



**Control of Asbestos at Work
Regulations 2002
(CAWR 2002).**

**'The new duty to manage
asbestos in non-domestic
premises'.**

**John Dyne LL.B
Dyne Solicitors Limited**

Introduction	3
Who must comply with the new duty to manage?.....	4
The ‘duty holder’	5
What are the duties under regulation 4? (What has to be done and how?).....	6
Determine if any asbestos is liable to be present	6
Find ACMs and assess their condition.....	7
Management of the risk.....	9
Monitoring arrangements	10
Provision of information.....	10
Review of the Management Plan	11
Obligations of contractors	11
Consequences of breaching the duty to manage.....	12
Defence.....	12

Introduction

The object of this note is to briefly summarise the key points of the Control of Asbestos at Work Regulations 2002 (CAWR 2002) in relation to the new duty to manage asbestos and the accompanying Approved Code of Practice '*The management of asbestos in non-domestic premises*' (ACOP).

The Control of Asbestos at Work Regulations 1987 (CAWR 1987) was the last specific set of regulations dealing with nearly all work with asbestos including monitoring and laboratory analysis. CAWR 1987 adopted the approach used in the Control of Substances Hazardous to Health Regulations (COSHH) of carrying out an assessment of work, which exposes employees to asbestos, and then taking appropriate measures to control the risk. The control limits for each type of asbestos were prescribed in the regulations.

Asbestos legislation has tended to focus on situations where it is known that asbestos is present in the working environment, such as the industries where asbestos is used or produced, or where specialist contractors are removing asbestos. There already exists a duty under CAWR 1987 for employers to carry out a risk assessment before undertaking any work, which exposes or is liable to expose employees to asbestos but in practice the employers would have little or no information about the premises where the work was to be undertaken. It was recognised that this made risk assessing difficult and therefore the asbestos legislation did not adequately protect the largest group of workers found to be at risk from asbestos-related disease i.e. those in maintenance and building related trades such as carpenters, plumbers, electricians and cablers who were especially vulnerable to exposure as they were often unwittingly working on asbestos containing materials (ACMs). Asbestos might be encountered unexpectedly or might not be identified at all, particularly if its presence was not suspected. The concern was that such lack of knowledge might lead to repeated exposure, which might be either 'high' or 'low' depending on the material being worked on and the tools being used.

A further issue was that not just building workers might be liable to exposure. It was recognised that people working or living in premises with damaged ACMs (in circumstances where fibres may be disturbed and released) might also be at risk of small but repeated exposures.

The new duty to manage has been devised specifically to address these problems and to protect these groups of people.

The new duty to manage will require duty holders to actively look for ACMs rather than just deal with them when they are found. CAWR 2002 consolidates the duties imposed generally by existing law (see S. 4 HSWA 1974) and relates

them specifically to the hazard of asbestos in buildings. Duty holders will be required to identify ACMs and presumed ACMs in their premises, record their location and condition, undertake a risk assessment and implement a plan to manage the risks from them (including providing information to maintenance workers or others who are liable to disturb the ACMs).

The new duty applies only to non-domestic premises – i.e. factories, warehouses, offices and other workplaces. Non-domestic premises exclude premises occupied as a private dwelling (including any garden, yard, garage, outhouse etc appurtenant to such private dwelling). Although the duty to manage does not place any duties on landlords in respect of individual houses or flats; lifts and other common parts (corridors, staircases etc) in housing developments and blocks of flats are not part of the private dwelling and are treated as non-domestic.

Who must comply with the new duty to manage?

The meaning of ‘duty holder’ (regulation 4(1)) has undergone a series of revisions during the course of the consultation process.

The original consultation proposed that the duty holder be *‘the employer in control of premises which they occupy and in which persons work’*. This approach was criticised because it was felt that it did not adequately deal with the many situations where the occupier of a building is not solely responsible for maintenance and repair activities nor did it address the range of relationships that exist between tenants and landlords. The approach was also criticised because it failed to place any duties on other parties who might have a significant influence on how asbestos is dealt with.

