

Scottish Employment Injuries Advisory Council Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Scottish Employment Injuries Advisory Council Bill, introduced in the Scottish Parliament on 8 June 2023. They have been prepared by the Non-Government Bills Unit on behalf of Mark Griffin MSP, the member who introduced the Bill.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 30–LC);
 - a Financial Memorandum (SP Bill 30–FM);
 - a Policy Memorandum (SP Bill 30–PM);
 - a Delegated Powers Memorandum (SP Bill 30–DPM).
3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

Summary

4. The purpose of the Bill is to establish a Scottish Employment Injuries Advisory Council (“the Council”) to research, shape and scrutinise the social security available to people injured in the course of their employment.

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5. In Scotland, the relevant form of assistance is employment-injury assistance provided under section 33 (once it comes into force) of the Social Security (Scotland) Act 2018 for those having suffered an injury or a disease in the course of employment. This assistance replaces industrial injuries disablement benefit in Scotland following the devolution of certain social security powers, including industrial injuries benefits, through the Scotland Act 2016. Ministerial powers (see section 33 of the Scotland Act 2016 and section 53 of the Scotland Act 1998) were not transferred in relation to industrial injuries advisory bodies, and as a result, Scottish Ministers do not have access to the UK Industrial Injuries Advisory Council (“IIAC”), which has advisory and scrutiny functions in relation to industrial injuries benefits.

6. The Bill therefore establishes the Council to play a similar role as the IIAC but in Scotland, with a range of functions including scrutinising related legislation, reporting to the Scottish Ministers and the Scottish Parliament and the addition of research functions. The functions and expertise of the Council will compliment and in the case of legislative scrutiny and reporting replace the role of the Scottish Commission for Social Security under the Social Security (Scotland) Act 2018 in relation to employment-injury assistance.

7. At the time of introduction of this Bill, section 33 and schedule 7 of the Social Security (Scotland) Act 2018, which cover employment-injury assistance, have not come into force. Industrial injuries disablement benefit is still being provided under interim arrangements between the Scottish Government and the Department for Work and Pensions. By establishing a Council in advance of the roll out of employment-injury assistance, it is hoped that the Council’s expertise will play a role in shaping this.

8. The Bill is in 11 sections and has 3 schedules.

Commentary on sections

Section 1: Establishment

9. Subsection (1) of section 1 of the Bill establishes the Council. Subsection (3) introduces schedule 1, which makes detailed provision for the status, powers, procedure, financing and membership of the Council.

Section 2: Functions

10. Section 2 sets out the Council’s core functions. These include scrutiny of proposals for legislation; reporting to the Scottish Ministers and the Scottish Government on any matter relevant to employment-injury assistance that the Council is asked to report on by the Scottish Ministers or the Scottish Parliament, in respect of any research or any other matter the Council consider appropriate; and carrying out, commissioning, or supporting research into any matter relevant to employment-injury assistance. Subsection (2) enables the Council, when exercising any of the core functions listed in subsection (1), to have regard to any international human rights instruments that may be relevant to its work, for example the International Covenant on

Economic, Social and Cultural Rights. Subsection (3) requires that when the Council produces a report in pursuance of a function listed in subsection (1) it must make that report available to the public within one month of submitting the report to the Scottish Ministers or the Scottish Parliament. In doing this, the Council must, under subsection (4), have regard to the importance of communicating in an inclusive way. Under subsection (5) the Scottish Ministers may confer additional functions on the Council by regulations. Under section 4(2)(a) these regulations are subject to the affirmative procedure.

Section 3: Further procedure for employment-injury assistance regulations

11. Section 3 sets out further procedure for regulations on employment-injury assistance, including the involvement of the Council. These regulations are made under section 33(2) of the Social Security (Scotland) Act 2018 and are subject to the procedures set out in sections 96 and 97 of the 2018 Act. These sections of the Social Security (Scotland) Act 2018 set out which laying procedure the regulations are subject to and the involvement of the Scottish Commission on Social Security. The amendments set out in schedule 2 of this Bill remove employment-injury assistance from the scope of the procedure in section 97 of the Social Security (Scotland) Act 2018 as the role of the Commission is replaced by the Council and the procedure in this section.

