The Association of Personal Injury Lawyers response

to

Industrial Injuries Disablement Benefit scheme

Department for Work and Pensions consultation paper

APRIL 2007

APIL (the Association of Personal Injury Lawyers) was established in 1990 by a group of lawyers working on behalf of personal injury victims and now has over 5,000 members.

APIL campaigns for better laws to help people who are injured or become ill through no fault of their own.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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EXECUTIVE SUMMARY

- APIL believes the principle of a ‘no fault’ occupational injury government benefit scheme remains as valid as ever
- The current scheme is an appropriate and fair mechanism of targeting ‘no fault’ compensation at those most seriously injured
- A holistic view of occupational injury must consider issues such as rehabilitation and the return to work
- The need for greater rehabilitation can only be met by tackling the desperate shortage of rehabilitation and treatment facilities
- Delays in rehabilitation often permanently damage victims’ opportunities to return to work
- Considerations of medical rehabilitation and return to work should not be restricted to those who happen to qualify for IIDB
- APIL recommends that the Industrial Injuries Advisory Council, or a similar body, be maintained
- APIL recommends that the scheme be extended to include self-employed workers
- APIL further supports the recommendation that modern work-related illnesses such as musculoskeletal disorders and stress-related illnesses should be included in the scheme
- APIL would consider it fairer if IIDB was disregarded in the assessment of means-tested benefits
- APIL argues that any benefit scheme should still be funded by the state

PURPOSE

Q1: What is the case for a 'no fault' occupational injuries and diseases scheme?

APIL believes that the principle of a 'no-fault' occupational injury scheme forms an integral part of an equitable welfare system, and remains as valid as ever. Providing adequate support to those who have suffered injury, disease or loss through no fault of their own is a fundamental aspect of a civilised society.

It is equally right and fair that particular recognition and compensation should be available for those who have been injured in the course of their work, while contributing to the country's economy and wealth.

As is reiterated in the consultation paper[1], those able to work are and should be expected to do so by both the state and the wider community. The flipside of this norm must be that society as a whole shares the risks and losses of the minority of workers who had the misfortune to suffer an accident.

Q2: What should the purpose of such a scheme be?

It therefore seems right and fair that those injured through their work should receive a benefit and compensation over and above the amount available to others experiencing illness, disability or unemployment for the reasons outlined above.

This, in essence, is achieved by the current Industrial Injuries Disablement (IIDB) scheme. In APIL's view, this is no less valid a purpose in the twenty-first century than it has been in past decades, irrespective of changes in the labour market or workforce.

APIL would submit that the current scheme is an appropriate and fair mechanism of targeting no-fault compensation at those most seriously injured. While the association would recommend that the scheme should be extended in some respects, to cover all individuals seriously disabled through work, we would urge the Department for Work and Pensions to retain the scheme in principle.

Q3: Should it be a compensation scheme, a benefit scheme, or both?

At present, IIDB offers limited amounts of money to those injured in the workplace. To qualify, a claimant must demonstrate a significant level of disability sustained directly through their work for an employer. In practice, IIDB is often not a benefit which people receive for life. If a claimant's health improves, he will often fall under the required threshold of disablement and cease to be eligible even if he does not fully recover.

[1] pp. 18/ 19

Furthermore, victims with certain life-long disabling conditions (e.g. industrial deafness) routinely do not qualify at all, as their disablement is not considered severe enough.

For these reasons, APIL considers IIDB an indispensable benefit for those most seriously injured at work but its scope could be widened.

OCCUPATIONAL SUPPORT

Q5: How should a new scheme be integrated with measures for the prevention of work-related accidents and illness, rehabilitation, retention, retraining and return to work?

APIL is delighted to read of proposals to enhance the role of rehabilitation. Having campaigned for greater and faster access to rehabilitation for injured people for years, APIL sincerely welcomes the recognition of the fact that more, earlier rehabilitation would benefit the victim, improve their employment prospects and reduce long-term costs to the public purse or compensator.

We concur with the notion that a holistic view of occupational injury must consider rehabilitation for injured people, civil compensation and effective accident prevention as well as state benefits. These are, though, in many respects, separate issues. An effective strategy must therefore understand them as separate pillars of the same scheme.

