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ANALYSIS 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.

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 indorsed 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.

ZUIRICH 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

[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

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

[2] Asbestos Anatomy of a Mass Tort © Munchener Ruckversicherungs-Gesellschaft
[3] Philip v Ryan [2004] 4 IR 241

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.