



Northern Ireland
Assembly

**COMMITTEE FOR
FINANCE AND PERSONNEL**

**OFFICIAL REPORT
(Hansard)**

**Damages (Asbestos-related Conditions)
Bill**

16 February 2011

NORTHERN IRELAND ASSEMBLY

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FINANCE AND PERSONNEL**

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Members present for all or part of the proceedings:

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

Witnesses:

Mr Trevor Cooper	}	Department of Enterprise, Trade and Investment
Mr Iain McFarlane	}	Department of Enterprise, Trade and Investment

The Chairperson (Mr McKay):

I welcome the following Department of Enterprise, Trade and Investment (DETI) officials to the meeting: Trevor Cooper, head of DETI's finance and EU programmes division, and Iain McFarlane, who is an accountant in DETI's finance accounts branch. Trevor, would you like to make an opening statement?

Mr Trevor Cooper (Department of Enterprise, Trade and Investment):

Thank you, Chairman. I should say at the outset that our Minister has indicated support for the Bill, so you will appreciate that we are not in a position to comment on specific clauses.

However, I am happy to take you through how we arrived at our draft Budget position.

In allocating the overall resource and capital funding envelope provided to DETI in the draft Budget, the Minister allocated funding in the first instance to legal commitments. In DETI's case, legal commitments include existing contracts for facilities maintenance and, in Invest NI, selective financial assistance letters of offer, which have a multi-year dimension, and other legal obligations. Our legal commitments were the first thing that we made an allocation to.

As the Committee will be aware, one of DETI's legal obligations relates to the pre-privatisation liabilities of Harland and Wolff, which was privatised in 1989. Its liabilities remained with government, particularly any employee liabilities in relation to asbestos exposure, which would probably have occurred in the 1960s and 1970s. DETI owns the liabilities of the company that was privatised in 1989. The insurers of the company went into receivership in 2002, and at that point the Executive agreed that government would cover the liabilities that could not be met by private insurers. That is why we have asbestosis liability and potential liability for pleural plaques, if and when the legislation passes.

In coming to an amount in relation to what might arise over the Budget, we have looked at recent experience of claims that have been paid over the last years, particularly this year, in relation to asbestosis. We have also taken note of the actuarial review that the Department undertook of the total potential liability over the next 35 to 40 years in relation to both asbestosis and pleural plaques. We have an actuarial review looking at potential future liabilities as at 31 March 2008.

In commissioning that review, we noted that the Assembly and the Executive might want to legislate in line with how Scotland was proceeding to legislate to overturn a House of Lords decision that had made pleural plaques non-compensable. Our actuaries looked at the potential total liabilities of both asbestosis and pleural plaques, and they came up with a potential total of about £130 million over the 35- to 40-year period.

This year's payments for asbestosis could amount to £4.2 million. In light of the position as per the actuarial review and our recent experience, we have allocated £5 million per year, which

totals £20 million over the Budget period. I should say that we have indicatively allocated that, because it is a draft Budget and draft spending proposals that are subject to consultation and review.

We have allocated £12 million for pleural plaques. The actuarial review set out an estimate of about £10 million for pleural plaques, but it is an actuarial review, and we will commission future actuarial reviews. In the Budget period, that means that we have an estimate of £32 million. If there are additional liabilities, we will bid, and if the estimate is too high we will look at how we could reallocate that money, subject to Ministers' decisions.

In the final year of our budget, we have a total of £7 million of resource funding between asbestosis and pleural plaques. In the normal run of events, one's resource budget rolls forward, so, subject to any future actuarial reviews, we will have a theoretical 35-year rolled-forward £7 million baseline. Over the 35-year period in which we expect to get future liabilities, that theoretical budget will total £245 million. In future, we will commission actuarial reviews every few years to look at trends on claims, changes in legislation or case law and to review the future potential overall liability. We will adjust our total liability and surrender money or otherwise. Although there is a theoretical baseline that rolls forward over 35 years, we will look at it on an ongoing basis. I apologise if that is slightly complicated.

