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A Health and Safety Executive consultation on reviewing, revising, consolidating or withdrawing the Approved Codes of Practice is a mix of good principle, tinkering and nonsense, writes Godric Jolliffe

Health and safety gone mad?

THERE IS nothing wrong in principle with keeping Approved Codes of Practice (ACoP) under review. Thompsons and the trade unions said as much in response to the Löfstedt review of health and safety, which recommended that all ACoPs should be reviewed.

But the HSE's consultation (closing 14 September) isn't just a consultation on whether ACoPs should be reviewed. It sets out decisions already taken on certain ACoPs, after an initial review of 32 of the 52 following the Löfstedt recommendation, which it expects respondents to comment on without there being an agreed criteria for when ACoPs should be used.

In spite of the unseemly haste and muddled approach to the consultation, few of the proposals appear to be major revisions

And it doesn't provide the actual wording that a revision or consolidation will use, although it does promise further consultation on individual redrafts before they are published.

Pressure

This can only reflect the pressure being brought to bear by the government on the HSE's timetable due to the determination of ministers to tick boxes on its red tape challenge and tackle "health and safety culture". The consultation states that: "if agreed these proposals will be taken forward by the review for delivery by end 2013."

There is no obligation to follow an ACoP, but doing so should enable a duty holder to be confident that they are complying with the law (Health and Safety at Work Act Section 17). If there is a health and safety prosecution, and it is proved that the relevant provisions of the ACoP have not been followed, then that element of the offence will be taken as proved unless the duty holder can show the court that they have complied with the law in some other way.

Wider discretion

HSE guidance material allows duty holders wider discretion to identify the options that are the best fit for their circumstances and crucially does not have to be followed in the same manner as an ACoP.

In spite of the unseemly haste and muddled approach to the consultation, few of the proposals appear to be major revisions. For asbestos, for example, the suggestion is that the two ACoPs be consolidated to make it clearer what duty holders can do to comply with legal requirements and to reflect the recent changes to the Control of Asbestos Regulations 2012.

L24 – Workplace Health, Safety and Welfare – is to be revised to make it clear what duty holders must do to comply with legal requirements and to remove duties that are no longer current.

But then it doesn't explain which of those duties that might be.

L5 – the Control of Substances Hazardous to Health regulations (COSHH) – wil be revised to make it clearer what duty holders can do to comply with legal re-

quirements. It will be updated to keep abreast of changing EU regulations. If this reduces safe exposure levels and produces a clearer link to EU limits then that will be a positive development.

However, the emphasis of this section of the consultation on low risk industries is a concern. It suggests that these industries need less monitoring. In reality, no company using hazardous chemicals should be defined as a low risk industry and any agenda to reduce breaches of these regulations or compliance by minimising duty holder obligations (at a time when inspections will also be reduced) will need to be opposed.

Two ACoPs will be revised or withdrawn without consultation as soon as the consultation finishes. This is either because the changes were consulted on prior to the Löfstedt review or because the legal provisions have been revoked:

- L117 – 'Rider-operated lift trucks: Operator training'
- L130 – 'The compilation of safety data sheets'.

There are no or minor changes to the ACoPs for many of the areas union health and safety reps will be concerned with, including work equipment, lifting equipment, confined spaces, pressure systems and worker involvement.

One substantive proposal, to limit the length of ACOPs to 32 pages, other than in exceptional circumstances, is obvious nonsense. ACoPs should be as short or as long as they need to be to do the job and setting an artificial limit is just facile.

Those responding to the consultation are asked to:

- explain if they support the proposal, and why
- identify ACoPs that should or should not be limited to 32 pages
- give examples of particular ACoPs that can be streamlined
- identify positive or negative impacts.

The most substantial and alarming change is to replace the ACoP under the Management of Health and Safety at Work Regulations with "structured, well sign-posted guidance". This ACoP has always been something of a disappointment and isn't really fit for purpose. It should have provided generally applicable advice on how to implement some of the most important requirements for ensuring health and safety at work.

Instead, it has managed to leave most organisations in the dark about what essential safety features such as risk assessment and competence, should look like.

