

THE HEALTH AND SAFETY EXECUTIVE (HSE)

FURTHER CONSULTATION ON WORK AT HEIGHT REGULATIONS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL22/04)

NOVEMBER 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 around 5,000 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:

| | |
|----------------------|---|
| Colin Ettinger | President, APIL |
| Martin Bare | Executive committee member, APIL |
| Cenric Clement-Evans | Co-ordinator of APIL Wales Regional Group |
| Nigel Tomkins | Member, APIL |
| Karl Tonks | Member, APIL |

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WORK AT HEIGHT REGULATIONS AND THE CONSTRUCTION INDUSTRY

TWO-METRE RULE

Introduction

1. APIL believes that the retention of the 'two-metre' rule for the construction industry would create a two-tier system of protection in the new Work at Height Regulations, leaving construction workers with a lower level of protection than workers in other sectors. This lower level of protection for some employees would ultimately defeat the aims of both the original European directive and the Health and Safety Commission (HSC). APIL considers that this lower level of protection may also influence other non-construction industries and allow a 'two-metre trigger height' to be implied in regulations governing non-construction activities. Finally, APIL feels that by allowing a sector specific clause to be introduced into the Work at Height Regulations, thereby allowing different regulatory constraints for construction work, the originating Directive would not be properly implemented.
2. Please see Appendix A for APIL's completed '*Work at Height Regulations – Feedback form*'

Two-tier protection

3. APIL believes that the retention of a two-metre rule for the construction industry would result in a lower level of employer obligation and, consequently, protection, for construction employees, compared with other sectors. Yet, APIL contends, it is in the construction industry that current health and safety regulations relating to falls from height must be strengthened. Of the 235 fatalities to workers in 2003/04 nearly a third occurred in the construction industry and over a half of these involved a fall from height¹. In fact, falls from height are the biggest killer in the

¹ There were 70 worker fatalities in the construction industry in 2003/04. Of these 70 fatalities, 38 occurred due to falls from height. In addition, nearly 23 per cent of these falls from height occurred either below two metres or no height was stated. (Source: HSE – *Statistics of Fatal Injuries 2003/04*) (see <http://www.hse.gov.uk/statistics/overall/fat0304.pdf> for copy of report)

workplace and the second biggest cause of major injuries. In addition, two-thirds of these major injuries are the result of 'low falls' – i.e. falls below two metres.

4. APIL fully supports the HSC position – as stated in a recent discussion paper – that there needs to be *“a single set of goal setting regulations on work at height for all workers in all sectors across GB”* (paper’s own emphasis)². APIL further agrees that *“[a] separate numeric standard for construction will undermine the risk based approach for the rest of the industry”*³. By allowing the construction industry to retain the two-metre rule, it could be argued that workers employed in other sectors would be afforded a greater level of protection than those in construction; essentially a two-tier level of protection. This conclusion would make a mockery of the HSC’s above position, as well as its original approach to the Work at Height regulations, namely:

*“making a cohesive, single set of goal-setting Regulations which will ... apply to all industries.”*⁴

5. APIL contends that a two-tier level of protection would also undermine the purpose of the original EU directive on which the Work at Height Regulations are meant to be based, namely the protection of workers. Paragraph 4 of the directive preamble clearly states the aim behind the directive:

*“Compliance with the minimum requirements designed to ensure a better standard of health and safety in the use of work equipment provided for temporary work at height is essential to ensure the health and safety of workers.”*⁵

² Health and Safety Commission Paper – HSC/04/114 – Paper File ref: SPD/216/1000/03-02 – paragraph 4, pages 1 & 2 (see <http://www.hse.gov.uk/aboutus/hsc/meetings/2004/121004/c04114.pdf> for copy of document)

³ Ibid – Annex 0 – paragraph 14 (iii), page 9

⁴ HSC consultation *'Proposals for Work at Height Regulations' (CD192)* – Summary of Document – page 3 (see <http://www.hse.gov.uk/consult/condocs/cd192.pdf> for copy of document)

⁵ 2nd Amending Directive (2001/45/EC) to the Use of Work Equipment Directive (89/665/EEC) – 27 June 2001 – paragraph (4)

6. APIL supports the use of a risk-based approach within the new Work at Height Regulations. A risk-based approach means that *“the new regulations prescribe goals rather than the type of work equipment⁶”* to be used and the type of work equipment will be *“down to the risk assessment and what is reasonably practicable⁷”*. APIL feels the construction industry’s representations stating that the removal of the ‘two metre rule’ will mean that it will be *“required to have edge protection ... even when workers are nominal distances above the ground⁸”* and that the *“removal of a specific reference to work equipment to prevent ... falls above 2 metres might lead to guardrails [etc.] ... not being used when they should⁹”* are inappropriate and misguided.

