



Northern Ireland  
Assembly

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**COMMITTEE FOR  
FINANCE AND PERSONNEL**

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**OFFICIAL REPORT  
(Hansard)**

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

8 December 2010

**NORTHERN IRELAND ASSEMBLY**

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FINANCE AND PERSONNEL**

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**Members present for all or part of the proceedings:**

Ms Jennifer McCann (Chairperson)  
Mr David McNarry (Deputy Chairperson)  
Dr Stephen Farry  
Mr Paul Frew  
Mr Paul Girvan  
Mr Simon Hamilton  
Mr Daithí McKay  
Mr Mitchel McLaughlin  
Mr Adrian McQuillan  
Mr Declan O'Loan  
Ms Dawn Purvis

**Witnesses:**

Mr Neil Lambe            )        Departmental Solicitor's Office  
Ms Oswyn Paulin        )

**The Chairperson (Ms J McCann):**

I welcome Oswyn Paulin and Neil Lambe from the Departmental Solicitor's Office. If you would make a few opening remarks, members will ask you questions. I remind members that we had a discussion earlier about the timetabling of Bills, although some members were not here for it. After we have heard the witnesses' evidence, I will ask the Committee Clerk to take us through

the timetable for the benefit of members who were not here for the first discussion.

**Mr Oswyn Paulin (Departmental Solicitor's Office):**

Thank you, Madam Chairman. Officials from the Department of Finance and Personnel last attended the Committee on 15 September when we had a lengthy session on the Department's proposals for legislation. My comments will be very brief this morning.

The Department subsequently published the analysis of the consultation on the Bill and its response, 'The Proposed Way Forward', is at the end of that document.

In addition, as the Chairman mentioned, the Executive have given the Minister permission to introduce the Bill, which he proposes to do on 14 December. The Second Stage will take place in the new year. It will be a considerable challenge to bring the Bill through all its legislative stages before the Assembly is dissolved towards the end of March.

Since we last attended the Committee, the Assembly Research and Library Services produced a paper on numbers, costs and international approaches. I will not comment on the paper, except to say something about the costs. The paper attempts to estimate the costs of the change. It should be borne in mind that, until three years ago, pleural plaques were a recognised head of claim of damages. If the calculations are correct, the sums referred to were the savings made as a result of the House of Lords decision that removed that entitlement. The assumption that everyone who has pleural plaques will claim is not entirely reasonable. There will always be people who are entitled to claim but who do not, and there will be people who have the condition but do not know it and therefore take no steps to have it diagnosed. I am happy, with the assistance of my colleague Mr Lambe, to respond to the Committee's questions.

**Dr Farry:**

I am somewhat of a sceptic about the Bill, but I want to focus primarily on timetabling. The Committee has been circling this issue for quite some time, and now the First Stage will be before Christmas. After Christmas, the Bill is expected to go through all the remaining stages, including Committee Stage, with the prospect of passage before the dissolution of the Assembly in March.

In discussing the Construction Contracts (Amendment) Bill and the Civil Registration Bill, the Committee found the Department's pace in coming back to us with amendments and in taking things through to Consideration Stage and Final Stage at best leisurely. Bearing in mind that we have been discussing the issue for so long, I am at a loss why, all of a sudden, the "go" button is being pushed in Assembly's final stages. In essence, we are being asked to do a Committee Stage in the formal six-week period whereas virtually every other Bill in this Assembly mandate has had its Committee Stage extended.

Furthermore, we must bear in mind that the legislation is not straightforward in that virtually all the Bills that the Committee has dealt with have not been contentious but have had broad support. The Confederation of British Industry (CBI) and the insurance industry have both expressed considerable concerns, and there is near unanimity in the medical profession that although pleural plaques may be a condition, it is not harmful. However, we are being told that we must push ahead at full pace with a relatively short Committee Stage despite considerable contention. There is uncertainty over the financial implications of the Bill, but, again, we are being asked to legislate in haste. Moreover, the equivalent legislation in Scotland is under legal challenge, yet, despite everything, we are being asked not to wait to see how that develops before we commit to a Bill that may, in practice, turn out not to be legally sustainable.

