

**HEALTH & SAFETY EXECUTIVE**

**DISCUSSION DOCUMENT**

**REGULATING HIGHER HAZARDS: EXPLORING THE ISSUES**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS  
(PARTS I & II)**

**26 JANUARY 2001**

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**HSE Discussion Document**  
**Regulating Higher Hazards: Exploring the Issues**

**A Response from the Association of Personal Injury Lawyers (Part I)**

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4800 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:
  - To promote full and prompt compensation for all types of personal injury;
  - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
  - To alert the public to dangers in society such as harmful products and dangerous drugs;
  - To provide a communication network exchanging views formally and informally.
2. APIL welcomes the opportunity to respond to this discussion document, which seeks views on how safety within higher hazard industries should be regulated. This response concentrates on questions concerning regulation of safety within the railway industry, a matter of much concern to APIL in recent years.
3. This detailed response follows an initial response submitted in November 2000, which outlined APIL's support for the establishment of an Accident and Disaster Investigation Bureau to provide a co-ordinated response to, as the name suggests, accidents and disasters (but would have additional roles). This initial paper is attached for ease of reference.
4. APIL strongly believes that the government should establish an independent statutory body to set, monitor and enforce safety standards within the fragmented railway industry. As such it would take over the functions of the Health & Safety Executive and would have similar functions and powers to

those of the Civil Aviation Authority. It shall be referred to in this paper as the Rail Safety Authority (“RSA”).

5. In addition APIL strongly believes that Railtrack should not be responsible for supervising and organising safety within the fragmented rail industry due to its continuing failures and conflicting interests (i.e. financial and safety interests). This responsibility should be given to the RSA.
6. It is important to note in the context of this discussion that many of the safety problems experienced in recent years stem not only from the deficient regulatory framework, which is dealt with below, but also from the poor safety culture within Railtrack and the rail operating companies. This should not be allowed to continue. Health and safety should be at the heart of these, and indeed, any companies.
7. For this reason APIL fully supports the introduction of an offence of corporate killing. Imposing safety duties upon company directors will ensure that company boardrooms have a vested interest in making their companies safe. This will only work, however, if there is close policing of those with health and safety responsibilities and rigorous enforcement. In addition it depends upon the introduction of a range of appropriate sanctions to fit the seriousness of non-compliance (for example, fines, disqualification and imprisonment).

**Q2 HSE would welcome your views on whether this basis for the application of ‘permissioning’ regimes is appropriate.**

8. APIL agrees that ‘permissioning’, as an extra layer of regulation and monitoring is appropriate where it is proportionate to the potential hazardous consequences of certain industries and operations.

**Q3 HSE would welcome your views on whether principle 2 properly reflects the responsibilities and demands which should be placed on duty holders.**

9. It is agreed that principle 2 reflects the **general** responsibilities and demands that should be placed on duty holders. It is not agreed however that principle 2 reflects the full extent of the responsibilities and demands that should be placed on them as is explained below.

**Q4 HSE would welcome your views on what more could be done to help safety cases to become living documents of practical relevance to the daily operation of sites.**

10. Safety cases on paper alone are almost pointless. Safety cases must become living documents. This can only be achieved by ensuring that all workers (including contractors), and not just managers, are aware of the importance of safety cases and their contents. This can be ensured with clear, regular instruction and training of all workers. Such instruction must relate to a worker's particular job and not merely be general in nature. Further, workers must be monitored in their work to ensure compliance with the details of the safety cases.

**Q5 In relation to all or any of the regimes, HSE would welcome your views on whether the current balance between goal setting and prescription is appropriate.**

11. APIL strongly believes that the current balance between goal setting and prescription is inappropriate. Since privatisation of the railway industry, Railtrack and the rail operating companies have been allowed to work within a goal setting framework and to set their own goals and this has consistently failed to ensure safety. It is time to acknowledge and accept that such an approach is insufficient and that a more prescriptive approach is necessary.
12. Firstly, safety should not be a "goal" which it is hoped will be achieved. It should be defined by "standards" which rail companies must strive to achieve. Secondly, the HSE has recognised that Railtrack and the rail operating

companies have failed to agree suitable goals on safety (paragraph 131). It is, therefore, no surprise that the “goal-setting” framework has consistently failed. The RSA should be responsible for setting safety standards. This would provide common standards in a fragmented industry and achieve clarity. It would also minimise the scope for economics taking precedence over public safety.