Effect on other industrial sectors

7. APIL is concerned that the retention of the ‘two metre trigger height’ within the new Work at Height Regulations, regardless of whether it is solely for the purposes of the construction industry, will inevitably be used to interpret ‘reasonably practicable’ in other non-construction sectors. Evidence for this proposition can be seen in the current application of the ‘two metre’ rule in the Construction (Health, Safety and Welfare) Regulations 1996 (CHSWR). Regulation 6 (3) states: *“where any person is to carry out work at a place from which he is liable to fall a distance of 2 metres or more ... (a) there shall ... be provided and used suitable and sufficient guard-rails and toe-boards, barriers and other similar means of protection to prevent, as far as is reasonably practicable, the fall of any person from that place”*. When considering whether an employer has met the test of ‘reasonable practicability’ in reference to work at height in non-construction industries the court has, at times, had regard to trigger heights in the CHSWR¹⁰. APIL feels that by allowing a trigger height to be specified in relation to the construction

⁶ Health and Safety Commission Paper – HSC/04/114 – Paper File ref: SPD/216/1000/03-02 – Annex 0 – paragraph 12, pages 8

⁷ Ibid – paragraph 13, page 8

⁸ Ibid

⁹ Ibid

¹⁰ See *Wright v Romford Blinds and Shutters* [2003] EWHC 1165 (QB)

industry, health and safety protection offered within other industries will ultimately be affected.

8. Furthermore, APIL considers that the extent to which a two-metre rule would adversely affect workers should not be underestimated, even though it would be restricted to the construction industry. APIL envisages that the new regulation 7 (3) in the proposed Work at Height Regulations will use the CHSWR's definition of 'construction work'¹¹. This definition is extremely wide so as to include a host of activities which many would not traditionally associate with the construction industry, such as: cleaning buildings; installation of telephone equipment; decorating; maintenance; and repair of electrical systems in a building.

Implementation of Original EU directive

9. APIL suggests that the proposed regulation 7 (3) contravenes the original directive by specifying a separate regulation for a specified industry type. The directive does in no way specify that there should be additional consideration for the construction industry in any roll-out of new work at height legislation. Indeed, within the preamble to the previous Work at Height Consultation the HSE stated:

“The Temporary Work at Height Directive sets out minimum requirement for the selection and use of work equipment for all work at height – the European Commission has made it clear that it has ‘the same scope of application as the Framework Directive, and therefore it applies to all sectors of activity where temporary work at height is carried out’.¹²”

10. By attempting to include industry-specific standards into the new Work at Height Regulations, the HSE would be in breach of the proper application of the originating European directive on which the regulations are based.

¹¹ See *The Construction (Health, Safety and Welfare) Regulations 1996* (SI1996 No. 1592) section 2 (1) – Interpretation

¹² HSC consultation '*Proposals for Work at Height Regulations*' (CD192) – Background – page 8

11. In addition, it should be noted that there is no mention of any specific trigger height requirements within the EU directive. The directive offers a minimum standard for each country. APIL considers that by including both an industry-specific clause and a set trigger height the HSC would be falling below this standard, making any regulations based on the directive defective.
12. APIL considers that the re-instatement of the 'two metre rule' would ultimately lead to the current unsatisfactory status-quo being maintained. This would defeat the directive's intention of unifying all industries under a single set of regulations concerning working at height, as well as undermine the purpose of the directive to protect workers.
13. In order to clarify what is meant by 'work at height', APIL restates its suggestion (from our previous response¹³) that the corresponding definition should explicitly state that work at height is not subject to any minimum distance. While this was specified within the guidance attached to the previous consultation – under the title "*What is meant by 'work at height'?*"¹⁴ – APIL would like to see it echoed within the actual drafting of the regulations.

¹³ See Appendix B – APIL's response to the HSC: *Proposals for Work at Heights Regulations* (APIL09/04) April 2004

¹⁴ "*The WAHR [Work at Height Regulations] have no minimum height requirement*" - HSC consultation 'Proposals for Work at Height Regulations' (CD192) – Guidance – paragraph 9, page 58

Appendix A

APIL'S COMPLETED HEALTH & SAFETY COMMISSION'S (HSC)

WORK AT HEIGHT CONSULTATION - FEEDBACK FORM

NOVEMBER 2003



Work at Height Regulations - Feedback form

We are seeking your views on an additional Regulation to introduce a version of the current '2-metre rule' for construction work into the Work at Height Regulations.

Please provide some background information about yourself and your organisation.

| Title | Forename | Surname |
|-------|----------|---------|
| Mr | Miles | Burger |

Organisation The Association of Personal Injury Lawyers (APIL)

Address 1 11 Castle Quay

Address 2

Address 3

Town/city Nottingham

County Nottinghamshire

Postcode NG7 1FW

Email address (optional) miles.burger@apil.com

Telephone number (optional) 0115 938 8710

Number of employees

26-50

Role

Not answered

If you have answered 'other', please enter a category that best defines your role

Policy Research Officer

Sector

Other (please specify)

If you have answered 'other', please enter a category that best defines your sector of industry

Claimant representative organisation

Confidentiality

Please indicate below if you do not wish details of your comments to be available to the public. (NB if you do not put a tick in the box they will be made public. This takes precedence over any automatic notes on e-mails that indicate that the contents are confidential.)

Please treat my response as confidential. (tick means confidential)

Alternatively, to treat your comments on a particular section as confidential, please insert bracketed text '(treat as confidential)' within that section response.

If you work in or represent the construction industry please tick the following box

1 (a) Do you support the introduction of a 2-metre rule for the construction industry?

No

(b) If Yes to 1(a), do you think Regulation 7(3) is workable in the construction industry?