The paper is undoubtedly right in acknowledging the range of services and measures required after a workplace accident and injury. Yet it does not logically follow that one measure can replace or compensate for a lack of the other.

The family of an injured person cannot meet its outgoings through falling injury statistics, or shorter hospital waiting lists. Neither rehabilitation nor prevention should therefore be presented as an alternative to occupational injury benefits. By the same token, ideas for improved rehabilitation or prevention are no logical starting point for the abolition or replacement of IIDB.

APIL believes that the need for greater rehabilitation can only be met by tackling the desperate shortage of rehabilitation and treatment facilities in England and Wales. Victims' return to work is best facilitated in the workplace, and the 'polluter pays' principle should be maintained and strengthened throughout the compensation system. None of these objectives could, however, be achieved primarily through changes in IIDB, because their relationship to the state benefit system is very limited indeed.

APIL would question to what extent a benefit scheme administered by the DWP could facilitate rehabilitation. There is at present a real shortage of rehabilitation

facilities. Since this is a health care issue, rather than a question of welfare benefits, it is unclear to the association how a reform of a particular state benefit could address the problem.

We share the paper's aspiration for "a scheme that helps people who have been injured or who have contracted a disease at work by providing rehabilitation so that they can quickly recover from their injury or illness and return to work."[2] At the same time, we are surprised at repeated suggestions that injured people would somehow have to be 'encouraged' to take up such an offer, through incentives and disincentives in the payment of benefits.

The vast majority of injured people are, in the experience of APIL members, desperate to return to work and keen undergo any medical treatment to make this possible. The reality of rehabilitation is, however, that the key forms of rehabilitative treatment (physiotherapy, occupational therapy, cognitive behavioural therapy) are virtually impossible to secure through the National Health Service within any reasonable timescale.

Rather than 'discouraging' disabled people from relying on benefits, policy making ought therefore to address the fact that many disabled people who would be keen to get better and move off benefits into employment are forced to wait for many months before they receive the treatment they require. In many cases, the window of opportunity for full or near recovery is lost because patients are left without treatment or prospects in the crucial early months after an injury, leaving their condition to deteriorate at the point when treatment and rehabilitation would be most effective.

While the mobility and long-term employment prospect of many injured people deteriorate as they awaited physiotherapy, nine out of ten physiotherapy graduates could not find employment within the NHS last year.[3] In these circumstances, APIL would question whether IIDB or any other state benefit are at the heart of the problem. It seems to the association that changes in the benefits system cannot remedy the problems which force many victims to rely on state benefits long-term

The consultation paper suggests that the current IIDB scheme does not in any way facilitate or encourage rehabilitation. APIL would question the accuracy of this statement. In the experience of APIL members, the process of applying for IIDB often serves as a gateway to rehabilitation for injured people who would not, otherwise be referred for treatment.

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[2] p. 19.

[3] The Chartered Society of Physiotherapy (2006) 'No NHS jobs for more than 9 out of 10 graduate physios', available at http://www.csp.org.uk/director/newsandevents/news.cfm?item_id=7C66E5E8FEF1CA89D23897F5FC185E18

In order to receive IIDB, injured people are required to undergo a medical examination which assesses the extent of their disability. It is often at this stage, when investigating injuries, future prognoses and treatment options, that recommendations and referrals for rehabilitation are first made.

We would therefore submit that the IIDB system plays a not insignificant role in signposting victims of industrial injury or illness to the best services for rehabilitation and return to work. Notwithstanding, APIL strongly feels that injured people must be referred to rehabilitation earlier to improve outcomes.

Many weeks will normally have passed since the injury before rehabilitation is even considered in the way described above. Injured people rarely apply for IIDB, or indeed know about the benefit, in the early days or weeks after an accident. As is set out in the paper, even after an application has been made, the jobcentre will investigate the victims eligibility and the circumstances of any accident before the victims' injuries assessed by a medical expert who would be in a position to recommend treatment.

The disablement caused by an accident, both physical and mental, is in some cases irreparably exacerbated in the early weeks after an accident, while victims are often left to their own devices, with little or no support.

Rehabilitation must address and prevent such a deterioration as far and as early as possible. Rehabilitation at its most effective and cost effective would commence as soon as an injured person is discharged from an accident and emergency department. Effective rehabilitation cannot be delayed until an application for a state benefit is made.

