HEALTH AND SAFETY COMMISSION (HSC)

ALTERNATIVE PENALITIES FOR HEALTH AND SAFETY OFFENCES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL20/05)

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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 just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

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Executive Summary

- APIL is a keen supporter and promoter of the 'carrot and stick' approach to health and safety in the workplace. While we believe in the enforcement of health and safety law via the use of penalties and sanctions ('the stick') we feel that this should be balanced against the rewards which good health and safety can bring ('the carrot').

- APIL believes that a safety culture in this country would give us a society which does not tolerate people being injured as a result of someone else's fault.

- APIL would emphasize that regardless of any new penalties which are suggested via this consultation, the use of inspection and enforcement should continue to be the primary method used by the HSE to police workplaces.

- APIL believes that the level of fines for health and safety offences which are currently imposed on companies are often too lenient to act as an effective deterrent and should subsequently be adjusted to adequately reflect a substantial portion of the offending company's wealth.

- 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.

- APIL suggests that the use of anti-social behaviour orders (ASBOs) should be extended to target company directors who fail to comply with a health and safety enforcement or improvement notice.

- APIL proposes that the role of employee safety representatives should be significantly expanded, and should include enforcement powers.

- APIL considers the use of administrative fines, as suggested by the HSC, as totally inappropriate for health and safety offences.

- While APIL concedes that restorative justice has worked in a number of other settings, we feel that it is not appropriate for use in the context of health and safety offences.

- APIL offers limited support to the HSC's proposal that conditional cautioning should be used for health and safety offences.

- APIL is encouraged, and supports, the HSC suggested use of enforceable undertakings as a penalty for health and safety offences.

- APIL does not support the use of fixed fines as they fail to adequately take into account the individual circumstances of both the injured employee and the previous health and safety record of the employer.

- APIL cautiously welcomes the HSC's suggestion that on-the-spot fines should be used to tackle health and safety offences.

- In terms of remedial orders, while APIL supports the principle of them, we assume that their use is already relatively widespread.

- While APIL agrees with the HSC's suggestion that companies and directors should, on conviction, be *"placed on probation for offences committed"*, we feel that this measure should be expanded to include other penalties for failing senior management.

- APIL wholeheartedly supports the HSC's suggestion that offenders should have to *"publicise their failings"* via the use of adverse publicity orders.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Health and Safety Commission's (HSC) consultation on alternative penalties for health and safety offences. While APIL has considered each of the suggestions made by the HSC in its *"snapshot of … alternative sanctions"*[1], we agree that this list is *"not exhaustive"*[2]. APIL's response therefore includes several other detailed proposals for alternative penalties for health and safety offences including: unlimited fines; linking employers' liability compulsory insurance (ELCI) with health and safety records; the use of Anti-Social Behaviour Orders (ASBOs) on company directors; and an enhanced role for safety representatives within the workplace.

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 penalties and 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 means that health and safety needs to become 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

[1] Consultation document (see http://www.hse.gov.uk/consult/condocs/penalties.htm for a copy of this document).
[2] *Ibid*

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 year[3]. While some of these costs are off-set against insurance[4], it has been found that for every £1 which is claimed on insurance, the company has to meet a further £3.30 itself[5].

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 cent[6].

Inspection and enforcement

5. While the business benefits represent the 'carrot' element of the aforementioned health and safety equation, APIL still believes there should be sanctions and penalties for companies failing to adequately protect its workers ('the stick'). APIL is therefore fully supportive of the HSC's decision to consider *"what the impact would be of introducing alternative penalties for health and safety offences"*[7] as well as the need for these new penalties to *"deal immediately with serious risk, help ensure sustained compliance with the law and hold failing duty-*

[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] 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.
[5] HSE Ready Reckoner – Costs Overview – See http://www.hse.gov.uk/costs/costs_overview/costs_overview.asp for a copy of the document
[6] *Ibid*
[7] Consultation document

holders to account"[8]. We would, however, emphasize that regardless of any new penalties which are suggested, or possibly introduced, the use of inspection and enforcement should continue to be the primary method used by the HSE to police workplaces.

