

**THE HEALTH AND SAFETY COMMISSION (HSC)**

**PROPOSALS FOR NEW CONTROL OF VIBRATION AT WORK  
REGULATIONS IMPLEMENTING THE  
PHYSICAL AGENTS (VIBRATION) DIRECTIVE (2002/44/EC)  
HAND-ARM VIBRATION**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS  
(APIL08/04)**

**MARCH 2004**

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 5,400 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.

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.

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

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## **CONTROL OF VIBRATION AT WORK REGULATIONS**

### **Introduction**

1. APIL welcomes the opportunity to put forward its comments regarding the Health and Safety Commission's (HSC) proposals for new Control of Vibration at Work Regulations, in particular hand-arm vibration. Hand-arm vibration (HAV) is caused by the use of work equipment and work processes that transmit vibration into the hands and arms of employees. These tools and processes are widely used in many industries and occupations. Long-term, regular exposure to HAV is known to lead to permanent and debilitating health effects such as vibration white finger, loss of sensation and pain and numbness in the hands and arms. These effects are collectively known as hand-arm vibration syndrome.
2. In summary, APIL provisionally supports the new regulations and feels that they are a great advance in this field of health and safety. It is hoped that the regulations will introduce controls which will substantially reduce the ill health caused by exposure to HAV. We are, however, concerned that the issue of specific risk assessment, in particular with reference to the need for it to be done by a competent person, is not addressed fully in the regulations themselves. APIL is further concerned by the non-inclusion of self-employed workers in relation to health surveillance and training. Finally, the proposed HAV regulations seem to echo the current Control of Substances Hazardous to Health Regulations ("COSHH") 1999, yet fail to include similar provisions with regard to the instructions and information which employers need to provide to workers.

## Consultation Questions

### Issue 1: HSE's draft guidance

Question 1: Do you agree with the proposal to issue the guidance on HAV and WBV as separate documents?

3. APIL believes that the decision to split hand-arm vibration (HAV) and whole body vibration (WBV) is sensible, as each type of illness tends to have different symptoms and effects. In addition, the necessary preventative measures needed to combat HAV and WBV are significantly different, meaning that different legislation is needed.

Question 2: Do you think the short guide for employers (Part 1) of the guidance should remain as part of the main guidance booklet?

4. APIL believes that the summary guidance, currently contained within Part 1 of the document, should continue to be included within the main regulations and guidance booklet. We do, however, feel that there should be a shortened guide for employers, and agree with the consultation document that Part 1 should *“form the basis for a separately published leaflet”*<sup>1</sup>.
5. Yet APIL is concerned that employers may only read the summarised guide and fail to appreciate the more specific points contained within the main regulations. In order to avoid this potential problem the separate booklet needs to be explicit in the need for the employer to read the main document as well.

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<sup>1</sup> See page 6 – paragraph 25

**Question 3:** Is the overall structure and content of the guidance helpful?

6. APIL's major concern in relation to the guidance, and particularly the aforementioned short guide for employers (Part 1), is that it fails to fully appreciate the use and utility of risk assessment. There is a real need to strengthen and expand the provision for individual risk assessment within the guidance, and this can be effectively achieved by the moving the risk assessment criteria from the main guidance<sup>2</sup> to the summary document.
7. In terms of the rest of the guidance, APIL feels that more examples are needed of the advantages which effective risk assessment and health and safety policies can have on businesses. We are aware that the HSE has recently published a series of guides detailing such business advantages, and these examples could be used in both the summary and main guide.
8. In general, APIL feels that the guidance is written in plain and understandable language and represents a huge advance in the consideration of hand-arm vibration (HAV) within health and safety legislation.

**Issue 2: Regulation 3. Transitional Provisions (Directive Article 9)**

**Question 4:** Do you agree that the transitional periods should be incorporated into the regulations and be available to all industries rather than be decided by HSE on a case by case basis?

9. APIL supports the HSE's use of transitional periods for a number of reasons. Firstly, we are pleased to note that the transitional period for

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<sup>2</sup> See Appendix 1 – page 132

agriculture and forestry relates only to whole-body vibration<sup>3</sup> (WBV), not hand arm vibration. It should be noted that it is within these two industries that APIL has seen a large amount of vibration-caused illness, particularly in relation to HAV. By their non-inclusion within the transitional period, standards within these particular industries should be forced to improve.

10. Secondly, APIL is further encouraged to note that the transitional period also only relates to regulation 6 (3). This means that regulation 5 – which deals with effective risk assessment – is not covered by the transitional period and, as such, is applicable immediately. Risk assessment is the cornerstone of good health and safety practice, so its immediate introduction will have a positive effect in reducing instances of hand-arm vibration injuries.

