

Health and Safety Executive

**Consultation on proposals for a National Local Authority
Enforcement Code**



A response by the Association of Personal Injury Lawyers

March 2013

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 comment on the HSE's latest consultation stemming from Professor Lofstedt's recommendations in his report "*Reclaiming health & safety for all: An Independent review of health and safety legislation*". The consultation document reinforces the government's misconception that health and safety is an "unnecessary burden". This is far from the truth, and even in low risk areas, health and safety regulation is vital to ensure that people are not put in danger at work. We believe that these proposals, which include limiting pro-active inspections to "high risk" areas, are flawed and could lead to dangerous consequences for people in the work place.

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

Q.1. Do you feel that the measures outlined in the Code and Annex will effectively deliver the Government's commitment to stop Local Authorities from proactively inspecting low risk businesses on health and safety grounds?

We believe that the measures outlined will deliver the Government's commitment to stop Local Authorities proactively inspecting low risk businesses on health and safety grounds, as Annex A is very restrictive as to what activities and sectors are classed as "high risk" and therefore qualify for pro-active inspections. However, we are not supportive of this commitment, as we strongly believe that low risk businesses should not be treated differently to high risk businesses, as doing so could put workers and employees at risk. There are many problems with an arbitrary high risk/low risk distinction. How is "low risk" defined? Where is the line drawn between a "low risk" workplace and a "high risk" workplace? In addition, just because a workplace is "low risk" does not mean that it is *free* from risk. Even an office can be a potentially dangerous environment, with incorrectly fitted wires causing a hazard, or boxes being stacked in a dangerous way, poorly lit stairwells, missing handrails or balustrades, or people suffering injuries from the way that they sit at their desk. The standards of these so called "low risk" businesses will fall dramatically if there are no longer pro-active inspections, and no reason therefore to keep standards high.

Q.2. Is the scope of the National Code sufficiently defined?

We do not believe that the National Code is sufficiently defined. We feel that the proposals fail to properly take into account risk. Our comments above relating to apparently 'low risk' workplaces also apply here.

Q.3. What are your views on the risk based approach proposed?

APIL is not opposed to a risk-based approach. We appreciate that resources are limited, and it is sensible to tackle risk proportionately, as this allows resources to be freed up to tackle problem areas. However, there is an irreducible minimum that must be carried out to ensure that health and safety standards in the workplace do not slip. The approach proposed in the consultation document includes a definition of high risk that is far too simplistic (see below for our comments on Annex A). Further, it is not clear how the criteria for inspection are going to be reviewed, and how problems are going to be identified if inspections are not carried out. At paragraph 21 for example, the consultation document states that “(LAs) should not invest limited resources on matters of comparatively low risk- unless of course, they come across matters of evident concern”. How are the inspectors going to “come across matters of evident concern” if they do not carry out pro-active inspections? This will mean that dangerous practices will be going unchecked. We firmly support the idea that prevention is better than cure, and so proactive inspection should take place in all sectors, to ensure that dangerous practices are spotted and dealt with as soon as possible, before someone is hurt.

Whistleblowing is clearly the manner in which the HSE envisage that they will now be alerted to unsafe practices in low risk areas, as the consultation document, at paragraph 23 states “proactive inspection must only be used to target the high risk activities in those sectors specified by HSE or where *intelligence suggests risk are not being effectively managed* (emphasis added)”. This is an unsuitable format for alerting the HSE to unsafe practices in the workplace, as employees who are aware of these conditions may feel that they cannot speak up for fear of losing their job. Dismissals as a result of whistleblowing have been on the increase in recent years¹, and even though dismissals for genuine whistleblowing will be classed as unfair dismissal and so will entitle employees to compensation and re-statement, this can still be a traumatic experience that many will seek to avoid by simply staying quiet and turning a blind eye to bad practices.

Q.4. What are your views on the proposal for HSE to publish a list of the higher risk sectors (and key activities) appropriate to be targeted for proactive inspection by LAs?

We are concerned that the list is not a good idea, as it diverts attention from other potentially high risk areas. The list presents itself as exhaustive, and from the consultation document, this appears to be the case (paragraph 23 “for this purpose HSE will publish a list of high risk sectors (and the key activities that make them such) that are to be subject to proactive

¹ <http://www.guardian.co.uk/money/2010/mar/22/tenfold-rise-whistleblower-cases-tribunal>

inspections by LAs). However, this does not take into account that there are other high risk areas that are not concerned within the Annex that the HSE has provided. It is extremely difficult and also subjective to divide workplaces into just high and low risk. By doing this, some areas that are in need of proactive inspection will be missed out. Also, as mentioned above, just because a workplace is so-called “low risk” does not mean that it is free from risk. Dangerous practices can still go on, which can cause harm to employees and workers, and because that particular workplace is “low risk”, there will be no inspection taking place that will alert the LA to those dangers.