6. APIL suggests that there needs to be an increase in funding for the HSE so more health and safety inspectors can be employed, allowing for more inspections to take place. This will ultimately make inspection and enforcement more effective. This view was recently echoed in a Work and Pensions Select Committee report which indicated that there is a significant need for more money to be provided for front line inspectors and inspections, with the committee 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"*[9].

7. One of APIL's recurring concerns[10] is that use of inspection and enforcement by the HSE will be restricted in order that funds and manpower can be employed elsewhere on a so-called 'proportionate' basis. APIL feels that the use of sanctions and penalties should not be overly constrained by the need for the enforcement to be *"proportional to the seriousness of the breach and the risk that the breach creates"*[11]. Health and safety law exists to protect both workers and members of the public from death and injury. Every breach of it should be taken seriously. Dealing with breaches proportionately may equate, in some instances, to tolerating breaches. APIL considers this unacceptable. If health and safety in the workplace is to be improved, employers must be aware that consequences will follow a failure to comply with the relevant legislation.

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[8] *Ibid*
[9] 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 46, paragraph 150
[10] See APIL's response to the HSE consultation - *'Workplace health and safety in Great Britain to 2010 and beyond'* (Jan 2004) – a copy can be downloaded at: http://www.apil.com/pdf/ConsultationDocuments/114.pdf.
[11] Consultation document

8. APIL firmly believes that any restriction on the use of inspection and enforcement as a method of ensuring health and safety compliance will severely restrict the 'carrot and stick' approach which APIL believes works well. Again this view was reflected 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 from inspection and enforcement to fund an increase in education, information and advice"*[12].

Unlimited fines

9. APIL believes that the level of fines for health and safety offences which are currently imposed on companies are often too lenient to act as an effective deterrent against negligent practices and should subsequently be adjusted to adequately reflect a substantial 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, APIL believes that 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

[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

freeze wages and/or refuse bonus payments in order to recoup the amount of the fine.

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

10. 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. Therefore poor health and safety practice should be penalised by an increase in the employer's ELCI premiums. 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, and 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 Department for Work and Pensions (DWP) has stated "[w]*e 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"*[13].

11. This suggestion by the DWP has subsequently led to in a number of initiatives within the Health and Safety Executive (HSE) and the insurance industry. For example, a number of small businesses in the

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

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 made[14]. In a press release from the Association of British Insurers (ABI)[15] - 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 Contractors[16] has said that it has seen a slight premium reduction in 2004 and expected a 10 per cent reduction in 2005.

The use of Anti-Social Behaviour Orders (ASBOs)

12. APIL suggests that the use of anti-social behaviour orders (ASBOs) should be extended to target company directors who fail to comply with a health and safety enforcement or improvement notice. While these types of orders tend to be used in the context of actions which cause 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 Borough[17]. 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 from, could be seen as being detrimental both to the local community and to society

[14] HSE Ready Reckoner – Costs Overview – See http://www.hse.gov.uk/costs/costs_overview/costs_overview.asp for a copy of the document
[15] 8th September 2003
[16] Post Magazine (30 September 2004) page 2 - *'Insurers dismiss EL failure claims'*
[17] 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

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.

Safety Representatives

13. In order for many of the enforcement actions suggested by both the HSC and APIL to be effective, we propose 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 representatives have a significant positive impact on health and safety in the workplace[18].

14. 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 Regulations[19] - 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 2001[20], there have only been 24 enforcement notices issued under the Health and Safety (Consultation with Employees) Regulations 1996[21]. Prospect – the union for professional engineers, including health and safety

[18] Safety Behaviour in the Construction Sector, Nick MacDonald and Victor Hrymak, 2002
[19] Statutory Instrument 1977 No. 500
[20] 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
[21] Statutory Instrument 1996 No. 1513

inspectors – has stated that the reason for the reluctance to use the regulations is that the HSC considers it *"an industrial relations issue, and the instructions given to inspectors since 1977* [is] *basically to steer well clear of them"*[22]. Essentially while these regulations have created safety representatives within workplaces, these safety representatives have been given no actual power or authority.