Question 5: Do you agree that the transitional period should apply to second-hand and hire equipment provided it is sold or hired out for the first time before 2007?

11. APIL provisionally supports the suggestion that the transitional period should apply to second-hand and hire equipment. This support, however, is on the basis that the majority of the HAV and WBV regulations will come into force immediately, and it is only regulation 6 (3) that the transitional period applies to. So it will be necessary to perform risk assessment on all items of vibration equipment, regardless of the transitional period. This risk assessment will highlight potential levels of dangerous vibration for all work equipment. It is unlikely that any rental company would risk allowing a piece of equipment to be hired by someone that had been identified as unsafe by risk assessment, due to the business and legal consequences.

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<sup>3</sup> Consultation document, page 7 – “The HSC does not propose to include additional transitional period for agriculture and forestry (up to 2014) for HAV even though this permitted under the Directive”.

12. In addition, APIL is encouraged to see that new technological advances, which are part of the Management of Health and Safety at Work Regulations 1999, have been included in the proposed regulations under 3 (3) (b):

*“...but in using such equipment the employer shall take into account the latest technical advances and the organisational measures taken in accordance with regulation 6 (2).”*

This means that while the transitional period may apply, the equipment that the employer owns must still be shown to be in keeping with current technical advances within its area.

Question 6: Can you identify a particular reason why the transitional period for HAV for agriculture and forestry work should be extended beyond 6 July 2010 to 6 July 2014?

13. APIL strongly believes that there is no reason why the transitional period for HAV for the forestry and agriculture should be extended beyond the current time limit, and as such cannot identify one. Indeed, the consultation paper itself offers little in the way of possible reasons for such an extension.

**Issue 3: Regulation 5. Determination and assessment of risks (Directive Article 4)**

Question 7: Do you agree that, where available, suitable published HAV information could be used by employers to produce risk assessment rather than their needing to measure vibration exposure?

14. APIL's over-riding concern in this area, and indeed in relation to consultation questions 7 to 11, relates to the fact that the regulations do not specify that risk assessments should be conducted by a

competent person. The guidance<sup>4</sup> extensively details the level of knowledge and expertise required to conduct a risk assessment:

*“The important point is that you have the necessary expertise available to assess and manage risks from vibration to satisfy the requirements of the Vibration Regulations as described in this guidance. Competence is needed for bringing together and presenting information about the vibration exposures, and for making decisions on what you need to do to comply with the Vibration Regulations (i.e. to manage the risks from exposure to HAV). You may also need competent advice on whether you need additional specialist help.”*

15. The necessity, however, for a competent person to conduct the risk assessment, and what is expected of a competent person, is not echoed in the corresponding regulations. APIL firmly believes that it is fundamental in respect of preventing injury to workers that the person conducting the risk assessment should have the necessary abilities and skills. In relation to whether employers should be allowed to conduct risk assessments, APIL feels that they are simply not competent enough to do so effectively.

16. APIL does, however, admit that not every situation will require a measurement of the vibration exposure, particularly where the vibration is transient and fleeting. Suitable published HAV information is only going to be able to assist employers in certain circumstances, and there will still be instances where it is necessary for measurement to take place. The situations which do require measurement could be effectively dealt with via a flow chart extension to the risk assessment. For example, the Manual Handling Regulations 1992 include such a flow chart. The flow chart could be used to indicate at what stage it would be necessary for measurements of vibration to be taken.

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<sup>4</sup> See Appendix 1 (page 132)



Question 8: Do you agree that measurement may be necessary in situations described in paragraph 33?

17. Please see APIL's previous comments in answer to question 7 concerning the necessity for a competent person to be involved in the risk assessment process.

Question 9: Do you agree that the employer or one of his employees could carry out the vibration exposure assessment using relevant published HAV information?

18. Please see APIL's previous comments in answer to question 7 concerning the necessity for a competent person to be involved in the risk assessment process.

Question 10: Do you agree that the employer or one of his employees could be trained to carry out HAV measurements on his equipment?

19. Please see APIL's previous comments in answer to question 7 concerning the necessity for a competent person to be involved in the risk assessment process.

Question 11: Do you agree with HSE's guidance on the necessary competence to carry out a risk assessment and when the services of a consultant may be needed?

20. Please see APIL's previous comments in answer to question 7 concerning the necessity for a competent person to be involved in the risk assessment process.

Question 12: Do you agree that risk assessments should be updated on a needs basis rather than at fixed intervals e.g. every 2 or 3 years?

21. APIL believes there should be a requirement for a new risk assessment to take place on a mandatory fixed intervals basis of three years, as well as on a needs basis, whichever is the sooner. This will ensure that the employer has to conduct a risk assessment regularly. By widening this requirement to both interval and needs based, APIL feels more employers' will be induced into assessing their equipment promptly and effectively.

