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## The Speaker



Northern Ireland  
Assembly

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**TO ALL ASSEMBLY MEMBERS**

**21 March 2011**

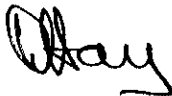
Dear Member,

**DAMAGES (ASBESTOS-RELATED CONDITIONS) (NORTHERN IRELAND) BILL**

I am attaching for the information of all Members a copy of a letter I have received from the Association of British Insurers in relation to the Damages (Asbestos Related Conditions) (Northern Ireland) 2010. The final stage of the Bill is listed for Plenary Business on Monday 21 March 2011.

I have also deposited a copy of the correspondence in the Assembly Library.

Yours sincerely,



**William Hay MLA**



Association of British Insurers

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William Hay  
Speaker of the Northern Ireland Assembly  
Parliament Buildings  
Ballymiscaw  
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Belfast, BT4 3XX

9 March 2011

RECEIVED IN  
SP/41-53  
10 MAR 2011  
SPEAKER'S OFFICE

Dear Mr Speaker

**Damages (Asbestos Related Conditions) ( Northern Ireland) Bill 2010**

I wrote to you on 22 November 2010 setting out our substantial concerns about the Northern Ireland Assembly's power to pass the Damages (Asbestos-Related Conditions) Bill (NIA Bill 10/10) under the Northern Ireland Act 1998. I enclose a copy of that letter for ease of reference. In an email dated 7 December 2010 your Private Secretary indicated that you had noted my letter.

Despite the Northern Ireland Human Rights Commission giving evidence to the Finance and Personnel Committee, we remain concerned that the highly complex legal arguments about insurers' rights under the European Convention on Human Rights have not been adequately considered and debated by the Finance and Personnel Committee. Our concerns that the Bill's substantive provisions, if passed, would breach the insurers' Convention rights are compounded by the manner in which the Bill is being dealt with. Given the Committee's inability to consider and reflect on all relevant evidence there must be real doubt that the Assembly can discharge its legal obligation to act proportionately in interfering with the insurers' legitimate rights and interests. Failure to discharge that duty puts the UK Government at risk of breaching its international obligations.

The Committee itself must have recognised these concerns when it requested an extension to the Committee Stage of the Bill, which the Assembly refused on 14 February. Furthermore, in its report on the Bill, the Committee notes that at its meeting on 16 February "a number of gaps in the evidence base were identified" including in relation to:

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



Although the Committee has since heard from DETI officials and from people with pleural plaques, this was outside the timescales for the Committee to digest this evidence and include it in the official report. We believe the Committee had also planned to hear evidence from the Chief Medical Officer for Northern Ireland, the Confederation of British Industry and other experts on the subject matter of the Bill. In addition, the Committee has not undertaken a formal clause-by-clause scrutiny of the Bill.

All of these factors create substantial and real doubt as to whether the Assembly has acquainted itself with all the relevant facts sufficiently to reach an informed view about all relevant considerations, including whether the Bill can be regarded as being in the public interest and having a proportionate interference with the rights of the insurers affected. If the Committee considering the Bill is of the view that "the evidence received to date is incomplete and there is insufficient time to collect and consider all of the further evidence required to enable the Committee to reach a fully informed position [on the Bill]", there must be substantial doubt as to whether the Assembly will be in a position to do so when it considers the Bill at Final Stage. We urge full consideration of this view before the Bill is referred back to the Assembly for Final Stage.

I have written to the Minister for Finance and Personnel and the Finance and Personnel Committee Chair expressing similar concerns, and I am copying this letter to the Secretary of State for Northern Ireland.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Maggie Craig', with a long horizontal flourish underneath.

**Maggie Craig**  
**Acting Director General**



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22 November 2010

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22 NOV 2010  
SPEAKER'S OFFICE

Dear Mr Speaker

### **Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010**

I am writing to you to raise our urgent and substantial concerns about the Damages (Asbestos-Related Conditions) (Northern Ireland) Bill 2010 (the Bill).

Based on the advice we have received, there are real doubts as to whether the Northern Ireland Assembly can, in terms of its powers under the Northern Ireland Act 1998, pass this proposed legislation. We believe there is a significant risk that the Bill's provisions (if enacted) would breach the European Convention on Human Rights (ECHR). As such, it is outside of the Assembly's 'legislative competence' to pass this Bill. This is especially so because, in our view, the NI Assembly has not considered sufficiently alternative means of reaching policy objectives; for example, the route pursued for England and Wales of offering benefit to those whose claims had commenced before the House of Lords decision in *Rothwell*.

We raised these concerns in response to the Department for Finance and Personnel consultation CP 02/08 on Pleural Plaques. They were subsequently referred to in the Department's consultation on the draft Bill. However, we do not think these concerns have been considered adequately by either the Department in its consultation responses or in the debates in the Finance and Personnel Committee. As such, we believe that if the Assembly proceeds with the legislation there is a substantial risk of future legal challenge.

As noted by members of the Finance and Personnel Committee, it is particularly important for the Assembly to evaluate this legislation carefully given that the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 (on which a number of consultees relied to justify their own support for the Bill) is at this very moment subject to judicial review in Scotland on the basis of similar legal concerns.

### **Breach of ECHR rights**

We believe the Bill (if enacted) will breach the Convention rights (i.e. those rights contained in the ECHR and incorporated into UK law) of those, including employers and insurers, who will bear the burden of the proposed Bill.

We consider that the Bill if passed will breach employers' and insurers' rights under Article 1 Protocol 1 of the ECHR. By making asymptomatic conditions 'compensatable', the Bill would make employers and their insurers liable for a condition for which they would not otherwise have any liability. That liability would be significant in monetary terms and, indeed, at this stage is unquantifiable. Imposing such liability represents an interference with possessions for the purposes of Article 1 of Protocol 1 which could only be justified on the grounds of compelling public interest and where it could be shown to be a proportionate response. Compensating those who have an asymptomatic condition is not a legitimate policy goal and, even if it were, the benefits (if any) of doing so are not sufficient to justify such a substantial interference with the property rights of employers and insurers.

We also believe that the Bill if passed will breach employers' and insurers' rights under Article 6 of the ECHR. The Bill would make employers and their insurers liable retrospectively for a condition for which they would not otherwise have been liable. This would be contrary to Article 6 as it would interfere with settled arrangements. Again this interference could only be justified on the grounds of compelling public interest, which does not exist in this instance. The questionable legality of imposing such retrospective liability is further compounded by the delay of two years since the *Johnston* decision was issued: parties in Northern Ireland have quite properly organised their affairs on the assumption that the decision of the House of Lords was an authoritative and final determination of the question of compensation for pleural plaques.

### Conclusion

I would urge you to take comprehensive legal and constitutional advice on the matters raised in this letter and to instruct the Committee considering the Bill to do likewise. As you will appreciate, while legal proceedings remain ongoing in Scotland the legal position is extremely uncertain and it would be in no one's interests for the Assembly to proceed with legislation which might ultimately be found to be *ultra vires*.

We would be happy to meet you to discuss these points further.

Yours sincerely



*fw* **Maggie Craig**  
Acting Director General