ANALYSIS OF RESPONSES TO CONSULTATION PAPER ON PLEURAL PLAQUES

BACKGROUND

On 13 October 2008 the Department of Finance and Personnel ("the Department") issued a consultation paper which considered the House of Lords' decision in Johnston v NEI International Combustion Ltd and conjoined cases [2007] (known at earlier stages as Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)).

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

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

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

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

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

The identified options were:

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

METHODOLOGY

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

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

The paper contained 10 questions, which are set out in Annex B. The responses from representative organisations, insurance companies and solicitors tended to be more detailed, although not all addressed the 10 questions posed. Individual respondents tended to focus on the issue of legislative change and whether the decision in the Johnston case should be overturned, although some also recounted how their circle of friends and colleagues had been diminished by asbestos-related diseases ("ARDs").

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

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

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

Submissions received

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

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

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[1] Not all of the individual respondents are listed, as some of the signatures on the responses could not be made out.

Disability Action

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

Government departments

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

The response from DSD notes that the IIAC would be reporting on the issue again and the Department undertook to highlight the publication of the IIAC report in due course. That report has now issued and is discussed further at page 29.

Harland and Wolff plc

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

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

The response goes on to say that Harland and Wolff plc relies on funding from DETI and notes that, if legislative change is pursued, DETI will have to bid for additional in-year funding and future financial cover.

Insurance companies

The responses from the insurance companies tended to mirror the responses from the CBI and ABI (discussed below), expressing support for an awareness campaign and opposition to the creation of a register or legislative change.

The response from **AXA Insurance UK plc** ("AXA") notes that it is a major provider of employers' liability insurance and that it handles a significant

volume of claims arising from employment-related exposure to asbestos. Prior to the Johnston case, it was a contributing insurer in between 300 to 500 claims per year in respect of pleural plaques.

AXA says it would not wish the decision in the Johnston case to be overturned because it would —

- change the operation of the law of negligence on a retrospective basis;
- de-stabilise the system and create uncertainty for employers' and insurers' assessment of future risks to business; and
- create a precedent for further changes to the law in respect of symptomless conditions.

In AXA's view, the legal duty to pay under employers' and public liability policies arises "as a result of a legal duty upon their policy holder to pay damages under the laws of negligence." It suggests that a requirement that insurers fund a payment scheme "notwithstanding the cover provided by the insurance policies sold to their customers would constitute a serious disturbance to the rights of insurers and is likely to be in breach of the European Convention on Human Rights" ("ECHR").

AXA supports the introduction of information leaflets. It recognises that those who have been exposed to asbestos have anxieties and believes the provision of "unambiguous information" via leaflets and "better trained" GPs, nurses and healthcare specialists will be of great value.

AXA does not support a register, partly because the burdens would outweigh the benefits, but also because it would send out a mixed message (i.e. if there is nothing wrong, why is there a need to register?).

AXA asserts that it is "quite clear from the medical evidence that only a small proportion of those who are diagnosed with pleural plaques subsequently, and separately, develop mesothelioma or other symptomatic asbestos-related conditions."

In its view, "[i]nitiating legislation in relation to pleural plaques would signal an intention to support a potentially wide expansion in the categories of person who can pursue a claim for compensation – at a high future cost to industry and the taxpayer."

It also believes the long-term consequences of overturning the Johnston decision "to both business, and indeed the whole Northern Ireland Executive itself are simply unquantifiable, but nevertheless wholly real".

AXA emphasises that it remains committed to fulfilling policyholders' obligations to pay compensation to those who "sustain symptomatic asbestos-related conditions". It notes that it has paid out £10m since the decision in the Johnston case (i.e. between October 2007 and January 2009) and is working to speed up the claims process, especially in relation to those diagnosed with mesothelioma.

The response from AXA also raises the issue of “run-off companies and solvent defendants with insolvent insurers”. It believes such companies are likely to have limited assets to meet asbestos liabilities and suggests that any available resources should be used to pay claims for mesothelioma and other symptomatic conditions, rather than pleural plaques.

The response from **Royal Sun Alliance Insurance plc** (“RSA”) commences by saying that RSA has always been clear that “where individuals have suffered physical harm as a result of exposure, they should be entitled to compensation”. RSA does not, however, believe that compensation should be paid “where there are no physical symptoms” and it will “strongly oppose any proposal to overturn the House of Lords’ judgment or to introduce a no-fault compensation scheme”.

RSA believes the anxiety levels of those diagnosed with pleural plaques would be heightened by the payment of compensation and it quotes Dr Richard Butland MA MD FRCP, who has said —

“the ending of compensation for pleural plaques has carried a clear message…that pleural plaques are of no consequence. I have seen this from my own experience and indeed reassure patients that pleural plaques are not actionable because they are unimportant. I would find it very difficult to tell patients that they are eligible for compensation but that pleural plaques were benign and unimportant. Patients would naturally think that if they are eligible for compensation, pleural plaques must be harmful. Thus the provision of compensation would create needless anxiety.”

Dr Butland was instructed by RSA to prepare a report to answer various questions relating to pleural plaques. However, the response from RSA emphasises that Dr Butland’s report is an objective, expert report.

RSA believes “people appreciate having their practical concerns dealt with, rather than just an anonymous financial pay out” and it supports awareness-raising, with improved guidance for GPs and specialist units. In this regard, it proposes a Government sponsored website, or one hosted by a medical body, as it believes information on the web is “inconsistent and inaccurate”.

RSA would have less difficulty with a register than it would with legislative change. However, like others, it recognises that the burdens associated with maintaining a register could outweigh any potential benefits.

RSA believes legislative change would increase “potential confusion” and “unnecessary concern”. It also believes it would undermine the fundamental principles of the law of negligence and be “inconsistent with the established medical evidence in the vast majority of cases”.

RSA distinguishes between earlier legislative provisions which have overturned legal decisions relating to mesothelioma and the issue of pleural plaques. In its view, the “terrible effects of [mesothelioma] and the right of

sufferers to compensation have never been in doubt". In contrast, it believes it would be wrong to provide compensation for "a symptomless condition". It goes on to say that the establishment of a right to compensation for anxiety relating to pleural plaques could give rise to calls for compensation for other anxiety conditions. In this regard, RSA suggests that those occupationally exposed to sunlight could be anxious about the possibility of developing skin cancer.

Like others, RSA raises the concern that money will be diverted away from symptomatic asbestos-related conditions and it suggests that similar concerns have prompted a number of States in the US to enact legislation which prevents claims from those with symptomless pleural plaques.

The response from the **Norwich Union** ("NU") states that it is the UK's largest general insurer, with a 14% market share. It also notes that it was one of the insurers which funded the Johnston case.

NU believes awareness-raising would help to reduce the worry associated with a diagnosis of pleural plaques. It goes on to say that, not only do a tiny fraction of people with pleural plaques develop mesothelioma, most mesothelioma sufferers do not have pleural plaques.

Like others, NU believes a register would contradict any assurances given and could not be justified on a cost/benefit analysis. It goes on to suggest that a register of those with pleural plaques would be a database for those who will not develop any disease.

The response from NU highlights 3 sources of statistical information, namely –

- a report of 10 November 2004 by Dr Moore Gillon which states that, for every person who develops mesothelioma in any given period, there will be 20 to 30 people who develop pleural plaques. The estimated level of pleural plaques within the UK is 30,000 to 75,000 cases per annum;
- an autopsy study of males over 70 near Glasgow, which revealed an incidence rate for pleural plaques of 51.2 %; and
- Professor Tony Newman Taylor's assessment that between ⅓ to ½ of those occupationally exposed to asbestos will have calcified pleural plaques 30 years after the first exposure. The Professor is a previous chair of the IIAC.

The NU suggests that it is impossible to actually predict the likely number of claims following a change to legislation. By way of comparison, it notes that, at the outset of the British Coal Chronic Obstructive Pulmonary Disease Scheme, 150,000 cases were expected. However, at the close of the scheme 592,000 claims had been registered. This was despite the availability of data with greater accuracy than that available in relation to pleural plaques.

Like the other insurers, NU does not believe it would be appropriate to overturn the House of Lords' decision. Such a response would, it suggests,

send out a message that pleural plaques are more serious than they are and would, therefore, increase anxiety levels.

NU's response also refers to the undermining of business confidence and concerns about fundamental changes to the law of negligence are also repeated.

NU believes a change would "erod[e] the integrity of a large area of common law" and open the floodgates for other claims which are not currently actionable. This would expose defendants to significant costs and impact on insurance premiums and the economy. The suggestion that retrospective legislation would be contrary to the ECHR is also repeated, the argument being that the legislation would interfere with "settled arrangements".

