HEALTH AND SAFETY COMMISSION CONSULTATION

PROPOSALS FOR REGULATIONS TO AMEND THE PERSONAL PROTECTIVE EQUIPMENT AT WORK, THE MANUAL HANDLING OPERATIONS, THE WORKPLACE AND THE PROVISION AND USE OF WORK EQUIPMENT REGULATIONS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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PROPOSALS FOR REGULATIONS TO AMEND MISCELLANEOUS HEALTH AND SAFETY REGULATIONS

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 5000 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 this opportunity to comment upon the amendment of miscellaneous health and safety regulations that are currently non-compliant with their originating European directive. APIL addresses the proposed amendments below, but would firstly like to highlight our ongoing concern about the term "so far as it is reasonably practicable", which appears repeatedly in the UK's health and safety law, including the regulations under consideration in this consultation. APIL is not alone in believing that the use of this term represents a failure by the UK to fully implement the relevant European directives into domestic law. In Hawkes v London Borough of Southwark, the Court of Appeal found that the proper construction of the term "reasonably practicable" should be that outlined by Asquith LJ in Edwards v National Coal Board [1949] 1KB 704, where he stated:

"Reasonably practicable is a narrower term than physically possible and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in measures necessary for averting the risk (whether in money, time or trouble) is placed in

the other, and that if it be shown that there is a great disproportion between them, the risk being insignificant in relation to the sacrifice, the defendants discharged the onus on them. Moreover, this computation fails to be made by the owner at a point in time anterior to the accident."

3. Our concern relates to the general use of the term "so far as is reasonably practicable" but in this instance shall elaborate on our concern in relation to the Manual Handling Operations Regulations 1992. Those regulations require that employers should avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured so far as is reasonably practicable. If it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured, then a risk assessment has to be carried out and the risk of injury reduced to "the lowest level reasonably practicable".

4. This should be contrasted with the Manual Handling Directive. This provides in clear and prescriptive terms that the employers should take "appropriate organisational measures, or shall use the appropriate means, in particular mechanical equipment, in order to avoid the need for the manual handling of loads by workers." The words "so far as is reasonably practicable" do not appear anywhere. Effectively, it is only when it is impossible to avoid the lifting that the employer should consider an alternative. When employers have to consider alternatives, an assessment should be carried out which will result in making "handling as safe and as healthy as possible". This is a greater burden than merely to reduce the risk of injury to the lowest level that is reasonably practicable, which is provided in the domestic regulations. In essence, provisions in the directive are absolute, in the regulations they are qualified by "so far as is reasonably practicable". We do not believe that the safety of employees should be compromised as it is by the use of the term "so far as is reasonably practicable" and we call for the UK's health and safety legislation to be amended accordingly to ensure that it is directive compliant.

Health and Safety (Display Screen Equipment) Regulations 1992

5. APIL supports the proposed amendment to regulation 3 of the above, which would impose obligations in respect of all workstations and not just those used by workers as defined in the directive.

Manual Handling Operations Regulations 1992

6. Before addressing the proposed amendment, APIL would like to make a related point about the implementation of article 3(1) of the Manual Handling Directive into the Manual Handling Operations Regulations 1992. Article 3(1) states:

   "The employer shall take appropriate organizational measures, or shall use the appropriate means, **in particular mechanical equipment**, in order to avoid the need for the manual handling of loads by workers." (emphasis added)

   The term "in particular mechanical equipment" is extremely important and should be expressly included in regulation 4 of the Manual Handling Operations Regulations. By contrast, the term is included within regulation 5(1) of the Merchant Shipping and Fishing Vessels (Manual Handling Operations) Regulations 1998 which states:

   "The employer shall, so far as is reasonably practicable, take appropriate measures or provide means **(including mechanical equipment)** to avoid the need for manual handling of loads which involve a risk of workers being injured" (emphasis added)

   We see no reason for the omission in the Manual Handling Operations Regulations.

7. Article 4 of the Manual Handling Directive deals with the organisation of workstations and states:

   "Wherever the need for manual handling of loads by workers cannot be avoided, the employer **shall organise workstations** in such a way as to make such handling as safe ad healthy as possible…" (emphasis added)

   The organisation of workstations does not feature within the Manual Handling Operations Regulations as a factor in dealing with the manual handling of loads. We submit that the regulations should be amended accordingly.

8. In addition, we believe that an omission from article 6 of the Manual Handling Directive should be remedied. Article 6(2) states:

   "…employers must ensure that workers receive in addition proper training and information on how to handle loads correctly and the risks they might be open to particularly if these tasks are not performed correctly…"

   Whilst article 6(1) of the directive has been directly introduced into the manual handling regulations, article 6(2) has not. Again, a provision similar to article 6(2) appears in the Merchant Shipping and Fishing Vessels (Manual Handling Operations) Regulations 1998 and we do not believe that there is any justification for the two regulations to differ in this respect.

