques are medically trivial, cause no impairment and, until it was proposed by lawyers that they should attract compensation, caused no medical problems. They have now become big business for law firms (a Google search gives evidence of this) and an easy source of income for expert witnesses. Their unnecessary investigation by CT scanning has resulted in considerable radiation exposure of well people, sometimes at the instigation of lawyers rather than doctors.

6. I first became interested in industrial and asbestos diseases and their prevention as a junior doctor in Liverpool in the 1960s. In the United States, from 1969 to 1971 I concentrated mostly on coalminers' diseases but in Cardiff, as a young chest consultant, I saw many patients with both coal- and asbestos-caused disease. My interest and knowledge of these and other conditions was such that I published my first book on the subject with my American colleague, Prof WKC Morgan, "Occupational Lung Diseases" in 1975. At that time and well into the 1980s the benign nature of pleural plaques was known to the medical profession. In pathological terms they are collagenous (fibrous) scars, usually on the under-surface of the ribs or on the diaphragm, on what is called the parietal pleura and almost always covered by an intact layer of normal lining mesothelium. They neither involve the lungs themselves nor impair its function. They are not pre-malignant. They were however known to be an indication of previous asbestos exposure and thus a confirmation of the story recounted by the subject. They indicate that some asbestos has passed through the lungs and reached the lung lining and has then been inactivated by a fibrotic reaction. By their limited extent and their position away from the lung, they cannot impair its function.

7. During my earlier professional career it was possible to deal with patients in whom pleural plaques had been discovered, almost always as an incidental finding consequential upon having a chest radiograph, by explaining that they simply meant that, as the person usually knew, he (rarely she) had been exposed to asbestos and that they did not imply the likelihood of any serious disease. As time passed, it became possible for chest physicians with suitable knowledge to explain any risk of other asbestos disease related to the exposures and to make a rough estimate of risk in relation to other likely conditions such as other cancer or heart attack. It was thus possible to reassure the person. A competent chest physician was therefore able to prevent a long legacy of usually unnecessary anxiety and allow the person to continue to lead his (almost always these people are male) normal life.

8. From a clinical medical point of view, matters changed when it was decided legally that individuals with pleural plaques became entitled to sue for injury and able to obtain financial compensation. Part of this acknowledged the presence of "anxiety", an inevitable consequence of bad medical management forced upon doctors by the difficulty of explaining the benign nature of the condition when the law apparently says it is a disease, with implied serious consequences. The management of these individuals was thus handed over to lawyers who did not have a strong interest in reducing any anxiety. Since the House of Lords' decision it has again been possible to manage such individuals according to established medical practice.

9. In making these comments, I should point out that I have appeared in Court in the British Isles and the United States on a number of occasions both for defenders and plaintiffs and have often written expert reports on asbestos cases. My and my colleagues' research work over a lifetime has been devoted to prevention of industrial and environmental diseases and some has resulted in considerable benefits to working people. The recognition that coal mining caused chronic obstructive lung disease, for example, long disputed by other medical researchers, came about as a result of our research although it was primarily targeted at finding appropriate preventive dust standards. Dust standards in the wool and PVC industries are also based on research I led. I am currently working on a case for recognition of solvent-induced neurological disease in the UK. Regrettably, occupational disease is far from rare in the UK and many workers are seriously disabled as a consequence. In my opinion, however, the medical case for recognition of pleural plaques as a disease is flimsy in the extreme. If their Lordships' decision were to be overturned by legislation, the financial benefits to workers, lawyers and experts would be balanced by a return to the situation whereby it again becomes difficult to explain to well people that they are not seriously ill, with the attendant psychological consequences.

Anthony Seaton

5th October 2009 and revised 28th January 2011

Addendum – Estimate of Numbers of Individuals with Pleural Plaques

1. The number of future cases in Great Britain of the malignant asbestos-related tumour, mesothelioma, has been estimated by Hodgson and colleagues (British Journal of Cancer 2005;92:587-93). This paper estimates that some 65,000 deaths from this disease will occur between 2001 and 2050. Approximately nine tenths of these deaths would be likely to occur in England and Wales, making 59,500 less the 9000 or so that will already have occurred since 2001.
2. Assuming all patients with asbestos-related mesothelioma have plaques, this allows estimation of the numbers of cases of plaques currently in England and Wales with such radiological abnormalities. Were, say, 100% of individuals with plaques to develop mesothelioma, there would now be c50,500 men with plaques currently in England and Wales, since it is reasonable to suppose that the large majority of future mesothelioma patients already have plaques as a consequence of past exposure (it is unlikely that current exposures to asbestos will cause mesothelioma). This is a minimum figure for plaques.
3. More realistic figures may be obtained by making assumptions about the risk of developing mesothelioma in individuals with plaques. Thus, if say 50% of those with plaques were to develop the tumour, the numbers currently with plaques would be 101,000 men or if (a more realistic figure) 5% were to develop mesothelioma there would be 1,010,000 men currently with plaques in England and Wales. This would represent around 4% of the adult male population. If my original assumption is wrong, and say only 50% of people with mesothelioma have plaques, the figure would be halved to around 2% of the male population.
4. To put these estimates into perspective, the estimates derived by Peto and colleagues are helpful (Lancet 1995;345:535-39) The highest risks of mesothelioma occur in the cohort of individuals born in the years 1940-58 and risks have declined in cohorts born subsequent to 1948. In those males born in that period, approximately 1% have died or are expected to die from mesothelioma. The highest risks in terms of trades are among shipyard workers, carpenters, electricians, fitters and construction workers in these 1940-1950 birth cohorts, averaging between 2 and 7% over a lifetime. The cost of a significant proportion of claims will

fall on the public sector, especially councils. Even such high relative risks do not overall alter life expectancy which depends on more common causes of death. Roughly one in three of us will die of cancer and a similar proportion of cardiovascular disease, usually in old age. The risk of mesothelioma alters the odds of the sort of cancer from which an individual might die rather than altering the likely time at which the inevitable event of death will occur.

5. If the law recognises, effectively, that pleural plaques are a disease for which compensation might be obtained through the Courts, it is not unreasonable in the light of what happened after recognition of bronchitis and emphysema (real diseases) in coalminers to expect that law firms might maximise efforts to obtain clients by advertisement. Since the risks of both mesothelioma and plaques relate to asbestos exposure, the targets of such promotional activity would be those who had worked in the above-mentioned industries. It would be necessary to subject such individuals to radiographic investigation. Since plaques are often not easily diagnosed by simple chest films and may be mimicked by other conditions such as pleural fat pads, it is not difficult to see that this would often include CT scanning. Such investigation, whether positive or negative for plaques, would detect a proportion of incidental abnormalities requiring further investigation and causing attendant anxiety, quite apart from subjecting individuals to unnecessary radiation. The objective of any proposed law to allow individuals to seek compensation for anxiety would thus have the paradoxical effect of increasing the number of people with this condition, as well as adding to the costs on the NHS. Ultimately the management of litigation-induced anxiety falls on the NHS.

Dr Robin Rudd Damages Submission

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RMR 1st February 2011

Karen Jardine
Assistant Assembly Clerk
Committee for Finance and Personnel
Northern Ireland Assembly

Dear Ms Jardine

Re: Pleural Plaques

I reply to your request for my medical view on pleural plaques. As a physician who has specialised in asbestos related diseases of all types for nearly 30 years and who has treated thousands of patients with mesothelioma and lung cancer, I should like to draw the attention of Members of the Northern Ireland Assembly to the following points.

1. Pleural plaques are pathological change in the membrane which surrounds the lung, caused by inhalation of asbestos fibres. They vary in size from a few millimetres to many centimetres.

2. The plaques themselves usually do not cause symptoms, although in exceptional cases when they are very extensive they may cause discomfort, pain and breathlessness.
3. Pleural plaques are detected on chest x-ray in less than 1% of the general population and when they are present enquiry almost always reveals a history of asbestos exposure.
4. Because of their past asbestos exposure, people with pleural plaques are at risk of developing diffuse pleural thickening causing breathlessness, asbestosis of the lungs causing breathlessness, lung cancer which is usually fatal and mesothelioma, a cancer which can occur in the lining of the chest cavity or in the lining of the abdominal cavity, which is almost invariably fatal, usually within 12 to 18 months of the first symptoms.
5. People with pleural plaques who have been heavily exposed to asbestos at work have a risk of mesothelioma more than one thousand times greater than the general population. The risk for those more lightly exposed is less but still substantially greater than that of the general population.
6. People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. It has been suggested that the anxiety is a result of lack of information about the true nature of plaques and that all that is needed to dispel the anxiety is a full explanation. It has also been suggested that the anxiety has been caused or contributed to by the fact that damages were payable in respect of plaques. While these factors may come into play, they are not responsible for all or even most of the anxiety.
7. Explanation that the future risks arise from the asbestos exposure which caused the plaques and not from the plaques themselves is a fine distinction that means little to the person without scientific training. It is the discovery of the plaques that has led to the situation in which an explanation of the future risks is necessary. For those who have been heavily exposed to asbestos the truth about their future risks is not in fact reassuring. To be told your present condition is benign but there is a 10% risk that you will die prematurely of mesothelioma and that your risk of lung cancer may be 40% or more, as in the case of a heavily exposed smoker, is not likely to set your mind at rest.
8. Despite the best intentioned and comprehensive reassurance offered by doctors that plaques are harmless, often the person diagnosed with plaques knows of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques. Patients have sometimes been told to look out for new symptoms and report them to their doctor. Every ache or pain or feeling of shortness of breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life.