For this reason, APIL does not believe that a benefit scheme could provide an appropriate gateway to rehabilitation, and would advise against giving any future occupational injury scheme such a function.

APIL shares the sentiment "that an injury at work should not mean someone is written off and consigned to a life on benefits".[4] It is in the interest of injured people, their families, and society that a victim should return to suitable and meaningful employment if they are fit to do so. It is undoubtedly right that every effort should be made to facilitate a disabled person's return to work.

It does not, however, follow from this premise that all victims of occupational injury will or can be helped back into work. On the contrary, the reality is that some victims will never be able to return to work. Even those able and willing to return to employment are unlikely to find work easily or return at the same level as they would have without disability. Many may struggle to find or retain gainful employment at all.

[4] p. 1

Any policy which ignores these realities, or operates on the supposition that injury victims can return to employment without long-term losses is likely to be ill-conceived and fail to respond to some key problems.

The paper is right to note that the nature of employment has changed over the past decades. It would, however, be a fallacy to conclude that the post-industrial labour market accommodates injured and disabled people easily after a period of rehabilitation.

In the largely service sector-based labour market the paper refers to, all the evidence suggests that it is rare for an injured person to return to work at a comparable level, permanently or full-time. Thus Rigg[5] found that disabled people's transition rate into employment is over four times lower than that of non-disabled people, even after allowing for the fact that some disabled people may be unwilling to work, while Shropshire et al. reported that that disabled job seekers spend twice as long seeking work as those who are not disabled,[6] and Jenkins and Rigg concluded that disabled people are less likely to stay in work.[7]

Disabled workers who succeed in finding and retaining employment often work below their skill levels and below their previous rates of pay. Furthermore, disabled people become progressively less economically active over time, and are at an increasingly greater disadvantage compared to non-disabled workers with age.

In this context, APIL notes that organisations representing disabled people are not included in the list of consultees for this paper.

APIL would reiterate that some accident victims will never return to work, because their injuries or diseases are very severe or terminal. By way of example, we note that the Pneumoconiosis etc (Workers' Compensation) Act 1979 is included among the schemes under review in this consultation.[8] In relation to asbestos victims, all the predictions are that the number of asbestos-related lung cancer cases will continue to rise rather than fall in years to come. With a latency period of up to 60 years, median survival rates for mesothelioma sufferers are only around one year from the day of diagnosis.[9]

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[5] Rigg, J (2005) *Labour Market Disadvantages Amongst Disabled People: a Longitudinal Perspective, Centre fore Analysis & Social Exclusion, London School of Economics*, November 2005.

[6] Shropshire et al (1999) *Unemployment and Job Seeking: The Experience of People with Disabilities*, Centre for Research & Social Policy, Loughborough University, Research Report No. 102, DfEE.

[7] Jenkins, SP & Rigg, J (2004) 'Disability & Disadvantage: Selection, Onset & Duration Effects', in *Journal of Social Policy*, vol. 33, no. 3, pp 479 – 501.

[8] p. 6

[9] *Improving claims handling for mestothelioma cases: Response: Forum of Asbestos Victims Support Groups*, p. 4.
British Thoracic Society Standards of Care Committee (2001) 'Statement on malignant mesothelioma in the United Kingdom', in *Thorax*, vol. 2001, no. 56, pp. 250-265.

These cases are but one example of the fact that welfare to work will be unsuitable for many of the most severely injured IIDB claimants, whose needs cannot be met by a policy which presents work as the solution to financial loss caused by accident or illness.

Many of the obstacles to effective rehabilitation which currently impede a quick and full recovery equally prevent victims from remaining in the labour market.

Where victims are offered employment advice (which in the experience of APIL members is not always the case) the object of such advice is often defeated by long waits for treatment and rehabilitation, as a result of which advisers are not able to help victims effectively to return to work. It is not helpful to advise an injured person on the work they might undertake if they had already received the physiotherapy for which they are in fact still waiting. Victims must be helped to regain their fitness to work before they are helped to find work. APIL would recommend that any future occupational injury strategies prioritise and provide services in this order.

