Health and Safety Executive
Proposals to exempt self-employed persons from section 3(2) of the Health and Safety at Work etc Act 1974, except those undertaking activities on a prescribed list

A response by the Association of Personal Injury Lawyers

August 2014

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 4,000 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

We welcome the opportunity to respond to the Health and Safety Executive's consultation on proposals to exempt self-employed persons from section 3(2) of the Health and Safety at Work Act 1974. The proposals are unnecessary and are likely to have harmful consequences, both for the self-employed and those they may interact with in the course of their work.

APIL believes that:

- The proposals are founded on a misconception that health and safety regulation is "unnecessary" and "overly burdensome" for the self-employed. In reality, it is neither;
- The self-employed are a sizeable and growing work force. They deserve the same protection with regard to health and safety as all other workers;
- The new prescribed list will result in much confusion. This confusion is likely to lead to self-employed people thinking that they are not required to comply with any health and safety regulation – making them a risk to themselves and anyone they may interact with;
- The new proposals do not address the concerns surrounding the original 2012 consultation;
- Very low compliance with health and safety regulations by the self-employed should not be brushed aside. The problem should be tackled with greater education and guidance, to reassure the self-employed that their obligations under current law are not onerous, and to help them comply efficiently.

General comments

The proposals are based on misconceptions

Health and Safety law is burdensome to the self-employed

APIL has previously responded to the HSE's proposals on exempting the self-employed from the scope of health and safety law, and we reiterate our earlier concerns. The proposals are founded on a misconception that health and safety regulations are overly burdensome to self-employed people. The language of "burdensome" health and safety requirements is littered throughout this consultation. The impact assessment states that: "the intended effect (of the proposals) is to remove the burden of implementing health and safety legislation for the self-employed, and to remove the fear of inspections and possible prosecutions. This would remove unnecessary expenditure and contribute to an improved perception of HSE's regulatory activity – showing it to be sensible and proportionate".

In reality, the current law is far from burdensome. Concessions are already made for the self-employed in relation to health and safety measures that they must adopt – the regulations are appropriate to the risks, realistic and achievable. Professor Lofstedt himself explained that the actual burden that the regulations currently place upon the self-employed may not be particularly significant due to existing exceptions. For example, Regulation 3(2) of the Management of Health and Safety at Work Regulations 1999 states "Every self-employed person shall make *suitable and sufficient* assessment of (a) the risks to his own health and safety to which he is exposed whilst at work; and (b) the risks to health and safety of persons not in his employment arising out of or in connection with the conduct by him or

his undertaking*".* This is not a burdensome requirement – the self-employed person just needs to make a suitable assessment, and this may involve doing very little. A further example is that self-employed people do not need to provide written risk assessments. Section 5(2) of the MHSW Regulations 1999 only requires employers of five or more people to record the arrangements undertaken.

Health and Safety Law is unnecessary red tape

Health and safety regulations are also far from "unnecessary". According to the Trade Unions Congress (TUC), since the Health and Safety at Work Act was introduced in 1974, there has been an 80 per cent decrease in fatalities. The HSE estimates that half of this is as a result of health and safety legislation and enforcement. [1]

The self-employed sector is a large and expanding workforce. Figures from the Office of National Statistics indicate that the self-employment sector increased by 367,000[2] between 2008 and 2012. ONS data suggests that in 2012, there were more than 4.2 million self-employed people, amounting to 14 per cent of the overall workforce[3]. Health and safety regulation provides a vital role in ensuring those who go to work return home safe, and there is no justification for denying self-employed people this protection. In addition, a growing self-employed workforce means a growing client base for those workers. These clients and anyone else who interacts with those self-employed people are entitled to reassurance that the self-employed are obliging by their duties under health and safety law, and their workplace and practices are safe.

Low compliance does not mean low risk

To exempt the self-employed would have dangerous consequences as the HSE would be unable to monitor dangerous workplace practices. Throughout the impact assessment the point is made that there is already very low compliance – at paragraph 48, it is stated that during qualitative research commissioned by the HSE, only 5 out of the 60 self-employed people interviewed thought that they had any health and safety obligations. The remaining 55 either said that they did not, or that they were unsure. At paragraph 49, the impact assessment states that the HSE will assume a very low proportion of self-employed individuals will seek to understand their health and safety duty, and they will use a compliance rate of 10 per cent. Already, the vast majority of self-employed people are unaware of their duties – so how can health and safety law be seen as burden?

Implementing the new proposals would lead to confusion, and the majority of self-employed people automatically assuming that they are exempt- even if this is not the case. The end result would be that most self-employed people would carry out work with no regard to health and safety. What is required is education, not deregulation. Education and guidance on the current position would increase compliance, and make self-employed people realise that they do have duties under health and safety law, but these duties are not overly burdensome or onerous.

