HEALTH AND SAFETY EXECUTIVE CONSULTATION

PROPOSALS FOR A NEW DUTY TO INVESTIGATE ACCIDENTS, DANGEROUS OCCURRENCES AND DISEASES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The executive committee would like to acknowledge the assistance of the following people who contributed to the preparation of this response:

Frances McCarthy	President, APIL
Colin Ettinger	Executive Committee Member, APIL
Cenric Clement-Evans	Co-ordinator of Occupational Health Special Interest Group, APIL
James Thompson	Joint Secretary of Occupational Health Special Interest Group, APIL

Any enquiries in respect of this paper should be addressed, in the first instance, to:

Annette Morris
Policy Research Officer, APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 9388710
Fax: 0115 958 0885

E-mail: Annette@apil.com

A NEW DUTY TO INVESTIGATE ACCIDENTS, DANGEROUS OCCURRENCES AND DISEASES

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4900 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. As noted in APIL's response to the HSC's earlier discussion document on this issue, we fully support the introduction of an explicit duty on employers to take reasonable steps to investigate accidents, dangerous occurrences and diseases. Such an explicit duty is essential in ensuring that the causes of workplace accidents and ill health are identified and fully understood.

3. Emphasis must also be placed, however, on learning from accidents and dangerous occurrences to prevent recurrences. APIL is concerned, therefore, that no provision is made in the draft schedule to ensure that the findings of investigations are taken into account when revising risk assessments. Paragraph 1(2) of the draft schedule states: "References in this Schedule to a responsible person carrying out an investigation are references to his taking such steps as are reasonable for a person in his position to take to ascertain, so far as it is possible to do so, the cause of the accident, dangerous occurrence or disease **so as to enable the cause to be considered in the review of any relevant risk assessment."** We do not believe that "enabling" employers to take account of any investigation findings when conducting a review of any

relevant risk assessment is sufficient. It is imperative that employers are required to act upon any investigation findings where it is appropriate and we urge the HSC to introduce a clearer and more explicit duty in this respect.

4. We also believe that an ACoP should be introduced to provide authoritative guidance on both the best way to conduct an effective investigation and on the recording of investigations. This is important if the new duty is to be effective, as many with the responsibility to investigate will not have any relevant experience. Such information should, at the very least, be provided as general guidance.

Q1: Do you agree that the duty to investigate should be incorporated in the MHSWR?

5. As noted in our previous response on this issue, APIL fully agrees that the duty to investigate should be incorporated in the MHSWR. We believe that this approach would ensure that the changes to the law are seen within the overall context of managing and improving health and safety. Accident investigation should be an integral part of risk assessment.

Q2: If you answered no to Q1, what would be your preferred legislative route?

6. Not applicable.

Q3: Do you agree that the duty to investigate should apply to those accidents reportable under RIDDOR?

7. As stated in our previous response, we agree that the duty to investigate should apply to those accidents reportable under RIDDOR subject to the point made below.

Q4: If you answered "no" to Q3, what range of accidents do you think we should include within the scope of the duty?

8. In response to the first consultation on this issue we recognised that a duty to investigate all accidents, diseases and dangerous occurrences would be too onerous and would make the regulations unworkable. We now believe, however, that the duty should also apply to work-related road incidents. This follows the statistics revealed in an HSC related consultation paper on work-related road traffic accidents issued earlier this year. It was noted in that paper that between 25% and 33% of all serious and fatal road traffic incidents involve someone who was at work at the time. In response to that consultation we submitted that employers should be required to report at-work road incidents under the RIDDOR scheme.

Q5: Do you agree that the duty to investigate should apply to "near misses", but limited to those dangerous occurrences reportable under RIDDOR?

9. APIL agrees that the duty to investigate should apply to "near misses" but does not agree that the duty should be limited to dangerous occurrences reportable under RIDDOR.

Q6 If you answered no to Q5, what scope do you think the duty should encompass?

10. We believe "near misses" should be reportable whether or not they are reportable under RIDDOR if the "near miss" had the potential to cause serious injury. We understand, as noted in paragraph 28, that this will make the duty more difficult to define legally but we do not think that this should preclude attempts to do so.

Q7: Do you agree that the duty to investigate should apply to diseases, but limited to those reportable under RIDDOR?

