

HEALTH AND SAFETY COMMISSION (HSC)

**A PROPOSED STATEMENT BY THE HEALTH AND SAFETY COMMISSION
(HSC) ON THE PUBLIC SAFETY ROLE OF THE HEALTH AND SAFETY
EXECUTIVE (HSE)**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL13/05)**

SEPTEMBER 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 members of the Health and Safety Policy Working Group in preparing this response:

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THE PUBLIC SAFETY ROLE OF THE HSE

Executive Summary

- APIL proposes that the current regulatory powers of the Health and Safety Executive (HSE) should be extended so as to allow it to operate as an overarching, or super, regulator in relation to all health and safety matters. Whilst, in terms of its remit, the HSE should act as a light-touch regulator thereby regulating not only the services under its direct control but any other front-line regulators which have health and safety responsibilities.
- APIL believes that the HSE should be required to show – via objective means - that there is effective management of health and safety within the major hazards industries, rather than simply providing assurance to the public that such management is in place.
- APIL proposes that as part of the HSE’s regulatory oversight powers, it should have the ability to induce a public inquiry into any event which it deems needs to be investigated ‘in the public interest’.
- APIL believes in a safety culture and risk managed society, not a risk adverse society, and is supportive of the HSC’s statement that *“it wants to promote a society where risk is properly understood, managed and appreciated”*.
- APIL believes that the use of intervention should not be guided by a mathematical formula – i.e. a risk to both the public and workers being twice as important as just a risk to either the public or workers - but rather by the appropriate risk assessment of each of the situations involved.

- APIL is fully supportive of the work that the environmental health officers – as the local arm of health and safety – do throughout the country, and feel that they provide an exceptional service to the local community.
- Yet while APIL is fully supportive of the work currently being done by local authorities, and their environmental health officers, we feel that there should be a minimum standard which all health and safety inspections should reach. In order to effectively implement such standards, and ensure that these standards are maintained, there needs to be a comprehensive training regime undertaken by local environmental health officers which is administered by the HSE itself.
- APIL believes the HSE has the experience to be able to identify and deal with issues – such as BSE – that affect the wider public and become issue of national concern.
- Finally, APIL considers that the issue of occupational road related risk is definitely an area which needs further attention, in particular in relation to driver fatigue and the use of mobiles phones whilst driving.

Introduction

1. APIL welcomes the opportunity to put forward its comments on ‘a proposed statement by the Health and Safety Commission (HSC) on the public safety role of the Health and Safety Executive (HSE)’. In particular, APIL’s response will focus on the draft principles under which the HSC suggests the HSE will regulate public safety.

Health and Safety Super-Regulator

2. APIL proposes that the current regulatory powers of the Health and Safety Executive (HSE) should be extended so as to allow it to operate as an overarching, or super, regulator in relation to all health and safety matters. The need for such a health and safety oversight regulator is highlighted within the discussion document, which states that “[t]here are ... instances where there is confusion about who leads with regard to public safety” as well as there being “no clear public understanding of which regulatory authority, if any, is best placed to deal with an incident affecting public safety”. While the Health and Safety at Work Act¹ (HSWA) will often bring such public safety incidents under the jurisdiction of the HSE, the establishment of the HSE as an overarching regulator will allow for a less piecemeal approach to be taken. In terms of its remit, the HSE would act as a light-touch regulator thereby regulating not only the services under its direct control but any other front-line regulators which have health and safety responsibilities. Furthermore APIL believes that the HSE’s current responsibilities, combined with its wealth of knowledge and experience within the health and safety arena, make it the ideal body to take on such a role.
3. APIL also believes that the presence of the HSE as the health and safety oversight regulator would address several of our other concerns. For example, each industrial sector currently comes under

the regulatory gaze of several disparate government departments. Naturally this can cause problems in terms of resources and accountability. The HSE – as oversight regulator – would act as primary contact for all matters relating to health and safety therefore reducing the number of departments needing to report to the Government and unnecessary duplication. The HSE would also have the necessary overview to co-ordinate the resources in other areas – such as investigation – again in order to avoid duplication of time and effort. The reduction of necessary duplication of work would not only allow the HSE to better conserve its resources, but also allow other bodies to conserve theirs.