Ms Purvis:

Thank you for your presentation. Have you figures from when the company insurers went into liquidation? That is from 2002 to the Johnston ruling in 2007. How many compensation cases were pursued for people with pleural plaques?

Mr Cooper:

In that period, I believe that there were about 1,300 cases.

Mr Iain McFarlane (Department of Enterprise, Trade and Investment):

Yes; the figure was 1,300 cases.

Ms Purvis;

What was the cost to the Department?

Mr Cooper:

Most of the cases had not been settled by the time of the Johnston ruling, so the cost will not have been substantial. I can come back to you on that.

Ms Purvis:

Some of the medical evidence suggests that a peak has been reached in the number of cases because of the time lag and that the number of cases may begin to tail off. Has the Department witnessed a peak in the number of cases? I take it that you have considered projected figures for cases should the Johnston ruling be overturned by legislation.

Mr Cooper:

The actuarial review predicted that the next four years will probably be the peak period for claim payments and settlements. That is not out of step with what you are saying. I hope that that answers your question.

Ms Purvis:

Your paper talks about the £12 million additional cost associated with pleural plaques. Does that include court and other costs from legal challenges, or is it purely for what you think compensation claims will amount to?

Mr Cooper:

Any potential budgetary requirement will be a total requirement.

Mr O'Loan:

You said that your Minister is in support of the Bill. Your memorandum to the Committee states:

“Our Minister was part of the Executive decision that agreed to the introduction of the Bill into the Assembly.”

Can you clarify that?

Mr Cooper:

I am not sure what clarification you need. DETI's position is to support the Bill.

Mr O'Loan:

Those are not the words that have been used here. The words in your memorandum to the Committee are:

“Our Minister was part of the Executive decision that agreed the introduction of the Bill into the Assembly.”

Is the position stated in the memorandum the Minister's position?

Mr Cooper:

That is my understanding: we are supportive of the Bill. DETI was part of the decision to support the Bill; that means that we support the Bill. I am sorry, but I am not sure —

Mr O'Loan:

The words in your document are not that the Minister and the Department support the Bill; they are:

“Our Minister was part of the Executive decision that agreed the introduction of the Bill into the Assembly.”

Do you take those two statements to be identical and equivalent?

Mr Cooper:

I take it that DETI's position is that it approved the passage of DFP's proposals.

Mr O'Loan:

This is an important point. Given that many Bills come before the Executive that have not been scrutinised and that Ministers do not want to obstruct them, it is probably normal practice for Ministers to agree to Bills being introduced to the Assembly in order to allow due process to take place there. It would be better if the memorandum said that the Minister was part of the Executive decision that agreed to the introduction of the Bill into the Assembly.

If the Bill goes through, DETI will budget £3 million a year for pleural plaques. Do you have any idea of the cost to business generally?

Mr Cooper:

The cost to business generally is a matter for DFP to consider after having looked at the overall implications.

Mr O'Loan:

Therefore DETI, which is the Department with responsibility for business, has not done any work on that and does not feel that it needs to.

Mr Cooper:

I am not in a position to give you any additional information on the cost to business; I can give you DETI's budgetary position. The Association of British Insurers (ABI) said that most of the cost to business fell to the pre-privatisation liabilities of Harland and Wolff. Therefore if the majority of those costs for ABI fell to Harland and Wolff, you would certainly be able to talk about the pre-privatisation liabilities that fell to Harland and Wolff.

Mr O'Loan:

The explanatory and financial memorandum discusses the financial effects of the Bill. It also discusses, by comparison with Scotland, what the annual cost to business might be in Northern Ireland. However, it offers no figure for the cost to the Northern Ireland Executive.

Mr Cooper:

As I said at the outset, I am not in a position to comment on specific clauses.

Mr O'Loan:

It concerns me that one Department is telling us that there is cost to the Northern Ireland Executive while another Department is not presenting those costs. DETI's figure, which is in the public arena, for asbestosis and pleural plaques was £31 million over the four-year period. However, when I mentioned that in the House, the Minister said that the figure was of the order of £1point something million per annum, which was not substantiated by any documentation and which does not agree with the DETI figure.

