

## Written evidence from ATaC - Asbestos Testing and Consultancy Association (ASB0038)

### ATaC supplementary evidence to the House of Commons Work and Pensions Committee on HSE's approach to asbestos management.

This document is supplementary evidence to that discussed in the inquiry. In the committee's response following the sessions, they asked specifically for the following:

*We were interested in your comments about the lack of data on the effectiveness of the asbestos regulatory regime and the need for greater enforcement. We were also interested in your observation that the 'playing field' for the professions operating in the asbestos industry was uneven with different regulatory requirements placed on surveyors and analysts*

#### **1. Level playing field.**

ATaC is the trade association of the analytical part of the sector, known as 'analysts' for this document. Its membership comprises over 50% of the asbestos consulting sector and includes accredited survey companies.

UKAS is the national accreditation body, recognised by the government, which assesses the competency of organisations against international ISO standards. Its legal status is a not-for-profit private company limited by guarantee.

This section deals with the different regulatory requirements in terms of whether UKAS accreditation is mandatory for surveyors and analysts, and the disadvantage this places those companies maintaining survey accreditation in order to position themselves at the higher quality end of the market.

It is a legal requirement for anyone carrying out air testing and laboratory analysis of bulk samples to be accredited by UKAS. This was introduced in 1998 and 2002 respectively with the justification given by the HSE as;

- "the issue of ensuring high standards in air monitoring is sufficiently important to merit inclusion in the Regulations".
- "As with analysing air measurements, quality and competency are essential in order to allow the correct identification of asbestos in bulk materials".

There is, however, no similar legal requirement for surveying organisations to be accredited by UKAS, even though this accreditation was initially established by UKAS over 20 years ago in anticipation of it being made regulatory. Mandatory accreditation for sampling was first proposed by the HSE in 2001, but since the Duty to Manage (DTM) asbestos was introduced in 2002 (enacted in May 2004), of which surveying is a key part, the HSE has only ever "advised" survey accreditation in non-mandatory guidance.

Voluntary accreditation by laboratories for bulk sampling and analysis was in place from the mid 1980's and it took almost 20 to see the benefit that this produced in quality of work. We are now 20 years on from the introduction of the Duty to Manage but we still have haven't learned the lesson regarding quality.

It has never been explained why the HSE did not apply the same reasoning to survey accreditation when the DTM was introduced in 2002, or when the regulations changed again in 2006 and 2012. It is clear that these criteria are equally as important when attempting to identify asbestos in buildings by means of a survey, as they are for analysing asbestos.

The overall effect of UKAS introducing a survey accreditation scheme in 2002 at the same since time as the HSE decided against making it a mandatory requirement means that;

- There are no qualifications, knowledge, experience or accreditation legally necessary to carry out asbestos surveys; absolutely anyone can become an asbestos surveyor and set up a surveying practice
- There are approximately 120 companies that have voluntarily chosen to be accredited by UKAS to differentiate themselves from non-accredited companies
- These accredited companies are duty bound to carry out the following non-chargeable quality-related tasks which non-accredited companies can avoid;
  - o Maintain the quality system
  - o Quality assurance of site work – a resurvey of 5% all completed surveys
  - o Only use appropriately qualified and trained surveyors
  - o Annual witness audits of surveyors – up to three times a year for each surveyor
  - o Quality checking of survey reports
- These tasks can all be grouped under the heading of “high standards”, competency” and “quality” which was fundamental to the HSE’s change to the previous regulations
- The estimated non-recoverable costs to these companies would be a minimum of £20k per annum, and may be as much as £150k per annum for a larger survey company.

It is important to note that none of these costs are carried by non-accredited organisations and no register exists of these non-accredited organisations so it is impossible for HSE to track and monitor the performance of these companies.

The above activities are strictly monitored via UKAS as part of the accreditation scheme. Those organisations and individuals not covered by accreditation avoid these necessary checks and hence can operate on a lower cost basis, with no evidence of competency to undertake the work. They are not monitored in terms of compliance and nor is there a way of even identifying these organisations or individuals.

We would therefore ask the following questions of the HSE;

- Why was mandatory survey accreditation not introduced when a scheme was developed in anticipation of this?
- Why is it acceptable for there to be no oversight of the quality of non-accredited surveys?
- How has this affected the overall objective of preventing exposure to asbestos?

