

## Written evidence from Neal Stone (ASB0012)

### Summary

Evidence from expert research and reviews highlight that the Control of Asbestos Regulations 2012 (CAR) are making a significant contribution to protecting those working with or potentially exposed to asbestos.

My contention, however, is that the enforcement of CAR is lacking in three key respects. First, HSE as one of the lead regulators on CAR does not have the resources that are necessary to ensure effective enforcement. Second, whilst asbestos enforcement is cited as an HSE priority the statistics show that Improvement and Prohibition Notices and Prosecutions are plummeting. Third, there is evidence that Judges and Magistrates are failing to properly follow the Sentencing Guidelines and are still imposing derisory fines.

### Introduction

The latest HSE Annual Statistics Report 2019/2020 reports, "Occupational lung diseases account for around 12,000 of the 13,000 total annual deaths estimated to be linked to past exposures at work." Of these deaths 20% are each attributable to Mesothelioma and Lung Cancer.

As Asbestos.com notes, "Mesothelioma can take 20-50 years to develop after initial asbestos exposure. It is very rare to have a mesothelioma latency period of less than 15 years."

My interest in the regulation and enforcement of asbestos controls stems in part from my work as a Policy Adviser with HSE from 1992-2008, as Director of Policy and Deputy Chief Executive with the British Safety Council (BSC) from 2008-2016 and subsequently as a health and safety consultant. Whilst with BSC I published articles and spoke at conferences concerning the continuing harm the mismanagement of asbestos in buildings causes. The long latency period and the challenges this presents are not and should not be an excuse for a lack of enforcement action or derisory fines.

### Coverage of my evidence

The two particular questions my evidence addresses are:

- How effective is the current legislation and regulatory framework for the management of asbestos?
- Does HSE commit adequate resources to asbestos management in line with the level of risk?

### Argument

The Post Implementation Review (PIR) of the Control of Asbestos Regulations 2012 and Duty-holder evidence on the Control of Asbestos Regulations 2012 (CAR) highlight that, "CAR were considered effective in achieving their objective to protect workers and others from the risk of exposure to asbestos provided that they were complied with." However, "there was some evidence to suggest that non-licence holders might not always be fully aware, or have a sufficient understanding of, the requirements under the regulations."

HSE has undergone a significant reduction in resources over the past ten years. The number of HSE Inspectors and Visiting Staff has fallen from 1,464 on 1 April 2010 to 1,059 on 31

March 2020. This reduction in numbers, together with the concomitant loss of knowledge and expertise, has led to a significant fall in enforcement action. Generating revenue through HSE’s Fee for Intervention regime should not be the driver for enforcement action. Whilst HSE is not the sole enforcing authority for CAR it does undertake by far and away the greatest share of enforcement activity.

Appendix 4 of the PIR of CAR provides a wealth of information concerning the enforcement action taken by HSE in the years 2007/2008 to 2015/2016. This includes data on Improvement Notices (Ins), Prohibition Notices (PNs) and Prosecution outcomes. Regrettably HSE does not appear to have comprehensively updated this information for the years 2016/2017 – 2019/2020. HSE has however published information for 2019/2020 concerning the number of Asbestos Inspections delivered and the number of convictions under CAR.

The policy objectives underlying the revised sentencing guidelines for health and safety offences in February 2016 include “punishing offenders” and “reducing crime by deterring others”. Whilst the Sentencing Council published an impact assessment of the revised sentencing guidelines in April 2019 the findings concerned the quantum of fines imposed not the extent to which the underlying policy objectives had been achieved. The evidence set out the impact assessment was that Judges and Magistrates were adhering to the guidelines when sentencing for health and safety offences was anecdotal rather than empirical.

Although not addressed in detail in my evidence it is clear that HSE has for many years opposed the enactment of legislation requiring occupiers of buildings to register the presence of asbestos. The lack of a register is a serious impediment to preventing both workers and others being exposed to asbestos. The UK would do well to follow the example of countries which have had the foresight to institute comprehensive registers for asbestos in buildings.

### **HSE Enforcement activity**

Appendix 4 of the 2017 PIR of CAR details the following information concerning breaches, convictions and fines.

<b>Year</b>	<b>Improvement Notices</b>	<b>Prohibition Notices</b>	<b>Successful Prosecutions</b>
<b>2013/2014</b>	234	218	40
<b>2014/2015</b>	224	249	34
<b>2015/2016</b>	198	187	49

The PIR noted that “132 duty-holders were fined in the period April 2007-March 2016. The fines totalled £1,513,368. The average fine was £5,219 and the most common range of fine was £1,000 - £2,000 and £2,000-£2,999 (44 cases for each range).”

Note that the period reported on, that is April 2007-March 2016, was prior to the introduction of the revised sentencing guidelines for health and safety offences.

HSE reported the following prosecutions under CAR in 2019/2020.