15. APIL believes that safety representatives within workplaces should be fully trained by the HSC, at the expense of the employer, and 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 high HSC 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 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"*[23].

16. There is a concern, however, that employers may attempt to circumvent safety representatives by discouraging employees to report accidents. This is especially concerning considering that the level of reporting under the compulsory Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR)[24] is estimated at only 41.3 per cent. This indicates that well over 50 per cent of non-fatal injuries are not reported. APIL also feels that some

[22] 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
[23] Ibid, page 52, paragraph 176
[24] Based on the Labour Force Survey

employers may try to influence the independence of safety representatives through political or other means.

17. In order to combat either of the above possibilities, APIL suggests that 'whistleblower' laws for employees and safety representative should be strengthened so that health and safety breaches can be communicated to the enforcing authority without fear of 'reprisals' from the offending employer. In addition, safety representatives should be provided with sufficient help and support from the HSE and HSC due to the demanding nature of the role.

18. APIL is aware, however, 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.

What alternative penalties are being considered by the HSC?

Administrative fines

19. APIL considers the use of administrative fines, as suggested by the HSC, as totally inappropriate for health and safety offences. APIL believes that such a system will allow employers who have breached health and safety regulations to simply 'buy' their way out of a criminal prosecution without the matter being properly considered by a court. For example, due to the fact that an administrative fine is imposed by the regulator, the offending company or employer will not be required to explain themselves before a judge and/or jury. Only in the event that the employer fails, or refuses, to pay the fine will matters *"revert to consideration of a criminal prosecution in the*

normal way"[25]*.* We feel this is not the message that the HSC should be promoting, especially in light of the *"public interest in criminal prosecution"*[26].

20. In addition, while administrative fines may be appropriate for 'paper' offences – such as failing to deliver company accounts – APIL feels they are not appropriate for health and safety breaches which can, and do, cause very real harm to hundreds of thousands of workers each year.

21. APIL is concerned that the use of administrative fines will result in businesses treating the health and safety of their workforces simply as a financial equation – i.e. the cost of health and safety changes to the workplace versus the potential cost of any administrative fines for the subsequent health and safety breaches. For instance, with the only penalty for a health and safety offence being a fine, rather than spend money on improving safety, APIL envisages that companies will simply set aside, or reserve, money for health and safety breaches as they would any other type of expense. APIL believes such behaviour would contradict the HSC's stated intention that its enforcement policy, and attached penalties, should change *"duty-holder behaviour"*[27] for the better.

22. While APIL doesn't support the use of administrative fines, we do support the need for additional funding for the HSE. We are therefore concerned that if administrative fines are introduced, the money which they generate will go to the Exchequer rather than the HSE itself. APIL suggests that all money generated by such fines should be re-invested in the HSE in order to support it activities.

[25] Consultation document
[26] *Ibid*
[27] *Ibid*

Restorative justice

23. While APIL concedes that restorative justice has worked in a number of other settings – most notably in the criminal justice arena, between victim and offender – we feel that it is not appropriate for use with health and safety offences. Firstly, on a practical note, APIL would question who would represent the organisation within such a process anyway – the managing director, the largest shareholder, the production manager to a basic employee – and whether having the victim meet such a representative would actually lead to any kind of resolution in the aftermath of an offence. There is also the question of "[w]*ho ultimately agrees* [the] *solution: courts, HSE or HSE via courts, and who monitors/ensures compliance?".*

24. APIL believes that the restorative justice process could be used by companies as a means of avoiding penalties – such as a criminal prosecution or an unlimited fine – which may directly impact on the company's reputation or bottom line. As with administrative fines, APIL is concerned that a company may decide to use this process as a means of saving its reputation and/or bottom line, rather than as a genuine attempt to address the consequences of its health and safety breach. APIL would also highlight that the fact that the public's interest in *"criminal prosecution"*[28] would again not be served, as the restorative justice process would probably circumvent it completely.