In addition, the design of employment services ought to take into account that delays in rehabilitation not merely delay but often permanently damage victims' opportunities to return to work at all. The longer an injured person is kept out of employment by lack of access to medical treatment, the less likely they are to return to work at all. Speeding up access to rehabilitation, through early referrals and reduction of waiting lists should therefore be a key part of any welfare to work strategy.

APIL would like to stress that considerations of medical rehabilitation and return to work should not be restricted to those who happen to qualify for IIDB. Rehabilitation is important, beneficial and cost effective for all injury victims, not merely for the minority who successfully claim this particular form of compensation.

This important distinction appears to be absent from all considerations in the consultation paper. IIDB is and should be a benefit specific to those injured through work. Medical rehabilitation and support in finding employment, on the other hand, should be available to every injured person capable of returning to work.

In this sense, a review of IIDB may not be the ideal framework within which to review rehabilitation and welfare to work, because the latter issue is far broader.

APIL would like to see greater reference made to the role of employers in relation to plans for the rehabilitation, retraining and return to work of injured people.

It is the experience of APIL lawyers that employers do not always play as big a part in facilitating a return to work as they could do. We further believe that the lack of support from employers is not always intentional. Promoting best practice for employers in itself may help injured people return to work as well as allowing employers to retain qualified and experienced staff.

Some employers are, in the experience of our members, genuinely committed to retaining staff and facilitating their return, but may not know how best to manage their relationship with an employee who is off ill. On the one hand, employers rightly avoid disturbing employees or making them feel under any pressure to return to work, particularly if the employee is off work under a doctor's certificate. On the other hand, employees may feel isolated or feel that their employers are unsupportive if no contact is made, or a return is not discussed after the worker feels ready to resume some sort of work while they are still officially signed off.

A perceived positive and supportive attitude from employers can in our members' experience go a long way towards giving injured people the confidence that they can return to work. Effective steps in this area could facilitate rehabilitation at little or no cost to employers, and reduce long-term losses for victims and the public purse.

The association would therefore like to suggest that as part of wider rehabilitation measures the DWP could promote best practice mechanisms for employers to remain in contact with staff during periods of illness.

Notwithstanding, it cannot be assumed that all employers will adopt promoted best practice for facilitating the return of disabled workers. Some employers are less supportive of injured employees than others, and in relation to the less supportive there is an argument that it is too easy for employers to lay off injured, ill or disabled staff.

In so far as it is the purpose of future occupational injury schemes to increase retention and return to work, APIL therefore believes that the rights of injured people to retain their jobs through periods of ill health and return to their previous jobs or employers ought to be strengthened.

That is to say, strategies for return to work should target not solely the injured and unemployed worker through or incentives and services associated with their compensation, but provide clear disincentives for employers who are considering the dismissal off an injured member of staff.

In relation to employers APIL welcomes the suggestion that there should be "financial incentives relating to health and safety for employers to help reduce the risk of accidents and illness occurring"[10].

[10] p. 21

While the association is not entirely convinced that a benefit scheme is the best mechanism through which to promote health and safety, we fully support any proposals to create financial incentives in this respect. We are inclined to agree with suggestions that employers' contributions to any future occupational injury scheme should reflect their health and safety performance. APIL has long worked to encourage greater regard for health and safety to prevent avoidable injuries in the workplace, and agrees that financial incentives and disincentives are instrumental in promoting the business case for health and safety. We lament the fact that insurers still fail to reflect the health and safety records of individual employers, and would in this sense welcome measures to link employer's contributions to a state compensation scheme such as IIDB should be assessed to the safety of their workplaces.

Any future occupational injury scheme should, in our view, not shy away from levying additional charges on employers who fail to fully protect their staff from avoidable injury, or do not take reasonable measure to facilitate the return of their employees after accidents.

Overall, better prevention, rehabilitation and return to work of employees should be self-funding as they allow savings in the areas of sick pay, re-training and the replacement of staff. It is therefore entirely reasonable and proportionate to expect employers to invest in health and safety, and rehabilitation as well as, and to charge those employers who do not take their responsibilities towards employees sufficiently seriously.

DECISION MAKING

Q7: How should inclusion of injuries and diseases in the scheme be decided?

In order to preserve the generally fair and judicious decision making, APIL would recommend that the Industrial Injuries Advisory Council, or a similar body, be retained. The Council comprises a suitable mix of professionals from various backgrounds and, on the whole, has a good track record of advising on injury and illness.

