



The Scottish Parliament
Pàrlamaid na h-Alba

Finance Committee
Convener: Andrew Welsh MSP

Bill Aitken MSP
Convener, Justice Committee
Via email

Room T3.60
The Scottish Parliament
EDINBURGH
EH99 1SP

Direct Tel: (0131) 348 5451
(RNID Typetalk calls welcome)
Fax: (0131) 348 5252
(Central) Textphone: (0131) 348 5415
finance.committee@scottish.parliament.uk

1 September 2008

Dear Bill

**Damages (Asbestos-Related Conditions) (Scotland) Bill –
Financial Memorandum**

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. At its meeting on 24 June 2008, the Committee agreed to adopt level one scrutiny in relation to the Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee has now received submissions from the Scottish Court Service, the Association of British Insurers, Zurich Financial Services, and AXA Insurance UK plc. All submissions are attached to this letter.

The Committee's remit is to scrutinise expenditure from the Scottish Consolidated Fund, but does not extend to examining the potential impact on the private sector. As the submissions from the insurance industry primarily address the underlying policy of the bill and the financial implications for businesses, it is my view they are more appropriately addressed to the lead committee on the Bill.

In addition, the Committee sought written evidence from those UK Government Departments which will be affected by the Bill (the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform) on whether they plan to invoke the Statement of Funding Policy. If the departments were to invoke the

Statement of Funding Policy, this would obviously have a significant impact on the Scottish Consolidated Fund. On the basis of figures provided in the Financial Memorandum, the total cost would be around £6 million. However, given the uncertainty surrounding the number of cases outlined in the submissions from the insurance industry, it may be that the actual figure will be in excess of this amount.

On that basis, if the submissions from DBERR and the MoD were to conclude that the Statement of Funding Policy will be invoked, the Committee would strongly recommend that the Justice Committee raise the issue with the Scottish Government.

The departments have committed to supply the Committee with submissions by 8 September 2008, although the clerks have contacted officials to request them sooner. They will be forwarded to the Justice Committee as soon as they are received.

If you have any questions about the Committee's consideration of the Financial Memorandum, please contact Allan Campbell, Assistant Clerk to the Committee, on 0131 348 5451, or email: allan.campbell@scottish.parliament.uk

Yours sincerely

Andrew Welsh MSP
Convener

SUBMISSIONS

Finance Committee

Scrutiny of Financial Memorandum – the Damages (Asbestos-Related Conditions) (Scotland) Bill

Submissions received

SUBMISSION FROM THE ASSOCIATION OF BRITISH INSURERS

The ABI is the voice of the insurance and investment industry. Its members constitute over 90 per cent of the insurance market in the UK and 20 per cent across the EU. They control assets equivalent to a quarter of the UK's capital. They are the risk managers of the UK's economy and society. Through the ABI their voice is heard in Government and in public debate on insurance, savings, and investment matters. And through the ABI they come together to improve customers' experience of the industry, to raise standards of corporate governance in British business and to protect the public against crime. The ABI prides itself on thinking for tomorrow, providing solutions to policy challenges based on the industry's analysis and understanding of the risks we all face

EXECUTIVE SUMMARY

The Scottish Government has committed to introducing legislation to make symptomless pleural plaques and other symptomless asbestos-related conditions compensatable, and has introduced a draft Bill to that effect.

Pleural plaques are small fibrous discs on the surface of the lungs. They are symptomless in all but a handful of exceptional cases, and neither lead to, nor increase susceptibility to, any other conditions. They are benign and do not impair quality of life. Despite this clear prognosis, there continues to be much confusion and concern among people with the condition and the general public about what a diagnosis of pleural plaques really means for a person's health.

