

Health and Safety Executive

**Consultation on Control of Substances Hazardous to Health Regulations
2002 (as amended)**



A response by the Association of Personal Injury Lawyers

August 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 *Control of Substances Hazardous to Health Regulations 2002 (as amended)*. 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, yet this is not entirely correct. We have a number of concerns with the new redrafted ACOP, namely a lack of detail in some parts, leaving the guidance open to wide interpretation which is not useful for employers who are looking for clarity of their obligations. This could lead to dangerous practices as the employer is unaware of the steps they must take to comply with the regulations.

General comments

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 or become too vague, the employer may not realise that they have additional obligations, or understand the obligations that they have, and the standard of compliance will fall.

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 appear throughout the ACOPs to enable employers to see how the regulations work in practice. We are pleased to note that throughout the redrafted ACOP, examples are provided to ensure ease of understanding. However, we would welcome the introduction of real life case outcomes, to further aid the appliance of the regulations in real life situations.

Specific comments on the regulations

Our main concern is that the replacement ACOP lacks the detail of the current document. Lack of detail could lead to employers being unsure of how to comply with the regulations and thus falling foul of them, potentially creating dangerous workplaces. There is also increased use of vague concepts that are not explained fully, such as “as far as is reasonably practicable” and “at suitable intervals”. These should be spelt out clearly with practical examples.

We note that in the ACOP for regulation 3, detail is missing in the redrafted ACOP with regard to the duties of employers. For example, the meaning of “reasonably practicable” is set out in detail in the current ACOP at paragraph 34, but is missing from the replacement document. Reasonably practicable is a term which is open to very broad interpretation and, without examples or further explanation, could lead to the employer failing to do enough to comply with the regulations. The current ACOP also provides an explanation of what “working on another employer’s premises” entails. This is also missing from the redrafted ACOP, and could again leave employers and employees unaware of their duties. Further, the section in the current ACOP that sets out the duties of employees is completely removed from the new redrafted ACOP, and thus employers and employees will be left uninformed, which could again result in a drop in standards.

In the current ACOP for regulation 5 (paragraph 44), there is reference to Dangerous Substances and Explosive Atmosphere Regulations (DSEAR), as a place to look for further guidance should COSHH regulations not apply. This is removed in the new redrafted ACOP, and therefore employers will be left without sufficient information of where else information can be found to help them create a safer working environment for their employees and workers.

With regard to regulation 6, much more detail is present in the current ACOP as to what the risk assessment should entail. The current ACOP, at paragraph 50, includes a detailed section which gives the employer a background of the aims of the risk assessment. Detail of this kind is important to ensure compliance, as an employer who fully understands why a risk assessment needs to be carried out, and that it is not just overbearing health and safety requirement, is more likely to ensure that the job is done properly. Paragraph 52 in the current ACOP also states that “the COSHH assessment can be made as part of, or as an extension of, the more general risk assessment duties placed on employers by regulation 3 of the Management of Health and Safety Regulations.” This is removed from the new ACOP, but would be important in helping the employer to put into context how all of their obligations from different sets of regulations fit together.

We also have concerns with the ACOP for regulation 9. Firstly, the beginning paragraph (paragraph 160) of the current ACOP has been deleted. This describes the importance of preventing the spread of infection, and puts the rest of the ACOP into context. Omitting this could potentially change an employer’s approach to interpretation of the guidance. As stated above, providing background information on the aims of the regulations will mean that employers are more inclined to comply with their obligations.

A more pressing concern in the ACOP for regulation 9 is the removal of set time limits for inspection of safety equipment. The current ACOP reads “the quality of breathing apparatus should be tested at least once every three months and more frequently when the quality of the air supplied cannot be assured”. In the new ACOP, “once every three months” is replaced by “tested at suitable intervals”. Also, in the current ACOP, it is stated that “Thorough maintenance examinations, where appropriate, tests of items of RPE, other than one-shift disposable respirators, should be made at least once every month, and more frequently where the health risks and conditions of exposure are particularly severe”, whilst in the new ACOP, this is replaced by “...should be made at suitable intervals”. This vague language can allow employers to not comply fully with the regulations, and could lead to a drop in standards and dangerous practices. “Suitable intervals” has a very broad interpretation, and without examples demonstrating what this entails, it is difficult for the employer to know whether they are doing enough to comply with the regulations.

Removal of appendices

We note that the appendices to COSHH are to be removed, and largely replaced by information on the HSE website. We are disappointed with this decision, in particular the removal of Appendix 3, the Approved Code of Practice on asthma. The information contained in this appendix is to be distributed throughout the relevant sections of the new ACOP, and also put on the HSE website. Appendix 3 was incredibly useful as a “one-stop shop” for all of the employers’ obligations under COSHH, relevant to the prevention of occupational asthma. This information is now hidden away in the body of the main ACOP, and it is no longer made clear that the main duty of the employer with regard to occupational asthma is to *prevent* exposure to substances with the potential to cause this disease, and control of exposure is the secondary aim if prevention is not reasonably practicable. If employers want information on occupational asthma, they will now have to trawl through the entire ACOP and the HSE website, picking out the relevant sections. This is unsatisfactory, and will not help the busy employer to find information on a particular subject quickly. This could then lead to non-compliance and a fall in workplace standards.

- Ends -

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