Draft Principles for HSE’s Regulation of Public Safety

Principle 1

HSE will provide public assurance that health and safety risks in the major hazards industries are properly managed.

4. APIL believes that the HSE should be required to show – via objective means - that there is effective management of health and safety within the major hazards industries, rather than simply providing assurance to the public that such management is in place. For example, an amended principle could read ‘HSE will provide public *verification* that health and safety risks in the major hazards industries are properly managed’. APIL contends that it is not enough for the HSE to promise that health and safety in the major hazards industries is being ‘properly managed’, it should also be required to provide evidence contesting to this fact. This is especially true considering the potential damage both to workers and members of the public that a health and safety breach in these industries could cause.

¹ 1974

5. APIL believes that the HSE should provide a touchstone for issues of public concern relating to health and safety, and therefore act as the first point of contact for all health and safety related queries. We feel that it is vital that the public is able to approach an independent organisation in order to gain impartial and objective evidence and advice regarding health and safety, and that the HSE should perform this role. For instance, members of the public who live next to a large chemical works may want further details concerning the safety record of that site. Although the HSE may not be the direct regulator of the site, it would be able to either guide people to the correct organisation or deal with their query directly.

6. APIL suggests that another part of the HSE's public safety role should be the storage and dissemination of health and safety information and research. By placing such a duty on the HSE, it would ensure that the numerous disparate pieces of research – both internal and external to Government – relating to health and safety could be collected and collated centrally. This would not only enable the HSE to monitor possible future health and safety problems which may be emerging, but also allow other agencies and members of the public to gain access to such research. For example, there has recently been a published study from the University of Bristol concerning childhood leukaemia near powerlines². Whereas previously this information would have been kept within the originating organisations files, if the HSE acted as a central repository for health and safety research, it would be included within its files as well. Subsequently concerned members of the public could gain access to the research if they so wished.

7. In addition APIL believes that the HSE – as oversight regulator – should provide a series of base standards under which all health and safety inspections should take place. The difficulty with specialist

² 'Study of childhood leukaemia near powerlines' Draper G., Vincent T., Kroll M.E. and Swanson J. British Medical Journal (BMJ) 2005;330;1290-doi:10.1136/bmj.330.7503.1290

inspections is that they can often be focussed on the needs of the specified industry while more general issues of public concern may be excluded or minimised. The HSE has got a huge amount of experience in developing procedures for measuring the success of regulations and regimes within various contexts so it would be more than capable of producing a set of basic parameters under which safety would be considered within all industries. These parameters would, in turn, be supplemented with specialist and technical requirements relative to the industry being inspected.

8. APIL proposes that as part of the HSE's regulatory oversight powers, it should have the ability to induce a public inquiry into any event which it deems needs to be investigated 'in the public interest'. While APIL envisages this ability being used sparingly – i.e. the sanction of last resort – it will provide the HSE with the ability to fully investigate incidents which may lead to improvements within that particular industry. APIL is, however, very concerned about the recent Inquiries Act 2005, which provides ministers with the power to exclude the public from all or part of an inquiry, to control publication of the final report, to restrict the publication of documents, to insist on the omission of crucial evidence from the final report "*in the public interest*" and sack the chairman or a member of the inquiry panel. Indeed Lord Saville – the law lord who presided over the Bloody Sunday inquiry – recently told Parliamentary Under Secretary at the Department for Constitutional Affairs (DCA) Baroness Ashton that the act "*makes a very serious inroad into the independence of any inquiry; and is likely to damage or destroy public confidence in the inquiry and its findings*"³. APIL agrees with these sentiments and is deeply opposed to these suggestions. We firmly believe that inquiries should be independent from external influences.

³ The Guardian Online – '*Judges urged to boycott inquiries*' (Thursday April 21, 2005) (see <http://www.guardian.co.uk/print/0,3858,5175727-105744,00.html> for a copy)

Principle 2

HSE will continue to work with other regulators that have public safety duties, and specific expertise, to promote a coherent overall approach to public safety, including greater clarity of responsibilities among the regulatory bodies.