The ABI opposes the *Damages* Bill for three main reasons:

- **It is not the best way to help people with pleural plaques** – paying compensation sends the wrong message to people that the condition is more serious than it is, perpetuating confusion. Educating people about what the condition really means for a person's health will provide reassurance and reduce anxiety. Further, making the condition compensatable is likely to lead to a resurgence in scan vans – claims farmers who encourage people to have x-rays for pleural plaques with the aim of 'selling' the claim onto a solicitor for a fee. Unnecessary x-rays carry health risks.
- **It will fundamentally change the law of delict** – interference with the fundamental principles of law in this way and applying the changes retrospectively may be used as a precedent to argue for compensation for other

currently non-compensatable conditions, further increasing costs for defendants. The Bill will detrimentally affect the economic rights and interests of insurers, in breach on the European Convention on Human Rights.

- **It will undermine business confidence** – the Bill proposes a fundamental and retrospective change to the law of delict, undermining confidence in Scotland's stable legal environment, and making it a less attractive place for investment. It will also increase costs for businesses, local authorities and insurers, which will ultimately be passed back to taxpayers and policyholders.

We believe that the Scottish Government has significantly underestimated the potential cost of the legislation. On the basis of figures from the UK Government, the annual cost of making plaques compensatable in Scotland is likely to be between £76m and £607m, the total cost to Scotland would be between £1.1bn and £8.6bn¹. To put this into context, annual net employers' liability premium in Scotland is approximately £131m².

The financial costs would fall on defendants, including insurers, local authorities and the Government itself, and would be passed onto policyholders and taxpayers in the form of higher premiums and council tax.

We urge the Finance Committee to highlight to Parliament the issues associated with this Bill.

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

The Association of British Insurers did respond to the consultation on the partial Regulatory Impact Assessment; additionally, seven of our members submitted separate responses. All eight responses raised concerns about the adequacy of the financial assumptions made.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No, we do not believe our comments on the financial assumptions, or the financial implications for the ABI's members, have been accurately reflected in the Financial Memorandum.

¹ Ministry of Justice, *Pleural Plaques*, July 2008

² ABI estimate based on ABI statistics and National Statistics

While our comments have been noted, they have not been given sufficient attention. The Scottish Government has calculated the likely cost of the Bill on the basis of unknowns; we are extremely concerned about the potential for significant underestimation.

- **We do not know how many people have, or will develop, pleural plaques**

The Financial Memorandum fails to consider the financial impact of any changes in the proportion of the population developing pleural plaques, or their propensity to claim.

There are a number of studies which suggest that pleural plaques is more prevalent among the population than the Scottish Government acknowledges:

- A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques³
- A study by SJ Chapman concludes pleural plaques “are found in as many as 50% of asbestos-exposed workers”⁴
- Professor Tony Newman Taylor, previously chair of the Industrial Injuries Advisory Council, states that about one-third to one-half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure”⁵.

- **We do not know the future number of pleural plaques claims**

The Financial Memorandum recognises that “there is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim”. It considers the average annual number of cases settled in Scotland in 2004-2006 as “a reasonable basis on which to proceed because of the lack of any “firm figures to the contrary”. Accordingly, the financial implications of the legislation are based on 200 claims being received per year.

While we cannot give a precise number of future claims, in our responses to the partial RIA we pointed to data that could be used to inform what the range might be. This has not been considered in the Memorandum. Figures from the Institute of Actuaries⁶ show that, across the UK, approximately 500 pleural plaques claims were made against insurers in 1999, by 2005 this had risen steeply to 6,000, only to fall again to 2,250 in 2006 following the Court of Appeal judgment when there was uncertainty as to whether pleural plaques would be compensatable. Scotland has around 30% of the UK’s asbestos liabilities; accordingly, based on the data from the Institute of Actuaries, we estimate that had the Court of Appeal judgment upheld first ruling that plaques were compensatable, the annual number of claims in Scotland would be closer to 1,800 than the 200 the Financial Memorandum suggests.