Not answered

(c) If 'Yes' to 1(b) please explain how a 2-metre rule will improve safety performance in the industry. If you answered 'No' please explain why you believe Reg 7(3) is not workable.

Reg 7(3) would introduce two-tier protection for employees working at height.



2. (a) Does the introduction of a 2-metre rule for the construction industry have implications for other industries/sectors?

Yes

(b) If 'Yes' to 2(a) please set out briefly what those implications are.

The lower level of protection introduced by reg 7(3) could be applied in other non-construction industries.



3. Please make any other comments in the space provided.

For a full discussion of APIL's concerns, please see APIL's full response (APIL22/04) - sent separately.



Submit

Reset

Appendix B

APIL'S RESPONSE TO THE HEALTH AND SAFETY COMMISSION (HSC)

PROPOSALS FOR WORK AT HEIGHT REGULATIONS

(APIL09/04)

APRIL 2004

THE HEALTH AND SAFETY COMMISSION (HSC)

PROPOSALS FOR WORK AT HEIGHT REGULATIONS

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL09/04)**

APRIL 2004

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- 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;
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Work at Height Regulations

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| <p>Work at Height Regulations Summary of issues and questions from the Consultative Document</p> |
| <p>Transitional Arrangements</p> |
| <p>Q1. Should any industries, groups or provisions relating to specific items of work equipment be subject to these transitional arrangements? Please choose from the options below, and then explain your answer in the space provided (making reference to what specifically should be subject to a transitional period).</p> |
| <p>No</p> |
| <p>APIL understands that many of the regulations suggested are not new and simply "reflect existing good practice in the construction and other industry sectors" (consultation document - background - page 8). As such, APIL does not understand why there is a need for a two year transitional period? It is APIL's experience that transistional arrangements are often used by companies as a means of avoiding implementing new rules and regulations.</p> |
| <p>◆ Please make any additional comments on Transitional Arrangements here.</p> |
| <p>While there are some amendments which alter specific requirements, such as the height of work rails, and these amendments may incur a certain amount of cost, APIL feels that these limited examples do not justify an across the board use of transitional arrangements.</p> |
| <p>Regulation 2 - Interpretation</p> |
| <p>'Work at Height'</p> |
| <p>Q2. Is the definition of 'work at height' clear? Please choose from the options below, then type any additional comments in the space provided e.g. how could it be improved upon?</p> |
| <p>Very Unclear</p> |
| <p>APIL belives that the definition for 'work at height' is circular and logically flawed. The definition includes the words "if measures required by the Regulations were not taken" (regulation 2 (1)). It cannot be determined, however, whether there is any requirement to take measures under the regulations without knowing what "work at height" is. If you do not know whether measures were required by the regulations how can you determine whether the work in question is "work at height"? It would seem to APIL that the definition of "work at height" needs to be used in order to understand the definition of "work at height".</p> <p>In order to clarify the definition, APIL proposes the following inclusion to regulation 2 (1) after the words "from which":</p> <p>"... a person could fall a distance liable to cause personal injury, not otherwise subject to any minimum distance".</p> <p>While the guidance states that the proposed Work at Height Regulations (WAHR) has "no minimum height requirement for work at height" (guidance - paragraph 9 - page 58), this fact is not echoed in the drafting of the regulations themselves. APIL belives that it is essential that no minimum distance should appear in the regulations, and the proposed change will</p> |

Work at Height Regulations

| Work at Height Regulations Summary of issues and questions from the Consultative Document |
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| accomplish this and add clarity. Further, APIL would like to see the inclusion in the guidance of examples of falls from heights less than two metres that have caused serious injuries, as this will illustrate the need for no minimum distance to be specified. |
| 'Working platform' |
| Q3. Are the definitions about 'working platforms' set out in the Work at Height Regulations a) clear and b) workable? Please choose an option from both of the lists below, then type any additional comments in the space provided e.g. how could it be improved upon? |
| 3a) Unclear |
| 3b) Workable |
| APIL feels the current drafting of section 2 (1) (f) is confusing, as it indicates that the regulations will only be relevant where there is a "gantry and stairway". In order to correct this we propose that the regulation should be amended to read "gantry or stairway". |
| 'Fragile Surfaces' |
| Q4. Do you agree that we have adopted the right approach to fragile surfaces? Please choose from the options below, then type any additional comments in the space provided. |
| Yes |
| APIL believes that the change of the term 'fragile material' to 'fragile surface' will allow for a more comprehensive approach to safety in this area. In particular we are encouraged to note that the outline of the proposals specifically mentions that "casings or fixings" are to be included in the definition (outline of the proposals - paragraph 6 - page 13). We are, however, concerned that fixings and casings have not been included in the definition of a fragile surface in the actual WAHR at regulation 2 (1). In addition, APIL feels there needs to be recognition of the stresses that can be applied to a surface within the regulations. In order to resolve these issues, APIL proposes the following drafting replacement of the fragile surface definition at regulation 2 (1): "'fragile surface' means a surface, or any part thereof or fixing thereof, which would be liable to fail if any reasonable foreseeable loading or stress were applied to it." In addition, APIL would like to see more explicit guidance illustrating exactly what is meant by fragile surface. The employer should also be under a duty to consider if a surface is fragile within any risk assessment. Indeed we feel that it would be advantageous to have a specific risk assessment for fragile surfaces, as this will focus employers' consideration of the working environment and necessary preventative measures. |
| 'Personal Fall Protection Systems' |
| Q5. Do you agree that we have adopted the right approach to Personal Fall Protection Systems? Please choose from the options below, then type any additional |