The Association of British Insurers estimates that the liability to DETI is considerably higher

than your offering? Is the association wrong?

Mr Cooper:

We have looked at the best information that we have available, and the estimate was looked at on foot of best advice. We went out to tender for best advice on the actuarial liabilities. We took best advice at the time of the review and made our budgetary estimates on the basis of the best advice available. An actuarial review is an actuarial review and requires to be updated every four years or so, so we will undertake regular actuarial reviews. Although we looked at a potential in that actuarial review of total liabilities of £130 million, the theoretical budgetary provision over a 35-year period is £245 million. We need to look at it and update the position regularly.

Dr Farry:

Was there communication between DETI officials and DFP officials about drawing up the Bill, particularly the explanatory and financial memorandum?

Mr Cooper:

There has been interaction between DETI and officials.

Dr Farry:

Define “interaction”. That covers a whole range of communications.

Mr Cooper:

When DFP went out for consultation, I discussed the potential implications of the Bill with DFP officials.

Dr Farry:

Was that, in effect, like a consultee, like a member of the public? If so, that gives me cause for concern as opposed to two Departments having discussions about what is potentially a cross-cutting issue.

Mr Cooper:

It was at an official level.

Dr Farry:

Therefore it was not as a consultee but as two Departments interacting.

Mr Cooper:

It was at an official level.

Dr Farry:

Did DETI express concerns about the Bill?

Mr Cooper:

Are you talking about the passage of the Bill? I am not in a position to talk about specific clauses.

Dr Farry:

I am not talking about clauses.

Mr Cooper:

The Minister has indicated her support for the Bill.

Dr Farry:

Right. What is the rationale behind DETI's support for the Bill?

Mr Cooper:

The Minister has indicated her support for the Bill. I am not in a position to go further.

Dr Farry:

Presumably, DETI has a responsibility to manage most carefully the scarce resources at its disposal to support business in Northern Ireland, and opportunity costs arise from every decision.

Mr Cooper:

Absolutely. Every decision has implications.

Dr Farry:

To what extent does DETI's support for the Bill assist the growth of business and the development of the economy in Northern Ireland?

Mr Cooper:

I am sorry, but I am talking about the budgetary position.

Dr Farry:

With respect, so am I. A possible £12 million is being earmarked for compensation, yet there is significant medical evidence — one could go so far as to say consensus — that pleural plaques are asymptomatic. The Confederation of British Industry, in its response to the draft Budget, including DETI's draft departmental spending plan, wondered why, during a financial downturn and with a pressing need to invest in the economy, £12 million was earmarked for compensation rather than for some other purpose.

Presumably, DETI has internal governance and risk management arrangements. Why then would a Department voluntarily support proposals to take £12 million out of its budget, at the opportunity cost of other activities to promote the economy?

Mr Cooper:

There is also the opportunity in our budget process to bid for resources; therefore those decisions are not discrete.

Dr Farry:

Yes, and decisions to bid for certain resources are at the opportunity cost of bidding for other resources to do extra things for the economy.

Mr Cooper:

Those are decisions for the Executive.

Dr Farry:

Is there agreement between DETI and DFP on the viability figures?

Mr Cooper:

We are responsible for the liabilities in our books, so there is an absolute responsibility on DETI from that point of view. DFP does not have the locus in relation to the liabilities in our books. Seeking its agreement or consensus is not an issue for us.

Dr Farry:

The Bill does not come to us simply as a DFP Bill; it comes with the endorsement of the Executive, which includes the DETI Minister. Why does the explanatory memorandum refer to the costs to be incurred by the private business sector but contains no reference to the costs to be borne by the public sector through DETI? One would have thought that such information would need to be in the explanatory memorandum. Like Declan, I am at a loss as to why that does not appear. It is a massively material consideration that seems to have slipped through the net. Since it is an Executive Bill, I would have thought that DETI officials, irrespective of whether the Minister supported the Bill or not, would have made it clear when the Bill came from the Executive as a cross-cutting issue that not only were the private costs listed as an estimate but that the public sector liabilities would be listed as well.

Mr Cooper:

That interaction would have happened as part of the Budget process.

