INTRODUCTION

As the leading Pursuers' personal injury firm in Scotland, acting for the victims of injury and occupational disease, we have extensive knowledge of the Industrial Injuries Benefit scheme and welcome the opportunity to comment on the devolution of benefits to Scotland.

5. INDEPENDENT ADVICE AND SCRUTINY

Do you think that there is a need for an independent body to be set up to scrutinise Scottish social security arrangements?

There needs to be more than a single independent body to scrutinise Scottish social security arrangements.

We should recognise the strengths as well as the weaknesses of the present UK social security benefit system and retain those arrangements that work well. Two strengths of the present arrangement are the separate functions of the Social Security Advisory Council (SSAC) and the Industrial Injuries Advisory Council (IIAC). Two independent bodies need to be set up for the devolved benefits: a Scottish SSAC to advise the Scottish Government on all social security matters, excluding Industrial Injuries Benefits; and an independent Scottish IIAC to consider draft regulations relating to IIB and to advise on general IIB questions.

There should be a separate Scottish IIAC. The present UK IIAC is recognised as an extremely capable body and is well respected because of its tripartite nature and quality of its recommendations.[i] A Scottish IIAC should be established to provide the Scottish Government with independent and expert scientific advice about industrial injuries.

The establishment of an independent Scottish IIAC is essential because the industrial injuries scheme involves complex and specialised medical and epidemiological evidence to assess occupational causation of disease, particularly to provide advice about the list of prescribed diseases, and thus ensure the industrial injuries scheme keeps pace with the ever changing world of work.

If you agree, does the body need to be established in law or would administrative establishment by the Scottish Government of the day be sufficient?

A Scottish IIAC should be established as an advisory non-departmental public body, on a statutory basis with its remit set out in primary legislation, principally to declare its independence from government but also to ensure its deliberations are transparent and that those using the industrial injuries scheme have confidence in the independence of the Scottish IIAC.

It should mirror as closely as possible the existing UK IIAC, whose "continued delivery as an independent, expert scientific advisory body remains the most efficient and effective way" of providing up-to-date, scientifically robust advice to government about the industrial injuries scheme.[ii]

If yes, what practical arrangements should be made for the independent body (for example, the law could state how appointments to it are made and the length of time an individual may serve as a member of the body)?

It should consist of a chairman appointed by the Scottish Government and such number of other members so appointed as the relevant Minister shall determine. Its independent members should consist of specialists in occupational medicine, epidemiology, toxicology and the law. There should be equal representation of workers and industry.

The Purpose, Constitution, Membership and Terms of Reference of the Scottish IIAC should broadly follow the current UK body.[iii] (see DWP Triennial review of the IIAC: Call for evidence, Annex C, Industrial Injuries Advisory Council Terms of Reference, 16 January 2015).

Independent scrutiny of standards

Should there be a statutory body to oversee Scottish social security decision making standards?

There should be an independent Scottish Ombudsman to oversee, maintain and adjudicate on complaints or disputes relating to decision making standards in Scotland's Social Security system.

Industrial Injuries Disablement Benefit (IIDB)

If DLA and PIP help meet the additional costs of disability, what is the role of IIDB and its supplementary allowances (Constant Attendance Allowance, Reduced Earnings Allowance etc) in the benefits system?

Industrial Injuries Disablement Benefit

The Industrial Injuries Benefit scheme was introduced in 1948 to support those who suffered injury or disease because of work. It is a 'no-fault' scheme and so the injured do not have to prove negligence on the part of an employer to be entitled to benefit. Industrial Injuries Disablement Benefit (IIDB), the main payment, is paid for 'loss of faculty'. It represents payment of compensation for the non-pecuniary consequences of injury (personal injury; or 'solatium' in Scottish Civil law). It is paid regardless of fault but since there is no payment for loss of income (for injury on or after 1 October 1990) the main benefit does not provide full compensation for the consequences of injury. IIDB is not intended to help meet the additional costs of disability but is a compensation payment for injury suffered at work and the resulting loss of faculty.