The Department's approach of pushing the Bill vigorously at the last minute when we have had so much time and in light of the opposition and all the obstacles is bewildering. I appreciate, Mr Paulin, that that is not necessarily your call, but I am happy to hear your response from a departmental perspective

**Mr Paulin:**

The Bill is undoubtedly controversial for insurance companies. We have been over this ground quite a few times in the Committee. I referred to the meeting of 15 September, but I recall being here on other occasions. The issues have not changed very much. We have consulted twice, on the issue in general and on the proposals in the Bill. Ultimately, Ministers decide whether they want to pursue a Bill while the Assembly decides a Bill's priority.

**Dr Farry:**

The decision over the timing was a political one. However, you make a valid point: the Bill today is no different, in any shape or form, from the version that we saw in September. If it is no different, why was a decision not taken in September to proceed with it? At least that would have allowed the Committee to scrutinise the Bill for more than a narrow six-week period. That would have been useful, particularly bearing in mind the very complex issues that the Bill throws up.

**Mr Paulin:**

As you know, once the consultation was completed and the results of the consultation and the Department's response to them published, it was necessary to get Executive agreement for the Bill to proceed. It is no secret that that can take quite a long time, and it has taken a long time in this case.

Although the Bill is controversial, it is quite straightforward. There are fairly simple choices to be made. The Bill is not enormously complicated, lengthy or technical; it is quite straightforward. The issue of principle is clear, and it is a decision for the Assembly.

**Dr Farry:**

If it is straightforward, can you tell me what the financial implications of the Bill will be for the public purse and for the private sector? If the equivalent law in Scotland is overturned by the courts, what will be the implications for anything that the Assembly passes?

**Mr Paulin:**

I will deal with the last question first. In Scotland, the case has been heard by a judge at first instance, who found that the Bill is within the competence of the Scottish Parliament. As you know, the Scottish Parliament's competence is exactly the same as the Northern Ireland Assembly's. Therefore the Scottish court has pronounced the Bill okay.

The insurance companies have appealed, and we are awaiting a judgement. We are not sure when that will happen, but it will be during the Bill's passage through the Assembly. If that appeal goes against the Scottish Government, our Bill can be looked at again; there will be time to do that as it goes through the Assembly.

My recollection is that the Scottish appeal court completed its hearing of the case as long ago as September, so a decision might have been anticipated before now; best estimates suggest that a decision may not be made until the end of January or the beginning of February 2011. If the decision is an adverse one for the Scottish Government, our Bill can still be amended as it goes through the Assembly.

The decision could go either way, but my expectation is that the court of appeal will uphold the original decision. If we wait until that decision is taken, do we wait until the case goes to the Supreme Court and a decision is made there? Regardless of the outcome of the appeal, there is a strong likelihood that one or other party will appeal to the Supreme Court. However, even that will not produce finality, because there is a very strong likelihood that a case will be taken to the European Court of Human Rights in Strasbourg. Strasbourg takes quite a long time to make decisions, so we could be waiting three, four or five years for absolute finality from the courts on the Scottish legislation. Therefore it seems appropriate to proceed with the draft Bill now rather than wait until the courts make a final decision.

**Dr Farry:**

The perceived urgency did not produce a Bill earlier. What consideration was given to tabling the Bill in June and allowing for a proper Committee Stage? The Bill deals with controversial issues, as can be seen by the fact that the Scottish legislation may go the whole way to Strasbourg.

**Mr Paulin:**

If the Executive want to bring forward the draft Bill, why not do it now rather than wait until June?

**Dr Farry:**

Why was it not introduced six months ago?

**Mr Paulin:**

You may ask that question, but I cannot answer it.

