

HSC CONSULTATION

**PROPOSALS FOR REDUCING THE INCIDENCE OF OCCUPATIONAL
ASTHMA, INCLUDING AN APPROVED CODE OF PRACTICE: CONTROL
OF SUBSTANCES THAT CAUSE OCCUPATIONAL ASTHMA**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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**A RESPONSE FROM THE ASSOCIATION OF PERSONAL INJURY
LAWYERS**

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 consultation document, which seeks views on the HSC's proposals for reducing the incidence of occupational asthma. In summary, APIL welcomes the fact that the HSC is tackling the problem of occupational asthma given the extremely worrying statistics as to the number of new cases that present each year. The current general approach, under COSHH alone, has proved itself to be insufficient. APIL does not feel, however that the draft proposals, including an ACoP, are sufficiently tough or detailed.

Our own definition of occupational asthma points out the difference between asthma caused by work and pre-existing asthma made worse by workplace conditions. Is the reason for this definition clear?

3. The difference between asthma caused by work and pre-existing asthma made worse by workplace conditions is, of course, understood. The reasons for tackling the first and not the latter in the draft strategy and ACoP are,

however, unclear and unhelpful. Employers have a duty towards all employees to protect them from the risks of occupational asthma whether they have pre-existing asthma or not. APIL is concerned that concentrating on one aspect of that duty only may confuse employers as to the full extent of their duties. If the HSC are to tackle the problem of occupational asthma, this should be done in full.

What do you consider would be a stretching, but realistic target for reducing the incidence of occupational asthma by 2010?

4. Having recognised the worrying extent of the problem, the target for reducing the incidence of occupational asthma by 2010 must be as high as possible. APIL therefore believes that the HSC should aim to reduce its incidence by more than 50%.

In addition, would it be helpful to express the target in terms of reducing the exposure to the top eight substances that can cause occupational asthma?

5. APIL can appreciate why the HSC feels it will be able to reduce the incidence of occupational asthma to a greater extent if enforcement of COSHH is targeted on the eight substances and occupations. We are, however, extremely concerned about this strategy as it would only tackle substances which account for about half of all new cases. It would, of course, be preferable for all substances to be tackled through a general monitoring and enforcement plan. If this strategy is to continue, however, HSC should develop a detailed plan as to the substances that will be tackled next and when this next stage of the programme will occur. Without such a plan there is a great risk that occupational asthma caused by other substances will not be addressed.

Do you support the proposed activities under the 5 key programmes in the draft strategy at Appendix 1?

Programme 1 (Compliance)

6. APIL generally supports the proposed activities in programme 1 but believes that greater detail is necessary of the way in which the programme will be implemented if it is to be successful.
7. The need for compliance is imperative if the number of new cases of occupational asthma is to be reduced. Given the current statistics it is clear that employers are not currently complying with their duties under COSHH. APIL believes that the key to compliance is thorough enforcement. Many employers will only comply with their duties if it is more advantageous than non-compliance, i.e. that there is a real fear that a sufficiently serious sanction will be imposed. In the draft strategy the HSC states that “greater enforcement visibility and the fear of prosecution is likely to raise the profile on occupational asthma with firms.” This is too weak an approach. The HSC/HSE should make an open and detailed commitment to enforcing COSHH and the ACoP dealing with occupational asthma, when it is introduced.
8. APIL supports the introduction of an ACoP and the reasons for this are outlined in response to question 6.
9. The introduction of a ‘process change’ strategy is fully supported, as it would certainly lead to a reduction in the incidence of occupational asthma. The provision of one example as to how this strategy can be implemented is insufficient. The HSC should provide clear and comprehensive details as to the way in which it can encourage and require process changes and product substitution.
10. The suppliers of chemicals are in a prime position to provide required information as to the dangers substances can pose and the means of controlling the risks arising from use of them. If research has shown a significant proportion of safety data sheets contain inaccuracies, the suppliers should be

made, through appropriate enforcement, to provide users with correct safety data sheets. It is insufficient for the strategy to require the HSE and local authorities to “consider” such action as is stated in paragraph 1.4 of the draft strategy.