#### **Issue 4: Regulation 6(4). Derogations (Directive Article 10)**

Question 13: Do you think the decision on whether the weekly averaging derogation can be used should be delegated to individual employers rather than by application to HSE?

22. In relation to this question, APIL would like to reiterate its concern over the need for a competent person to conduct the risk assessment and the lack of employers' competence in risk assessment. We feel that this can best be remedied by shifting the need for competence from the guidance to the main body of the regulations. This would bring the current proposed HAV regulations in line with other complimentary health and safety legislation, in particular regulation 7 (1) of the Management of Health and Safety at Work Regulations 1999. These regulations state that:

*“Every employer shall, subject to paragraphs (6) and (7), appoint one or more competent persons to assist him in undertaking the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.”*

23. APIL is further concerned about the direct inclusion from the European Directive of the need to provide evidence to show that vibration exposure is below the necessary limits during the casual use of equipment. The Directive, on which the regulations are based, only indicates a minimum standard of duty, and as such we would like to see the necessary evidence about exposure come from a competently carried out risk assessment. In order to implement this we suggest the addition of *“from the risk assessment”* after the word *“evidence”* in regulation 6 (4) (b). This amendment is dependent on the acceptance and implementation of APIL’s earlier point concerning the inclusion of competency in risk assessment.

#### **Issue 5: Regulation 7. Health Surveillance (Directive Article 8)**

Question 14: Do you agree with the proposal that a tiered system of health surveillance is appropriate and effective?

24. Please see APIL’s previous comments in answer to question 7 concerning the necessity for a competent person to be involved in the risk assessment process.

Question 15: Do you agree with the criteria outlined in paragraph 41 for when health surveillance should be undertaken?

25. APIL welcomes, and agrees, with the HSE’s suggestions concerning the instances where health surveillance should be undertaken. As such we have nothing further to add at this time.

## Proposed Control of Vibration at Work Regulations

### Application

#### (Regulation 3)

26. APIL is concerned that self-employed workers do not appear to be included within the provision of regulation 3 (4) of the proposed HAV regulations. We firmly believe that the proposed HAV regulations should reflect as closely as possible other current health and safety legislation. In particular, the Provision of Use of Work Equipment (PUWER) 1998 details the duties that an employer has to self employed workers in regulation 3 (3):

*“(3) The requirements imposed by these Regulations on an employer shall also apply -*

*(a) to a self-employed person, in respect of work equipment he uses at work;*

*(b) subject to paragraph (5), to a person who has control to any extent of -*

*(i) work equipment;*

*(ii) a person at work who uses or supervises or manages the use of work equipment; or*

*(iii) the way in which work equipment is used at work,*

*and to the extent of his control.”*

These duties would seem to be applicable to HAV regulations as both sets of regulations deal with possible dangers and illnesses that are connected to work equipment.

27. In addition, the importance of including self-employed workers under HAV legislation is that often, in terms of liability, they can be viewed as employees. In *Lane v Shire Roofing co. (Oxford) Ltd.*<sup>5</sup> the court found that although a person may be self-employed for tax purposes – i.e. they will be paid gross and pay their own tax and National Insurance – if the employer retains and exerts control over the workers activities the self-employed person will be considered an employee. APIL believes that it is vital that both employees and self-employed people should be adequately covered under the proposed HAV regulations. Indeed this problem could be further compounded within industries such as construction, forestry and agriculture, where there is a culture of self employed “subbies”, or casual workers employed “on the lump”. From the viewpoint of avoiding preventable injuries, APIL would ask the HSE what is the justification for omitting self-employed workers from both health surveillance (regulation 3 (4) (a)) and proper training and information (regulation 3 (4) (b))?

28. In addition, the current proposal regulations echo the Control of Substances Hazardous to Health Regulations (COSHH) 1999. If this mirroring is to be fully applicable, regulation 6 (1) of the HVA regulations needs to also reflect COSHH. APIL proposes that the term “*reduced to a minimum*” is replaced by “*adequately controlled*”. In terms of drafting, APIL feels that it is appropriate that COSHH is used as a flexible template for the current HAV proposals as both are connected with noxious substances and pollutants; one liquids, the other vibration.

### Health Surveillance

#### (Regulation 7)

29. APIL feels that the use of the term “*probable*” in sub-section (3) (b) of regulation 7 sets a restrictively high standard for employees. Also the

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<sup>5</sup> [1995] I.R.L.R. 493; [1995] P.I.Q.R. P417; *The Times*, February 22, 1995, CA

use of the term “*probable*” is inconsistent with the rest of the regulation. In order to retain consistency and allow for a more appropriate standard of duty to be applicable, we propose that the phrase “*that there is a risk*” – used earlier in regulation 7 (1) – should be replicated further on in the regulation and should replace “*probable*” in (3) (b).