Yours sincerely

Dr Robin Rudd

Consultant Physician MA MD FRCP
Co-Director Barts Mesothelioma Research
Co-Chair London Lung Cancer Group

Committee for Justice



Northern Ireland
Assembly

Committee for Justice
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From: Christine Darrah
Clerk to the Committee for Justice
Date: 14 February 2011
To: Shane McAteer
Clerk to the Committee for Finance and Personnel

THE DAMAGES (ASBESTOS-RELATED CONDITIONS) BILL

At a recent meeting, the Committee for Justice considered correspondence from the Department of Justice regarding the Damages (Asbestos-Related Conditions) Bill. A copy of the response is attached.

The Committee noted the contents of the response and has no further comments to make.

Christine Darrah
Committee Clerk

Enc

FROM THE OFFICE OF THE MINISTER OF JUSTICE



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Our ref: JCP\11\12

Ms Christine Darrah
Committee Clerk
Committee for Justice
Northern Ireland Assembly
Parliament Buildings
Stormont
Belfast
BT4 3XX

1 February 2011

Dear Christine,

DAMAGES (ASBESTOS-RELATED CONDITIONS) BILL

Thank you for your letter of 14 January covering one from the Committee for Finance and Personnel, and asking about any justice issues related to the above Bill.

Policy on the law of negligence is one which it is intended will transfer to the Department of Justice in the future, along with the transfer of responsibility for keeping the civil law under review.

At this stage, however, I am advised that, while the Bill would open up certain new actions in negligence, it is unlikely to make a substantial impact on overall levels of court business.

[REDACTED]

FROM THE OFFICE OF THE MINISTER OF JUSTICE



I expect that DFP officials will be liaising with officials here on any implications for Legal Aid. You will be aware that this area is currently subject to a fundamental review.

I should be grateful if you could forward a copy of this letter to the Clerk to the Committee for Finance and Personnel.

A handwritten signature in black ink that reads "Jane Holmes". The signature is written in a cursive style.

JANE HOLMES
DALO



Department of Enterprise, Trade and Investment

Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
BELFAST
BT4 3XX 15 February 2011

Draft Damages (Asbestos Related Conditions) (Northern Ireland) Bill 2010

1. The Chair's letter of 7 January 2011 refers.

2. As you will appreciate DETI are not in a position to comment on the details of the proposed Bill as our Minister was part of the Executive decision that agreed to the introduction of the Bill into the Assembly. I should at the outset say that DETI has sympathy with any person who has developed pleural plaques as a result of negligent exposure to asbestos in the course of their employment.

3. DETI believes it is likely that a majority of the exposure to asbestos in Northern Ireland occurred in the Harland and Wolff shipyards in Belfast pre-privatisation. As the publically owned company's insurers went into liquidation, the cost of compensation for such claims is mainly funded by this department. Therefore a key issue for this Department is ensuring that there would be adequate additional budget cover within DETI going forward.

4. The Committee should note that DETI support for the Bill has always been on the basis that the Executive agree to make available additional budget cover for the full cost of claims for pleural plaques that could fall to DETI.

5. DETI has earmarked £32m for asbestos related liabilities out of its overall Draft Budget allocation, of which £12 million relates to potential additional costs associated with pleural plaques. In reality however any budgetary requirement can only be an estimate and actuarial reviews will be required across this and future Budget periods.

6. The key issues for DETI in the period from 2011-15 are therefore:

a. what is the near term profile of any actual budgetary requirement. Should this be greater than the Draft Budget allocation of £32 million then further bids for pleural plaques would be required; and

b. the need to fund pleural plaques liabilities lessens the funding available to allocate to core DETI business areas within the overall Draft Budget envelope should additional funding not be available.

7. The Department recognises that funding what would be a new statutory requirement would put additional strain on the DETI budget and the NI Block. As DETI officials indicated in their evidence session on the Draft Budget, DETI will of course be seeking to make a case for additional funding for mainstream activities should any additional funding become available between Draft and Final Budget.

David McCune

DETI Assembly Liaison Officer

Asbestos Victims Support Groups Forum UK

Asbestos Victims Support Groups Forum – UK

Submission to the Northern Ireland Assembly: Department of Finance and Personnel concerning the Draft Damages (Asbestos-related Conditions) Bill 2010

The Asbestos Victims Support Groups Forum – UK (Forum) is a national organisation comprising regional asbestos victims support groups who provide support and advice to asbestos victims throughout England, Wales and Scotland.

The Forum participates in the All Party Parliamentary Group on Occupational Safety and Health Asbestos Sub-Committee and represents asbestos victims on committees and bodies concerned with issues affecting asbestos victims.

Most importantly, the Forum is in daily contact with asbestos victims, victims of the world's worst occupational health disaster, whose suffering is rarely fully appreciated, and who face a continuous battle for justice. Hardly a year goes by without a new attempt, principally by employers' liability insurers, to limit their liabilities for insurance they wrote to cover asbestos-related diseases. Several attempts have been rebuffed by the courts^[1], but not in every case. In one notable case, *Barker v Corus (UK) Plc*. Parliament overturned a Law Lords' decision in a case that would have denied justice to thousands of dying mesothelioma sufferers.

The decision to abolish compensation for sufferers of pleural plaques^[2] has caused huge dismay and led to a prolonged campaign to have this House of Lords' decision overturned.

We appreciate that the Department of Finance and Personnel (the Department) will have taken expert submissions concerning the medical, legal and human rights questions relating to the draft Damages (Asbestos-related Conditions) Bill 2010 (the Bill). Our submission is based on the experience of pleural plaques sufferers and our experience working with asbestos victims for nearly two decades and we hope that the Department will take some account of our submission.

1. Pleural plaques diagnosis – the reality

Asbestos ladders who were heavily exposed to asbestos, often for many years, have suffered a high incidence of fatal asbestos cancers. Consider the GMB branch Heat & Frost Ladders experience. Out of 350 members 58 had contracted asbestos-related diseases.

- 25 had pleural plaques (7 later contracted lung cancer or mesothelioma)
- 8 pleural thickening (2 later contracted lung cancer or mesothelioma)
- 15 asbestosis (3 later contracted lung cancer or mesothelioma)
- 3 lung cancers
- 7 mesothelioma

Twenty three of the branch members had died from asbestos-related illnesses.^[3]

The reality is that many pleural plaques sufferers know of, or have witnessed, the death of their work colleagues from asbestos-related cancers. One member of the above GMB branch, Brian Fairbrass (Benny) committed suicide on learning of his diagnosis.^[4] Pleural plaques sufferers often live in close-knit communities and all too often they read of the death of a fellow worker from mesothelioma or asbestos-related lung cancer – how can this not cause anxiety?

It is argued that pleural plaques sufferers should not feel more anxious than those who have been exposed to asbestos who have not developed pleural plaques. This argument comes from people who have no knowledge or understanding of what a diagnosis of pleural plaques means. From our experience, once someone is told that they have an asbestos disease, everything changes for them. They know that their bodies have reacted to the asbestos fibres in their lungs, causing damage, and an irreversible change has occurred. In all likelihood, they will have been shown X rays or CT scans depicting the affected areas of their lungs. In our experience,

reassurances that pleural plaques are the least serious of the asbestos diseases never allay their fears. The fact that it is the asbestos fibres in their lungs, not pleural plaques that may yet cause more serious disease makes no difference. They now know that their lungs have been affected and the chance of something worse happening is real in a wholly different way.

The response to a diagnosis of pleural plaques varies, for example, one man said that he had 'put his house in order and paid for his funeral', but for most the news is bad and they hope for the best. In our experience, no one diagnosed with pleural plaques takes that diagnosis lightly.

We believe that our testimony on the impact of a diagnosis of pleural plaques is borne out by the experience of many health professionals who have diagnosed people with pleural plaques. We urge the Department to see beyond the reassurances of the insurance industry that pleural plaques are inconsequential and nothing for people to worry about. The insurance industry reassurance has gone so far as to say that pleural plaques are a "good thing" because it proved that the body's defence systems were in good working order. This was the view expressed by Dr. Pamela Abernathy of the Forum of Insurance Lawyers.^[5]

2. The law brought into disrepute

The right to compensation for pleural plaques sufferers was a matter of settled law for twenty one years. Nothing has changed over twenty one years in the medical understanding of pleural plaques: they are, as they always have been, scarring of the lung pleura resulting from the body's reaction to asbestos. Pleural plaques occur where there has been significant exposure to asbestos, consistent with heavy occupational exposure. They are thus a marker of exposure to asbestos fibres, fibres which might yet cause serious asbestos disease. For twenty one years compensation was paid for the damage done to the lung, the scarring of the lung pleura, and for the anxiety, and in some cases the distress that this diagnosis caused.

We accept that the law is not immutable, it changes over time. However to change the law in respect of compensation for pleural plaques where there has been no change in legal principles of the tort of negligence, and no new medical evidence, brings the law into disrepute. For pleural plaques sufferers, the abrupt change in the law makes no sense. The Forum groups have spent hours on the telephone for days on end talking to pleural plaques sufferers who cannot accept the fine legal distinctions as to what constitutes 'damage'. For them, their lives have changed, their fears are real and it is the law that is unreal.

3. Legal inconsistency

In evidence to the Secretary of State for Justice in 2009,^[6] Dr. Rudd, an eminent consultant physician and authority on medico-legal matters, exposed the inconsistency in the law and articulated the instinctive objection of pleural plaques sufferers to a change which simply made no sense to them whatsoever.