During the second consultative stage the duty holder definition placed the main duty on the employer in occupation to ensure that the requirements of the regulation were carried out and introduced a duty on all *‘other parties’*¹ who had, by virtue of any contract or tenancy, an obligation in relation to the maintenance or repair of the premises (or any means of access or egress to or from the premises) to take the necessary steps to enable the employer to meet those requirements. The extent of the duty would be determined by express or implied terms in leases or contracts between the parties.

However it was felt that the revisions lacked clarity and the obligations on the other parties to *‘take the necessary steps to enable the employer to meet his requirements’* were too *‘passive’*. It was also felt that there should be explicit duties on building owners.

¹ ‘Other parties’ – i.e. owners of buildings, managing agents, sublessors.

The 'duty holder'

The meaning of duty holder was subjected to further revision to make it clear that when deciding who the duty holder was, the starting point is always to establish who has the maintenance and repair obligations under the terms of the contract or tenancy. In situations where no relevant contract or tenancy exists, it falls to any person who has control of the premises.

'4 (1) Duty holder means: -

- (a) every person who has, by virtue of any contract or tenancy, an obligation of any extent in relation to the maintenance or repair of non-domestic premises or any means of access thereto or egress therefrom; or
- (b) in relation to any part of non-domestic premises where there is no such contract or tenancy, every person who has to any extent, control of that part of those non-domestic premises or any means of access thereto or egress therefrom,

and where there is more than one duty holder, the relative contribution made by each such person in complying with the requirements of this regulation will be determined by the nature and extent of the maintenance and repair obligation owed by that person.'

It should be emphasised that there may well be more than one duty holder. For instance the Tenant might be responsible for the repair and maintenance of the internal parts whilst the Landlord might be responsible for the external walls roof and common parts. This may pave the way for potential disputes between Landlords and Tenants over the interpretation and effect of repairing obligations in leases!

An HSE Asbestos Policy Adviser's expressed view is:

'If there are grey areas in the lease where there is no clear responsibility lying with the tenant HSE is likely to require the owner to manage the risks. If a subsequent legal ruling shows that the tenant was responsible the owner would be able to recover his costs from the tenant. If the duty holder fails to carry out an assessment under Regulation 4 they would be the ones HSE would take enforcement action against. But the employer in occupation should be aware of his responsibilities under Regulation 6 of CAWR to carry out risk assessments where employees are liable to be exposed to asbestos and Regulation 10 to prevent his employees being exposed to asbestos. They would need to be careful not to do anything that might disturb the fabric of the building where no regulation 4 assessments had been done. The tenant should report problems like this to the local HSE Officer'.

The duties under regulation 4 will thus rest with the person in control of the maintenance activities whether or not that person is the occupier or the Landlord, sublessor or the managing agent.

In a situation where a lease or tenancy agreement indicates that the landlord will be responsible for the maintenance of the building but the landlord has entered into an arrangement with a buildings management consultant under the terms of which the buildings management consultant assumes full responsibility for the management of asbestos in the building, who will be the duty holder? Will the duty holder be the landlord or the buildings management consultant? The HSE Asbestos Policy Adviser's view is: -

'In the example you give the landlord remains the duty holder. They are simply employing a consultant to assist them in managing the risks from the asbestos-containing materials. The contract is not giving the consultant control of the management of building in respect of general maintenance and repairs'.

The ACOP states that *'the owner/leaseholder may pass all or some responsibilities for maintenance and repair of the premises to a managing agent. The agent would be required to carry out the actions in the same way as the owner. However, this does not necessarily mean that the owner has passed on his legal obligations to comply with the duty to manage regulation'.*

Where no tenancy agreement or contract exists, or where the premises are unoccupied, then the duty will fall on the person in control of the premises. An owner may lease the premises on the basis that the tenant is responsible for all alterations, maintenance and repairs in the premises. In such event the tenant will be the duty holder. Alternatively the owner may retain responsibility for maintenance and repairs in which case the owner will be the duty holder. If the premises are unoccupied, or occupied solely by the owner, again the owner will be the duty holder for the purposes of regulation 4. Again, as mentioned above, the Landlord and Tenant may well have to share the responsibility. In the majority of cases I suspect that the obligation will rest with the Tenant (in other words, the employer of the workers at the premises).