Information, instruction and training for persons who may be exposed to risk from vibration  
(Regulation 8)

30. APIL is concerned that regulation 8 does not provide for the instructing and training of managers and employers. While the guidance notes<sup>6</sup> mention “*supervisors*”, and regulation 8 (1) is concerned with employees, there does not appear to be any duty for managers and employers to have training and instruction. We feel that this could be rectified by the adoption of regulations 8 and 9 of PUWER 1999. These regulations state:

*8. - (1) Every employer shall ensure that all persons who use work equipment have available to them adequate health and safety information and, where appropriate, written instructions pertaining to the use of the work equipment.*

*(2) Every employer shall ensure that any of his employees who supervises or manages the use of work equipment has available to him adequate health and safety information and, where appropriate, written instructions pertaining to the use of the work equipment.*

*(3) Without prejudice to the generality of paragraphs (1) or (2), the information and instructions required by either of those paragraphs shall include information and, where appropriate, written instructions on -*

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<sup>6</sup> See page 106 – ‘Information and training for operators and supervisors’

*(a) the conditions in which and the methods by which the work equipment may be used;*

*(b) foreseeable abnormal situations and the action to be taken if such a situation were to occur; and*

*(c) any conclusions to be drawn from experience in using the work equipment.*

*(4) Information and instructions required by this regulation shall be readily comprehensible to those concerned.*

9. - *(1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.*

*(2) Every employer shall ensure that any of his employees who supervises or manages the use of work equipment has received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.*

31. APIL is encouraged to see that, similar to the regulation 12 (2) of COSHH 2002, the proposed HAV regulations include a list of instructions and information that employers should provide. We would, however, like to see an expansion of regulation 8 (2) (d) to include a fuller description of the symptoms related to hand-arm vibration. It is APIL's experience that the lack of knowledge concerning the symptoms of vibration illnesses can often lead to the condition being ignored and overlooked. In addition, for regulation 8 (2) (f), APIL would like to see some examples and illustrations on the issue of safe working practices included in the regulations. If these were not to be included in the

regulations, however, APIL would like to see them in the guidance notes in a very clear and detailed form.

32. APIL also believes that it is vital to include anonymised health surveillance information and relevant safety data sheets to the employee as part of the necessary training and instruction relating to vibration equipment. We propose the addition of a couple of sub-sections to regulation 8 (2) to reflect these requirements. The following regulations come from COSHH 2002 – 12 (2) (a) (iii) and (e) - and could be modified to be applicable to the proposed HAV regulations:

*(a) (iii) access to any relevant safety data sheet, and*

*(e) the collective results of any health surveillance undertaken in accordance with regulation 11 in a form calculated to prevent those results from being identified as relating to a particular person;*

33. The inclusion of these requirements will strengthen the HAV regulations considerably, and allow employees to be given the appropriate amount of training and information in order to prevent hand-arm vibration injuries.

34. APIL also believes that it is important that maintenance should be included as a training requirement for employees within regulation 8 (2). While the guidance<sup>7</sup> discusses training in maintenance of work equipment, APIL feels that this should be moved to be included with the main regulations. Such a maintenance requirement would enable dangerous or faulty equipment to be identified and fixed, so causing fewer problems in terms of unexpected vibration injuries.

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<sup>7</sup> See page 106, paragraph 38 – “It is important that you provide your operators and supervisors with information about the risks from vibration and that they receive the required instruction and training in the correct use and maintenance of the equipment.”



35. Finally, APIL agrees with the inclusion of regulation 8 (4) as it places an absolute duty on the employer to ensure that everyone has “*suitable and sufficient information, instruction and training*” in relation to vibration equipment. This duty will compel employers to properly train workers in the use of equipment, and such training should help reduce vibration caused injuries.

#### Pre-employment assessment

36. APIL believes that specific risk assessment should be included within the proposed HAV regulations, and should reflect the medical and employment history of the worker. We feel that the requirements that are detailed in the guidance<sup>8</sup> should be incorporated into the main body of the regulations. The inclusion of a specific pre-employment risk assessment will also help the proposed HAV regulations reflect current health and safety legislation, in particular the amended Manual Handling Regulations<sup>9</sup>.

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<sup>8</sup> Page 113 – Pre-employment assessment

<sup>9</sup> Contained within The Health and Safety (Miscellaneous Amendments) Regulations 2002 – 4. Amendment of the Manual Handling Operations Regulations 1992