Dr. Rudd explained that the Law Lords' implication that 'physiological damage' as well as 'anatomical damage' is necessary for an injury to constitute actionable damage is inconsistent with other areas of personal injury law. He gave an example where a person suffers a facial injury which leaves a scar, 'anatomical injury', and is awarded damages even though the 'physiological function' of the face is not impaired.

He gave another example where the law allows compensation where someone has neither anatomical nor physiological damage. Where someone receives an injection where, for a while, it is thought to be contaminated with the virus, HIV, the only physical injury is the puncture of the

skin by a needle, yet compensation is allowable for psychological damage. Dr. Rudd goes on to say:

"It must be at least equally appropriate to award damages to persons who are acknowledged to have been negligently exposed to asbestos, who have suffered 'anatomical injury' i.e. pleural plaques, who are at significant, and in some cases large, long term risks of lung cancer and mesothelioma."

We urge the Department to take account of the inconsistency of the law as described by Dr. Rudd. We believe that the fine legal distinctions about what constitutes damage in respect of pleural plaques, which are so perplexing to asbestos victims and seem so unfair, do not provide the grounds to abolish compensation. On the contrary, they are in conflict with existing law.

4. A profound sense of injustice

Were it not for the negligence of employers and the institutional failure of government, health and safety enforcement agencies and public health authorities we would not be witnessing an epidemic of mesothelioma deaths and the persistent diagnoses of non-cancerous asbestos-related diseases, all too often preceding a diagnosis of mesothelioma or lung cancer.

The fine legal distinctions concerning what constitutes damage are not just lost on someone who has just seen an X ray showing the 'damage' to the lungs, they seem utterly offensive to someone who worked with no protection whatsoever in a dirty, dusty environment, full of asbestos fibres with no warning of the dangers of asbestos exposure or any protection whatsoever from fibres that can cause cancer. Reproduced (scanned) below is a restrained and polite letter from David Richardson to his MP in 2007. We have heard less restrained comments from many pleural plaques sufferers who are outraged that they were not only negligently exposed to asbestos and have been diagnosed with an asbestos disease, pleural plaques, but that they should lose their right to compensation.

I was diagnosed as having Pleural Plaques and Bronchiectasis last year and have had to take premature retirement due to failing health. Due to Pleural Plaques I also have to live with the fear of an increased risk of developing Mesothelioma. I am very disappointed by the House of Lords appeal decision that Pleural Plaques is not worthy of any compensation. This decision gives victory to the companies that carried on the production and use of asbestos when they knew that it was injurious to health and lets the insurance companies off while I and many people in my position have had their health and well-being damaged/ruined for the profit of these companies.

May I respectfully ask, that you as my elected representative in parliament take note of the lobbying and attend the meeting scheduled for 29th January 2008 in Room 14, to hear fellow Member's of Parliament and other speakers on this disgraceful state of affairs.

Furthermore, may I ask that you everything within you power and influence to bring justice to those of us thus affected, through no fault of our own.

Yours faithfully

5. Opening the floodgates

It has been argued that to allow compensation for pleural plaques will 'open the floodgates' for claims for anxiety caused by other injuries. This argument is unsustainable. For twenty one years pleural plaques were compensatable and there was not an explosion of other claims based on the law relating to pleural plaques compensation. There is no reason whatsoever to believe that the situation will change if the law is returned to the position prior to the Law Lord's judgment in 2007.

In respect of claims for pleural plaques we would like to categorically state that we deplore the use of scan vans to encourage people to make claims. It is not only damaging for people to be exposed to radiation, it is also wrong to put people in the way of anxiety and distress about a potential asbestos disease. Where a diagnosis of pleural plaques is made during a medical investigation then it is right to inform a patient of their diagnosis. In these circumstances patients should also have the right to sue for compensation.

Conclusion

We have no doubt that the testimonies from pleural plaques sufferers in Northern Ireland will confirm our experience working with asbestos victims in England, Wales and Scotland. The incredulity, shock and profound sense of injustice felt by so many asbestos victims we have supported over the years we believe will be reflected in the testimonies of people in Northern Ireland.

As for England and Wales, the reaction to the decision to end compensation from Alan Watson was:

"I worked at British Rail and I have known work colleagues die of Mesothelioma, being diagnosed with pleural plaques is like standing on the edge of a precipice, to be denied compensation as well, adds insult to injury"

A reaction to the decision to provide some compensation only for those diagnosed prior to 17th October 2007 was summed up by Mr. Molyneux who said:

"I was wrongly exposed to asbestos for many years and have seen the effect it has had on so many people who have died from mesothelioma. The asbestos fibres lodged in my lungs, causing pleural plaques, signal a heightened risk that I too may suffer serious consequences. I have to live with that and so do hundreds of others. Can the Government live with its decision today to compensate some but not others?"

Compensation for pleural plaques is not just about money, it is first and foremost about justice.

Contact for the Forum:

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[1] Fairchild v Glenhaven [2002] HL

[2] Johnson v NEI International Combustion Ltd [2007] UKHL 39

[3] <http://www.britishasbestosnewsletter.org/ban70.htm>

[4] http://ibasecretariat.org/lka_landmark_demo_pleur_plaque_rul.php

[5] <http://news.scotsman.com/politics/Asbestosrelated-condition-39a-good-thing39.4451333.jp>

Asbestos Support Groups' Forum UK

Asbestos Action Tayside; Asbestos Support West Midlands; Barrow Asbestos Related Disease Support; Bradford Asbestos Victim Support Group; Cheshire Asbestos Victims Support Group; Clydebank Asbestos Group; Derbyshire Asbestos Support Team; Greater Manchester Asbestos Victims Support Group; Hampshire Asbestos Support & Awareness Group; Merseyside Asbestos Victims Support Group; North-West Wales Asbestos Victims Support Group; North East Asbestos Support & Awareness Group, Ridings Asbestos Support & Awareness Group, Sheffield And Rotherham Asbestos Group

Correspondence from Mr Robert Friel

Mr Daithí McKay

I've read with interest the clipping in the Mirror Newspaper 4th February 2011 that Sammy Wilson criticized the Finance Committee for seeking more time to scrutinize the Damage Bill. I suffer from Pleural Plaques and our time is running out we suffer from a toxic poison in our bodies and it is killing us every day. Please answer my question, who is holding this bill back?

Faithfully yours,

Robert Friel

Correspondence from Mr Robert Friel 15th February 2011

Correspondence from Mr Robert Friel - 15th February 2011

I would be grateful for answers.

I have questions I would like to ask the Committee.

- 1) If any members have the illness or know anything about it?
- 2) Do they have any family member or relation with the illness? Hoping not
- 3) Do they know the worry we have if the toxic poison in our bodies take off? There is no cure for this illness. We die, money is not the issue it's the firms we work to getting away with murder and that's what it is. Have they asked anybody with the illness to address the Committee?

Robert Friel

Employers warned over 40 years ago. With working with deadly asbestos.

The admission has been made by Maria Eagle MP. The NIO Minister at the Department of Employment and Learning in Belfast at least from 1965 Employers were aware of the dangers of Asbestos, even in small quantities.

Even if your employer or employers were declared bankrupt they would have had employer liability insurance covering the period of your employment. The Government has agreed a solution with the insurance industry which may apply ask your solicitor to look into this solution which arose out of "the Chester Street Holdings Case" in England.

Cape Asbestos is the first most dangerous concerning asbestos states Dr Ken O Bryne, Consultant "All asbestos contact is toxic poisoning". Finally you may ask to consider your entitlement under the PNEUMOCONIOSIS etc. (Workers Compensation)(Northern Ireland Order 1979) This Scheme is now administered by the department of Social Development.

The British government knew since 1940 it took them 40 years to tell employers and unions and they never told the workers They are as much to blame as the government.

All types of asbestos in your body is toxic and all could become life threatening.

To the Committee for Finance and Personnel

Robert Friel

All Asbestos is toxic no matter what name they call it. We need somebody to fight our case. We need to be given some conciliation. We need help please give it to us. I have been fighting my case since 2002. I will be 70 on the 29th May 2011. I've worked as a Pipe Fitter with Monsanto, Coleraine and Du Ponts, Derry.

Thank you.

CBI Follow Up

Shane

We are surprised that the DETI budget figures (see attached), and which only include government liabilities are significantly different from the figures used by Sammy Wilson in the debate on this at Second Stage of the Bill. He mentions £1.8million per year for pleural plaques. Can you ensure the Committee is aware of this.

As stated in the short evidence we provided to the Committee we are deeply concerned that the costs of this remain a major uncertainty, and we would very much welcome greater clarity and deeper consideration of this issue.

Regards

Nigel Smyth

Director, CBI Northern Ireland

Use of Provisions Draft Budget 2010 Allocations

	2011-12	2012-13	2013-14	2014-15
	£000s	£000s	£000s	£000s
H&W Asbestosis	5,000	5,000	5,000	5,000
H&W Plueral Plaques	3,000	3,000	4,000	2,000
Mines	500	250	250	250
Early Retirement	80	50	34	24
Total Use of Provisions Budget	8,580	8,300	9,284	7,274

Appendix 6

Research Papers



13 October 2010

Pleural Plaques: Numbers, Costs, and International Approaches

Colin Pidgeon

This paper examines assessments of the financial impact of the draft Damages (Asbestos-related Conditions) Bill and seeks to put the proposed legislation into an international context.

