

March 2001

## **"Asbestos New Regulations and a new ACOP"**

***Presentation by Ray Cooke, HM Principal Inspector HSE Midland Region,***

Ray prefaced his presentation with the news that the new Regulations were not as imminent as had been thought. Since the arrangement of the presentation it has recently been announced that the introduction has been postponed by as much as 12 months and is likely to go out for consultation again. Nevertheless, he was able to tell us why there was a need to revise the existing Regulations and what the major proposals were likely to be. He gave us this outline of the problem: -

- Over 3000 people die each year from asbestos related diseases like asbestosis, lung cancer and mesothelioma. The asbestos legacy stems from its long latency period and the fatalities are likely to rise to 5 b- 10,000 by the year 2020.
- Between the 1950s and 1970s asbestos was used extensively in the UK as a building material. It was very good at what it was designed to do and still is - if it is good condition!
- Thousands of tons of asbestos still remain in buildings
- Over 1.5 million commercial premises have asbestos in them, the majority of them will probably be Local Authority enforced and will be mainly SMEs.
- 25% of people who are now dying from asbestos-related diseases once worked in trades associated with construction and building maintenance. This was identified in 1995 by Professor Peto and HSE statisticians.
- The Asbestos Regulations were aimed at those working in asbestos factories and asbestos removers.
- Although the Regulations were not specifically intended to cover those people who come into contact with asbestos accidentally it was possible that they might be covered already by the Health and Safety at Work Act. Ray added that this was a very real problem because workers went into roof spaces and under floors and were unaware that they were being exposed.. Ray then challenged the audience to look around the Hall to see if they could identify any materials containing asbestos and admitted that he couldn't!

He went on to say there were no surprises in the list of people at risk: -

- Electricians
- Plumbers
- Carpenters & Joiners
- Plasterers
- Gas Fitters
- Cable layers
- Demolition Workers
- Painters & Decorators
- Heating & Ventilation Engineers
- Roofing Contractors
- Fire & Burglar alarm installers
- General maintenance staff

and posed a rhetorical question about whether surveyors and Health and Safety professionals were also at risk!

Although the Control of Asbestos at Work Regulations had been altered over the years there was still a bit of the 'jigsaw' missing: -

- Contractors didn't know they were working on materials containing asbestos.
- Very few occupiers were passing on information about the location of asbestos, even when a survey had been done.
- The key point is that no one was managing the risk!

So the question was - What should we do?

**Should we remove all the asbestos?**

- No - asbestos can serve a useful purpose, such as fire protection. Also if it is in good condition and in a position where it will not be disturbed, it poses very little risk at all.
- Removal would be prohibitively expensive - about £12 billion
- Disposal of waste would generate immediate problems in finding enough available spaces to put it in and enough licensed contractors to remove it!
- Removing asbestos creates an additional, unnecessary risk for removers because it disturbs the fibres, as the French discovered.

**Should there be a single duty to survey?**

Many premises have been surveyed already and a single survey might not be adequate because: -

- Information about the presence of asbestos may not be passed on to those who need it.
- Survey information goes out-of-date.
- The condition of asbestos - containing material deteriorates

For these reasons, it may not protect anyone and could prove to be an expensive way to fill a filing cabinet! Also, there are not enough competent surveyors in practice and HSE is anxious to avoid creating an asbestos 'bandwagon'.

The HSE is now proposing: -

- A new regulation in the Control of Asbestos at Work Regulations 1987. Because these have been amended several times the new requirements would be incorporated into a new Control of Asbestos at Work Regulations 2001.
- A new regulation to focus on a duty to 'manage the risks from asbestos'.
- A new Approved Code of Practice to back up the new regulation and to provide guidance to the **designated duty holders**.

