

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

**PROPOSALS FOR NEW CONTROL OF NOISE AT WORK REGULATIONS  
IMPLEMENTING THE  
PHYSICAL AGENTS (NOISE) DIRECTIVE  
(2003/10/EC)**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS  
(APIL15/04)**

**JUNE 2004**

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 4,800 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.

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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## NEW CONTROL OF NOISE AT WORK REGULATIONS

### Regulation 4 (2): Weekly exposure

**Question 1: Do you agree with the proposal to allow employers to decide whether weekly exposure is appropriate? If not, why not?**

Yes  No

1. APIL believes that the reasons detailed by the Health and Safety Commission (HSC) within the consultative document are compelling in terms of employers deciding weekly exposure. It should be noted, however, that such approval is conditional on the fact that it only applies to employees whose exposure to noise “*varies from day to day*”, i.e. employees whose job involves them working in a variety of different environments with differing noise exposure. For example, a worker could spend one day on-site, three in the factory and one day in the boiler house. Such different work environments would involve different levels of noise exposure.
2. In addition, APIL is reassured by the fact that the regulation deals solely with weekly exposure, and does not either restrict or contradict the requirements concerning daily exposure limits contained within regulation 4 (1).

### Regulation 5: Noise measurement

**Question 2: Do you agree with our proposed approach to assessment and measurement? If not, why not?**

Yes  No

3. APIL’s over-riding concern with the measurement and assessment of risk is that the regulations do not specify that the corresponding risk

assessment should be conducted by a competent person. APIL firmly believes that it is fundamental in respect of preventing injury to workers that all persons conducting risk assessment should have the necessary abilities and skills. The importance of this point cannot be overstated, and if risk assessment is to be the cornerstone of an effective health and safety regime it must be undertaken by a competent person.

4. In addition, APIL considers that the failure to mention the need for a competent person in the regulations is contrary to the intention and specifics of the originating European directive which the regulations are implementing. Any new regulation based on a European directive has to reflect the corresponding directive as closely as possible. In order for the directive to be effectively implemented, the minimum standards that it contains need to be echoed. The proposed position within the regulations is contrary to Article 4 (4) of the originating European Directive<sup>1</sup>, which states that:

*“[t]he assessment and measurement referred to in paragraph 1 shall be planned and carried out by competent services at suitable intervals, taking particular account of the provisions of Article 7 of Directive 89/391/EEC concerning the necessary competent services or persons.”*

In addition, the aforementioned Article 7 of Directive 89/391/EEC states that if a competent person can not be located internally, then a competent external person should be used<sup>2</sup>.

5. In order to remedy this problem, APIL proposes that the necessity to use a competent person to conduct the risk assessment needs to be reflected in the new regulations.

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<sup>1</sup> Directive 2003/10/EC of the European Parliament and Council (6 February 2003) on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

<sup>2</sup> See Appendix A - Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work – Article 7

6. APIL also feels that the need for measurement only in cases “*where the work is likely to expose employees to noise at or above an upper exposure action value*”<sup>3</sup> should be amended so as to require measurement from “*noise at or above a lower exposure action value*”<sup>4</sup>. Requiring measurement at only the upper action level devalues the purpose of the regulations, and places the employer rather than a competent person in the position of assessing risk in the majority of instances. APIL does not feel that employers, or indeed anyone, have the ability to distinguish between the upper and lower exposure action values without technology. For example, if a competent person – as detailed in the previous point – was asked to identify between 80 dB(A)<sup>5</sup> (lower exposure action value) and 85 dB(A) (upper exposure action value) by simply listening, it is unlikely that he would be able to tell the difference. If a competent person is unable to effectively note the difference, then it seems inexplicable to APIL that such an important duty should be placed in the hands of a non-competent person (i.e. the employer).