**Dr Farry:**

What will the implications be for the public and private sectors?

**Mr Paulin:**

I touched on the implications earlier, and, at the meeting in September, we went into them in great detail. There is no clear answer and no one can predict what the implications will be. However, figures were produced.

**Dr Farry:**

That is why I dispute your use of “straightforward.” The Assembly is being asked to sign a blank cheque when private and public sectors are under considerable financial and budgetary pressures.

**Mr Paulin:**

I made the point in my opening remarks that people received compensation until the House of Lords changed the law. The House of Lords and the courts generally approach things by declaring what the law always was. However, in this case, no one knew what the law was until the Court of Appeal and the House of Lords decided it, and until then everyone thought that the law was that people were entitled to compensation. Therefore the Bill will not create totally new expenditure in an area in which there had been none previously; rather it will reinstate what used to be. The resources that were available in the past will, no doubt, become available again.

**Dr Farry:**

Would that not provide an accurate baseline to answer the question of what it will cost in future? If we can extrapolate from the past, it should be possible to give a definitive answer and assure people like me who are wary of signing a blank cheque.

**Mr Paulin:**

Even the Assembly Research and Library Service was unable to come up with an appropriate methodology for doing that.

**Dr Farry:**

With respect, you gave me two contradictory answers. You said that it will not be blank cheque, because this happened in the past and it was an ongoing expenditure; yet when I asked whether we can use past expenditure to work out what the likely expenditure will be, you tell me that no one knows.

**Mr Paulin:**

I hope that I have not contradicted myself. Compensation was available in the past, and it did not bring about a catastrophe. If it is reinstated, I cannot see that it will do so this time.

**Mr Neil Lambe (Departmental Solicitor's Office):**

One of the difficulties is that insurance companies and public-sector employers in Northern Ireland did not keep a record of how much compensation was paid or how many claims were settled solely in respect of claims for a diagnosis of pleural plaques. Ossie is saying that we know that those claims were settled, because that was the accepted law at the time. However, the reports produced by the audit teams for public-sector employees were never so detailed that they showed that a certain amount of money was given out in any one year for those specific claims; they showed, rather, the total damages that were paid out for personal injury claims.

**Dr Farry:**

Ultimately, we do not know; therefore, the legislation cannot be straightforward. I will leave it there.

**Mr McLaughlin:**

The witnesses will be familiar with the answers to the Committee's questions. On the rationale for proceeding, we must recognise that legislation was examined by the courts and that it was challenged and pronounced upon. In this instance, the Scottish Parliament is ahead of us.

We are proceeding in the knowledge that those legal processes are in train. Indeed, the Department has discussed the fact that it could end up at the European Court. In the answer to question 1, we are told that it will take some considerable time to exhaust the court process and that the Department does not think it desirable to defer the Bill and deny relief for what could be



a lengthy period.

What does “relief” mean, and what are the consequences of giving people access to relief if the Bill is, for whatever reason, found by the European Court not to be competent?

**Mr Paulin:**

I think that “relief” in those circumstances means damages; in other words, people do not have entitlement to apply for compensation under that heading. “Relief” means what would be available if the Bill were passed. You are asking me what would happen —

**Mr McLaughlin:**

Sorry, just to be absolutely clear: does “relief” mean the award and receipt of damages or that you have a recorded claim to be concluded after the legal process is concluded?

**Mr Paulin:**

I think that “relief” is being used quite loosely, but in the end it means the remedy that is supplied by the court; that is, damages. You go to the courts seeking relief. It is a rather odd expression, but you are seeking damages or an order for the court to stop somebody doing something or to make somebody do something. That is generally called relief. I do not know why; it seems an odd expression.

**Mr McLaughlin:**

OK, I am not discussing why; I just want to know the practical effect. Does it mean that people get compensation even though there is a legal process that the insurers are involved in?