But while the management ACoP is not fit for purpose, replacing it with guidance is, because of the way ACoPs are used in prosecutions, generally less authoritative and it could have significant consequences, not least that the role of the HSE is effectively downgraded in this area.

It is absolutely vital that the HSE gets it right this time. The new guidance must tell organisations how they can reasonably comply with the law and how health and safety reps can ensure that they do.

Considerations

The consultation says that in reviewing each ACoP the HSE has taken into account:

- **whether an ACoP was the most appropriate format for providing guidance on the issue in question**
- **whether methods of compliance could be described with sufficient precision for duty holders to be certain they have complied with the law**
- **what revisions were required to ensure the advice provided was technically up-to-date, legally correct and clear about what the law requires**
- **whether the advice was presented in the most appropriate way for the intended audience, how it fitted with the wider guidance portfolio and how much of it is in demand**
- **the number of businesses the advice in each ACoP applied to the findings of the Löfstedt review, comments submitted to the Red Tape Challenge website and known stakeholder views.**

More HSE consultations

Two further consultations that reduce health and safety protection or employer obligations were published by the HSE as Health and Safety News went to press.

They are a consultation on proposals to "simplify and clarify RIDDOR reporting requirements" and another on exempting some self-employed people from health and safety legislation. Both close on 28 October 2012.

Employer reporting duties under the RIDDOR regulations have already been reduced. The consultation is intended to clarify for businesses how to comply with the regulations and there is no change in the definition of "accident".

Of most concern however is the proposal that only occupational diseases caused by exposure to a biological agent need to be reported in future. Reporting requirements will also be removed for:

- non-fatal accidents to people not at work
- dangerous occurrences outside of higher risk sectors or activities
- the reporting by self-employed people of injuries or illness to themselves.

Employers and people in control of work premises should report:

- all deaths to both workers and people not at work
- all major injuries (simplified list) to people at work
- over-seven-day injuries to people at work
- dangerous occurrences that occur within major hazard industry sectors or within other specified higher risk sectors or activities such as construction
- domestic gas events (simplified criteria to apply).

Employers and those in control of work premises to record:

- all reportable incidents (other than gas events)
- over-three day injuries to people at work.

No fundamental changes are proposed to the administrative arrangements for reporting incidents although the consultation says this will be subject to ongoing review, simplification and improvement as appropriate. Disappointingly, the consultation explicitly rules out the potential for widening the scope of reportable incidents where the HSE and other enforcing authorities do not have primacy, such as work-related road traffic accidents.

Self employed

The HSE is also proposing that the self-employed who "pose no potential risk of harm to others" and who do not work in a high-risk sector should be exempt from health and safety law. This follows a recommendation in the Löfstedt report.

In the HSE's preferred option, a self-employed person who met the following preconditions would be exempt from health and safety law if:

- they are self-employed (as defined at Section 53 of the Health and Safety at Work Act)
- they do not employ anyone
- when carrying out their work activities/conducting their undertaking or by the products and services created by the work activities, they pose no potential risk of harm to others
- they do not work in a prescribed industry/sector/site/activity (these are a combination of high hazard and high risk sectors – defined by the Secretary of State and listed in the consultation).

The HSE says this is a more prescriptive approach that will provide the self-employed with clarity and reduce the opportunity for mis-understanding for those who work in the prescribed sectors, although it would mean that the law would still fully apply to those self-employed who may only occasionally pose a risk to others in the course of their work.

> Disappointingly, the consultation explicitly rules out the potential for widening the scope of reportable incidents

Alternatives

The consultation looks at a number of alternatives, including an option to exempt the self-employed who pose no potential risk of harm to others entirely from health and safety law. But it acknowledges that this would not reflect the complexity of activities and sites that self-employed people may work in and would expose those self-employed working in high risk sectors to greater risk of harm.

Sharps consultation

A consultation on proposed regulations to implement the European Council Directive on preventing sharps injuries in the hospital and healthcare sector closes on 8 November.

The Regulations, provisionally titled the Health and Safety (Sharp Instruments in Healthcare) Regulations 2013, implement European Council Directive 2010/32. EU Member states have until 11 May 2013 to ensure that the Directive has been implemented into national legislation.