## The new duty holder will have to: -

- Take reasonable steps to identify asbestos containing materials in a building. This does not necessarily mean a full survey, or even a survey, per se. If this is coupled with a survey, it could be at one of three levels: -

- ❖ **Type 1 Thorough examination, without samples.**

- ❖ **Type 2 Thorough examination, plus samples.**

- ❖ **Type 3 Full Invasive Survey, plus samples.**

*Examples of an invasive survey are breaking into wall cavities to see what lies underneath the outer skin, or removing an outer layer of pipe insulation to discover if there was an asbestos layer underneath.*

- **Presume that materials contain asbestos unless there is a reason to suppose otherwise.**

*There are two extremes: -*

i.) *Carry out a full invasive survey*

ii.) *Assume there will be some unknown form of asbestos so only assume there is **none** as a result of a survey or if there is solid evidence to the contrary, e.g. Stone/metal.*

- **Record the location and type of asbestos material identified.**

- **Assess the condition of these materials, and**

- **Assess the risk from them**

How likely is it that it will be disturbed?

Where is it?

What form is it in e.g. cement, Asbestos Insulating Board (AIB), loose, friable material?

## Once asbestos has been found, what are the options for action?

- If it is in good condition and a low risk, leave the asbestos in place and introduce a management system to keep it safe.
- Seal it or enclose it i.e. Make it safe.
- Remove it using licensed contractors for insulation/coating/AIB (i.e. if the asbestos is damaged, in poor condition, or if major work is planned on the premises). This is not necessary if the work is of short duration i.e.

One person for <1 hour - 7 consecutive days.

More than 1 person - <2hours - 7 consecutive days.

An employer can use his own employees in his own occupied premises without a licence, but CAWR still applies. He must inform HSE each time that type of work takes place and must submit

- Method statements

- An assessment of the asbestos and the quantity likely to be released into the air
- Control Measures (Type H Vacuum Cleaners, Air Movers)
- Training (ARCA/ACAD)
- Decontamination Unit
- Health Records (Keep for 40 years) and medical surveillance

All of this supports the view that using a licensed contractor is far easier!

- Prepare a written action plan, and
- When materials are to remain in the building:
  - ❖ Inform other of the location and condition of the asbestos-containing materials. This is critical if we are to reduce accidental exposure to asbestos and needs a robust management system.
  - ❖ Carry out regular checks of the condition of all asbestos-containing materials, in order to detect early signs of deterioration
  - ❖ Review and revise the action plan as necessary.

This all about **Managing the Risk**.

A crucial aspect about managing the risks is **Who has the Duty and to where does it apply?**

Definition of these twin issues is the problem which has delayed the introduction of the new legislation, because these regulations have to be compatible with other legal requirements. In general terms the duty holder is

**The person or body having control over the situation giving rise to the risk in: -**

- **The workplace, and**
- **The common areas of rented housing.**

*In the main this applies to landlords and managing agents except where a tenancy agreement makes the occupier responsible for the fabric.*

There is also the question of possible extension of protection to social rented premises, so that workers receive protection outside their work premises, as well. The definition of 'rented' would probably be limited to property provided by companies and/or organisations. Other legislation which may afford partial protection includes the Defective Premises Act 1972, which requires landlords to take reasonable care to ensure that tenants/others are safe from injury caused by

defects in the premises. It is possible that the Human Rights Act might apply to tenants.

Ray continued by saying that there will be a new ACOP which will have the status of the Highway Code on the road. It will be a defence in court to demonstrate that a defendant took other measures that produced at least the equivalent level of Health and Safety as that laid down in the ACOP. It will give advice on methods for: -

- Identifying asbestos
- Maintaining a register of asbestos
- Assessing the risk
- Preparing an action plan
- Setting up suitable admin. systems

There will also be other forms of guidance: -

- MDHS 100 will give guidance on carrying out surveys
- Hard hitting video "How are you today? (**Already in BHSEA Library**)
- "Asbestos Essentials" - task-based guidance for maintenance workers aimed at non-licensed work such as drilling a few holes in cement or short duration work on lagging/coating/AIB
- Free leaflet for SMEs
- Guidance for large employers

Ray added that the consultation exercise also looked at the impact of CAWR on the Chemical Agents Directive where the requirement to write down assessments was related to health surveillance and training. There was also an amendment to the Health and Safety (Enforcing Authority) 1998 which needs to clarify demarcations between HSE and Local Authorities. In these Regulations: -

- Schedule 2 lists activities allocated to HSE for enforcement, regardless of the main activity. This includes construction work in a "physically segregated area", e.g. an asbestos enclosure.
- So asbestos work in a LA enforced premises falls to HSE, except stripping of asbestos insulation from pipework
- Local Authority Inspectors cannot, therefore, generally enforce without calling in the HSE.

