

HEALTH AND SAFETY EXECUTIVE (HSE)

EVALUATION OF HSC ENFORCEMENT POLICY STATEMENT

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL04/05)**

APRIL 2005

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 Health and Safety Policy Working Group in preparing this response:

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Executive Summary

- APIL is a keen supporter of the ‘carrot and stick’ approach to health and safety, with good behaviour rewarded and bad behaviour punished. To this end we suggest that a safety culture should be encouraged.
- APIL believes, and actively promotes, the notion that a safety culture in this country would give us a society that does not tolerate people being injured as a result of someone else’s fault.
- APIL suggests that good health and safety records should lead to reduced employers’ liability insurance premiums, and in particular that premiums should be weighted in accordance with the insured’s health and safety record.
- APIL firmly believes that inspection and enforcement should continue to be the primary method used by the HSC to police workplaces.
- APIL proposes that the use of anti-social behaviour orders (ASBOs) could be extended to target company directors who have failed to comply with an enforcement or improvement notice.
- APIL considers that an effective enforcement tool is to ‘name and shame’ companies which commit health and safety offences. In addition, this campaign should include placing offending companies onto a publicly available register or ‘black list’, and this list could be made available via a dedicated web-site to the public and especially the press.
- In contrast, companies with good health and safety records could be placed on a ‘name and praise’ list. The presence of a company on either list could have wider implications e.g. it could affect its listing on the FTSE4Good index.
- APIL considers that there should be systems in place to ensure that company directors who are guilty of neglecting health and safety are brought to task. One such sanction is the introduction of an offence of corporate manslaughter, another is disqualification from acting as a company director.

- APIL proposes that the role of employee safety representatives should be expanded so as to include enforcement powers.
- APIL contends that companies should be punished for health and safety offences by the unlimited fines based upon their means.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Health and Safety Executive's (HSE) consultation on the Health and Safety Commission's (HSC) enforcement policy statement.
2. APIL is a keen supporter of the 'carrot and stick' approach to health and safety in the workplace. While APIL believes in enforcement of health and safety law via the use of sanctions – the stick – we feel that this should be balanced against the rewards which good health and safety can bring – the carrot. In order to achieve the full benefits of such an approach, however, there needs to be a cultural shift. Ultimately this would mean that health and safety becomes central to the way businesses are run and it is accepted that any breach of these laws rightly results in sanctions. Indeed APIL hopes that enforcement policy will eventually become of secondary concern as both society and employers accept the need for a safety culture.

Safety Culture

3. APIL believes, and actively promotes, the notion that a safety culture in this country would give us a society that does not tolerate people being injured as a result of someone else's fault. The need for such a culture can be seen in the huge cost of accidents and ill health at work: over one million injuries and 2.3 million cases of ill-health are experienced by workers each year; around 40 million working days are lost to businesses each year; and British employers lose an estimated £3.3 to £6.5 billion each year¹. While some of these costs are off-set against insurance², it has been found that for every £1 which is claimed on insurance, the company has to meet a further £3.30 itself³.

¹ HSE Ready Reckoner – Costs Overview – See http://www.hse.gov.uk/costs/costs_overview/costs_overview.asp for a copy of the document

² It should be noted, however, that insurance is itself a cost. The fact that a loss is insured simply means that it is a loss borne by insurers, rather than by the employer or the state.

³ HSE Ready Reckoner – Costs Overview – See http://www.hse.gov.uk/costs/costs_overview/costs_overview.asp for a copy of the document

4. In contrast, companies with good health and safety records show improved production and efficiency; less staff absence; lower staff turnover; and improved quality of work. The savings and benefits to a business can be considerable. For example, South West Water saved over two and half million pounds by accident prevention alone between April 1992 to March 1998, while the Cheese Company found that by tackling health and safety across ten of its sites, accidents were reduced by 40 per cent and productivity was increased by 25 per cent⁴.

Health and safety records and Employers' Liability Compulsory Insurance (ELCI)

5. APIL suggests that a direct consequence of health and safety practice should be the re-adjustment of employers' liability compulsory insurance (ELCI) premiums so that they reflect the risk involved. For example, a workplace which has few accidents, or few serious accidents, will cost an insurer considerably less than a workplace where employees are frequently injured. Such a proposal would, however, require the ELCI market to operate in a similar way to the motor insurance market. Good health and safety performance would attract lower premiums, whereas poor health and safety performance would attract higher premiums. It is by visiting the consequences of negligence on those who have caused it that health and safety standards will be driven to improve; an improvement in health and safety intrinsically means fewer negligent injuries and deaths. This view is supported by a variety of different institutions and commentators. The DWP has stated "*We think there is a strong case for making the improvement of health and safety practices an explicit objective of the compensation system.*" The report went on to conclude that "*a key challenge is to improve the link between health and safety practices and EL premiums*"⁵.

