Health and Safety Executive

Consultation on proposed new draft Approved Code of Practice for the Workplace Health Safety and Welfare Regulations 1992

A response by the Association of Personal Injury Lawyers

July 2013

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 4,000 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.

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 consultation on a new draft Approved Code of Practice (ACOP) for the *Workplace Health Safety and Welfare Regulations 1992*. Whilst the Health and Safety Executive (HSE) has stated that the redrafting of the ACOP was not intended to change the standard of protection set out in the guidance, this is not entirely correct.

The HSE has stated that no duties have changed beyond those mentioned in the introductory note to the ACOP. Page 5 of the introductory note lists the only changes that should have occurred. The changes relate to a number of legislative changes which are necessary in order to bring the ACOP up to date. Changes also involve the inclusion of webpages and links throughout the ACOP. It is also stated that "where appropriate, the content and layout has been revised to simplify and clarify the language". We suggest that several duties have in fact changed as a result of the redrafting of the ACOP, albeit subliminally. ACOPs have a special status, because although they are not in themselves legally binding, employers often look to them for guidance as to how they can comply with regulations. The impression is given that if employers comply with an ACOP, then they are fully complying with the relevant regulations. Therefore when the ACOP becomes less detailed, and parts of the guidance are completely removed, the employer may not realise that they have additional obligations and the standard of compliance will fall. We have highlighted the changes between the old and redrafted ACOPs in a document which is available on the APIL website, for your reference, and is also attached as an appendix to this document.

Comments on specific regulations

Regulation 4 Requirements under these Regulations

APIL's biggest concern is the removal of the reference to risk assessments in the ACOP. The old ACOP for regulation 4 states that "The Management of Health and Safety at Work Regulations 1992-3 require employers and self-employed people to assess risks…" There is no such equivalent in the new ACOP, and this could therefore mean that employers do not realise that they must carry out a risk assessment. Employers may only look to the ACOP, and not to the original regulation, to find out how they should fulfill their obligation. They will believe that if they comply with the ACOP, they are also complying with the regulation, and if a duty to carry out a risk assessment is not mentioned in the ACOP, then they will not realise that one must be carried out. It is important that the guidance surrounding the regulations reinforces the duty to carry out a risk assessment.

Regulation 5 Maintenance of workplace, and of equipment, devices and systems

We also have concerns about the re-drafted Approved Code of Practice on regulation 5, which we feel arguably no longer accurately reflects the regulation. Firstly, the old ACOP at paragraph 20 states that "If a potentially dangerous defect is discovered, the defect should be rectified immediately, or steps should be taken to protect anyone who might be put at risk, for example by preventing access until the work can be carried out or the equipment replaced…steps should be taken to ensure that repair and maintenance work is carried out properly". In comparison, the corresponding guidance in the new ACOP reads that "If a potentially dangerous defect is discovered, the defect should be rectified immediately…Equipment that could fail and put workers at *serious* risk should be properly maintained and checked at regular intervals, as appropriate... Action should be taken immediately to isolate and rectify the fault where there is a risk of *serious or imminent* harm (emphasis added)".

The additional information in the new ACOP appears to narrow the requirement that steps should be taken to ensure that repair and maintenance work is carried out properly. The new ACOP suggests that maintenance work needs to only be carried out where there is a "serious risk" to workers. The actual text of Regulation 5 does not suggest that maintenance should be carried out only where there is a serious risk of harm, and narrowing the employer's obligations like this will result in a reduction of safety standards in the workplace. There are also issues of clarity. It is unclear what a "serious risk" means in this context. A serious risk could mean that there is a serious risk of minor injury or a small risk of catastrophic injury. We are concerned; therefore, that this ACOP section does not accurately reflect the employers' obligations as enshrined in the regulations, and is also not sufficiently clear to allow the employer to fulfill their obligations completely.

Regulation 9 Cleanliness and waste materials

We also have concerns about regulation 9, which refers to cleanliness of the workplace. The original ACOP at paragraph 69 states that "floors and indoor traffic routes should be cleaned at least once a week. In factories and other workplaces of a type where dirt and refuse accumulates, any dirt and refuse which is not in suitable receptacles should be removed at least daily." This is removed and replaced in the redrafted ACOP simply with "...workplaces should be regularly cleaned to ensure that dirt or refuse is not allowed to accumulate…" Again, there are issues of clarity with the wording of this ACOP, because "regularly cleaned" could mean once a week, or even twice a year in some contexts. Whereas the original ACOP gives clear guidance on how to comply with the regulation, the new ACOP is