Work at Height Regulations

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| <p>Work at Height Regulations Summary of issues and questions from the Consultative Document</p> |
| <p>comments in the space provided.</p> |
| <p>Yes</p> |
| <p>APIL does not wish to comment further on this subject at the present time.</p> |
| <p>Other</p> |
| <p>◆ Please make any additional comments on Interpretation here.</p> |
| <p>APIL feels that the definition of the word "suitable" in regulation 2 (1) is contrary to other health and safety legislation. In order to clarify the position, APIL feels that the proposed WAHR definition for "suitable" should be replaced with that in regulation 4 (4) of the Provision and Use of Work Equipment Regulations (PUWER) 1998:</p> <p>"suitable" means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person."</p> |
| <p>Regulation 3 - Application</p> |
| <p>Q6. We would welcome your comments on the appropriateness of the dutyholder application – particularly in relation to any situations which you feel may not be covered by these proposals or where further guidance might be required.</p> |
| <p>APIL has some overall concerns on this issue as Regulation 3 (2) and (3) - application of regulations to employees and self-employed people - does not seem to reflect the current status in respect of other health and safety regulations, in particular regulation 3 (3) of PUWER and regulation 4 (1), (2) and (3) of the Workplace (Health, Safety and Welfare) Regulations 1992. Regulation 3 (3) of PUWER states:</p> <p>" (3) The requirements imposed by these Regulations on an employer shall also apply -</p> <ul style="list-style-type: none"> (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 - <ul style="list-style-type: none"> (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, <p>and to the extent of his control."</p> <p>APIL believes there is a need for the proposed WAHR to reflect contemporary and complimentary health and safety legislation. We feel that the definition in regulation 3 (2) and (3) of the WAHR should be altered so as to reflect the definition in PUWER and the Workplace regulations. This will ensure a consistency of definition across health and safety law.</p> |
| <p>Q7. Do you agree that the WAHR should be applied offshore in the way proposed? Please choose from the options below, then type any additional comments in the space</p> |

Work at Height Regulations

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| <p>Work at Height Regulations Summary of issues and questions from the Consultative Document</p> |
| <p>provided.</p> |
| <p>Yes</p> |
| <p>APIL agrees with this proposition as long as the duty on the employer is in no way reduced.</p> |
| <p>◆ Please make any additional comments on Application here.</p> |
| <p> </p> |
| <p>Regulation 4 – Organisation and Planning</p> |
| <p>Q8. We would welcome your views on the requirements in the WAHR to organise and plan work at height.</p> |
| <p>APIL is concerned that there is a lack of duty on the employer to carry out a competent risk assessment. As discussed in APIL's reply to question 6, there is a need for the proposed WAHR to be consistent with corresponding health and safety legislation. It should be noted that a lot of other regulations contain the duty to carry out risk assessment prior to the commencement of work activities. It appears that the proposed WAHR regulations carry the intention of effective risk assessment, but there is no explicit requirement contained within the regulations themselves. In addition, within any hierarchical approach, prevention should intuitively be followed by risk assessment, ideally an individual and specific risk assessment.</p> <p>APIL also believes that the issue of organisation and planning should be supervised by a competent person. As such we propose the words "by a competent person" be inserted after "appropriately supervised" in regulation 4 (1) (b).</p> |
| <p>Q9. We aim to encourage dutyholders to assess the 'overall' risk involved in working at height, for example by considering the risk of installing equipment for work at height as well as the risks of using it, by taking full account of the nature and duration of the work, by taking account of emergency and rescue situations and by taking a full range of technical solutions: a) are our aims understood? and b) could they be made clearer? Please choose an option from both of the lists below, then type any additional comments in the space provided.</p> |
| <p>9a) Yes</p> |
| <p>9b) Yes</p> |
| <p>APIL believes that there should be a specific duty to risk assess in the regulations as this would provide greater clarity for the duty holder. We also feel that there should be a specific re-statement of the principles of prevention from schedule 1 (2), regulation 4, of the Management of Health and Safety Regulations 1999:</p> <p>"GENERAL PRINCIPLES OF PREVENTION</p> <p>(This Schedule specifies the general principles of prevention set out in Article 6(2) of Council</p> |

Work at Height Regulations

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| Work at Height Regulations Summary of issues and questions from the Consultative Document |
| Directive 89/391/EEC) |
| (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." |
| 'Health and Medical Issues' |
| Q10. Should we say any more in the Guidance about a person's physical capability for working at height? Please choose from the options below, then type any additional comments in the space provided. |
| Yes |
| APIL believes that a persons physical capability for working at heights should be part of the risk assessment, and should include musco-skeletal problems, epilepsy, vertigo and other appropriate medical conditions. We would also like to see the inclusion of young workers and possibly pregnant woman within the class of people considered. In general the guidance should be more illustrative and give examples of health as well as safety. For instance, the recent modifications to the Manual Handling Operations Regulations 1992 actually include within the regulations themselves a need for the consideration of a person's physical capability. |
| In terms of navigating through the document, APIL thought that the guidnace in relation to physical capability was particularly difficult to find. We reiterate the need for the guidance and regulations to more 'user-friendly' once finalised. |
| Q11. Have we a) achieved a reasonable balance and b) gone into the right amount of detail on health and medical issues? Please choose an option from both of the lists below, then type any additional comments in the space provided. |

Work at Height Regulations

Work at Height Regulations

Summary of issues and questions from the Consultative Document

11a) Poor Balance

11b) Not Enough Detail

As detailed in our answer to Question 10 (above), APIL feels that there is not enough detail on health and medical issues.