The NU response concludes that legislative change would label a class as injured, even though "they have not been injured, are not unwell and have not suffered any damage".

On the creation of a no-fault scheme, the NU believes that would send a further confusing message that pleural plaques is a condition for which compensation is required.

The response from **Zurich Insurance plc** ("Zurich") states that it helped to action the test case on pleural plaques and that it has conducted 5 years of research and liaison with medical experts which culminated in the decision in the Johnston case. It also reveals strong support for education and increased access to appropriate information. However, in keeping with the other insurance companies, Zurich opposes legislative change on the basis that it sends out the wrong message about the nature of pleural plaques, will undermine business confidence and will fundamentally change the law of negligence. It also opposes the creation of a register on the basis that "only a tiny fraction of people with pleural plaques develop mesothelioma", so "the vast majority of the people on such a database would not, therefore, develop any disease".

In rejecting the option of legislative change, Zurich quotes the Royal College of Physicians in its submission to the Scottish Justice Committee[2]

"…there is little doubt that patients can be confused and anxious about "asbestosis" in general and categorise pleural plaques within this group. The College understands this but the medical evidence is clear and competent and knowledgeable physicians should be in a position to allay those fears. Lawyers seeking to support patients in compensation claims must not be allowed to undermine the medical evidence."

Zurich also raises the prospect of claims farmers "who have a vested interest in generating referral fees, encourage people to have unnecessary and possibly harmful x-rays and put extra pressure on the national health system."

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[2] The Committee was tasked with undertaking close scrutiny of the Scottish legislation, which is discussed further below.

Like the NU and AXA, it believes "[r]etrospective legislation…would be contrary to the European Convention on Human Rights on the basis that the legislation interferes with settled arrangements and could only be justified on the grounds of compelling public interest. In this instance, the public interest is best served by allowing the courts to rule on a fundamental interpretation of the common law."

Once again, the impact on the business sector and employer liability premiums is raised and Zurich asserts that amending legislation will "increase costs and divert resources for businesses, Government, local authorities and insurers. There would be added pressure on the health system, with increased demand for x-ray and CT scans, including costs for medical staff time, training and operation of equipment."

Larne Borough Council

The response from **Larne Borough Council** expresses support for an awareness campaign and legislative change. In its view "those responsible for negligent exposure should be called to account". However, it also suggests that systems and procedures should be put in place to allow compensation claims to be dealt with quickly and cheaply and to "relieve the burden placed upon the courts and the legal system".

Legal Profession

Two firms of solicitors replied, both of which represent claimants. In addition to calling for legislative change, the response from **RobinsonMurphy Solicitors** states that the insurance companies are applying the Johnston case more widely and either completely denying compensation to those with pleural thickening and asbestosis, which, it is said, may "initially be symptomless", or requiring evidence of "a disability of more than 10%". The response goes on to say that RobinsonMurphy would be bringing four test cases relating to asbestosis before the Newcastle Upon Tyne County Court. However, the firm was unable to say when judgment would be given and anticipated that, even if judgment was favourable to its clients, the insurance companies would appeal.

RobinsonMurphy believes the Johnston case has had a much greater impact than was originally envisaged and it suggests that insurers are using the case on a day to day basis to "try to drive a coach and horses through the entire compensation regime for those suffering from asbestos-related disease."

The response concludes with an interesting assessment of the issue of unanimity. Some commentators have suggested that the legislature should be slow to overturn the Johnston case because it was a unanimous decision of the House of Lords. However, clearly, RobinsonMurphy does not regard unanimity as a deterrent to legislative change. In its view, the Law Lords have merely reached a unanimous decision on the law as it stands – that is their job. RobinsonMurphy goes on to say, however, that it is for the Government

to decide whether the current law "[j]ustly serves its purpose or not". In its view, and given the "different constitutional roles undertaken by the House of Lords and by Government", unanimity "poses no problem whatsoever for elected representatives wishing to change the law".

The response from **Thompsons/Thompsons McClure Solicitors** ("Thompsons") notes that it is a leading Trade Union and personal injury law firm and that it acted on behalf of Unite, the Union in the lead test case in Johnston.

Thompsons recognises that the UK Government has demonstrated concern for asbestos victims by re-dressing the decision in the Barker case[3] and introducing lump sum payments for mesothelioma victims. However, it calls for further action, saying there are "strong moral and political reasons" why people with pleural plaques should be compensated.

Thompsons regards pleural plaques as a violation of bodily integrity and it notes that the importance of that principle was recognised by Hale LJ in Parkinson v St James and Seacroft University Hospital NHS Trust 2002 (discussed below).

Thompsons believes the House of Lords' decision in the Johnston case overlooked established legal practice, separating pleural plaques from the risk of malignancy and anxiety in order to conclude that "as separate entities they were not significant in their own right".

Thompsons suggests that "erudite legal reasoning does not make the problem go away" and goes on to say that the "Law Lords' intellectual reductionist sophistry has deprived people with pleural plaques of a remedy and left them feeling angry, powerless and belittled".

Thompsons favours plain English information, but its response questions the effectiveness of previous information campaigns. There is also a concern that information campaigns should be part of a wider response, which restores

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[3] In that case, the House of Lords ruled that, where more than one employer had negligently exposed a claimant to asbestos and the claimant went on to develop mesothelioma, each employer should only be held liable to the extent that his breach of duty increased the risk of the claimant contracting the disease. Accordingly, the decision avoided the burden of full liability falling on a dwindling number of employers who happen to be traceable and solvent or insured, but potentially reduced the amount of compensation claimants could expect to recover in such cases. After the decision, there were calls for the ruling to be reversed and the Compensation Act 2006 was duly introduced. The Act reverses the effects of the Barker judgment to enable claimants, or their estate or dependants, to recover full compensation from any liable person. It is then open to the person who has paid the compensation to seek a contribution from other negligent persons.

compensation, and not used to discourage claims under a restored right to compensation or otherwise.

Clearly, Thompsons regards a register as a distraction, but it supports the creation of an Employers' Liability Insurance Bureau ("ELIB"), which guarantees victims of workplace accidents and occupational disease compensation where the employer is uninsured or insured, but can't be traced. It notes that the Motor Insurance Bureau ("MIB"), which was established in 1946, meets liability in personal injury claims under the terms of the MIB Uninsured Drivers Agreement and Untraced Drivers Agreement. Companies selling motor insurance must sign MIB Agreements. Thompsons also notes that the EC Directive on Motor Insurance requires all Member States to operate similar funds.

Thompsons recognises that employer's liability insurance is a statutory obligation, but says that, if an employer goes out of business or is uninsured/can't be traced, there is no fund of last resort to meet the employer's liability to compensate an injured worker. The problems of uninsured employer/untraced insurers is, it says, particularly prevalent in "long tail" diseases and is likely to get worse, given that the Government recently repealed regulation 4(4) of the Employers' Liability (Compulsory Insurance) Regulations 1998, which required employers to retain copies of insurance certificates for 40 years.

Thompsons argues that an ELIB would have a nil cost for Government and should not present problems for the insurance industry, given that the industry has claimed that it wants to plough the savings from pleural plaques cases into compensation for serious ARDs. It also believes an ELIB could reduce the demand on courts and distress to families.

Thompsons' believes the decision in the Johnston case has allowed employers to evade liability for the harm evidenced by pleural plaques. It goes on to say -

"The House of Lords declared the law but that is not the same as deciding what is fair and just. Where there is a divergence between the common law and justice it is the responsibility of Parliament to remedy it."

In its view, the decision is a licence to employers to take risks with workers' health. It also believes that employers' liability insurers have benefited financially and have been "emboldened in the strategy to erode the rights of asbestos victims and other workers." This is, it says, evidenced in the case of Owen v Esso Exploration and Production UK Ltd, where a claim for symptomless asbestosis and asbestos-related pleural thickening was successfully challenged in the Liverpool County Court.

Thompsons says that, rather than clarifying the law, the decision in the Johnston case has created instability by precipitating satellite litigation. Legislative change would, it suggests, restore equilibrium.

On the issue of a privileged class of claimant, Thompsons considers that such a suggestion is insulting and adds that there is nothing privileged about being exposed to asbestos.

Thompsons has commissioned a firm of accountants to produce a report on the financial consequences of the Johnston case. The report concludes that the incurred, but not yet reported reserve (i.e. the pot of money for claims not yet made) will be reduced to zero and released as profit.

Thompsons suggests that the insurance industry will try to hide behind the current financial crisis. However, it believes the industry should not be allowed to soften the blow of lean times by paying dividends with reserves that should be used to compensate asbestos victims.