⁴ Ibid

6. This suggestion by the DWP has subsequently resulted in a number of initiatives within the HSE and the insurance industry. For example, a number of small businesses in the North West took part in a health and safety support project, in which one construction firm reduced its ELCI premium from £12,000 to £6,000 because of the changes it made⁶. In a press release from the Association of British Insurers (ABI)⁷ - concerning an insurance based scheme called 'Making the Market Work' - John Parker (ABI's head of general insurance) said "*Business will understand the health and safety practices insurers are looking for, while insurers will be able to reflect good health and safety in the terms they can offer. Hopefully, we will see rising standards of health and safety across the small business sector.*" While there has, however, been mixed reports regarding the success of the ABI's scheme, the National Federation of Roofing Contractors⁸ has said that it has seen a slight premium reduction in 2004 and expects a 10 per cent reduction in 2005.

Inspection and enforcement

7. While potential business benefits and reduced insurance premiums represent the 'carrot' element of the aforementioned equation, APIL still believes there should be sanctions for companies failing to adequately protect its workers – i.e. the stick. APIL therefore firmly feels that inspection and enforcement should continue to be the primary method used by the HSC to police workplaces. To this end we were disappointed to read Bill Callaghan's (Chairman of the Health and Safety Commission) recent comments concerning the monitoring of health and safety within companies. In particular, Mr Callaghan seemed to indicate that by virtue of the fact that the number of businesses far out-numbered the number of inspectors "[w]e cannot investigate every company"⁹. APIL believes

⁵ Department of Work and Pensions – Review of Employers' Liability Compulsory Insurance (First Stage Report) (June 2003)

⁶ HSE Ready Reckoner – Costs Overview – See http://www.hse.gov.uk/costs/costs_overview/costs_overview.asp for a copy of the document

⁷ 8th September 2003

⁸ Post Magazine (30 September 2004) page 2 - '*Insurers dismiss EL failure claims*'

⁹ Daily Telegraph – 'Don't be scared of us, says health and safety men' (24/02/2005) See <http://www.telegraph.co.uk/money/main.ihtml?xml=/money/2005/03/24/cnhas24.xml> for a copy of the article.

the HSE should be more positive about its enforcement obligations. Indeed companies should be concerned that if they do not adequately comply with health and safety law they will be found and punished by the HSE. APIL believes that it may be healthy for companies to actually *fear* the sanctions available to the HSE in this respect, yet at the same time encouraging them to seek guidance and help where appropriate.

8. In order to make inspection and enforcement more effective, APIL supports an increase in funding for the HSC so as to increase the number of health and safety inspectors and consequently the number of inspections being undertaken. A recent Work and Pensions Select Committee report indicated that there is a significant need for more money to be provided for front line inspectors and inspections, stating it was *“concerned both at the low level of incidents investigated and at the low level of proactive inspections and recommends that resources for both are increased”*¹⁰.

9. In relation to the use of inspection and enforcement by the HSC, one of APIL’s primary concerns - which echoes a similar concern raised in APIL’s response to the *‘Workplace health and safety in Great Britain to 2010 and beyond’*¹¹ consultation – is that use of it will be restricted so that funds and manpower can be employed elsewhere. APIL firmly believes that any such move would severely restrict the ‘carrot and stick’ approach which APIL believes works well. This view was recently echoed by the Work and Pensions Select Committee which stated: *“The evidence supports the view that it is inspection, backed by enforcement, that is most effective in motivating duty holders to comply with their responsibilities under health and safety law. We therefore recommend that the HSC should not proceed with the proposal to shift resources*

¹⁰House of Commons Work and Pensions committee – The work of the Health and Safety Commission and Executive (Fourth Report of Session 2003-04 Volume I) HC 456-I, page 46, paragraph 150

¹¹ (Jan 2004) See www.apil.com – press and parliamentary / Consultation papers for copy of APIL response

*from inspection and enforcement to fund an increase in education, information and advice*¹².

10. APIL considers that there is a real need for inspection to be more widely used, especially considering the shocking statistic that the estimate for the level of reporting under the compulsory Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR)¹³ is only 41.3 per cent. This indicates that well over 50 per cent of non-fatal injuries are not reported. It is therefore essential that the HSC investigates as many workplaces as possible since some high risk workplaces may be seen as low risk due to under-reporting. More widespread inspection should also drive up reporting standards leading to more accurate health and safety figures.