subjective in its wording and we feel that this may mean that employers do not comply fully, and that dangerous practices could take place. The fact that "regular cleaning" can have dangerous consequences depending on the context is illustrated in *Bassie v Merseyside*[1]. This was a case where there was a breach of the Workplace regulations, and an employee slipped and broke his knee cap. This happened in a room that was being used for gym activities. The actual gym was cleaned daily, but the appliance room, in which the accident occurred, was only cleaned once a week. Dust settled in the appliance room and it was this that caused the claimant to fall over. This demonstrates the importance of having clear detailed guidance setting out recommended cleaning schedules for different types of rooms. It is helpful to have "weekly cleaning" etc as detailed guidance. "Sufficiently clean" and "regularly cleaned" are subjective and open to broad interpretation – both once a week and once a day could be classed as "regularly cleaned", and if the employer followed the new ACOP guidance in this case, they would believe that they had satisfied the requirements of the regulations, but it is clear here that they had not done enough. The whole point of guidance is to add "flesh to the bones" of the regulations, to make them easier to understand and apply in real life situations. With subjective language, guidance is not very effective.

Regulation 13 Falls or falling objects

We note that the ACOP for regulation 13 now only refers to regulation 13(5). We recommend that in this ACOP section, it is highlighted that regulation 13(1)-(4) has been revoked by the Work at Height Regulations 2005. Further, the employer should be directed to the guidance on the Work at Height Regulations 2005. Alternatively, we suggest that regulation 13 should be separated completely from this ACOP and, together with the Work at Height Regulations 2005, be provided with an ACOP of their own. This will enable employers to access all of the relevant regulations and guidance for all safety aspects of working at height in one place.

Regulation 18 Doors and gates

We have further concerns about regulation 18. The ACOP here heavily references the Building Regulations. For example, paragraph 166 of the new ACOP states that "doors and gates should be maintained in accordance with the Building Regulations…" These regulations only apply to buildings constructed after they came into force, and so it is unclear from the ACOP what steps to take if the building regulations do not apply, if for example the employer has an old door that has become faulty. Our understanding is that the employer would not need to retrofit. A further issue with such a heavy reliance on the Building Regulations for guidance is that the Building Regulations do not have health and safety as

[1] [2005] EWCA Civ 1474

the sole consideration. The requirements under these regulations could change, therefore, for non-health and safety reasons in future. A continuing duty to maintain, which would apply to doors and windows, is demonstrated in the case of *Clegg v North Ayrshire*[2]. Here a lady slipped on a ramp that was not properly maintained and fractured her wrist. Schiemann LJ in *Palmer v Marks and Spencers*[3] also points out, albeit in reference to regulation 12(1), that one must bear in mind that (the Workplace Health Safety and Welfare Regulations 1992) are intended to guide an employer in the construction, in the first place, of a workplace, and thereafter its maintenance. The approved code of practice does not illustrate this, and gives the impression that if the Building Regulations are complied with, then employers have done all that they can and so will not be liable for accidents that occur.

Regulation 21 Washing facilities

We also recommend that in regulation 21, which concerns washing facilities, where it is stated in the new ACOP "man-made water systems are a potential source for legionella bacteria growth, and risks from legionella in such systems should be appropriately assessed and managed", a link should be put in to the legionella ACOP, to give guidance as to how the system should be "appropriately assessed and managed". Further on in regulation 21, there is a link to more information on legionella, and it would be useful for the employer if these two references were linked up so that whenever legionella is mentioned, the employer is clear as to where they must look for information on how to prevent legionella growth.

General comments

We note that throughout the new ACOP, a number of terms are open to broad, and therefore perhaps wrongful, interpretation by the employer. Wrongful interpretation would mean that the employer would not comply sufficiently with regulations and workplaces could become unsafe. Terms that are open to interpretation are commonly used such as "reasonably practicable" "sufficient and suitable" "adequately ventilated", and "appropriate to the building's type". At the very least, examples should accompany this subjective language, to guide the employer as to what "sufficient and suitable", or "appropriate to the building's type" actually entails.

In our previous response to the consultation on the review of ACOPs, we suggested that there should be a greater use of examples in the ACOPs to demonstrate how one should comply with the regulations. We also suggested that previous court decisions should also

[2] [2002] ScotCS 127 (7th May, 2002)
[3] [2001] EWCA Civ 1528

appear throughout the ACOPs to enable employers to see how the regulations work in practice. It is apparent that this suggestion has not been taken on board, and if anything, there has been a removal of examples in this new redrafted ACOP. This will hinder the effectiveness of the approved code of practice, as its function is to help employers comply with the regulations. The most effective way to do this would be to provide practical real life examples of what classifies as compliance, and which activities will fall foul of the rules.

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