**Mr Paulin:**

The legal process that the insurers are involved in is in Scotland. I do not want to speculate about what the insurers may do in Northern Ireland.

**Mr McLaughlin:**

It would not take much speculation.

**Mr Paulin:**

I do not want to give them any encouragement.

**Mr McLaughlin:**

Have they not told us what they will do?

**Mr Paulin:**

They said that they might do various things.

**Mr McLaughlin:**

That is a lawyer's answer. *[Laughter.]*

**Mr Paulin:**

However, if things go badly for them in Scotland, that may make them less enthusiastic. I do not know. You would need to ask the insurers that.

**Mr McLaughlin:**

I am examining the logic of proceeding when there could be either a positive or negative outcome for the Scottish legislation. A negative outcome would raise serious questions here, particularly if claims had proceeded in the full knowledge of a process in Scotland that would have implications here. Would that logic not be challenged in hindsight?

**Mr Paulin:**

I do not want to speculate about what insurance companies may do here, but I do not think that that would necessarily happen. The danger in not legislating is that the longer you leave the gap between the House of Lords decision and legislating, the more difficult it is to —

**Mr McLaughlin:**

If we proceed and pass the legislation and claims are made, adjudicated on, and awarded — notwithstanding an ongoing legal challenge in Scotland or the right of insurers here to challenge — would they have to pay out those awards?

**Mr Paulin:**

It depends on what they do. If an insurance company or employer says, “I will defend this case in court rather than challenge the legislation”, and the arguments are made, and the court makes an award, the insurance company can go through its various appeals. However, if the award is paid to the person, I cannot see how the insurance company can recover it.

If a court orders damages to be paid to someone who then receives those damages, I would say that that is an end of the matter as far as that person is concerned.

Normally, if someone is awarded damages and the other party appeals, the order of the court that those damages be paid is stayed. In other words, the order is stopped until the appeal process is dealt with.

**Mr McLaughlin:**

OK. That is what I was trying to get at.

**Mr Paulin:**

I am sorry that it took so long.

**Mr McLaughlin:**

No; that is fine.

**Mr Lambe:**

The analogous situation is that the 2007 ruling of the House of Lords that asymptomatic pleural plaques were not an actionable cause in negligence did not result in insurers going back over all the claims that they had settled in the previous 20 years and asking for their money back because the claims had been settled on a misunderstanding of the law.

**Mr McLaughlin:**

No, but is there an exposure here, given that there is an almost parallel process involving the courts in Scotland? Despite 20, 30, or 40 years’ accepted practice, we are enacting legislation while there is an ongoing challenge to exactly similar legislation. A question arises about timing.

Since the legislation might be judged incompetent by the Supreme Court, the European Court or some other court, why are we proceeding?

**Mr Paulin:**

It is up to the Assembly whether it proceeds, but its position is defensible. Waiting until the decision on a challenge to a similar provision had been finalised would be a very simple way of preventing the Assembly from legislating on almost anything. Someone could simply produce a challenge in another court.

**Mr McLaughlin:**

Your previous answer dealt with the consequences as far as the courts are concerned; they may take account of imminent decisions and stay an order.

**Mr Paulin:**

They may, but only at the instance of one of the parties before the court.

**Mr McLaughlin:**

Absolutely. I imagine that everyone looks after their interests in those circumstances.

The Committee asked what advice had been sought from the Attorney General. The interesting answer was that it is not the practice to comment on whether advice has been sought from the Attorney General. The Committee found it interesting and important enough to ask that question, so what advice has been sought from the Attorney General? We did not get an answer. As you probably noticed, we got an answer to a different question. Was that because of the lawyers again? I thought that it was politicians who did that. *[Laughter.]*

**Mr Paulin:**

I am afraid, to be honest, that I am not going to give you an answer today. There is a long-standing convention in government that we do not answer questions about whether the Attorney General's advice has been sought.