What are the duties under regulation 4? (What has to be done and how?)

Determine if any asbestos is liable to be present

A duty holder is tasked with ensuring that a *'suitable and sufficient assessment'* is carried out as to whether asbestos is or is liable to be present in the premises.

'4(3) In order to enable him to manage the risk from asbestos in non-domestic premises, the duty holder shall ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises.'

In practice the duty holder will need to ensure that a '*competent*' person is appointed to carry out the assessment in order to meet the requirements of regulation 4. The MHSWR 1999 states that a person is '*competent*' if he has '*sufficient training and experience or knowledge and other qualities to enable him to properly assist in undertaking the measures referred to*'.

The duty holder can delegate the task but not the legal responsibility to a nominated person. It is therefore essential to nominate a person or organisation that knows what he, she or it is doing. The ACOP states that the nominated person '*should have suitable competence and training for this work, have adequate experience, independence, impartiality and integrity, an adequate management system as well as the ability to carry out any survey in accordance with recommended guidance, MDHS100 Surveying, sampling and assessment of ACMs.*' '*If personnel are being employed to identify ACMs through sampling and analysis accreditation by UKAS, under either ISO 17025 or ISO 17020, as appropriate would indicate that they are likely to be competent*'. The ACOP further cautions that: '*before employing anyone to undertake a survey, you are strongly advised to check that the person you employ has the relevant accreditation for the type of survey that you request and practical experience of the type of building*'.

Find ACMs and assess their condition

An assessment will have to be made as to whether or not there is or may be asbestos in or on the premises and if so its condition checked.

'4(4) In making the assessment:-

- (a) such steps as are reasonable in the circumstances shall be taken; and*
- (b) the condition of any asbestos which is, or has been assumed to be present in the premises shall be considered.'*

The ACOP provides an illustrative list of potential ACMs but any part of the premises, which are reasonably accessible, where asbestos might have been used must be inspected. Fixed plant and machinery and parts of process plant as well as mobile equipment, which are kept and operated on the premises all the time, must be included. Detailed guidance on what to look for and how to go about the inspection is contained within MDHS100. The ACOP also states that '*everything that can reasonably done must be done*'. All documentary information that can be obtained about the premises must be gone through systematically and anyone (i.e. architects, building surveyors, building contractors, safety representatives and staff who are familiar with the premises) who may be able to provide information should be consulted.

'4(5) the duty holder shall ensure that: -

(a) *account is taken of building plans or other relevant information and of the age of the premises; and*

(b) *an inspection is made of those parts of the premises which are reasonably accessible.'*

During the inspection of the premises, if any material is found that looks as though it might contain asbestos, it should be presumed that it does, unless there is strong evidence that it does not.

'4(6) The duty holder shall ensure that the assessment is reviewed forthwith if: -

(a) *there is reason to suspect that the assessment is no longer valid; or*

(b) *there has been a significant change in the premises to which the assessment relates.'*

The duty holder must ensure that the drawing or record is reviewed and brought up to date every time that it is known something has changed that

affects the risks from the ACMs. The ACOP cites as examples *'if building work is done, some of the asbestos material is removed or if someone else provides some more information about where asbestos may be'* or if it is noticed that the ACM has become damaged.

'4(7) The duty holder shall ensure that the conclusions of the assessment and every review are recorded.'

Where asbestos is present, or assumed to be present, the duty holder must make a note of the location of the asbestos; the extent of the asbestos, its condition and what form the ACM is in (i.e. tiles, boards, cement sheets) and what it looks like (e.g. if it is painted, what colour). Enough information must be noted in the record so as to enable another person to identify it. The ACOP suggests that an accurate drawing of the premises should be used and the main features of each room and passageway as well as any other information that will assist the identification of individual locations. Whatever means is used to record information, whether records, drawings, building plans or photographs, others must easily be able to identify the places where it is suspected there may be asbestos.

