The Damages (Asbestos-related Conditions) (Scotland) Act 2009 came into force on 17 June 2009. Since being passed by Parliament, the legality of the 2009 Act has been challenged by way of judicial review. On 8 January 2010, the Outer House of the Court of Session rejected this legal challenge.

The purpose of this briefing is to provide an update on the legal challenge and on other post-enactment developments.

This briefing considers:

- the passage of the Bill and commencement of the 2009 Act
- the legal challenge to the 2009 Act
- the possibility of further legal challenge to the 2009 Act
- relevant developments in other parts of the UK
# CONTENTS

OVERVIEW ................................................................................................................................................................... 3

PASSAGE OF THE BILL ............................................................................................................................................... 4

COMMENCEMENT OF THE 2009 ACT ........................................................................................................................ 5

JUDICIAL REVIEW .................................................................................................................................................. 5

   THE PROCEDURE ........................................................................................................................................... 5

   THE CHALLENGE .......................................................................................................................................... 5

   THE OPINION ............................................................................................................................................... 6

      The petitioners' right to be heard by the court ......................................................................................... 7

      Title and interest of the additional respondents .................................................................................... 7

      Competency of the petitioners' challenge at common law ...................................................................... 7

      The grounds of judicial review .................................................................................................................... 7

      Final disposal ............................................................................................................................................ 9

   REACTION ....................................................................................................................................................... 9

APPEAL PROCESS .................................................................................................................................................... 9

   APPEAL TO THE INNER HOUSE OF THE COURT OF SESSION ............................................................... 9

   APPEALS TO THE SUPREME COURT ....................................................................................................... 10

DEVELOPMENTS IN OTHER PARTS OF THE UK ............................................................................................... 10

SOURCES ......................................................................................................................................................... 11

RELATED BRIEFINGS .............................................................................................................................................. 16
OVERVIEW

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") is intended to ensure that anyone who develops certain asymptomatic asbestos-related conditions (such as pleural plaques) as a result of being negligently exposed to asbestos in Scotland can pursue damages in the Scottish courts. In doing so, the 2009 Act seeks to ensure that a controversial House of Lords judicial decision in an English appeal (the "Rothwell" case) is not followed by the courts in Scotland. Although the decision of the House of Lords was not legally binding on Scottish courts, it was highly persuasive and, in the absence of legislation to the contrary, it is very likely that it would have significantly influenced any related decisions of the Scottish courts.

The 2009 Act came into force on 17 June. However, the legality of the 2009 Act was challenged in the courts by way of judicial review.

Judicial review is a type of court action which allows parties to challenge the exercise of power by UK or Scottish Ministers, government departments and agencies, non-departmental bodies, local authorities and other official decision makers. In certain circumstances judicial review can be used to challenge acts of the UK or Scottish parliaments (for more on judicial review in general, see Harvie-Clark 2009). In June 2009, a number of insurers (led by Axa) petitioned for judicial review of the 2009 Act.

Two decisions of the Outer House of the Court of Session in June and July of this year (Allison v Henry Robb Ltd and others and McKenzie v Carillion (Singapore) Limited and others) effectively determined that all claims in the Scottish courts for compensation for pleural plaques should be suspended pending the outcome of the judicial review of the 2009 Act.

The Scotland Act 1998 (section 29) requires that any legislation passed by the Scottish Parliament must be consistent with the European Convention on Human Rights (ECHR). One of the arguments made in the judicial review of the 2009 Act was that it is incompatible with Article 1 of Protocol 1 (Protection of property) and Article 6 (Right to a fair trial) of ECHR. A further ground of judicial review argued that the circumstances surrounding the passage of the 2009 Act demonstrated that decision makers had exercised the powers in an unreasonable and irrational way.

In a judicial opinion of 8 January 2010, Lord Emslie (sitting in the Outer House of the Court of Session) dismissed the petition for judicial review, effectively upholding the legality of the 2009 Act.

However, it remains possible that Lord Emslie’s decision will be appealed by the insurance industry. This might delay further the ability of those with pleural plaques and certain other asbestos-related conditions to claim compensation for their conditions.