Conditional cautioning

25. APIL offers limited support to the HSC's proposal that conditional cautioning should be used for health and safety offences. If such a scheme were to operate, however, we feel it would only be appropriate for companies which *"have 'good records' and where conventional prosecution may well serve to discourage … health and*

[28] *Ibid*

safety improvement and performance"[29]. In order to identify such companies, APIL suggests that the HSC could introduce a discretionary award – a gold star rating, if you will – or kite-mark indicating that a particular company has an excellent health and safety record. The presence of this kite-mark would allow the corresponding company to be issued with a conditional caution in the event of a minor health and safety breach. Companies which accrued a certain amount of cautions within a set-time frame would, however, be liable for the normal penalties associated with a health and safety breach, namely a fine and/or prosecution.

26. Furthermore, APIL believes that conditional cautioning is an inappropriate penalty for *serious* health and safety breaches, regardless whether the company has the aforementioned 'kite-mark'.

Enforceable undertakings

27. APIL supports the use of enforceable undertakings as a penalty for health and safety offences as they will ensure that offending organisations *"carry out specific activities to improve worker health and safety and deliver benefits to industry and the broader community*[30]*"*. APIL believes that the HSC needs to focus and develop, as a matter of urgency, links between workplace health and safety and the communities within which these workplaces are located. We feel that this will deliver the opportunity to *"create tangible links between occupational health and safety and local communities"*[31].

28. Finally, in contrast to the HSC, APIL believes that the use of enforceable undertakings should be widespread and not limited to offenders who have *"good records"*[32] and/or limited to *"minor*

[29] *Ibid*
[30] *Ibid*
[31] *Ibid*
[32] Consultation document

offences"[33]. The widespread use of this penalty, when combined with the other penalties suggested, will allow the HSE to enforce changes to the workplace which will inevitably be for the benefit of the organisation's employees and wider community.

Fixed penalties

Fixed fines

29. APIL believes that the use of fixed fines fails to adequately take into account the individual circumstances of both the injured employee and the previous health and safety record of the employer. In order to reflect the individual circumstances of each health and safety breach, it is essential that the fine be based on the specific circumstances surrounding the original breach, rather than a generic consideration of the offence. We also feel that the use of fixed fines will allow companies to reserve a set amount for such fines rather than implement necessary, but potentially costly, health and safety arrangements. As with administrative fines this will lead to companies failing to take precautions in the knowledge that if a breach is found, and a fine levied on them, they will know exactly how much to pay and will have already set aside sufficient funds.

30. More troubling to APIL, however, is the fact that the HSC – in reference to what type of offences fixed fees should be used for – states that *"risk assessments"*, *"compulsory insurance"* and *"RIDDOR requirements"* represent *"so-called 'paperwork' requirements"*[34]. APIL considers these requirements to be vital for effective health and safety, with the use of risk assessments the cornerstone of any safety culture regime. Describing these requirements as mere *"paperwork"*[35] is particularly worrying considering the 'risk-based approach' the HSC has endorsed in several pieces of recent health and safety legislation.

[33] *Ibid*
[34] *Ibid*
[35] *Ibid*

For example, the recent consultation on new Work at Heights proposals explicitly states that one of the key elements of the HSC's approach to the regulations was "[t]*o adopt a risk-based approach , so that measures taken to comply with the Regulations are proportionate to the risk involved*"[36]. APIL therefore views the HSC decision to under-emphasise the importance of risk assessment as counter-productive in the drive towards a safety culture.