'Appropriate Supervision'

Q12. Should we say more about management of workers and the work process in the Guidance? Please choose from the options below, then type any additional comments in the space provided.

Don't Know

APIL feels the regulations should reflect the same duties as those in other current health and safety legislation. In particular, we would like to see the same duties as detailed in PUWER 1998 regulations 8 and 9 applied here:

Information and instructions

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 -

(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.

Training

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.

Work at Height Regulations

| Work at Height Regulations Summary of issues and questions from the Consultative Document |
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| (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." |
| 'Weather Conditions' |
| Q13. Have we given enough explanation about weather conditions and the effect they can have in the Guidance? Please choose from the options below, then type any additional comments in the space provided. |
| No |
| APIL believes that there needs to be considerably more detail in terms of illustration and examples in relation to the guidance for weather conditions. |
| 'Other' |
| ♦ Please make any additional comments on Organisation and Planning here. |
| |
| Regulation 5 - Competence |
| Q14. Can or should we attempt to define 'competence' in the Regulations? Please choose from the options below, then type any additional comments in the space provided. |
| Yes |
| APIL believes that the concept of competence should be defined and included in the proposed WAHR. Indeed the definition of competence offered within the guidance (paragraph 45 - page 72) is suitably comprehensive and should be moved into the main body of the regulations. This definition closely reflects that included in the Management of Health and Safety at Work Regulations 1999 at regulation 7 (5): |
| "A person shall be regarded as competent for the purposes of paragraphs (1) and (8) where he has sufficient training and experience or knowledge and other qualities to enable him properly to assist in undertaking the measures referred to in paragraph (1)". |
| As previously stated, we feel that the current regulations need to effectively reflect other current health and safety legislation. In addition, APIL firmly believes that it is prudent to include too much information and detail within the regulations, rather than too little. As such more of the detail from the guidance should be shifted over to the regulations. |
| Q15. Is the Guidance clear in its definition of 'competence'? Please choose from the options below, then type any additional comments in the space provided. |
| Clear |
| As discussed above, APIL feels that the definition of competence is clear but that it needs to be moved from the guidance to the main body of the regulations. |

Work at Height Regulations

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| <p>Work at Height Regulations Summary of issues and questions from the Consultative Document</p> |
| <p>Q16. To what extent, if at all, should the definition of competence encompass consideration of a person's training and qualifications? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Significantly</p> |
| <p>APIL feels that competence could not be appropriately defined without reference to a person's training and qualifications.</p> |
| <p>◆ Please make any additional comments on Competence here.</p> |
| <p> </p> |
| <p>Regulation 6 – The hierarchy of avoiding and controlling risks from Work at Height</p> |
| <p>Q17. Do you agree with the principles set out in the hierarchy in Reg. 6 – e.g. is there sufficient clarity on what is required of dutyholders? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Agree</p> |
| <p>APIL agrees that the hierarchial principle is the right approach.</p> <p>Within regulation 6, APIL believes that confusion could be caused because it appears that the phrase "in compliance with Schedule 1, where it is reasonably practicable to do so safely and under appropriate ergonomic conditions" only applies to regulation 6 (3) (a) (ii). In reality, the phrase is applicable to both (i) and (ii) of regulation 6 (3) (a). APIL suggests that, in order to avoid further confusion, the phrase detailed above should be properly identified as being relevant to both (i) and (ii).</p> <p>In addition, APIL proposes the inclusion, within the Regulations, of a need for a specific risk assessment. The reasons for specific risk assessment have been detailed previously. The inclusion to regulation 6 (1) of the phrase "and suitable and sufficient risk assessment has been completed" after "height" would effectively reinforce the hierarchial approach of prevention, then risk assessment.</p> |
| <p>Q18. In the hierarchy is the meaning of a safe place of work for work at height, as defined in Schedule 1, clearly defined? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Clear</p> |
| <p>APIL supports the principles outlined and more prescriptive drafting may confuse the situation rather than rectify it.</p> |
| <p>Q19. Do we need to say more – without being over-prescriptive – about the type of equipment that should be used to meet each step of the hierarchy? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>No</p> |
| <p>APIL supports the principles outlined and more prescriptive drafting may confuse the situation rather than rectify it.</p> |