Q.5. What are your views on the contents of Annex A?

We do not agree with Annex A. The content is extremely narrow, and there are several noticeable gaps, which will lead to problems. Hazards are identified, but then only certain sectors are identified as being associated with those hazards, with other obvious sectors being ignored. For example, number 4 in the Annex states that small to medium companies that fit tyres, and companies that deal with high volume warehousing and distribution are the high risk sectors that could result in “fatalities/injuries resulting from being struck by vehicles”. There are a host of other sectors that could result in fatalities or injuries resulting from being struck by vehicles, including for example, work on a construction site. The Annex is therefore inadequate, and this inadequacy could therefore mean that people who are working in higher risk areas that are not listed in Annex A will be at risk, as problems with practices could go undetected, or will only be brought to the attention of the HSE when someone “blows the whistle”. Another example of the insufficiency of Annex A is at number 9, where it is stated that carbon monoxide poisoning and gas explosions are only a risk in commercial catering premises using solid fuel cooking equipment. This is untrue, as the improper burning of natural gas or any carbon based fuel such as propane, kerosene or gasoline can also lead to gas explosions and carbon monoxide poisoning. The risk is not limited to solid fuel.

Q.6. What are your views on the assurance measures proposed for LAs on meeting the requirements of the Code?

We feel that the assurance measures proposed for Local Authorities are lacking in sufficient detail. It is unclear from the consultation document as to what monitoring performance entails. With regard to data collection, what will the “means of monitoring” be, as mentioned in paragraph 48? At paragraph 49, what is the information to be given to the public, and how will it be given to the public? We also have fears that Peer Review will not work in practice as a method to ensure compliance with the Code.

Q.7. Will the Code require regular review in the future?

APIL feels that should the proposals go ahead, there should be regular review of the Code to ensure that it is appropriate, and there should especially be review of Annex A, so that all high risk areas at least are kept under review.

Q.8. If you have answered “yes” to question 7, would five years be the right frequency or would you suggest an alternative frequency?

If the proposals were to go ahead, APIL believes that five years is not sufficiently frequent to ensure that risks in the workplace are monitored effectively. The review of the Code should be at least once a year, but preferably continual and on-going.

Q.9. Does the Code adequately set out how LAs can achieve a consistent approach to regulation via risk based targeting?

As above, the detail in the Code is lacking in some places. Even if a consistent approach is achieved, APIL is against this because of the concerns expressed earlier.

Q.10. Does it provide for sufficient local flexibility?

We believe that the approach provides too much flexibility, and would actually be a recipe for regulators to justify doing less work, because those areas where there should be proactive inspections are being neglected because they are not seen as “high risk”.

Q.11. Have we provided sufficient direction for LAs to target their resources based on risk?

We feel that the direction provided is not detailed enough, and must be monitored at all times.

Q. 13. Is there more that the Code can say about ensuring that businesses take responsibility for managing the risks that they create?

The primary responsibility for managing risks to workers and the public who might be affected by work activity lies with the business or organisation that creates the risks in the first place. It is extremely important that businesses take responsibility for managing the risks that they create. Therefore we would recommend tightening up the consequences of breaches of the code, to ensure compliance.

Q.14. The Code sets out how LAs can achieve a consistent approach to regulation via risk based targeting using specified guidance material. Will this bring about the desired consistency of approach?

The approach, via risk based targeting, is likely to bring about consistency. However, this consistency should not be desired, because, as detailed above, just focusing on high risk areas will lead to unfair and dangerous consequences for employees working in slightly lower risk areas that fall out of the criteria for high risk proactive inspections.

Q.16. Do you have any other comments on the ideas and proposals explored in this document?

The proposals in this document are totally misconceived. It is clear that the intention of the government is to reduce the so-called “burden of red tape”, but this is to be done at the expense of vulnerable employees and workers. The philosophy should not be profit before people - businesses should be more concerned about the wellbeing of their staff over cutting corners to save money. However, we are not against a risk-based proportionate system, but this risk must be better defined.

Q.17. Is there anything you particularly like or dislike about this consultation? Please provide comments

We strongly believe that, for the reasons expressed above, the consultation as written is misconceived. Further, the consultation questions are weighted to suggest that the government has already made up its mind to stop local authorities proactively inspecting low risk businesses (or, indeed, those businesses that do not fall within Annex A) on health and safety grounds, and the proposals are merely a vehicle in which to implement this. These loaded questions are designed not to bring out the real issues at stake- such as the dangers that people will face if workplaces and practices go unchecked because they are so called “low risk”.

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