Research and Library Service briefings are compiled for the benefit of MLA's and their support staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. We do, however, welcome written evidence that relate to our papers and these should be sent to the Research & Library Service, Northern Ireland Assembly, Room 139, Parliament Buildings, Belfast BT4 3XX or e-mailed to RLS@niassembly.gov.uk

NIAR 278/10

Key Points

- The cost estimates of the impact of the Bill provided by the Department and the Ministry of Justice vary considerably. Both methodologies have significant weaknesses – this is particularly the case in relation to the latter.
- It has not been possible to develop a more robust methodology on the basis of the available evidence.
- Although the Department has twice sought information from the insurance industry and solicitors in relation to the number of cases of pleural plaques in Northern Ireland without much response, it might be possible for the Committee to play a part in generating an evidence base during its formal consideration of the Bill.
- Internationally, issues relating to compensation for pleural plaques are generally handled by the courts rather than in legislation. There is no clear evidence of specific legislation relating to pleural plaques outside of Scotland.

Executive Summary

The research presented in this paper addressed two main issues. Firstly, the quantification of pleural plaques cases and associated cost that might result from the Bill. Secondly, whether there are international examples of legislation that addresses pleural plaques as a compensatable condition.

In relation to the first issue, the methodologies applied by the Department of Finance and Personnel and the UK Ministry of Justice are examined. Neither is free from relatively significant difficulties. But it has not been possible to establish on the basis of available evidence a more robust methodology.

In relation to the second issue, it has not been possible to find specific examples of legislation that refer to pleural plaques in other countries with the obvious exception of Scotland. In fact, it appears that as a general rule, this issue is handled by the courts not legislatures.

The paper does not consider the moral or political implications of either proceeding or not proceeding with legislation.

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2. Assessment of potential number of claims and associated costs

2.1 Cost assessments produced by the Department

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2.3 How many claims could there be in Northern Ireland?

2.4 What might the associated costs be?

3. International experience in compensating individuals that develop pleural plaques.

3.1 Compensation funds

3.2 Employers' liability

3.3 Countries in which compensation may or may not be claimed for pleural plaques

3.4 Considerations arising from this evidence

4. Concluding remarks

Appendix 1

Calculation of potential Northern Ireland cost of legislation using Ministry of Justice methodology

1. Introduction

The Department of Finance and Personnel ("the Department") intends to bring forward the Damages (Asbestos-related Conditions) Bill to the Assembly. On the current timetable it will be introduced on 15 November 2010.

The Committee for Finance and Personnel ("the Committee") has received a number of briefings on the proposed legislation from the Department. On 15 September 2010, the Committee heard evidence in relation to the Department's consultation on the Bill.^[1]

A number of issues were identified by Members of the Committee as being of concern and subsequently it was decided to commission this paper from Assembly Research. The paper explores two primary considerations:

- the number and costs of previous and potential claims; and
- examines whether pleural plaques is a condition for which compensation may be claimed in other jurisdictions.

In the course of the research, a number of broader points have come to light and these are also discussed in the concluding remarks.

What are pleural plaques?

Pleural plaques are a thickening of the pleura (lining of the lung) that are caused by asbestos exposure. They are a distinct medical condition from diffuse pleural thickening, asbestosis, mesothelioma or asbestos-related lung cancer. The medical consensus is that pleural plaques are not harmful and do not develop into other life-threatening diseases, but their presence in the lungs of an individual does indicate exposure to asbestos – see section 4 for further detail.

2. Assessment of potential number of claims and associated costs

2.1 Cost assessments produced by the Department

The Department's Cost Estimates

The Department attempted to gather information on the potential number of pleural plaques cases and therefore the associated cost of introducing the legislation. In its Regulatory Impact Assessment, the Department noted "very little information was forthcoming, making it difficult to predict the likely impact of a change to the law."^[2]

In the absence of an alternative approach, the Department quantified the possible financial impact of the Bill by reference to the cost assessment attached to similar legislation that has already been passed in Scotland.^[3] The assessment was performed on the basis of dividing the projected annual cost in Scotland by 1/3 given that Northern Ireland's population is about 1/3 of Scotland's. This gave a potential annual cost in Northern Ireland of between £1,253,666 and £2,315,666.

The Department then noted that "the level of payments of compensation in Northern Ireland are higher than in Scotland" and suggested that an annual figure of £2,000,000 to £3,000,000 might be more realistic.^[4]

Weaknesses of this approach

There are potential difficulties with the Department's chosen approach to estimating the cost:

- The data for Scotland are based on estimates and projections rather than concrete figures - although in Scotland it was at least possible to quantify the number of backed-up cases which for Northern Ireland it was not. Simply put, it is quite possible that the data will be inaccurate, as with any projections. Consequently, an attempt to quantify costs in Northern Ireland by reference to those figures may also be inaccurate; and
- Size of population is not necessarily of itself a good indicator of the prevalence of pleural plaques in that population. There are a number of other factors that might have a bearing:
 - prevalence of asbestos use in Northern Ireland industry relative to Scotland;
 - the number of people employed in asbestos-using industries relative to the population as a whole; and
 - differences in other environmental factors that could lead to increased risks – such as background levels of asbestos in the atmosphere.

Having said this, given that neither Northern Ireland nor Scotland is or was an asbestos producing region, the impact of background exposure differentials may well not be significant.

2.2 Cost assessments provided by the insurance industry

The Association of British Insurers' Cost Estimate

The Association of British Insurers (ABI) stated in its response to the Department's consultation that "the costs of the Bill are unquantifiable". But having said that ABI went on to state that the costs were "likely to be very high."^[5]

The UK Ministry of Justice produced an estimate of costs for proceeding down a legislative route on the same issue, approximating that costs could be between £3.7 billion and £28.6 billion.^[6] The sheer scale of the range in that estimate in itself points at the uncertainty inherent in trying to assess the costs of legislative change. Nevertheless, ABI estimated – also on the basis of population proportions – that Northern Ireland could "expect to bear 2.9% relative to [that] cost" i.e. between £111 million and £858 million.

Note: These figures represent an estimate of total cost. The Department's estimate was of an annual cost. Given that asbestos cases may not peak until 2020 (see section 2.3) the annual cost could reasonably run for at least 20 years. Working on the mid-point of the Department's estimate gives: £2.5 million x 20 years = £50 million.

Weaknesses of this approach

Even bearing in mind the difficulties with basing relative costs on population size mentioned above, the difference between these estimated costs to Northern Ireland is still staggering.

The Ministry of Justice document does acknowledge that:

There is a high level of uncertainty regarding the estimated number of future claims. Pleural plaques are asymptomatic and there may be a long latency period, so it is difficult to estimate with certainty the number of potential cases.^[7]

The approach taken by the Scottish Government was to look at cases 'backed up' in the legal pipeline. The Ministry of Justice Regulatory Impact Assessment utilises a large number of assumptions, which explains the enormous range in potential costs. For purposes of illustration, the same costing methodology is applied to Northern Ireland in the next section.

2.3 How many claims could there be in Northern Ireland?

This section looks first at another methodology for estimating exposure and then explores the possibility of developing an alternative evidence-based approach to assessing the impact of the legislation.

Method 1

Using the methodology applied to costing the impact of equivalent legislation by the Ministry of Justice on the UK as a whole but using Northern Ireland data yields the following results:

Table 1: estimate of asbestos exposure in Northern Ireland

	Low estimate	High estimate
Total potential occupational exposure	114,400	143,000
Total diagnosed – 25% diagnosis rate	28,600	35,750
Total diagnosed – 50% diagnosis rate	57,200	71,500

A fully worked example of this methodology is attached at Appendix 1.

Alternative methodologies

An alternative methodology to that used in the Ministry of Justice Regulatory Impact Assessment (RIA) is to base an estimate on epidemiological^[8] studies that have been conducted using data from the Northern Ireland population. The overwhelming difficulty with such an approach is again a lack of up-to-date evidence.

A study published in the Annals of the New York Academy of Sciences found that approximately 20% of the male population of Belfast had asbestos bodies in the lungs at autopsy. The study concluded that:

It is impossible to say [the risk to the population], but it appears that about a quarter of the male population and a smaller proportion of the female population [of Belfast] may have been exposed to sufficient asbestos to cause mesothelioma in susceptible individuals.^[9]

This study was conducted more than fifty years ago and the findings were based on a small post-mortem sample of 200 individuals that did not have malignant lung disease.

The importation of asbestos has been stopped altogether in the years following this study, although there is still asbestos in the environment contained in products such as roof tiles and boiler linings for example. But this data is simply too old to be of much relevance to the modern day population of Belfast, let alone the wider Northern Ireland population as a whole.

A more up-to-date study was published in 1999 in the Journal of Public Health Medicine^[10]. The researchers looked at all deaths in Northern Ireland between 1985 and 1994 in which asbestos-related disease was mentioned anywhere on the death certificate – a total of 527 cases. It found that:

Deaths were clustered around the Belfast estuary, the site of Northern Ireland's shipbuilding industry. High proportional mortality ratios were demonstrated for occupations associated with the shipbuilding and construction industries [...] If lung cancers are included, there may be an average of 81 asbestos related deaths in Northern Ireland every year.^[11]

The question for the present paper, however, is whether there are any useful data for quantifying the incidence of pleural plaques in the present Northern Ireland population. The researchers also went on to state:

The knowledge of the dangers to health caused by asbestos exposure and the possibility of compensation arising from industrial injuries have probably ensured that most of those who may have been occupationally exposed have been adequately examined and diagnosed ante-mortem.^[12]

This statement – taken at face value – would imply that there is not a huge 'time-bomb' of occupationally exposed individuals who are not already aware of the presence of pleural plaques in their bodies. But the difficulty remains that - without access to medical records or information from solicitors – it is not possible to say how large a group of people may have been affected.