Dr Farry:

It is not in the Bill.

Mr Cooper:

As I said at the outset, I am not in a position to comment on the clauses.

Dr Farry:

I am not talking about the clauses; I am talking about the explanatory memorandum, which sets out the context. It seems that this has slipped back into a silo, and we are getting half a story.

Mr McLaughlin:

With regard to projecting what would fall to the Department as opposed to any discussion on the clauses, have you anticipated the costs of a legal challenge?

Mr Cooper:

I am not sure what you mean by a legal challenge.

Mr McLaughlin:

I mean a legal challenge to the Bill. Assuming that it is enacted, it will fall to DETI in some respect. Moreover, there is a clear statement of intent by the insurance industry to contest the Bill, as it does elsewhere. Have you built in contingency for legal costs?

Mr Cooper:

I do not see that there would be a contingency for DETI.

Mr McLaughlin:

Is that a no?

Mr Cooper:

I do not see that there would be a cost —

Mr McLaughlin:

The question is not a hostile one, but the answer to it is either yes or no. Have you prepared for a possible legal challenge?

Mr Cooper:

The legislation was not brought forward by DETI.

Mr McLaughlin:

I understand that. However, for the purposes of my question, let us assume that the Bill as presented by the Minister of Finance and Personnel is adopted by the Assembly and passes into

law. The consequences are that a certain responsibility falls to DETI, and you are indicating that you —

Mr Cooper:

There would fall to DETI a responsibility for the liabilities of Harland and Wolff through companies legislation and through legislation in relation to pleural plaques and asbestosis.

Mr McLaughlin:

I understand that. There would be considerable interest, particularly in precedents. We have heard evidence that indicates strongly that the insurance industry will take a keen interest in decisions or in compensation awards that would have implications for insurers. They made it clear that the insurance industry will challenge the legislation legally. From your answer, it appears that you do not consider that that issue needs to be addressed at this stage.

Mr Cooper:

I do not see it as a DETI budgetary matter. DETI's budgetary responsibilities relate to —

Mr McLaughlin:

You would be aware of whether there was a contingency, and you are not aware of it. That is the answer to my question.

Mr Cooper:

In relation to the actuarial reviews, legal costs and legal challenge would have been built in. However, when you say that someone will challenge DETI in making payments under its legislation, we follow through with our legal requirements under legislation, and that is what we have budgeted to do.

Mr McLaughlin:

That poses more questions than it answers. Any Department acting responsibly would take account of all factors, including that this is a hotly contested issue that will possibly be taken to the courts — as it has been elsewhere. Since DETI was party to the process of the Bill, which, for the purposes of this discussion, we anticipate will be approved, there is the possibility that, as

a consequence of any decision that you make in respect of former Harland and Wolff employees who may make a claim under the new legislation, you could find yourself embroiled in legal dispute with the wider insurance industry. The industry has flatly told us that it will challenge the legislation as far as the European Court.

Mr Cooper:

It is difficult for me to speculate on what the insurance industry may or may not do.

Mr McLaughlin:

That is fair enough, but my question is whether there is a contingency for a possible legal challenge.

Mr Cooper:

I am not sure that any specific costs would fall to the Department. However, we will keep the area under regular review. The total costs are an estimate, and we will review those regularly. Costs may be higher or lower than the budgetary provision. If they are higher, we will bid in-year; if lower, we will look to reallocate.

Mr McLaughlin:

You used the words “total costs”. As an Assembly, we have to take into account that, as well as budgeting for possible compensation awards, total costs have to anticipate —

Mr Cooper:

Total costs would fall to DETI.

Mr McLaughlin:

— the possibility of expensive legal challenges.

Mr Cooper:

We believe that we have covered the costs that would fall to DETI.

Mr O'Loan:

Thank you for allowing me to come back in on the issue, Chairperson. Will you give me absolute confirmation that you estimate that the £3 million per annum that you talked about will cover all compensation, legal and administration costs borne by the Department?