9. We support the proposed amendment to regulation 4 which would integrate the factors appearing in Annex II of the Manual Handling Directive into the body of the regulations.

Personal Protective Equipment at Work Regulations 1992

10. It is stated in article 4(6) of the Personal Protective Equipment at Work Directive that "[p]ersonal protective equipment shall be provided free of charge by the employer…". Whilst both the ACoP to the Personal Protective

Equipment Regulations and the Health and Safety at Work Act 1974 require this to be the case, we believe that this provision should be reproduced in the Personal Protective Equipment Regulations for the sake of clarity. Again, reference is made directly to this requirement in The Merchant Shipping and Fishing Vessels (Manual Handling Operations) Regulations 1998 which state at regulation 6(3):

"Personal protective equipment shall be provided free of charge to the worker except that where use of the equipment is not exclusive to the work place, workers may be required to contribute towards the cost of personal protective equipment."

11. APIL does not agree with the proposed amendment of regulation 4(3) of the Personal Protective Equipment Regulations, as we do not believe that it actually implements article 4(3) of the Personal Protective Equipment Directive. Our concern relates to the reference in the directive to the period for which personal protective equipment is worn. Article 4(3) of the directive states:

"The conditions of use of personal protective equipment, in particular the periods for which it is worn shall be determined on the basis of the seriousness of the risk, the frequency of exposure of the risk, the characteristics of the workstation of each worker and the performance of the personal protective equipment".

This means that the way in which the relevant personal protective equipment is used – especially the amount of time for which it is used – should depend on various factors, such as the frequency of the exposure of the risk.

12. The proposed regulation 4(3), however, states:

"…personal protective equipment shall not be suitable unless-

(a) it is appropriate for the risk or risks involved, the conditions at the place where exposure to the risk may occur, and the period for which it is worn…"

By contrast, therefore, in the proposed regulation 4(3), the period for which the personal protective equipment is worn goes to the suitability of the actual equipment and not to the way in which that equipment is used. As a result, it is our view that article 4(3) of the directive will not be properly implemented by the proposed regulation 4(3) and that it should be amended accordingly.

13. In addition, if the Personal Protective Equipment Regulations are amended as proposed, both Control of Substances Hazardous to Health Regulations 1999 and the various regulations set out in regulation 3 should be amended accordingly.

Workplace (Health, Safety and Welfare) Regulations 1992

14. It is proposed that paragraph 80 of the Workplace Regulations Approved Code of Practice should state:

" **'Organise'** For the purposes of this regulation organise means the management or equipment that is needed to protect the health and safety of workers with disabilities as regards their access, egress and work activity whilst in the workplace."

We believe that the ACoP would be far more effective if it explained **how** employers could organise their workplaces as required, by providing a few examples, in addition to describing what the term 'organise' means for the purposes of the regulation.

Provision and Use of Work Equipment Regulations 1998

15. APIL strongly believes that regulation 10 of the above should remain as currently drafted and should not be amended as proposed in the consultation paper. The safety of those at work, or on work premises, must be paramount and it should be a requirement that work equipment is safe in accordance with modern standards.

16. The proposed amendment appears to breach the general principles of prevention set out in article 6(2) of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work and incorporated as a schedule to regulation 4 of the Management of Health and Safety at Work Regulations 1999 which requires (adopting a hierarchy approach) the following:

    (a) avoiding risks;
    (b) evaluating the risks which cannot be avoided;
    (c) combating the risks at source;
    (d) adapting the work to the individual especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
    (e) adapting to technical progress;
    (f) replacing the dangerous by the non-dangerous or the less dangerous;
    (g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;
    (h) giving collective protective measures priority over individual protective measures; and
    (i) giving appropriate instructions to employees.

The proposed amendment appears to fail to require this approach to be followed and in particular to breach requirements (e) and (f).

17. APIL supports the proposed amendment to regulation 11(2) of the above regulations.

Conclusion

18. In conclusion, APIL would like to comment upon the way in which it is intended to implement the amendments. It is proposed to introduce the amendments to various regulations indirectly through one statutory instrument, i.e. the Health and Safety (Amendments) Regulations. We believe that it would be much more effective to introduce the amendments directly, i.e. by amending the relevant regulations on an individual basis. The complexity of health and safety regulations should not be underestimated and amending the regulations individually would, in our view, increase the understanding of all concerned – employers, employees, safety representatives and legal representatives – of the relevant obligations and requirements imposed by the various regulations. We also believe that it would be useful to annex any guidance or approved codes of practice to the relevant regulations, together with the originating directive.