Only and only if there is no prospect of legislative change would Thompsons support a no-fault scheme. The scheme should, it suggests, be funded by the insurance industry with a pro rata contribution from Government Departments to the extent that they have liability as employers to workers exposed in former nationalised industries.

Thompsons goes on to say that the payment should be a fixed sum in every case and cites a figure of £17,500, which, it says, is based on the mid-point of the second edition of the Judicial Studies Board Guidelines for the Assessment of General Damages for Personal Injury Cases in Northern Ireland and which is subject to an annual RPI increase.

In common with the GMB, Thompsons believes touting for claims should be banned. In its view, the use of “scan vans” and the activities of claims farmers should be a criminal offence. This is because free scans are offered as a way of generating a substantial number of claims, which then attract a referral fee for solicitors, after the event insurance and a deduction from a successful claim. Thompsons believes the activities of claims farmers were instrumental in precipitating the challenge from defendants and insurers and it offers to assist in any investigation into such activities.

Ultimately, Thompsons concludes that employers have a duty to protect employees and suggests that, if they fail to do so, the resulting cost should not be a factor in deciding the future compensation for pleural plaques sufferers.

The response from the **Committee of the Personal Injuries Bar Association** expresses “unanimous support for legislation to overturn the decision in the Johnston case”. In its view, the funding and regulation of any payment scheme could present “very considerable practical and political problems in setting up the scheme and formulating the criteria for entitlement”. It also urges caution in separating compensation from fault, suggesting that such an approach could “shift the burden of payment away from the negligent wrongdoer and his insurer onto the public purse”.

The response from **Charles Hill QC** suggests there is a technical difficulty in telling a patient that pleural plaques do not cause mesothelioma, asbestosis or cancer, but are a marker of asbestos exposure which could cause any one of those diseases.

Mr Hill has been dealing with claims for many years and he believes the best way to deal with pleural plaques is by way of an award of damages. He goes on to say that the "matter requires to be dealt with as comprehensibly as possible by legislation". In his view, there are other aspects of asbestos exposure which will fall to be considered. By way of example, Mr Hill highlights an ongoing dispute as to whether or not dependents of a deceased person who died as result of exposure to asbestos can bring their own financial claim for loss of dependency. In addition, he cites the case of Maguire v Harland and Wolff, which was heard in Liverpool. In that case, the wife was thought to have been exposed to asbestos on her husband's clothes. She subsequently developed mesothelioma and died. However, the Court of Appeal in England has ruled that the development of the disease was too remote. Mr Hill recognises that the decision is not binding in Northern Ireland. However, he anticipates that the point may be argued and need to go up to the House of Lords. In his view, it would be unnecessary to incur such a delay, because, as a matter of logic, if the employer would have been liable to the husband, it should have also been liable to wife and legislation should establish that point.

A response was also received from a member of the judiciary, in his personal capacity. He favoured adopting the Scottish approach.

Medical Profession

Dr Shepherd is a Consultant Respiratory Physician with extensive experience of ARDs, particularly those resulting from asbestos exposure in the shipyard environment. His response highlights the lack of knowledge among individuals. He believes people do not understand the difference between ARDs and pleural plaques and that, as a result, they fail to appreciate that pleural plaques do not interfere with lung function or become cancerous, but are a marker of exposure and "of a small degree of risk of possibly developing asbestos related disease in the future".

In his view, it would be useful to have information leaflets which set out the difference between pleural plaques and ARDs and put the risks in context with other risks which patients accept during their life, such as cigarette smoking or the risk of a road traffic accident.

Like other respondents, Dr Shepherd does not support the creation of a register, largely because he feels it would have no clear purpose and is unlikely to be comprehensive or maintained.

From a medical perspective, Dr Shepherd does not believe pleural plaques cause any injury and, on that basis, does not feel that legislative change would be justified.

He is concerned that, if pleural plaques are designated as compensatable, there will be a risk of medically unjustified CT scans being carried out.

He recognises that the absence of legislative change will produce two "populations", one of which has had civil compensation for pleural plaques (i.e. up to the decision in the Johnston case) and one of which has not. However, he goes on to say that it seems "sensible that compensation should be for a disability, rather than a future risk of possibly developing a disability".

The response from the **Chief Medical Officer for Northern Ireland** supports any measure which would ensure a better understanding of pleural plaques for both the public and the medical profession. He notes that the IIAC is undertaking a review and that the Chief Medical Officer for England and Wales has also been asked to conduct an independent review. He looks forward to the outcome of both reviews, but, in the meantime, was unable to identify figures for the prevalence of pleural plaques.

Methodist Church in Ireland

The covering letter to the response from the **Methodist Church** reports that the Church has had, and continues to have, members, both male and female, who have been employed in industries which have made use of asbestos. Against that background, the Church feels that information leaflets on pleural plaques would be "absolutely essential".

The Church does not support the creation of a register, largely on the basis that it would be of no real value.

Although the Church believes the decision in the Johnston case has "introduced inequity into this area", it favours a payment scheme over legislative amendment, which it feels could set an unhelpful precedent.

The Church hopes that new health and safety procedures will help to reduce future "asbestos related injury". Taking that factor and projected incubation periods into account, the Church believes a payment scheme could be time limited. However, in terms of equal treatment, it recognises that much would depend on the level at which payments are set. So, it suggests that, if a payment scheme is established and the payment rate is set below the previous rate of compensation payments, there could be a continuing degree of inequity.

Political parties

The response from the **Alliance Party** ("AP") notes that there has been considerable interest in the issues, but that the interest is "limited to certain

groups (e.g. men who worked in industry) and certain locations (e.g. East Belfast)".

It does not explicitly state that the AP is opposed to legislative change. Rather, it makes the point that, in choosing to legislate in this area, the Scottish Government has chosen how to prioritise its budget. AP believes priority funding should go to mental health issues, which would cover any anxiety associated with pleural plaques, and does not believe people in Northern Ireland would be at a disadvantage to those in Scotland.

The response from AP goes on to express strong support for an awareness campaign, provided it is carefully targeted and taken forward with the "utmost care" (to avoid raising anxiety levels).

Like other respondees, AP is opposed to the creation of a register, largely on a cost/benefit basis, but also because it would wish to avoid stigmatisation or increased anxiety. However, it would support "substantive research concerning the impact of a diagnosis with pleural plaques".

The response from the **Progressive Unionist Party** ("PUP") accepts that the House of Lords' decision was right in law. However, it goes on to say that it is for elected representatives to change the law if that law is "found to be immoral or to be failing our citizens".

In the PUP's view, the situation post-Johnson is "unacceptable and action to right this wrong should be taken swiftly". It believes pleural plaques can be attributed to negligent employers and that "those responsible for this negligent exposure should be held to account".

The PUP goes on to suggest that the move by the Scottish Government to reinstate compensation creates "an unjust hierarchy" and states that "all citizens of the United Kingdom who have developed pleural plaques as a consequence of their employment should have access to the same level of compensation."

The Pup would also support an awareness-raising campaign.

Representative organisations

The response from the **CBI** expressed "strong support" for increased support and information, but opposed "in the strongest terms the idea of either overturning the House of Lords' decision… or a no-fault payment scheme which would involve ignoring overwhelming scientific evidence".

In its view, the payment of compensation sends the message that a condition is serious and would, therefore, "perpetuate the confusion". It also believes that legislative change would "undermine the stability of the legal environment" and business confidence, result in increased levels of litigation and impact on insurance premiums. Legal instability would, it said make

Northern Ireland a less attractive investment option and increase the costs for business, government, local authorities and insurers.

On the issue of precedent, the CBI concludes by saying that there are many agents which have now been classified as having the potential for long-term effects and it asks if compensation for concern alone will increase levels of compensation.

The welcome for increased support, help and information is echoed in the response from the **Association of British Insurers** ("ABI"), as is the opposition to legislative change and a no-fault payment scheme. The response also expresses concern about "claims farmers" who have an interest in generating referral fees and who encourage "unnecessary and possibly harmful x-rays".

ABI's response also echoes the CBI's comments about legal stability, investment and increased costs and suggests that legislative change could result in compensation for other non-compensatable conditions and "detrimentally affect the economic rights and interests of insurers, in breach of the European Convention on Human Rights".

Clearly, ABI believes that the earlier system of compensation payments was problematic and it quotes Professor Anthony Seaton, Emeritus Professor at the University of Aberdeen, who has said:

"The change in the caselaw that led to individuals with pleural plaques receiving money for a non-disease caused problems in their management. While giving appropriate reassurance and explaining the risks of other asbestos-related diseases in relation to the risks of much more likely diseases, we were obliged to advise them to consult a lawyer – a mixed message with the obvious consequence of causing anxiety. The main beneficiaries have been lawyers and expert witnesses, such as me. I believe we have better things to do, to prevent real disease."