³ Cugell, DW and DW Kamp, "Asbestos and the Pleura: A Review", Chest 2004:125, 1103-1117

⁴ Chapman, SJ et al, "Benign Asbestos Pleural Disease", Curr Opin Pulm Med 2003:9(4), 266-271

⁵ 3 Dec 2007 House of Commons debate, Michael Clapham (Lab): reading an email from Professor Tony Newman Taylor: "You may be interested to know that about a third to one half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure. After twenty years, 5 to 15 per cent. will have uncalcified pleural plaques".

⁶ Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)

Further, history shows us that it is very difficult to accurately predict how many claims are likely to arise following changes to legislation: at the outset of the British Coal Chronic Obstructive Pulmonary Disease scheme, 150,000 claims were expected; by the time the scheme closed, 592,000 claims had been registered. This massive underestimation was despite data with an apparently greater degree of statistical certainty than exists for plaques.

In addition, the Financial Memorandum also fails to adequately deal with the potential for forum shopping (where non-Scottish claimants seek to bring a claim in Scotland). This creates further uncertainty about the potential number of claims.

The UK Government has subsequently published a consultation document on pleural plaques which includes a more thorough assessment of the potential costs of compensating for the condition; on the basis of its assessment, the potential cost of compensating pleural plaques in Scotland is likely to be between £1.1bn and £8.6bn. We urge the Financial Committee to consider these figures rather than those contained in the Memorandum when examining expenditure from the Scottish Consolidated Fund.

- **We are concerned about the potential for other currently uncompensatable conditions becoming compensatable**

Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable, exposing defendants to potentially significant costs.

Another concern raised in our response to the partial RIA consultation was that the proposed legislation fundamentally changes the law of delict, which could pave the way for any number of claims being made for the risk of an illness occurring, or for worry that something might happen. If legal developments of this nature occurred, the level of litigation would significantly increase along with the possibility of weak or spurious claims, with damaging effects for businesses and the economy. While the Memorandum notes our concern, it suggests that it is not relevant to this discussion. We disagree: any financial assessment of the legislation must consider the cost of its wider implications.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The Bill will impose significant financial costs on the insurance industry. Higher costs for insurers may be passed onto policyholders in the form of higher employers' liability and public liability premiums. The UK government suggest that the potential cost of compensating pleural plaques in Scotland is likely to be between £1.1bn and

£8.6bn⁷. To put this context, the current annual net employers' liability premium in Scotland is £131m⁸. Potentially, some insurers may choose to exit the Scottish liability insurance market altogether.

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable.

8. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

For an action for damages for personal injuries there must be (a) a negligent act or breach of statutory duty by the defender which (b) causes an injury to the pursuer's body, as a result of which (c) the pursuer suffers material damage. Any damage must be more than *de minimis* which is to say that it is required to reach a threshold of seriousness if it is to justify the intervention of the law; a risk of future damage is not, by itself, compensatable; and mere anxiety about a risk of future damage is not, by itself, compensatable.

Under the current law, symptomless pleural plaques are not therefore compensatable. Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable.

We cannot know what type of new claims might arise under these circumstances, or how many; it is therefore impossible to quantify the potential costs; however, we can say that they are likely to be substantial.

Pleural plaques can only be detected by x-ray or CT scan examination. The Financial Memorandum does not include the cost to NHS Scotland for a significant rise in demand for such examinations, including costs for medical staff time, training, or operation of examination equipment.

CONCLUSION

The *Damages* Bill fails to address the real issues for people with pleural plaques and is based upon a belief that paying money in some way deals with this condition. In summary, it:

- is not the best way to help people with pleural plaques
- will fundamentally change the law of delict
- will undermine business confidence.

⁷ Ministry of Justice, *Pleural Plaques*, July 2008

⁸ ABI estimate, based on ABI statistics and National Statistics

SUBMISSION FROM AXA INSURANCE UK PLC

About AXA Insurance

AXA Insurance UK plc is a major general insurer in the UK market. It is the general insurance business arm of AXA UK PLC and occupies a leading position as one of the top 4 commercial business insurers in the United Kingdom.