**Mr McLaughlin:**

Does that relate to the detail of his advice or whether you have even —

**Mr Paulin:**

At all. That is enshrined in the Freedom of Information Act.

**Dr Farry:**

You cannot speculate then. *[Laughter.]*

**Mr McLaughlin:**

Question 4 relates to the consequential of cases that had been lodged or commenced.

“Following the House of Lords ruling the defendants were entitled to apply for those stayed cases to be struck out or discontinued, or to insist that they were withdrawn”.

Will cases that were previously lodged be regarded as determined cases or could they be dealt with under the draft Bill?

**Mr Paulin:**

Such cases could be revived if the legislation goes through. Proceedings that have not been struck out can be brought back to court and the person can ask to proceed with a case. If the proceedings have already been struck out, it would be a matter of bringing new proceedings. Generally, all the cases have been adjourned until —

**Mr McLaughlin:**

OK, but the answer states that the Department sought the views of Legislative Counsel on whether those cases are regarded as determined.

**Mr Lambe:**

The issue was also raised by Thompsons McClure Solicitors in its response. The Department will have to look at that issue a little more closely as it is a very technical area. It would be useful for us to consult the judiciary on what it regards as “determined”, meaning for the purposes of claims that may have been lodged and then withdrawn by the plaintiff solicitor once the House of Lords ruling was made and to find out whether those fall within the definition of determined. It is worth looking again at that issue.

**Mr McLaughlin:**

Is that not germane to the decision to proceed with the legislation in the absence of that information?

**Mr Paulin:**

That is a detail. I hesitate to be so confident, but I would be very surprised if many claims have been withdrawn.

**Mr McLaughlin:**

I know that.

**Mr Paulin:**

I do not think that that is what people would do knowing what is going on. There is a consultation on the legislation, so why would anyone withdraw their claim because they do not think that the Assembly would ever legislate on that? I think that everyone would take their chance because it costs nothing to leave it there. I do not think that the insurance companies have implied that they would strike out all those things. That is certainly not the information that we received during the consultation.

**Mr McLaughlin:**

Therefore it is a theoretical situation. It is not that cases lapsed or were withdrawn as such, and even in those circumstances the door is not closed, although you are still seeking advice.

**Mr Paulin:**

I think that we will go back to the Office of the Legislative Counsel and take further advice.

**Mr Frew:**

I know that we do not have a figure, but the document states that one-off payments of £5,000 were handed out in England and Wales. There is no doubt that people who have been exposed to asbestos and have conditions, symptomless or not, are entitled to something. However, it strikes me that — to use a flippant term — throwing money at them will do nothing to assuage their

health concerns. Five thousand pounds could be better spent on an enhanced health stream for people with such a condition so that, when they realise that they have been exposed to asbestos, they will be put in a health stream that will react to their needs. That is a better way of assuaging concern rather than giving them compensation. I believe that Japan has such a system. How practical is that? Would that change the Bill completely or even require new legislation?

**Mr Paulin:**

It would be a very radical approach. Generally, the National Health Service is provided free to people. They are entirely separate issues. If my legs were broken in a road accident, I would be treated by the National Health Service; however, I could also sue the driver of the car that caused the injury, provided that I can establish that he was negligent and that it was not my fault. There would be issues if people received additional healthcare instead of being compensated because, if I broke my legs and it was my fault, I would get less healthcare than if it was someone else's fault. Similarly, if I had growths on my lungs that were due to smoking, I would not get the same treatment as someone who had growths in their lungs due to asbestos from their employer. People need to be given the best possible healthcare, regardless of the causation of their problems. Those are very separate issues.

**Mr Frew:**

Therefore it would not be practical.

**Mr Paulin:**

I cannot see it being practical in our system. Japan is a different country with a different culture; I am sure that there are many things to commend it. Pulling out one condition — pleural plaques — and treating it differently from all other injuries would be a major change to the legislation. I do not know how we could do it, particularly since the condition does not have symptoms. A person would have to have a certain number of sessions with a counsellor telling them that there was nothing much wrong with them.