The response from ABI echoes the earlier responses which refer to additional pressures on the health system, in terms of increased demands for x-rays or CT scans.

The response from the **British Insurance Brokers Association** ("BIBA") supports the call for education and information, but proposes that the information should also be distributed among lawyers, Trade Unions and the press, not just potential claimants.

BIBA emphasises the need for care, to ensure that the dissemination of information does not compound the problems by causing panic, increased anxiety or pressure on the NHS for x-rays or investigations. It advocates a two level approach. Level 1 information, which would be restricted to GPs, hospitals and NHS Direct, would contain detailed technical explanations, a prognosis and appropriate medical references. BIBA believes the level 1 information would be of particular assistance to non-specialist medical

professionals, who may not fully understand the issues. Level 2 information would contain an overview for the general public and be distributed via the Citizens' Advice Bureaux and other outlets.

BIBA does not favour the introduction of a register on the basis that it would be "unwieldy, expensive and ultimately of little utility".

BIBA confirms that it has no information on figures, but goes on to suggest that legislative change would set a precedent and expose the insurance market to unpredictable claims, where there is no reserve of funding. In BIBA's view, the Law Lords' analysis of the criteria for negligence is sound and constitutes the "bedrock of the common law". It believes legislative change could create a "seismic shift", the results of which could be "unexpected, unsuccessful and unwanted".

The response from BIBA highlights the danger of cross-border forum shopping and the possibility of claiming for other symptomless conditions, even those unrelated to asbestos exposure.

BIBA does not support the introduction of a payment scheme, saying that "[c]ommercial insurers would not fund a payment scheme where the underlying issue is not actionable in law. Hence it would be a straightforward drain on general taxation". Any attempt to force contributions could, it says, destabilise the liability insurance market and result in the costs being quickly passed on to the insured.

In BIBA's view, it is unfair to compensate those who have not suffered an injury and not compensate those who have suffered an injury, but are unable to prove negligence or are faced with an insolvent employer or unknown insurer.

BIBA believes it would be impossible to limit the legislative change to pleural plaques and "impossible at present to forecast how far the effects of any such change would spread". It also believes there is "every likelihood that the number of people affected in small firms has been underestimated."

Ultimately, BIBA states that it would not support a different compensation culture or legislation within the constituent parts of the UK, which could lead to insurance costs varying within those parts.

The response from the **Association of Personal Injury Lawyers** ("APIL") welcomes "any proposals to raise awareness" (even though it acknowledges the difficulties associated with allaying very personal concerns), opposes the creation of a register (on the basis that it would undermine any awareness-raising campaign and make people "feel stigmatised") and a payment scheme, and advocates legislative change, which would apply on a retrospective basis, thus ensuring equality. APIL also supports the extension of any amending legislation to asymptomatic pleural thickening and asbestosis and states that claims which have become statute barred since

the Court of Appeal decision in the Johnston case should be covered by any amending legislation.

On the issue of a payment scheme, APIL believes, in principle, "that the polluter must pay" and states that it is "fundamentally wrong for the State to be responsible where there is an identifiable wrongdoer." Having noted that insurance premiums have already been collected, it states that "it is entirely right and proper that the negligent party should make recompense for its negligence."

APIL recognises that the biggest obstacle facing any individual is the tracing of employers or insurers many years later. The difficulties associated with tracing those responsible prompts APIL to call for a statutory central database of employers' liability insurance policies and a fund of last resort for those suffering injury and occupational disease, similar to that operated by motor insurers.

APIL notes that, in the Johnston case, there was no question that there was a duty of care or that that duty was breached. Rather the claims were resisted on the basis that there was no damage. In APIL's view, pleural plaques constitute a "physiological change to the body signifying the permanent introduction of asbestos" and it cites the following quotes in support of its call for amending legislation —

"The right to bodily integrity is the first and most important of the interests protected by the law of torts"[4].

" I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society"[5]

"The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached."[6]

The response from APIL also —

- raises the spectre of forum shopping where there are cross-border issues;
- argues that "asbestos victims are a special category in highly exceptional circumstances" and that they should, therefore, be able to "obtain full and just compensation"; and
- expresses support for the enforcement of the regulations relating to the use of x-rays and CT scans and argues that the regulations should be

[4] per Lady Hale in Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266 at 284
[5] per Lord Steyn in Chester v Afshar [2004] UKHL 41, at paragraph 25
[6] per Lord Hope in Chester v Afshar, at paragraph 87

strengthened to prevent claims management companies introducing their own scan vans.

Southern Health and Social Services Board

The response from the **SHSSB** records support for the concept of information leaflets on pleural plaques, but not the introduction of a register. Although the Board recognises that, in themselves, pleural plaques are benign, it believes the exposure to asbestos carries risks and suggests that, if people have been put at risk, they should be compensated.

Unions

The response from **GMB** states that it is Britain's third largest trade union, with over 600,000 members, 13,000 of which are in Northern Ireland. The response goes on to say that GMB has significant membership in areas of heavy industrial exposure to asbestos and that GMB members have witnessed "first hand the devastating effects of [ARDs]".

The GMB believes that the decision in the Johnston case was wrong and "appears to have been heavily influenced by evidence provided by the insurance industry, motivated by potential savings of £1.4 bn." In its view, that sum was created by premium payments and its retention represents a "windfall profit for the British Insurance Industry".

GMB is not convinced by the general call for more information. It recognises that clear factual information at the time of diagnosis may help to reduce uncertainty, but it does not believe it will provide reassurance "to a great degree".

Although the response from GMB initially states that a person diagnosed with pleural plaques may have an "incorrect, but entirely natural, assumption" that s/he will develop mesothelioma, it later refutes the suggestion that there is no link between pleural plaques and mesothelioma and goes on to say that 1 in 3 members of the GMB Heat and Frost Branch have developed pleural plaques and subsequently been diagnosed with mesothelioma. The response also highlights the torment associated with visits to the GP, which, GMB suggests, raise the possibility of a diagnosis of mesothelioma.

Clearly, GMB favours a proactive risk-based approach, which will allow for those who have had contact with asbestos through work to be prioritised for screening and follow-up treatment. The pro-active approach would require a GP to ask if his/her patient had worked with asbestos and, if there is a positive response, to record that response and arrange for regular screening to be undertaken. The requirement to record the response is interesting, given that the GMB does not favour the creation of a register for people with pleural plaques.

Ultimately, the GMB believes it is "absolutely appropriate, correct and necessary to legislate to overturn the [Johnston] decision". It regards pleural

plaques as a violation of the right to physical integrity and states that “[t]he previous system of small amounts of compensation for the development of the condition was, therefore, absolutely correct and sound”.

The response from GMB makes the following key points in support of the case for legislative change —

- the payment of compensation for pleural plaques would provide a means of establishing liability “before the onset of mesothelioma or other asbestos-related terminal conditions”;
- the benefits to society in passing an amending law would “far outweigh the potential costs”;
- the payment of compensation would avoid double standards, whereby external scarring is compensated, regardless of impairment of function, or payments are made for hurt feelings or loss of reputation (i.e. in defamation cases); and
- the payment of compensation would ensure that all UK citizens are equal before the law and avoid a “postcode lottery for the receipt of compensation”.

If legislative change is forthcoming, GMB would wish to see the cases which were suspended due to the Johnston case being prioritised, but not distinguished over and above others. The GMB would also support the introduction of a criminal offence, to deal with those who tout for claims.

If legislative change cannot be secured, GMB, like Thompson’s, would support the introduction of an ELIB (which is discussed in more detail above). It would also countenance a payment scheme alongside the ELIB. However, the scheme would have to have an independent board, adopt a benchmark figure for compensation and make flat single payments, regardless of the extent of the pleural plaques. In addition, payment from the scheme should not preclude further legal action if the claimant develops mesothelioma.

The GMB suggests that the scheme could be funded by the insurance industry, negligent employers and companies which produced/manufactured asbestos products on a 70%, 25% and 5% ratio. A 3 year limitation period from the date of diagnosis is proposed.

One issue which is discussed at some length in GMB’s response is the dearth of research, publicity and guidance on pleural plaques. In its view, guidance material should be available to the general public at hospitals, health centres, GPs surgeries and online. It would like communications to be informed by cutting edge knowledge and is keen to expand on what is known about the health effects of pleural plaques, mesothelioma and other ARDs.