#### New HSE Guidance – and why this is mandatory by default

This section deals with a recent issue which has affected the asbestos analyst companies with regards to changes to air testing and laboratory analysis methods.

As described above, UKAS accreditation for carrying out these tasks is mandatory, and the prescribed methods are detailed in an HSE guidance document called HSG248 Asbestos The Analysts' Guide. Its status is guidance and is therefore non-mandatory, but because UKAS accreditation is a legal requirement for these activities, the method becomes mandatory by default. In the UK, UKAS are the monopoly accreditation "provider" to our sector.

The main point is that, while accreditation is mandatory (through regulation), how that accreditation is gained and maintained **should** be assessed through demonstration of competence and quality, using HSG248 as a **guide**. However, UKAS assess accredited laboratories not using the Guide as guidance, but as a literal and word-for-word instruction manual. As such, with regard to our sector, Guidance has been elevated to a status higher than that of Approved Code of Practice (where satisfactory compliance can be demonstrated not by dogmatic adherence to the text itself, but by the achievement of the required standard in some equal or better way).

When the HSE proposes changes to a regulation it is duty bound to carry out a cost-benefit analysis (a Regulatory Impact Assessment, RIA) to assess the cost of introducing the new legal requirements. However, no such requirement exists for changes to non-mandatory guidance. So when the Analysts' Guide was updated last year to include substantially more stringent quality checks, there was no RIA carried out, even though following the new methods is mandatory in order to maintain UKAS accreditation.

These new quality checks have placed significant added costs onto those companies and although the impact of these is too early to assess, anecdotal evidence suggests this will place a similarly significant cost burden on UK property owners.

The HSE originally consulted on changes to the Analysts Guide in 2015, however, this was the only consultation exercise between then and 2021 when the document was published. We would therefore ask the following questions of the HSE;

- Why did it take six years for the document to be published?

- Why did the HSE not act on comments received during the initial consultation?
- Why were further versions of the document produced, with newly added requirements, without further consultation?
- Why was there no financial impact for the additional cost burdens carried out?
- What part of the regulatory framework allows UKAS to enforce non-mandatory guidance?
- Why is it now necessary for a qualified experienced bulk analyst to spend at least 15 minutes examining a material that experience and quality checks will tell them does not contain asbestos, while someone with minimal training and experience from a non-accredited surveying organisation can make the same decision without access to the microscopes used within a laboratory?

## **2. Comments / response to inquiry sessions.**

A number of the witnesses spoke about the historic use of asbestos, but we feel what has not been made clear to the inquiry and what we believe will assist the inquiry is an understanding of how we have got the position we are currently in regarding asbestos.

Prof Peto referenced deaths amongst removal contractors as one of the reasons it's not safe to remove asbestos, while at the same time casting doubt on the work of Robin Howie. Prof Peto has referenced the risk to asbestos removal operatives and we would like to address this in two parts the first relating to Licensed asbestos removal and the second to non-licensed asbestos removal activities.

Licensing of asbestos removal activities commenced in the UK in 1983 so we have had licensing in place for almost 40 years. At the original onset of licensing work activities were associated with the removal of sprayed asbestos and asbestos insulation materials (our highest risk products) and we had only recently prohibited the use of asbestos insulating board in the 1980's. It is important to note that a significant number of people employed in the removal of asbestos were also the same people that had installed the asbestos in the first place, and hence the risk was twofold.

Initially asbestos was removed wet, the material would have been saturated with a water overnight by a running hose, and then left to fall onto the ground. This methodology produced difficulties with cleaning the workspaces, although this reduced the levels of asbestos fibre. As a result of the difficulties in cleaning processes and the general dissatisfaction with the cleanliness of removal environments the process changed to the dry removal of asbestos and this considerably increased fibre levels within asbestos workspaces, but this was countered by the belief that the Respiratory Protection Equipment (RPE) in use would provide protection.

At this time a typical asbestos removal respirator would have had a nominal protection (NP) of 1000. This meant that the respirator would protect the wearer up to 1000 the control limit. At the time the

control limit was 2 f/ml this meant that the respirator was considered effective up to 2000f/ml. To give this some context this equates to 2,000,000,000 fibres per cubic metre.

In 1996 Robin Howie et al published a paper questioning the protection factor of asbestos respirators and as a direct result of this the NP was subsequently reduced from 1000 to 40. This was entrenched in HSE guidance. In addition to this the control limit had been reducing, and currently stands at 0.1 f/ml. Today highly controlled wet stripping of licensed asbestos is the norm.

