

HEALTH AND SAFETY COMMISSION

**A STRATEGY FOR WORKPLACE HEALTH AND SAFETY IN GREAT
BRITAIN TO 2010 AND BEYOND**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

DECEMBER 2003

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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1. The aims of the Association of Personal Injury Lawyers (APIL) 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 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;
 - To promote health and safety.

2. APIL welcomes this opportunity to comment on the Health and Safety Commission's (HSC) proposed strategy in Great Britain to 2010 and beyond. We agree that health and safety should be seen as a "*cornerstone of a civilised society*" and indeed this aim closely mirrors APIL's own.

3. Within the seven point strategy, as detailed within the consultation paper, we particularly welcome the proposed "*development of occupational health and safety advice*", an area which APIL suggested was a growing problem in our previous response (please see attached – Appendix A: *APIL's response to Health and Safety Executive consultation on 'Strategic Thinking – Work in progress' (August 2003)*), and the acknowledgement that the management of health and safety must respond to the "*the changing world of work*". The reference to rehabilitation is also encouraging. We are, however, slightly concerned that the focus of the HSC seems to be being diverted away from

enforcement and sanctions, an area which APIL feels is essential in the effective management of health and safety.

Point 1: The strategy is about the health and safety system in Great Britain as a whole, not just HSC, HSE and LAs. HSE's role is to stimulate, orchestrate, audit, assure, and take appropriate action when things go wrong – reserving it involvement for that which only it can do.

4. APIL is concerned that the HSC is proposing that the HSE's involvement in health and safety be reserved to taking '*appropriate action*'. Whilst we feel that the HSC's move to tackle the '*changing world of work*' should be supported, this strategy should not in any way influence the use of sanctions as an effective deterrent. We have, on several occasions, expressed our concern about the current HSC enforcement policy, which is based on the Department for Trade and Industry's (DTI) enforcement concordat. This concordat seeks to promote "proportionate" enforcement. It states that "*action should be proportionate to the seriousness and persistence of the breach and should be the minimum necessary to secure future compliance*". APIL does not believe that enforcement should be 'proportionate' when it comes to issues of health and safety.

5. Health and safety law exists to protect both workers and members of the public from death and injury. Every breach of it should be taken seriously. Dealing with breaches proportionately equates, in our view, to tolerating breaches and this cannot be acceptable. If health and safety in the workplace is to be improved, employers must be aware that consequences will follow a failure to comply with the relevant legislation. Proportionate enforcement fails to secure this message. The seriousness and persistence of the breach should not be relevant to the issue of enforcement. Those subjective issues should instead be considered when deciding on the appropriate punishment for the breach.

6. APIL proposes that the sanctions for health and safety breaches should be more in tune with the harm and damage they cause. For example if a young man seriously injured another person outside of the workplace he would be charged with a criminal offence and serve an appropriate prison sentence. If, by a company's negligent act or omission, a worker is similarly seriously injured, it is unlikely that any person will be charged with a criminal offence or indeed serve a prison sentence, yet the effect of the damage caused is the same. APIL has continually supported the introduction of legislation in order to criminalise health and safety breaches, as well as pushing for a corporate killing law which will more effectively punish the negligent acts of company directors.
7. In addition, APIL would like to see further consultation on the possibility of introducing turn-over fines to punish companies for health and safety breaches. Currently the fines for breaches are detailed in statute and do not effectively reflect the seriousness of the breach. A turn-over fine would base the monetary amount of the penalty on a consideration of the negligent company's annual earnings. This will mean the larger the company, and the more serious the breach, the larger the fine – it is an economic solution to a problem with very real human consequences. Any such fine would, however, have to ensure that the cost of the breach was not passed down to the workers, thus hurting the very people which such an action would be designed to protect. For example the offending company could freeze wages and/or refuse bonus payments in order to recoup the amount of the fine.
8. The intention of the HSC to *“move away from areas that are better regulated by others or by other means”*¹ is cautiously welcomed by APIL. In order for self-regulation to work effectively we propose that there should be an effective mechanism for enforcement and sanctions by the self-regulating body. We would like to see trade associations