Mr Cooper:

Yes; that is what we estimate. However, those are estimates based on the best information; they cannot be better than estimates. In a field as complex as this, no actuarial review will ever come up with what an exact claims figure will be in any given year. Actual liability and payments relate to when people fall ill. Some people who have illnesses do not know when they are ill. Many factors determine a liability. Costs will potentially fall over 35 years. We are looking at the next four years and have looked at the best available information on total cost.

Mr O'Loan:

Since the Johnston case was decided, cases have been accumulating; I believe that several hundred cases are in the pipeline and may be sitting on solicitors' desks. If the Bill becomes law, presumably there would be a surge in cases in the first instance.

Mr Cooper:

There could be.

Mr O'Loan:

Have you allowed for that in your figures? Given that you have put forward an annual figure for the next four years, it does not sound as though you have.

Mr Cooper:

It is not an annual figure; it is £3 million over four years. We have looked at it and it will tail off in the later years.

Mr O'Loan:

Do you accept that there could be a surge of hundreds of cases?

Mr Cooper:

I accept the principle of what you say. However, the budgetary provision is not a flat line; it goes up and down.

Mr O'Loan:

Your figure might seem modest against a surge of several hundred cases.

Mr Cooper:

I am not sure of the basis on which you make that assumption. We have looked at the best estimates, and we would bid in-year if there was a higher requirement on us.

Mr O'Loan:

Therefore you might have to bid in-year?

Mr Cooper:

As I said at the outset, one can only estimate liabilities. It is a hugely complex area.

Mr McLaughlin:

I remain concerned. I am trying to get a specific response. In arriving at your estimate, did you take cognisance of the legal challenges in Scotland, for example, and build them into your estimate? Have you considered legal costs or have you disregarded them? What is the bottom line?

Mr Cooper:

A legal challenge could delay payment, which might mean overprovision in our budget. As I said at the outset, we will look at our budgetary provision, and if we have overprovision we will surrender it. A legal challenge could delay payments, so it would move the position out over the 35-year period. It is something that we have to look at on an ongoing basis.

Mr McLaughlin:

In my comments in the House, I anticipated that it will delay getting financial relief to victims. That is what concerns me. At an extreme, it could mean that the budget that has been set aside to

compensate victims will be paid to lawyers. From the information that I am hearing, you do not seem to have taken that into account.

Mr Cooper:

We have taken into account our estimate of the liabilities in relation to the passage of the Bill.

Mr McLaughlin:

OK. You could break that down.

Ms Purvis:

I want to clarify something, because I think that you are talking at cross purposes. I think that Trevor is talking about individual compensation claims, whereas Mitchel is talking about an overall judicial review of the legislation. Have you taken into consideration the costs of a judicial review of the legislation?

Mr Cooper:

The costs of a judicial review would not fall to the Department.

Mr McLaughlin:

OK.

Ms Purvis:

I am happy that the Minister supports the Bill and that DETI has sympathy with those who have been negligently exposed to asbestos. I want to return to what you said earlier: that most exposure to asbestos in Northern Ireland occurred in Harland and Wolff.

Mr Cooper:

That is the Association of British Insurers' position.

Ms Purvis:

However, you also believe that it is likely that most of the exposure to asbestos in Northern Ireland occurred in Harland and Wolff shipyards in Belfast before privatisation. Therefore, DETI

is liable for that. Are the 1,300 cases that were lodged between 2002 and 2007 for which DETI was liable concern Harland and Wolff alone or do they include all cases?

Mr Cooper:

They are cases from Harland and Wolff.

Ms Purvis:

Have you looked at the total number of cases of pleural plaques? Perhaps that would give us an idea of what Stephen was talking about — the liability of DETI and the liability of other businesses.

Mr Cooper:

We have looked at it only in the context of Harland and Wolff.

Ms Purvis:

Given that most cases will fall to DETI, have you any analysis of the impact on business? The Department will be stumping up the greater amount of money for it in comparison to ABI and other businesses. Is that what you are saying?

Mr Cooper:

That looks to be the case.

The Chairperson:

I thank Trevor and Iain for answering the Committee's questions. For information on Mitchel's point, the costs of a judicial review would fall to the Department of Finance and Personnel.