Reduced Earnings Allowance

When the Industrial Injuries Scheme was first set up in 1948, 'special hardship allowance' was paid in addition to the main IIDB payment to compensate for impaired earning capacity. The Minister for National Insurance at the time, Jim Griffiths, introduced the allowance to enable workers to relocate and remain in work without suffering financial hardship. In the House of

Commons in October 1945, he described the allowance as providing "the foundation upon which a great constructive human service can be built, to restore the injured workman to his old job, or if that is impossible, to care for him and his dependents." The allowance was subsequently renamed Reduced Earnings Allowance (REA) and paid where, as a result of accident or disease, the injured was unable to continue in or return to their 'regular occupation' or work in a job paying the same level of earnings. It was a major feature of the Industrial Injuries Benefit scheme until it was withdrawn in 1990. Although payments continue to be paid, entitlement only arises for injury commencing before 1 October 1990.

The abolition of Reduced Earnings Allowance is an important loss to the Industrial Injuries scheme. "This was arguably the most enlightened part of the scheme. It provided an earnings replacement benefit, to enable those with occupational disease, whose health would be adversely affected by remaining in their job, to move to other less well paid work, providing the means to prevent disease progression to a severe and irreversible level of disability."[iv]

REA is not intended to compensate for the additional costs of disability, but rather for reduction of earning capacity caused by the work related injury.

What is right with the IIDB scheme?

IIAC

The independent Industrial Injuries Advisory Council has proven to be "an efficient and effective body providing high quality advice that is well respected by a broad range of stakeholder whilst offering value for money to the taxpayer."[v] There should be a separate Scottish IIAC.

List of Prescribed Diseases

Although criticised by some because it reflects an industrial past heavily benefiting men over women with too high a standard before diseases can be added, for almost 70 years the list of prescribed diseases has resulted in the payment of industrial injuries benefits to thousands of workers suffering from occupational disease.

Before a disease may be added to the list of prescribed diseases under the existing UK statutory provisions[vi], the Secretary of State has to be satisfied that the disease:

i. ought to be treated, having regard to its causes and incidence and any other relevant considerations, as a risk of the occupation and not as a risk common to all persons; and
ii. is such that, in the absence of special circumstances, the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty.

A disease can therefore only be added to the list of prescribed diseases if an occupation carries with it a recognised risk of a particular disease, and the link between disease and occupation can be established or reasonably presumed.

"For purposes of prescription a link has to be made in the individual case between diagnosis and occupational exposure. In general the IIAC adopts one of two approaches to attribution:

- Evidence is first sought of distinctive clinical features in the individual that might point strongly to work as the cause (e.g. a challenge test with a specific allergenic agent from the workplace). This is the approach that was recommended by IIAC when occupational dermatitis and asthma were incorporated into the scheme
- But where clinical evidence is not sufficient, epidemiological evidence is sought that would allow attribution on the balance of probabilities (with at least a doubling of risk in defined occupational groups). This has proved possible in situations where sound research has indicated higher risks of a given outcome in workers identifiable by their shared occupational exposure (eg chronic bronchitis and emphysema in coal miners working underground for more than 20 years)."[vii]

The list of prescribed diseases and the standards that are applied before a disease can be added to the list provides two significant benefits:

1. The injured victim does not need to prove their disease has been caused by their occupation. They need only prove they have been employed in a prescribed occupation and developed a prescribed disease.
2. The presumption of injury in such conditions has allowed the industrial injuries scheme to operate as a high-volume, low-cost, no fault compensation system. In its response to the UK Government's 2007 Consultation the TUC stated that "The administration of the Industrial Injuries Disablement Benefit scheme is currently extremely cost effective. With administrative costs of 2%, it already provides extraordinary value for money."[viii]

What is wrong with the IIDB scheme?

It has been under attack from successive Governments since 1981 which, instead of implementing progressive reform of the scheme, have sought to abolish the scheme.

