

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL: STAGE 3

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Stage 3 proceedings for the Damages (Asbestos-related Conditions) (Scotland) Bill are scheduled to take place on 11 March 2009.

The purpose of this briefing is to summarise the issues that have arisen so far. In particular, this briefing summarises:

- the main issues that arose during Stage 1
- amendments lodged at Stage 2
- the revised financial estimates
- other issues of relevance.

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SUMMARY

The Damages (Asbestos-related Conditions) (Scotland) Bill was introduced in the Parliament on 23 June 2008. The [SPICe Briefing on the Bill](#) (Hough 2008) is available on the Scottish Parliament's website.

The objective of the Bill is to ensure that those who are negligently exposed to asbestos in Scotland and go on to develop asymptomatic asbestos-related conditions (including pleural plaques) can continue to pursue civil actions for damages. It follows a House of Lords judgement (2008) which ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. The Bill is intended to ensure that this judgement does not have effect in Scotland.

The Parliament's Justice Committee was designated as lead committee in relation to the Bill. Its [Stage 1 Report](#) (2008a) on the general principles of the Bill was published on 13 October 2008. The Committee unanimously supported the Government's policy objectives and the general approach of the Bill. The Justice Committee's only area of real concern was in relation to the Bill's financial implications. The Scottish Government did not respond in writing to the Justice Committee's Stage 1 Report (it did, however, provide the Justice Committee with relevant correspondence between it and the UK Government).

The [Stage 1 debate](#) took place on 5 November 2008 and the Parliament subsequently agreed unanimously to the general principles of the Bill (Scottish Parliament 2008). However, in so doing, it noted the terms of the Justice Committee's Stage 1 report and, in particular, the concerns expressed with regard to the Financial Memorandum. The Parliament also resolved unanimously to call on the Scottish Government to provide it with a more detailed analysis of the likely cost implications prior to the Bill being considered at Stage 3.

[Stage 2](#) (detailed consideration by the lead committee) was completed at a single meeting of the Justice Committee on 2 December 2008 (Scottish Parliament Justice Committee 2008b).

On 25 February 2009, the Minister for Community Safety (Fergus Ewing MSP) provided the Justice Committee with the [Scottish Government's reassessment of the financial implications of the Bill](#) in accordance with the motion passed by Parliament at Stage 1 (Scottish Government 2009).

Stage 3 (final consideration by Parliament) is scheduled for 11 March 2009.

STAGE 1 CONSIDERATION BY THE JUSTICE COMMITTEE

The Justice Committee received 31 responses to its call for evidence and held two oral evidence sessions in September 2008. The Committee also published 5 supplementary submissions. Full details of all the evidence received by the Justice Committee are provided in its Stage 1 Report (paras 18-19). The following paragraphs summarise some of the main issues highlighted in the Committee's Stage 1 Report.

In relation to the medical evidence, the Committee noted that medical experts were divided in their opinion as to whether damages should be awarded to pleural plaques sufferers (para 37). However, the Committee took the view that people with pleural plaques have a specific physical manifestation of asbestos exposure, that this signifies that their risk of developing mesothelioma is many times greater than that of the general population and that the resultant effect on the lifestyle and sense of wellbeing of those diagnosed with pleural plaques is substantial and

adverse (para 72). The Committee was not persuaded by the suggestion that the anxiety felt by those diagnosed with pleural plaques can be allayed by the provision of appropriate medical information and advice (para 73).

In relation to the legal effect of the Bill, the Committee noted the differing views on whether the Bill is consistent with the law of delict¹ (para 83) and accepted that the Bill represents a departure from the established principles of delict in Scotland (para 85). However, the Committee did not accept that the Bill will overturn or undermine the law of delict generally as it is expressly restricted to asbestos-related conditions (para 85). The Committee noted that a publicly funded compensation scheme was proposed as a possible alternative to the Bill and acknowledged both the benefits and problems associated with such schemes (para 95). However, the Committee's clear preference was for the legislative approach adopted by the Scottish Government (para 96). The Committee was unclear whether there will be issues relating to how quantum (the level) of damages is established and invited the Scottish Government to provide clarification on this point (para 104).

The Committee expressed the view that there were compelling grounds to legislate for pleural plaques and the other asbestos-related conditions provided for in the Bill (para 112) and that the Bill is drafted in such a way as to confine its application to those conditions (para 111). The Committee also expressed its satisfaction that the Bill would not inhibit the ability of pleural plaques sufferers to claim damages for more serious conditions should one develop following an award for an asymptomatic condition (para 117).