**Q6 For any or all of the regimes, HSE would welcome your views on the extent to which principle [4] adequately describes the place of the safety regulator in ‘permissioning’.**

13. APIL is not concerned with the adequacy of the principles in describing current approaches but with the practical consequences and shortcomings of the current approaches and the options for improvement.

**Q7 For any or all of the regimes, HSE would welcome your views on whether safety regulator intervention is currently pitched correctly, bearing in mind that more activity requires more resource.**

14. As is clear from paragraphs 11 and 12, APIL does not believe that safety regulator intervention has been pitched correctly. It has been made clear that Railtrack should not be responsible for coordinating safety within such a fragmented industry. The ‘safety regulator’ should intervene much more and, as stated, safety regulation should be performed by the RSA.

15. It is stated in paragraph 40 that the HSE fears, and tries to avoid, acting in such a way as to create an adversarial relationship with the companies that it is monitoring. The recent spate, however, of accidents on the railways has demonstrated that the HSE’s current approach does not work.

16. The rail companies must be shown that it is more advantageous to comply with safety requirements than not. This can only be achieved if there are real fears that serious disadvantages will ensue following non-compliance. This fear will only arise if the companies believe that action will actually be taken

against them if they disregard safety and if the penalties that may be imposed reflect the seriousness of such disregard. This relates to APIL's earlier comments as to the introduction of an offence of corporate killing discussed in paragraph 7.

**Q8 For any or all of the regimes, HSE would welcome your views on the likely consequences of greater disclosure of safety cases and the safety regulator's reports.**

17. Transparency must always be welcomed. It is the compliance with safety cases, however, that is of paramount importance.

**Q9 In relation to the principles, and to any or all of the regimes covered in Chapter 3, HSE would welcome your views on whether the description of the key features matches your understanding of them.**

18. The description of the key features within the railway industry does match APIL's understanding of them. The focus, however, should be on the practical adequacy of those features.

**Q10 In relation to the principles, and to any or all of the regimes covered in chapter 3, HSE would welcome your views on the extent to which the differences between the 'permissioning' regimes are necessary and appropriate.**

19. The differences between the 'permissioning' regimes are both necessary and appropriate. The activities of each industry pose very different risks. The management systems in place to control those risks must be tailored to suit them, and the hazardous regimes, specifically.

**Q11 In relation to the principles, and to any or all of the regimes covered in chapter 3, HSE would welcome your views on the role and value of external non-regulator scrutiny in a ‘permissioning’ regime.**

20. APIL believes that external scrutiny is essential and has already stated that responsibility for co-ordinating safety within the fragmented industry should lie with the RSA and not Railtrack and the Health & Safety Executive.

**Q12 HSE would welcome your views on the extent to which a system of approvals is still relevant to the regulation of the railway industry, where safety cases are now an established procedure. If it is, how should it be delivered?**

21. The current system of approvals is virtually useless. The HSE currently approves new or altered works before they are taken into use. This means, however, that the approval takes place when the works are completed. Many standards of safety currently depend upon what is “reasonable”. By the time approval is given, when the works are completed, it may not be “reasonable” to require changes to the new or altered works to achieve safety. In addition, the railway may continue to be used whilst works are being developed or altered. Such works may take many years, during which, safety is often not considered by an external body. This is hazardous and must be addressed.

22. It is essential that safety be considered from the initial design stage. As recognised, once designs are implemented, it often becomes too late to alter the design of the work to account for safety. It appears from evidence given at the Ladbroke Grove Inquiry that safety considerations were indeed ignored at the initial layout design stage in that area. APIL believes that a staged system of consents as outlined in paragraph 147 would meet the above concerns. It would ensure that safety was considered at all stages. It is envisaged, of course, that such a consents system would be administered by the RSA.



**Q13 HSE would welcome your views on how the development of Notified Bodies will affect the approvals regime, and what the role of the safety regulator should be.**

23. The RSA, as an independent statutory body, could become a notified body which would allow one body to coordinate regulation introduced at both national and European level.

**Q14 HSE would welcome your views on the role of external non-regulatory scrutiny in all proposals for works on the railway, and on the place for conformity assessment schemes.**

24. An external body, i.e. the RSA, should scrutinise proposals for all works on the railways. This would assist in ensuring that economic considerations do not take precedence over safety from the very beginning of the project. Conformity assessment is a crucial element of this. The only way to monitor safety is to assess whether Railtrack and the rail operating companies are achieving the safety standards that have been set.