To respond to these HSE consultations go to http://www.hse.gov.uk/consult/live.htm

Businesses in breach of laws to pay HSE fees

Godric Jolliffe explains the new Fee for Intervention scheme

FEES OF £124 an hour are to be levied on businesses by the Health and Safety Executive to cover the costs of regulatory work, including inspections, if firms are found to be in breach of health and safety laws.

The Fee for Intervention (FFI) scheme, which comes into effect on 1 October 2012, applies when there has been a "material breach" by a duty holder requiring written notice of the contravention, an improvement or prohibition notice or prosecution.

It will not apply when an inspector gives a verbal warning or written advice that is not about a contravention.

Firms will be charged according to how many hours it takes the HSE to identify and conclude its regulatory action. The types of situation where FFI will apply are broken down, in HSE guidelines, into four areas:

- health risks – where failure to comply might lead to exposure to harmful substances such as dust, fumes and chemicals or energy such as noise or vibration
- safety risks – where the potential effects are immediate due to traumatic injury such as contact with moving machinery, falls from height or contact with vehicles
- welfare breaches – requirements that are either part of the controls required for health risks, or are a basic right of people in a modern society (such as toilet facilities and drinking water)
- requirements related to capability to manage health and safety risks to a sustainable acceptable level.

The fee will be applied to each intervention where a material breach is identified and any other associated work. Where the material breach is identified during a visit, costs for the whole visit are recoverable, from the point of entry at the site to the point of leaving. Costs for other associated work are also recoverable, including:

- writing letters and reports
- preparing and serving improvement or prohibition notices
- follow-up work to ensure compliance
- taking statements
- specialist assistance
- gathering information/evidence
- assessing the findings and the documentation of inspection, investigation and enforcement conclusions
- recording conclusions and inspection, investigation and enforcement information
- reviewing investigations to ensure progress and appropriate lines of enquiry are followed
- research related to the material breach that is needed to carry out the tasks outlined above.

The guidance says the length of time taken is affected by factors such as the:

- response and needs of the duty holder
- individual circumstances of the case
- complexity of the breach and the extent of work that is required for the HSE to regulate effectively in relation to material breaches
- inspector's level of experience
- standards of compliance found at the time.

It is not clear from the guidance as to how an employer would challenge an FFI. But if the HSE brings an unsuccessful prosecution it will repay any fee paid that related to the alleged offence.

The HSE's guidance is available from: **www.hse.gov.uk/pubns/hse47.htm**

The Health and Safety (Fees) Regulations 2012 can be obtained from **www.legislation.gov.uk/uksi/2012/1652/contents/made**

If the HSE brings an unsuccessful prosecution it will repay any fee paid that related to the alleged offence

Comment

Union health and safety reps may find that the additional cost of FFI is a useful tool in keeping employers focussed on their duties. There should be no objection from businesses that follow the law to the HSE recovering fees.

However, the income from FFIs should not be seen as supplementing the HSE's shrinking budget.

Jennie Walsh explains employers' obligations under the Lifting operations regulations

Lifting: the burden on the employer

THE LIFTING Operations and Lifting Equipment Regulations (LOLER) 1998 replaced a number of legal requirements relating to the use of lifting equipment. They encompass a wide definition of lifting equipment, ranging from heavy industrial equipment to the patient lift on a hospital ward.

> The judge said the firm was in breach of reg 8, because the operation had not been properly planned by a competent person

Lifting equipment is also subject to the requirements of the Work Equipment Regulations 1998 (PUWER). Regulation 3 of LOLER adopts the same language as PUWER, substituting "lifting equipment" for "work equipment".

The LOLER regulations require that lifting equipment provided for use at work is:

- strong and stable enough for the particular use and marked to indicate safe working loads
- positioned and installed to minimise any risks
- used safely, ie the work is planned, organised and performed by competent people
- subject to ongoing thorough examination and, where appropriate, inspection by competent people.

Employers are subject to duties under the regulations in respect of any lifting equipment provided for use by employees and by third parties (though not members of the public).