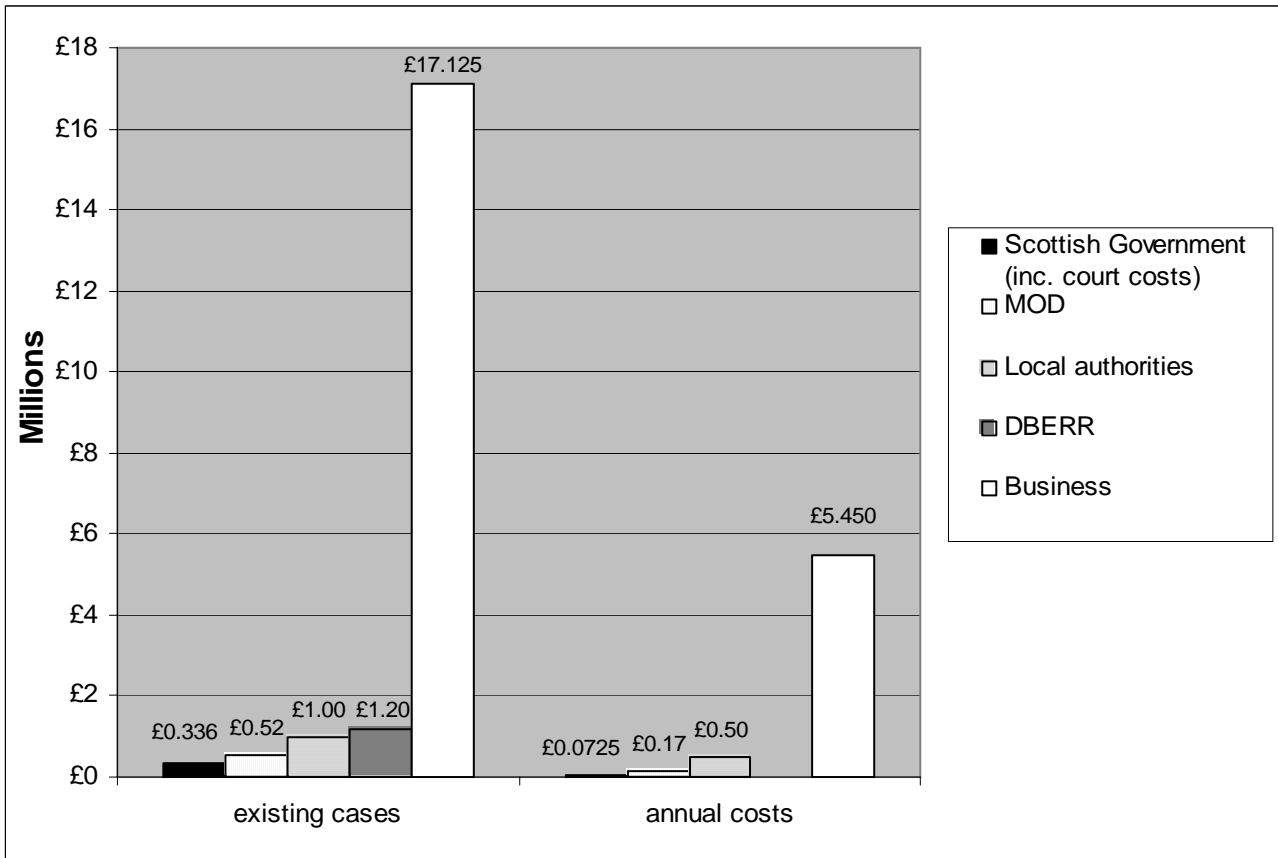
In relation to the financial impact of the Bill, the Committee noted the considerable divergence in the figures provided by the Scottish Government and those provided by the insurance industry as to the annual number of pleural plaques claims likely to be raised (para 135). The Committee took the view that the Scottish Government had underestimated and the insurance industry significantly overestimated the costs (para 136). It invited the Government to give further consideration to the figures it presented in the Financial Memorandum (para 137). In addition, the Committee sought clarification on the potential costs to the Scottish Consolidated Fund should the UK Departments invoke the Statement of Funding Policy² (para 146).

It should be emphasised that the costs associated with the Bill fall mainly to business (rather than to the state) and invocation of the Statement of Funding Policy would only affect liability for that proportion of claims that fall to UK Government departments. This constitutes a relatively small proportion of overall liability, according to June's Financial Memorandum. For example, the Ministry of Defence advised the Scottish Government that it would cost around £518,000 to settle its existing cases plus around £168,000 per annum to settle cases raised thereafter. This compares to the estimated cost to business (employers, former employers and their insurers) of £17,125,000 to settle existing cases and £5,450,000 plus per annum to settle new cases (see figure 1 below).

¹ Delict is a civil wrong created by the deliberate or negligent breach of a legal duty

² The Statement of Funding Policy provides that where decisions taken by any of the devolved administrations have financial implications for departments or agencies of the UK Government, the body whose decision leads to the additional cost will meet that cost. If the UK departments were to invoke the Statement of Funding Policy this would impact upon the Scottish Consolidated Fund.