On-the-spot fines

31. APIL cautiously welcomes the HSC's suggestion that on-the-spot fines should be used to tackle health and safety offences. We would also promote the wider use of on-the-spot enforcement orders. APIL does, however, recognise that the adoption of such a policy could potentially lead to health and safety inspectors being put at risk due to possible retaliation for the imposition of such on-the-spot penalties. For example, an inspector may physically be in danger if he attempted to enforce an on-the-spot fine, to be paid immediately, on a site employing dozens of workers.

Remedial orders

32. While APIL supports the principle of remedial orders, we assume that their use is already relatively widespread. For example, it is APIL's experience that in the event of a health and safety conviction the court will naturally order the *"cause of the offence to be remedied"*[37]. APIL thinks it is highly unlikely that a court would convict an employer for a health and safety breach, but fail to order the immediate cessation of the cause of that breach. In addition, while the HSC comments that it has been suggested that *"greater use should be made of this power"*[38], APIL feels that whilst its current usage must

[36] Health and Safety Commission (HSC): *Proposals for Work at Height Regulations* – CD192 (April 2004) page 3 of 166 (see http://www.hse.gov.uk/consult/condocs/cd192.pdf for a copy of the document)
[37] Consultation document
[38] *Ibid*

continue we would also endorse the other recommendations referred to elsewhere in this response.

Probation for companies and directors

33. While APIL supports the HSC's suggestion that companies and directors should, on conviction, be *"placed on probation for offences committed"*[39] and any further offence within a set time limit would *"result in the original offence being punished"*[40], we feel that this measure should be expanded to include other penalties directed at the senior management of companies with failing health and safety standards. 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, APIL believes that every company should have a nominated health and safety director whose responsibilities are enshrined in statute. Such a change could be enacted by several amendments to section 282 and 309 of the Companies Act[41] concerning the need for a company to nominate one of its directors as a health and safety director, and that this health and safety director's name should be set out in the company's annual return.

34. APIL considers the appointment of a health and safety director will have several key benefits: firstly, it will allow health and safety to be considered at a strategic boardroom level; secondly, it will make it is easier to identify those within a large company who have breached health and safety law. In respect of the former benefit, APIL believes it is essential that health and safety management becomes as much a company priority as financial management. Indeed the Financial Services Authority (FSA) recently stated that compliance with regulations, including health and safety regulations, should take place at a board room level:

[39] *Ibid*
[40] *Ibid*
[41] 1985 (c.6)

"We are making it absolutely clear to firms that we expect them to think about regulation at board level. In the past companies have regarded compliance as something boring to give to some compliance officer down the corridor. We are saying very clearly to senior people in firms that dealing with the regulatory system sensibly and thinking about regulatory standards is something that we expect boards to do"[42].

35. While in terms of the latter benefit, APIL understands that one of the greatest difficulties with any type of prosecution resulting from a health and safety breach, including corporate manslaughter[43], is that someone must often be *"identified as the embodiment of the company itself"*[44] in order for there to be a successful conviction. The difficulty in identifying this 'directing mind' is that companies, particularly large companies, have labyrinthine management structures. This often allows directors of large firms to hide in anonymity in a way that directors of small firms can not. By having a dedicated health and safety director, with specified legislative duties, it will be easier to identify who the 'directing mind' is behind any health and safety breach and be able to successfully prosecute the company or individual for the breach.

36. While an appointed health and safety director will allow responsibility for a breach to more readily established, APIL believes that it is vital this is accompanied by sufficient and effective penalties which can be utilised against directors. The need for more stringent sanctions can be seen to be due to the perceived failure of company directors to take compliance with regulations – of all types – sufficiently seriously. For example, a former chief executive of a FTSE 100 company stated that "[a]*lthough I signed the papers to be a director, I had no clue*

[42] DLA Piper Rudnick Gray Cary LLP – *'UK Regulatory Awareness Survey'* – page 7
[43] See APIL's response to the Home Office consultation: Corporate Manslaughter – The Government's draft bill for reform (June 2005 (see http://www.apil.com/pdf/ConsultationDocuments/159.pdf for a copy).
[44] *R v HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10, 16, *per* Bingham LJ

when I signed them what that meant and where I might end up as a result. I was completely ignorant of my obligations. Management has a cavalier attitude to regulation and assumed in some way that it didn't really apply to them"[45].