So we have moved from a position in 1983 when it was considered acceptable for asbestos removal operatives to wear respirators where the work area contained up to 2000 f/ml whereas today the maximum permitted undertaking the same work would be 4 f/ml.

The deaths that we are currently seeing from those that worked in the asbestos industry date back to exposure 30, 40 or even 50 years ago and with hope, the work done by Howie and others has reduced this risk considerably and we should not see the same levels of deaths from within the licensed removal sector. Whether the same is true of the non-licensed sector it is impossible to say at this stage as the data is simply not available.

Alongside the changes in RPE from the licensing regulations also saw the establishment of commercial asbestos laboratories, initially these organisations were uncontrolled but from the mid 1980's these organisations began becoming accredited to a predecessor of UKAS (NATLAS). Enlightened clients began specifying the use of these accredited laboratories which eventually resulted in the mandatory accreditation for laboratories undertaking post removal checks in 2006. Check fibre counting date.

It is our opinion that Professor Peto's comments undermine the work undertaken by Howie and the pivotal role that this has played in reducing risk in the asbestos industry and also in workplaces where RPE is used. The most recent being the widespread use of RPE within the health sector with frontline staff being face fit tested to ensure the RPE they are provided with face fits. Without this the consequences of covid within the health sector could have been far greater.

This also illustrates how the pace of change in the sector is slower than we would hope and that the sector lacks any detailed research aims and objectives. Our members who have been in the sector for most of their working lives still find it difficult to understand why we have high-risk materials such as sprayed asbestos in schools and other public sector buildings. Part of this we feel is due to the approach to measuring asbestos risk. The RPE changes have been typical of changes in asbestos controls since the introduction of controls in the 1930's.

It is generally assumed that a scientific approach sits behind the establishment of a control limit, but this is not necessarily the case. Initial limits to set controls on asbestos following the introduction of the 1931 regulations were based upon what was achievable and what was measurable. The limits were set based upon what could be achieved at a reasonable cost, and this approach still pervades today with our cost benefit analysis.

The reduction in control limits in respect to asbestos is an on-going long-term experiment, a limit is established as being achievable and measurable. Subsequent analysis of the impact of these levels will be made and if the levels are not in line with expectations further reductions are made. Given that the effect of these measurements can only be made over decades we will always see this delay.

What our current approach does not consider is the impact of long-term, low -level exposure. Asbestos fibres are biopersistent and once inhaled will remain in the body. So a single very low level exposure should not produce any long term harm. However, cumulative exposure to very low levels will potentially over time result in exposures similar to those who work with asbestos. Alongside this we are seeing research that considers susceptibility. What we have not done in the UK is tie all of this together into an approach that is fit from today's acceptance of risk.

Elsewhere in Europe they have started to review exposure in terms of tolerable risk, or acceptable risk, this involves establishing what is considered acceptable and then establishing a level to match this. If we follow the current guidance on risk modelling and look at fire then the events at Grenfell would be regarded as acceptable as any cost benefit analysis would not show the risk justified the cost, but public and political anger has changed this approach. If we consider covid Government spending as at September 2021 was £370 billion based on deaths at the time of writing this places a life at £2,500,000 over twice that used in the current asbestos cost benefit analysis.

Our position is based upon the analysis of data, but we cannot be certain of the accuracy of the data we have, the number of mesothelioma cases in the UK increased rapidly and the presumption is that this follows our intensive use of asbestos 30-50 years prior to the death being recorded. This assumption relies on all mesothelioma deaths being recorded as such. It is interesting that the evidence submitted by Mesothelioma UK notes that between 2002-15 the ONS recorded 177 deaths from health works from mesothelioma whereas NHS Resolution recorded 961 claims between 2004-17 of which half were successful.

It is important that we have a true figure as each under or over recording affects overall numbers as for each mesothelioma death we assume an asbestosis victim.

Furthermore, we talk about asbestos as if it is one product accepting that all types of asbestos fibre present a risk. We need to consider the differing risks from the different products in which these fibres are used. We have products in which the asbestos fibres are loosely bound and are very easily released and at the other extreme products where the fibres are well bound and not easily liberated. The ability of these products to release fibres affects the risk they present. When talking about the wholesale removal of asbestos we should consider the highest risk materials first, in this day and age we should not have materials such as sprayed asbestos present in schools and other educational facilities or public buildings. More work needs to be done by all involved in the sector to improve the understanding of the different risk these products present and this could start with revising guidance so that the scoring system reflects the quantum of risk difference and not simply be an incremental increase in value.

