

Draft letter from Chair to Lord Hunt

Proposals for new Control of Asbestos Regulations

At its meeting on 25 July, the Health and Safety Commission agreed to recommend to you proposals for new Control of Asbestos Regulations and I am now writing to ask you to make them so that they can come into force at the next common commencement date (1 October). This will enable us significantly to tighten the existing regulatory regime at the earliest opportunity and to respond effectively to EC infraction proceedings which have already started. I attach a background note which summarises the main changes that the draft Regulations incorporate as well as setting out the package of measures we intend putting in place to support them ([Annex A]). The draft Regulations are at [Annex B].

I am also writing to seek your consent to approve two Approved Codes of Practice (ACoP). One (Annex C) provides code of practice material on all the requirements of the draft Regulations except regulation 4, which contains the duty to manage asbestos in non-domestic premises. The other ACoP (Annex D) covers this duty to manage and, although unchanged in substance, needs to be approved under the new Regulations. It is intended that both ACoPs will come into effect on the same day as the new Regulations. The Regulatory Impact Assessment is at [Annex E].

Many of the changes incorporated into the new Regulations arise from the need to implement Directive 2003/18/EC which amended the Asbestos Worker Protection Directive (AWPD). The amending Directive was due to be implemented by 15 April 2006, so the UK is now subject to infraction proceedings for late implementation. We have received an Article 226 letter to which a response is being sent making clear that, should you agree to making the Regulations, we expect the amending Directive to be implemented by 1 October 2006.

The delay in implementation has been caused mainly by the need to consult further with stakeholders on two proposals that consultation showed to be contentious:

- a) implementation of a provision in the amending Directive which derogates from the most onerous requirements (such as notification) where the exposure is “sporadic and of low intensity”; and
- b) the proposed removal of work with textured decorative coatings containing asbestos (TCs) from the licensing regime.

There was, in particular, a good deal of further research and consultation with stakeholders as a result of the need to respond to the substantial concerns raised about the latter proposal. This further work was needed so that the Commission could be sure that, within a framework of controls proportionate to the risks involved, the evidence clearly justified the removal of such work with TCs from the licensing regime. I regret the delay this has caused but, given

the toll on ill-health that exposure to asbestos has created and the quite proper concerns of stakeholders to ensure this proposal would not result in further future deaths from asbestos exposure, you will appreciate how important it was that the Commission explored this issue fully before making recommendations to you.

You will also want to note the risk of legal challenge arising from concerns raised about the implementation of the “sporadic and low intensity exposure” derogation, explained more fully in the background note attached.

Although concerns among stakeholders remain, we believe that, overall, the proposed Regulations significantly tighten the controls on working with asbestos containing materials. The establishment of a single control limit, a further alignment with the control hierarchy in the Control of Substances Hazardous to Health and the imposition of mandatory training are particularly important in this respect. The simplification of the regulatory framework by replacing three sets of regulations with one and three ACoPs with two, should also aid levels of compliance, particularly when seen as part of the package of measures we intend putting in place to support the Regulations when they come into force – for example, the campaigns we will be running as part of the asbestos strand of our Disease Reduction Programme.

BILL CALLAGHAN
Chair, Health and Safety Commission

Background Note

Introduction

1. In October 2005, the Health and Safety Commission (HSC) published a Consultative Document (CD) setting out proposals for:
 - a) a new set of Regulations to replace three existing sets of Regulations; and
 - b) a new Approved Code of Practice (ACoP) to replace two existing ACoPs with one, while retaining a further ACoP which would nevertheless need to be approved under the new Regulations.
2. The changes proposed arose from the need to:
 - a) Implement the amendments to the Asbestos Worker Protection Directive (AWPD) contained in Directive 2003/18/EC;
 - b) Remove work with textured decorative coatings containing asbestos (TCs) from the licensing regime to ensure the controls on such work are proportionate to the risks in the light of new evidence about the level of risk of exposure to asbestos fibres arising from such work;
 - c) Simplify the existing regulatory regime.
3. Following consultation and HSC's subsequent agreement to make recommendations to the Minister for the draft Control of Asbestos Regulations (the 'Asbestos Regulations') to be made and to seek his consent for the approval of the ACoPs, this note summarises the main changes to the regulations and the supporting package of measures which it is intended will be put in place should the Minister make the Regulations.