### **Regulation 5 (5): Exposure reassessments**

**Question 3: Do you agree with our proposed approach to reassessment? If not, why not?**

Yes  No

7. APIL agrees with the circumstances, as defined by the regulations, which would require a reassessment, yet APIL feels that more guidance is needed in relation to the frequency of these reassessments. The regulations state that “*the risk assessment shall be reviewed regularly*”<sup>6</sup>, but they do not go into any further detail. APIL

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<sup>3</sup> Consultation Document – page 12 – Regulation 5 (1)

<sup>4</sup> Ibid – Regulation 5 (3)

<sup>5</sup> ‘dB’ is the abbreviation for decibel.

<sup>6</sup> Consultation Document – page 13 – Regulation 5 (5)

would like to see further clarification on what exactly is meant by “regularly” included within the attached guidance.

8. APIL believes that the requirement for reassessment should be on a ‘needs’ basis in addition to a ‘regular’ time basis (e.g. a mandatory fixed interval basis of three years). This will ensure that the employer has to conduct a risk assessment regularly. For example, if the noise exposure levels were between 80–85 dB then it may be appropriate to allow for reassessment every three years, whereas if the noise exposure levels were between 95–100 dB then a more regular reassessment would be necessary. By widening the requirement for reassessment due to both interval and needs based considerations, APIL feels more employers will be persuaded to continually monitor the level of noise to which their workers are exposed.

### **Regulations 9: Health surveillance**

**Question 4: Do you agree with our proposed approach on when to introduce health surveillance? If not, why not?**

Yes       No

9. APIL proposes that any health surveillance should include an initial assessment to ascertain whether an individual is potentially more susceptible to auditory damage due to exposure to noise at work. For example, in the case of a person who already has impaired hearing, any further loss of auditory ability will affect them disproportionately as it will mean that their abilities will decline from an already poor state.

**Question 5: Do you agree that health surveillance can continue to be carried out by a suitably qualified audiometrist? If not, why not?**

Yes  No

10. APIL agrees that the health surveillance should continue to be carried out by a qualified audiometrist, with the provision that initial assessment should be carried out in order to determine whether certain employees are more susceptible to noise at work.

**Regulation 1 (a): Music and entertainment**

**Question 6: Do you agree that the two-year transition period is applied to all venues where/occasions when music (whether live or recorded) is played? If not, who should it apply to and why?**

Yes  No

11. APIL provisionally agrees with the use of the two-year transition period, due the practicalities involved, but we would urge caution as there are high rates of non-compliance in relation to the existing 1989 regulations within this particular business sector. APIL is concerned, therefore, that the two-year transition period may be seen by some as a two year extension to non-compliance.

**Question 7: Do you agree with having a blanket transitional period for the music and entertainment sector? If not, why not?**

Yes  No

12. Please refer back to question 6.

## Question 8: Do you have any other comments on the draft regulations?

### *Regulation 3 - Application*

13. APIL believes that the term “*worker*” should be used within the draft regulations in place of “*employee*” or “*person at work*”. APIL is concerned that the proposed wording in the proposed regulations does not provide a strict enough duty for employers in ensuring the safety of all possible types of workers. Regulation 3 (2) states that:

*“Where a duty is placed by these Regulations on an employer in respect of his employees, the employer shall be under a like duty, so far as reasonably practicable, in respect of any other person at work who may be affected by the work carried out by the employer”.*

The extension of the regulations to “*any other person at work*” is qualified, and so restricted, by the employers’ duty only needing to be discharged when “*reasonably practicable*”. While APIL supports the use of the term “*any other person at work*”, as it reflects the terminology of the originating directive<sup>7</sup>, we feel that it should not be limited in anyway.

14. APIL considers that the use of the term “*employee*”, or the use of the aforementioned restricted “*other person at work*” phrase, will leave certain classes of workers unprotected. For example, people who work on ‘the lump’<sup>8</sup> may not be included, as well as people who are on nil-hour contracts. In particular, there would be no protection for people travelling to the place where they work as the proposed definition can

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<sup>7</sup> The directive states, within Article 1 (1), that it “*lays down minimum requirements for the protection of workers from risks to their health and safety arising or likely to arise from exposure to noise and in particular the risk to hearing*”.

