

# Employers' Liability and Workers' Compensation: Questionnaire

ANNOTATED BY KAO AND GW FOR MEETING ON 5 NOVEMBER 2010

*[Reports should be structured according to the numbered headings below. Items designated by bullet points need not be addressed in separate sub-headings, but must be addressed clearly and unambiguously. Some headings are followed by explanatory notes in parentheses; these do not form part of the headings.]*

## **General Points**

- 1. Please make sure you follow the organisation of the questionnaire, using the mandatory headings specified, and addressing each and every point in the bullets and parentheses.*
- 2. Please do not add new headings at the existing heading levels. However, you are free to add further headings at lower heading levels.*
- 3. Please keep internal cross references, especially in the text, to a minimum (eg 'This was considered above at no XY'). Use a short summary in the text, supported (if necessary) by a footnoted cross-reference to the appropriate marginal number.*
- 4. Please ensure you provide proper evidence for statements in the text, including such generalities as 'The system is widely considered to work well.'*
- 5. Inclusion of empirical evidence (eg statistics) is particularly important. It can also be useful to note if there is no relevant empirical evidence available.*
- 6. Please do not concentrate exclusively on Code / statutory provisions but refer to decided cases, or even hypothetical examples, to illustrate the principles.*
- 7. Above all, make sure you give substantial consideration in the final section, and at appropriate places elsewhere, to the 'big policy questions' identified on page 7 below.*

## **I. Introduction**

### **A. Basic system of compensation and liability**

- Existence of public insurance schemes covering workplace injuries?

*This section should include a short historical overview, including the date of the WC scheme's introduction and the reasons for it, together with details of any fundamental changes made to it subsequently.*

- General role of private law remedies: primary, supplementary or excluded?

## B. Interaction with other institutions

## C. Empirical evidence

- outline of main sources of empirical evidence and details relating to the relative scope of employers' liability, workers' compensation and (so far as they deal with employees' injuries) other institutions; empirical evidence should also, wherever possible, be integrated into each report at appropriate points throughout

*It is particularly important to include as much relevant empirical evidence as possible. Key statistical information to be included if available includes: number of claims per annum, total/average amounts awarded, numbers of work accidents and occupational diseases per annum; rates of work accidents/occupational diseases over time. Where accident/disease rates have risen or fallen over time, it would be helpful to have an indication of the factors that were or could have been responsible.*

## II. Workers' compensation

*For systems that don't have WC (eg NL) or only very limited WC (eg UK), the report should consider the principal social welfare benefits available to the injured worker.*

### A. Scope of cover

- Workers covered

*One small but significant issue that it might be useful to consider in the comparative report is: Is the worker still covered if the employer has failed to pay the prescribed contributions? If they have not answered it already, reporters should address it in the course of revising their reports.*

- Spatial, temporal and other limitations (eg 'course of employment', with discussion especially of the extent that travelling to and from work is covered)
- Effect of the victim's contributory conduct

### B. Compensation Trigger

- Accidents (including how distinguished from disease)
- Disease (prescribed lists, proof in individual cases or both? Special provision for particular conditions?)

## C. Scope of protection

*Reporters should pay particular attention to the logical arrangement of material under headings C (Scope of Protection) and D (Heads and Levels of Benefit), and deal under each heading with the items specified in the bullet points.*

- Personal Injury
- Sexual Harassment

*If there is compensation for harassment in general, not limited to sexual harassment, please specify.*

- Dignitary Injuries (eg resulting from discrimination)
- Property Damage

*Some reporters said WC did not cover property damage, then (inconsistently) noted that it did cover (eg) damage to prostheses, spectacles, clothes and/or personal equipment. It would be helpful if such exceptions were mentioned briefly here .*

- Pure Economic Loss

(The extent of such protection offered by general employment laws may be mentioned, but the focus should be upon the specific workers' compensation rules and injuries resulting from accidents or disease)

