

DEPARTMENT OF TRADE AND INDUSTRY (DTI)

PART 9 OF THE ENTERPRISE ACT 2002 (INFORMATION)

**CONSULTATION BY THE DTI ON WHETHER TO AMEND PART 9 OF THE
ENTERPRISE ACT 2002 TO ALLOW INFORMATION TO BE RELEASED
MORE EASILY FOR CIVIL COURT PROCEEDINGS**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL16/05)**

NOVEMBER 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

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

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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AMENDING PART 9 OF THE ENTERPRISE ACT 2002 (INFORMATION)

Executive Summary

- APIL supports option (iii) within the consultation paper which would “[a]mend Part 9 [of the Enterprise Act 2002] to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not required by Community law”¹.
- APIL proposes that there should be a single gateway from where all information relating to consumer products could be stored and disseminated. This Product Liability Agency (PLA) would provide a single gateway for consumers to gain access to information relating to consumer products. The PLA would also monitor and police the new General Product Safety Directive (GPSD) regulations
- APIL suggests that the consolidation of consumer information in the PLA will enable efficient companies to be singled-out and praised, while companies which fail to comply with the new agency’s requirements could be ‘name and shamed’.
- In order to provide clarity concerning the type of information which should be disclosed for civil proceedings, APIL proposes that the US discovery provisions within the Federal Rules of Civil Procedure should be adopted within the UK.
- In the absence of a product liability agency, APIL would recommend that a civil servant - an independent court disclosure arbitrator, if you will - should be detailed to consider which documents are appropriate to be used within civil proceedings.

¹ Consultation document – page 13, paragraph 21

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Department of Trade and Industry's (DTI) consultation on Part 9 of the Enterprise Act 2002 and the possible amendment to allow information to be released more easily for civil court proceedings. Please note, however, that as APIL represents the civil justice interests of people injured through the negligence of others, our response will concentrate on the information needed in civil cases where someone has been injured due to an unsafe product².

The need for change

2. APIL believes that when there are incidences of unsafe products injuring a consumer all effort should be made – in line with the principle of 'polluter pays' – to ensure that the victim is properly compensated by the negligent producer of the product. In order for the injured person to prove negligence and receive his rightful damages, however, he needs to be able to gain access to information concerning the unsafe product. It is therefore essential that the current system governing the release of consumer and competition data – introduced via the Enterprise Act 2002 – is amended so as to allow public authorities the freedom to release information to any person for use in a civil proceeding. While this occurs in the NHS³, we are unsure why big business – whose data the public bodies hold – should be allowed to refuse to release information due to the fact that it *may* be 'sensitive competition information' while other agencies do not enjoy the same protection. To this end, APIL supports option (iii) within the consultation paper which would "[a]mend Part 9 [of the Enterprise Act 2002] to allow the release of information for the

² Commonly known as 'product liability'.

³ The NHS is obliged to release adverse incident reports in relation to civil proceedings.

purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not required by Community law⁴.

3. APIL considers the amendment of Part 9 to be vital in order to correct effectively the adverse changes to consumer protection the Enterprise Act originally introduced. Previously, for example, under the Consumer Protection Act 1987 and sections of the Trade Descriptions Act 1968, there was a power for authorities to release information to any person for use in a civil proceeding. The introduction of the Enterprise Act, however, restricted this power so that information could only be released to *“any person for a criminal proceeding, but not for a civil proceeding”*⁵. We suggest that it is manifestly unjust, and a hindrance on people’s access to justice, to restrict the release of information by public bodies based on whether a case is going through the civil rather than the criminal courts.

A single gateway for consumer information

4. One of the primary reasons, APIL suggests, that Part 9 of the Enterprise Act 2002 needs to be amended, is that many authorities and agencies are unsure exactly what type of information can be disclosed and what type of information should be withheld. Ultimately this creates a situation where different agencies have different procedures concerning the release of information, and there is no consistency of approach. For example, a NHS Primary Care Trust was happy to supply details of drug trials conducted at its hospital, yet the medical licensing authority is currently reluctant to release similar information relating to the license application of another drug. In order to ensure a consistent approach to the type of information which is suitable for public authorities to release, APIL proposes that there should be a single gateway from where all information relating to consumer products could be stored and disseminated.

⁴ Consultation document – page 13, paragraph 21

⁵ Ibid – page 11, paragraph 9

5. APIL proposes that a new agency should be established which will hold, and release, designated product information to consumers and interested parties, including for the purposes of civil court proceedings. APIL has previously suggested such an agency – the Product Liability Agency (PLA) – in relation to the new General Product Safety Directive (GPSD) regulations⁶, and we feel that this proposed model could be expanded to include the storage and release of product information as well as the monitoring and policing of the new GPSD.

6. APIL originally envisaged that the new agency would be *“solely responsible for alerting the general public and businesses about any potential product liability issues, including dangerous products on the market and product recalls. For example, the chemical industry would not release its own product recalls, but go through the Product Liability agency⁷”*. In addition to this role, APIL proposes that the new agency would collate and disseminate information relating to all aspects of consumer products. For instance, the Medicines and Healthcare products Regulatory Agency (MHRA) would provide all information to the product liability agency once a new drug was licensed and approved.