AXA is a major provider of employers liability insurance in the UK market with in excess of 80,000 policyholders for this type of business in 2008.

Executive Summary

The Scottish Government has committed to introduce legislation to make symptomless pleural plaques and other asymptomatic asbestos-related conditions compensable, and has introduced a Bill to that effect, the *Damages (Asbestos-related Conditions) (Scotland) Bill* hereinafter referred to as the Damages Bill.

AXA opposes the Damages Bill for 3 key reasons:

1. It represents a fundamental and unwarranted alteration of the law of delict.
2. Alteration in the law of delict in this way will undermine business confidence in the Scottish environment
3. Legislation to provide compensation is not the best way to help those who are diagnosed with pleural plaques.

AXA will be submitting evidence to the Justice Committee in accordance with the Committee's current call for evidence.

We have reviewed the content of the Financial Memorandum published in association with the draft Damages Bill. We believe that the Scottish Government has significantly underestimated the potential cost of the legislation and that many of the financial assumptions upon which the Bill is based are flawed.

This paper sets out our key concerns and we urge the Finance Committee to highlight to the Scottish Parliament the issues associated with this Bill.

Our Submission to the Finance Committee

<p>4. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?</p>

AXA Insurance did respond to the consultation on the partial Regulatory Impact Assessment. We raised concerns about the adequacy of the financial assumptions made.

5. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

6. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No, we do not believe our comments on the financial assumptions or the financial implications for AXA have been accurately reflected in the Financial Memorandum.

The Scottish Government have calculated the likely cost of the Damages Bill on the basis of unknown trends and we are very concerned that the overall cost of the proposed legislation has been significantly underestimated as a result.

The Association of British Insurers (ABI) has provided the Scottish Government, and the Finance Committee of the Scottish Parliament, with evidence of the doubts that arise in relation to the future numbers of those diagnosed with pleural plaques. We agree with their views and believe that the number of cases predicted by the Scottish Government is understated.

The Scottish Government has recognised in the Financial Memorandum that “there is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim”. We agree with this comment. Whilst we cannot give precise data on the number of future claims we agree with the ABI comments on the data that could be used to determine what the range of possible claim volumes could be. We note that this data has not been considered in the Financial Memorandum.

We agree fully with the evidence submitted by the ABI in relation to the possible number of future claims and urge the Financial Committee to consider these figures rather than those contained within the Financial Memorandum.

We remain gravely concerned about the fundamental changes to the law of delict that will arise should the Damages Bill be enacted. The Memorandum prepared by the Scottish Government indicates that whilst our concerns have been noted they are not regarded as being relevant to the discussion. We disagree. Any consideration of the financial impact of the Damages Bill must consider the cost of its wider implications.

6. Did you have sufficient time to contribute to the consultation exercise?

Yes.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The Bill will impose significant financial costs on AXA Insurance UK PLC, which it will be able to meet. However, the inevitable higher costs may be passed onto policyholders in the form of higher employers' liability and public liability premiums.

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable

9. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

The Damages Bill is drafted to fundamentally alter the facts related to pleural plaques. Medical evidence is clear that pleural plaques are almost always asymptomatic and definitely do not lead to any other medical condition. The Bill legislates to reverse these facts, in total contradiction to all medical evidence.

We believe that the Scottish Government's determination to reverse clear medico-legal facts in this way will ultimately result in a precedent being set to do the same for other asymptomatic conditions. Once legislation is passed to enable one group of persons to secure compensation on the basis of anxiety about future harm alone it will be very difficult for the Scottish Government to resist demands from other groups.

We cannot quantify the possible costs associated with such a widening of the operation of the law of delict in Scotland but we can say they are likely to be substantial.

Conclusion

The Damages (Asbestos-Related Conditions) (Scotland) Bill is wrong and the financial assessment that has been prepared in support of its enactment is flawed.

We urge the Finance Committee to draw these matters to the attention of the Scottish Parliament.