HSE request for views: *What alternative sanctions do you believe would make a particularly positive impact on health and safety law enforcement?*

The use of Anti-Social Behaviour Orders (ASBOs)

11. APIL suggests that the use of anti-social behaviour orders (ASBOs) should be extended to target company directors who have failed to comply with an enforcement or improvement notice. While these types of orders tend to be used in the context of actions causing a public disturbance or nuisance, and result in a criminal sanction, there has been some precedent for its use in the civil arena with regard to fly-posting. Camden Borough Council recently took out an ASBO against Sony Music and BMG because of excessive fly-posting in the borough¹⁴. Sony avoided the imposition of criminal sanctions after promising not to commission any more illegal fly-posting. The purpose of this action by Camden Borough Council – indeed the purpose of ASBOs in general - is to make available criminal sanctions to an activity which, if not desisted

¹² House of Commons Work and Pensions committee – The work of the Health and Safety Commission and Executive (Fourth Report of Session 2003-04 Volume I) HC 456-I, page 43-44, paragraph 142

¹³ Based on the Labour Force Survey

from, could be seen as being detrimental both to the local community and to society at large. APIL believes that the non-compliance with health and safety law falls within a similar remit, with the failure to take appropriate precautions to protect employees being against the best interests of society. We feel that ASBOs could be used as an additional enforcement tool in the fight to ensure that health and safety law is complied with.

'Name and Shame'

12. APIL proposes that an example of a *“sanction used elsewhere in the world for health and safety offences¹⁵”* which has proved successful is the Canadian technique of ‘naming and shaming’ of companies which commit health and safety violations. The use of naming and shaming in Canada works to both punish the offending organisation or person, as well as build a sense of community outrage when a health and safety breach occurs. Once an organisation has been charged, its name appears in newspapers and on the radio. This naturally has a significant impact on that organisation’s image and reputation, and may lead to a loss of trust amongst consumers. The publishing of these details, and the transparency which results, influences people’s perception and behaviour and helps to cultivate a culture of community responsibility. Members of the local community are therefore involved in the process of punishment and sanction.

13. APIL proposes that any ‘naming and shaming’ campaign should also include placing offending companies onto a publicly available register or ‘black list’. Similar to the current use of the NHS Charter, a company’s health and safety records would be assessed against clearly defined and transparent criteria. Once a company has been assessed with reference to the various criteria, its details could then be placed on a league table, indicating how companies compare with each other and also highlighting

¹⁴ BBC News – ‘Fly-poster ban will hurt venues’ (26/08/2004) See <http://news.bbc.co.uk/go/pr/fr/-/1/hi/entertainment/arts/3601558.stm> for copy of article

any particularly persistent offenders. By virtue of this league table being available to the press and public, ideally via a dedicated website, the existence of which is made widely known to the press, companies would hopefully feel pressurised into improving their workplace health and safety.

14. APIL believes that in order for health and safety to be given a more prominent position within the corporate agenda, there should be a duty on the company to disclose in its year end accounts any, and all, health and safety notices which have been issued against it. This combined with the aforementioned 'black list' will hopefully allow investors to scrutinize companies which are failing in their health and safety duties. Subsequently this may lead to a loss of investor confidence unless the company can show that appropriate steps have been taken to prevent further health and safety breaches.

15. APIL suggests as the 'carrot' to this 'stick' of bad publicity and falling investor confidence, companies with a good health and safety record could apply to join a share listing which promotes good health and safety. For example, London-based shares can be listed on the FTSE4Good Index. This index has been *"designed to measure the performance of companies that meet globally recognised corporate standards, and to facilitate investment in those companies. Transparent management and criteria alongside the FTSE¹⁶ brand make FTSE4Good the index of choice for the creation of Socially Responsible Investment products¹⁷".* APIL suggests that part of the criteria for being accepted onto this, or a similar, index should be the health and safety records of companies.

16. In addition, APIL proposes companies which have excellent health and safety records could be placed on a 'name and praise' list. In order to reinforce and emphasise the possible business benefits of such a 'name and praise' list, the HSC could produce a discretionary award – a gold

¹⁵ Consultation letter

¹⁶ Financial Times Stock Exchange (FTSE)

star rating, if you will – or kite-mark indicating that a particular company has an excellent health and safety record. Any such award could be used in promotional material by the company, ideally leading to more customers and staff being attracted to the firm. The strength of such a concept, however, needs to be based on regular re-accreditation and the removal of any such award if serious health and safety breaches are subsequently identified.