The obligations of the regulations also apply to anyone else who has control over the lifting equipment, such as a person who

uses, supervises or manages the use of the equipment or the way in which it is used.

The regulations state that, before lifting equipment (including accessories) is used for the first time, it is thoroughly examined. Equipment and accessories used for lifting people must also be examined at least every six months.

Other lifting equipment must be examined at least annually or at intervals laid down in an examination scheme drawn up by a competent person. All examination work should be performed by a competent person, who must submit a report to their employer to take the appropriate action.

Adequate strength and stability

Regulation 4 requires employers to ensure that lifting equipment is of adequate strength and stability. "Adequate strength" was defined in the 1960 case of **Milne -v- CF Wilson**, that it was not just adequacy in respect of the statutory safe working load, but the actual load the equipment is expected to bear. This was reinforced by subsequent cases.

Regulation 5 imposes a mandatory duty to ensure that equipment used for lifting people will prevent users being crushed, struck or from falling out, while reg 7 provides a duty on employers to mark safe working loads on equipment. Regulation 8 states that an employer must ensure that the lifting operation is planned by a competent person, appropriately supervised and carried out safely.

This is a strict liability, so if an injury results as a consequence of the failure to plan or supervise, that in itself is proof that the operation was not carried out safely.

In the case of **Delaney -v- McGregor Construction (Highlands) Ltd**, the employer used a fork lift truck to unload steel rods from a lorry, because there was no crane or sling available. The rods fell on Mr Delaney.

The judge said the firm was in breach of reg 8, because the operation had not been properly planned by a competent person, and reg 6 by failing to ensure that the risk of being hit by falling rods had been reduced to the lowest level reasonably practical.

The Court of Appeal found, in the 2007 case of **Ellis -v- William Cook Leeds Ltd**, that the judge in the original case was right to find that the employee's injuries were caused by lifting a steel casting with a crane.

When castings fell off the tray, it was normal working practice to move them by the crane as long as it had not jammed. The injured man had been trying to remove a cone shaped casting by attaching a hook from the crane to the narrow end of the casting and operating the crane with the hand held control as usual. But the hook flew off and knocked him unconscious. The hook had been bent beyond normal tolerance.

The judge said it was likely that the casting was jammed, which was reasonably foreseeable. Attempting to move a casting that was at risk of jamming by using a hook, which could slip under the load, was extrinsically dangerous. This was an inherently dangerous working practice and the employer was liable (although Mr Ellis had contributed to the accident by standing too close to the crane).

Employers' duties

This underlines the fact that, while employees do not have duties under LOLER, they do have general duties under the Health and Safety at Work Act and the Management of Health and Safety at Work Regulations 1999 (MHSWR), to take reasonable care of themselves and others who may be affected by their actions and to cooperate with others.

"Is your job making you breathless?" asks Judith Gledhill

Occupational asthma and isocyanates

Anyone who has had an asthma attack will know what a frightening experience it can be. Coughing, wheezing and having to fight for breath as a result of exposure to fumes or dust at work is not something that any worker should have to go through.

Currently, the biggest cause of occupational asthma in working people is exposure to isocyanates.

Isocyanates are chemicals used in the production of polyurethane plastics. These, in turn, have many uses in society such as in cushioning for furniture, car bumpers and supermarket checkouts. Isocyanates are also used in the production of paints (typically two-pack paints), varnishes, and adhesives.

Paint sprayers in the motor vehicle repair industry have an eight times higher risk of contracting asthma to other UK workers

Two-pack paints are frequently used in paint spraying operations and workers in industries where paint spraying is common – such as those working in vehicle body repair shops and where paint is used as a finish for moulded components – are most at risk. Workers exposed to isocyanates may also develop dermatitis if the isocyanate comes into contact with their skin.

The hazards associated with isocyanates and symptoms caused by exposure have been known about for many years. Workers typically experience stinging to the eyes, a dry throat and coughing. Many workers do not appreciate that these symptoms are related to their work, simply putting the symptoms down to a cold or hay fever and therefore failing to alert their employer to their symptoms or to take medical advice.