GMB compares the work being undertaken at an international level with the work being undertaken in Britain and highlights the lack of Government funded research. The work of the Barts Mesothelioma Research Group is welcomed, but, as GMB notes, is reliant on donations. GMB also notes that the Australian National Research Centre for Asbestos Related Diseases

(“ANRCARD”) receives statutory funding, which, it believes, is critical to the development of research, testing, treatment and informed policy-making. According to the GMB, ANRCARD receives funding of about £.1.2m per annum. GMB notes that the British insurance industry received £31bn in premiums in 2006 and suggests that it should provide funds for a British National Research Centre. The sum suggested is £3m per annum, index linked.

The GMB response refers to the “appalling record” of the Association of British Insurers’ voluntary arrangements for dealing with employer liability compulsory insurance (“ELCI”) claims. It suggests that, in 2005/6, the voluntary arrangements could only trace 28% of the insurers who were being sought. GMB asserts that the highest trace rate since the inception of the voluntary code in 1999 is 41%.

FDA is a professional association and union for the UK's senior public servants and professionals. It has a growing membership of 18000 and is comprised of senior managers, tax and legal professionals and other professionals working across government and the NHS.

The response from the Northern Ireland Senior Officers’ Section of the FDA (“NISOS”) expresses support for a general awareness campaign, but concern about the creation of a register. The concerns largely centre on the issues of costs and data protection. However, NISOS also suggests that it would be unfair to provide for the registration of one condition, but not others.

Ultimately, NISOS favours the introduction of amending legislation, partly on the basis that it would be unfair if people in Scotland could continue to raise an action for damages, but people in Northern Ireland could not. On the issue of setting an unhelpful precedent, it suggests each case should be judged on its own merits and, in this instance, it believes amending legislation would be justified.

The response from **Unite** expresses concern about the Johnston case and welcomes the “progress being made in Scotland”. Unite is particularly concerned that the lack of a financial penalty, in terms of compensation, could result in employers taking risks with workers’ health. In its view, the promotion of a healthy and safe working environment is not solely due to legislative initiatives or even employers’ goodwill, but also due to a desire to avoid increased insurance premiums as a result of litigation. It would, therefore, support amending legislation along the lines of that in Scotland.

Individual respondents

As, mentioned above, the responses from individuals tended to simply contain calls for legislative change.

Three forms of standard letters were submitted and, in the initial stages of the consultation, it was thought that this heralded the start of a sizeable

campaign. However, in the event, such letters account for just over ⅓ of the individual responses (25 in all).

The first of the standard letters refers to people who have been “negligently exposed to the dangers of asbestos and —

- asserts that the decision by the House of Lords is “completely wrong and should be overturned by our Assembly”;
- notes that previous claimants have received compensation;
- states that no-one can say how long it takes for pleural plaques to “develop into full blown asbestosis”;
- refers to ongoing anxiety;
- refers to annual scans at a cost of £500 to see if the pleural plaques has “deteriorated, possibly to full blown asbestosis”;
- asserts that the overturning of the House of Lords’ decision would be “the right decision…for the good of those suffering with this disease in Northern Ireland”;
- asserts that the law says “the disease was caused by unlawful exposure and the companies were negligent” so “the claims should be allowed to go ahead”.

The second of the standard letters —

- notes that it has been “recommended” that the writer enlist the support of his/her local MP;
- notes that insurance companies had initially paid compensation to those with pleural plaques;
- notes that the decision in the Johnston case does not mention Northern Ireland;
- asserts that pleural plaques are the “first stage of cancer”, cause anxiety and require access to an inhaler for breathlessness;
- suggests that those with pleural plaques suffer “similar, if not identical symptoms, regardless of where they live”;
- highlights the decision in Scotland to overturn the decision in the Johnston case;
- advocates equal access to compensation throughout the UK, “with no differentiation being made and without bias”; and
- urges “Stormont” to strive to overturn the decision “by government legislation”.

The third of the standard letters —

- notes that, if the decision in the Johnston case is allowed to stand, claimants will feel they are being “unfairly and blatantly discriminated against and this would be totally unacceptable.”;
- expresses support for a general awareness campaign and further help and information for “sufferers of pleural plaques”, but queries the potential benefits of creating a register;

- suggests that a payment scheme with "restrictions on eligibility and the possibility of future impact on compensation payments" also amounts to "discrimination against "post-Johnston cases";
- suggests that the overturning of the decision in the Johnston case is "the only acceptable way forward, in that it would call to account those responsible for negligence, not impact on future claims for more serious diseases resulting from pleural plaques and also put [claimants] on an equal legal footing with those in Scotland who are able to register claims regarding pleural plaques."

Most of the other responses were short, hand written notes, although some respondents did include their medical reports and accounts of how they came to be diagnosed.

It is clear from the accounts given that many of the respondents have lived with a high level of anxiety post-diagnosis and have suffered greatly in terms of losing their friends and colleagues to ARDs or witnessing their struggle with such diseases —

"Where does it start and end?"

"Our friends are in a bad way in terms of their health when does it start for me?"

It is also clear from the responses that the decision in the Johnston case has provoked a strong sense of injustice and a desire to secure redress and a proper consideration of the issues —

"I feel betrayed and hurt by the House of Lords' decision on pleural plaques, which I think is totally wrong….I feel this is a cost-saving exercise. I hope this obscene judgment will be overturned by our Assembly and ensure justice is done."

"I find it very unfair after 20 years the English Courts have overturned the payment of compensation for this illness. The court itself admitted the employers exposed their workers to asbestos. I would ask the consulting committee to bear in mind the Scottish parliament's decision to overturn this law. "

"Through my ex-employer's negligence and failure to 1/ protect me from exposure and 2/ to warn me of the possibility of exposure, I have been placed in a position of harm…I find that having an avenue of redress taken from me is fundamentally wrong and goes against what is right. Describing pleural plaques as an injury or a disease is, in my opinion, in this case immaterial and missing the point".

"I hope that when this matter is debated that I and others in the same position will receive the consideration that I believe we are entitled to before we too pass away. "

“Some great men have died at the hands of this negligence who will never get the chance to voice their opinion as I am doing now and therefore I feel that myself and those who have suffered with this illness deserve a proper investigation with the aim of compensation.”

Some of the responses recount how the exposure occurred —

“We had to sit on the ships and eat our lunch and dinner and the dust was everywhere which we now know was asbestos dust”.

“I started to work in Belfast Shipyard in 1950: I was 14 years of age. I worked until the late 1970s as a welder. I worked in the boiler rooms and engine rooms where the asbestos was mixed by pipe coverers and it came down like a snowstorm.”

“many pipe coverers have died as a result of cancers related to asbestos and, although I was not employed in this activity, the dust from the asbestos covering was evident in the workplace.”

Other responses record the length of service and highlight what are perceived to be lax safety conditions—

“I was employed as a welder in Harland & Wolff shipyard for forty years. I commenced my employment in 1959 and, in those days, health and safety regulations were non-existent. Neither myself nor my colleagues were ever informed or advised as to the damage we could be doing to our health by working in the proximity of certain materials.

The consultant described it to me as a sleeping timebomb, which may or may not explode. This news has had a devastating effect on my life and, in that respect, I believe that I am deserving of compensation.”

“We were never at anytime warned or told of the dangers of asbestos, we were never given any safety clothing or masks. The owners of the shipyard never enlightened us at any time of the dangers of the illness we would suffer in later life.”

“I believe that part of the contract of employment included “Health and Safety issues”. I do not believe this was adhered to and therefore the company would be in breach of contract or negligent in providing proper safety equipment and information on the dangers of breathing asbestos dust.”

“We never had any education or information about asbestosis so we didn’t even have the chance to protect ourselves”

“Personal protection equipment was not up to standard it was just a dust mask”

Several of the responses contained a strong call for wrongs to be righted or expressed a determination to see those responsible held to account —

“All my life I have been taught if you do something wrong you had to pay for it. These people took the profit, but do not want to take responsibility for their actions.”

“We’re not going away until we get what we deserve.”

“The Johnston case cannot be accepted and should be contested by whatever means available and the negligent people called to account”.

One respondent stated that,“[a]s a matter of public policy, pleural plaques should be viewed as harm”. Others called for equal treatment to those who had already received compensation or who lived in Scotland —

“I think we should be treated the same way as the men who have been awarded compensation. The men who have been denied compensation worked in the same conditions as those who have been awarded financially.”

“It would be unjust if people in Scotland could claim compensation and people from Northern Ireland could not.”

“Scotland has a tradition in shipbuilding not unlike Northern Ireland. I would ask the Executive that the people of Northern Ireland be treated with equality”.

