

*Proposals for the implementation of the Chemical Agents Directive (98/24/EC) with the new COSHH Regulations and Control of Lead at Work Regulations.*

*Consultative Document CD 173*

Comments to reach HSE no later than 21<sup>st</sup> January 2002

Many of the requirements of the Chemical Agents Directive (CAD) are already implemented in the UK by means of the Control of Substances Hazardous to Health Regulations (COSHH) and the Control of Lead at Work (CLAW) Regulations. HSC proposes to refine these existing Regulations in case where CAD provides further clarification (e.g. prescriptive duties), changes of scope or higher (or explicit) standards.

The CAD is provided to lay down minimum requirements for the protection of workers from risks to their safety and health arising, or likely to arise from the effects of chemical agents that are present at the workplace or as a result of any work involving chemical agents.

CAD makes requirements on employers:

- risk assessment
- elimination or reduction of risk
- specific prohibitions
- exposure monitoring and health surveillance where risk assessment reveals a risk (how much?)
- planning for accidents incidents and emergencies
- information, training and consultation with employees.

CAD is included within the basis established by the Framework Directive 89/391/EEC. It is notable that UK law has arguably not been entirely consistent with this Framework Directive on the subject of strict liability. The Framework Directive provides that all employers (with some specific exceptions) "shall have a duty to ensure the safety and health of workers in every aspect related to work" and shall take all measures necessary to this end, which should be adjusted to take account of changing circumstances. The only (optional) qualifications to this apparently strict duty are "where occurrences are due to unusual or unforeseeable circumstances beyond the employers control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care".

*Significant omissions in COSHH*

HSC proposes to retain the qualification "so far as is reasonably practicable" (SFAIRP) in place of the Directive's "reduced to a minimum" with regard to risk exposure. It is believed that some member states have asked for clarification of the term "reduced to a minimum" but the Commission has not yet provided such guidance. Without clear guidance it is not possible to form a view of the congruence of these two qualifications. However,

1. The use of SFAIRP in UK law has been brought to the attention of the Commission in recent years.
2. The trend is to adopt a more precautionary approach. The relative effect of this remains speculative but it seems likely that it would result in pressure to increase the degree of protection.

HSC proposes to exclude the notion of the conditional "slight risk" introduced in the Directive for the purpose of permitting employers to take none of the prescribed preventive actions. In its place, **HSC proposes that employers should continue to be the arbiters of proportionate control.**

The definitions of "risk" are also different; CAD refers to the likelihood of reaching a significant exposure, COSHH refers to the likelihood and to the extent of any potential harm. This may be the cause of some confusion, the CAD approach would tend to give more weight to hazard identification, the COSHH approach gives weight to the significance of any harm that may result. To our knowledge, the distinction between hazard and risk has been tested in the courts and at least on one occasion the more precautionary approach has found favour. *Regina vs. Board of Trustees of the Science Museum, 1993.*

Both omissions and the variance may be the subject of EC scrutiny, especially if significant voices within the UK demand it.

*Some of the proposed changes:*

HSC proposes to change COSHH as follows

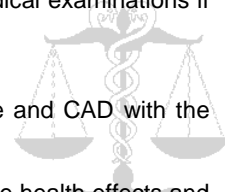
- Employees must not be exposed to chemicals at work until a suitable and sufficient risk assessment has been made **and**, the necessary control measures are in place.
- Substitution must be used in preference to any other form of control measure, so far as is reasonably practicable.
- General ventilation is included in the list of prioritised control measures, just ahead of PPE.

- Health surveillance should be used to provide protection to an employee's health, where there is a reasonable likelihood that an identifiable disease or adverse health effect will result from that exposure. The new part is to stipulate that the technique should be such that it is of low risk to the (health of the) employee.

The regulation continues, that where an occupational disease or adverse health effect is found: 1) the employee must be told 2) the employer must review the risk assessment and control measures 3) take into account the advice of the diagnosing occupational health professional, when considering changes to control measures 4) consider redeployment to alternative work 5) provide for a review of the health of other workers with similar exposures including medical examinations if recommended by an appropriate authority.

#### Comment

The difference between the absolute duty imposed under the Framework Directive and CAD with the UK's "so far as is reasonably practicable", remains unclear.



New health surveillance duties should bring forward the date of knowledge of adverse health effects and ill health caused by work. They should also increase the volume of baseline knowledge, which is helpful when limiting the number of years for which a claim may be made.

Prohibition of new work/systems of work until the appropriate controls are actually in place is a new absolute duty. This will have the effect of eroding the defence of reasonable practicability.

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