**Mr Frew:**

What concerns people is realising that they have suffered exposure. I do not know how compensating people at that stage assuages their concerns.

**Mr Paulin:**

That is quite a deep philosophical question. *[Laughter.]*

**Mr Girvan:**

Thank you for your presentation. There is a threat of insurance companies taking a legal challenge with a human rights-based approach if the Bill were to proceed. Since no decisions have yet been made on the Scottish cases, what is the Department's view on where we stand legally by introducing the legislation without giving due consideration to the outcome of the Scottish case?

**Mr Paulin:**

There has been an outcome in the Scottish case in that the judge who heard it said that the legislation is within the competence of the Scottish Parliament. There has not yet been an outcome from the appeal; however, as I said earlier, if we were to wait for the appeal process in Scotland to be exhausted, we could be waiting for many years. The Assembly can legislate; it is then up to the insurance companies to decide what to do. The Assembly cannot be criticised for legislating.

**Mr Girvan:**

There are concerns about the cost implications of going forward with the legislation. There are too many variables, and no one can give exact numbers on the people who will take action because they say that they have suffered. We can pull all sorts of figures out of the air, but no conclusive work has been undertaken to identify exact numbers. Some may be diagnosed with pleural plaques — or not; that is the point. People can live quite normal lives even after being diagnosed with the condition. It does not necessarily limit their life. We have to make a judgement.

Similarly, people might say that they worked in an environment that caused them to suffer a nervous breakdown because of stress. Some Committee Clerks might say that they were under such pressure that they suffer from job-related stress. We could say, therefore, that we should protect them, and there could well be some truth in that.



Are you saying that there is nothing from a perceived challenge to us from the European courts to preclude us from taking forward the Bill? Are we sure that the legislation does not contravene any European human rights legislation?

**Mr Paulin:**

The Assembly is entitled to legislate, and others are entitled to challenge the legislation, but they can challenge it only when the legislative process is complete.

**Mr Girvan:**

Having seen the draft of what we are proposing, the insurance companies believe that they could take a human rights case. We rely on guidance from professionals to tell us whether they have anything to stand on.

**Mr Paulin:**

It would be a brave man who said that there is absolutely nothing in their case. All I can tell you is that the court in Scotland has rejected it. If the court of appeal in Scotland says that the legislation is OK, will the insurance companies accept that and say that the matter is over with. Who knows?

**Dr Farry:**

Can I just clarify one legal issue? Is there a distinction between a challenge on whether a Bill is competent in relation to the Scottish Parliament and whether it is consistent with the Human Rights Act or the European convention, or, in essence, are they one and the same?

**Mr Paulin:**

No; "competent" is wider than the convention, but convention rights come into it.

**Dr Farry:**

Therefore if the Scottish court says that the Bill is competent, that means, by definition, that it is competent, including consistent with the Human Rights Act in the view of that court.

**Mr Paulin:**

That is right.

**The Chairperson:**

Thank you very much, Neil and Oswyn; there are no more questions. If there are any issues outstanding, we will write to you. I will ask Shane to take us through the timetable of the Bill and some other issues.

**Mr McLaughlin:**

Before we do that, there was an interesting answer to one of my questions. I propose that we get advice on the powers of the Committee to get answers to questions that we think are relevant to our work. As I understand it, the Committee has power to call for persons or papers. I think that those powers could go beyond freedom of information entitlements, which the ordinary public has access to.

**Mr Girvan:**

Are you thinking about the Attorney General?

**Mr McLaughlin:**

I am, yes. We might invite him to speak to the Committee on this issue.

**The Chairperson:**

We will get some clarity on that. The Committee Clerk will take us through the draft timetable.

**Mr McLaughlin:**

That was very quick, Paul; well done, my friend. *[Laughter.]*