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| <p>Work at Height Regulations Summary of issues and questions from the Consultative Document</p> |
| <p>◆ Please make any additional comments on the Hierarchy here.</p> |
| <p>Regulation 7 – General principles for selection of work equipment for Work at Height</p> |
| <p>Q20. We would welcome your views on the proposed selection criteria (Regulations and Guidance), in particular:</p> <p>a) Will it ensure that the safest and most effective measures will be selected to perform work at height? b) Is it clear where differing types of work equipment come into play when considering the hierarchy? c) Does it address the practicalities of performing work at height in all cases? d) Does the supporting Guidance illustrate adequately the various issues to consider when choosing different work equipment?</p> <p>Please choose an option from each of the lists below, then type any additional comments in the space provided.</p> |
| <p>20a) Yes</p> |
| <p>20b) Clear</p> |
| <p>20c) Yes</p> |
| <p>20d) Clear</p> |
| <p>APIL feels that the provisions relating to Regulation 7 are sufficient and clear. We feel no need at the present time to comment further.</p> |
| <p>◆ Please make any additional comments on the principles for the selection of work equipment here.</p> |
| <p>Regulation 9 – Fragile Surfaces</p> |
| <p>Q21. Are the Regulations too restrictive in insisting on coverings and other protective measures for fragile surfaces? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Right Balance Achieved</p> |
| <p>APIL feels that the regulation dealing with fragile surfaces is a huge advance in this area, and as such we support the provision fully.</p> <p>APIL does, however, have a number of drafting points that need to be considered in relation to question 21. Firstly, continuing the remarks made in relation to the definition of fragile</p> |

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| Summary of issues and questions from the Consultative Document |
| <p>surface in question 4, regulation 9 (2) (b) should be re-drafted to read:</p> <p>"no person at work passes across, or works on or from, a fragile surface unless suitable and sufficient platforms, coverings or other similar means of support are provided and used so that any foreseeable loading or stresses are supported by such supports".</p> <p>This amendment allows for the inclusion of stresses in relation to fragile surfaces, which we feel is an aspect that has been neglected by the consultation document. In addition, it appears that in regulation 9 (2) (c) the use of "material", as in "fragile material", has reappeared. APIL, and indeed the document itself (outline of the proposals - paragraph 6 - page 13), supports the use of "fragile surface" as a more appropriate term. The stated regulation should be amended to replace "material" with "fragile surface".</p> |
| <p>Q22. Should duties concerning fragile surfaces be qualified by SFAIRP? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>No</p> |
| <p>APIL believes that that the duties imposed should not be qualified by "so far as is reasonably practicable" (SFAIRP) due to the potential consequences of a fall from height. We would thus like to see the removal of the SFAIRP qualification from the end of regulation 9 (3). This amendment will place a similar duty on the employer as the "... is either prevented or, where this is not reasonably practicable, adequately controlled" clause within regulation 7 (1) of the Control of Substances Hazardous to Health Regulations 2002.</p> |
| <p>◆ Please make any additional comments on Fragile Surfaces here.</p> |
| <p> </p> |
| <p>Regulation 12 – Inspection</p> |
| <p>Q23. Have we succeeded in making it clear what needs to be inspected and when in the Regulations and the Guidance? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Clear</p> |
| <p>APIL believes that it would more appropriate for regulation 12 to be placed next to regulation 8 as both deal with work equipment. The current proposed regulations following regulation 8 deal with non-equipment related matters, so may be better placed elsewhere.</p> <p>While necessary, APIL feels that the current structure of regulation 8, moving from regulation to schedule, is not particularly 'user-friendly' and may be an area in which the HSE may consider a different structure.</p> |
| <p>Q24. Is it right that we drop the requirement in CHSWR for records of inspection of scaffolding to be kept for 3 months? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>No</p> |

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| <p>Work at Height Regulations Summary of issues and questions from the Consultative Document</p> |
| <p>APIL has no further points on this subject to make at this time.</p> |
| <p>Q25. Is it right that only scaffolding, and not other working platforms such as MEWPs, should be subject to the requirement to be inspected every 7 days (as currently required in the Construction (Health, Safety and Welfare) Regulations 1996)? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>No</p> |
| <p>APIL believes that the removal of this requirement will only increase the risk to employees, and that all working platforms should be subject to the same requirements. Inconsistency in this area will only cause possible confusion. We believe that it would be a shame to miss an opportunity to reduce the risks involved within this area.</p> |
| <p>Q26. Should the provisions governing the lifting of people using rope access and positioning equipment be removed from LOLER and placed in the WAHR? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>No</p> |
| <p>APIL believes that for the purposes of prevention there is no harm in there being a repetition of particular duties across a number of health and safety regulations.</p> |
| <p>◆ Please make any additional comments on Inspection here.</p> |
| <p>APIL is surprised that regulation 12 uses the phrase "fall more than 2 metres". One of the great advances that the new WAHR has proposed is that the definition of work at heights has removed the 2 metre distinction. We propose that, within regulation 12 (4), the phrase "more than 2 metres" should be replaced by "a distance liable to cause personal injury".</p> |
| <p>Regulation 13 – Inspection of places of work at height</p> |
| <p>Q27. Do you agree that a duty to inspect visually the surface before work at height commences should be included in the Regulations? Is it practicable? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Strongly Agree</p> |
| <p>APIL feels that due to the possible consequences that a fall from a height can have it is essential that a duty to inspect is retained. Indeed such an important duty should be conducted by a fully capable person. APIL proposes that the words "by a competent person" should be added after "visually" in regulation 13, reflecting the guidance notes suggestion that a "competent worker" should carry out any inspection (paragraph 74 - page 79). As mentioned previously, this is another example of the guidance needing to be carried across to the actual regulations.</p> |
| <p>◆ Please make any additional comments on Inspection of places of work at height here.</p> |
| <p> </p> |