If exposure continues, workers may become sensitised to isocyanates and can develop asthmatic symptoms such as a cough, wheeze and breathlessness. Once the worker is sensitised to isocyanate, even very low exposure levels can trigger an asthma attack and in some instances the worker can be affected when exposed to other substances such as detergents and perfume and even cold air.

One of the industries where isocyanates are used extensively is in motor vehicle repair. Paint sprayers employed in the motor vehicle repair industry have an eight times higher risk of contracting asthma compared with the UK working population. Every year, over 50 sprayers are diagnosed with isocyanate asthma and most have to leave the industry. The loss of their job can have a devastating effect on individuals and their families.

Significant risk

Workers in other industries, such as the production of polyurethane moulds – frequently finished with a high gloss paint and where varnish is applied – are also at significant risk.

Employers have a legal duty to prevent or minimise the exposure of their workforce to isocyanates and must comply with the Control Of Substances Hazardous to Health Regulations 2002 (COSHH) as amended. These regulations are designed to ensure that exposure to isocyanates is controlled, with employers expected to prepare an appropriate risk assessment.

The results of the risk assessment should be communicated to the workforce. If a risk

is established, the employer must put in place a hierarchy of controls. Firstly, an employer must use an alternative substance if one is available. Alternatively, the work process should be modified so as to remove the risk of an employee being exposed to fumes from isocyanates. If it is not possible to provide an alternative substance or to remove the risk by plant or equipment modification, an employer must control the risk by, for example, providing paint spray booths with local exhaust ventilation.

If, despite the employer having undertaken these measure, workers still run the risk of being exposed to isocyanate fumes, the employer must provide suitable personal protective equipment such as air fed masks (which have been approved for use by the Health and Safety Executive) and must ensure that the employee is taught how to use the mask and given information on the areas where the masks should be worn. The masks must also be regularly checked to ensure that they are working efficiently and properly maintained.

Monitor exposure

Employers must also monitor the exposure of their employees to isocyanates through, for example, air sampling and the undertaking of urine checks to ascertain whether workers are being exposed. All monitoring records must be kept for at least 40 years where they refer to individuals or five years in any other case.

In the case of health surveillance, workers should be seen by an appointed doctor on a regular basis at intervals of not more than 12 months. All health records must be kept for at least 40 years following the last date of entry. These records must be offered to the Health & Safety Executive if the employer ceases to trade.

Where paint spraying is undertaken in a spray booth or room, employers must ensure that appropriate clearance times are put in place so that people who are not wearing suitable respiratory protective equipment do not enter during the clearance time and that there is no risk of fumes being released from the booth when the doors are opened.

If an individual develops occupational asthma it is important that all further exposure is prevented. It may be possible for the worker to be moved to an area where there is no exposure to isocyanates. Before any move is undertaken the employer must be satisfied that there is no risk of the worker being exposed to isocyanates in the new working area.

Occupational asthma is a distressing condition and can leave an individual reliant on inhalers and other medication for the remainder of their lives.

These consequences can be avoided if employers comply with the provisions of the COSHH Regulations. Unfortunately, we still see many working people who have developed asthma as a consequence of being exposed to isocyanates and other substances in the workplace and for whom the only recourse is a claim for compensation.

Jeeva Sethu looks at the latest denial of justice for people who are the victims of crime at work

Government ends compensation for many violent crime victims

YET ANOTHER kick in the teeth for injured working people has been announced by justice secretary Ken Clarke. The majority of the proposals in the government's consultation on reforming the Criminal Injuries Compensation Scheme (CICS) are expected to become law on 30 September 2012.

This means that workers who are injured in the course of their duties as a result of a criminal act will be seriously restricted in the types of injuries they can receive compensation for.

Injuries in bands 1-5 (£1,000-2,000), which are the majority of the awards received by union members, will be abolished. Injuries in bands 6-12 (£2,500-11,000) will be significantly reduced.

Workers who are injured in the course of their duties as a result of a criminal act will be seriously restricted in the types of injuries they can receive compensation for

Trespass on the railway

Injuries that result from trespass on the railway will be removed from the scheme altogether. This means that train drivers traumatised by witnessing the horror of someone committing suicide by jumping in front of the train, and having to deal with the aftermath, will no longer be able to apply for an award because, the government says, suicide is not a crime of violence.