APIL is concerned that take-up of IIDB is low. Specialist APIL members often find that eligible clients are not claiming IIDB, or even aware that such benefits exist, when they first instruct a solicitor. We suspect that many eligible injury victims never receive IIDB because they are unaware of its availability, and would therefore recommend that more should be done in future to raise awareness of this benefit, specifically publicising the scheme in places and environments where potential claimants are likely to be found.

COVERAGE

Q10: Who should be covered by the new scheme?

APIL fully agrees with suggestions in the consultation paper that the exclusion of all self-employed workers is inappropriate, particularly in view of the fact that some self-employed workers today operate in similar conditions or even alongside employees. The association therefore recommends extending the scheme to self-employed workers.

We equally share the sentiment that individuals injured through environmental exposure should be covered by the scheme, provided they were injured through contact with an employee, or contamination from a workplace.

APIL further supports recommendations that modern work related illnesses such as musculoskeletal diseases or stress-related conditions should be covered under the scheme. Whilst recognising the inherent greater difficulties in demonstrating that these conditions were caused by work, we consider it possible to devise criteria under which the scheme could assess whether a period of employment or self-employment was the likely cause such an illness.

In line with our earlier comments on the rationale behind a no-fault compensation scheme, APIL would consider it fairer if IIDB were disregarded in the assessment of means tested benefits. It was the original purpose of IIDB to compensate loss and injury. The scheme makes payments to compensate loss of health or life rather than provide income. APIL therefore feels that compensation and basic income are entirely separate entitlements, and that one should not be reduced or offset against the other.

This principle should, in APIL's view, equally apply to relatives of deceased victims. While victims' themselves are usually able to set up a trust fund for any lump sum payments they receive under the scheme, their families do not have this option. It seems entirely iniquitous that IIDB or Pneumoconiosis compensation should effectively be a payment in lieu of housing or council tax benefit, as widows lose their entitlement to the latter when receiving the former.

As a final recommendation for reform, APIL feels that inequalities not only between living and deceased claimants, but also on the basis of a claimant's age should be reviewed and reduced. In particular, compensation for claimants who have reached retirement age is, in our view, often reduced to unfairly low amounts.

While all of these weaknesses are important areas to address, it is APIL's view that these difficulties are best resolved by reforming the current system, rather than a complete abolition or replacement of the existing IIDB scheme.

FUNDING

Q11: How should any new scheme be funded?

The consultation paper rightly points out that a worker who has been injured through an employer's negligence is entitled to sue the employer for civil compensation, in which case the public purse can recover the cost of state benefits and medical treatment the victim receives.

APIL has always promoted the 'polluter pays' principle, under which all expenses incurred as a result of the negligence are payable by the guilty party, and welcomed new legislation to allow the recovery of health service costs.

In this context, APIL would like to reiterate the importance of access to justice for injured people, and the difference this makes not only to the victim but also to the public purse and thus to society at large. Unless injured workers are able to bring a successful claim for compensation, the costs of rehabilitation and support for victims cannot be recouped through the compensation recovery system, and will therefore unnecessarily fall on the public purse, thus reducing funds available to help other ill, disabled or unemployed people.

Protecting access to justice for injured people should therefore, in our view, form an integral part of any strategy to protect the future funding of an occupational injury benefit scheme.

Notwithstanding the benefits of civil compensation, APIL would point out that this route will never be open to all victims of occupational injury or accident. The possibility of personal injury compensation can therefore not provide an alternative to the existence of a public, no-fault compensation scheme in the form of IIDB.

Q13: How can any new scheme be made simpler, and more cost effective to administer?

The mechanisms for claiming and assessing eligibility for IIDB are, on the whole, fair and straightforward. Whereas the consultation paper asks how the system could be made "simpler, and more cost effective, to administer" (Q13), APIL does not accept the premise that the current system is overly complex or costly to administer.

The administrative costs are low, and decisions are logical and justified. Precisely because IIDB requires no fault to be proven, is not means tested, and not dependent upon National Insurance contributions, the system avoids some of the complexities of other state benefits, and is thus more user-friendly, and less bureaucratic. Awards are made expeditiously and usually correct and appropriate within the rules of the scheme.