

HEALTH AND SAFETY EXECUTIVE CONSULTATION

**REVISED PROPOSALS FOR AMENDMENTS TO THE CONTROL OF
ASBESTOS AT WORK REGULATIONS AND A NEW SUPPORTING
APPROVED CODE OF PRACTICE**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

FEBRUARY 2002

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4900 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association 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 the 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.

2. APIL welcomes this second opportunity to comment upon the proposed amendments to the Control of Asbestos at Work Regulations and a new supporting approved code of practice. Whilst APIL still has some concerns about the regulations, we are fully supportive of the direction in which they are moving.

The Initial Assessment of the Location of Asbestos

3. In our first response, APIL expressed its full support for a requirement on employers to survey their premises to identify the location of asbestos. We raised concerns, however, about the effectiveness of the survey that would be achieved under the draft regulations. We remain concerned that the employer in making an assessment as to whether asbestos is, or is liable to be, present in non-domestic premises is only required to take such steps as are “reasonable in

the circumstances”. We continue our call for employers to be required to conduct a “comprehensive and detailed survey”.

4. In addition, we expressed our concern that an employer would be able to carry out an assessment without any specialist knowledge of asbestos use in buildings. We are pleased, therefore, that the HSE is actively encouraging the development of an accreditation and personnel certification scheme for asbestos surveyors, setting the standards to which surveys must be undertaken and ensure that they are only carried out by trained and competent staff. The HSE states that if these schemes prove successful, consideration will be given to introducing a legal requirement for duty holders to use only accredited/certified organisations or individuals to carry out asbestos surveys. APIL calls, however, for the introduction of such a legal requirement as soon as possible. APIL would also fully support the introduction of a new legal duty on employers to ensure that any organisation they use to undertake the analysis of materials for the identification of asbestos is appropriately accredited.

Progressive Removal of Asbestos

5. APIL recognises that unnecessarily removing asbestos in good condition may be inappropriate, but strongly believes that a system of progressive removal should be included within the regulations (as opposed to the ACoP). The Government must require the removal of asbestos in appropriate circumstances to eliminate future risk. APIL believes that asbestos should be removed as soon as its condition starts to deteriorate. All removal should be conducted by specialist firms.
6. In fact, APIL believes that Article 5(2) of the Chemical Agents Directive requires the removal of asbestos where it is not required for the type of work at the relevant workplace, as it states:

“Risks to the health and safety of workers at work involving hazardous chemical agents shall be eliminated or reduced to a minimum by...reducing the quantity of chemical agents present at the workplace to the minimum required for the type of work concerned...”

7. We believe, therefore, that the UK is obliged to implement a system of removal and the regulations, as they are currently drafted, do not comply with the Chemical Agents Directive. It is recognised, however, that progressive removal, in appropriate circumstances, is preferable. All asbestos will eventually have to be removed from buildings as it deteriorates and such removal will obviously cause undesirable risks. The longer, however, asbestos is retained in a building, the more people who will be exposed to the risk.

The Duty Holder

8. In APIL’s first response we agreed that the duty holder should be “the employer in control of premises which they occupy and in which persons work.” We appreciate the arguments made by some respondents that the proposal did not adequately deal with the many situations in which the occupier of the building was not solely responsible for either the fabric of the building or the control of the maintenance activities carried out there. We agree with the HSC’s suggestion, therefore, that regulation 4 should be amended to:
 - Place a duty on the employer to ensure that the requirements of draft regulation 4 are carried out; and
 - Introduce a duty on all other parties who have, by virtue of any contact or tenancy, an obligation in relation to the maintenance or repair of the premises (or any means of access/egress to/ from them) to take the necessary measures to enable the employer to meet those requirements.

“Unoccupied” Buildings

9. The HSC notes that there may be situations in which there is no occupier, for example, where a building has been left empty. To ensure that the risks from asbestos are properly dealt with, it is suggested that an additional legal duty should be created. Under the common law, even an empty building has an “occupier”. We agree, however, that non-domestic premises that are not occupied by an employer and in which people do not normally work will not be surveyed under regulation 4. This means that workers sent to do some work on those premises may be at risk of coming into contact with asbestos without knowing it. Whilst the workers’ employer would be required, under regulation 6, to ensure that he does not carry out work which is liable to expose his employees to asbestos, if an appropriate survey has not been carried under regulation 4, it would be difficult to comply with this. We agree, therefore, that it would be helpful to address this gap in the regulations. If the duty to survey is placed on someone other than the employer, a duty should be placed on that person to share the relevant information with employers of workers who go to work at their premises, to ensure that the employer can comply fully with regulation 6.

Individual Dwellings

10. The HSC notes that some respondents felt that the proposed duty should be extended to individual domestic dwellings, particularly those in social rented housing. We would agree with this because, as argued by the TUC, the risks to workers are the same. We understand, however, that this matter will be pursued separately. We agree that there should be no delay to the introduction of the regulations in their current scope.