<sup>8</sup> See *Ferguson v. John Dawson & Partners (Contractors) Ltd* [1976] 1 W.L.R. 1213 - A builder’s labourer working on “the lump” can be held to be an employee due to the master and servant relationship which exists – i.e. the employer can dismiss the workmen, and tells them what to do and where to do it and pays them a wage on an hourly basis. A good example of this practice (of a person working on “the lump”) is the use of “subbies” (i.e. sub-contractors) within the construction industry.



be seen to only apply to people engaged in work activities. Such exclusion would potentially leave some workers vulnerable. For example, a person may be travelling back from his lunch break to his assigned employment via an area where there is a potential for him to be exposed to a harmful level of noise. The difficulty is that this exposure occurred outside of his assigned job role. APIL believes that in such a scenario, the possible non-applicability of the proposed regulations to the injured person due to the strict definition of “employee” would be both unfair and unjust. APIL therefore feels that it is vital that the proposed regulations reflect the language, as well as the intention, of the originating directive and the term “worker” is used in place of “employee” or “person at work”. This simplification will allow for all appropriate classes of employee and worker to be protected under a singular duty of care by the employer.

15. APIL is concerned that the exemption in regulation 3 (4), regarding ship’s personnel, will leave workers in this particularly high-risk sector without the much-needed protection of the new noise at work regulations. Workers aboard ships are likely to be exposed to a huge variety of noise exposure, each potentially damaging the hearing of that worker. It is essential that this group is effectively covered by the proposed regulations. APIL notes that the originating directive makes no such restrictions on the application of the noise at work provisions, suggesting only that “Member States should be entitled to provide for a transitional period with regard to the personnel on board seagoing vessels”<sup>9</sup>. As previously noted, any new regulation based on a European directive has to reflect the corresponding directive as closely as possible. APIL thus feels that this exemption should be either altered or deleted from the proposed new regulations, so as to allow proper consideration of the noise risks aboard ships.

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<sup>9</sup> See Directive 2003/10/EC – Section (11)

#### *Regulation 4 – Determination of exposure limit values and action values*

16. APIL feels that the proposed wording of regulation 4 (4), in attempting to determine the exposure limit values and action values, is both unclear and confusing. We propose that clarification could be achieved by the regulation simply reflecting the language used in Article 3 (2) of the Directive<sup>10</sup>.

17. In addition, APIL questions whether the difference in terminology between regulation 4 (4) and regulation 4 (1) is intentional or needs correction. The confusion is caused by regulation 4 (4) cross-referencing regulation 4 (1) in respect of “*exposure limit values*”, yet in the latter regulation the terminology used is “*daily noise exposure level*”. Due to the fact that “*exposure limit values*” is taken directly from Article 3 (2) of the directive, APIL feels that this phrase is more appropriate in the context of the regulations and should be used throughout the regulations. We would, however, appreciate clarification on the matter.

#### *Regulation 5 – Assessment of the risk to health and safety created by exposure to noise at the workplace*

18. APIL firmly believes that any type of specific risk assessment conducted to ascertain noise exposure levels should also take account of the findings of the general risk assessment carried out under regulation 3 of the Management of Health and Safety at Work Regulations 1999<sup>11</sup> and that specific reference should be made to the ‘*Regulation 3 Risk Assessment*’. This will ensure that the potential risk

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<sup>10</sup> Directive 2003/10/EC of the European Parliament and Council (6 February 2003) on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) – Article 3 (2): “*When applying the exposure limit values, the determination of the worker’s effective exposure shall take account of the attenuation provided by the individual hearing protectors worn by the worker. The exposure action values shall not take account of the effect of any such protectors.*”

<sup>11</sup> See <http://www.hmso.gov.uk/si/si1999/19993242.htm#3> for details

factors involved within any job role or work environment will be appropriately considered.

19. APIL broadly welcomes the inclusion of the aforementioned specific risk assessment as detailed in regulation 5. The inclusion of this duty marks a significant improvement over the assessment of noise within the current regulations. APIL is further encouraged by the high level of detail that the regulations contain, as again this is a significant improvement on the current provisions.

