

**CONSULTATION BY THE
DEPARTMENT OF FINANCE
AND PERSONNEL ON THE
DRAFT DAMAGES
(ASBESTOS-RELATED
CONDITIONS) BILL
(NORTHERN IRELAND) 2010**

Published by:

The Department of Finance and Personnel

Balloo Annex

Rathgael House

Balloo Road

Bangor BT19 7NA

Northern Ireland

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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, asymptomatic 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:

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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 Elmslie's 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 1998¹, 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.

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.

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

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.

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 2007¹, 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 asymptomatic 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.

¹ <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

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.

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

Draft legislation.

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 asymptomatic 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. Screening questions

2.1 What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 equality categories? minor/major/none

Ans: 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. There is no evidence to suggest that the categories highlighted in section 75 are relevant factors in the claims process.

Section 75 category	Details of policy impact	Level of impact? Minor/major/none
Religious belief	The ability to submit a claim is not constrained by the claimant's religious belief.	No adverse impact identified.
Political opinion	The ability to submit a claim is not constrained by the claimant's political opinion.	No adverse impact identified.
Racial group	The ability to submit a claim is not constrained by the claimant's racial group.	No adverse impact identified.
Age	The ability to submit a claim is not constrained by reference to age. However, asbestos-related conditions are regarded as "long-tail conditions" and claimants are, therefore, likely to be older.	No adverse impact identified.
Marital status	The ability to submit a claim is not constrained by reference to marital status.	No adverse impact identified.
Sexual orientation	The ability to submit a claim is not constrained by reference to sexual orientation.	No adverse impact identified.
Men and women generally	The ability to submit a claim is not constrained by reference to gender. Anecdotal evidence would tend to suggest that more men than women are affected by asbestos-related conditions. This is because exposure to asbestos is most often associated with heavy industries, where, traditionally, men are more likely to	No adverse impact identified.

	have been employed. However, there have been cases where women have developed the conditions, either through contact with their husband/partner's work clothes or through their work in an affected building (e.g. a school). As the ability to make a claim will apply across the equality groupings, the draft Bill is considered to be section 75 compliant.	
Disability	The ability to submit a claim is not constrained by reference to disability.	No adverse impact identified.
Dependents	The ability to submit a claim is not constrained by reference to dependents.	No adverse impact identified.

2.2

Are there opportunities to better promote equality of opportunity within the section 75 equalities categories?

Ans: The draft Bill will apply across the board and, as such, provides for full equality of opportunity.

Section 75 category	If "Yes", provide details	If "No", provide reasons
Religious belief		No. The proposed legislation will allow anyone who has been negligently exposed to asbestos and who has developed any of the asymptomatic conditions covered to submit a claim in negligence for compensation.
Political opinion		As above.
Racial group		As above.
Age		As above.
Marital status		As above.
Sexual orientation		As above.
Men and women generally		As above.
Disability		As above.
Dependents		As above.

2.3

To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group? Minor/major/none

Ans: The purpose of the draft Bill is to ensure that claims can be brought for certain asymptomatic asbestos-related conditions. The Bill does not, therefore, impact on good relations.

Good relations category	Details of policy impact	Level of impact minor /major/none
Religious belief	The proposed legislation will allow anyone who has been negligently exposed to asbestos and who has developed any of the asymptomatic conditions covered to submit a claim in negligence for compensation.	None
Political opinion	As above.	As above.
Racial group	As above.	As above.

2.4 Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

Ans: No – see response at 2.3 above

Good relations category	If “Yes”, provide details	If “No”, provide reasons
Religious belief		No. The purpose of the draft Bill is to ensure that claims can be brought for certain asymptomatic asbestos-related conditions. The Bill does not, therefore, impact on good relations.
Political opinion		As above.
Racial group		As above.

2.5 Multiple identity

Generally speaking, people can fall into more than one section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities? (*For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people*).

Provide details of data on the impact of the policy on people with multiple identities.

Specify relevant Section 75 categories concerned.

Ans: There is limited data available on the asbestos-related conditions covered by the draft Bill. However, as the Bill applies across the board, it is not considered to have a negative impact on anyone who might be classed as “multiple identity”.

2.6 Screening decision

If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

Based on the available information, and given that the draft Bill will apply across the board, the Department has concluded that an Equality Impact Assessment is not required.

If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy introduced.

As stated earlier, the draft Bill will apply across the board and, as such, provides for full equality of opportunity. The Department does not, therefore consider that the need for mitigation or alternatives arises.

2.7 Consultation

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.

2.8 Monitoring and Review

In accordance with good practice, the Department will keep the operation of the proposed legislation under review.

2.9 Approval

Screened by:	Position/Job Title	Date:
Laura McPolin	Legal and Policy Advisor	8 July 2010
Approved by:		
The screening exercise has not been signed off to allow for views expressed during the consultation.		

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 before 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 have been 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 (minus those cases attributable to local authorities and Government departments)

would be £11,843,950 to £20,033,950. The annual cost would range from £3,761,000 to £6,947,000, likely to rise to £4, 513,200 - £8,336,400 when cases hit their 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;
- 138 cases backed up with the Department for Business, Enterprise & Regulatory Reform (BERR) and the Department of Energy and Climate Change. The cost of settling these cases, including legal costs, was estimated to be in the region of £1,373,050. 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 £4, 973,500;
- 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 annual cost of settling successful claims was estimated to be between £425,000 and £440,000, peaking to around £510,000-£528,000. The cost of settling the existing backlog of claims was estimated to be £850,000 -£880,000.;
- 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 £203,000 - £304,500.

The Scottish Government also produced alternative estimates based on possible increases in the number of cases.

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 $\frac{1}{3}$ of that in Scotland. On that basis, the annual cost to business for pleural plaques cases in Northern Ireland could be estimated to range from £1,253,666 to £2,315,666. 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 £2,000,000 to £3,000,000 might, therefore, be more realistic.

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. Small firms impact test

As stated above, pleural plaques are usually associated with occupational exposure to asbestos within the construction, steel and shipbuilding industries, including the former nationalised industries. However, the proposed legislation will apply across the board and may, therefore, also impact on small firms, such as employing carpenters, plumbers, electricians, painters and decorators. Such firms will have to make payments where there is a successful claim against them. However, that was the position prior to the Johnston case. They may also be subject to higher insurance premiums.

6. Other Impact Assessments

An Equality Impact Screening Exercise has been conducted (see Annex B)

7. Monitoring and Review

In accordance with good practice, the Department of Finance and Personnel will keep the operation of the proposed legislation under review.

8. 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.

9. 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.

10. 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