Programme 2 (Continuous Improvement)

11. Whilst a programme of continuous improvement is supported, in view of the statistics, the HSC/ HSE must concentrate on ensuring that employers comply with their legal duties under COSHH.

Programme 3 (Knowledge)

12. Programme 3 is fully supported. It is agreed that more information is necessary as to how and why individuals develop occupational asthma, as this will provide a better understanding of why and where controls are failing. Following up people with occupational asthma is a key aspect of this.

Programme 4 (Skills)

13. It is imperative that information as to the risks posed by the use or handling of hazardous substances reaches the workers that actually use or handle those substances. In paragraph 4.3 of the draft strategy the HSC states that “about a third of employees are not receiving any health and safety training” and that the “HSE will explore how to communicate to workers appropriate messages on occupational asthma”. Employers have duties to inform and train their employees on aspects of health and safety relevant to their employment, including occupational asthma if this risk arises. HSE should take appropriate monitoring and enforcement action against employers to ensure that they are complying with their duties in this respect. While the HSE should be assisting employers with their duties, it should not be fulfilling the duties of employers on their behalf.

Programme 5 (Support)

14. The strategy under programme 5 is supported. It is believed that sector specific information/ initiatives, in particular, will be useful. The success of any action is likely to be greater where the information or initiative is tailored to suit the particular risks posed by particular types of employment. In addition, insurers should certainly be encouraged to play a role in exerting pressure on employers to comply with health and safety duties through premiums and/ or available cover.

Please list the 5 proposals which you think will have the greatest impact on reducing the incidence of occupational asthma.

15. Whilst all of the proposals are essential if the problem of occupational asthma is to be effectively tackled, it is believed that the following aspects will be extremely beneficial:

- The introduction of an ACoP, providing it has sufficient authoritative guidance;
- Greater enforcement which raises a real fear of prosecution or the imposition of other sanctions as appropriate;
- Process changes and substitution of hazardous substances;
- The acquisition of information as to how and why individuals develop occupational asthma, especially the follow-up of those that are known to have suffered occupational asthma;
- The training of employees who handle or come into contact with hazardous substances;
- Sector specific information/ initiatives;
- The application of pressure by the insurance industry.

Do you agree that an ACoP could contribute to initiatives to prevent occupational asthma?

16. An ACoP would certainly assist in preventing occupational asthma for several reasons. Firstly, it would raise awareness amongst employers of the particular

problem of occupational asthma. Secondly, it will provide much needed guidance to employers on how to protect employees against occupational asthma and comply with legal duties under COSHH. Both of these factors should lead to a reduction in the incidence of occupational asthma. Thirdly, as recognised by the HSC, it will make enforcement of COSHH with respect to occupational asthma much easier. By providing guidelines on what employers should be doing, it will be easier to assess whether they are actually doing what they should.

17. Compliance with the ACoP and effective enforcement can only occur, however, if a sufficient amount of the ACOP is authoritative, rather than general, guidance. As will be seen in APIL's detailed response to the ACoP below, it is not believed that this has been achieved. In paragraph 21 of the consultation document it is stated that an ACoP will "give inspectors an extra tool in the armoury, helping them to enforce the COSHH regulations and thereby secure adequate standards of control. In contrast **guidance may be ignored** (emphasis added)." Having recognised this problem it is imperative that the HSC draft an effective and authoritative ACoP as suggested below.

Do you agree with the scope of the ACoP?

18. It has already been stated that APIL believes that the ACoP should tackle all cases of occupational asthma, whether caused at work or worsened by employment conditions.

Do you agree with the arguments and proposed text for:

Regulation 6

19. The ACoP text for regulation 6 does not provide sufficient authoritative guidance on how a risk assessment, with particular regard to occupational asthma, should be carried out. If the employer is to control the risk of occupational asthma effectively, a proper risk assessment is crucial. Without a proper risk assessment, an employer cannot hope to comply with his duties

under COSHH. The following parts of the ACoP, for these reasons, should be ACoP text:

“The first step in the risk assessment, therefore, should be to study each job or operation and identify the most likely sources of exposure, particularly those giving rise to high concentrations, including those over short periods.”