In summary, the Scottish Parliament passed legislation (the 2009 Act) to prevent the decision of the House of Lords in the case of Rothwell influencing the law in Scotland. The insurance industry challenged the legality of the 2009 Act in the Court of Session. The Outer House of the Court of Session rejected that legal challenge. It is possible that the decision will be appealed to the Inner House of the Court of Session and may, ultimately, be appealed to the UK Supreme Court. In the meantime, it is unlikely that compensation claims for pleural plaques (and related conditions) will be settled until the legal challenges to the 2009 Act have run their course.

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2. This judgment (from October 2007) ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages in England and Wales.

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PASSAGE OF THE BILL

The Damages (Asbestos-Related conditions) (Scotland) Bill (“the Bill”) was introduced by the Scottish Government on 23 June 2008. A SPICe Briefing on the Bill as introduced (Hough 2008) is available on the Scottish Parliament’s website.

The 2009 Act has five sections. The first section provides that asbestos-related pleural plaques are an actionable personal injury. Section 2 has similar effect for asbestos-related pleural thickening and asbestosis. Section 3 provides that claims for these asbestos related conditions do not become time-barred during the period between the date of the House of Lords judgment in the Rothwell case (17 October 2007) and the date the 2009 Act comes into force. Section 4 sets out the provisions for commencement and retrospection, whilst section 5 provides (amongst other things) that the 2009 Act binds the Crown.

The anticipated effect of the 2009 Act was that approximately 600 Scottish pleural plaque cases that were sisted (or suspended) pending the House of Lord’s decision in the Rothwell case would proceed and could be awarded damages. In addition, any new case in which it was proved that the claimant had pleural plaques caused by negligent exposure to asbestos would also succeed, where previously it would, in all likelihood, have failed at common law as a result of the Scottish courts following the House of Lords decision in Rothwell.

The lead committee for Stage 1 consideration of the Bill was the Justice Committee. The Committee’s Stage 1 Report (Scottish Parliament Justice Committee 2008a) on the general principles of the Bill was published on 13 October 2008. The Justice Committee unanimously supported the Government’s policy objectives and the general approach of the Bill. The Justice Committee’s only area of significant concern was in relation to the Bill’s financial implications, including the position of the UK Government in relation to the Statement of Funding Policy.

The Stage 1 debate took place on 5 November 2008 (Members spoke overwhelmingly in support of the Bill) and the Parliament subsequently agreed unanimously to the general principles of the Bill (Scottish Parliament 2008a). 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 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). Five amendments were lodged in total (all by Bill Butler MSP with the support of Robert Brown MSP). Mr Butler argued that the purpose of his amendments was to achieve the Scottish Government's policy objectives in a clearer, more direct and economical way, and in a manner that would not give rise to unnecessary questions that would have to be resolved by a court. In responding to the amendments, the Minister for Community Safety (Fergus Ewing MSP) argued that they would introduce weaknesses that may, unintentionally, defeat the objectives of the Bill. Having received assurances from the Minister, the amendments were not pursued.

On 25 February 2009, the Minister for Community Safety 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) took place on 11 March 2009. A SPICe Briefing on the Bill in advance of Stage 3 is available on the Parliament’s website (Hough 2009). At Stage 3, Scottish Government amendments were lodged to meet the concerns articulated at Stage 2 by Bill Butler and Robert Brown. In addition, an amendment was lodged by Derek Brownlee MSP which sought to ensure that the projected costs of the Bill were monitored after Royal
Assent, with explanations being provided for any significant variance. However, this amendment was subsequently withdrawn. After debate, the Bill as amended was agreed to by division (the Conservative Members voted against).

The Bill received Royal Assent on 17 April 2009.

COMMENCEMENT OF THE 2009 ACT

A Commencement Order, which provided that the 2009 Act would come into effect on 17 June 2009, was made on 29 April 2009.

On 27 April 2009, Lord Glennie rejected a request by the insurance industry for an interim interdict to prevent the Scottish Ministers from bringing the 2009 Act into force before a challenge to its validity could be heard and determined (Scottish Courts 2009).

JUDICIAL REVIEW

THE PROCEDURE

Judicial review is a mechanism for raising a legal challenge that is primarily concerned with the process or legality of official decision making, rather than the merits of the decisions themselves.