**Figure 1: Damages (Asbestos-Related Conditions) (Scotland) Bill
Costs arising from the Bill**



Source: based on figures provided in the original Financial Memorandum

(N.B. although annual costs to DBERR are not known, it has advised the Scottish Government that its total future liability might be in the region of £5.3m)

RELATED CORRESPONDENCE

In advance of the Stage 1 debate, the Committee was provided with correspondence between the Minister for Community Safety (Fergus Ewing MSP) and the Parliamentary Under Secretary of State at the UK Ministry of Justice (Bridget Prentice MP) in relation to spending issues associated with the Bill and, in particular, in relation to the Statement of Funding Policy. The Committee also received correspondence from the Department for Business Enterprise and Regulatory Reform and from the Ministry of Defence (which essentially reiterated the Ministry for Justice’s position that it would not be appropriate for UK departments to reach any decision on the Statement of Funding Policy until the outcome of the Ministry for Justice consultation is known and the exact terms of the Scottish legislation had been finalised).

This correspondence is reproduced in full on the [Justice Committee website](#).

STAGE 1 DEBATE

As noted above, the Stage 1 debate took place on 5 November 2008. Members spoke overwhelmingly in support of the Bill. It was, however, noted that by creating a clearly defined legal right to compensation, the legislation might lead to an increase in the numbers of people who are diagnosed with asbestos-related conditions and result in a corresponding increase in the number of compensatory claims. Indeed, the difficulties in calculating the likely number of

future claims and the potential impact on the Scottish Consolidated Fund was an issue raised by a number of those who spoke during the debate.

STAGE 2

As previously indicated, Stage 2 consideration took place on 2 December 2008. Five amendments were lodged in total (all by Bill Butler MSP and all supported by Robert Brown MSP). Bill Butler argued that the purpose of his amendments was to achieve the Scottish Government's policy objective but in a clearer, more direct and more economical way and in a way that would not give rise to unnecessary questions that will have to be resolved by a court. In moving his amendments, Bill Butler expressed doubt that the Bill, as drafted, would actually entitle the victims to claim damages not only for pleural plaques, but also for the anxiety about the risk of contracting asbestos-related conditions in future. In addition, Bill Butler argued that the Bill, as drafted, did not make it sufficiently clear that pleural plaques are a personal injury that cause actionable damage for the purposes of the law of delict.

In responding to the amendments, the Minister for Community Safety argued that they would introduce weaknesses that may, unintentionally, defeat the objectives of the Bill. Nonetheless, the Minister indicated that he would seek further discussions on the matter with relevant stakeholders before Stage 3. On that basis, the amendments were not pursued.

REVISED FINANCIAL ESTIMATES

In correspondence to the Justice Committee (Scottish Government 2009), the Minister for Community Safety states that the UK Government has declined so far to clarify its position and that:

“therefore, I am regrettably unable to provide new information about whether the UK Government will invoke the SFP [Statement of Funding Policy]”.

The correspondence also provides a reassessment of the financial implications of the Bill based on a re-examination of existing data, material that had come to light since the Bill was introduced and other, new material. Although the Scottish Government stated that the overall estimates of the Bill's anticipated financial implications are “broadly of the same magnitude as those set out in June's Financial Memorandum”, some cost estimates are now higher than they were when the Bill was introduced (see table 1 below).

Table 1: Damages (Asbestos-Related Conditions) (Scotland) Bill - Financial estimates

	Average cost per claim	Backed-up claims ³	Backed-up claims (£)	New claims per year	Claims in peak year (2015)	Claims in peak year (£) (2015)	Total claims to peak year	Total claims to peak year (£)
Original Financial estimate	£25,000	690	£20m	220	-	£7-£8m	-	-
Revised Financial Estimate	£25,000 ⁴	690-1040	£14.66m - £22.88m ⁵	220-358	341-848	£7.25m-£18.79m	2826-5928	£60.05m-£131.31m

Sources: Financial Memorandum (SP Bill 12-EN) and Revised Financial Estimates, 25 February 2009

³ Backed-up claims refer to those cases that have built up because of the uncertainty following the House of Lords judgement. They are either currently sisted (suspended) or with solicitors.

⁴ or £10,000 if claim unsuccessful

⁵ These figures include projections for successful and unsuccessful claims calculated at different rates
providing research and information services to the Scottish Parliament

In concluding, the Minister for Community Safety acknowledges that there is inherent uncertainty about future numbers of pleural plaques claims but asserts that the Scottish Government has produced “the most thorough Scotland-specific projection of the financial implications of ensuring that the civil justice system preserves rights of redress in relation to asymptomatic asbestos-related conditions.”

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