#### *Regulation 6 – Elimination or control of exposure to noise at the workplace*

20. APIL welcomes the linking of the new noise at work regulations to the current principles of prevention<sup>12</sup>. This allows for consistency and compatibility across the current range of health and safety regulations.

#### *Regulation 7 – Hearing Protection*

21. APIL proposes that the word “*immediately*” should be inserted between “*shall*” and “*make*” within regulation 7 (1) as this will help to emphasise the need for hearing protection at the earliest possible stage of employment. APIL feels that this regulation does not adequately indicate the urgency with which hearing protection needs to be supplied to workers and employees. It is essential that hearing protection is supplied as soon as possible in order to prevent any type of hearing damage.

22. APIL is slightly concerned about the use of the phrase “*shall make every effort*” within regulation 7 (3) (c), and feels it should be replaced by “*as far as reasonably practicable*”. While the phrase “*shall make every effort*” closely reflects the originating directive, it does not represent a duty that is widely recognised in the UK and particularly the

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<sup>12</sup> Detailed in regulation 4 of the Management of Health and Safety at Work Regulations 1999, and subsequently Schedule 1 of the same regulations.

UK legal system. APIL proposes that a more appropriate phrase in the context of the new regulations should be “*as far as reasonably practicable*”. This phrase is widely used in other health and safety regulations, and is well established with legal precedent. The use of this phrase would lead to clarity, whereas “*shall make every effort*” may lead to possible confusion during interpretation of the regulations; we believe in this instance that the current terminology is ‘better the devil you know’.

23. APIL suggests that regulation 7 (4) (b) should recognise recent revisions and be altered so that after the words “*Personal Protective Equipment at Work Regulations 1992*” the sentence ends with the phrase “*as amended*”.

#### *Regulation 8 – Maintenance and use of equipment*

24. APIL believes that the employer should have the absolute duty to ensure that the equipment that he provides for a worker is “*fully and properly used*”, and in order to achieve this we propose that within regulation 8 (1) (a) the words “*make every effort to*” should be deleted.

#### *Regulation 9 – Health Surveillance*

25. APIL feels that “*reasonable notice*”, as detailed in regulation 9 (3) (a), is ambiguous and we would like to see this phrase properly defined within the regulations guidance.

26. APIL is very concerned about regulation 9 (4), which states that “[w]here ... an employee is found to have identifiable hearing damage which is likely to be the result of exposure to noise, the employer shall ensure that the employee is examined by a doctor”. From the current wording of the regulations it appears that a subjective opinion has to be made concerning whether or not the hearing damage has been caused by exposure to noise. APIL firmly believes that such a subjective

determination can only be made by a competent person. As such APIL considers a doctor or an audiometrician as constituting a competent person, not an employer. Indeed the employer is not an appropriate party to make a decision about possible referral to a doctor. The presence of the employer within this assessment process could actually be used as a means of limiting the number of doctor referrals. APIL proposes that a doctor should be responsible for diagnosis in addition to any treatment or preventative measures in relation to hearing loss.

27. Indeed APIL suggests that the above change within the proposed regulations, with use of a doctor for both diagnosis and treatment, would effectively reflect the originating directive. In the directive, Article 10 (2) states that “[a] worker whose exposure exceeds the upper exposure action values shall have the right to have his/her hearing checked by a doctor or by another suitably qualified person”. This illustrates the right of a worker to be seen by a doctor, and as such should be echoed within the proposed regulations.

28. Furthermore, APIL believes that if someone has hearing damage, regardless of whether it is caused by noise or not, referral to a competent person (i.e. a doctor) should always take place. The phrase “*the result of exposure to noise*” has the potential to unjustly prevent potential health surveillance and referral for many workers. For example, if a person has age related hearing loss it would be, in the vast majority of cases, indistinguishable from noise-induced hearing loss (NIHL). It would consequently be inappropriate to leave this distinction to unqualified people. Furthermore, only a doctor experienced in this field would be able to assess whether a person’s sensorineural hearing loss was only age associated or whether it included a component cause by noise damage. Indeed in order to avoid further damage to the hearing of the patient, an experienced and prudent doctor might assume, in the interests of prevention, an element of noise damage.

