

**Health and Safety Executive**

**Consultation on proposals to review HSE's Approved Codes of Practice (ACOPs)**



**A response by the Association of Personal Injury Lawyers**

**14 September 2012**

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,300 members in the UK and abroad who represent hundreds of thousands of injured people a year.

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; and
- 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:

Karl Tonks – APIL President;

Matthew Stockwell – APIL Vice President;

Nigel Tomkins – APIL Treasurer;

Cenric Clement-Evans – APIL Executive Committee Member; and

Mark Turnbull – APIL Executive Committee Member.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Abi Jennings, Head of Legal Affairs

APIL

3 Alder Court, Rennie Hogg Road

Nottingham NG2 1RX

Tel: 0115 958 0585; Fax: 0115 958 0885 E-mail: [abi.jennings@apil.org.uk](mailto:abi.jennings@apil.org.uk)

## **Introduction**

APIL has previously provided input into the review of health and safety conducted by the Department for Work and Pensions (DWP) and the Health and Safety Executive (HSE) and we give further comment here in relation to proposals to review the HSE's Approved Codes of Practice (ACOPs) following recommendations within Professor Lofstedt's report, *Reclaiming health and safety for all: An independent review of health and safety legislation*.

## **Consultation response**

APIL welcomes the opportunity to respond to the HSE's consultation regarding proposals to review ACOPs. Professor Ragnar Löfstedt's report concluded that the health and safety system was fit for purpose and "*in general, there is no case for radically altering current health and safety legislation*"<sup>1</sup>. It is, therefore, important that any review or consolidation exercise does not dilute the protection that is offered to employees through current health and safety legislation.

APIL agrees in principle with the recommendation from Professor Löfstedt to review all of its ACOPs. The HSE ACOPs, like the regulations they refer to, have become somewhat disjointed due to various amendments over the years by government and the EU. These ACOPs exist to assist employers but they also help employees and their representatives, who rely upon them being updated on a regular basis following any amendments from the EU. It is essential for all parties to work together in a workplace to raise and maintain health and safety standards.

## **Section 1 Proposals to revise, consolidate or withdraw ACOPs**

### General comments

As stated by the HSE in the consultation paper, ACOPs provide practical guidance on complying with the general duties of the Health and Safety at Work etc Act 1974 (HSWA).

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<sup>1</sup> *Reclaiming health and safety for all: An independent review of health and safety legislation*, Professor Ragnar Löfstedt, November 2011, Page 1 paragraph 3.

*The review reported that overall a wide range of stakeholders supported the principles of ACOPs and saw them as a vital part of the system, forming a key link between goal setting legislation and guidance, though many also felt there was room for improvement.*

*They are important tools for experienced health and safety audiences that explain the law and enable the control of more complex risks. They can also provide certainty for duty holders by setting out preferred methods or standards to achieve compliance and by clarifying what is required by terms such as suitable, sufficient or adequate. ACOPs have mainly been made available for high risk activities where some precision is required in the approach to controlling the risks.*

*ACOPs are not law but do have a special legal status; if the advice in ACOP material is followed in relevant circumstances duty holders can be confident that are complying with the law. This is made clear in the front of each ACOP document by a statement that those who comply with ACOP material will have done enough to comply with the law on specific issues addressed by the ACOP.<sup>2</sup> (Emphasis added)*

The above paragraphs, taken from the HSE's consultation paper, show how businesses and users of ACOPs can utilise this guidance to ensure they are doing all that is required of them to comply with the law. It is essential that employers are aware of what they are required to do to provide a safe working environment for their employees. It is, therefore, crucial that this information can be digested so that it can be understood, absorbed and put into practice, safely and efficiently.

APIL can agree, in principle, with the proposals to review ACOPs on the basis that the information provided in the revised ACOPs will be updated and will continue to

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<sup>2</sup> HSE Consultation on proposals to review HSE's Approved Codes of Practice (ACOPs), Health and Safety Executive Consultation Document 241, published June 2012, Page 5-6 Paragraphs 3-7.

assist employers as much as the current ACOPs do (if not more) in detailing what is required of them. However, without seeing any drafts of the proposed guidance it is difficult to know whether the new ACOPS will be of a better standard than what we currently have. Therefore, there should be full consultation on any proposed draft for the replacement of these ACOPs.

Generally, APIL agrees that some ACOPs do need updating and that more relevant information could be provided to assist employers. However, it is most important that this guidance is consistent, reliable and allows employers to reasonably assess the safety of a workplace without the need for consultants to translate any jargon. Therefore plain English is a necessity of any revision so they are easy to understand and implement.

Many of the ACOPs could be improved but it is essential that each ACOP provides a comprehensive benchmark for employers. The Construction (Design and Management) Regulations 2007 has examples throughout the guidance to aid with compliance. The document also has good graphics and pictures to assist employers in understanding the text which also makes the guidance more user-friendly. APIL suggests that this is a good model on which to base new drafts.

APIL recommends that the inclusion of examples or how Regulations should be used in practice should be provided within ACOPs through the use of previous court decisions. Court decisions are useful guidance for everyone in understanding how the law should be applied and are not just for lawyers. Using court decisions as working examples in ACOPs guidance will enhance the information given and provide employers with a practical knowledge of when and where an ACOP is applicable as well as what they must do.

For example, the following facts as taken from the Court of Appeal case of Swain v Denso Marston LTD<sup>3</sup> could enhance any guidance so that an employer would know

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<sup>3</sup> Swain v Denso Marston LTD LTD [2000] EWCA Civ 3021.

exactly would be required and should be considered as part of an assessment in the circumstances.