“The assessment should consider storage, transport, handling, use and disposal of substances and in particular cover:

- A. The ways in which the substance may become airborne and reach the employee*
- B. The effectiveness and range of control measures*
- C. The effect of failure of control measures or machines/ processes.”*

“Special attention should be given to maintenance and other staff who may be subjected to unusually high concentrations over a short period of time, including during...”

“Employers must review the risk assessment if health surveillance indicates that an individual has developed asthma. In which case, the employer will need to look again at the substances the person handles, work practices and other materials that could be breathed in, including those from neighbouring activities.”

Regulation 11

20. Health surveillance is crucial as it can lead to the early detection of adverse changes due to exposure to hazardous substances and may identify the need for improved control measures. For these reasons, it is extremely important that much of the general guidance given in the draft ACoP should become authoritative guidance so that the benefits of health surveillance are maximised. The following, essentially concerned with when and how to implement a system of health surveillance, should become authoritative guidance.

“If the substance is totally enclosed, health surveillance may still be necessary since failure of control measures could lead unknowingly to exposure e.g. failure of filters in extraction systems or leakage of RPE due to poor fit or maintenance.”

“A health surveillance programme should ~~preferably~~ include pre-employment (or pre-assignment) assessment of past exposures; any history of respiratory

systems or disease and baseline information about breathing capacity. It should also include the provision of information about relevant symptoms to report to a responsible person (someone properly trained in accordance with the instructions of an occupational health doctor or nurse), with ongoing surveillance comprising the administration of an annual questionnaire.”

“Best practice would be to carry out low level health surveillance where the following conditions are met:

- A. Where there is only suggestive evidence of a hazard;*
- B. There is little likelihood of exposure in the particular circumstances of work; or*
- C. The substance may be handled in a way that normally prevents inhalation.*

But high-level health surveillance is needed where the following conditions apply:

- Where there is strong evidence of a hazard; and*
- It is not possible to conclude that there is insignificant or no risk in the circumstances of the work.”*

“Employees should be given information about relevant symptoms to watch out for. The employer should make clear arrangements for an employee to report symptoms to an identified responsible person who can refer them for detailed assessment to a health professional...A responsible person should monitor symptoms (e.g. checking questionnaire answers) among employees exposed to substances that can cause occupational asthma...”

“In confirmed cases of occupational asthma, control measures should immediately be reviewed and consideration given to increasing the frequency of surveillance.”

“This record should contain the employee’s details, a job history involving work with substances which can cause occupational asthma and the conclusions of health surveillance procedures, phrased in terms of fitness for work.

In addition, paragraph 50 concerning the role of the employer, should also be ACoP text.

21. For health surveillance to be successful, proper records must be kept for reference purposes. As employees often move between different jobs it may be sensible to require employers to send copies of the health surveillance records to the employee’s GP. This will ensure that comprehensive records are easily accessible.

Regulation 12

22. APIL agrees with the statement in paragraph 61 of the ACoP that the “provision of information is crucial to the success of any strategy to reduce occupational asthma”. For this reason, APIL believes that paragraphs 62 and 63 detailing the training and information that should be provided to employees should be in ACoP text.

Do you consider that the ACoP text on substances that cause asthma is needed under other COSHH regulations?

23. There should certainly be ACoP text for regulations 9 and 10 of COSHH as they both contain important means of tackling a reduction in the incidence of occupational asthma. Maintaining, examining and testing control measures is crucial if measures are to continue to be successful. In addition, gaining knowledge of how and when occupational asthma arises through monitoring will be an important tool in assessing how control measures can be improved. For these reasons it is crucial that there is ACoP text under both regulation 9 and 10 of COSHH.

Which of the following formats of the ACoP do you think will have the greatest impact?

- i. **stand alone ACoP**
- ii. **part of the COSHH General ACoP**
- iii. **ACoP text alongside simple guidance**
- iv. **Other**

24. A stand alone ACoP is likely to have the greatest impact, as this will stress the importance of and the particular problems surrounding occupational asthma.

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