*Regulation 10 – Information, instruction and training for persons who may be exposed to risk from noise*

29. APIL considers that the duty for instruction and training of people who may be exposed to noise should apply to those supervising and managing, so reflecting the current Provision and Use of Work Equipment Regulations 1998<sup>13</sup> (as amended).

30. In addition, APIL feels that the dangers of tinnitus are not acknowledged effectively within the regulations, and so we propose that for regulation 10 (2) (a) the word “all” is inserted between “of” and “risks” and the sentence concludes with the phrase “including tinnitus”.

**Question 9: Should the technical appendices be published as part of the guidance or be available separately on the HSE website?**

31. APIL believes that the technical appendices should be published as part of the guidance in addition to being available on the Health and Safety Executive (HSE) website. We feel that there is no harm in providing this information in the widest possible set of circumstances.

**Question 10: The draft guidance cites the regulations in part 1. Is this useful or does it make the guidance unnecessarily complicated?**

32. APIL found the structure of the draft guidance useful and uncomplicated. APIL’s only issue with the guidance is that it needs to contain more information in relation to a number of points; these points have already been highlighted in the answers to other questions within the consultation.

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<sup>13</sup> Regulation 9 (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.”

**Question 11: Do you have any other comments on the draft guidance?**

33. APIL feels that the tinnitus risk, which was briefly discussed in relation to regulation 10, should be more explicitly mentioned within the draft guidance. We believe that the dangers of tinnitus need to be explicitly spelt out, in particular the devastating effects that it can have on a person. For example, people with tinnitus can suffer from a range of major psychiatric illnesses, such as depression, which can in extreme instances lead to suicide.

34. APIL also considers the guidance relating to the effects of noise on hearing to be very 'dry'. In particular, as mentioned, we would like to see more consideration given to tinnitus and its effects; the fact that a person may have to wear a hearing aid; and the fact that a person may be more sensitive to sounds that other people find comfortable and normal. It is felt that the clearer the message as to the likely consequences of noise damage, the more likely that those at risk will take note. For example, the dangers concerning asthma are well-documented in the contents of the Approved Code of Practice to the Control of Substances Hazardous to Health Regulations (COSHH) 2002.

**For readers directly concerned with audiometric testing – Questions 12 – 15**

**Question 12: Do you agree with the proposed changes to the HSE categorisation scheme for noise induced hearing loss in annex 6?** *You may wish to comment specifically on the use of 80th and 95th percentiles as cut off points for warning and referral; the summation of hearing levels at 1,2,3,4 and 6kHz for categorisation; a difference of 60dB between ears as a level at which to define unilateral hearing loss, based on a summation at 1, 2, 3 and 4 kHz and; and, whether progressive hearing loss of 30dB or more, based on summation of hearing levels at 3, 4 and 6 kHz, over a maximum of 3 years would be adequate to detect 'rapid' hearing deterioration, particularly among young workers.*

Yes  No

35. APIL does not wish to comment on this question at this particular time. APIL feels that this question will be adequately answered by parties with a higher level of technological understanding in this area.

**Question 13: Should the sample questionnaires and materials in appendix F to the guidance be made available on the internet?**

Yes  No

36. APIL feels that the materials in appendix F should be openly available on the internet. We cannot see any harm in providing information in the widest possible set of circumstances.



**Question 14: Do you think otoscopic examination is an essential component of an audiometric test?**

Yes

No

37.APIL believes that an otoscopic examination is an essential component of an audiometric test, and is vital because it allows for the diagnosis of other possible diseases.

**Question 15: Should HSE develop a brief guide as to what we would consider 'appropriate training' for those conducting audiometric testing or is there already a suitable syllabus to follow e.g. training courses approved by the British Society of Audiology?**

38.APIL considers that the current syllabus offered by the British Society of Audiology is readily accessible and offers an effective means of training in conducting audiometric testing, and as such is worth following.