2019/2020	Convictions	Conviction rate	Total fines	Average fine per conviction
	19	95%	£58,200	£3,063

The average fine for a conviction for a breach of CAR was £3,063 in 2019/2020 compared to an average fine across all health and safety offences of £110,154 that is for 325 convictions. It is important to note that in 2009/2010 there were 735 prosecutions resulting in convictions that is over twice as many in 2019/2020. Prosecution numbers generally are in danger of falling over the cliff edge.

As stated above HSE reported that it had carried out 900 Asbestos Inspections in 2019/2020.

### Three reported cases

HSE publishes short reports of selective cases on its website. Three cases are reported below to highlight my contention that Judges and Magistrates are still imposing derisory fines. HSE and Procurator Fiscals should be more assertive in putting forward evidence of the serious risk of the harm that exposure to asbestos causes and that such action is seriously culpable. Judges and Magistrates need to understand that exposure to asbestos is a potential killer and whilst not necessarily resulting in a visible injury has the potential to end life. The Work and Pensions Committee should invite the Sentencing Council to review its guidelines in connection with health and safety offences arising from occupational disease.

It is also a matter of concern that despite HSE's undertakings given to Government coming out of the Löfstedt Review, "Reclaiming health and safety for all", of November 2011, there still appears to be an unacceptable delay in prosecutions being brought to Court. Although in the three cases reported below the time lag between the offence and the conviction was approximately between eighteen and twenty four months it is not unusual for prosecutions for health and safety offences generally to take three or more years to come before the courts.

May 2018 - **Excavation and Contracting (UK)**, an asbestos removal company, and two of its managers, were convicted at Greater Manchester Magistrates' Court after forging documents in order to obtain an asbestos licence from HSE. Between 2012 and 2016 both managers forged medical certificates and forged asbestos training certificates for their asbestos removal operatives. HSE's investigation found the defendants had used forged documents to obtain an asbestos licence from HSE in order to trade; additionally, the company could not show that they had properly trained or adequately monitored their workers who were exposed to asbestos. David Lloyd pleaded guilty to breaching CAR and was sentenced to 12 weeks in prison suspended for two years and was ordered to carry out 200 hours of community service. Lee Cooper pleaded guilty to breaching CAR and was ordered to undertake 80 hours of community service. Excavation and Contracting (UK) Ltd was fined £13,000 and ordered to pay costs of £10,000. See - <http://press.hse.gov.uk/2018/asbestos-removal-company-and-managers-sentenced-after-forging-documents/>

February 2020 - **Newnham College, Cambridge**, was fined £12,000 for failings that exposed employees and subcontractors to asbestos during refurbishment of a flat owned by the

college. Cambridge Magistrates' Court heard that in March 2018, employees of Newnham College and subcontractors were carrying out a refurbishment of a flat when asbestos insulation debris was discovered in the floor voids after work had been carried out in them. No asbestos refurbishment survey was carried out prior to insulation debris being found. One employee, who contaminated his gloves and clothing with loose asbestos debris, did not have asbestos awareness training and spread asbestos from his clothing outside the flat.

HSE's investigation found that there was inadequate planning and management of the refurbishment work of a flat. Newnham College pleaded guilty to breaching Regulations 5 and 16 of CAR and was fined and ordered to pay costs.

<https://press.hse.gov.uk/2020/01/15/college-fined-for-asbestos-failings/>

October 2019 - **RJW Building Solutions Limited**, a contractor carrying out refurbishment work at the Sea Hotel in South Shields, and **Hotel 52 (Sea) Limited**, the client company who arranged this work, were sentenced after workers disturbed asbestos. South Tyneside Magistrates' Court heard that while workers were refurbishing the bar area of the Sea Hotel in September and October 2018, they disturbed asbestos.

HSE's investigation found that both companies had failed to ensure an appropriate assessment was carried out to check for the presence of asbestos in the areas of the Sea Hotel where refurbishment work was taking place. RJW Building Solutions Limited pleaded guilty at South Tyneside Magistrates Court to breaching Regulation 5 of CAR and was fined £20,000 with costs. Hotel 52 (Sea) Limited pleaded guilty to breaching Section 3 (1) of the Health and Safety at Work Act 1974 etc and was fined £16,000 with costs.

<https://press.hse.gov.uk/2019/10/07/companies-fined-after-workers-exposed-to-asbestos/>

#### **Key document sources informing my evidence**

- Post Implementation Review of the Control of Asbestos Regulations 2012 (SI 2012/632), March 2017
- Duty-holder evidence on the Control of Asbestos Regulations 2012 (Post Implementation Review), HSE Research Report RR1106, 2017
- Sentencing Council Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Guidelines, February 2016
- HSE Annual Report and Accounts 2019/2020
- HSE Annual Statistics 2019/2020
- HSE Enforcement Database, Table 3, Offences prosecuted by HSE and the Procurator Fiscal and prosecution outcomes, 2019/2020
- HSE Media Reports

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