**Q15 HSE would welcome your views on:**

- **extending the contents of the application;**
- **requiring it in the form of a written plan**
- **the elements that should be included in such a plan**

25. It seems that it can only be beneficial to require an extended application in the form of a written plan including all of the elements outlined in paragraph 135. This would assist to focus the minds of the railway companies on, and clarify, what needs to be done to control risks and achieve safety when works are being carried out.

**Q16 HSE would welcome your views on a prioritisation approach using 2 or 3 categories and what it might be appropriate to include in the definition of each.**

26. Ideally all works should be approved. This is because minor works, which appear relatively simple, may still have major consequences on safety. However it is accepted that this may not be practicable and that a prioritisation approach, based on categories, should be introduced. APIL believes, however, that the RSA should be responsible for prioritising works into categories. This is to ensure that works are correctly prioritised and that economic considerations do not influence the categorisation. APIL favours the approach to categorisation outlined in paragraph 140, i.e. through looking at how particular works may result in specific risks.

**Q17 HSE would welcome your views on the need to introduce additional controls on operators before final approval, and how this might best be achieved.**

27. APIL has already expressed support for the system of consents outlined in paragraph 147. The process should certainly be formalised. The discussion document suggests that this process “might” logically also involve a power for HSE to withdraw such consent. This power must surely be invested in the relevant body (the RSA) if a system of consents is to have any meaning.

**Q18 HSE would welcome your views on turning approvals into a consent regime as outlined.**

28. APIL’s view on this has already been expressed. The suggestion of turning the system from one of ‘approvals’ into one of ‘consents’, however, is merely a facelift. The important point is that consent or approval is given in stages to ensure that safety is considered at all relevant points but especially at the design stage.

**Q19 HSE would welcome your views on introducing a safety regulator scrutiny point at the design stage for major works, before the detailed development of the Plan, and whether this should be statutory or voluntary.**

29. It seems clear from evidence given at the Ladbroke Grove Inquiry that safety was not sufficiently considered at the design stage of the layout in the Paddington area and it is accepted that the further plans proceed without regard for safety, the harder it is for safety to be achieved. APIL believes that scrutiny at the design stage would be extremely beneficial but that to be effective the duty would have to be statutory in nature. This should be an additional role of the RSA.

**Q20 HSE would welcome your views on enabling HSE to impose conditions on the operator either during or following the completion of the works.**

30. APIL agrees that a power should exist to enable the imposition of conditions on operators either during or following the completion of works as suggested in paragraph 152, i.e.

- to apply conditions for the duration of works
- to impose operational limits on the eventual running of works.

APIL, however, believes that such powers should be exercised by the RSA.

**Q21 HSE would welcome your views on placing a duty on operators to notify the safety regulator if works were significantly delayed or cancelled.**

31. Improving the flow of information on all aspects of works being carried out can only be advantageous.

**Q22 HSE would welcome your views on whether there is a need for a more explicit statement of where the primary duty lies.**

32. It is essential that an explicit statement is made as to where the various responsibilities for safety lie. This is especially because of the fragmented nature of the railway industry. Just as importantly, however, there should either be a re-organisation or clarification of where responsibility for safety lies within the internal corporate structures of Railtrack and each of the rail operating companies.

**Q23 HSE would be grateful for any information you wish to provide on the economic impact of the various discussion points set out in chapter 4.**

33. It is extremely important that it is acknowledged that railway companies should not be allowed to put profits before the health and safety of workers and the public. Past inquiries have discovered that this has indeed happened. This is why an independent body, which rigorously applies and enforces safety standards, is essential.

26 January 2001

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**A Response by the Association of Personal Injury Lawyers (Part II)**

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4800 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:
  - To promote full and prompt compensation for all types of personal injury;
  - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
  - To promote health and safety
  - To alert the public to dangers in society such as harmful products and dangerous drugs;
  - To provide a communication network exchanging views formally and informally.
  
2. APIL welcomes the opportunity to respond to this discussion document which deals with the regulation of higher hazard industries. APIL notes that responses received by 1<sup>st</sup> December 2000 will be fed into the Ladbroke Grove Inquiry (LGI). APIL intends to file a detailed response to this discussion document by the final deadline in January 2001 but wishes to make an important submission regarding the establishment of an Accident and Disaster Investigation Bureau at this stage, which is particularly relevant to the regulation of the railway industry and which we hope will be useful within the context of the LGI.
  