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| Regulation 14 – Duties of persons at work |
| Q28. Is the proposed approach to the duties on persons at work acceptable? Please choose from the options below, then type any additional comments in the space provided. |
| No |
| <p>APIL feels that a more appropriate approach to the duties on persons at work is that taken by PUWER regulation 8 and 9, and the current proposed WAHR should reflect these regulations.</p> <p>The current stipulation in Regulation 14 (1) that a person should report an activity that "he knows is likely to" endanger the safety of others implies a level of actual knowledge that is highly restrictive. In addition while safety is mentioned, there does not appear to be any consideration of the health implications. We propose the following amendment to regulation 14 (1) to address APIL's concerns; replace "which he knows is likely to endanger the safety" with "which may endanger the health and safety". This will also allow the document to accurately reflect regulation 12 (3) of the Workplace (Health, Safety and Welfare) Regulations 1992, which is a "may" duty.</p> |
| Q29. Is it right that we place specific duties in the WAHR, rather than relying on the duties as stated in other legislation? Please choose from the options below, then type any additional comments in the space provided. |
| Yes |
| <p>APIL believes that the current proposed regulations should put in place specific duties regardless of whether they are stated elsewhere. We would prefer to see the re-statement of duties, rather than a lack of stated duties. Such a policy will mean that a certain amount of confusion will be avoided.</p> <p>In addition, these duties must be reinforced by instruction, information and training. In particular the guidance needs to more specific in relation to information and training.</p> |
| ♦ Please make any additional comments on the duties of person at work here. |
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| Regulation 15 – Exemption by the Health and Safety Executive |
| Q30. Should any group of people, type of premises, type of work equipment or class of activities be exempted from these Regulations? Please choose from the options below, then explain your answer in the space provided (making reference to what specifically should be subject to an exemption). |
| Don't Know |
| <p>While APIL does not wish to comment specifically on any organisations, premises or types of work equipment that should or should not be included in any exemption, we do feel that the more exemptions there are the greater the risk to employees.</p> <p>In addition, the organisations that will be seeking to be exempt will be making their own submissions, so APIL feels little need to highlight any specific examples.</p> |

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| <p>◆ Please make any additional comments on Exemptions here.</p> |
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| <p>Schedule 1 – Requirements for places of Work at Height</p> |
| <p>Q31. Are these requirements a) clear and b) appropriate as they apply to a safe place of work at height? Please choose an option from both of the lists below, then type any additional comments in the space provided.</p> |
| <p>31a) Clear</p> |
| <p>31b) Appropriate</p> |
| <p>APIL is concerned that there is no mention of "falling" within schedule 1. This would seem to be the most applicable type of accident that occurs while working at height. We propose that the phrase "or falling" should be included after the word "tripping" in schedule 1 (f) (i).</p> |
| <p>◆ Please make any additional comments on requirements for places of work at height here.</p> |
| <p>Please note the word "suficiently" at schedule 1 (b) should be corrected to read "sufficiently".</p> |
| <p>Schedule 2 – Requirements for Guard-rails, etc.</p> |
| <p>Q32. Is it right that we should increase the minimum height of guard-rails to at least 950mm? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Yes</p> |
| <p>APIL does not have any specific points to make on this subject at the present time.</p> |
| <p>Q33. Are the other specific measurements in this Schedule a) necessary and b) appropriate? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>33a) Yes</p> |
| <p>33b) Yes</p> |
| <p>APIL believes that the specific measurements in this schedule are both necessary and appropriate.</p> |
| <p>◆ Please make any additional comments on requirements for guardrails, etc. here.</p> |
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| <p>Schedule 3, Part 2 – Scaffolding</p> |
| <p>Q34. What would be the impact of having specific requirements for scaffolds? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Positive</p> |

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| <p>APIL believes that the more specific the requirements for scaffolding, indeed the more specific the requirements for any health and safety regime, the greater the degree of protection it offers employees. We feel that greater protection for employees can only be a positive thing, and is supported fully by APIL.</p> |
| <p>Q35. Should we define 'scaffolding' in order to make it clear that this is meant to be covered? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Don't Know</p> |
| <p>APIL does have any specific view on this point at the present time.</p> |
| <p>Q36. Does the Guidance explain fully enough what is required in a scaffolding plan and when a plan is necessary? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Adequately Explained</p> |
| <p>APIL does have any specific view on this point at the present time, but does have some general concerns in relation to scaffolding in general.</p> |
| <p>◆ Please make any additional comments on scaffolding here.</p> |
| <p>APIL believes that it is vital that any regulations dealing with scaffolding should strictly follow regulation 20 of PUWER 1998 in relation to the absolute duty to secure any scaffolding:</p> <p>"Every employer shall ensure that work equipment or any part of work equipment is stabilised by clamping or otherwise where necessary for purposes of health or safety."</p> <p>We are anxious that this provision should not in any way be 'watered down'.</p> |
| <p>Schedule 4 – Collective Fall Protection Systems</p> |
| <p>Q37. In the requirements for 'collective safeguards for arresting falls', do we need to include any more technical detail on these, in the Regulations or the Guidance? If so, what detail should we include? Please choose from the options below, then type any additional comments about what detail should be provided in the space provided.</p> |
| <p>Don't Know</p> |
| <p>APIL does not have any specific view on this point at the present time.</p> |
| <p>◆ Please make any additional comments on Collective Fall Protection Systems here.</p> |
| <p>Schedule 5 – Personal Fall Protection Systems</p> |
| <p>Q38. We would welcome your views on the applicability of the requirements of Schedule 5, Parts 2 and 3 to all work positioning systems in various industries such as outdoor activities or arboriculture.</p> |
| <p>APIL does not have any specific view on this point at the present time.</p> |