ATAC participates in HSE Asbestos Network, this group was previously known as the Asbestos Leadership Group and is comprised of representatives from trades unions, industry bodies,

professional institutions and HSE during its time this group was permitted to produce memos which became de facto guidance for the asbestos removal industry but successive changes has meant that this no longer the case and although the trade bodies representing the licensed contractors will adopt the findings of the group other are less likely to, and in many instances will be unaware as the guidance is no longer badged by HSE guidance. It is imperative that groups like this are able to agree and produce guidance that can carry the branding and weight of HSE so that the guidance conveys the gravitas of the regulator.

### **3. Why is the regime ineffective (if indeed it is)?**

Why is Duty to Manage not effective, in some or more cases? Principally, lack of awareness and policing. Does everyone know about DTM? And if not, why not? Where is the publicity, the visits, the deterrent fines, the engagement of HSE with stakeholders? If the HSE does not have the resources to get this right, then how on earth can they, in all reasonableness, take on the Building Safety Regulations, and enforce those (in the aftermath of Grenfell), which they are going to do this year? Where are those resources coming from, and will there be any 'joined up' planning and enforcement? A question we cannot answer.

- lack of incentive to actually implement DTM? Certainly, management should be cheaper than removal, but what about the cost to society -health, deaths, compensation, and has there been an analysis compared to removal / improvement of properties such as schools.? Government backed assessments of the cost of maintenance shortfall in both the NHS and education estate is around £20 billion, but this cost does not factor in dealing with asbestos, clearly highlighting the lack of consideration being given by Government.
- lack of deterrent for failure to implement DTM? I cannot recall any fines for non-compliance, and the ones for breaches (see below) are paltry.
- lack of clear guidance on implementation of effective DTM?
- inaccurate information for the dutyholder (deficient survey information, for example)?
- is it that failure to implement DTM at all is a consequence of the default position being seen to be "do as little as possible", rather than a demonstrably pro-active approach of active remediation?
- We see evidence of reduced numbers of inspections and enforcement. Without inspections, they are unlikely to catch anyone, or enforce.
- What is the deterrent? The sentencing guidelines are clear, but some examples of fines are as follows:
  - Published December. Contractor removed licensed asbestos from a community centre in Ilford. 100 hours community service. Why was there no asbestos management plan for the centre initially as required by Regulations 4? Was there? Did it highlight the asbestos? But the builder (only) was fined.
  - 29<sup>th</sup> Nov. School and contractor fined while installing a new heating system. Disturbed AIB tiles (licensed activity). School fined £3000.00 + costs contractor fined £2000.00 + costs. A large-scale removal of AIB would likely cost £20k plus. The school should have had an AMP.
  - 18<sup>th</sup> Nov. Builder refurbishing a pub removed asbestos without a license. Fined £300.00.

Why pay for proper removal when it can be done with very little chance of getting caught, and if you do get caught, the fines are likely to be less than the actual cost of removal! We are seeing licensed asbestos contractors having non-licensed work assessed by HSE to the highest standards but non-licensed contractors undertaking work that should be licensed under the radar. As with non-accredited surveyors these organisations are not registered or monitored by HSE.

#### **4. Non-licensed work.**

The distinction between licensed and non-licensed work is documented in the CAR2012, but the inquiry has raised some questions on the distinctions between the types of work. When the regulations were updated in 2006, a new tier of work was introduced, in notifiable non-licensed works, due to the EU Directive being enforced. Anecdotally, it was known the HSE were unhappy with this change and were clear they didn't have the resources to sufficiently regulate this type of work.

There are clear issues with the distinction in the types of work. Licensing, as a permissioning regime, means contractors are granted a license by HSE to carry out this work, having met specific criteria, such as training, competence, medical surveillance etc. Then the work is notified to HSE 14 days in advance, so the HSE has statistics on this type of work, and the notification allows them to collate the statistics and to visit the sites should they need to do so. Finally, it is a regulatory requirement that licensed work is checked by an 'independent' (see section 5 for further comment) analytical organisation, under Regulation 17.