A court action for judicial review in Scotland can only be raised in the Outer House of the Court of Session in Edinburgh. The court action is raised by way of a document known as a “petition”, the person or body raising the action is called a “petitioner” and the person or body defending the action is called “the respondent”.

If an action for judicial review is successful the Court of Session can award a variety of remedies. “Reduction” is probably the most common of the remedies sought under judicial review. It allows the court to quash the original decision and remit the matter to the original decision maker to consider it anew (although in keeping with the nature of judicial review, the court will not express a view on what it thinks the ultimate decision should be). A “declarator” is another frequently sought remedy and is a pronouncement that an individual or body has a specific right or duty (useful where this has been doubted or denied).

THE CHALLENGE

Axa General Insurance Ltd, AXA Insurance UK plc, Norwich Union Insurance Ltd, Royal & Sun Alliance Insurance plc and Zurich Insurance plc petitioned for judicial review of the 2009 Act. The first respondent was the Lord Advocate (representing the Scottish Ministers). The petition for judicial reviews challenged the competency and legality of the 2009 Act and sought the following orders:

- declarator that the 2009 Act is not law on the grounds that it is incompatible with the petitioners’ rights under Article 6 and/or Article 1 of Protocol 1 of ECHR.

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3 Article 6 provides that everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal. Article 1 of Protocol 1 entitles persons to the peaceful enjoyment of their possessions.
• declarator that the 2009 is unlawful on the grounds that it is the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament by the Scotland Act 1998
• reduction of the 2009 Act
• interdict to restrain the Scottish Ministers from bringing the 2009 Act into force; or alternatively
• suspension of the 2009 Act; or alternatively
• postponing the coming into force of the 2009 Act
• such further orders as may seem just and reasonable to the Court

In relation to the Scottish Parliament’s consideration of the Bill, the petition stated that:

“the legislative process leading to the enactment of the Act in Scotland has proceeded on the basis of, at best, a misunderstanding of the factual position and, at worse, misrepresentation of that position […] Prominent in the campaign to change the law as it was held to be by the House of Lords in Rothwell have been Thompsons Solicitors, a firm which represents claimants and pursuers in asbestos-related litigation, and which has a direct financial interest in ensuring that pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis be held to constitute actionable damage. Further, the parliamentary debates on the decision of the House of Lords and on the Bill have been marked by the frequent use of intemperate and pejorative language and the expression of biased and ill-informed opinions.”

The petitioners contend that the 2009 Act is unlawful as a matter of the common law by reason of being an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament by the Scotland Act 1998. The respondents argued that all branches of the petitioners’ case were misconceived and ill-founded.

On 8 May 2009, Lord Uist heard a motion by 11 claimants suffering from pleural plaques (represented by Thompsons Solicitors) to be allowed to join the proceedings as respondents. The motion was opposed by the petitioners but, having heard arguments, Lord Uist allowed the motion. He was satisfied that the claimants had a direct interest in the issues involved in the review, and that the Court should exercise its discretion in their favour. In his view, although the Lord Advocate would represent the public interest in defending the 2009 Act, the claimants had the right to argue about the effect on their private interests. Lord Uist refused to grant leave to the petitioners to appeal his decision.

THE OPINION

Lord Emslie’s opinion (Scottish Court Service 2010) runs to 249 paragraphs and addresses in considerable detail some complex areas of the law. The following is intended to provide a very brief summary of the key points made, particularly those that relate to the Scottish Parliament. It should not be relied upon as an authoritative interpretation of Lord Emslie’s opinion.

Following an introduction setting out the general background to the challenge, Lord Emslie’s opinion deals with the following issues:

• the petitioners’ right to be heard by the court (their locus standi)
• the title and interest of the additional respondents (i.e. the right of the claimants suffering from pleural plaques to be involved in the legal proceedings)
• the competency of the petitioners’ challenge at common law
• the grounds of judicial review –
  – incompatibility with Article 6 of ECHR
  – incompatibility with Article 1 of Protocol 1 of ECHR
  – irrationality

The petitioners’ right to be heard by the court

The petitioners’ entitlement to challenge the 2009 Act was fiercely contested in court and the respondents sought dismissal of the petition without reference to the merits of the case. However, Lord Emslie did not consider that there was any sound reason for denying the petitioners access to the court for determination of the merits of their various grounds of complaint. Lord Emslie found that the petitioners had both title and interest\(^4\) to maintain the petition at common law and that their claims under the Convention were also admissible.