**AXA Insurance UK plc
18th August 2008.**

SUBMISSION FROM ZURICH FINANCIAL SERVICES GROUP

Zurich Financial Services Group (Zurich) is an insurance-based financial services provider with a global network of subsidiaries and offices in North America and Europe as well as in Asia Pacific, Latin America and other markets. Founded in 1872, the Group is headquartered in Zurich, Switzerland. It employs approximately 60,000 people serving customers in more than 170 countries, with around 7,900 employees based in the UK.

We provide insurance and risk management solutions and services for individuals, small and mid sized businesses, large corporations and major multi-national companies. We distribute third-party financial services products.

Zurich welcomes the opportunity to share its research, extensive knowledge and views with the Finance Committee to assist the scrutiny stage of the Bill. As one of the two lead insurers that actioned the test litigation on pleural plaques, Zurich has invested four years of research, resource, legal expertise and liaison with medical experts towards the litigation which accumulated in the House of Lords ruling in October 2007. Zurich has therefore a close interest in this proposal and will examine the legality of the proposed legislation.

GENERAL COMMENTS

Zurich is opposed to the decision by the Scottish Executive to introduce legislation to make pleural plaques compensatable and believes it should be revisited. The House of Lords concluded, in October 2007, that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages.

In his summary Lord Hoffman stated that pleural plaques do not cause or develop into asbestos-related disease, are symptomless and do not progress into other asbestos related conditions. This decision was based on agreed medical evidence applied to fundamental principles of the law of negligence.

Zurich is of the view that legislating to make compensation payable for anxiety rather than a recognised medical illness will set a dangerous example and would open the floodgates to people with exposure only claims. As a consequence this would have an impact on employers, insurers, local authorities and the Government. The implication of the proposed legislation means higher costs being passed onto customers by the way of higher insurance premiums, resulting in Scottish businesses being at a disadvantage to their English and Welsh competitors.

The RIA document states that the proposed legislation is to be retrospective in its application and effect. This creates a question regarding legal framework in Scotland and whether it can be regarded as one founded on stable and equitable principles that can be relied upon. Zurich would look carefully at the legality of the proposed legislation.

EXECUTIVE SUMMARY

The Scottish Government has committed to introducing legislation to make symptomless pleural plaques and other symptomless asbestos-related conditions compensatable, and has introduced a draft Bill to that effect.

Pleural plaques are small fibrous discs on the surface of the lungs. They are symptomless in all but a handful of exceptional cases, and neither lead to, nor increase susceptibility to, any other conditions. They are benign and do not impair quality of life. Despite this clear prognosis, there continues to be much confusion and concern among people with the condition and the general public about what a diagnosis of pleural plaques really means for a person's health.

Zurich opposes the Damages Bill for three main reasons:

- It is not the best way to help people with pleural plaques – paying compensation sends the wrong message to people that the condition is more serious than it is, perpetuating confusion. Educating people about what the condition really means for a person's health will provide reassurance and reduce anxiety. Further, making the condition compensatable is likely to lead to a resurgence in scan vans – claims farmers who encourage people to have x-rays for pleural plaques with the aim of 'selling' the claim onto a solicitor for a fee. Unnecessary x-rays carry health risks.
- It will fundamentally change the law of delict – interference with the fundamental principles of law in this way and applying the changes retrospectively may be used as a precedent to argue for compensation for other currently non-compensatable conditions, further increasing costs for defendants. The Bill will detrimentally affect the economic rights and interests of insurers, in breach on the European Convention on Human Rights.
- It will undermine business confidence – the Bill proposes a fundamental and retrospective change to the law of delict, undermining confidence in Scotland's stable legal environment, and making it a less attractive place for investment. It will also increase costs for businesses, local authorities and insurers, which will ultimately be passed back to taxpayers and policyholders.