Draft Regulations – main changes

4. The main changes recommended are:
 - a) Replacement of the Control of Asbestos at Work Regulations 2002, the Asbestos (Licensing) Regulations 1983 and the Asbestos (Prohibitions) Regulations 1992 with one set of Regulations – the Control of Asbestos Regulations (the 'Asbestos Regulations');
 - b) The Asbestos Regulations bring forward many of the requirements in the previous three sets of regulations unaltered but the following changes of substance are made:
 - A single control limit of 0.1 fibres per cm³ (f/cm³) to replace the current dual limit – one of 0.3 f/cm³ for Chrysotile (White Asbestos), the other of 0.2 f/cm³ for Amphiboles (Blue and Brown Asbestos);
 - The new single control limit to be measured in accordance with the 1997 World Health Organisation recommended method a more accurate method than that used previously;

- Further alignment with the control hierarchy contained in the Control of Substances Hazardous to Health (COSHH). This seeks to reduce exposure to asbestos fibres to as low as reasonably practicable by measures other than the use of respiratory protective equipment (RPE). However, where it is not possible to reduce exposure below the control limit by such measures, there is still a requirement that suitable RPE should be worn;
- Mandatory training requirements for those exposed or liable to be exposed to asbestos at work. Previously the detailed requirements of what training should cover was contained in an ACoP: the draft Regulations now list them;
- Extension of a requirement for accreditation to ISO standards for those issuing clearance certificates following four stage clearance of asbestos;
- Implementation of a provision in the amending Directive which provided for a derogation from certain requirements where exposure is “sporadic and of low intensity”. This issue was contentious during consultation and is dealt with in more detail below;
- Removal of work with TCs from the licensing regime. This too was contentious during consultation and is also dealt with in more detail below.

“Sporadic and low intensity” derogation

5. This derogation replaced a previous provision in AWPD that used action levels as a trigger-point above which certain requirements apply. Its purpose is to provide for circumstances where the release of asbestos fibres arising from work with asbestos is considered low enough to justify exempting dutyholders from the more onerous requirements such as notification and medical surveillance. Such requirements are essentially administrative measures where the risk of exposure to asbestos fibres is likely to be high and more stringent controls will be necessary to prevent exposure when dutyholders carry out work. Notification, for example, allows HSE to concentrate its enforcement action on such work.

6. There was substantial concerns expressed during consultation that the derogation was not clear. There were also concerns that the proposed provision in the Regulations did not fully implement the equivalent provision in the amending Directive (certain words have been omitted in regulation 3(2) which provide further detail on the sort of work which would qualify under the derogation – ie work with “non-friable” materials or removal “without deterioration of non-degraded” materials).

7. This has been discussed fully with stakeholders but we continue to believe that the way in which the “sporadic and low intensity” derogation has been implemented in regulation 3(2) is justified in terms of the clarity it provides. What is key in deciding whether or not exposure is sporadic and of low intensity is the nature and degree of exposure rather than the precise detail of that exposure. As a result, it is HSC’s view that whether or not the materials are friable, deteriorated or degraded should be assessed on the basis of the extent of risk of release of asbestos fibres in relation to the condition of the materials. However, to achieve further clarity, this regulation now includes a provision for the Commission to approve a peak

exposure limit beyond which exposure would not be considered to be sporadic or of low intensity. HSC have agreed to approve such a limit for all types of asbestos of 0.6 f/cm^3 in the air measured over a ten-minute period should the draft Regulations come into force. This is equivalent to the short term exposure level for white asbestos in current asbestos Regulations