¹ Health and Safety Executive: 'A strategy for workplace health and safety in Great Britain to 2010 and beyond' (October 2003), page 6

and guilds being more openly involved in the health and safety regulation of their members. Yet in order for this to work, these organisations must be stringent in their risk assessment and the sanctions attached to a breach of health and safety. An example of a self-regulating organisation is the Law Society. Without the practicing certificate, and the accompanying indemnity insurance, a solicitor is legally unable to practice. Solicitors are further regulated by the Law Society's complaints procedure and Code of Conduct. We believe that the ability to gain insurance should be based on the awarding of such a 'practising certificate' by the regulating body. Without this certificate it would thus be impossible to gain the appropriate insurance. In turn this practising certificate should be based on the effective risk assessment of the business.

9. Indeed the role of insurance has recently been examined by the Department for Work and Pensions (DWP), in the context of its review of employers' liability insurance. APIL called for premiums to reflect an employers' health and safety performance, as this would create an additional incentive for employers to comply with health and safety legislation. APIL will be involved in the DWP's working group on this issue, which will examine how risk-related premiums can be developed.

10. On a final point, in reference to areas in which the HSC, Health and Safety Executive (HSE) and local authorities have reduced their involvement, we see the enforcement of health and safety legislation as the key to improving injuries and illness within the workplace. Other initiatives should complement, rather than replace, HSE enforcement activity. Linking employers' liability insurance to an employers' health and safety record should, however, provide employers with an incentive to comply with the law.

Point 2: HSE recognises that it must change. More of the same, even with increased efficiency, will not deal with health issues or the changing world of work. We need to strengthen our links to keeping people in, or getting them back to, work.

11. APIL believes that tackling the changing world of work is imperative if the HSC is to achieve its ultimate goal of making health and safety the cornerstone of modern society. With technology and telecommunications becoming more advanced and prevalent in today's world, the idea of the working man has changed and is changing. More and more people are now 'mobile workers', not using an office but conducting their business either from home or on the move. This change brings with it new health and safety challenges. Some have already been tackled, such as using a mobile phone whilst driving, but the speed of change means that HSC will need to be more pro-active in its focus.

12. In addition the occupational needs of the workplace are growing. For example new types of working environments, like the call-centre, are producing new problems, such as work place stress and repetitive strain injury (RSI) for health and safety regulation to tackle. Examining external influences and predicting how workplaces will change in the future will help both the HSC and policymakers to prevent, rather than have to respond to, new health and safety issues. In addition, the scope of the HSC needs to address areas such as the leisure industry and the manufacturing industry as well as more traditional areas of concern (i.e. the building trade).

Point 3: Communications and reputation management will be major interventions in their own right and crucial in making the case that health and safety is an enabler, not a hindrance.

13. APIL agrees that there is a need for two-way dialogue between the HSC and businesses, and that such dialogue needs to be pro-active in

nature. We feel a good way of allowing this flow of information would be to establish a dedicated confidential HSC phone line for people to contact. This phone line would offer advice and suggestions to both employers and employees. It would also be a mechanism by which potential criticism of the health and safety regime could be fed back to the HSC. This feedback would hopefully enable the identification of growing health and safety concerns, the further definition of the HSC's enforcement remit in relation to problematic areas and would make the HSC seem more approachable.

Point 4: We need new methods to help firms, large and small. HSE will move away from the automatic presumption of producing general written guidance towards specific, targeted support and advice directed to the areas of greatest need. Because stakeholders tell us we need to separate enforcement from support and advice to be effective, much of this will be produced or distributed by others rather than by HSE.

14. As mentioned in point 3, APIL proposes that a dedicated and confidential HSC advice line should be established. APIL envisages that the advice line will allow for the dissemination of pertinent health and safety information to all sectors of the community, both business and public, in a similar manner to the current 'NHS Direct'. The consultation document has highlighted the fear and anxiety experienced by many businesses, in particular small firms, in contacting the HSC and HSE to ask for potential advice. The perception is that the HSE does not "talk their language" and that any communication may lead to an enforcement visit. As such there is an "untapped market willing to make significant health and safety improvements" which simply needs to be educated in health and safety, but there is no single point of contact to do so. The HSC advice line should be able to provide this point of contact. In addition the confidential nature of the advice line would help alleviate the fear and anxiety about being inspected felt by some firms which called for help.