12. Section 3 provides that, before the Scottish Ministers can lay draft regulations on employment injury-assistance before the Scottish Parliament for approval, they must first notify the Council of the date on which they will inform them of the proposals, then inform the Council of those proposals, tell the Parliament they have done so, and make the proposals public. Those proposals must be in the form of draft regulations and under section 3(3) unless urgent the gap between Scottish Ministers notifying the Council they will receive proposals and providing the Council with the proposals must be no less than one month.

13. Under section 3(4) and 3(5)(a), the Council must then prepare a report commenting on the proposals having regard to the Scottish social security principles and any relevant international human rights instruments. In accordance with section 3(5)(b) and (c) in preparing its report, the Council must consult those with experience of being exposed to the risk of suffering an injury or contracting a disease in the course of employment, as well as their representatives, which must include, where they exist, trade unions and relevant charities. Under section 3(6), if the Council's members are unable to agree the terms of the report unanimously, the report must set out in the matters in respect of which members differ. The Council must, under section 3(7)(a) submit a copy of its completed report to the Scottish Parliament and the Scottish Ministers. It must also make it publicly available within one month of this submission (section 3(7)(b)).

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14. In the normal course of events, the Scottish Ministers will lay the draft regulations before the Scottish Parliament for approval only after the Council has reported on the proposals. Unless urgent, under section 3(8) the Scottish Ministers must not lay the draft regulations before the Scottish Parliament before the date which is the earlier of the date on which they receive the Council's report, or 3 months from having informed the Council of their proposals.

15. Section 3(9) allows the Scottish Ministers to disregard the timescales in sections 3(3) and 3(8) for reasons of urgency.

16. Under section 3(10), when laying the draft regulations before the Scottish Parliament, the Scottish Ministers must also lay before the Parliament a response to the Council's report (including all the points set out in section 3(11) or if the Scottish Ministers have relied on section 3(9) so as not to comply with the relevant timescales the reasons for this, including why they consider there is such urgency. It is then up to the Parliament to decide whether to approve the draft regulations in the usual way. The points that the Scottish Government's response must explain under section 3(11) are: how, if at all, the regulations differ from the proposals; how the Scottish Ministers have sought to address the Council's report; and any recommendations contained in the report that the Scottish Ministers do not accept.

17. Section 3(12) provides that the process described in the preceding paragraphs does not apply to regulations, which simply consolidate earlier regulations. This is the same as with other social security regulations, which are scrutinised by the Scottish Commission for Social Security. Once regulations have been significantly amended a number of times, they can become hard to follow. A consolidation does not change the legal effect of the regulations as amended, but rather restates the current law for the sake of making it clearer and easier for users to follow. As the purpose of involving the Council in scrutinising regulations is to have the benefit of expert insight into the effects of proposed changes, there is nothing for the Council to report on for consolidation regulations (because the current law is not being changed). Nonetheless, if the Ministers or the Parliament particularly wished the Council to report on a proposal to consolidate regulations, or the Council considered it appropriate, a report could be requested under section 2(1)(b) or (c).

Section 4: Regulation-making powers

18. Section 4 sets out the parliamentary scrutiny procedures which are to apply to regulations made under the Act. Regulations to confer additional functions on the Council under section 2(5) are subject to the affirmative procedure. Section 4(3) provides that once the Council has been established the Scottish Ministers must consult the Council about any such additional functions being conferred. Regulations to prescribe additional bodies from which the Council can obtain access to information under paragraph 4(2)(i) of schedule 1 or to increase the number of members of the Council under paragraph 13(2) of schedule 1 are also subject to the affirmative procedure. Regulations to make ancillary provision under section 7 are subject to the affirmative procedure if they amend primary legislation, otherwise they are subject to the

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negative procedure. The negative and affirmative procedures are defined by sections 28 and 29 (respectively) of the Interpretation and Legislative Reform (Scotland) Act 2010. Put briefly, regulations subject to the negative procedure can be made by Ministers without prior parliamentary approval but Parliament can vote to annul them after they are made. Regulations subject to the affirmative procedure cannot be made by Ministers unless and until Parliament approves them in draft.

Section 5: Power to work with others

19. Section 5 expressly allows the Council to consult, assist or work jointly with a prescribed list of bodies, as well as anyone else the Council considers appropriate, at their discretion. This (like all other sections) is subject to the Council's functions, so that work could only be undertaken if it would further the performance of the Council's functions.