7. The intention behind the product liability agency (PLA) would be to provide a single gateway for consumers to gain access to information relating to consumer products. In terms of what information would be available, the general requirement would be that all information should be accessible unless the providing body provides reasons – which are accepted by the PLA – for the material to be exempted from disclosure. For example, this could include sensitive competition information.

⁶ See Appendix A - APIL's response letter to the DTI – 'Consultation on proposal to implement Directive 2001/95/EC on general product safety (GPSD)' (March 2005) (a copy can be downloaded at: <http://www.apil.com/pdf/ConsultationDocuments/151.pdf>)

⁷ Ibid

8. APIL believes that the PLA would have a statutory remit detailing the range of consumer products on which it required information and also the exact data needed from companies. Included in this consumer data, for example, could be details of drug trial results for pharmaceutical companies, development notes from car manufacturers and safety tests on toys. The various designated companies would have a statutory duty to submit information to the agency within a set time frame of a particular product coming onto the market. The data would then be stored in electronic format, with the ability to gain access to it provided via an interactive server facility.

9. In instances of non-disclosure, however, APIL suggests that the PLA should have the power to induce the release of documents as well as have the ability to levy a fine against the company. Furthermore, if it is shown that the non-disclosed information may have a direct bearing on an issue of public safety, the PLA would be able to serve a 'stop and recall' order on that particular consumer product. This would result in no further items reaching the market, as well as all the current items being recalled.

10. APIL recommends that the PLA should be partially financed by a levy on the disclosing industries themselves as well as some state funding. The exact percentages of contribution would be decided once the full scope and structure of the PLA was assessed and agreed. APIL feels that there needs to be government funding for the PLA as requiring industry to supply the entire outlay may lead to certain industries relocating due to the perceived high cost of financial and regulatory burdens in the UK. For example, Merck has recently closed its largest UK research centre due to the financial pressures it is experiencing due to problems with its arthritis drug Vioxx. The cost incurred in financing the PLA would be, however, balanced against the money industry would save by not having to deal with requests for information. All such requests would be dealt with by the new PLA.

11. The governance of the product liability agency would consist of a small board representing a variety of the consumer businesses which would be supplying information to the agency. In addition, APIL suggests there should be a lay consumer representative in order to ensure that appropriate front-line consumer information was being provided. The board would be varied in terms of background and interests in order to represent the myriad of different organisations supplying data. There would, however, be specialists from the larger and more complex consumer areas such as pharmaceuticals. These specialists would be able to advise on whether the data being received was appropriate and recommend alterations to the information being submitted if necessary.

12. APIL suggests that the consolidation of consumer information in a combined body will enable efficient companies to be singled-out and praised, while companies which fail to comply with the new agency's requirements could be 'name and shamed'. Such a strategy – also suggested by APIL in respect of the health and safety practices of firms – will mean that companies which have nothing to hide and provide full and accurate information will be identified and praised. While it is difficult to postulate the effect of such 'praising', it is anticipated that it would be positively viewed by the City and may subsequently help the company's share price. Naturally the opposite would be true for organisations failing to file the appropriate returns.

13. Due to the consumer-driven nature of the product liability agency it is essential that consumers are not restricted from requesting information due to high charges for the service. The size of the agency and the information held should mean that, in addition to the subsidies provided by the industries themselves, multiple requests for information would lead to lower costs.

Disclosure of information in civil proceedings

14. In terms of gaining access to information, APIL suggests that the product liability agency should always act in the best interests of the consumer. In terms of civil proceedings, this would mean that evidence which is of direct relevance to the case would automatically be disclosed to the requesting party. If, however, one party felt that the information requested was too sensitive to be released it could provide a submission asking for an exemption. The agency would then make the decision about whether or not to accept the party's request. APIL considers, however, that even if the agency agrees with the consumer product organisation's request, the other party in the civil proceedings must be made aware of the items to be withheld. In order to provide clarity concerning the type of information which should be disclosed for civil proceedings, a possible model is the US discovery provisions within the Federal Rules of Civil Procedure. These state that:

"a party must, without awaiting a discovery request, provide to other parties:

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party...⁸

APIL would submit, with this duty in mind, that the general rule governing disclosure is that everything pertinent must be provided unless the providing party has a valid reason – which has to be provided to the product liability agency – for it not to be disclosed.

15. In the absence of a product liability agency, APIL would recommend that a civil servant should be detailed to consider which documents are appropriate to be used within civil proceedings. In reference to the

procedure detailed above, the independent court disclosure arbitrator would decide whether certain documents were not relevant to be disclosed via a written submission by the disclosing party. In the event that the exemption submission was successful, however, there would still need to be a note provided for the opposing party detailing which document, or documents, was to be excluded and the reason for this. Where there was suspicion of non-compliance on the part of the disclosing party, this would result in a prosecution. Naturally the spectre of a prosecution for non-disclosure would create adverse publicity and should therefore act as an effective sanction on companies to disclose everything required.