Clarke dressed up the January consultation *Getting it right for victims and witnesses* as intended to give victims of crime more support. But the outcome, which is almost unchanged from the consultation's proposals, will ensure far less support for workers.

Apart from railway trespass related injuries, many others will no longer qualify for compensation. Injuries in tariffs 1-5 include temporary anxiety, temporary partial deafness, some types of fractures and injuries to teeth. These will go uncompensated.

The consultation paper states that: "a significant proportion of the [CICS] budget is spent on payments for those who suffer relatively minor injuries, such as a sprained ankle." But awards in bands 1-5 can be significantly more serious than a sprained ankle.

Assault by a patient

Take the paramedic who suffers broken teeth when assaulted by a patient while answering an emergency call. Making a claim to the CICA (Criminal Injuries Compensation Authority) in these circumstances isn't simply about getting some money for the sake of it for a relatively minor injury.

The award is a contribution to the cost of dental treatment to fix the damaged teeth. Without it, and without any prospect of a civil claim because the assault was not foreseeable by the employer, the victim will have to pay for costly dental treatment themselves. They will be doubly impacted – a victim of violence and financially worse off.

Thompsons recently dealt with a claim for a prison officer who suffered a knee injury when he was assaulted trying to de-escalate an aggressive situation. He was also traumatised by the incident as he and his colleague had no idea if the prisoner was armed or not. The CICA denied the claim, advising a law enforcement officer had to be exposed to "an exceptional risk" to qualify for an award. We appealed and he was awarded £2,000.

Injuries would not qualify

But now neither the officer's physical or psychological injuries would qualify for any award.

The reduction in band 6-12 tariffs means eye injuries, scarring to the limbs and torso and other injuries will be reduced from £2,500 to £1,000. Moderate burns and injuries resulting in continuing significant disability, such as a fractured collarbone, will be reduced from £4,400 to £2,400.

So a firefighter exposed to danger and injured as a result of arson, vandalism or a direct attack on a fire crew, will receive barely any recognition by the state of the sacrifice they have made in the course of their duty, even if they rescue trapped civilians in the process.

Further restrictions to eligibility include that there will be no award if the incident was not reported to the police as soon as reasonably practicable and if the victim has an unspent conviction. Though in a minor concession, the government has said this will not include minor motoring offences.

The current scheme allows incidents to be reported to a body other than the police, such as the employer. This is often more appropriate when someone has been assaulted in their workplace. Changing this rule is likely to deter some victims from claiming.

But, in typically ruthless manner, Clarke justifies the change by way of his having removed the lower tariffs: "With regard to workplace injuries, we are removing minor injuries from the scheme, and consider that victims who remain eligible to apply to the scheme will have sustained injuries serious enough to warrant a report to the police (as opposed to another body such as an employer) on every occasion."

At least the offensive and discriminatory proposal that, to be eligible for an award, the victim must have lived in the UK for less than six months has been dropped.

Not dropped however is that to qualify for a loss of earnings payment, applicants must demonstrate that they have no, or very limited, earning capacity.

To penalise someone who has been the victim of a violent crime in their workplace and who cannot return to their job as a direct result of that crime, but who is able to continue to work, albeit on a reduced income, is unreasonable and unfair.

Cynical move

As a money-saving measure, the reforms offer little. Far from giving more support to victims of crime, this is another cynical move by this government to deny access to justice to vulnerable and hard working people.

The depth of the contempt the Tories have for injured working people and the unions that represent them is barely concealed in the government's response to the consultation which sets out the reforms: "We have considered responses from trades unions raising concerns about the impact on those with minor injuries. However, we believe that, given all people who suffer injuries in the lower bands who are in employment will be entitled to statutory sick pay, the state already compensates them."

To penalise someone who has been the victim of a violent crime in their workplace is unreasonable and unfair

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Health and Safety News aims to give news and views on developments in health and safety issues and law as they affect trade unions and their members.

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