Section 6: Amendments to the 2018 Act

20. Section 6 introduces schedule 2, which makes certain amendments to sections 22 and 97 of the Social Security (Scotland) 2018 Act. These are explained in more detail in paragraphs 47 and 48 below. In summary, the effect of these changes is to:

- remove certain scrutiny and reporting functions in relation to employment-injury assistance from the Scottish Commission on Social Security as these functions will now be undertaken by the Council in accordance with section 2 of this Act, and
- exempt employment injury-assistance regulations from further procedure involving the Scottish Commission on Social Security under the 2018 Act, as these regulations will now be scrutinised by the Council and subject to the procedure in section 3 of this Act.

Section 7: Ancillary provision

21. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with the Act or any regulations made under it. These regulations cannot remove functions conferred on the Council by this Act. Regulations under this section are subject to the affirmative procedure to if they amend primary legislation, otherwise they are subject to the negative procedure (see section 4).

Section 8: Application of public authorities legislation

22. Section 8 introduces schedule 3, which amends certain enactments relating to public authorities in order to bring the Council within their provisions (see paragraphs 49 to 56 below).

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Section 9: Interpretation

23. Section 9 provides the definition of various terms used in the Bill: “the 2018 Act”, “communicating in an inclusive way”, “employed earner”, “employment-injury assistance”, “international human rights instrument”, “member of the Scottish Government”, “Scottish social security principles” and “Trade union”.

Section 10: Commencement

24. Section 10 provides that the provisions of this Act come into force at the end of the period of 6 months beginning with the day of Royal Assent.

Section 11: Short title

25. Section 11 provides for the short title to be the Scottish Employment Injuries Advisory Council Act 2023.

Schedule 1 – Operation and Composition of the Scottish Employment Injuries Assistance Council

26. Schedule 1 makes detailed provision for the status, powers, procedure, financing and membership of the Council.

Part 1 - Status

27. Paragraph 1 sets out that the Council is not subject to the direction or control of any member of the Scottish Government (subject to any contrary statutory provision). This is to ensure the Council’s independence in the exercise of its functions.

28. Paragraph 2 states that the Council is not to be regarded as a servant or agent of the Crown, or as enjoying any status immunity or privilege of the Crown.

Part 2 - Powers

29. Paragraph 3 permits the Council to do anything which appears to the Council to be necessary, expedient or conducive to the carrying out of its functions. These general powers are intended to give the Council a sufficiently wide range of powers to undertake any activity connected with its main functions, such as entering into contracts or obtaining advice, assistance or any other service from a third party (such as legal advice from a solicitor).

30. Paragraph 4 allows the Council a right of access at reasonable times to any relevant information that the Council may reasonably require for the purpose of performing its functions, and allows the Council to require any person who holds or is accountable for relevant information to provide at reasonable times any assistance or explanation that the Council may reasonably require for the purpose of performing its

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functions (or exercising its right of access to relevant information for the purpose of performing its functions). Sub-paragraph (3) provides that these provisions are subject to any other enactment or rule of law that prohibits or restricts the disclosure of any information or the giving of any assistance or explanation.

31. Paragraph 4(2) defines ‘relevant information’ as information in the possession or under the control of any member of the Scottish Government, a local authority, higher education institutions, certain health related bodies and the Scottish Fire and Rescue Service. The power also extends to other Scottish public authorities within the meaning of section 3(1) of the Freedom of Information (Scotland) Act 2002 (“FOISA”) this includes public authorities listed in Schedule 1 of FOISA, bodies designated by order under section 5(1) of FOISA and publicly owned companies, as defined in section 6 of FOISA. The Scottish Ministers may make further additions by regulations. Any such regulations are subject to the affirmative procedure (see section 4).

Part 3 - Procedure

32. Paragraph 5 gives the Council the power to establish committees and sub-committees to, for example, provide advice or carry out a Council function. Members of committees or sub-committees may include people who are not a member of the Council. Such members may be paid (see paragraph 9(2) of this schedule) but are not entitled to vote. This will allow the Council, where needed to gain access to additional specialised expertise and external resources.

33. Paragraph 6 gives the Council the power to determine its own procedures (including quorum) and that of committees and sub-committees. Paragraph 6(2) provides that the Council must hold at least one meeting a year that is open to members of the public.

34. Paragraph 7 permits the Council to delegate certain functions to any of its members or any of its committees or sub-committees. This means that not everything that may, or must, be done by the Council need be done by the members as a collective body.