⁸ Federal Rules of Civil Procedure – V. Depositions and Discovery (Rule 26) – (a) (1)

Appendix A

THE DEPARTMENT OF TRADE AND INDUSTRY (DTI)

THE GENERAL PRODUCT SAFETY REGULATIONS:
CONSULTATION ON PROPOSALS TO IMPLEMENT DIRECTIVE
2001/95/EC ON GENERAL PRODUCT SAFETY

30 MARCH 2005

30 March 2005

Mr Steve Ringer
Department of Trade and Industry
Consumer and Competition Policy Directorate
1 Victoria Street
London
SW1H 0ET

Dear Mr Ringer

The Department of Trade and Industry (DTI) – The General Product Safety Regulations: Consultation on proposals to implement Directive 2001/95/EC on general product safety (GPSD)

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

APIL believes that consumer safety should be at the forefront of Government legislation and is therefore fully supportive of the revised general product safety directive (GPSD) as it introduces *“an even higher level of protection from dangerous products than already exists”*⁹. Indeed it is encouraging to note that *“[o]ver the last six months, since the new Directive has been in force in some Member States, the rate at which dangerous products are notified to the Commission has already more than doubled, and is continuing to increase”*¹⁰.

In respect of the current consultation, APIL would like to make the following general observations, which we hope will be helpful.

- APIL believes that a new Product Liability agency, working under the auspices of the Department for Trade and Industry (DTI), should be set up in order to effectively implement, monitor and police the new General Product Safety Directive (GPSD) regulations. APIL is concerned that enforcement authorities, such as local authority trading standard

⁹ Consultation document – Introduction – Page 3

¹⁰ Liability, Risk and Insurance – February 2005 – Issue 174 – page 19

departments (which will have primary responsibility for enforcing the new GPSD laws) will not have “sufficient resources to deal with their new responsibility under these laws”¹¹. As such they may be tempted to adopt an “unreasonably cautious approach to dealing with the issue, to the detriment of consumers and producers alike”¹². In addition, as with any local authority service, trading standards departments would not have dedicated resources and may have to battle other departments for funding. By establishing a separate Government agency, however, funding would be ring-fenced and resources could be dedicated to the effective implementation of the GPSD regulations.

- APIL also feels that by removing the monitoring of the GPSD regulations from local authority control there is less likely to be conflicts of interests in relation to the authority’s competing business interests and responsibilities. For example, if a large local employer had a recall notice issued against them, and the local authority had to enforce this recall, possibly threatening jobs and investment in the area, this would represent a conflict of interest. It should be noted that the Foods Standards Agency (FSA) was initially set-up so as to remove itself from such a conflict of interest with the Department for the Environment, Food and Rural Affairs (DEFRA).
- APIL suggests that this Product Liability agency would hold the database for all products recalls and information relating to the implementation of the GPSD regulation as well as enforcing any recalls. Under the proposed revised regulations, it will in most cases be an offence for a producer or importer not to investigate, and keep a register of, consumer complaints relating to their products¹³. APIL feels that this register should be kept with a central body – the Product liability agency – so that possible patterns of faulty products can be appropriately identified and recalled if necessary. In addition, the public should be able to gain access to this central database without it being prohibitively expensive.
- The Product Liability agency would be solely responsible for alerting the general public and businesses about any potential product liability issues, including dangerous products on the market and product recalls. For example, the chemical industry would not release its own product recalls, but go through the Product Liability agency.
- APIL would like the situation clarified in relation to products which are manufactured outside the EU but distributed within it. For example, Mike Ellwood of Johnson and Johnson Consumer said: “*With our type of consumer products we are in many ways a distributor more than a manufacturer, as we have worldwide manufacturing facilities. We are looking at products where about 90 per cent are made in the EU, but there’s a good ten per cent that are produced outside the EU.*”¹⁴ APIL

¹¹ Liability, Risk and Insurance (February 2005) Issue 174, page 20

¹² Ibid

¹³ The General Product Safety Regulations 2005 – Part II – Section 7 (4) (b) (ii)

¹⁴ Post Magazine (10.03.05) page 32

feels it is the applicability of the GPSD in this type of situation which needs to be made more explicit prior to its implementation.

- APIL would also like further clarification in relation to *“products supplied as antiques and second-hand products that are supplied for reconditioning or repair prior to being used”*¹⁵. While we are supportive of this new duty we are concerned that it may inadvertently mean that items sold at charity jumble sales or school fetes will be included under the GPSD. In order to avoid these types of organisations being ‘caught’ within the provisions, APIL proposes that the new regulations should specify that they only apply to consumer products which are sold for ‘profit’. Otherwise *“[i]magine the obligations charities, which are selling second-hand goods, are going to have tracing them – it could almost put them out of business.”*¹⁶

For further information on APIL’s views on the GPSD, please find attached a copy of APIL’s previous response to the DTI consultation on ‘*Transposing the Revised General Product Safety Directive*’ (March 2002).

Finally, please do not hesitate to contact APIL if you would like clarification or further information on any of the points made above.

Yours sincerely

Miles Burger
Policy Research Officer

¹⁵ Consultation Document – Executive Summary – paragraph 2.3 – page 5

¹⁶ Post Magazine (10.03.05) page 32