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Q39. We have – in close consultation with industry trade associations - considerably expanded on what the Directive says about ‘rope access’. We have done this in the interests of accuracy and relevance. We would like to know if these sections (Schedule 5 and the related Guidance) are accurate and comprehensible. Should the Guidance give more examples to illustrate the systems that are referred to? Please choose from the options below, then type any additional comments in the space provided (making reference to which specific examples should be included).

Don't Know

APIL would like to emphasise the need for a specific duty to train people in how to use the system as well as the risks involved. Other than this point, we do not have any further specific views on this subject at the present time.

Q40. We would welcome your views on the use of single ropes in circumstances where use of two ropes would be more dangerous, and in particular on any other activities where the use of single rope working may be justified under the terms of Schedule 5, Part 3 of the WAHR.

APIL does have any specific view on this point at the present time.

◆ **Please make any additional comments on Personal Fall Protection Systems here.**

Schedule 6 – Ladders

Q41. Have we struck the right balance between deterring inappropriate use of ladders and accepting their practicalities and the fact that they are commonly used in a wide variety of situations? Please choose from the options below, then type any additional comments in the space provided.

Average Balance

APIL has no further comments in respect of this question at the present time.

Q42. Regarding the Guidance, should we say more about when it is appropriate to use, and the usefulness of, ladder stabilisation and ladder anti slip devices? Please choose from the options below, then type any additional comments in the space provided.

Slightly More Detail Needed

APIL feels it is worth noting that “ladders” within schedule 6 includes stepladders. A well-recognised risk of the use of ordinary ladders is that the feet of the ladder may slip or move. While schedule 6 details the numerous ways in which it is possible to prevent such slippage (paragraph 5 - page 51), it does not address, however, the risk of stepladders tipping. It is often a misconception that stepladders do not need footing. In APIL's experience the contrary is often true and as such we believe that the regulations should impose a duty to secure the stability of stepladders.

The schedule also imposes further requirements to the use of ladders (paragraph 10 - page 51). APIL considers that the wording of this paragraph could and should be tightened, with paragraph 10 (a) reading:

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| <p>“a secure and suitable handhold, foothold and secure support are always available to the user”.</p> |
| <p>Q43. Is Schedule 6 of the Regulations appropriate for all types of ladders, including stepladders and fixed ladders? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Don't Know</p> |
| <p>Please refer to APIL's answer to question 42, and the comments relating to stepladders.</p> |
| <p>Q44. Are the requirements for rest platforms on portable and fixed ladders still appropriate? Please choose from the options below, then type any additional comments in the space provided.</p> |
| <p>Don't Know</p> |
| <p>APIL does not have any specific views on this point at the present time.</p> |
| <p>◆ Please make any additional comments on ladders here.</p> |
| <p>APIL is concerned that it might be argued that the regulations will permit employers to validate unsafe practice by way of prior risk assessment. This concern is generated because of paragraph 1 of schedule 6 which states:</p> <p>“Every employer shall ensure that a ladder is used at height only if a risk assessment under Schedule 3 of the Management Regulations has demonstrated that the use of more suitable work equipment is not justified because of the lower risk and (a) the short duration of the use and (b) existing features on site which he cannot alter”.</p> <p>APIL would like to see within the schedule a reference to the current duties imposed by the Manual Handling Regulations 1992 and the use of ladders. The schedule, and/or the guidance, should consider the use of ladders when manual handling tasks are being performed, due to the increased risk of injury. For instance, using a hand to support a heavy load on a ladder.</p> <p>This concern could be effectively tackled by the use of a specific risk assessment, and it is within this risk assessment that factors such as manual handling could be addressed.</p> |
| <p>Q45. Please make any other comments in the space provided. These could be about the Regulations, Guidance, Directive or the Regulatory Impact Assessment. If you make any comments, please make it explicit what you are referring to.</p> |
| <p>APIL is concerned about the HSC's proposal that regulation 13 (4) of the Workplace (Health, Safety and Welfare) Regulations 1992 should be revoked. This regulation states the following:</p> <p>"(4) Any area where there is a risk to health or safety from any event mentioned in paragraph (3) shall be clearly indicated where appropriate."</p> <p>The duties within this revoked regulation, however, are not replaced with similar duties elsewhere in the proposed WAHR. Without a potential replacement regulation, APIL feels</p> |

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that employees will be left at risk.

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