Another consideration is the latency period. According to Mesothelioma Control

A latency period of pleural plaques is sometimes less than ten years. This fact distinguishes it from other asbestos-related conditions that have latency periods of 20 to 50 years. Pleural plaques may appear in those who have had limited or intermittent exposure to asbestos.^[13]

It may be that the researchers looking in the late 1990s would miss a number of cases simply because insufficient time had elapsed from the time of the exposure. Indeed, this is acknowledged in other work in the mid-1990s that predicted that Mesothelioma deaths in Great Britain would continue to rise for at least 15-25 years (i.e. possibly not peaking until 2020 or so).^[14]

On the other hand, in Clydebank in Scotland (also a shipbuilding centre) "rates of asbestos-related deaths peaked in 1989."^[15] So it might be possible to assume that a similar pattern would have emerged in the Belfast region.

In any case, the primary weakness with relying on this sort of evidence for estimating the prevalence of pleural plaques is that – as pleural plaques are asymptomatic – the condition may not be recorded on death certificates. Death registration data "rely on the accuracy of the diagnosis and coding of the cause of death, which in turn depends on the degree of clinical awareness and the range and availability of diagnostic facilities."^[16]

Even if – bearing in mind that important qualification – the data that this study unearthed could be relied upon, it still remains quite an epidemiological leap between the number of asbestos-related deaths in a given period and the number of individuals developing asymptomatic pleural plaques.

A final possible methodology was developed by the Finnish Institute of Occupational Health. It used a formula to relate the number of mesothelioma victims per country to that country's earlier asbestos consumption:

An annual raw asbestos consumption in the 1970s of 1kg per capita (of the total population) will have resulted in eight cases of mesothelioma per one million inhabitants in the years following 2000.^[17]

Such a formula could provide a rough indication of mesothelioma cases, but once again, not of the incidence of pleural plaques. In any case, in the course of this research it has not been possible to identify the tonnage of raw asbestos that was imported into Northern Ireland during the 1970s. For this reason, this methodology has not been pursued any further.

In summary, whilst the approaches used by the Department and the Ministry of Justice are far from perfect, it appears there is not sufficient evidence to construct a more robust estimate.

2.4 What might the associated costs be?

As discussed above in sections 2.1 and 2.2 above there are weaknesses with both the approach to costing used by the Department and that used by the UK Ministry of Justice. But as has been shown in section 2.3, an alternative methodology has not been identified by this research.

The ABI estimate quoted a potential cost of between £111 million and £858 million in Northern Ireland. In fact, the calculations in Appendix 1 show that if the Ministry of Justice methodology is applied to Northern Ireland data the cost could actually be in the range of £143 million to £893.75 million, which is even higher than the figure put forward by the ABI in response to the Department's consultation.

Clearly such figures are worthy of some discussion and there are a number of points that should be borne in mind in relation to these estimates:

- the Ministry of Justice methodology relies on a large number of assumptions. As each assumption is applied, accuracy is accordingly reduced. Assumptions include:
- it is possible to compare data from the USA on the occupational exposure to asbestos between 1940 and 1980 with occupational exposure in the UK over a similar period;
- it is possible to determine the number of those occupationally exposed who have died from all causes (i.e. not necessarily related to the exposure) with any accuracy;
- it is possible to assume a number of those exposed who will actually be diagnosed with pleural plaques; and
- it is reasonable to assume that everyone diagnosed with pleural plaques will proceed to make a claim and that all claims made will be successful.
- the methodology used was actually developed with input from the ABI.[\[18\]](#)

This second bullet point should not be understated. Whilst it is not suggested that the insurance industry and its representatives would deliberately manipulate calculations to its own advantage, it should be noted that it is not outside the realm of possibility that insurers might wish the potential costs to be recognised as extremely high in order to protect their businesses: the insurance industry has a vested interest whether pleural plaques are, or are not, actionable.

According to a document produced by the Munich Re Group, the House of Lords decision:[\[19\]](#)

...ended compensation for pleural plaques, thereby preventing up to 100,000 claims and saving defendants such as Norwich Union, Zurich Financial Services, Royal & Sun Alliance and Lloyd's of London a billion pounds or more [emphasis added][\[20\]](#)

If this claim is indeed correct, it illustrates the level of exposure the insurance industry itself recognises.

A proportion of any overall cost of the legislation would directly impact on the public finances through the liability of the Department of Enterprise, Trade and Investment in respect of Harland and Wolff. But there are likely to be other impacts. If the insurance industry has to meet large payouts for pleural plaques in Northern Ireland it is likely that there will be an upward pressure on insurance premiums. Given that the Committee is already concerned about the cost of insurance in Northern Ireland, this is probably not a negligible point.

3. International experience in compensating individuals that develop pleural plaques.

As a starting point for the following survey of some international approaches to compensating individuals with pleural plaques an important point needs to be made: insurance markets, compensation schemes, legislation and case law vary considerably in different nations. This has been described as a "historical jungle":

...in which the compensation of asbestos-related diseases is creating different scenarios and different stories. First-party insurance elements are compulsory health, disability and workers' compensation, and sometimes voluntary and supplementary group insurances. Tort-law elements are product, environmental and employers' liability.^[21]

In other words, it is a complex backdrop. Different models have developed for dealing with industrial accidents and illness, negligence and litigation. Having said that, it is possible to identify some themes and these are discussed in this section.

3.1 Compensation funds

In a number of states compensation funds have been established – for instance in France, Belgium, Japan and Slovenia. According to the Munich Re Group these funds are financed primarily by workers' compensation insurers (therefore, by employers) and are also awarded state subsidies. These state subsidies are to take into account:

...non-workplace-related environmental risks, past liabilities of companies no longer existing and of state enterprises – ultimately acknowledging the state's general responsibility as a risk manager and regulator.^[22]

In some regards, the limited extra-statutory compensation scheme in England, for individuals who had claims pending at the time of the House of Lords ruling, could be viewed as the state attempting to discharge its responsibility in this regard – particularly as in some cases there is liability resting with central government departments such as the Ministry of Defence.

3.2 Employers' liability

In the majority of countries (but notably excluding Canada, the USA, Mexico and Belgium, Germany and Austria) legal proceedings for compensation resolve around the field of tort law, the main element being employers' liability. Other tort law elements include environmental liability – for the dust exposure experienced by neighbours of asbestos-processing plants, the families of employees (for example the wives of shipbuilders who were exposed to asbestos dust when laundering work clothes) and other third parties.

The interaction between employers' liability and workers' compensation is complex "with combinations within each legal system and even within a single company."^[23] In some states employees must make a decision between receiving workers' compensation benefits and claiming under employers' liability – in India, Singapore and some states of Australia.

In other states workers' compensation can be applied simultaneously with employers' liability (such as Italy, Hungary and Russia) and in yet others only one or the other route to redress is possible. Under German law, for example, no workers' compensation annuity is payable if an individual's ability to pursue an occupation "is reduced by less than 20%."^[24]

Employers' immunity

In some states, employers are not liable at all for asbestos-related diseases in their workforce because labour laws replace tort law in employment contracts by claims against the social insurance institutions of the country concerned – for example in Mexico and the Philippines.

In some states, employers are immune from liability, with the exception of intent. In other words, employers are only liable if they intended to expose their employee to harm. It should be noted, however, that in the legal sphere 'intent' can be established in different ways. For example, in Belgium the law assumes employers act with intent if they continue to expose their employees to the risk of occupational disease after being informed of the risk in writing by the workers' compensation insurer. In the USA however, there is a legal distinction between intentional act and intentional injury.

According to the Munich Re Group, the majority of countries follow (albeit with many variations) the UK model – the Republic of Ireland, India, Hong Kong, Malaysia, Australia, Kenya and Ghana for instance. Under this model liability applies only in the case of fault – i.e. when the employer is negligent to some degree.

3.3 Countries in which compensation may or may not be claimed for pleural plaques

The previous two sections highlight further the complicated nature of comparing provisions across national boundaries. The issue that is of prime concern in relation to the proposed Bill is whether there are examples of other states that specifically exclude or include compensation for pleural plaques, irrespective of the way in which those claims might be settled.

The Münchener Re Group report from which much of the information for this paper has been extracted includes some country reports which do illustrate some differences in respect of the treatment of pleural plaques. This section highlights some of those examples.

Republic of Ireland

In general the Irish model of handling industrial disease is very similar to the UK model. One significant judgement does however have relevance. In 2003 there was a case where a worker developed a fatal lung disease and a number of fellow workers developed psychological problems as a result of fear of suffering a similar fate. On appeal, the Supreme Court found that:

...the employer's common-law duty did not extend to the plaintiff's psychological suffering in this case because the fear was irrational and counter to all the medical evidence.^[25]

Essentially the court found that it was not fair to hold an employer to account for an employee's irrational fear of harm. This of some relevance to the Committee's consideration of the Bill because one of the arguments put forward for making pleural plaques compensatable is that sufferers can experience anxiety when the condition is diagnosed; there is a fear that – even though the medical evidence states they are harmless – the plaques will or at least could develop into something more serious.