We believe that the Scottish Government has significantly underestimated the potential cost of the legislation. On the basis of figures from the UK Government, the annual cost of making plaques compensatable in Scotland is likely to be between £76m and £607m, the total cost to Scotland would be between £1.1bn and £8.6bn⁹. To put this into context, annual net employers' liability premium in Scotland is approximately £131m¹⁰.

The financial costs would fall on defendants, including insurers, local authorities and the Government itself, and would be passed onto policyholders and taxpayers in the form of higher premiums and council tax.

We urge the Finance Committee to highlight to Parliament the issues associated with this Bill.

⁹ Ministry of Justice, Pleural Plaques, July 2008

¹⁰ ABI estimate based on ABI statistics and National Statistics

EVIDENCE

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Zurich did respond to the consultation on the partial Regulatory Impact Assessment; our response raised concerns about the adequacy of the financial assumptions made.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No, we do not believe our comments on the financial assumptions have been accurately reflected in the Financial Memorandum. While our comments have been noted, they have not been given sufficient attention. The Scottish Government has calculated the likely cost of the Bill on the basis of unknowns; we are extremely concerned about the potential for significant underestimation.

We do not know how many people have, or will develop, pleural plaques

The Financial Memorandum fails to consider the financial impact of any changes in the proportion of the population developing pleural plaques, or their propensity to claim.

There are a number of studies which suggest that pleural plaques are more prevalent among the population than the Scottish Government acknowledges:

- A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques¹¹
- A study by SJ Chapman concludes pleural plaques “are found in as many as 50% of asbestos-exposed workers”¹²
- Professor Tony Newman Taylor, previously chair of the Industrial Injuries Advisory Council, states that about one-third to one-half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure”¹³.

¹¹ Cugell, DW and DW Kamp, "Asbestos and the Pleura: A Review", Chest 2004:125, 1103-1117

¹² Chapman, SJ et al, "Benign Asbestos Pleural Disease", Curr Opin Pulm Med 2003:9(4), 266-271

¹³ 3 Dec 2007 House of Commons debate, Michael Clapham (Lab): reading an email from Professor Tony Newman Taylor: "You may be interested to know that about a third to one half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure. After twenty years, 5 to 15 per cent. will have uncalcified pleural plaques".

We do not know the future number of pleural plaques claims

The Financial Memorandum recognises that “there is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim”. It considers the average annual number of cases settled in Scotland in 2004-2006 as “a reasonable basis on which to proceed because of the lack of any “firm figures to the contrary”. Accordingly, the financial implications of the legislation are based on 200 claims being received per year.

While we cannot give a precise number of future claims, in our responses to the partial RIA we pointed to data that could be used to inform what the range might be. This has not been considered in the Memorandum. Figures from the Institute of Actuaries¹⁴ show that, across the UK, approximately 500 pleural plaques claims were made against insurers in 1999, by 2005 this had risen steeply to 6,000, only to fall again to 2,250 in 2006 following the Court of Appeal judgment when there was uncertainty as to whether pleural plaques would be compensatable. Scotland has around 30% of the UK’s asbestos liabilities; accordingly, based on the data from the Institute of Actuaries, we estimate that had the Court of Appeal judgment upheld first ruling that plaques were compensatable, the annual number of claims in Scotland would be closer to 1,800 than the 200 the Financial Memorandum suggests.

Further, history shows us that it is very difficult to accurately predict how many claims are likely to arise following changes to legislation: at the outset of the British Coal Chronic Obstructive Pulmonary Disease scheme, 150,000 claims were expected; by the time the scheme closed, 592,000 claims had been registered. This massive underestimation was despite data with an apparently greater degree of statistical certainty than exists for plaques.

In addition, the Financial Memorandum also fails to adequately deal with the potential for forum shopping (where non-Scottish claimants seek to bring a claim in Scotland). This creates further uncertainty about the potential number of claims.