Non-licensed work, however, has none of the above requirements. Those carrying out the work must be competent (required training) and subject to a risk assessment and plan of work (like all work with asbestos), but unlike the LARCs (HSE) and analytical organisations (UKAS) there are no external checks on this work. Notifiable non-licensed work, while requiring notification to HSE prior to work starting and medical surveillance of the workers, has no independent checks of the standard of work. The HSE produces statistics of number of notified non-licensed works, but to our knowledge does not specifically attend these sites.

As a consequence, it appears there is a significant sector of asbestos removal work which goes ahead unchecked. A customer is often uninformed in that they may not be aware of what is licensed and what is not. The decision regarding which category any asbestos works falls into is ultimately made by the dutyholder. While legislation, regulation, and guidance assists in this decision-making process, there is a hinterland where the category is subject to interpretation of the specific circumstances. Due to the lesser actual and perceived degree of control merited / required for non-licensed work, "downgrading" of the category can be advantageous to the dutyholder

But even if the material is non-licensed, there are examples of a client employing, say, a roofing contractor to remove asbestos cement roofs. This work is non-licensed. But as there are no independent checks on the work, they have been left with significant clean up costs once the new contractor arrives, and discovers significant debris to roof purlins, floors etc following the poor work, and refuses to work until this is cleaned up.

There appears to be an attitude that the 'jobbing builder' with a training course can remove some asbestos because it is 'low risk'. While this is literally true, how do we know if the work is carried out correctly and safely? This perception also appears to be common with LARCs who are often employed to carry out non-licensed work, but do not necessarily apply the same stringent practices as they would with licensed work. It is likely this is because they see the work as not as 'hazardous' but equally, they know there are no independent checks or likely HSE attendance.

Therefore, while it is known that the non-licensed asbestos products are lower risk, the lack of enforcement and checks can, in fact, increase risk if the work is not carried out correctly. The reason the HSE were forced to introduce the notifiable non-licensed tier of work was because the EU did not feel the Directive was correctly implemented. However, it seems this has not solved the problem of a large sector of 'asbestos workers' as well as the public being potentially exposed to asbestos.

## **5. Changes to CAR 12 in 2022 review**

- A review of the UK's approach to our long-term management of asbestos is required to ensure our approach to asbestos provides those managing properties with some clear guidance as to the objectives to manage asbestos in the short, medium, and long term. We believe that, in 2022, it is unacceptable to find high risk materials such as sprayed asbestos within education buildings.
- Accreditation for surveying in Regulation 4. While the costs for this have been explained, there needs to be a level playing field, particularly if consistency of information and databases are the future. There should be a demonstrable cost and quality benefit in this being the case. While it is a matter of record that both accredited and non-accredited surveys have been conducted well in many instances (and poorly in others) accredited surveying organisations have, through mandatory and audited in-house QA procedures, demonstrable independence, objectivity, reproducibility, and reassurance in their accuracy. Therefore, if the HSE's key regulation is Regulation 4 then surely this is a key component of this. They have also demonstrated that accreditation can be required. It is puzzling why this is not in place.
- Ensure independence of analysts and LARC for Reg 17. Like everywhere else in Europe, Hong Kong, Australia etc., analysts, under Regulation 17, must be client-appointed and not directly employed by LARCs (marking their own homework). The HSE is aware of this, but just 'recommends' independence. If they are aware of the problem, then why not act, and now, when they can? This would go a considerable way to reducing the number of poor visual inspections, as was suggested were happening during the inquiry, as well as removing the element of pressure and abuse of analysts by LARCs. The point must (always) be made that for every poor visual inspection there is, by definition, a poor abatement project and a poor visual inspection by the LARC's supervisor (which is part of the due process).
- In addition, independence should be expanded for businesses with shared ownership i.e. LARCs owning analytical organisations or vice versa. Again, in the new HSG 248 it is implied this shouldn't happen, but how would a client know if this were hidden?
- Review the status of non-licensed work with regards to licensing and independent checks etc. It isn't realistic for this huge sector of work to go on being effectively 'unregulated'.
- Social housing is specifically excluded. This is largely a workplace, and places where a large sector of society could be exposed to asbestos. Lots of social housing providers have this information. It needs inclusion, specifically, not just in regulation 5 which isn't explicit. We believe that social housing needs to be part of Regulation 4.

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