The report concludes that it is unclear what the implications of case law might be were a case like Johnson^[26] to come before the Irish courts. It questions whether the courts might "extend the bounds of compensatable harm, or would revert to orthodox principles and reject the claim."^[27]

Italy

In Italy, besides monetary loss (therefore lost income and medical expenses) due to a personal injury, there are three kinds of non-economic loss recoverable:

Danno biologico	Implicit in the injury of personal integrity
Danno morale	Implicit in the pain and suffering related to a harmful event; it refers to the psychological suffering of the injured party in their internal sphere
Danno esistenziale	Relating to the change of the victim's habits as a consequence of the harmful event and therefore refers to the external sphere

A decision of the Corte di Cassazione recently found that in the absence of danno biologico (i.e. physical damage) compensation is – in principle – admissible for compensation for the other two kinds of damage.

Claimants have to provide evidence of the seriousness of the prospective illness, or their pain and suffering and/or the loss implicit in the change of their everyday habits. There has to be a causal connection between their emotional distress and the prospectively harmful event.^[28]

Czech Republic

The Czech Republic's Labour Code provides a prescriptive list of conditions for which compensation may be claimed. Only those diseases specified are subject to compensation. In relation to the asbestos-related disease Section III of the list mentions:

- asbestosis;
- disorder of the pleura with defect of pulmonary function;
- mesothelioma; and,
- cancer of the lungs in connection with asbestosis or disorder of the pleura.^[29]

Given that pleural plaques are held not to affect the function of the lungs, they appear to be excluded.

Japan

In Japan there is a 'healthcheck note system.' Workers involved in handling asbestos get checks when hired and then annually plus a bi-annual 'asbestos examination.'

It is of some note that workers who have developed pleural plaques can apply to their prefectural labour department to receive a healthcheck note. This system provides such individuals with long-term health care and checks after finishing working with asbestos.^[30] It does not appear to be the case however that compensation may be claimed for pleural plaques themselves but only when in combination with other conditions such as lung cancer.

Legislation

Generally speaking, the issue of whether asbestos-related conditions in the wide sense and pleural plaques specifically are compensated is handled in these cases by the courts rather than in legislation – the exceptions being the Czech Republic and Scotland. There is a reference in the submission made by the ABI to the Committee which is drawn from the Münchener Re Group report:

...in most [US] states up until recently pleural plaques and scarring qualified as "injuries" for legal purposes, meaning that a person with signs of asbestos exposure but no functional impairment could file a legal claim for compensation.^[31]

This statement is not, however, backed up by reference to either case law or legislation which makes it difficult to verify. A search of a number of databases of legal references has not produced any results – in relation to the USA or, indeed, anywhere else.

3.4 Considerations arising from this evidence

There are a number of issues that arise from this evidence:

- compensation for pleural plaques is far from consistent in a number of countries;
- it is, generally speaking, a matter that is decided by courts rather than legislatures. Clearly the Scottish Parliament is an exception to this rule; and
- it has not been possible to identify other examples of legislation that refer to pleural plaques.

4. Concluding remarks

In the course of the research presented in this paper, a number of issues have come to light, which, whilst not strictly relevant to the terms of the research request, nonetheless appear relevant to the Committee's consideration of the draft Bill. For this reason, these issues are considered in this section of the paper.

Medical evidence

During previous evidence sessions with the Department, the Committee has sought assurance that the medical evidence on pleural plaques is clear.^[32] It would be a brave researcher who would state categorically that there is no contrary evidence.

Having said that, there does seem to be a considerable weight of evidence that supports the position that pleural plaques are indeed symptomless. In particular, the Industrial Injuries Advisory Council (IIAC) published a position paper on pleural plaques in response to a request from the Secretary of State for Work and Pensions which considered the likelihood of disability arising from pleural plaques, the likelihood of other more severe complications of asbestos exposure arising amongst those currently having plaques, and whether compensation through the Industrial Injuries Scheme would be appropriate for people diagnosed with this condition.^[33]

It should be remembered that its findings are addressed specifically at the social security system rather than the law itself. But, it is nevertheless, a comprehensive review of the literature. The IIAC also conducted a number of consultations with leading experts in the field. It found that:

The nature and anatomical location of pleural plaques means that they do not alter the structure of the lungs or restrict their expansion. Therefore, they would not be expected to cause an

important degree of impaired lung function or disability; and such studies as we have found and such experts as we have consulted agree that losses of lung function are likely to be either small or non-existent.^[34]

The position paper further stated that:

Plaques tend to grow slowly over time, but they do not become cancerous. Neither are they a cause of cancer at other sites, such as lung cancer or mesothelioma. However, the balance of evidence suggests that they are a marker of future risk of lung cancer and mesothelioma, because they are a marker of exposure to asbestos.^[35]

On that basis it is entirely reasonable to assume that the established medical position is the correct one.

Anxiety and psychological distress

If the position that pleural plaques do not of themselves cause harm to individuals in terms of their lung function is accepted, there remains a question about the psychological impact of a diagnosis. At a fundamental level, it is evident from responses to the Department's consultations and Members' lines of questioning in evidence sessions in Committee that anxiety following diagnosis of pleural plaques is an issue; if one is diagnosed with pleural plaques, statements such as those quoted above from the IIAC position paper are unlikely to provide total and complete peace of mind.

Anxiety can be defined as:

- (psychiatry) a relatively permanent state of worry and nervousness occurring in a variety of mental disorders, usually accompanied by compulsive behaviour or attacks of panic
- a vague unpleasant emotion that is experienced in anticipation of some (usually ill-defined) misfortune^[36]

This definition is at two levels, which is quite helpful in terms of clarifying what is understood by the term. The former definition is rooted in psychiatry which may make it a reasonable basis for compensation. The latter definition is clearly a less well-grounded and would seem a far less reasonable basis for compensation.

Looking at the former definition further, the Oxford English Dictionary definition is quite helpful:

4. Psychiatry. A morbid state of mind characterized by unjustified or excessive anxiety, which may be generalized or attached to particular situations. Freq. attrib. and Comb., as anxiety-producing, -ridden adjs.; anxiety complex (cf. COMPLEX n. 3); anxiety hysteria, a form of anxiety neurosis (see quot. 1923); anxiety neurosis [tr. G. angstneurose (Freud 1895, in Neurolog. Zentralbl. XIV. 55)], anxiety state, names technically applied to such a condition of anxiety.^[37]

The words 'unjustified' and 'excessive' are interesting when set into the context of the view of the Supreme Court of Ireland that it is was not fair to hold an employer to account for an employee's irrational fear of harm.

Cost of insurance

The point was made above in section 2.4, but is perhaps worthy of restatement, that the legislation may well drive up the cost of insurance in Northern Ireland. This point was made by the ABI in a letter to the Committee clerk:

A move towards legislation will also be extremely unhelpful in keeping a stable operating environment for insurance providers. We fear that it is likely to impact on consumers in terms of higher premiums.^[38]

This statement can be read as a pretty clear indication of how insurance providers are likely to react to the Bill. The consequences of higher premiums are quite straightforward: as a result of being compelled to meet negligence claims under employer liability insurance, insurers are likely to charge consumers more for future policies.

An additional consideration is that the legislation passed in Scotland has been subject to a judicial review and an appeal which is currently ongoing. This legal process is not cost free to the government, or to the insurers bringing the challenge. If a similar legal challenge were brought in Northern Ireland – which seems quite possible – then there would also be a cost to society. Whether this took the form of reduced public expenditure (because government had to meet costs) or increased premiums (because insurers had to meet costs) would depend on the court's decision.

Appendix 1 Calculation of potential Northern Ireland cost of legislation using Ministry of Justice methodology

Step one

Between 1940 and 1980 27.5 million workers (14.6% of the workforce) in the USA were occupationally exposed to asbestos. 14.6% of the UK population ~ 7.7million.

Note this assumption follows the Ministry of Justice approach. It should be noted that 14.6% of the workforce is not the same as 14.6% of the population.

Step two

Assume this is reduced by deaths (from all causes) to between four and five million.

In 2005 Northern Ireland's population was 1.724 million and the UK was 60,209.5 million.

So Northern Ireland's proportion of the population is $(1.724 \div 60,209.5) \times 100 = 2.86\%$

Low estimate:

4 million x 2.86% = 114,400.

High estimate:

5 million x 2.86% = 143,000.

So the estimated occupational exposure in Northern Ireland is between 114,400 and 143,000.

Step three

Assume the proportion of those occupationally exposed to asbestos that develop pleural plaques.

Low estimate:

If 25% of those exposed develop pleural plaques:

$$114,400 \times 25\% = 28,600 \text{ or } 143,000 \times 25\% = 35,750$$

High estimate:

If 50% of those exposed develop pleural plaques:

$$114,400 \times 50\% = 57,200 \text{ or } 143,000 \times 50\% = 71,500$$

Step four

Assume the proportion of those that develop pleural plaques that are diagnosed with the condition.

Low estimate:

If 20% of those with pleural plaques are diagnosed:

$$28,600 \times 20\% = 5,720 \text{ or } 71,500 \times 20\% = 14,300$$

High estimate:

If 50% of those with pleural plaques are diagnosed:

$$28,600 \times 50\% = 14,300 \text{ or } 71,500 \times 50\% = 35,750.$$

Step five

Assume that every case that is diagnosed leads to a claim and that each claim is won at a total cost of £25,000 (£8,000 legal costs for claimants, £6,000 legal costs for defendants plus damages award of £11,000).

