Health and Safety Executive

Consultation on the Proposed Regulations to implement Council Directive 2010/32/EU on preventing sharps injuries in the hospital and healthcare sector

A response by the Association of Personal Injury Lawyers
November 2012

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,400 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

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

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Introduction

APIL welcomes the opportunity to respond to the proposed Regulations to implement Council Directive 2010/32/EU on preventing sharp injuries in the hospital and healthcare sector. Protecting those whose work exposes them to medical sharps is very important. It might appear that the injury is just a "pinprick" or scratch, but the consequences of a sharps injury can be life changing. For example, a person who is cut by a needle infected with Hepatitis B has a 66% chance of contracting the disease[1]. Even if the needle does not transmit infection, the incident can lead to anxiety, stress, depression and having to stop work whilst waiting for results of blood tests. A senior operating department assistant, Herbert Busby, was awarded £58,000 compensation after suffering injury from needles. He was assisting an anaesthetist in 1997 when a tray flipped over showering him with needles. One penetrated his toe. He experienced trauma and shock waiting a total of nine months to discover if he had been infected by Hepatitis B from the needle. Although cleared, he developed a phobia of needles and was unable to continue in his previous job. Employers are also affected, because employees will need to have time off work to attend necessary appointments. It is clear therefore, that sharps injuries need to be prevented, and the Council Directive goes a long way to ensure that this is the case.

APIL believe that the proposed Regulations as drafted do not correctly implement the Directive; they are unclear and ambiguous; and leave some groups of people who should be entitled to protection, vulnerable to risk of harm. We see no reason why the wording of the Directive should not be transposed directly into the Regulations, as this gives clear definitions and would ensure that the intention of the Directive was fully enforced by the Regulations, leaving no loopholes. The Directive is very clear in its wording and definitions as to what it is aiming to achieve, and we feel that this clarity should be transferred directly to the Regulations. There should be no amendment or watering down, which will have the consequence of leaving some vulnerable people without protection.

As our remit only extends to concerns about personal injury, we have only responded to those questions which relate to this field.

[1] http://www.rcn.org.uk/__data/assets/pdf_file/0008/418490/004135.pdf

Q.2. In addition to the examples provided, are there other common circumstances under which people carry out healthcare activities using medical sharps where the application of the proposed Regulations could usefully be clarified in guidance?
Regulation 3 (1) of the draft Regulations reads:

> "the requirements imposed by these Regulations on an employer apply to an employer whose main activity is the managing, organising and provision of healthcare…"

The use of the words "main activity" has the potential to leave certain groups of people outside the scope of the Regulations, and so unprotected. It is not uncommon for private sector organisations, such as Virgin or Serco, to be contracted to carry out healthcare duties. Their main activity is *not* the provision of healthcare, but nevertheless the people working for them in healthcare sector roles will be exposed to medical sharps in just the same way as a person working for the public sector in a similar role. The Regulations would not apply to them, unless they are working on the premises of a healthcare employer. If these people were contracted to carry out work in the community, for example, they would be put at risk.

Consequently, it is our view that the Regulations do not correctly implement the Directive. Clause 2 of the Directive, which details its scope, states that:

> "This agreement applies to all workers in the hospital and healthcare sector…"

Those who work in the private sector, carrying out healthcare duties but not on healthcare premises, would be covered under this definition. The concern should not be whether the "main activity" of the employer is healthcare, but whether the employees are carrying out healthcare activities. Clause 3(2) further demonstrates that this is what the Directive intended. Here, it is stated that with regard to the Directive:

> "workplaces covered: healthcare organisations/services in public and private sectors and every other place where health services/activities are undertaken and delivered…"

There is no mention of the phrase "main activity" in the wording of the Directive, and "every other place" suggests that the test of whether someone falls under the Directive is whether the worker themselves carries out healthcare activities, not *where* they may carry them out, or whether their employer's "main activity" is healthcare.

APIL suggests that the definition in the Directive should have been transposed into the regulations, so that there is clarity as to who would be affected, and there would not be a loophole leaving some people who are at risk of harm unprotected.

Q.3.Is it clear what actions employers and employees will need to take under the proposed Regulations?

The proposed Regulations include a defence of "reasonable practicability". Paragraph 29(a) of the consultation paper, and Regulation 4 of the draft Regulations, for example, state that:

> "the employer should substitute the traditional, unprotected medical sharp with a "safer sharp" where reasonably practicable".

APIL again believes that choosing to include a defence of "reasonable practicability" could mean that the Directive will not be correctly implemented. The wording of the Directive itself states, in Clause 6, that:

> "Where the results of the risk assessment reveal a risk of injuries with a sharp…workers' exposure *must be eliminated* by taking the following measures" (emphasis added).

There is no mention of an employer not having to comply with the Directive if it is not "reasonably practicable" to do so. It was stated by Lord Asquith in *Edwards v NCB* that the test of "reasonable practicability" permits consideration of gross disproportion between cost and risk. Therefore where the wording "reasonably practicable" applies, an employer is entitled to weigh up the costs against the chance of injury before eliminating risk, and if it would be too expensive, will not be liable for not taking the appropriate steps. This is not what was intended by the Directive.

A further issue in Regulation 4(1)(c) is that, with regard to recapping needles:

> "An employer must ensure that needles that are medical sharps are not capped after use at work unless the risk of injury to employees is effectively controlled by use of a suitable appliance, tool or other equipment…".

The Directive reads at Clause 6(1) that "the practice of recapping shall be banned"- with no exception.

As evidenced above, the Regulations are watering down and limiting the scope of the Directive, which could lead to people at risk not being protected. No such watering down is permitted; the Regulations must implement the Directive fully.

Q.4. Do you agree that HSE's guidance on the new regulations should be built into its existing relevant guidance?

APIL suggests that as well as building the new Regulations into existing relevant guidance, where people could access it in the same way as they have been accessing the old guidance, the new guidance should also be issued as a stand-alone document together with the new Regulations.

Also, there are many sources of guidance laid down in the consultation paper (paragraphs 30 and 31), and whilst having lots of places where the guidance is available may make it more available, APIL would like to suggest that all the guidance is consolidated and put in one place, along-side the Regulations, as this would make it easier to access. This will also ensure that there are no gaps in the guidance.

APIL also believes that it would be advantageous, when putting together guidance, for the HSE to liaise with the Department of Health in England, and corresponding Departments in Wales, Scotland and Northern Ireland, and also work with other interested parties such as the Royal College of Nursing, UNISON, GMB and Unite.

Q.5. Does the proposed implementation date have any unintended consequences for the UK healthcare sector?

Whilst it is difficult for APIL to comment on this, having no special knowledge regarding the healthcare sector, we would like to make a general comment. The proposed implementation date is 11 May 2013, even though it is far more usual for new legislation to be brought in either in October or April. APIL would like to suggest that the regulations are brought into force in April, rather than on an arbitrary date that people may miss.

Impact Assessment

Again, whilst we do not have any special knowledge about the healthcare sector, we would like to make the general comment that if the Directive is properly implemented,

this would save the healthcare sector substantial sums of money, because injuries, and subsequent legal claims, would be avoided.

- Ends -

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