“ I feel having been diagnosed with pleural plaques that I am entitled to the same compensation as sufferers in Scotland. For too long the people of Northern Ireland have been treated less favourably in many aspects of life. This is an opportunity for those of us who were exposed in this way to be acknowledged by our elected Assembly and the same system as Scotland should be adopted here.”

Some respondents who responded collectively felt it was a “basic human right to receive …compensation”, as they had been “affected the same way as the people that ha[d] already received compensation. “ This group also criticised the insurance industry, saying —

“We know the insurance companies have saved money on the people that have died already, never mind the people that are living.”

Summary of points made during consultation

It will be clear from the foregoing that the main subject of discussion during the consultation exercise was the availability of compensation for pleural plaques and the overturning of the decision in the Johnston case. The option of legislative change commanded the most support. However, there was also general support for awareness raising and information gathering/sharing, provided such activities are undertaken in a careful and sensitive way.

The option of a register did not find favour, largely because of concerns about the cost of creating and maintaining the register, but also because of concerns about its intrinsic value and the danger of stigmatisation.

The creation of a no-fault payment scheme was also generally opposed, although some respondents were willing to countenance such a scheme if legislative change is not forthcoming.

As was perhaps to be expected, there is a clear split of opinion between the business/insurance sector and individuals and their representatives.

Essentially, the business/insurance sector, which is opposed to legislative change, makes the following points—

- the House of Lords reached a unanimous decision in the Johnston case on the basis of undisputed medical evidence;
- it has been recognised that the House of Lords' decision was in keeping with the established principles of the law of negligence;
- the precedent value of a change to the law should not be underestimated: there is a real danger of an ever-widening range of claims for which there is no reserve of funding (e.g. for anxiety alone or for other "injuries" which have no symptoms);
- in the absence of detailed information on the prevalence of pleural plaques it is impossible to predict the full financial implications of legislative change;
- public funding should be prioritised and that funding could be spent in other areas, such as mental health, which would also be beneficial to those with pleural plaques;
- the payment of compensation sends the message that pleural plaques in and of itself is a serious condition. This causes further confusion and anxiety to those who have been diagnosed with the condition;
- legislative change would undermine the stability of the legal environment and business confidence, result in increased levels of litigation and impact on insurance premiums;
- legal instability will make Northern Ireland a less attractive investment option;
- legislative change will increase the costs for business, government, local authorities and insurers;
- legislative change will lead to "claims farmers" who have a vested interest in encouraging people to seek a diagnosis of pleural plaques;
- legislative change could increase the pressure on the health system, in terms of increased demands for x-rays or CT scans;
- legislative change could result in "forum shopping";
- legislative change would divert resources away from symptomatic conditions, such as mesothelioma; and
- retrospective legislation would breach the ECHR and will be challenged in the courts.

On the other hand, individuals and their representatives, who support legislative change, make the following points—

- exposure to asbestos carries risks and, if people have been put at risk, they should be compensated;
- those responsible for negligent exposure should be called to account;
- all citizens of the United Kingdom who have developed pleural plaques as a consequence of their employment should have equal rights and access to compensation;
- the payment of compensation for pleural plaques would provide a means of establishing liability before the onset of mesothelioma or other asbestos-related terminal conditions;
- the benefits to society in passing an amending law would far outweigh the potential costs;
- the payment of compensation would avoid double standards, whereby external scarring is compensated, regardless of impairment of function, or payments are made for hurt feelings or loss of reputation;
- pleural plaques constitute a violation of the right to physical integrity;
- the lack of a financial penalty could undermine the health and safety at work message and result in increased risk taking by employers;
- the activities of “claims farmers” can be regulated by the criminal law or the enforcement of the existing regulatory regime;
- legislative change would reduce the need to “forum shop”;
- asbestos victims are a special category of claimant in highly exceptional circumstances and should, therefore, be able to obtain compensation;
- legislative change would prevent the wider application of the decision in the Johnston case and the consequent distortion of the compensatory framework;
- judicial unanimity should not be seen as a barrier to legislative change;
- there is a moral case for legislative change and any such change would restore the equilibrium of the justice system;
- the civil law should right wrongs and reflect public opinion;
- legislative change will reduce the need for satellite litigation and thereby reduce the pressure on the justice system; and
- legislative change would prevent an unjust windfall for employers’ liability insurers.

Developments post-consultation

Before we consider the way ahead, it might be helpful if we highlighted what has happened elsewhere in the UK, post-consultation.

Scotland

It was noted earlier that the Scottish Government had given an undertaking to legislate to ensure that the decision in the Johnston case did not have effect in Scotland.

In February 2008 the Scottish Government initiated a consultation on a partial regulatory impact assessment of the proposed legislative change and, on 23 June 2008, the Damages (Asbestos-Related Conditions) (Scotland) Bill was duly introduced into the Scottish Parliament.

The Bill provided for asbestos-related pleural plaques to be a non-negligible personal injury for which damages could be recovered. As it was possible that the courts might look to the Johnston case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions[7], the Bill also provided that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, should continue to give rise to a claim for damages.

The Bill completed its final stage in the Scottish Parliament on 11 March 2009, received Royal Assent on 17 April 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 asbestos-related conditions will still be able to sue for compensation, despite the decision in the Johnston case.

The provisions of the new Act (copy attached in Annex D) take effect from the date of the House of Lords' judgment, 17 October 2007. This means the Act will cover people who had raised a claim prior to the Johnston case, but whose cases had not been settled or determined by a court before the House of Lords gave judgment. It also means 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.

On 27 April 2009 five insurance companies (Axa General Insurance Limited, Axa Insurance UK plc, Norwich Union Insurance Limited, Royal and Sun Alliance Insurance and Zurich Insurance plc) launched a judicial review of the new Act. The companies sought a declaration that the Act is incompatible with their rights under Article 6 of, and/or Article 1 of the First Protocol to, the ECHR. They also sought a declaration that the Act was the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament.

The insurance companies tried to prevent the Act from coming into force by arguing that it should be held in abeyance until the judicial review proceedings were over. However, the Court rejected the application and, as stated earlier, the Act came into force on 17 June 2009.

[7] In January 2009 it was reported that a case relating to whether asymptomatic asbestosis should be compensated was to be heard in Newcastle.

The first hearing in the petition for judicial review concluded on 22 October 2009 and, on 8 January 2010, Lord Elmslies' written decision, which dismissed the companies' petition, was published. The companies have lodged an appeal against the decision, which has been set down for 13-16 and 20-23 July 2010.

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. 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, which is attached at Annex E, essentially followed the Scottish legislation.

On 21 July 2009 the Secretary of State for Justice and Lord Chancellor, Jack Straw, was asked when the Government would publish the outcome of the consultation exercise. In reply, Mr Straw noted that the Government had published to the House of Commons two reports on the medical aspects of pleural plaques, one from the Chief Medical Officer's expert adviser and a second from the IIAC. Mr Straw undertook to reflect on the reports and to return to the Commons after the summer recess with final recommendations.

At that stage, Mr Straw said the UK Government was considering measures to—

- make the UK a global leader in research on the alleviation, prevention and cure of ARDs; and
- help speed up compensation claims for those who develop serious ARDs, such as mesothelioma.

He also said the Government was examining the process for tracking and tracing employment and insurance records, as well as the support given to individuals who are unable to trace such records.

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 Scottish legislation, 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.

On 25 February 2010, Mr 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.

On 23 March 2010 the Ministry of Justice published the analysis of the responses to the consultation exercise on pleural plaques. The analysis[8] 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.

IIAC

The IIAC is a scientific advisory body which provides independent advice to the Secretary of State for the Department for Work and Pensions and the Department for Social Development in Northern Ireland on matters relating to the Industrial Injury Disablement Benefit Scheme ("IIDB scheme"). This is the scheme by which employed earners in the UK receive benefits for industrial accidents or certain occupational diseases, which are referred to as "prescribed diseases".

The IIAC is comprised of 17 members who are appointed by the Secretary of State. The members include specialists in occupational medicine, epidemiology and toxicology, lawyers, representatives of employers and representatives of employees.

On the 11th June 2008, the Secretary of State asked the IIAC to explore the issue of pleural plaques and, in particular, to consider—

- the prevalence of pleural plaques;
- the occupational causation of pleural plaques currently found in the population;
- the likelihood of disability arising from pleural plaques;
- the likelihood of other more severe complications of asbestos exposure arising amongst those currently having plaques, and
- whether compensation through the IIDB scheme would be appropriate for people diagnosed with the condition.