17. In terms of Government bodies and public authorities, which do not have shareholders and cannot be affected by market forces, APIL suggests that the awarding of Government funds should take account of the performance of the organisation in relation to the 'blacklist'. Furthermore when Government agencies are assessing tenders for work via public procurement, one of the primary considerations - in addition to cost - should be the health and safety record of the potential supplier. Ultimately this will reward companies with good health and safety records, and punish those with poor health and safety records, and will hopefully aid the Government in achieving its *'Revitalising Health and Safety'* targets.

Health and safety responsibilities of company directors

18. In relation to specific company directors - which the above suggestions do not explicitly cover - APIL considers that there should be systems in place to ensure that if they are guilty of neglecting health and safety they are brought to task, for example via a charge of corporate manslaughter. It is imperative that company directors take responsibility for their company's health and safety practices if deaths and injuries at work are to be prevented. To this end, the Companies Act should be reformed to enshrine directors' health and safety responsibilities in law. This would make it easier to identify those who have breached health and safety law and effectively level the playing field, as directors of large firms are often able to hide in anonymity in a way that directors of small firms are not. The reformed Companies Act would invoke the Health and Safety at

¹⁷ See <http://www.ftse.com/ftse4good/index.jsp#>

Work Act under which penalties for health and safety breaches by individuals should be toughened to include imprisonment. At this stage, please note that APIL is currently in the process of responding to the Government's draft bill on corporate manslaughter¹⁸.

19. In addition to any corporate manslaughter bill which may be passed, we believe that there should be positive duty of disclosure for any director who has been involved in a company where there has been any type of health and safety breach. In a similar fashion to when a company has been declared bankrupt, directors of a company with health and safety offences cannot trade in any business under any other name unless they inform all persons concerned of these offences. In terms of directors who have been convicted of some health and safety offence which has resulted in a criminal charge (regardless of eventual sentence) there should be a presumption – as with bankruptcy – that he cannot act as a company director, and cannot take any part in the promotion, formation or management of a limited company without the permission of the court. This provision would also apply to any director who has had an ASBO issued against them.

Safety Representatives

20. In order for many of the enforcement actions listed above to be effective, APIL proposes that the role of employee safety representatives should be expanded so as to include enforcement powers. The difficulty with the current system – and potentially with any future systems – is that it is very difficult to monitor ongoing compliance with health and safety regulations. APIL acknowledges that the person doing the job is often most aware of the risks involved in the job. The appointment of, and consultation with, worker representatives should therefore be encouraged. Indeed research conducted by academics in Northern Ireland and the Republic of Ireland has illustrated that safety

¹⁸ See http://www.homeoffice.gov.uk/docs4/con_corp_mans.html for a copy of the Government's draft bill for reform.

representatives have a significant positive impact on health and safety in the workplace¹⁹.

21. While there is currently legislation governing safety representatives and safety committees in the workplace, these regulations are not being used. For example, under the 1977 Safety Representatives and Safety Committees Regulations²⁰ - as of January 2000 - there had been only one improvement notice served by an HSC inspector – that’s one in 22 years. In addition, since April 2001²¹, there have only been 24 enforcement notices issued under the Health and Safety (Consultation with Employees) Regulations 1996²². Prospect – the union for professional engineers, including health and safety inspectors – has stated that the reason for the reluctance to use the regulations is that the HSC consider it *“an industrial relations issue, and the instructions given to inspectors since 1977 [is] basically to steer well clear of them”*²³. Essentially while these regulations have created safety representatives within workplaces, these safety representatives have been given no actual power or authority.

22. APIL believes that safety representatives within workplaces should be given the power to enforce health and safety standards, and this power should be enshrined within legislation. By employing safety representatives to actually enforce health and safety legislation a considerable burden will be removed from the HSC in terms of inspection and enforcement, as well as allowing each workplace to be governed with the same standards but on an individual basis. APIL is encouraged to note that this view is echoed in the recent select committee report which suggests that HSC resources would be maximized if *“safety representatives were empowered to enforce health and safety law in the workplace, we believe this would have a powerful effect in improving*

¹⁹ Safety Behaviour in the Construction Sector, Nick MacDonald and Victor Hrymak, 2002

²⁰ Statutory Instrument 1977 No. 500

²¹ House of Commons Work and Pensions committee – The work of the Health and Safety Commission and Executive (Fourth Report of Session 2003-04 Volume I) HC 456-I, page 66, paragraph 234

²² Statutory Instrument 1996 No. 1513

²³ House of Commons Work and Pensions committee – The work of the Health and Safety Commission and Executive (Fourth Report of Session 2003-04 Volume I) HC 456-I, page 66, paragraph 234

*standards. We also believe this power to take action, should include not just criminal prosecutions but also improvement and prohibition notices, subject to the usual right of appeal to the Employment Tribunal and as to terms on legal costs*²⁴.