Removal of TCs from the licensing regime

8. In response to the considerable concerns expressed about this proposal, further work has been done to assess the level of risk of exposure to asbestos fibres arising from work with TCs so as to ensure that any decision to remove TCs from the licensing regime was entirely consistent with our approach that the level of control should be proportionate to the level of risk. This work has confirmed that the risks from such work are low, are similar to those arising from work with materials (such as asbestos cement) which is not licensed and do not justify its continued inclusion in the licensing regime. Although licensing is not a requirement of the Directive, we have linked the application of licensable work to the “sporadic and low intensity” provision in regulation 3(2) (see above).

Supporting package of measures

Approved Codes of Practice (ACoP)

9. The Asbestos Regulations will be supported by two ACoPs:

- a) one which covers all the requirements of the new Regulations other than regulation 4 (the duty to manage asbestos in non-domestic premises). This replaces two existing ACoPs which, respectively, deal with work on licensable materials and unlicensed work;
- b) the other which covers the duty to manage. This will be unchanged in substance from the current ACoP on this duty, but will be re-approved under the new Regulations.

10. The former will include approved code material and guidance on the new requirements. It will include new code material and guidance where the legal requirements have changed. In particular, there is significant additional code material and guidance to explain the provisions in relation the “sporadic and low intensity” derogation and to ensure that work with TCs is still done to all the other requirements necessary for such work, even though it has been removed from the licensing regime.

Other guidance

11. As well as the two ACoPs there is great deal of guidance currently available. We have already consolidated some of this into a Licensed Contractor’s Guide and an Analysts Guide. As part of the Disease Reduction Programme we intend to continue with this consolidation working with stakeholders to provide a more effectively focussed range of guidance material covering both licensed and unlicensed work. For the latter, we are revising Asbestos Essentials which will be made freely available through the website thus providing full, practical guidance for those carrying out such work. We are also developing an asbestos portal on HSE’s website

Training

12. As well as detailed training requirements now included in the Regulations, more guidance is given in the ACoP on the training necessary for both licenced and unlicenced asbestos workers and on asbestos awareness. Also, improvements in training standards have been achieved for the licensed sector in recent years by working in partnership with the Asbestos Training Providers' Working Group (ATPWG) which includes training providers (including trade associations) who deliver asbestos training courses. This group represents a cross-section of training providers who are listed on HSE's asbestos website as complying with the standards set out in the training chapter of the Licenced Contractor's Guide. They have worked together with HSE and HSL to develop a Code of Conduct and have recently agreed to extend it to cover training providers who deliver asbestos awareness training and other non-licensed asbestos training.

Compliance

13. HSE is continuing with a programme of work for the inspection of licensed work. Inspectors also carry out inspections of contractors carrying out repair and refurbishment work and other awareness and promotional activity. Asbestos issues are raised as part of the 'height aware' campaign and as a specific topic at some 'Safety and Health Awareness Days'. HSE is also working with the manufacturing sector and their 'step up' campaign to cascade asbestos messages within this sector. Together with health and safety enforcement officers within Local Authorities, HSE inspectors continue to include the duty to manage asbestos (DTM) as a key activity in their inspection visits. In support of this, HSE Health and Safety Officers will also be undertaking DTM visits, seeking to raise awareness amongst dutyholders in small and medium enterprises (SMEs) of DTM and the risks from incidental exposure to asbestos.

14. As part of the Disease Reduction Programme a number of different interventions are planned. There will be a 'campaign' later in the year which will include trade directed media interventions on asbestos for plumbers and heating and ventilation workers. There will also be direct mail interventions to around 100,000 dutyholders in SMEs. This campaign will be supported with other products which will include packs of cards with safety messages on asbestos and a pack on DTM which can be obtained by telephone or from the asbestos website and given out during visits.