15. In addition APIL is encouraged to note that HSE and Local Authority (LA) inspectors will continue to provide valuable health and safety advice during visits to sites.

Point 5: This is a strategy about hard choices and priorities. We have finite resources. HSE, working with LAs, will develop a new interventions strategy. We will give priority to those activities that only the enforcing authorities can carry out and will ensure that appropriate action is taken when things go wrong. Where the proper management of risk can be assured, we will not intervene.

16. In order for health and safety to become the cornerstone of society which is envisaged, there must be an acknowledgment that adequate resources must be available. APIL would like to see the HSC's budget increased to allow for the adequate enforcement of health and safety legislation. We appreciate, however, that the HSE has to work within the budget provided and, as such, will have to target its work. In short, even if the HSC's budget were increased, it would still be finite. Due to the nature of our members' expertise, however, it is difficult for us to comment on the areas in which the HSC/E and local authorities should reduce their involvement.

17. We are, however, very interested in what appears to be a pilot scheme of 'roving' health inspectors which is currently in operation in the north of the country. Such a scheme would hopefully allow for the effective management of the resources which are available to the HSC, HSE and LA's, and would allow the prioritisation of work based on appropriate risk assessment.

18. The role of the worker representative in health and safety matters should be further enhanced and promoted in order to allow the HSC to direct its efforts to other areas. Research conducted by academics in Northern Ireland and Ireland demonstrated that safety representatives

have a significant impact on health and safety.² The appointment of, and consultation with, worker representatives should, therefore be further encouraged. In many cases these worker representatives will belong to a union, for example TUC health and safety advisers are in many large workplaces. APIL members have attested to the positive influence which such representatives have on health and safety. There are, however, many small workplaces which are not able to have such union representatives due to the current law³. APIL would like to see further consideration and discussion given to there being stronger laws for recognising trade unions in workplaces which have less than 21 employees.

19. Promoting detailed risk assessment is also vital, as the assessment of risk underpins the management of health and safety in the UK. Unless employers assess the risks of ill health and accidents occurring, they cannot hope to prevent them.

20. Finally, the extension of regulation by trade bodies (as already detailed) should also allow the HSC to further prioritise its work load based on the health and safety management of non-regulated businesses.

Point 6: We wish to see the development of occupational health and safety advice and support outside HSE with national coverage that is active in preventing ill-health, promoting rehabilitation, and getting people back to work more quickly.

21. For some time, APIL has supported rehabilitation, which seeks to restore an injured person to as productive and as independent a lifestyle as possible through the use of medical, functional and vocational interventions. We are thus encouraged to see the

² Safety Behaviour in the Construction Sector, Nick MacDonald and Victor Hrymak, 2002

³ Employment Relations Act (1999) – There is recognition and negotiation procedures for employers with at least 21 workers, with the establishment of bargaining unit.

promotion of rehabilitation detailed in the HSC's seven point strategy. APIL was involved in drafting the Code of Best Practice on Rehabilitation for personal injury claims which seeks to encourage claimant and defendant lawyers to liaise with each other to secure rehabilitation for injured claimants.

22. Rehabilitation, however, should not only be considered within the context of litigation. APIL believes that employers should be under a legal duty to at least consider the use of rehabilitation after an injury has occurred. In short, rehabilitation should be an integral part of an employer's health and safety strategy and, more specifically, it should be mandatory for employers to have a rehabilitation policy. In addition, rehabilitation services within the NHS appear to be available, organized and financed only on an ad hoc basis. APIL calls for rehabilitation to become the priority it should be within the healthcare and social support system.

23. In respect of occupational health, this topic was discussed with Justin McCracken, Deputy Director General (Operations) – Health and Safety Executive (HSE), with whom APIL recently met. Various issues were tackled within the meeting, in particular growing occupational health concerns such as stress and RSI. As such, APIL is currently working with the HSE on this issue as well as advising on making health and safety documentation more streamlined and efficient.

Point 7: We will not back away, where necessary, from redesigning health and safety institutions and their respective roles to achieve any of the above.