The UK Government has subsequently published a consultation document on pleural plaques which includes a more thorough assessment of the potential costs of compensating for the condition; on the basis of its assessment, the potential cost of compensating pleural plaques in Scotland is likely to be between £1.1bn and £8.6bn. We urge the Financial Committee to consider these figures rather than those contained in the Memorandum when examining expenditure from the Scottish Consolidated Fund.

We are concerned about the potential for other currently uncompensatable conditions becoming compensatable

Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable, exposing defendants to potentially significant costs.

¹⁴ Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)

Another concern raised in our response to the partial RIA consultation was that the proposed legislation fundamentally changes the law of delict, which could pave the way for any number of claims being made for the risk of an illness occurring, or for worry that something might happen. If legal developments of this nature occurred, the level of litigation would significantly increase along with the possibility of weak or spurious claims, with damaging effects for businesses and the economy. While the Memorandum notes our concern, it suggests that it is not relevant to this discussion. We disagree: any financial assessment of the legislation must consider the cost of its wider implications.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The Bill will impose significant financial costs on the insurance industry. Higher costs for insurers may be passed onto policyholders in the form of higher employers' liability and public liability premiums.

There may be an assumption that the cost of this action will simply be borne by Insurers. This is not the case. Zurich has many customers now and in the past who have elected to take deductibles on their EL / PL policies. This means that they bear the first part of any claim up to an agreed sum from their own funds. We believe that both corporate customers and Local Authorities could be exposed to additional expenditure if the Scottish Parliament pursues this course of action.

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable.

8. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

For an action for damages for personal injuries there must be (a) a negligent act or breach of statutory duty by the defender which (b) causes an injury to the pursuer's body, as a result of which (c) the pursuer suffers material damage. Any damage must be more than *de minimis* which is to say that it is required to reach a threshold of seriousness if it is to justify the intervention of the law; a risk of future damage is not, by itself, compensatable; and mere anxiety about a risk of future damage is not, by itself, compensatable.

Under the current law, symptomless pleural plaques are not therefore compensatable. Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable.

We cannot know what type of new claims might arise under these circumstances, or how many; it is therefore impossible to quantify the potential costs; however, we can say that they are likely to be substantial.

Pleural plaques can only be detected by x-ray or CT scan examination. The Financial Memorandum does not include the cost to NHS Scotland for a significant rise in demand for such examinations, including costs for medical staff time, training, or operation of examination equipment.

CONCLUSION

The Damages (Asbestos – related Conditions) (Scotland) Bill fails to address the real issues for people with pleural plaques and is based upon a belief that paying money in some way deals with this condition. In summary, it:

- is not the best way to help people with pleural plaques
- will fundamentally change the law of delict
- will undermine business confidence.

Zurich has legal advice that in passing the Bill in its current form (or indeed any similar form to the same retrospective effect), the Scottish Government would be acting outwith its legislative competence, contrary to the provisions of the Scotland Act. Zurich would like to make it clear that, given the advice received, it intends to challenge the legislation through the courts if it is passed by the Scottish Parliament.

We hope this information assists your consideration of the Bill.

Bill Paton
UKGI Chief Claims Officer

SUBMISSION FROM THE SCOTTISH COURT SERVICE

QUESTIONNAIRE

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Damages (Asbestos-Related Conditions) (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee's scrutiny.

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

The Scottish Court Service was consulted during the drafting of the Bill and in relation to the content of the Financial Memorandum.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Yes.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Scottish Court service contributed to the terms of paragraphs 20 and 21 of the Financial Memorandum.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Yes, the Scottish Court Service is content that the Courts can meet the costs associated with the provisions in the Bill. Claims arising from pleural plaques have in recent years been a normal part of the business dealt with by the Court of Session. Many of those claims are currently live in the Court, as is mentioned in the Memorandum, and would have been dealt with in normal course if the House of Lords had not passed the judgment which they did.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The Scottish Court Service cannot comment on this.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Some guidance will require to be provided to Court staff on the effect of the legislation, if passed, but any costs associated with that will be minimal.