Title and interest of the additional respondents

The petitioners submitted that the participation of the 11 claimants (referred to above) who were allowed by Lord Uist to join the proceedings as respondents was unwarranted and that their continued participation in the proceedings should not be sanctioned. Lord Emslie took the view that petitioners’ argument on this matter had no merit.

Competency of the petitioners’ challenge at common law

The respondents disputed whether the 2009 Act (as legislation emanating from the non-sovereign Scottish Parliament) is susceptible to challenge on traditional common law grounds of judicial review.\(^5\) The petitioners argued that the courts have the jurisdiction to review the Scottish Parliament’s power to pass primary legislation. The respondents, on the other hand, argued that Acts of the Scottish Parliament are excluded from the traditional grounds of judicial review (illegality, irrationality and procedural impropriety). Lord Emslie saw no good reason why long-established common law challenges could not be considered alongside challenges on ECHR grounds and, therefore, upheld the competency of the petitioners common law challenge.

The grounds of judicial review

Incompatibility with Article 6 of ECHR

The petitioners argued that a violation of Article 6 (Right to a fair trial) of ECHR could arise where the state interfered, by means of legislation, with the judicial determination of a dispute. They went on to argue that by passing the 2009 Act with retrospective (as well as prospective) effect, the Scottish Parliament had interfered with the judicial determination of several hundred preceding pleural plaques claims. A consequence of this, the petitioners argued, was to impose new liabilities on insurance contracts for which premiums were never taken. The respondents argued that Article 6 was not engaged in this case. Lord Emslie ultimately reached the view that

\(^4\) ‘Title to sue’ is a legal concept that gives a person the legal right to raise an action; ‘interest’ constitutes a legal concern in a matter and is also a necessary prerequisite to having the right to raise an action.

\(^5\) It is long established that primary legislation enacted by the sovereign Parliament at Westminster is altogether immune from judicial review on common law grounds.
petitioners’ reliance on Article 6 was misplaced and that no violation of the rights guaranteed by that article was established.

**Incompatibility with Article 1 of Protocol 1 of ECHR**

The petitioners argued that their “possessions”, under Article 1 of Protocol 1, had been unlawfully interfered with in two respects. Firstly, the Rothwell decision was an asset of enormous commercial value and importance to the insurance industry and, secondly, the petitioners would be required to maintain massive reserves against future liabilities. The respondents disputed that any violation of the article had been established in this case (primarily on the grounds that the interests asserted by the petitioners could not qualify as “possessions”). Lord Emslie was not persuaded that any violation of Article 1 of Protocol 1 had been demonstrated in this case. In reaching his conclusion on this point, Lord Emslie observed that:

“there is nothing intrinsically unreasonable or outrageous about legislation which seeks to alter or reverse the effects of a judicial ruling” (para 203)

and that

“I think it can be said with some confidence that they [MSPs] legislated on a fair understanding of the relevant facts and of the existing state of the law. Certain wayward observations are no doubt to be found among the parliamentary papers, especially at an early stage, but judging by the terms of the Act itself allied to ministerial statements as the legislation progressed, I am satisfied that the Parliament did not ultimately legislate under any material error.” (para 204)

On the role of Thompsons Solicitors in the legislative process, Lord Emslie observed:

“it is beyond doubt that they [Thompsons] lobbied tirelessly from the outset to secure a legal disapplication of the Rothwell decision in Scotland. However, as the respondents forcefully asserted, lobbying must be regarded as a legitimate part of the political process; the decision to place a Bill before the Parliament could be taken only by the Scottish Government; passing the Bill was in the hands of the Parliament alone”. (para 212)

Lord Emslie rejected the petitioners’ challenge based on Article 1 of Protocol 1.