35. Paragraph 8 provides that the validity of things done by the Council or its committees or sub-committees are not affected by any vacancy in membership, defect in appointment of members or when a member's appointment is terminated early by virtue of paragraph 16 of this schedule.

Part 4 - Finance

36. Paragraph 9 provides for the payment by Scottish Ministers of remuneration and expenses to Council members and other committee or sub-committee members.

37. Paragraph 10 provide for payment by Scottish Ministers for allowances and fees for other persons attending Council, committee, or sub-committee meetings.

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38. Paragraph 11 sets out that it is the responsibility of the Scottish Ministers to provide the council with staff and other resources that the Council requires to carry out its functions.

39. Paragraph 12 requires the Council to keep accounts and to prepare a statement of account for each financial year and send a copy to the Auditor General for Scotland for audit. The phrase “financial year” is defined in schedule 1 of Interpretation and Legislative Reform (Scotland) Act 2010 as a year ending with 31 March. In these matters the Council must comply with any directions given by the Scottish Ministers. As the Council’s accounts are required, by statute, to be sent to the Auditor General for Scotland for auditing, sections 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000 (“the 2000 Act”) apply. These require the Council’s accounts to be sent to the Auditor General not later than 6 months after the end of the financial year in question and for the Auditor General to audit the accounts or appoint someone suitably qualified to do so. The accounts, and the auditor’s report on them, are then sent to Scottish Ministers to then lay before the Scottish Parliament and publish (unless published by the Council) not later than 9 months after the end of the financial year to which the account relates. In addition, the principal accountable officer for the Scottish Administration can designate someone to be the Council’s accountable officer (see section 15(3) of the 2000 Act), and the Auditor General for Scotland can look into whether the Council has been using its resources appropriately (see section 23 of the 2000 Act).

Part 5 - Membership

40. Paragraph 13 provides that the Council consists of a member appointed as chair and at least 6 but no more than 12 other members. The Scottish Ministers may by regulations amend the maximum number of members and specify the time for which this change would apply. These regulations would be subject to the affirmative procedure under section 4(2)(b).

41. Paragraph 14 sets out that Council members are appointed by Scottish Ministers. The initial members must be appointed no later than 6 months from the date of commencement of this Act. Following the appointment of the initial members, the Scottish Ministers must consult the Council in respect of the appointment of any future members. When appointing members to the Council the Scottish Ministers must have regard to the desirability of securing that the Council as a whole has relevant experience and knowledge of the matters specified in sub-paragraph (5), which include employment assistance policies, research in connection with injuries and diseases in course of employment, Scots law in respect of employment and personal injury, relevant medical practice, the effect of disability on daily life and disability as a result of injuries or disease in the course of employment. The Scottish Ministers must also have regard to the desirability of having a member on the Council with personal experience of having a disability arising from or as a result of injuries suffered or disease contracted in the course of employment, having Council members who represent both employers and employed earners (for example, trade unions), as well as the Council having new members. Sub-paragraph (6) imposes a requirement that other than the chair the Council’s members represent employers and employed earners equally. In achieving

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this balance Scottish Ministers must consult with such organisations as they think fit. In making their appointments the Scottish Ministers will also be subject to other public body legislation such as the Public Appointments and Public Bodies etc. (Scotland) Act 2003 which requires them to comply with a code of practice, and the Gender Representation on Public Boards (Scotland) Act 2018 which requires steps to be taken to achieve a gender balance in membership. See paragraphs 54 and 56 below.

42. Paragraph 15 deals with the tenure and other terms and conditions of appointment of members of the Council. Members are to be appointed for 3 years and may be reappointed. In consultation with the Council, the Scottish Ministers may determine other terms and conditions of membership of the Council.

43. Paragraph 16 sets out the circumstances in which a person's membership of the Council will terminate before the person's period of appointment has come to an end, namely:

- where they resign,
- if the person becomes disqualified (see paragraph 17),
- if the person is removed as a member by the Scottish Ministers because they consider the member is unfit to continue as a member or unable to perform the member's functions.

44. Paragraph 17 sets out certain categories of person who may not be appointed as a member of the Council. The list of disqualifications is to ensure that the Council is free from political influence, given that the role will involve scrutinising laws over which these institutions have influence or control, either as part of a legislature or local or national government. Where a member of the judiciary may be involved in legal proceedings related to social security they are also excluded by virtue of sub-paragraphs (2)(h)-(j).