3. APIL believes that the legal regulation of safety in higher hazard industries requires reform and will deal with the detail of that reform in a later response. The point APIL wishes to make at this stage, however, is that legal regulation alone fails to protect against loss of life and limb. Recent avoidable accidents, especially on the railway, demonstrate this. Under current legal regulation,

higher hazard industries are essentially left to regulate themselves with minimum input from prosecuting authorities like the HSE and as stated in the discussion document at paragraph 122: “...confidence in the ability of industry to self-regulate is low”.

4. APIL shares the general public’s lack of confidence and advocates the establishment of an “Accident and Disaster Investigation Bureau”. Such a Bureau would have several inter-linked functions which will be outlined below. The HSE has invited discussion surrounding the regulation of safety in higher hazard industries. Whilst such a Bureau would not directly fit into such regulation, its creation would assist in solving many of the problems outlined in the discussion document and apparent from evidence given in Part I of the LGI.
5. The Bureau would have a general supervisory and monitoring role in health and safety issues in all areas, including the railway and other higher hazard industries. It is well recognised that the fragmentation of the railways has caused poor communication within the industry and perhaps confusion as to where responsibilities for safety lie. An effective supervisory and monitoring body would have been able to identify this problem at a much earlier stage. In the current system, such problems are only identified when it is too late, that is, after a large-scale railway accident such as at Paddington and where the injured and bereaved have insisted on a public inquiry.
6. The concept of ‘safety’ changes rapidly as technological advances reveal means of alleviating dangers caused by higher hazard industries. However, concern for cost may influence industry views as to whether such advances should be embraced. The Bureau would, however, independently monitor and carry out a research into the improvement of public safety, by liaising with similar bodies in other countries and ensuring that the UK operates best practice on all aspects of safety.
7. In addition, the Bureau would provide an effective and co-ordinated response after an accident or disaster. The discussion document notes that the

“...consideration of safety at all stages, from concept selection and design, is an important element in permissioning regimes.” APIL agrees and believes that one of the relevant stages at which safety should be considered within the legal framework, is after an accident or disaster. It is imperative that after an accident or disaster has occurred lessons are learned and action taken to prevent recurrence. There is no effective system in place in the UK, however, to ensure that this happens.

8. Following an accident or disaster various bodies respond in a fragmented, un-coordinated and often conflicting manner. A coroner may hold an inquest to establish the cause of individual deaths; there may be a HSE or similar investigation of the accident circumstances; there may be prosecution of private or corporate individuals; civil claims for compensation may be pursued on behalf of the injured or bereaved. In addition, victims may seek a public enquiry in which recommendations to improve safety may be made. Some of these proceedings may be halted whilst others take place and much repetition occurs.
9. Also, whilst important lessons may be learned through these various proceedings after an accident, there is no effective regulatory system in place to ensure that relevant bodies implement recommendations made to improve safety. For example, it is clear from evidence given in the LGI that railway operators were slow or failed to act upon recommendations made within the context of other public inquiries dealing with railway safety. No body is responsible for monitoring the implementation of such recommendations.
10. The proposed Bureau would carry out such roles and would provide a co-ordinated and practical response to an accident or disaster. The Bureau would initially decide or make recommendations upon the most appropriate form of investigation and decide whether timely and thorough investigation or prosecution should take precedence. Following investigation, the Bureau would make recommendations as to safety improvements necessary to prevent similar accidents or disasters. It would maintain a secretariat to monitor the

implementation of those recommendations to improve safety and keep documentation upon this which would be available to the public.

11. APIL envisages, however, a much wider role for the Bureau than outlined above. In addition it would:

- consider the granting of funding for the representation of any person, group or body appearing before an investigation held by the Bureau
- deal with formal matters presently carried out by a coroner at an inquest, that is, take evidence sufficient to declare the identity of each deceased person and how, when and why they died
- oversee the prosecution process, making recommendations for prosecution and gathering evidence
- have the power to award damages, including punitive or exemplary damages, against any person or body.

12. In summary, whilst the proposed Accident and Disaster Investigation Bureau would not be part of the specific legal framework regulating safety in higher hazard industries, it would be an integral part of that framework. It would remedy many of the shortcomings that are evident in the current regulations, especially within the railway industry and ensure safety of Britain's railways, something considered in 1993 by the Health & Safety Commission and the Department of Transport but not yet achieved.

29 November 2000