[1] http://www.tuc.org.uk/workplace/tuc-20513-f0.pdf
[2] http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/february-2013/sty-self-employed-workers.html
[3] http://www.ons.gov.uk/ons/infographics/self-employed-workers-in-the-uk/index.html

The Deregulation Bill

This consultation is premature, as it is based on the presumption that the Deregulation Bill will be passed into law, and s 3(2) of the Health and Safety at Work Act will be amended to exempt self-employed people. The Bill is still subject to the Parliamentary process. As the consultation paper states: there is no guarantee that the proposed amendments to clause 1 of the Bill will be given Royal Assent – at least in their current form. Given the many concerns raised regarding the exemption of the self-employed, it is inappropriate to press on with proposals based on an amendment to the Health and Safety at Work Act which may never, and should never, come into force.

The "prescribed list" approach

The HSE and government have responded to concerns about the original proposal to exempt the self-employed by broadening the scope of the exemption to everyone aside from those on a "prescribed list". Instead of addressing the concerns raised, this exacerbates them further.

The government has deliberately misunderstood Lofstedt's recommendations

It is clear that implementing this proposal would go much further than Lofstedt recommended. It seems that the government has deliberately misunderstood those recommendations and then used them as a justification for removing vital health and safety regulation. As stated in the consultation document at page 26, Lofstedt recommended exempting from health and safety law those self-employed whose work activities pose no potential risk of harm to others. He went on to state that "it is vital that this change is accompanied by clear guidance to ensure that the *limited* scope of the change is clearly understood and that *not all* the self-employed will be exempt (emphasis added)". This is not reflected in the changed proposals – these clearly state that *all* self-employed people will be exempt, except those on a prescribed list. It is clear that the exemption extends far beyond those self-employed whose work activities pose no potential risk of harm to others.

Definitions

Many of the definitions in the prescribed list are unclear. The list leads readers on a wild goose chase through numerous sets of regulations to find a definition – for example, a self-employed person working in "equipment and plant" would turn to the regulations to see if they are exempt or not. The definition reads that the activity will not be exempt from health and safety law if it is the examination, maintenance or testing conducted for the purposes of the Provision and Use of Work Equipment Regulations 1998, the Lifting, Operations and Lifting Equipment Regulations 1998 or the Control of Substances Hazardous to Health Regulations 2002. The self-employed person will then have to trawl through those regulations to identify if they are conducting an activity for those purposes. Many self-employed people will simply not bother to persevere and try to determine if they are exempt, and it is likely that they will just assume that they do not have to comply with any health and safety regulations. Those that do persevere will be left bewildered as to whether the exemption applies to them or not.

Confusion

The consultation states that the prescribed list approach was adopted after the original suggestion to remove health and safety burdens from the self-employed in low-risk occupations, whose activities represent no risk to other people, was criticised for being confusing. The new approach of an exemption coupled with a prescribed list is likely to result in similar, if not greater, confusion than the original proposal. The list is unclear, and people will simply not know whether they are exempt or not. The vast majority of self-employed people will assume they are exempt, and in turn will give little or no thought to health and safety. They will not think about or identify potential hazards or risks, or how to handle them safely. This will have dangerous consequences for the self-employed person themselves, and for those who have to interact with them or are affected by their work.

Incomplete list

The unsuitability of the prescribed list is further demonstrated by the numerous categories of activity that are absent. We have identified a number of categories of activity where, if no regard for health and safety was given, there is a risk of injuries to either the self-employed person or another individual. Firstly, there is no specific category for those who work with animals, for example – dog walkers would be exempt. Another category, whose exemption from the prescribed list is cause for alarm, is those working with children. Under the new proposals, child-minders will not be required to take any steps to comply with health and safety regulations.

Further, the self-employed who work in the security sector do not feature on the list. Bouncers and others in this sector are likely to face potentially hazardous situations on a fairly regular basis. If no thought is given to how to safely handle these situations – injuries are likely to occur. Transport is another key area that is missing from the prescribed list. According to RoSPA, around one third of fatal and serious road crashes involve someone who was at work[4]. Office of National Statistics data indicates that taxi drivers were the largest category of self-employed people in 2012. Their work involves interacting with members of the public for most of the time, and also involves a high level of risk as they are often concentrating on driving but also communicating with an operator. It is inconceivable that the self-employed who drive for a living will be exempt from having to comply with health and safety regulations.

Impact assessment

The impact assessment is a poor basis for the changes, as it appears unreliable and confused. The monetary savings as a result of implementation of the proposals varies significantly throughout. From the impact assessment, the savings to businesses do not seem very large or worthwhile given the likely impacts of implementation. For example, paragraph 42 of the impact assessment states that for every individual who would have otherwise had to undertake familiarisation; there will be a saving of £20.

Suggestions for guidance

[4] http://www.rospa.com/faqs/detail.aspx?faq=296

It is extremely difficult to provide clear guidance on proposals which are so prone to being misunderstood. There will never be clarity under these proposals because there are two standards, and it is unclear which standard applies in different circumstances.

Instead of exempting the self-employed to dispel the myth that health and safety regulation is applied inappropriately, the focus should instead be on providing guidance and information on the *current* position. This would increase compliance and highlight to the self-employed and others that their health and safety obligations are not onerous or complex. There should be education – not deregulation.

- Ends -

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