<u>Reduced Earnings Allowance</u>

Reduced Earnings Allowance should be reintroduced to compensate for reduction in earning capacity caused by industrial injury. Neither Statutory Sick Pay nor Employment Support Allowance compensates for reduction in earnings. Payment of SSP is limited to 28 weeks only but, in any event, those benefits are only paid in the event of a claimant being unfit for all work. REA provided compensation to bridge the gap for those injured, able to work, but not able to continue in their regular occupation and enjoy their pre-injury earning capacity. Reduction in earning capacity has a further knock-on effect in relation to pension contributions with resultant potential reduction in income during retirement. Therefore, Retirement Allowance should similarly be reinstated (at present, eligibility requires payment of REA on reaching state retirement age and not being in 'regular employment').

Non prescribed diseases

Notwithstanding the significant benefits brought about by the prescribed disease system outlined above, those suffering occupational diseases that are not on the list of prescribed diseases have no entitlement and so unable to claim industrial injuries benefit for their disease.

Harsh and illogical consequences follow for many.

For example, a lifelong non-smoking coal miner with 19 years underground at a mechanised coal face cannot claim for Prescribed Disease D12, chronic bronchitis emphysema because he does not have 20 years underground employment. When adding the condition to the list of prescribed diseases, 20 years was set by the IIAC as the qualifying period of employment after which causation could be presumed. The 20 year limit took into account the risks created by both smoking and underground employment in a coal mine.

Gardeners are exposed to a wide variety of hand held vibrating tools sufficient to cause hand arm vibration syndrome but their occupation is excluded from the list of prescribed diseases for the purposes of Prescribed Disease A11.[ix]

In neither example would the injured worker be able to apply successfully for industrial injuries benefit because they are not covered by the prescribed disease qualifying conditions and cannot receive Industrial Injuries Benefits even though, in both cases, there would be reasonable prospects of causation being established under the civil law.

In 1978,[x] the Pearson Royal Commission recommended that the British Government introduce a 'mixed system' ie, those suffering disease on the list of prescribed diseases would continue to benefit from the presumption their condition had been caused by their occupation, but those suffering a non-scheduled disease should be able to claim industrial injuries benefit but subject to the condition that the onus is on that individual claimant to prove the causative link between occupation and disease. The IIAC gave qualified support to the individual proof method[xi] but the recommendation was not accepted by the Government of the day.

Scotland should introduce a mixed system for occupational disease.

Self Employed

The most important economically active group not entitled to claim under the industrial injuries scheme is the self-employed. They pay national insurance contributions but are excluded from the scheme. They number nearly 4.2 million, about 14% of the UK workforce. Scotland has one of the lowest rates of self-employed in the UK.[xii] About 70% of self-employed workers are male. The top three occupations for the self-employed include construction trades and carpenters/joiners. These are industries and occupations that have statistically higher rates of injury.[xiii]

The Industrial Injuries Benefit Scheme should be extended to cover the self-employed where they work in the undertakings of other legal entities.

Should different approaches be taken for people with life limiting conditions compared to people with less severe conditions?

Different approaches are already taken for those suffering life limiting conditions and terminal disease results in assessment of 100% disability. Such payment reflects their suffering during lifetime. Those who suffer from a terminal disease do not, however, receive compensation for loss of life expectancy. A lump sum payment should be paid in such circumstances depending on the extent of the life expectancy loss. It would be a simple system to administer, based on life expectancy rates set out in the Ogden Actuarial tables.[xiv]

In addition to a loss of life expectancy lump sum, for those with terminal illness but no entitlement to early lump sum payment of compensation from statutory schemes such as the Pneumoconiosis etc (Workers' Compensation) Act 1979, then the Scottish Industrial Injuries scheme should provide equivalent lump sum payment.

The IIB scheme does not compensate those who die in consequence of their industrial injury. Industrial Death Benefit was abolished in 1986. A widow(er) or dependents death benefit pension should be introduced.

Are there situations where a one off lump sum payment would be more appropriate than a regular weekly IIDB benefit payment?

Lump sum payments may be appropriate in terminal disease cases where there is no entitlement to other statutory lump sum payments.