37. APIL therefore recommends that the court should make greater use of its powers to disqualify a director if he is found to have contributed to a health and safety breach which resulted in a death or serious injury. Indeed the director of the Office of Fair Trading (OFT) recently stated that although fines are an effective sanction, the *"sanction that attracts the most attention of directors is director disqualification. The threat of being disqualified seems to strike a large number of senior managers and directors"*[46]. While the Company Directors Disqualification Act[47] allows for the disqualification of a director who is convicted of an "indictable offence" - including a breach of health and safety legislation - this sanction is rarely used. APIL proposes that the Company Directors Disqualification Act could be made more effective by the adoption of the aforementioned proposal to enshrine boardroom responsibility for health and safety in legislation. This would allow the appropriate identification, and disqualification, of directors who have failed in their health and safety duties.

38. In addition, APIL suggests that there should be positive duty of disclosure for any director who has been involved in a company where there have been serious or persistent health and safety breaches. 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. This provision would also apply to any director who has had an ASBO issued against them or been placed on the HSC's proposed 'probation'. Due to the transitory and brief nature of many directorships, it is hoped that this

[45] DLA Piper Rudnick Gray Cary LLP – *'UK Regulatory Awareness Survey'* – page 9
[46] DLA Piper Rudnick Gray Cary LLP – *'UK Regulatory Awareness Survey'* – page 10
[47] 1986 (c.46)

penalty will been perceived by directors and senior management as potentially adversely affecting future positions, therefore leading to a greater consideration of health and safety matters by them while in office.

Adverse publicity orders

39. APIL wholeheartedly supports the HSC's suggestion that offenders should have to *"publicise their failings"*[48] via the use of adverse publicity orders. We have repeatedly proposed a similar concept where companies which commit health and safety violations are publicly 'named and shamed'. The use of naming and shaming 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. For example, the use of 'naming and shaming' works particularly well in Canada where, once a charge has been made, the culprit's 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.

40. In terms of who will *"agree the wording, publication mediums and timing"*[49] of the adverse publicity orders, APIL feels these specifics will be detailed within any 'alternative penalties' legislation, perhaps with standardised wording laid down by Regulation. If needed, APIL offers its expertise in drafting this standardised wording. We do, however, have an initial suggestion concerning the possible publication medium such orders should take. APIL proposes that any adverse publicity order should include placing offending companies

[48] Consultation document
[49] Consultation document

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. For example, included within such health and safety information would be whether the company has appropriate ELCI cover or not. Failure to have such cover would instantly place the company on the 'black list'. APIL has for many years supported the establishment of an Employers Insurance Bureau (EIB) to record and monitor employers' insurance provision and also to act as insurer of 'last resort'. By recording ELCI provision, and other corresponding information, the EIB could be used to supplement the assessment criteria used in aforementioned 'name and shame' blacklist[50].

41. 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 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.

42. 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, including adverse publicity orders. This combined with the aforementioned 'black list' will hopefully allow investors to scrutinize companies which are failing in their health and safety duties. Consequently 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.

[50] Further details relating to the Employers Insurance Bureau (EIB) can be found in APIL's response to the Health and Safety Commission's (HSC) consultation – *'Regulation and recognition: Towards good performance in health and safety'* - page 7, paragraphs 8–11 (see http://www.apil.com/pdf/ConsultationDocuments/148.pdf for a copy).

43. 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 FTSE*[51] *brand make FTSE4Good the index of choice for the creation of Socially Responsible Investment products*[52]*".* 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.

44. 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 heath 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.

[51] Financial Times Stock Exchange (FTSE)
[52] See http://www.ftse.com/ftse4good/index.jsp#