9. As detailed above, APIL believes that HSE should be established as the oversight regulator for all health and safety matters. Unsurprisingly we feel that the HSE should definitely be the 'enforcer of last resort' as this will allow for a consistency of approach which has not previously existed. In addition the HSE will ensure that there aren't any gaps in the regulation of health and safety, as well as making sure that all the other bodies involved in health and safety have clear divisions of labour.

Principle 3

HSE will not unnecessarily restrict the liberty of people to engage in certain hazardous activities, should they wish to do so.

10. APIL believes in a safety culture and risk managed society, not a risk adverse society, and is supportive of the HSC's statement that *"it wants to promote a society where risk is properly understood, managed and appreciated"*. We are therefore disappointed that principle 3 does not explicitly promote the use, and wider understanding of, risk assessment and management. While the supporting statement attached to principle 3 is positive in its assertion that the *"HSE will ... continue to expect that organisations that provide access to ... activities [such as schools trips and adventurous activities] as part of their undertaking, or business, comply fully with their legal requirements to ensure that risk is effectively controlled, so far as is reasonably practicable"*, this intention is not mirrored in the actual wording of principle 3.

11. APIL would also suggest that there is already a presumption that the HSE will not unnecessarily restrict the liability of people who choose to engage in certain hazardous activities. The emphasis of the HSE's work should be on the establishment and maintenance of high standards of health and safety. Admittedly it is only correct that if these standards – which are for the benefit of society as a whole – are infringed that the perpetrator should be punished. On the other hand, if a business or employer adheres to these standards and prevents the unnecessary injury or death of his workers he will be rewarded with increased productivity and reduced 'downtime'. We therefore feel it would be more worthwhile for the HSC to assign the HSE the role of effectively managing risk within all areas of society, and that this role should form the basis of principle 3.

Principle 4

HSE will give particular priority to intervention when the risks to the public from a work activity and the risks to workers from that same work activity are linked.

12. APIL is unsure about exactly what types of incidents this principle is attempting to address. APIL believes that the use of intervention should not be guided by a mathematical formula – i.e. a risk to both the public and workers being twice as important as just a risk to either the public or workers - but rather by the appropriate risk assessment of each of the situations involved. Admittedly there may be situations where two different types of risk may be managed by two differing prevention systems, which may ultimately be incompatible with each other. In these circumstances it is only right that extra priority be given to these risks as the incompatibility of the two system may lead to a lower level of protection overall.

13. APIL considers it vitally important that the HSE – as part of its public safety role - should establish and highlight the close links which exist between accidents in the workplace and the safety of the general

public. For example, while an explosion in a factory may injure those workers inside, there is a strong possibility that it could also injure people living alongside the factory. APIL believes that the HSE should emphasise the fact that it needs to have interventionist strategies in order to not only protect workers, but the public as well. In fact this example would illustrate that by protecting employees in the workplace, the HSE are often also protecting the public; employee safety for the public good.

14. Finally, APIL would make the point that in many instances the division between workers and the public may be a false one, as within large industrial towns a large proportion of the populace either work or are directly involved with the local employer. This illustrates the symbiotic connection between employee safety and public safety.

Principle 5

That where possible and appropriate, risks to public safety that arise in a particular locality be dealt with by those within that locality.

15. APIL is fully supportive of the work that the environmental health officers – as the local arm of health and safety – do throughout the country, and feel that they provide an exceptional service to the local community. The local knowledge which has been built up by these officers is an invaluable tool to detecting and punishing health and safety breaches within their particular locality. Consequently APIL sees no reason to for this arrangement to be altered or changed dramatically.
16. APIL is, however, disappointed that the HSC has chosen to illustrate this principle with examples of activities which do not necessarily constitute a considerable risk to the public – swimming pools for instance. While we feel that the HSE should use its expertise in *“addressing risks to public safety that arise from work activities that are managed by local authorities and so are regulated by HSE”*, the

choice of swimming pools appears to be an ill-chosen example. In contrast, events such as firework displays are exactly the type of occasion where local environmental health officers need to be involved as they can sometimes be operated by people who have not taken the appropriate safety precautions. The presence of a local environmental health officer will ensure that the event is undertaken with an effective risk assessment and the appropriate safety precautions put into place.