Between about 1953 and 1986, those with a disablement assessed between 1 and 20 per cent received a lump sum 'gratuity' payment rather than weekly benefit. Other than byssinosis, mesothelioma, asbestosis, pneumoconiosis and silicosis, a weekly benefit is presently only paid to those with 14% assessment or more (20% or more for occupational deafness).

We support the extension of weekly pension payments from 1% to those suffering from asbestos related diffuse pleural thickening, since to do so would be consistent with the principle excepting the above lung diseases from the 14% threshold.

For other industrial injuries of less than 14% (and occupational deafness) then lump sum payments of benefit should be introduced in the absence of weekly pension entitlement for disablement assessments between 1-13%. However, where an injured worker suffers from two or more industrial injuries, their assessments should continue to operate for the purposes of aggregation, and so become entitled to weekly Industrial Injuries pension payments, if they become 14% disabled or more (or whatever disablement assessment threshold is set by the Scottish legislature).

Should the Scottish Government seek to work with the UK Government to reform the IIDB scheme?

The Scottish Government should seek to work with the UK Government insofar as the Industrial Injuries Scheme in Scotland may be affected by decisions of the UK Government.

Given that the main benefit, IIDB, is paid for the disability caused by loss of faculty, then payment of IIDB should not be included in the assessment of entitlement to any income related benefits. This is consistent with the principle which exempts Disability Living Allowance and the other disability related benefits from assessment for purposes of income related benefits. The implementation in Scotland of such provision concerning payment of IIDB would, however, require an arrangement with the UK Government insofar as income related reserved benefits are concerned.

The consultation document does not consider the role of the UK Compensation Recovery Unit (CRU). IIDB is subject to recovery from civil compensation where compensation is paid for loss of earnings. We presume that arrangements will be made with the UK Government to ensure that recovered benefits find their way back into the Scottish Social Security system.

Although Reduced Earnings Allowance is included in Schedule 2 of the Social Security (Recovery of Benefits) Act 1997, and so recoverable from any civil compensation settlement if earnings loss is paid, in practice recovery of REA does not arise. If Scotland reintroduces REA then arrangements will be needed with the UK CRU to ensure benefits are returned to the Scottish system.

[redacted]

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[i] Industrial Injuries Disablement Benefit (IIDB) Scheme, Consultation Report, June 2007, DWP, http://webarchive.nationalarchives.gov.uk/20100407022214/http://dwp.gov.uk/docs/iidb-response.pdf

[ii] Final Report of the triennial review of the IIAC, 12 March 2015, DWP, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411435/iiac-triennial-review-2015.pdf

[iii] Triennial review of the IIAC – Call for evidence, 16 January 2015, DWP, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396051/IIAC-triennial-review-call-for-evidence-Jan-2015.pdf

[iv] Professor Anthony Newman Taylor, The Changing Nature of Occupation and Occupational Disease, 12 October 2016, IIAC

[v] Final Report of the triennial review of the IIAC, supra note ii, page 28

[vivi] Social Security Contributions and Benefits Act 1992

[vii] Stress at Work as a Prescribed Disease and Post-Traumatic Stress Disorder, Position Paper 13, February 2004 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328600/iiac-pp13.pdf

[viii] Supra, Note i, page 15

[ix] Gardeners are, however, entitled to apply for Prescribed Disease A12, carpal tunnel syndrome, since that disease is prescribed simply where hand held vibrating tools are used.

[x] (1978) Royal Commission on Civil Liability and Compensation for Personal Injury, Stationery Office, Cmnd 7054

[xi] (1981) Report on Industrial Diseases, IIAC, Cmnd 8393, paras 144-149

[xii] Office for National Statistics, Self-employed workers in the UK, http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html

[xiii] Health and Safety Executive, Annual Report 2014-2015, http://www.hse.gov.uk/statistics/overall/hssh1415.pdf

[xiv] Actuarial Tables With explanatory notes for use in Personal Injury and Fatal Accident Cases, Seventh edition, The Stationery Office, 2011 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245859/ogden_tables_7th_edition.pdf