**Irrationality**

Under this heading, the petitioners argued that the 2009 Act had no rational basis, that its aims and achievement were unreasonable, irrational and arbitrary, and that the Scottish Government and Parliament had failed to approach the legislative process in a rational manner. The respondents contested that the petitioners had failed to establish “irrationality” in this case. Lord Emslie expressed the view that the petitioners’ contentions fell short of what would be required to justify reduction of an Act of the Scottish Parliament. He considered that:

“primary legislation would require to be tainted to a serious and exceptional degree before an application such as the present could be upheld”. (para 230)

Lord Emslie was “unable to accept that (…) the Bill received inadequate consideration, or that the Parliament can properly be charged with abusing its legislative discretion in this regard” (para 231). Thus, he also rejected the petitioners’ challenge to the 2009 Act on this ground.
Final disposal

Lord Emslie dismissed the petition.

REACTION

Welcoming the decision, Justice Secretary Kenny MacAskill said:

“The Scottish Government believes that the legislation is right in principle and right in law and has been unequivocally upheld. I firmly believe that people with pleural plaques should be able to raise a claim for damages and I am pleased that this decision has gone in their favour.

I sincerely hope that the insurers will now carefully reflect on what Lord Emslie has said and abandon any plans they have to raise an appeal in the Inner House.” (The Journal Online 2010)

The Association of British Insurers has said that the firms involved in the court action were considering grounds of an appeal. Nick Starling, the association's director of general insurance and health, is reported as saying:

“This is not the end of the road” (…) “We are very disappointed with this judgment. Insurers brought the review on the grounds that the Damages Act is fundamentally flawed as it ignores overwhelming medical evidence that plaques are symptomless and the well-established legal principle that compensation is payable only when there are physical symptoms.” (Times Online 2010)

Bill Butler MSP has raised the following parliamentary motion on pleural plaques:

“Pleural Plaques Justice—That the Parliament welcomes Lord Emslie's judgment on the Damages (Asbestos-related Conditions) (Scotland) Act 2009 that has dismissed an attempt by insurance companies to set aside an Act of the Scottish Parliament; salutes the campaigning efforts of victims’ groups across Scotland that continue to fight tirelessly on behalf of people with pleural plaques and their families, and believes that those who brought this action should accept that the Act is the settled will of the Scottish Parliament.” (S3M-5482)

APPEAL PROCESS

APPEAL TO THE INNER HOUSE OF THE COURT OF SESSION

The findings of a judicial review can be appealed from the Outer House to the Inner House of the Court of Session.

Virtually all cases that are considered by the Court of Session as a court of first instance are dealt with by a single judge sitting in the Outer House of the Court. Such decisions, except certain procedural decisions, can be appealed to the Inner House of the Court where they are reviewed by more than one judge (normally three judges).

An appeal against a decision of the Outer House is marked by enrolling what is referred to as a reclaiming motion. A reclaiming motion is a written request for review of the decision. The party enrolling the reclaiming motion, or any other party to the case, may ask the Court to order early
disposal of the appeal. If the court orders early disposal this effectively gives the hearing of the appeal priority over other cases. Early disposal cases are normally put into gaps in the Court’s diary created by the settlement or abandonment of other appeals. The length of time required for the hearing of a particular appeal is also a consideration.

Currently, appeals in which early disposal is ordered are normally heard within 4 to 12 term weeks (term weeks exclude weeks when the Court is in recess). Exceptionally, if a case is considered sufficiently urgent, other business of the Inner House may be postponed to make way for the urgent case. Such decisions are a matter for the Lord President.

If the Court does not order early disposal, the normal first order in a reclaiming motion is an order for grounds of appeal to be lodged. Normally 28 days are allowed for grounds of appeal. After grounds of appeal are lodged the Court will normally allow a hearing in the appeal. Parties then attend court and fix a date for the hearing in consultation with the Keeper of the Rolls (the court official responsible for the scheduling of cases). The current waiting period for a non-urgent civil appeal is about 30 to 35 term weeks.

At the conclusion of an appeal hearing the Court normally makes avizandum (reserves judgment) and issues a written judgment at a later date. The interval between avizandum and the issuing of a judgment is not fixed.