17. While APIL is fully supportive of the work currently being done by local authorities, and their environmental health officers, we feel that there should be a minimum standard which all health and safety inspections should reach. As already detailed, these standards should be set centrally by the HSE. Environment health officers would therefore conduct health and safety inspections using these HSE minimum standards as a base-line for their work, with local issues being investigated with reference both these HSE standards as well as specific local practices. Therefore while local environmental health officers should operate, and report, in a way which meets the need of the local authority, they will also be bound by a national set of minimum standards. This will ensure that there is a uniformity of approach across the country in terms of the standards expected of health and safety monitoring and inspection.

18. In order to effectively implement such standards, and ensure that these standards are maintained, there needs to be a comprehensive training regime undertaken by local environmental health officers which is administered by the HSE itself. This training would ensure consistency across the application of the set standards. Furthermore, once trained, the local environmental health officers would have to regularly undertake 'refresher' courses and courses in new legislation and health and safety developments in order to ensure that their knowledge was up to date and relevant.

Principle 6

HSE will, where circumstances demand, apply its unique expertise in controlling and managing risk to pressing issues of public and national concern.

19. APIL fully supports this principal as it fits well with our previously proposed extension of the HSE's powers as an over-riding regulator. APIL believes that the HSE represents an independent and impartial body, which is viewed positively by the public, industry and the Government. In addition it has an over-riding public interest remit, meaning that any actions which it takes have to be in the interests of the public, rather than for any financial reasons. This will enable the HSE to deal effectively with issues - such as the BSE crisis - in a manner which will be objective and impartial enough for the general public to accept.

20. APIL believes the HSE has the experience to be able to identify and deal with issues – such as BSE – that affect the wider public and become issue of national concern. The HSE's considerable resources and knowledge will enable action to be taken quickly and decisively in such circumstances, which is especially important in terms of wide-ranging public and national health and safety issues. Furthermore if the HSE are provided with the power to instigate a public inquiry – as suggested by APIL – it would seem totally appropriate that they are involved with health and safety issues which are of national concern.

21. Finally APIL considers that the issue of occupational road related risk – which the HSE specifically mentions in relation to principle 6 - is definitely an area which needs further attention, in particular in relation to driver fatigue and the use of mobiles phones whilst driving. For instance, research by the Transport Research Laboratory (TRL) and Direct Line has shown that talking on a mobile phone is more dangerous than being over the legal alcohol limit. The research said reaction times were, on average, 30 per cent slower when talking on

a mobile than when just over the legal limit, and nearly 50 per cent slower than when driving normally⁴.

22. Whilst in relation to the aforementioned driver fatigue, a study by the Sleep Research Centre⁵ indicates that up to 20 per cent of accidents are caused by driver fatigue on monotonous roads, while an earlier study of road accidents between 1987–1992 found that sleep related road accident comprised 16 per cent of all road accidents and 23 per cent of accidents on motorways⁶. The increase in working hours, traffic on the roads and mobile working means that both of these issues are becoming increasing frequent and dangerous occurrences, leading to more and more deaths each year. Of particular concern is the fact that road accidents can not only cause the death of the driver concerned but also other innocent road users. For example the Selby rail crash was caused by Gary Hart falling asleep at the wheel. While he was only mildly injured, numerous passengers on the train which hit his car were killed. APIL believes this is a topic that the HSE needs to spend more time investigating and providing initiative solutions for.

23. APIL believes that the HSE should not be afraid to tackle new and emerging health and safety risks, as the sooner action is taken the less damage they can cause. If the HSE is to be given an overarching regulatory role, the ability to monitor and take action against newly emerging problems will be significantly boosted.

⁴ *Mobiles 'worse than drink-driving'* - BBC News website (see <http://news.bbc.co.uk/1/hi/uk/1885775.stm> for a copy of the story)

⁵ Jim Horne and Louise Reyner, *Sleep Related Vehicle Accidents*, Sleep Research Laboratory, Loughborough University, 2000

⁶ J A Horne and L A Reyner, *Sleep Relates Vehicle Accidents*, British Medical Journal (Vol 310) March 1995