Any area of the premises not accessed or inspected must be recorded. Any such area must be assumed to contain asbestos unless there is strong evidence that it does not. The ACOP states *'partition wall boards, ceiling tiles and insulation materials on pipe work and boilers need to be treated as though they contain asbestos unless there is strong evidence that they do not'*. Once a material has been identified or presumed to contain asbestos its condition must be checked and its condition noted. ACMs only have the potential to damage health if they release dust and fibres into the air, which people breathe. The ACOP states that if the ACMs are in *'good condition and are unlikely to be damaged or disturbed, then it is better to leave them in place and to introduce a*

system of management'. If the ACM is intact there is no need to remove or interfere with it. All that needs to be done is to make a note of the location and condition of the ACM and to ensure no one interferes with it unless proper precautions are taken. ACMs will have to be removed despite the fact they are in good condition if the ACMs are in places where they are likely to be disturbed or damaged – e.g. if demolition, building work or maintenance is likely to disturb them then ACMs should be removed before the work commences.

ACMs, which are slightly damaged, can be repaired encapsulated or enclosed. This option will be appropriate if no major alterations or refurbishment to the relevant area of premises is planned. ACMs, which are damaged and cannot be repaired, would normally need to be removed or sealed away.

Management of the risk.

'4(8) Where the assessment shows that asbestos is or is liable to be present in any part of the premises the duty holder shall ensure that:-

(a) a determination of the risk from that asbestos is made;'

Where asbestos is present, or assumed to be present, the duty holder must carry out risk assessment. The information on the drawing or record of location of the ACMs will need to be considered for the purposes of the risk assessment and in order to decide how the risk is to be managed. For ACMs to pose a risk asbestos fibres must be released and become airborne. The ACOP states that ACMs that have deteriorated or been damaged, or are likely to be disturbed in the course of unplanned work or are very accessible and likely to be disturbed or damaged in normal use or by vandalism will present a greater risk. The risk will be greater still if the ACMs are in a confined space or unventilated area. There is unlikely to be any significant risk from ACMs in areas, which are unoccupied, inaccessible and not likely to be disturbed by maintenance activities.

Each separate location will therefore need to be assessed individually.

'(b) a written plan identifying those parts of the premises concerned is prepared, and'

Where an ACM is present or is presumed to be present the duty holder must prepare a written plan, which sets out how the risks from any ACMs are to be managed. The plan will need to identify the parts of the premises affected as well as the measures, which are to be taken for managing the risk. The ACOP states that *'managing the risk means making sure as far as reasonably practicable no one can come to any harm from asbestos on the premises'*.

'(c) the measures which are to be taken for managing the risk are specified in the written plan'

The management plan will need to specify whether any repair or removal work needs to be done and the order of priority for this. The ACOP states that *'areas of highest risk will need the earliest attention and the strictest management'*. The management plan will also need to manage any ACMs that remain on the premises so that potential danger is tightly controlled and the risks are kept to a minimal practicable level. Whether to remove or 'repair and manage' will depend on a number of factors including the type of asbestos, its condition, and its vulnerability to accidental damage, vandalism, or disturbance by maintenance. Whatever is decided the decision must be recorded and the records and drawings kept up to date.

Monitoring arrangements

'4(9) The measures to be specified in the plan for managing the risk shall include adequate measures for: -

- (a) monitoring the condition of any asbestos or any substance containing or suspected of containing asbestos;*
- (b) ensuring any asbestos or any substance is properly maintained or where necessary safely removed; and'*

Any ACMs left 'in situ' will need to be inspected periodically to check that they have not deteriorated or been damaged. The ACOP states that ACMs *'will need to be checked more often if it is in a place where it might get damaged'*.

Provision of information

The measures specified in the management plan should be recorded in a manner that is both easy to retrieve and comprehend. The ACOP suggests the clear labelling of all the ACMs or suspected ACMs on the premises or, alternatively, the operation of a permit to work system whereby no work commences until the maintenance worker or his supervisor has been provided with all relevant information as to the location and condition of the ACMs.

'4(9)(c) ensuring that information about the location and condition of any asbestos or any such substance is: -

- (i) provided to every person liable to disturb it, and*
- (ii) made available to the emergency services.'*

The duty holder is obliged to ensure that information as to the location and condition of asbestos is provided to *'every person liable to disturb it'* and make such information *'available to the emergency services'*. This is in keeping with the main focus of the regulation, which is the protection of those in

maintenance and related trades and the emergency services² most likely to disturb ACMs or come into contact with disturbed asbestos. This would also include passing on information to any new occupier.