*On the known facts of this case Denso Marston Ltd had a health and safety officer. The employer knew who had manufactured and supplied the conveyor in question. Any proper assessment by or on behalf of the employer would have been a systematic assessment under the control of either an outside consultant or the health and safety officer (even if part of the task was delegated to a person who was an experienced employee). The assessment would have considered whether repairs and non-routine maintenance for specialised plant and machinery should be carried out by the employer's staff, or by the manufacturer. The assessment would have had to consider what manual handling tasks were involved in repairs and non-routine maintenance. If no brochure or specification was available the assessment might have involved making inquiries of the manufacturer. If none of that had been possible (or none of that had disclosed the weight of the roller) then prudence would have dictated the assumption that it might be unexpectedly heavy. That assumption might have been communicated to those employees who needed the information under Regulation 4 (1) (b) (iii).<sup>4</sup>*

ACOPs have previously failed to take into consideration the decision of the courts on specific topics such as risk assessments and manual handling. In the case of Allison v London Underground<sup>5</sup>, also a Court of Appeal decision, Lady Justice Smith stated,

*To say that the training is adequate if it deals with the risks which the employer knows about is to impose no greater a duty than exists at common law. In my view the statutory duty is higher and imposes on the employer a duty to investigate the risks inherent in his operations, taking professional advice where necessary.*

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<sup>4</sup> Swain v Denso Marston LTD [2000] EWCA Civ 3021 paragraph 19.

<sup>5</sup> Allison v London Underground [2008] EWCA Civ 71.

.Lady Justice Smith went on to say that the test is consistent with that which the court used in the case of Dugmore<sup>6</sup> where it was decided that there is a

*More onerous duty imposed by the regulations, which, the court held required the employer to go out and discover the risks and to take the appropriate steps.*

The inclusion of comments like these from the courts explains fully the pro-active approach to risk assessments that employers should take. An ACOP could include the following within its guidance by way of explanation of how risk assessments should be conducted,

*Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. They should be a blueprint for action.*<sup>7</sup>

The courts' interpretation of ACOPs and guidance is what employers need to be aware of as this is what will provide them with the knowledge of what pitfalls there can be.

### Specific comments

Although we have provided general comments above in relation to the proposal to review ACOPs we do have some comments in relation to specific sections within the consultation paper, specifically Section 1.6 which looks at L24 – Workplace health, safety and welfare. This ACOP includes guidance on various areas of general workplace health and safety which have been grouped together into a single ACOP. APIL does not agree with the proposal to simply update this ACOP. APIL recommends that falls from height, Construction (Design and Management) Regulations 2007 and the Quarry Regulations 1999 are separated and provided

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<sup>6</sup> Dugmore v Swansea (1) and Morriston (2) [2002] EWCA Civ 1689.

<sup>7</sup> Allison v London Underground [2008] EWCA Civ 71.

within their own ACOPs. These are such important regulations that they should be treated separately in their own right and not simply grouped together with other general health and safety regulations. These regulations are particularly important for the construction industry when you consider the HSE statistics which states fatal injuries to construction workers was 50 in 2010/2011<sup>8</sup>. If guidance or ACOPs were sector specific they would be more accessible to employers because they would be able to identify relevant regulations and guidance more easily. Therefore construction, agriculture, industry and offices should have separate, sector specific guidance.

Agriculture remains a high risk area and the HSE needs to tread lightly in any proposal to withdraw or review guidance on child safety within agriculture as discussed in Section 1.8 of the consultation paper. There continues to be a large number of accidents and fatalities within the agricultural industry and the HSE should regard any information, guidance or ACOP for this sector as essential in assisting to prevent these.

## **Section 2 Proposals to make minor revisions or no changes to ACOPs**

Generally APIL agrees that some minor revisions can be made to ACOPs in order to bring them up-to-date and make them more relevant to the employer, however, it needs to be accepted that there will always be some crossover and duplication. For example one piece of equipment may have different uses in different industry sectors and in different circumstances and so different regulations will be applicable.

## **Section 3 introducing a limit on the length of ACOPs**

As stated above, the HSE understands the importance of ACOPs, what assistance they can provide to employers because they can be certain they are complying with the law if they utilise them. Therefore, APIL cannot understand why the HSE is proposing to limit that necessary guidance to any maximum length. The important yardstick is that the guidance is relevant, up-to-date, easy to understand, and

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<sup>8</sup> Health and Safety Executive Annual Statistics Report 2010/11, page 7.



provides the necessary guidance to avoid accidents and prevent needless injury. Emphasis should be on the quality of the information provided and not the quantity of pages used to display it. Longer documents can have contents pages and be split into different sections to ensure that specific information is easy to find.

More and more information is being made available online via the HSE's website and so the length of this guidance is irrelevant in terms of printing costs.

## **Conclusion**

APIL supports the streamlining and simplification of confusing regulations and ACOPs but not at the expense of the current health and safety framework that has significantly improved health and safety in the workplace. Professor Löfstedt found no reason for any radical change to this framework or the existence of health and safety legislation. APIL hopes that the government will use this opportunity to simplify confusing legislation without "watering-down" good regulation that provides protection from needless injuries to millions of employees every day.

The difficulty in responding to this consultation is that we can't necessarily support or agree with the HSE's proposals without first seeing the proposed revision to each ACOP. In principle a consolidation and simplification exercise could prove valuable but the validity of any such consolidation depends on the content of the end product.

- Ends -

## **Association of Personal Injury Lawyers**

- ▶ Unit 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
- T: 0115 958 0585 ● W: [www.apil.org.uk](http://www.apil.org.uk) ● E: [mail@apil.org.uk](mailto:mail@apil.org.uk)