Note Current guidance for the Northern Ireland judiciary^[39] does not give any guidance in relation to awards for pleural plaques. The suggested range of award for pleural thickening with functional impairment is £18,000 to £36,000. This is to include the risk of subsequent developments adversely affecting lung function such as further thickening, asbestosis, mesothelioma and lung cancer. But the medical evidence suggests that pleural plaques do not impair lung function or indicate that further disease is necessarily going to develop.

In response to a request for data on previous compensation awards the NI Courts and Tribunals Service statisticians advised that the only relevant information available is for mesothelioma cases.

For mesothelioma (asbestos-related) compensation orders there are fewer than five of these from 2008 to date. Due to the small numbers, they cannot provide any further information on the amount of compensation in terms of damages or costs, to avoid the identification of individual persons.

They noted that it is important to realise that similar claims for compensation could have been made under personal injuries or negligence and not as mesothelioma and we would be unable to

separate this information out from their databases. Therefore, it is only possible to use an assumed figure.

Low estimate:

5,720 x £25,000 = £143 million

High estimate:

35,750 x £25,000 = £893.75 million

[1] Official Report, Committee for Finance and Personnel 15 September 2010, available online at:
http://archive.niassembly.gov.uk/record/committees2010/FinancePersonnel/100915_Pleural_Paques.pdf (accessed 30 September 2010)

[2] DFP (2010) 'Consultation on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010' available online at: <http://www.dfpni.gov.uk/consultation-on-pleural-plaques-legislation.pdf> (accessed 30 September 2010) (see page 32)

[3] The Damages (Asbestos-related Conditions) (Scotland) Act 2009

[4] DFP (2010) 'Consultation on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010' available online at: <http://www.dfpni.gov.uk/consultation-on-pleural-plaques-legislation.pdf> (accessed 30 September 2010) (see page 33)

[6] DFP (2010) 'Analysis of responses to the consultation on the draft Damages (Asbestos-related Conditions) Bill 2010'

[7] Ministry of Justice (2008)'Pleural plaques: consultation paper CP 14/08' available online at: <http://www.justice.gov.uk/docs/cp1408.pdf> (accessed 30 September 2010) (see page 33)

[8] 'epidemiology' is the study of the spread and treatment of disease.

[9] Elmes, P and Wade, O (1965) 'Relationship between exposure to asbestos and pleural malignancy in Belfast' *Annals of the New York Academy of Sciences* 132(1): 549-57 (see page 556)

[10] O'Reilly, D et al (1999)'Asbestos related mortality in Northern Ireland: 1985-1994' *Journal of Public Health Medicine* vol 21, no.1 pp 95-101

[11] O'Reilly, D et al (1999)'Asbestos related mortality in Northern Ireland: 1985-1994' *Journal of Public Health Medicine* vol 21, no.1 pp 95-101 (see page 95)

[12] O'Reilly, D et al (1999)'Asbestos related mortality in Northern Ireland: 1985-1994' *Journal of Public Health Medicine* vol 21, no.1 pp 95-101 (see page 99)

[13] <http://www.mesotheliomacontrol.com/asbestos-related-diseases/benign-pleural-plaque.html>

[14] See Peto, J et al (1995) 'Continuing increase in Mesothelioma mortality in Britain' *Lancet* 345: pages 535-539

[15] O'Reilly, D et al (1999)'Asbestos related mortality in Northern Ireland: 1985-1994' Journal of Public Health Medicine vol 21, no.1 pp 95-101 (see page 100)

[16] O'Reilly, D et al (1999)'Asbestos related mortality in Northern Ireland: 1985-1994' Journal of Public Health Medicine vol 21, no.1 pp 95-101 (see page 98)

[17] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort'

[18] Ministry of Justice (2008)'Pleural plaques: consultation paper CP 14/08' available online at: <http://www.justice.gov.uk/docs/cp1408.pdf> (accessed 30 September 2010) (see page 40)

[19] According to its website, the Munich Re Group is "one of the world's leading reinsurers" see <http://www.munichre.com/en/profile/strategy/default.aspx>

[20] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 63)

[21] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 9)

[22] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 9)

[23] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 40)

[24] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 40)

[25] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 69)

[26] The Johnson case resulted in the 2007 Law Lords Judgement in England that compensation should not be paid for pleural plaques.

[27] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 70)

[28] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 74)

[29] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 88)

[30] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 91)

[31] Münchener Re group (2009) 'Asbestos: anatomy of a mass tort' (page 27)

[32]http://archive.niassembly.gov.uk/record/committees2010/FinancePersonnel/100915_Pleural_Paques.pdf (see page 6)

[33] IIAC (2008) 'Pleural plaques: position paper 23' available online at: http://www.iiac.org.uk/pdf/pos_papers/pp23.pdf (accessed 5 October 2010)

[34] IIAC (2008) 'Pleural plaques: position paper 23' available online at: http://www.iiac.org.uk/pdf/pos_papers/pp23.pdf (accessed 5 October 2010) (see page 5)

[35] IIAC (2008) 'Pleural plaques: position paper 23' available online at: http://www.iiac.org.uk/pdf/pos_papers/pp23.pdf (accessed 5 October 2010) (see page 6)

[36] source <http://wordnetweb.princeton.edu/perl/webwn?s=anxiety> Princeton university's lexical database for English. (accessed 5 October 2010)

[37] Source

http://dictionary.oed.com/cgi/entry/50009991?single=1&query_type=word&queryword=anxiety&first=1&max_to_show=10 (accessed 5 October 2010)

[38] ABI letter to Committee clerk 23 October 2009.

[39] The Judicial Studies Board for Northern Ireland (2008) 'Guidelines for the assessment of general damages in personal injury cases in Northern Ireland' 3rd edition.



13 January 2011

Damages (Asbestos-Related Conditions) Bill

Dr. Jodie Carson

This paper provides an overview and discussion of the Damages (Asbestos-related Conditions) Bill.

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NIAR 644/11

Executive Summary

Background

- The Damages (Asbestos-related Conditions) Bill is concerned with the issue of pleural plaques; these are a thickening of the lining of the lung, caused by asbestos exposure. The medical consensus is that pleural plaques are not harmful, and do not develop into other life-threatening diseases.

- The Bill is intended to negate a decision, taken by the House of Lords in October 2007 (Johnston v NEI International Combustion Ltd), which held that asymptomatic benign pleural plaques do not constitute an injury for which compensation may be sought.
- Prior to the Johnston case, the courts in NI appeared to have accepted that pleural plaques, in and of themselves, were actionable. However, post-Johnston, damages for symptomless pleural plaques are no longer available in the courts in Northern Ireland.
- The Bill would reverse this decision; it would then be up to the courts to decide how much to award in damages depending on severity, etc.

Key Issues

- The key issue around the proposed legislation appears to be the argument as to whether people should be compensated for a condition which is without symptoms. However, this might be balanced against the argument that people should be compensated for the anxiety associated with confirmed exposure to asbestos and the future risks that this might imply. It could also be argued that employers should be held accountable for not having prevented/managed the exposure to asbestos.
- Another issue with the Bill is that there is considerable uncertainty around the number and costs of previous and potential claims.
- Should the Bill be passed, it may have implications for the cost of insurance, which is already considered to be comparatively high in Northern Ireland.
- Comparable legislation in Scotland continues to be the subject of legal challenge. If the Scottish legislation was found to be in breach of the European Convention on Human Rights, the NI legislation (assuming the Bill is passed), could similarly be found to be in breach.
- Concerns have been raised as to the proposed timetable for the Bill, and in particular the time allowed for committee scrutiny.
- Finally, the argument has been made that the proposed legislation could be counter-productive, if, in reinstating the condition as being compensatable, it enhances people's anxiety that they are going to develop other related conditions.

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Executive Summary

1 Background to the Bill

2 Position in Northern Ireland

3 Position in Scotland, England and Wales

4 Bill Clauses

5 Key Issues

1 Background to the Bill

The Damages (Asbestos-related Conditions) Bill is concerned with the issue of pleural plaques^[1]; these are a thickening of the lining of the lung, caused by asbestos exposure. Pleural plaques are distinct from diffuse pleural thickening^[2], asbestosis^[3], mesothelioma^[4] or

asbestos-related lung cancer. The medical consensus is that pleural plaques are not harmful, and do not develop into other life-threatening diseases; however, their presence does indicate exposure to asbestos^[5].

The Bill is intended to negate a decision, taken by the House of Lords in October 2007 (Johnston v NEI International Combustion Ltd), which held that asymptomatic benign pleural plaques do not constitute an injury for which compensation may be sought. It is worth highlighting that the House of Lords decision did not necessarily imply that there was no negligence associated with exposure to asbestos, resulting in pleural plaques; just that this did not constitute damage. The proposed bill would reverse this decision and say that this does constitute damage. It would then be up to the courts to decide how much to award depending on severity, etc^[6].

The Bill was introduced to the Northern Ireland (NI) Assembly on 14 December 2010 and is scheduled to reach second stage on 17 January 2011.

2 Position in Northern Ireland

2.1 Legal Position in Northern Ireland before/after Johnston Case

Prior to the Johnston case, it would appear that the courts in NI had accepted that pleural plaques, in and of themselves, were actionable. In paragraph 12 of the judgment in Bittles v Harland and Wolff^[7], Mr Justice Girvan (as he then was), stated that:

"In a case such as the present where the plaintiff has been exposed to and has inhaled asbestos dust as a result of the defendant's negligence and has in consequence developed pleural plaques, the development of the pleural plaques even if asymptomatic represent bodily damage and a personal injury...Thus the plaintiff is entitled to recover damages both for the pleural plaques and for the risks of developing more dangerous medical conditions, such as asbestosis and mesothelioma."