23. There is a concern, however, that employers will attempt to circumvent safety representatives, as well as general health and safety policies, by discouraging employees to report accidents. As already mentioned, reporting under RIDDOR is already very low, and this may push it down even further. In order to combat this possibility, APIL suggests that 'whistleblower' laws for employees and safety representative should be sufficiently strengthened so that health and safety breaches can be communicated to the enforcing authority without fear of 'reprisals' from the offending employer.

24. In contrast, APIL is aware that there may be instances where a safety representative could be over-zealous in his duties and proceed against a genuine employer with either a vexatious or frivolous claim or a claim that is plainly unfounded. The ability to appeal a decision, in conjunction with possible costs sanctions, will hopefully act as a safety valve for any such over zealous action.

25. APIL suggests that there should be a power available to safety representatives, in addition to their enforcement capabilities, to publicly 'name and shame' any offending companies. This power would tie in with the previously detailed concepts of a 'name and shame' blacklist and possibly a 'name and praise' award.

Unlimited fines

26. APIL believes that fines currently imposed on companies are often not high enough to act as an effective deterrent against negligent practices and should therefore be adjusted to adequately reflect a substantial

²⁴ Ibid, page 52, paragraph 176

portion of the offending company's wealth. It is our contention that a fine only works as a sanction if it relates to the depth of the defendant's pocket. This will mean the larger the company, and the more serious the breach, the larger the fine – it is an economic solution to a problem with very real human consequences. The difficulty is that due to the differences in the way companies are constituted, some organisations may be asset rich rather than cash rich. As such a turnover fine may not adequately punish the company. This means that in some cases it may be more appropriate for a fine to be unlimited and based on the means of the company, rather than a simple turnover-related fine. Regardless of how the fine is calculated, it is vital that the cost of the breach is not passed down to the workers, therefore hurting the very people which such an action would be designed to protect. For example, the offending company could freeze wages and/or refuse bonus payments in order to recoup the amount of the fine.

HSE request for views: *How can we ensure that any alternative sanctions are feasible in practice and capable of being applied proportionately and consistently?*

27. APIL firmly believes that the alternative sanctions discussed above are all feasible in practice and would ensure a safer working environment for workers. As far as possible we have attempted to detail the pertinent issues involved with each option, as well as considering the legal implications which would result.

HSE request for views: *Are the current sanctions adequate and effective and that as such, no alternatives are needed?*

28. APIL feels the current sanctions, while effective in a limited manner, are not adequate to protect employees from being harmed at work. Indeed thousands of needless injuries and countless deaths could be avoided if the UK were to adopt a proper safety culture. The HSE's Health and Safety Statistics Highlights, 2003-2004, reports that there were 235

employee deaths and 30,666 major injuries in the workplace due to health and safety failures during that year. APIL believes that, while unavoidable accidents will always happen, thousands of injuries are completely foreseeable and that there is a real need to strive for a society where people are not injured because of the thoughtlessness and negligence of others. It is hoped that this can be partially achieved via the adoption of a 'carrot and stick' approach to health and safety – as detailed above - where good behaviour is rewarded and bad behaviour punished.

HSE request for views: *What sanctions do you think are most effective in promoting and achieving sustained compliance with the law?*

29. The best means of ensuring compliance with health and safety law, APIL suggests, is the wholesale adoption of a safety culture both within businesses and society. If health and safety were to be given its proper importance within the corporate agenda, and breaches of health and safety were seen by the public as deserving severe punishment, APIL believes that the amount of ill-health and injuries occurring within businesses would fall dramatically.
30. In terms of traditional sanctions, APIL supports, and continues to support, the use of inspection and enforcement in monitoring health and safety compliance. The success of this as a sanction, however, has proved sporadic. As such we feel that it should be used in combination with APIL's other suggestions, namely: the linking of health and safety to insurance premiums; the use of anti social behaviour orders (ASBOs); the naming and shaming of companies which commit health and safety breaches; the introduction of corporate manslaughter legislation to prosecute negligent directors; the role of safety representatives to be expanded so as to include enforcement powers; and unlimited fines for offending companies.