Schedule 2 – Amendments to existing enactments

45. Schedule 2 amends the Social Security (Scotland) Act 2018.

46. Paragraph 1 adds a subsection (2A) to section 22(2) of the 2018 Act, which sets out the functions of the Scottish Commission on Social Security. The effect of this addition is to remove certain functions (scrutinising legislative proposals and preparing and reporting to the Scottish Ministers and the Scottish Parliament) in relation to employment-injury assistance from the Commission as these functions will now be undertaken by the Council under section 2 of this Act.

47. Paragraph 2 amends section 97(1)(a) of the 2018 Act with sets out further procedure for regulations about various forms of assistance under the 2018 Act, in particular the involvement of the Scottish Commission on Social Security. The effect of this is to exempt employment injury-assistance regulations under section 33 of the 2018 Act from this procedure, as these regulations will now be subject to the procedure in section 3 of this Act and the scrutiny of the Council.

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48. These changes reflect the expertise of the Council in relation to employment-injury assistance and avoid duplication of work by the Scottish Commission on Social Security.

Schedule 3 – Application of public authorities legislation

Ethical Standards in Public Life etc. (Scotland) Act 2002

49. Paragraph 1 of schedule 3 adds the Council to the list of devolved public authorities in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2002. This means that the Council will need to:

- have a code of conduct for its members, whose compliance with the code will be policed by the Standards Commission for Scotland and which Council members will be under a duty to have regard to in carrying out their functions and activities as members of the Council, and
- maintain a public register of its members' interests.

Freedom of Information (Scotland) Act 2002

50. Paragraph 2 of schedule 3 adds the Council to the list of Scottish public authorities in schedule 1 of FOISA. This means that the Council will be subject to the requirements which FOISA places on public authorities, including requirements to provide information to the public on request and to have in place a scheme for the proactive publication of information it holds.

51. Being a public authority within the meaning of FOISA also makes the Council a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004 apply. This means that the Council will be subject to requirements to publish environmental information it holds and make it available on request.

52. It also means that the Council falls within the definition of a “public body” under section 44 of the Climate Change (Scotland) Act 2009. This means that the Council must act in a way calculated to contribute to the delivery of climate change targets and any climate change adaptation programme and in the way that the Council considers is most sustainable. The Council can also be made subject to further climate change duties, including reporting duties.

53. In addition, as a public authority within the meaning of FOISA, the Council is a “public authority” or “public body” for the purposes of the UK General Data Protection Regulation (“UK GDPR”) by virtue of section 7 of the Data Protection Act 2018 (subject to the power under that section to remove that status not being exercised). In accordance with section 3(10) of the Data Protection Act 2018 the UK GDPR means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern

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Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018, and the interpretation in section 205(4) of the Data Protection Act 2018. There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data controllers and processors) in the UK GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

Public Appointments and Public Bodies etc. (Scotland) Act 2003

54. Paragraph 3 of schedule 3 adds the Council to the list of specified public authorities in schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003. This means that the Scottish Ministers, when appointing the Council’s members, will need to comply with the code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland.

Public Services Reform (Scotland) Act 2010

55. Paragraph 4 of schedule 3 adds the Council to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010. This means that it is a body in relation to which an order can be made under section 14 of that Act where it would improve the exercise of public functions, having regard to efficiency, effectiveness and economy. An order under section 14 of the 2010 Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body; and
- amend the constitution of a public body.

Gender Representation on Public Boards (Scotland) Act 2018

56. Paragraph 5 of schedule 3 adds the Council to the list of bodies in schedule 1 of the Gender Representation on Public Boards (Scotland) Act 2018. This means that in appointing the members of the Council, the Scottish Ministers must ordinarily give preference to a woman if there are equally qualified candidates – one who is a woman and one who is not – where appointing a woman would result in, or be a step towards, 50% of the directors being women (see section 4 of the Gender Representation on Public Boards (Scotland) Act) 2018). This is subject to consideration of whether the appointment of the candidate who is not a woman is justified on the basis of a characteristic or situation particular to that candidate. In addition, section 5 of the Gender Representation on Public Boards (Scotland) Act 2018 requires that steps be taken by both the Scottish Ministers and the Council to encourage women to apply to be Council members.

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