24. The ability to be flexible and not intimidated by the prospect of tackling the problem of health and safety within new organisational structures is the correct attitude to have if the HSC is to achieve its aims. We feel that by taking account of the changing face of work and designing interventions which are pro-active, the HSC will have an active role to play in health and safety well into 2010 and beyond.

APPENDIX A

Health and Safety Executive (HSE)
Strategic Thinking – Work in Progress
August 2003

HEALTH AND SAFETY EXECUTIVE CONSULTATION

STRATEGIC THINKING – WORK IN PROGRESS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

AUGUST 2003

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REVITALISING HEALTH AND SAFETY IN CONSTRUCTION

25. APIL welcomes this opportunity to comment on the HSE's strategic thinking for the next 10 years. We agree that the health and safety strategy needs to keep evolving in order to maintain pace with the changing work environment. We further agree that the HSE has identified the main issues that are likely to affect health and safety and the management of it in the future.

26. We particularly welcome the recognition of occupational ill health as a problem area and the acknowledgement that the management of health and safety must respond to the "changing economy in a changing world". Examining external influences and predicting how workplaces will change in the future will help both the HSE and policymakers to prevent, rather than respond to, new health and safety issues. The reference to rehabilitation is also encouraging. For some time, APIL has sought to promote rehabilitation in the context of personal injury claims. We believe, however, that the provision of rehabilitation should be increased for the ill and the injured, whether they have a personal injury claim or not.

27. We also support the following underlying assumptions noted in the consultation paper, that is:

- The involvement of worker representatives;
- Promoting risk assessment; and
- Improving the role of insurance

Research conducted by academics in Northern Ireland and Ireland demonstrated that safety representatives have a significant impact on health and safety.⁴ The appointment of, and consultation with, worker representatives should, therefore be encouraged. Promoting detailed

⁴ Safety Behaviour in the Construction Sector, Nick MacDonald and Victor Hrymak, 2002

risk assessment is also vital, as the assessment of risk underpins the management of health and safety in the UK. Unless employers assess the risks of ill health and accidents occurring, they cannot hope to prevent them.

28. The role of insurance has recently been examined by the Department for Work and Pensions. In the context of its review of employers' liability insurance, APIL called for premiums to reflect an employers' health and safety performance, as this would create an additional incentive for employers to comply with health and safety legislation. APIL will be involved in the DWP's working group on this issue, which will examine how risk-related premiums can be developed.

29. The HSE also mentions that the HSC enforcement policy will remain essentially unchanged. We have, on several occasions, expressed our concern about this enforcement policy, which is based on the DTI's enforcement concordat. This concordat seeks to promote "proportionate" enforcement. It states that "action should be proportionate to the seriousness and persistence of the breach and should be the minimum necessary to secure future compliance." APIL does not believe that enforcement should be 'proportionate' when it comes to issues of health and safety.

30. Health and safety law exists to protect both workers and members of the public from death and injury. Every breach of it should be taken seriously. Dealing with breaches proportionately equates, in our view, to tolerating breaches and this cannot be acceptable. If health and safety in the workplace is to be improved, employers must be aware that consequences will follow a failure to comply with the relevant legislation. Proportionate enforcement fails to secure this message. The seriousness and persistence of the breach should not be relevant to the issue of enforcement. Those subjective issues should instead be considered when deciding on the appropriate punishment for the breach.

31. We would like to see the HSE's budget increased to allow for the adequate enforcement of health and safety legislation. We appreciate, however, that the HSE has to work within the budget provided to it and, as such, will have to target its work. In short, even if the HSE's budget were increased, it would still be finite and would still need to be enforced. Due to the nature of our members' expertise, however, it is difficult for us to comment on the areas in which the HSC/E and local authorities should reduce their involvement.

32. On a final point, the HSE asks what mechanisms could be put in place to maintain standards in areas in which the HSC/E and local authorities have reduced their involvement. As we have made clear, we see the enforcement of health and safety legislation as the key to improving health and safety. Other initiatives should complement, rather than replace, HSE enforcement activity. Linking employers' liability insurance to an employers' health and safety record should, however, provide employers with an incentive to comply with the law. We would also like to see legal duties for health and safety imposed on company directors, although we note the HSE's comment that it does not envisage any major new legislative programmes.