## D. Heads and levels of benefit

- Medical Care

*Please state (at least briefly) if an allowance is provided for gratuitous care, and if the costs of preventative care / screening are covered.*

- Rehabilitation Assistance

*Please indicate the purpose that RA is intended to achieve (eg to return V to the same job, or to any job), how RA is supported (eg provision of (re-)training, the right to return to one's previous job), and whether it is compulsory for the employee. (If so, what is the penalty for refusing?)*

- Lost Earnings, Loss of Earning Capacity and Loss of Pension Entitlements

*A key issue in many systems is managing the 'tail' of those in receipt of periodic benefits. Please specify how a claimant's continued entitlement to benefit is assessed (noting, if appropriate, if a permanent entitlement is recognised for permanent injury).*

- Non-Pecuniary Losses
- Dependants' Benefits
- Comparison with Damages in Tort (How much lower?)
- Lump sums or periodical payments?

## E. Funding systems

- Type of System (Private or public insurance? Voluntary or mandatory? To what extent, if any, can the employer self-insure?)

*Please indicate in addition whether the scheme is run on a fully-funded or pay-as-you-go basis..*

- Contributions to the Workers' Compensation Fund (Who pays for what?)

*Please specify how contributions are calculated. It would be helpful to include relevant statistics (eg average cost as percentage of payroll).*

- Incentives (eg Risk-Rating of Contributions)?

*Please specify if experience or 'observed conditions' rating is used, or another method of variable contributions, or only a flat rate (for all employers? for employers in a particular risk category?).*

## F. Administration and adjudication of claims

- Organisational Framework of Workers' Compensation Institutions
- Who Decides over Claims for Benefits?
- Reviews and Appeals: Special tribunals or general civil justice system?

*Please specify if the appeal tribunal substitutes its own decision or only nullifies the initial decision and remits the case for re-hearing.*

- Speed of claims' resolution and administrative cost

*Statistics would be particularly useful here, eg as to admin costs as a percentage of overall costs (or as compared with compensation costs)..*

## G. Rights of recourse of workers' compensation institutions

- Recourse against the Employer.
- Recourse against a Co-worker?
- Recourse against Third Parties (equipment/component manufacturers, suppliers of raw materials, etc).

## H. Interaction with general social welfare provision and private insurance

*This section was addressed in rather cursory fashion in some reports.*

- Fund of First Resort (Who initially bears the cost: the Social Health Insurance/Public Health Service, Private Health Insurance or Workers' Compensation?)

- Deductibility of Benefits (Collateral Source Rule? – Are benefits provided by social or private health insurance deducted from claims against workers' compensation carriers)
- Recourse of Social Welfare Agencies, Social Health Insurance, Private Health Insurers, etc, against Workers' Compensation Institutions?

#### I. Interaction with employers' liability

*Please avoid unnecessary duplication with material supplied in Section III. That should be where full details of (eg) deduction of WC benefits from damages is discussed. A short summary here should be enough.*

- Availability of Damages in addition to Workers' Compensation Benefits?
- Deductibility of Benefits provided by WC from Claim against Employer (Collateral Source Rule?)
- Subrogation of WC into the Claim of Worker against Employer?

### III. Employers' liability

*In general, please highlight any interesting contrasts with WC.*

#### A. Classification

- Contract or tort?

*If both are available, please consider whether a contract claim can be used to circumvent limits of tort (eg exclusion of pure economic loss) and vice versa .*

- General Law or a Special Category?

#### B. Elements of liability

- Liability of employers for their own acts or omissions

*Please consider the employer's liability for system and coordination failures.*

- Liability of employers for the acts or omissions of their employees and others (the scope of vicarious liability; the effect of any 'common employment' exclusionary rule)
- Relevance of health and safety legislation in establishing liability
- Overall a fault-based or strict liability?
- Causation (highlighting specific problems of causal uncertainty related to work injuries).
- Effect of the victim's contributory conduct

## C. Scope of protection

*Please include statistics, if available, on numbers and costs (including compensation costs) of claims.*

- Personal Injuries.
- Sexual Harassment.