It would also appear that awards of provisional damages of between £5,000 and £7,500 were previously considered appropriate in Northern Ireland. However, post-Johnston, damages for symptomless pleural plaques are no longer available in the courts in Northern Ireland^[8].

2.2 Consultation

In October 2008, DFP issued a consultation paper which considered the impact of the decision in the Johnston case and sought views on the following options:

Option 1 – increased support, help and information for people with pleural plaques;

Option 2 – introduction of a register of those with pleural plaques;

Option 3 – introduction of a no fault payment scheme for pleural plaques; and

Option 4 – introduction of amending legislation to "reinstate" civil claims in negligence for asymptomatic pleural plaques^[9].

The consultation period concluded on 12 January 2008 and 94 responses were received. According to DFP, the option of legislative change commanded the most support. Options 2 and 3 were generally not supported. However, option 1 also received some support.

DFP also consulted on the terms of the Bill from July to September 2010. Only 12 responses were received and the majority of these came from the insurance industry, which reinstated its opposition to legislative change.

3 Position in Scotland, England and Wales

3.1 Scotland

The Scottish Executive has introduced legislation which curtails the effect of the Johnston judgement. On 23 June 2008, the Damages (Asbestos-Related Conditions) (Scotland) Bill was introduced to the Scottish Parliament. This created a reaction from insurers and business interests regarding the possibility of increased costs associated with claims and insurance premiums, and the possible involvement of claims management companies. The Scottish Executive defended the Bill, stating that the wider implications were misplaced and that the Bill only deals with three asbestos-related conditions – pleural plaques; symptomless pleural thickening; symptomless asbestosis – and would have no effect beyond these. The Bill completed its final stage in the Scottish Parliament in March 2009, received Royal Assent in April 2009 and came into force in June 2009^[10].

In April 2009, five insurance companies (Axa General Insurance Ltd, Axa Insurance UK Plc, Norwich Union Insurance Ltd, Royal and Sun Alliance Insurance and Zurich Insurance Plc) launched a judicial review of the 2009 Act. The companies sought a declaration that the 2009 Act is incompatible with their rights under Article 6 of, and/or Article 1 of the First Protocol to, the European Convention on Human rights. They also sought a declaration that the 2009 Act was the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament. This hearing concluded in October 2009 and was dismissed in January. However, the companies have since appealed and the legal challenge is ongoing^[11].

3.2 England and Wales

In July 2008, the UK Government issued a consultation paper on pleural plaques. There were a number of failed attempts to introduce a Damages (Asbestos-Related Conditions) Bill. In February 2010, Jack Straw announced that the law in England and Wales would not be amended, but that the Government had decided to introduce an extra-statutory scheme, which would make payments of £5,000. However, these payments would be limited to those individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the Law Lords' ruling in October 2007^[12].

4 Bill Clauses

The Bill consists of the following five clauses^[13]:

Clause 1 – Pleural Plaques

This clause addresses the key issue in the Johnston judgement, by providing that asbestos-related pleural plaques are actionable damage. Subsections (1) and (2) provide that pleural plaques can be the subject of a claim for damages. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston case, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining liability.

Clause 2 – Pleural thickening and asbestosis

This Clause prevents the ruling in the Johnston case from being applied in relation to asymptomatic pleural thickening or asbestosis. Subsections (1) and (2) provide that asbestos-related pleural thickening and asbestosis, which have not and are not causing physical impairment, constitute actionable damage. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston judgment, to the extent that their application would result in asymptomatic pleural thickening or asbestosis being considered non-actionable. Subsection (4) ensures that section 2 does not otherwise affect the operation of statutory or common law rules for determining liability.

Clause 3 – Limitation of actions

This Clause provides that the period between the date of the decision in Johnston (17 October 2007) and the date on which any change to the law comes into force does not count towards the three-year limitation period for raising an action for damages in respect of the three conditions covered in the Bill. Subsection (1)(a) addresses the kinds of claims to which the Clause applies, i.e. those involving the asbestos-related conditions covered in Clauses 1 and 2. This includes claims that have been raised in the courts before any change to the law comes into force, as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date on which the change to the law comes into force, this section will apply only if those cases are ongoing at that date (this is intended to address cases that could be at risk of being dismissed by the courts on time-bar grounds).

Clause 4 – Commencement and retrospective effect

This Clause sets out the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Bill will come into force on a date appointed by the DFP by Commencement Order. The remaining subsections explain the retrospective effect of the provisions of the Bill. Subsection (2) provides that Clauses 1 and 2 of the Bill are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the decision in Johnston^[14]. Subsection (3) qualifies the effect of subsection (2) by providing that Clauses 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Act (if made) comes into force. The effect of subsections (2) and (3) is that claimants in cases which have not been settled, or determined by a court, before the Act (if made) comes into force will be able to raise, or continue, an action for damages.

Clause 5 – Short title and Crown application

This Clause gives the short title of the Bill and provides that the Act (if made) will bind the Crown.

5 Key Issues

- A key issue around the proposed legislation appears to be the argument as to whether people should be compensated for a condition which is without symptoms. However, this might be balanced against the argument that people should be compensated for the anxiety associated with confirmed exposure to asbestos and the future risks that this might imply. It could also be argued that employers should be held accountable for not having prevented/managed the exposure to asbestos.
- Potential Cost: Considerable uncertainty exists as to the number and costs of previous and potential claims. Since there is no current requirement to record a diagnosis of pleural plaques, there is no way of accurately knowing how many cases exist in NI. Accordingly, it is difficult to assess the financial implications of the Bill. DFP has

estimated that the cost to NI could be between £1.3m and £2.3m. However, this is based upon a population-adjusted estimate, using data for Scotland, and fails to account for differences in the prevalence of, and exposure to, asbestos between Northern Ireland and Scotland. If the fact that compensation levels are likely to be higher in NI than in Scotland is accounted for, the department suggests that an annual figure of £2m-£3m may be more realistic. However, the Association of British Insurers' (ABI) has suggested that the total cost to Northern Ireland could be between £111m and £858m, (refer to previous research paper for further details on cost estimates[15]).

- Potential Impact upon Cost of Insurance: According to the ABI:

"A move towards legislation will also be extremely unhelpful in keeping a stable operating environment for insurance providers. We fear that it is likely to impact on consumers in terms of higher premiums[16]."

- Legal Challenge in Scotland: The fact that the legislation is the subject of ongoing legal challenge in Scotland is noteworthy. If the legislation in Scotland was found to be in breach of the European Convention on Human Rights, the legislation in Northern Ireland (assuming the Bill is passed), would similarly be found to be in breach, unless local courts took a different view[17].
- Consultation: the ABI is of the view that insufficient time is available for proper scrutiny of the legislation[18]. The Committee has also expressed concerns regarding the proposed timeframe for progress of the Bill.
- Counter-Productive? The argument has been made that the proposed legislation could be counter-productive, if in reinstating the condition as being compensatable, it enhances people's anxiety that they are going to develop other related conditions. Evidence submitted to the committee suggests that categorising as 'personal injury' conditions which are asymptomatic would only serve to promote litigation and cause unnecessary anxiety to claimants. The submission also suggests that the logic behind the proposed legislation could be extended to other asymptomatic conditions such as personal injury through smoking at work[19].

[1] The House of Lords ruling and the proposed bill are concerned with pleural plaques that are asymptomatic

[2] Non-malignant disease in which the lining of the pleura becomes scarred
Consultation Paper: Pleural Plaques, DFP, 13 October 2008

[3] Non-malignant scarring of lung tissue which impairs lung elasticity.

[4] Asbestos related cancer which affects the mesothelium (the protective lining which covers most of body's internal organs)

[5] NI Assembly Research Paper: Pleural Plaques: numbers, costs and international approaches, October 2010

[6] Official Report (Hansard), 15 September 2010

[7] [2000] NIQB 13, as cited in: Consultation Paper: Pleural Plaques, DFP, 13 October 2008

[8] Consultation Paper: Pleural Plaques, DFP, 13 October 2008

[9] The legislation would also cover asymptomatic pleural thickening and asbestosis

[10] Consultation by DFP on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

[11] Ibid

[12] Ibid

[13] Damages (Asbestos-related Conditions) Bill, Explanatory and Financial Memorandum, Session 2010-2011

[14] This is because an authoritative statement of the law by the House of Lords is considered to state the law as it has always been.

[15] NI Assembly bill Paper, Pleural Plaques: numbers, costs, and international approaches, 13 October 2010
<http://assist.assemblyni.gov.uk/services/rsrchlib/products/researchpubs/dept/fp/2010/pid/geon18310.pdf>

[16] ABI letter to Committee clerk, 23 October 2009, as cited in NI Assembly bill Paper, Pleural Plaques: numbers, costs, and international approaches, 13 October 2010

[17] Unless local courts took a different view; local courts are not bound by the decisions of Scottish courts. However, such a finding might be highly persuasive
Official Report (Hansard), 15 September 2010, p. 30

[18] ABI letter to Committee chair, 10 January 2011

[19] Response to NI Assembly Committee for Finance and Personnel's call for evidence
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Damages (Asbestos-related conditions) Bill, January 2011