



**DEPARTMENT FOR WORK AND PENSIONS**

**A Review of Certain Provisions within the Employers' Liability (Compulsory Insurance Regulations 1998**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS**

**August 2007**

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.

APIL's executive committee would like to thank APIL president, Martin Bare, for his assistance in drafting this response.

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## Executive Summary

- APIL rejects the recommendation to repeal regulation 4 (retention of policy certificates for 40 years).
- A central electronic database would be the most efficient and effective way of protecting employees against employers who flout the law. The requirement to trace insurance policies should not be left to the Association of British Insurers' non-statutory code which has a poor success record to date.
- If the insurance policies of Britain's cars can be registered on a central database, it is even more appropriate for the policies of employers, who can be responsible for thousands of employees, to be registered in the same way.
- If the concept of an electronic database continues to be rejected, the current system should not be repealed. A guideline, however strongly worded, is no substitute for a regulation.
- Penalties should be introduced to give the regulation 4 'teeth'.
- Policy certificates should be displayed on a central database.
- While the need to reduce costs and bureaucracy is recognised, this should not be at the expense of employees who have every right to expect to go to work and return home unharmed. If they are injured through their employers' negligence, everything which can be done must be done to ensure they are able to obtain proper redress.

## **Regulation 4 (retention of policy certificates for 40 years)**

1. While APIL appreciates the objectives behind the proposal to repeal regulation 4, we fundamentally disagree with the proposal as we do not believe this is the best option for injured people.
2. The association has argued for many years that the interests of injured people are best served by establishing a secure electronic database of ELCI insurance policies. While we accept that this may be of limited value to disease victims at the moment, it will most certainly be of benefit to those in the future. With deaths from asbestos-related disease alone not expected to peak until 2015, there is a great deal which needs to be done to protect people injured through the negligence of their employers.
3. This system is highly effective in other applications, notably with television licensing and particularly with the Motor Insurance Database (MID). This is managed by the Motor Insurers' Information Centre, which is part of the Motor Insurers Bureau. The purpose of the MID is to permit the identification of insurers by reference to a vehicle's registration number, thereby making it easier for accident victims to claim compensation and for the police to enforce the obligation of all motorists to insure in compliance with the Road Traffic Act 1988.
4. Driving uninsured and employing people without insurance are illegal. If an effective system can be set up, funded and administered for the 26 million cars on British roads<sup>1</sup>, it is inconceivable to suggest that something similar cannot be established for the ELCI policies of the 1.2 million UK businesses with employees<sup>2</sup>, providing a vital safety net for people who need it when they are at their most vulnerable. It will also provide cast-iron assurance that records will be retained for 40 years, which is by no means guaranteed under the present system.
5. To compare such a database with the Association of British Insurers' tracing system is completely erroneous. In the last year of records for tracing ELCI policies (2004-2005) the code had an extremely poor success rate of 23 per cent. The success rate the year before that was only 27 per cent and the highest success rate it has achieved since its inception in 1999 has been less than half at 41 per cent. The ABI has, this year, undertaken steps to improve these success rates and APIL has been pleased to work with the ABI on this project. To date, however, we have not seen the results of this work.

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<sup>1</sup> Based on figures from the Office for National Statistics figures for 2005.

<sup>2</sup> Early 2006 figure. Source: Department for Business Enterprise and Regulatory Reform enterprise directorate analytical unit

6. In short, this is a voluntary, not a statutory code, with a very poor track record and which is certainly no replacement for the current regulation.
7. While we have not undertaken any analysis into the cost of establishing a central database of insurance policies, it is clear that such a system will save the current £71 million administrative costs associated with storing and displaying ELCI policy certificates, and it is felt that this could be used to finance the setting up of an efficient, modern system, which has been tried and tested in other fields.
8. We do not suggest that access to the database should be unrestricted. The database could be established in such a way that access is by password. In addition, where information from the database is used in legal proceedings, that information is automatically exempt from data protection regulation.
9. Support for a central register of ELCI policies is not new, but was raised by several organisations in response to the Department of the Environment's 1995 Review of the Employers' Liability (Compulsory Insurance) Act 1969. At the time, the Federation of Master Builders said:

"Bearing in mind it is a legal requirement for insure and maintain insurance it seems appropriate to arrange for this information to be logged centrally".
10. The Brewers' Association of Scotland said that, in order to deal with the identities of insurers of dissolved companies:

"a central register maintained by the Association of British Insurers could be the answer"
11. The Association of Insurance and Risk Managers in Industry and Commerce said:

"The respondents were in accord with the proposal to establish a central register."
12. Bowring Marsh & McLennan Ltd (insurance brokers) said, following a survey of clients:

"Bowring believe that an industry operated fund similar to the Motor Insurers' Bureau (an ELIB) may be the only viable option for compensation to be paid for valid but unsatisfied claims.

With improved record tracing through a central register and severe penalties for non-insurance, the cost of running an ELIB.... should not greatly impact upon premiums.”

13. If the Government continues to believe, however, that a database is not a viable option, then the suggestion that ‘strongly worded guidance may ensure that business is aware of its continuing liability’ is completely unacceptable. The fact that there is, as yet, no penalty for non-compliance with the regulation does not justify removing it.
14. The answer is to introduce penalties and, while it may not be practical or possible to check maintenance of records on an annual basis, this can be checked during HSE health and safety inspections, when the employer could be required to produce previous certificates. A regulation even with this level of enforcement is better than a guideline, however strongly worded, which will clearly be more open to abuse.
15. Another option would be to reverse by regulation the judgment in *Richardson v Pitt-Stanley* (1995) QB123. In this case, the argument that a company director or other officer who was responsible for the fact that the employer company was not insured should be held personally liable, was rejected by the Court of Appeal.

#### **Regulation 5 (display of certificates)**

16. APIL believes that keeping electronic copies of records is acceptable, provided the records are stored on a central database. Allowing businesses to deal with the display of policy certificates entirely in a bespoke manner would result in unacceptable inconsistencies. Employees should be able to have access to the information and many are unlikely to find this on their own company website, even if businesses could be relied upon to comply with the requirement to do so.