



CABINET OFFICE

DRAFT REGULATORY AND ENFORCEMENT SANCTIONS BILL

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 Martin Bare, APIL President, who contributed to discussions about this consultation.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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GENERAL COMMENTS

APIL welcomes the opportunity to put forward its views on the Draft Regulation and Enforcement Sanctions Bill. Our response is restricted to issues which fall within the area of expertise of APIL members, and in particular to inspection and enforcement policies in the context of health and safety law. The Health and Safety Executive (HSE) is listed in Schedule 3 of the draft bill as a 'designated regulator'. The association will therefore limit its response to the proposed regulatory sanctions, outlined in part 2, which would be available to the HSE.

Executive summary

- APIL would emphasise that, regardless of any new sanctions which appear in the draft bill, the use of inspection and enforcement should continue to be the primary method used by the HSE to police workplaces
- APIL is deeply concerned that funding cuts to the HSE budget will make it extremely difficult for inspection and enforcement to be performed at the necessary level to deter breaches of health and safety law
- 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
- APIL does not support the use of fixed monetary penalties 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

Enforcement

APIL's fundamental position is that health and safety needs to become central to the way businesses are run and we believe any breach of health and safety laws should result 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.

APIL is deeply concerned that the HSE will shortly be unable to perform its duties to the necessary high standard. The HSE faces a 15 per cent budget cut by 2011 and has already lost over 250 jobs since April 2006 and faces a further 100 job losses in the remaining half of this financial year¹. This will clearly have an impact on levels of investigation and enforcement. This comes as the recently published 2006-07 statistics for fatal injuries at work show a rise to 241 from 217 in 2005-06². It is critical, therefore, that the HSE is properly resourced for it to be able to ensure that this figure does not continue to rise.

¹ Rise in workplace fatalities 'linked to HSE cuts', Prospect union, 26/07/2007

² Statistics of fatal injuries 2006/07, HSC, 26/07/07

It is clear that large numbers of routine accidents are already not being investigated. An internal HSE audit, obtained by the Centre for Corporate Accountability (CCA) under the Freedom of Information Act, revealed that inspectors should be prosecuting in three times as many cases than they currently do³. This situation will only deteriorate once the funding cuts start to bite.

APIL feels that the use of sanctions and penalties should not be overly constrained by the need for the enforcement to be 'proportionate'. 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.

The intention to make regulation in the area of health and safety more effective and proportionate will therefore be fatally undermined from the outset if the regulator simply does not have the resources to regulate properly. The most effective way to stop companies breaking the law is through a comprehensive system of inspection.

Sanctions

Fixed Monetary Penalties

APIL believes that the use of fixed fines fails adequately to 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. We also feel that the use of fixed monetary penalties will allow companies to reserve a set amount for such fines rather than implement necessary, but potentially costly, health and safety procedures.

The fundamental problem, though, is that fines are not high enough to deter breaches of health and safety law, a fact acknowledged by the HSE and the Government. In 2005-06 the average penalty per conviction was £29,997. This figure includes 13 fines in excess of £100,000 which, when removed, gives an average of just £6,219⁴. The average fine levied by the Financial Services Authority, in contrast, is £75,000 and that is for financial misdemeanours rather than for causing physical injuries. This is not high enough to deter companies from breaking the law. As the Macrory report, 'Regulatory Justice: Making sanctions effective', stated:

³ Internal Audit of Regulatory Decision Making Incident Investigation, HSE, July 2006

⁴ HSE Enforcement statistics, <http://www.hse.gov.uk/statistics/enforce/index.htm>

“This lack of an effective deterrent compromises the effectiveness of the regulatory relationship.”

In fact, many companies will find it more expensive to implement effective health and safety policies than to pay the fines for any breach. This is not acceptable.

It is also essential that fines are not seen as a way of avoiding criminal prosecutions in such cases. If a fixed monetary penalty is imposed by the regulator, the offending company or employer will not be required to explain themselves before a judge and/or jury. Breaches of health and safety law often mean individuals suffering terrible injuries, or death, and the bill should not lead the HSE to see fines as an ‘easy option’.

A regulatory regime is only as strong as the sanctions available to it for non-compliance, otherwise it falls into disrepute. If negligent companies are aware that the HSE is unable to fulfil its role then the provisions of the draft bill will be rendered totally irrelevant.

APIL advocates the introduction of a new law to ensure that fines are proportionate to either a company’s annual turnover and/or its assets. This will in effect mean the larger the company, and the more serious the breach, the larger the fine. The association is therefore disappointed there is no mention of this measure in the draft bill.

The HSE, in its published response to the draft bill, states that it is working with the Department for Work and Pensions (DWP) ‘to explore options to take forward the commitment to raise penalty levels’. APIL welcomes these discussions and urges the two sides to come forward with proposals as a matter of some urgency.

The new sanctions outlined in the draft bill, though welcome in principle, do not address these fundamental problems. APIL would urge the Government to reconsider the funding cuts to the HSE and to introduce legislation as soon as possible to rectify the deficit in the level of fines for health and safety breaches.

Enforcement Undertakings

APIL supports the use of enforcement undertakings as a penalty for health and safety offences. The association believes 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. APIL believes these undertakings should then be publicised on the company’s website.