Thus, depending on whether it is considered urgent, the start of a court hearing on an appeal against the decision of the Outer House in this judicial review could take between 4 and 35 weeks, with a judgment being delivered weeks or even months later.6

**APPEALS TO THE SUPREME COURT**

Judgements of the Inner House of the Court of Session may be appealed to the [UK Supreme Court](#).

The appeal must be filed within three months of the date of the interlocutor (official judgement) appealed from. The notice of appeal must be signed by two Scottish counsel (advocates) who must also certify that the appeal is reasonable. Where the Inner House judgement was unanimous, permission to appeal is required for an appeal to the Supreme Court. Only the Inner House of the Court of Session may grant permission to appeal. A refusal by the Court of Session to grant permission is final. Where the opinion of the Inner House was not unanimous, permission to appeal is not required (although signature of counsel is still necessary).

**DEVELOPMENTS IN OTHER PARTS OF THE UK**

Debates on the subject of pleural plaques took place in the House of Commons on [23 January 2008](#), [4 June 2008](#) and [26 November 2008](#) (in which most participating MPs spoke in support of introducing legislation to reverse the House of Lords decision). A further debate took place on [11 February 2009](#).

The UK Government originally decided that “it would not be appropriate to legislate” to reverse the House of Lord’s judgement in the Rothwell case for England and Wales ([House of Commons 2007](#)), a position which it reiterated during the House of Commons debate on 23 January 2008 ([2008a](#)). However, on 9 July 2008, the Ministry of Justice published a consultation document on pleural plaques ([2008](#)) which proposed that action should be taken to

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6 SPICe is grateful to Bob Cockburn, Deputy Principal Clerk of Session, for providing details of the appeals process.
improve understanding of pleural plaques and invited views on whether changing the law of negligence would be appropriate, a position reflected in the House of Commons debate on 4 June 2008 (2008b). The consultation closed on 1 October 2008.

As at October 2009, the Government had not made a statement as to how it plans to take forward any changes (House of Commons Library 2009).

It would appear from the following recent exchange at Prime Ministers Questions that the issue of compensation for those who have pleural plaques following exposure to asbestos in England or Wales remains unresolved:

Q14. [297517] Paul Rowen (Rochdale) (LD): The Prime Minister promised in June that there would be a statement on the restoration of compensation for victims of pleural plaques. It is now November, so can he tell us why we have not yet received it?

The Prime Minister: We are meeting the Members of Parliament who have raised this issue with us, and we will come back to the House with a statement on exactly that (House of Commons 2009b).

In January 2009, Andrew Dismore MP brought forward a Private Member’s Bill (the Damages (Asbestos-Related Conditions) Bill), which would have the effect of allowing pleural plaques to be treated as an actionable personal injury (for more information see the House of Commons website). Although the Bill cleared all of its Commons stages, it fell at prorogation (the end of the parliamentary session). An equivalent Bill was introduced in the House of Lords on 19 November 2008 by Baroness Quin.

There have also been a number of Early Day Motions on the subject, including EDM 254, which expressed concern at the delay in announcing the Government’s response to the consultation on pleural plaques and EDM 1181 which welcomed the Prime Minister's recent statement that an announcement would be made soon in relation to the Government's response to the consultation on pleural plaques.

The Northern Ireland Executive has also consulted on the issue and, on 29 June 2009, the then Finance and Personnel Minister, Nigel Dodds MLA, announced that he would recommend a change to the law in Northern Ireland to enable people with pleural plaques to claim compensation (Northern Ireland Executive). On 7 October 2009, on a majority basis, the Northern Ireland Assembly’s Committee for Finance and Personnel determined that it was supportive of the proposal for legislation, subject to the relevant Executive Department taking account of developments in Scotland (Northern Ireland Assembly Committee for Finance and Personnel).

**SOURCES**


RELATED BRIEFINGS

SPICe Briefing 09-75 on Judicial Review  (Harvie-Clark 2009)

SPICe Briefing 08-40 on the Damages (Asbestos-related Conditions) Bill  (Hough 2008)

SPICe Briefing 09-18 on the Damages (Asbestos-related Conditions) Bill: Stage 3  (Hough 2009)

SPICe Briefing 09-69 on the Supreme Court  (Hough 2009)

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