The Risk Assessment Under Regulation 4

11. Regulation 4, which requires an employer to assess the risks to his workforce arising from exposure or potential exposure to asbestos, should include a non-exhaustive list of the factors that should be taken into account when carrying out that assessment. These factors, crucial to the effectiveness of the risk assessment, should not be included in guidance whether it is an ACoP requirement or general guidance. Such factors to be included are:

- The condition of the asbestos or asbestos containing material
- The potential for future disturbance of the asbestos due to the level of activity in the immediate area
- The risk of vibration.

The Extent of the Duty

12. Regulation 3 states that the duties owed by an employer to his employees shall also be owed to “any other person who may be affected by the work activity” but only “so far as is reasonably practicable”. APIL believes that the same duty should extend to all who may be affected by exposure to asbestos on work premises, whether employee, independent contractor or member of the public. That duty should not be qualified in any way.

13. This would not greatly increase the burden on employers in complying with the regulations, as they would, in any event, be required by the regulations to minimise the risk and minimise the number of persons coming into contact with the asbestos.

Provision of Information

14. Regulation 4 requires only “adequate” measures to be taken to ensure that information about the location and condition of any asbestos or any such substance is provided to every person liable to disturb it. This regulation fails to ensure that vulnerable workers will be protected. The regulations should require employers to ensure that information about the location and condition of any asbestos is provided to every person liable to disturb it in all situations. This duty should not be qualified in any way.

Training

15. A non-exhaustive list of the issues that should be covered in training given to relevant employees should actually be detailed in the regulations. This will ensure that employees are given the comprehensive training they will need. The issues listed should include:

- The potential hazards associated with exposure to asbestos fibres
- The location of asbestos-containing materials in the building
- Applicable asbestos regulations
- Personal protection
- Proper use and maintenance of protective equipment
- Proper handling of asbestos containing materials
- Maintenance of records
- Repair of asbestos containing materials

Enforcement of / Compliance with the Regulations

16. APIL sincerely hopes that the regulations will be effectively enforced and that the authority responsible for such enforcement will devote sufficient resources

and time to ensure compliance with the regulations. Successful enforcement is crucial to the effectiveness of any health and safety measure.

17. APIL is opposed to the proposed amendment to the Health and Safety (Enforcing Authority) Regulations 1998 for the following reason. It allows responsibility for health and safety in respect of asbestos to remain divided between two enforcing authorities. This may cause the implementation of differing standards and methods of enforcement and is highly undesirable. Responsibility for enforcement should be concentrated in one body. That enforcement should be conducted by individuals who are specifically trained to deal with the use of asbestos in buildings.

18. Each company should also be required to ensure, internally, that the regulations have been complied with within the workplace. This should be achieved by two means. Firstly, a regulation similar to regulation 7(1) of the Management of Health and Safety at Work Regulations 1999 should be included within the regulations. Regulation 7(1) requires the appointment of one or more competent persons to assist an employer in undertaking the measures an employer needs to take to comply with the requirements imposed upon him by health and safety regulations. By making one or two people responsible for the implementation of the regulations it is to be hoped that co-ordination between the various requirements under them would be achieved. The person(s) appointed to do this should, preferably, be the same person as appointed under regulation 7(1) of the Management of Health and Safety at Work Regulations 1999.

19. Secondly, each company should be required by the regulations to operate a 'permit to work' scheme within each work premises. The appointed person would be responsible for co-ordinating this scheme. It would essentially require the appointed person to certify, before work commences on work premises, which will or could disturb asbestos, that all the regulations have been satisfactorily complied with.

Records

20. APIL strongly supports the making, reviewing and retention of the records currently required by the draft regulations. A system is required, however, to ensure that such records are kept for as long as they may be necessary and that they are kept safe. As asbestos related diseases may not develop for up to around 50 years, all records kept under the regulations should be kept for at least this long. The records will be necessary to review the success of any risk management system in place. The documented risk assessments should be filed with the existing documentation relating to the structure of the building. This would make investigation of any potential claim by an injured worker in the future much easier.

21. It is also important that employee's health records are properly maintained. Employees move jobs and perhaps those within the building trades move jobs more often than others. It would not be practicable or useful to have health records relating to the same person scattered amongst various employers. For this reason, the results of all medical surveillance and health records required to be maintained by an employer (or at least copies thereof) should be lodged with the employee's personal GP. The health record maintained by the employee should be required, by regulation, to record in the same document the times, periods and types of asbestos to which an employee has been, or potentially been, exposed.

Due diligence defence

22. APIL agrees that the 'due diligence' defence should be removed from the Control of Asbestos at Work Regulations as suggested.