Ray added that the proposal is to give all work in LA premises to the LA, unless it is part of a CDM job. However, the review is on-going and we will have to wait and see what happens.

Once the new Regulations are enacted, there will be a 2 year 'lead-in' period because of the general lack of resources to carry out competent surveys or to remove asbestos materials. The overall strategy will be: -

- **Year One**
  - ❖ **Awareness Training for all**

- ❖ **Practical support to SMEs**
- **Year Two**
  - ❖ **Consolidation**
  - ❖ **Support and Guidance**
- **Year Three and Beyond**
  - ❖ **Directed Enforcement**

Ray concluded by saying that the aim was to reduce deaths by 5000, over the next 50 years, although it was realised that the benefits will not be measurable for at least 20 years, because of the long latency period. The costs were likely to be in the region of £4.8 billion!

## *Members' Questions*

**Francis Quinn of Birmingham City Council** asked for advice on the fact that building surveys were not going to be compulsory. **Ray** replied that the regulations would require duty holders to take "reasonable steps" to identify asbestos in buildings and had deliberately avoided the word 'survey'. He added that parts of a building would be surveyed from time-to-time, as required prior to work being carried out. In reply to another question from Francis, he said that he could not say what construction dates would place which buildings in an 'at-risk' categories, because there were so many variables involved. Neither could he say whether materials supplied after a certain date were safe, because they might have lain on a store shelf for years before being used.

**Tony Hall of Birmingham City Council** asked if a house was considered to be a place of work, would a comprehensive survey would be need for the whole housing stock to be sure to cover urgent work out of normal hours. Ray replied that was a decision that only the Council could take and reminded the audience that there were three types of survey that could be taken to suit various circumstances.

**Jeff Stanton of Matthew Boulton College** asked if there was any guidance on whether floor tiles came under the Regulations. Ray replied that they did not come under the Licensing Regulations but that they were covered by the Control of Asbestos at Work Regulations.

**Mark Hoare of Birmingham University** sounded a cautionary note by saying that in his experience not even 'intrusive' surveys were able to find all the asbestos present in a structure. Ray agreed that not all the so-called experts were competent and added that clients got what they paid for. He reminded the audience of the accreditation standards to look for when appointing any contractors.

**Christopher Peck of W.S. Atkins Defence Services** confirmed what Mark said about surveys being fallible. Ray agreed that a tight system of management was needed for protection against this problem.

**John Beighton** asked if there was any guarantee of quality as far as Analysts were concerned. Ray replied that only Licensed Asbestos Removal Contractors need accreditation under the Regulations - it really was a case of "Caveat Emptor" as far as analysts were concerned. He went on to say there had been a recent prosecution of a licensed asbestos removal contractor for carrying out an inaccurate survey.

**David Hughes** asked if fines were graded according to the size of as company and the magnitude of the risks to which persons were exposed. Ray explained that although fines were restricted in a magistrates court, cases could be referred to a Crown Court for sentencing if a higher fine was thought to be more appropriate. He went on to quote a precedent in the case against HOW Engineering where 'aggravating' facts were weighed against 'mitigating' facts in the sentencing process. The fine was set at  $\frac{1}{4}$  the last year's profits recorded on the company's accounts. Ray added that anyone who decided to plead guilty on their first offence, i.e. at the 'First Available Opportunity' automatically received a 30% reduction in the fine. **Geoff Miller of Solihull MBC Safety Section** commented that the neighbouring residents during the exposure of asbestos during demolition at the Coventry hospital were the persons at risk in that case and it could be argued that they deserved compensation. Ray commented that compensation is related to 'damage' and in cases of asbestos exposure it is difficult to establish because of the long latent period. Neither can it be predicted in advance because, although it is 'dose-related' exposure does not lead inevitably to disease, due to the variability between individuals. Ray added that the audience in the room were probably exposed to many hundreds of asbestos fibres per  $m^3$ , but without any harmful results.

As there were no further question, the Chairman asked the members to thank Ray for his excellent talk in the traditional way.