*If there is liability for harassment in general, not limited to sexual harassment, please specify.*

- Dignitary Injuries (eg resulting from discrimination).

*Do not provide a full account of anti-discrimination law, but do give details of the compensation claims that can be made (identifying any material differences from general civil liability).*

- Property Damage.
- Pure Economic Loss

*If relevant, mention if there is liability for failing to insure employees against injury (ie for loss of insurance benefits).*

## D. Heads and levels of damages

- Same Level as in other Cases of Personal Injury?
- Main heads of recoverable damages
- Costs of Medical Care

*Please state (at least briefly) if an allowance is provided for gratuitous care, and if the costs of preventative care / screening are covered.*

- Costs of Rehabilitation Assistance

*Highlight any difference in how these costs are handled in EL as opposed to WC.*

- Lost Earnings, Loss of Earning Capacity and Loss of Pension Entitlements
- Non-Pecuniary Losses
- Dependants' Benefits
- Form of Payment (Lump sums or periodical payments?)

## E. Administration of claims

- Courts or Specialised Tribunals?
- General Civil Procedure or Special Procedures?

*Please mention any specific pre-trial procedures.*

- Reviews and Appeals
- Speed of claims' resolution and administrative cost

#### F. Rights of recourse

- Against other Employees (who caused the harm) or their liability insurer?
- Against Third Parties (equipment / component manufacturers, suppliers of raw materials, etc) or their liability insurer?

#### G. Interaction with Social Welfare Systems and Private Insurance

- Deductibility of Benefits Received from Social Welfare Agencies (Collateral Source rule)?
- Recourse of Social Welfare Agencies and Private Insurers against the Employer?

#### H. Insurance

*Please address the particular issue of insuring against liability for harassment, discrimination and other non-physical injuries to the person (identifying any material differences from general employers' liability insurance).*

- Voluntary or mandatory? (If voluntary, how common?)

*Several reporters failed to deal with the question in brackets..*

- General Liability Insurance or Special Policy? (If a special policy, what is its usual scope?)
- Basic Principles of Employers' Liability Insurance (Trigger, Scope of Coverage, Exclusions, Limits, Deductibles , etc)

### IV. Evaluation and conclusions

*It is vital that every report addresses the big policy questions here, especially:*

*\* As regards WC, what justifications are given for extending benefits to injured workers that are not available (via social welfare) to injured persons generally, and what criticisms are made of this 'employee preference'?*

*\* If EL is wholly or partly excluded, what justifications are given for denying compensation to workers injured by fault or risky activities that would be available (via general civil law) to persons generally if injured by fault or risky activities, and what criticisms are made of this limitation of worker's rights of action?*

*\* What justifications are given for preferring a one-track (EL or WC) over a two-track (EL plus WC) approach, or vice versa, and what criticisms are made of this*

*choice? If a two-track system is adopted, is this perceived to increase overall costs; if so, is the increased cost justified?*

*These questions should be addressed with reference to the attitudes of affected interest groups (including employers/their representative organisation and workers/their unions), as well as debates in the legal literature. But please state your personal views too.*

A. Compensation

- Does the overall system provide compensation of adequate breadth at adequate levels?

B. Prevention

- Are there appropriate incentives to ensure health and safety and compliance with relevant regulations?

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C. Overall costs

- Are they reasonable in the light of the benefits provided?

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*Obviously, statistics would be very useful here, including a comparison over time, if possible (eg have WC / EL / combined costs risen or fallen as a percentage of payroll?).*

D. Interaction between workers' compensation and private law (Employers' Liability)

- Does this interaction further or obstruct the goals of compensation and prevention?

E. Plans for reform

E. Overall Quality of each system independently and in combination.

- How do they work in the eyes of those concerned? Principal advantages and disadvantages.