The work on pleural plaques was taken forward by the IIAC's Research Working Group. The Group conducted a literature search, consulted with leading experts in respiratory research and asbestos-related diseases and invited evidence via its website and mail shots to occupational specialists.

The IIAC's position paper on pleural plaques was published on 30 June 2009. The paper notes that "representative population-based screening data ha[s] not been collected within the UK" and that there is "no direct or precise estimate of the current prevalence of pleural plaques in the UK". The paper states, however, that the condition is likely to be common, with one expert suggesting that as many as 36,000 to 90,000 people a year may develop plaques.

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[8] The full analysis can be viewed at http://www.justice.gov.uk/consultations/docs/pleural-plaques-response.pdf

The paper goes on to say that pleural plaques do not alter the structure of the lungs or restrict their expansion. It notes that the consensus amongst medical experts is that any loss of lung function is likely to be small or non-existent and well below the level required by the IIDB scheme. It also notes that "most authorities hold that pleural plaques rarely cause major symptoms". In this regard, it quotes a survey from Sweden, which found that nearly all of the 827 subjects were "symptom free at the time their plaques were discovered. "

The paper states that, although plaques do not "become cancerous", they are a "marker of future risk of lung cancer and mesothelioma, because they are a marker of exposure to asbestos". However, the paper recognises that "the predictive information about future risks is limited and imprecise". Likewise, it notes that there is no evidence about the resulting scale and severity of any psychological ill-health.

The paper concludes by noting that the IIAC did not recommend the prescription of pleural plaques when it last considered the issue in 2005 and that its latest inquiry has not prompted it to revise that opinion.

The paper does, however, emphasise that the IIAC was focusing on prescription for the purposes of the IIDB scheme and recognises that "different considerations may apply" in civil proceedings.

The full report can be accessed on the IIAC's website at www.iiac.org.uk

Report to the Chief Medical Officer for England and Wales

In July 2008 the Chief Medical Officer for England and Wales asked Professor Robert Maynard to prepare a report on the medical aspects of pleural plaques.

In his report[9] Professor Maynard states that "there is no evidence to show that the presence of pleural plaques is a reliable predictor of the risk of mesothelioma". The Professor goes on to say that the "generally accepted position seems to be that plaques, per se, do not produce significant changes in lung function" nor do they affect life expectancy. Having reviewed various research the Professor concludes that it is impossible to say whether pleural plaques are a "reliable predictor of serious lung disease". In his view, the plaques are a "pathological response to a foreign body: asbestos fibres". However, although they could be described as damage in "an anatomical sense", the Professor does not consider that, in the great majority of cases, they represent damage in a "physiological sense". He believes the law as it currently stands requires proof of damage "in a physiological sense" and, although he accepts that the current law could be subject to criticism, he ultimately concludes that providing compensation "to those who develop pleural plaques would be costly and unfair to those who do develop serious disease but who do not develop plaques".

[9] The Medical Aspects of Pleural Plaques: A Review for the Chief Medical Officer, Sir Liam Donaldson

The Way Ahead

The Department has carefully reflected on the submissions made during the consultation exercise and has closely monitored developments since the consultation exercise closed.

It has noted the general desire to increase the support, help and information which is available to people with pleural plaques and believes there is merit in exploring the issue further. In the coming months, the Department hopes to work in partnership with medical experts in Northern Ireland and other departments, both locally and across GB, with a view to exploring how access to information and support networks can be improved.

The IIAC's position paper confirmed the shortage of UK-specific data on pleural plaques and the Department encountered this first-hand when it was preparing its consultation paper. The paper specifically asked for information on previous settlement figures and associated legal costs or any estimates regarding:

- the number of people currently diagnosed with pleural plaques;
- the future number of people who will develop pleural plaques;
- the future distribution of pleural plaques cases;
- the period of time over which people will develop pleural plaques; or
- the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation.

The responses from the insurance industry highlight a number of medical studies/assessments. However, the GMB has suggested that the figures for pleural plaques have been over-estimated by the insurance industry. It estimates that 1-2% of males over 50 and a much lower number of males and females under 50 would be affected. In terms of round figures GMB suggests 100,000 to 200,000 people may be affected, of which the vast majority will never be diagnosed.

The response from Thompsons suggests that the Surveillance Work-Related and Occupational Respiratory Disease Project (SWORD) is the only reliable source of data on occupational respiratory diseases. Thompsons notes that SWORD has produced an estimate of 900 new cases of pleural plaques per year.

Thompsons' own database shows that between 2004 and 2008 it received instructions in 1582 pleural plaques cases. The peak of business occurred in 2005, when it received 617 cases[10].

[10] The response from Thompsons emphasises that none of the cases were referred by claims farmers or scan vans.

Given the uncertainty around the available figures, it could be argued that a register of those with pleural plaques would be useful. The Department has, however, noted the concerns raised during the consultation exercise, particularly those regarding the cost of creating and maintaining a register. The Department recognises that, from a data collection perspective, a register would only be effective if it is very carefully and systematically managed. At this stage, the Department has decided not to pursue the creation of a register. It has, however, noted the comments referred to earlier from Mr Straw and will be exploring how Northern Ireland can assist the UK Government in any research initiatives in relation to ARDs.

Turning to the option of a no-fault payment scheme, the Department has noted the opposition to the scheme and, in particular, the suggestion that insurance companies would be unwilling to participate in any such scheme. The Department considers that the active involvement of the insurance industry would be critical to the success of any payment scheme and that it would be unfair to expect the costs of any such scheme to be met purely from Government resources. The Department has, therefore, concluded that the option of a no-fault payment scheme is not viable.

This brings us to the final and, for many, the most critical option, namely the option of legislative change. The Department has set out above the principal arguments which have been made for and against legislative change and has carefully considered the weight which should be attached to the arguments on either side of the debate.

The Department does not propose to set out a critical analysis of each of those arguments. It does, however, believe that the issue of unanimity merits particular comment. The Department recognises that the House of Lords' decision in the Johnston case was a unanimous decision and accepts that that is a strong factor to be considered when determining the preferred policy option. However, the Department notes that the decision in the Barker case was also a strong decision, with only one dissenting judgment. Nevertheless, the UK Government determined to overturn that decision and enacted the Compensation Act 2006. The Department accepts the argument that legal unanimity cannot act as a bar to legislative action. Moreover, over the full course of the legal proceedings in the Johnston case, there were differing judicial views. In particular, and as was noted in the consultation paper, Lady Justice Smith gave a strong dissenting judgment in the Court of Appeal.

In the course of her judgment, Smith LJ said—

"most people on the Clapham omnibus would consider that workmen who have been put in the position of these claimants have suffered real harm. I do not think that they regard these consequences of asbestos exposure as trivial and undeserving of compensation."

The Department believes that view carries force.

The Department also regards the history of liability for the condition as significant. The fact that liability for the condition was established in a series of cases in 1984 and compensation appears to have been paid in such cases for 20 years until the insurers decided to mount a challenge to the long-established practice has undoubtedly given rise to a sense of grievance on the part of those who have been adversely affected by the House of Lords' decision. In addition, those affected have sustained damage to their lungs, albeit there are no physical symptoms of that damage other than the plaques themselves.

Having weighed up all the arguments for and against legislative change, the Department has, on balance, decided to recommend that legislation to restore symptomless pleural plaques as an actionable condition be brought forward. The Department believes a change in the law will hold employers to account and this is in keeping with most people's sense of justice and fairness and should encourage compliance with health and safety requirements. In addition it will provide people in Northern Ireland with the same rights as people in Scotland.

In terms of the form which any amending legislation should take, the Department has noted the terms of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 and the various Bills which emerged in England and Wales. Taking account of those documents, the Department has concluded that the amending legislation in Northern Ireland should also ensure that symptomless pleural thickening and asbestosis remain actionable.

Conclusion

The Department has determined that—

- the support, help and information which is available to people with pleural plaques be further explored, in partnership with medical professionals and other departments;
- a register of those with pleural plaques should not be introduced;
- a no fault payment scheme for pleural plaques should not be introduced; and
- legislation be introduced to ensure that civil claims for symptomless pleural plaques, pleural thickening and asbestosis can be brought in Northern Ireland.