The HSE have recommended to the Health & Safety Commission that, on balance, it is best not to extend the duty to pass on information to a wider category of persons (i.e. all workers in and visitors to the premises not liable to disturb asbestos) as this might increase the pressure to remove (perhaps unwisely) the ACMs. In the view of HSE *'the risk of inappropriate action would outweigh any health & safety advantages in complete openness'*. The ACOP simply states that the dutyholder must tell employees about the arrangements specified in the asbestos management plan and provide copies of the recorded arrangements to employee safety representatives and trades union safety representatives. It is assumed that the duty to 'tell', in the case of employees, will be limited to those employees liable to come into contact with and disturb asbestos.

Review of the Management Plan

'4(10) The duty holder shall ensure that: -

- (a) the plan is reviewed and revised at regular intervals, and forthwith if:-
 - (i) there is reason to suspect that the plan is no longer valid, or*
 - (ii) there has been a significant change in the premises to which the plan relates;**
- (b) the measures specified in the plan are implemented; and*
- (c) the measures taken to implement the plan are recorded.'*

The records and drawings must be updated to reflect any changes discovered. The ACOP suggests that *'as a minimum the ACMs should be checked every 6 to 12 months even if it is in good condition and not going to be disturbed, as it may for example be accidentally damaged.'*

Not only should the management plan be implemented but also any details of the implementation and monitoring system employed should be recorded.

The ACOP states that *'there should be periodic checks to make sure that the arrangements are working and that people are fully aware of what they should be doing to comply with the duty to manage.'*

Obligations of contractors

² The ACOP suggests that the Fire Services in particular need to be made aware that ACMs are in the premises.

Building maintenance contractors will not have any direct duties under regulation 4 (save in relation to their own business premises) unless they either have contractual responsibilities for maintenance activities or they exercise some control over the premises – i.e. ‘caretaker’ duties. The ACOP provides that *‘In order to clarify their duties the contractor may wish to ensure that the contract specifically excludes duty to manage responsibilities so that there is no doubt about their role here.’*

The duty holder should give the contractor information on the location and condition of ACMs and if any asbestos is present or likely to be present, the contractor will have to comply with all of CAWR 2002 with the exception of regulation 4. The ACOP states that a contractor should report any unexpected asbestos or suspected asbestos to the duty holder and *‘inform the duty holder if there is any discrepancy between the actual condition of the material and the information they are given.’*

‘4(2) Every person shall cooperate with the duty holder so far as is necessary to enable the duty holder to comply with his duties under this regulation.’

Consequences of breaching the duty to manage

Any failure to comply with regulation 4 will be a breach of statutory duty giving rise to a maximum fine of £5000 in the Magistrates Court and an unlimited fine in the Crown Court. If employees or other persons are exposed to risks as a result of the failure to comply with regulation 4, then it is likely that HSE would also bring additional proceedings for breach of S.2, S.3 and S.4 HSWA 1974 which could each potentially visit fines of up to £20,000 in the Magistrates court or unlimited fines in the Crown Court.

A new regulation 28 appears in the final version of CAWR 2002, which affords a defence in relation to breaches of all regulations under CAWR 2002, not just regulation 4. New Regulation 28 states: -

Defence

28. Subject to regulation 21 of the Management of Health and Safety at Work Regulations 1999, in any proceedings for an offence consisting of a contravention of these Regulations it shall be a defence for any person to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of that offence.

It will not be necessary to prove that the breach of regulation 4 was due to the act or default of another person.

A duty holder will not however be afforded a defence to any breach of his obligations by reason of any act or default of an employee or a person appointed by him to give competent advice - regulation 21, MHSWR 1999.

The HSE may well refrain from bringing proceedings preferring to enforce the regulations through the enforcement notice procedures available to them. However serious or persistent breaches will inevitably end up in Court.

John Dyne LL.B., Solicitor.
Dyne Solicitors Limited
March 2005.
ibd@dynesolicitors.co.uk
Tel: 01829 773 102
Fax: 01829 773 109