11. We agree that the duty to investigate should apply to diseases but should not be limited to those reportable under RIDDOR.

Q8: If you answered no to question 7, what scope do you think the duty should encompass?

12. Employers should have a duty to investigate all circumstances in which people have been exposed to potentially harmful substances in their control. We do not believe it is sufficient to limit investigations to those diseases reportable under RIDDOR for the following two reasons:

- Exposure to harmful substances may have varying consequences. In some it may only cause minor health problems that are not reportable under RIDDOR. The same exposure may, however, have more serious consequences for others at a later stage. In these circumstances, however, the exposure would not have been investigated at the time the exposure occurred because at the time it did not cause any diseases reportable under RIDDOR.

- A newly discovered occupational disease, which is not reportable under RIDDOR, may, for example, be no less serious than a disease which is reportable and so should also be included within the duty to investigate.

Q9: Do you agree that the duty holder should be the same person as the one who has the legal duty under RIDDOR to report accidents, dangerous occurrences and diseases?

13. We agree that the duty holder should be the same person as the one who has the legal duty under RIDDOR to report accidents, dangerous occurrences and diseases, as this would be logical. This may, however, cause problems in certain circumstances. For example, when the employee of a contractor is injured at a workplace occupied by a third party, the third party may have the reporting duty but the cause of the incident may be an unsafe working practice of the contractor. If the duty to report and investigate does lie with the occupier, rather than the contractor, the contractor will not learn from the incident and safer working practices may not be introduced. This problem could, perhaps, be addressed within the suggested ACoP.

Q10: If you answered no to Q9, who do you think should be responsible for carrying out the investigation?

14. Not applicable.

Q11: Do you agree that an investigation should commence within the timescales set out in paragraph 32?

15. We are slightly concerned that over three day injuries may not be investigated until 13 days after the accident or dangerous occurrence but our main concern on this issue relates to fatal accidents.

Q12: If you answered no to Q11, what time limits do you think should be set for the commencement of investigations?

16. Fatal accidents should be investigated immediately to reflect the seriousness of the event and the need to prevent a recurrence.

Q13: Are the draft regulations' proposals for keeping a record of investigations sensible and workable, or would you prefer to align any record keeping requirements on investigations with:

- **The record keeping requirements in the MHSWR; or**
- **The record keeping requirements in RIDDOR; or**
- **Link them to the requirements in regulation 5, as well as regulation 3, of MHSWR?**

17. We do not believe that the record-keeping requirements in the current schedule are sufficient. In paragraph 37 of the consultation paper it is stated that the HSC "believe some records need to be kept, if only to demonstrate compliance with the requirements". This is reflected in the draft schedule, which at paragraph 3(1)(a) states that the responsible person who has carried out an investigation shall "keep a record showing that the investigation has been carried out".

18. It is important for written records to be made and kept not only on the fact of an investigation, but also on the findings of an investigation for two reasons. Firstly, if findings from investigations are to be fed back into the management of health and safety and the assessment of risk under MHSWR, as submitted, it is imperative that the relevant person has access to the required information. Secondly, written records are likely to be important for evidential reasons. A proportionate and adequate record of the investigation would be extremely useful in the context of any later personal injury claim for damages. The

provision of a written record in that context could simplify and accelerate the process of determining whether the employer is liable.

19. In addition, we fear that keeping records for three years will be insufficient. An injury or disease may develop some time after an accident or dangerous occurrence has occurred or alternatively it may take some time for an injured person to attribute his injury or disease to his employer. For these reasons, APIL believes that records should be kept for a minimum of six years.

20. Finally, we do not believe that employers with less than five employees should be excluded from the record keeping requirements.

Q14: What arrangements do you currently have in your workplace for record keeping in respect of the investigation of accidents etc.?

21. Not applicable.

Q15: Do you think that the legal duty should be extended to include providing the investigation findings to others, e.g. the person(s) involved in the event, or employers' liability insurers?

22. We believe that it would be extremely beneficial for the investigation findings to be revealed to the persons involved in the event. In the event of a claim for damages, the availability to the injured person's solicitor of the investigation findings could simplify and reduce the time and cost involved in investigating liability for the injury. This is desirable for all involved.