ANNEX A

LIST OF CONSULTEES

Action Mental Health
Advice NI
Age Concern
Al Nur Craigavon Asian Association
Amalgamated Engineering & Electrical Union
Association of British Insurers
Association of Personal Injury Lawyers
Axa Insurance UK plc
Bar Council
British Medical Association
CARE in Northern Ireland
Carers NI
CBI
Chief Medical Officer for Northern Ireland
Chinese Welfare Association
Citizens Advice Regional Office
Council of County Court Judges
Construction Employers Federation
Disability Action
District Councils
Dr Richard Shepherd
Engineering Employers Federation
Equality Commission
Farset Youth and Community Development Ltd.
FDA
GMB
Health and Social Services Boards
Health and Social Care Trusts
Help the Aged
Institute of Directors
Institute of Professional Legal Studies
Irish Congress of Trade Unions
Justice for Asbestos Victims
Law Centre
Law Commissions
Law Society
Lord Chief Justice's Office
Members of the House of Lords
MLAs
MPs
Mr Conlane
Mr Crothers
Mr Doole
Mr Duff
Mr Hayes

Mr McLaughlin
Mr Mitchell
Mr Williams
National Federation of Self-Employed and Small Businesses Ltd.
NIACAB
NI Association for Mental Health
NI Chamber of Commerce and Industry
NICVA
NI Court Service
NI Departments
NI faith groups and churches
NI Human Rights Commission
NI Local Government Association
NI Magistrates' Association
NI MPs
NI MEPs
NIPSA
NI Solicitors Associations
Political parties in Northern Ireland
Professor Tony Newman-Taylor
Royal Hospital
The Queen's University of Belfast
Transport & General Workers Union
UNISON
UNITE
University of Ulster
Women's Forum NI
Women's Information Group
Women's Resource and Development Agency
Women's Support Network
Youth Council for NI
Youthnet

ANNEX B

QUESTIONS POSED IN THE CONSULTATION PAPER ON PLEURAL PLAQUES

QUESTION 1: Do you think information leaflets on pleural plaques would be useful? if not, why not?

QUESTION 2: Would you support the creation of a register? Please give reasons for your answer.

QUESTION 3: Do you have any information on settlement figures and associated legal costs or any estimates regarding:

- **the number of people currently diagnosed with pleural plaques;**
- **the future number of people who will develop pleural plaques;**
- **the future distribution of pleural plaques cases;**
- **the period of time over which people will develop pleural plaques; or**
- **the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation.**

QUESTION 4: Do you think legislation should be introduced to overturn the decision in the Johnston case?

QUESTION 5: If you do think legislation should be introduced, would you favour legislation which —

(a) restricts claims to those who had been diagnosed with pleural plaques before the Johnston case?;

(b) allows anyone who has been diagnosed with pleural plaques to claim?;

(c) follows the bill in Scotland by covering pleural plaques, pleural thickening and asymptomatic asbestosis?

QUESTION 6: Do you think there is a danger that legislation will create a privileged class of claimant or set an unhelpful precedent?

QUESTION 7: Do you support the option of a payment scheme for pleural plaques? if so, how would you see the scheme working? In particular, what level of payment would be appropriate and should a limitation period be applied?

QUESTION 8: Would any of the identified options lead to a higher or lower level of participation or uptake by the section 75 groups or have a differential impact on the groups? Please give reasons for your answer.

QUESTION 9: Do you have any information about how a change to the law would impact on the business sector?

QUESTION 10: Do you have any comments on the impact assessments prepared for England and Wales or Scotland?

When answering the above questions, please give reasons for your views.

ANNEX C

LIST OF RESPONDENTS

Alliance Party
Association of British Insurers
Association of Personal Injuries Lawyers
Axa Insurance UK plc
British Insurance Brokers' Association
CBI
Charles Hill QC
Committee of the Personal Injuries Bar Association
Department for Social Development
Dr Michael McBride Chief Medical Officer for Northern Ireland
Dr DRT Shepherd
Disability Action
Farset Youth & Community Development Ltd
FDA
GMB
Harland and Wolff plc
Larne Borough Council
Methodist Church in Ireland
Mr Ashe
Mrs Bailie
Mr Benson
Mr Brown
Mr Browne
Mr Caruthers
Mr Caughey
Mr Coghlan
Mr Colwell
Mr Corbett
Mr Corkil
Mr Currie
Mr J English
Mr W English
Mr Farr
Mr Fisher
Mr Flaherty
Mr Gaur
Mr W H N Gorman
Mr G N Gorman
Mr Hayes
Mr Honeyford
Mr Hume
Mr Irwin
Mr Kirpatrick
Mr Lyons
Mr Martin

Mr McCread
Mr McDowell
Mr McFarlane
Mr and Mrs McFaul
Mr McGregor
Mr D McKeown
Mr W McKeown
Mr McNeill
Mr Meek
Mr Mitchell
Mr Passmore
Mr Perry
Mr Proctor
Mr Purdy
Mr Robinson
Mr Roy
Mrs Russell
Mr Simms
Mr Spiers
Mr Spratt
Mr Stevenson
Mr Stewart
Mr Terry
Mr Williams
Mr Wilson
Ms Barkley
Norwich Union
Progressive Unionist Party
RobinsonMurphy Solicitors
Royal and Sun Alliance Insurance plc
SHSSB
Thompsons and Thompsons McClure Solicitors
Unite
Zurich Insurance plc

ANNEX D

Damages (Asbestos- related Conditions)(Scotland) Act 2009

2009 asp 4

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 11th March 2009 and received Royal Assent on 17th April 2009

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

1 Pleural plaques

(1) Asbestos-related pleural plaques are a personal injury which is not negligible.

(2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.

(3) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.

2 Pleural thickening and asbestosis

(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused and is not causing impairment of a person's physical condition is a personal injury which is not negligible.

(2) Those conditions are—

(a) asbestos-related pleural thickening; and

(b) asbestosis.

(3) Accordingly, such a condition constitutes actionable harm for the purposes of an action of damages for personal injuries.

(4) Any rule of law the effect of which is that such a condition does not constitute actionable harm ceases to apply to the extent it has that effect.

(5) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.

3 Limitation of actions

(1) This section applies to an action of damages for personal injuries—

(a) in which the damages claimed consist of or include damages in respect of—

(i) asbestos-related pleural plaques; or

(ii) a condition to which section 2 applies; and

(b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.

(2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 Commencement and retrospective effect

(1) This Act (other than this subsection and section 5) comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

(2) Sections 1 and 2 are to be treated for all purposes as having always had effect.

(3) But those sections have no effect in relation to—

(a) a claim which is settled before the date on which subsection (2) comes into force (whether or not legal proceedings in relation to the claim have been commenced); or

(b) legal proceedings which are determined before that date.

5 Short title and Crown application

(1) This Act may be cited as the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

(2) This Act binds the Crown.

ANNEX E

Damages (Asbestos-Related Conditions) Bill

A

B I L L

TO

Provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Pleural plaques

(1) Asbestos-related pleural plaques are a personal injury which constitute actionable damage.

(2) A person who has pleural plaques may recover damages in respect of them from a person liable for causing them.

(3) Any rule of law the effect of which is that asbestos-related pleural plaques are not a personal injury or constitute actionable damage ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable for causing (or materially contributing to the development of) a personal injury.

2 Pleural thickening and asbestosis

(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition is a personal injury which constitutes actionable damage.

(2) The conditions referred to in subsection (1) are—

(a) asbestos-related pleural thickening; and

(b) asbestosis.

(3) It is not necessary for a person seeking damages in respect of asbestos-related pleural thickening or asbestosis to prove that it has caused, is causing or is likely to cause impairment of that person's physical condition.

(4) But where a person seeking damages claims, in relation to the amount of damages sought, that the thickening or asbestosis has caused, is causing or is likely to cause such impairment, it remains for that person to prove those matters.

3 Limitation of actions

(1) This section applies to an action of damages for personal injuries—

(a) in which the damages claimed consist of or include damages in respect of—

(i) asbestos-related pleural plaques; or

(ii) a condition mentioned in section 2(2) which has not caused, Is not causing or is not likely to cause impairment of a person's physical condition; and

(b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.

(2) For the purposes of sections 11 and 12 of the Limitation Act 1980 (c. 58) (special time limit for actions in respect of personal injuries) and (special time limit for actions under Fatal Accidents legislation), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 Commencement and retrospective effect

(1) This Act (other than section 5) comes into force on such day as the Secretary of State shall by order appoint.

(2) Sections 1 and 2 are to be treated for all purposes as having always had effect.

(3) But those sections have no effect in relation to—

(a) a claim which is settled before the date on which section 1 comes into force (whether or not legal proceedings in relation to the claim have been commenced); or

(b) legal proceedings which are determined before that date.

5 Short title, Crown application and extent

(1) This Act may be cited as the Damages (Asbestos-Related Conditions) Act 2009.

(2) This Act binds the Crown.

(3) This Act extends to England and Wales and Northern Ireland only.