Consultation on replacement of the Construction (Design and Management) Regulations 2007

IOSH response to the HSE consultation on CD261

Submission

06.06.14
Introduction

This consultation seeks views on proposals to replace the Construction (Design and Management) Regulations 2007 (CDM 2007) and withdraw the Approved Code of Practice. The proposed Regulations implement in Great Britain the requirements of Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites, apart from certain requirements which are implemented by the Work at Height Regulations 2005.

In the main proposed changes, the Government aims to: make the Regulations easier to understand; replace the CDM coordinator (CDMc) role with the principal designer; replace the ACoP with targeted guidance; replace the detailed and prescriptive requirements for individual and corporate competence with a more generic requirement; align notification requirements with the Directive; and apply the Regulations to domestic clients but in a proportionate way.

IOSH notes the summary results from the 2012 Evaluation of the Construction (Design and Management) Regulations 2007 report (RR920), indicating that:

- CDM 2007 has gone a long way to meeting its objectives, but some concerns remain within the industry
- Construction design, management and site practices improved between 2006 and 2010
- Respondents rated the benefits obtained from CDM2007 as higher than costs
- Industry practice was found to have a significant influence on how CDM 2007 is implemented.

IOSH summary position

Given that one construction worker is killed each week on average during construction work and there are around 31,000 new cases of occupational ill health per year; improvement is urgently needed. IOSH is disappointed that these proposals have not taken more opportunity to strengthen construction risk management, while reducing bureaucracy, and are concerned at the lack of emphasis on health and safety competence throughout. In our submission, we have suggested a number of improvements and would be pleased to work with HSE and the industry to identify and implement practical solutions.

As well as specific concerns about these proposals (see 10-point list below), IOSH has concerns about the timings and scope of proposed changes related to CDM, as follows:

- The major evaluation study into CDM2007 (RR920), did not indicate a need for radical change (see below) and neither did Professor Löfstedt’s review, which only recommended “...a clearer expression of duties, a reduction of bureaucracy and appropriate guidance for small projects.”
• The EC is currently conducting a major review into the practical implementation of EU law, including 92/57/EEC, with a preliminary report due at the end of 2015, which could provide useful lessons, including on domestic clients
• Concerningly, RR920 found the recent economic downturn had led to instances of “…price being more important than competence, early starts on site and compressed timescales.”
• During the economic recovery, the UK construction sector is likely to grow and become more active, resulting in an increase in risk due to inexperienced workers
• The Lord Young, Professor Löfstedt and Red Tape Challenge recommendations have already led to numerous changes to health and safety guidance for stakeholders to assimilate since 2010
• The Construction Industry Training Board and HSE are currently reviewing the overall approach to construction health and safety competence and a clear way forward is yet to be established

IOSH’s specific concerns about these proposals include:

1. IOSH fully supports the need to strengthen CDMc efficacy, but disagree with transferring the role to the Principal Designer and instead, propose improvements, including the appropriate use of project risk registers
2. We agree there is scope for improved guidance and ACoP and would be pleased to assist with this, but disagree with withdrawing the ACoP, which we believe is unhelpful
3. We are keen to reduce bureaucracy and suggest ways to do this, but we disagree with removing the explicit competence requirement, due to concerns it may potentially lead to incompetent site practice and accidents
4. We are not convinced that the proposed changes will be more easily understood by SMEs and have suggested other methods of achieving this
5. We counter-argue the view that the current notification threshold is ‘gold plating’ and are against extending it to require 20 workers working simultaneously, because this may lead to lower standards
6. We suggest the reinstatement of the general management duties for coordination, which have been lost from the new regulations
7. We are concerned that the proposed ‘deeming’ arrangements for domestic clients may lead to unintended results and recommend they are reconsidered
8. We suggest that the timing of these proposals is reviewed, given the issues highlighted in our list above
9. We are concerned that there is a foreshortened consultation period and would stress the need for full and proper consideration of this important topic
10. We recommend revision of the draft impact assessment, which we believe overestimates the benefits and underestimates the costs

In the response that follows, we provide answers to the consultation questions, a list of references and further information about IOSH. Our positions are based on a consensus of views received from a cross-section of our membership.
IOSH answers to consultation questions

1. This Consultation Document sets out a new approach to CDM. HSE believes that this approach will be more easily understood by small or medium sized employers than the current one (set out in CDM 2007). Do you agree?

IOSH disagrees that this new approach to CDM will necessarily be more easily understood by SMEs. We believe that improved guidance, case studies and worked examples could assist. We would be concerned if replacement of the CDMc role, loss of competence specifications and withdrawal of ACoP status from guidance, gave SMEs the wrong impression that CDM and health and safety were now considered less serious or important than previously.

2. Please comment on any of the definitions in draft regulation 2 that you think are problematic.

IOSH members have concerns regarding definition and terminology, as follows:

- Pre-construction information – we suggest that the need for information about the site, the proposed use of the structure and minimum time allowed for planning and preparation should be included (as required by existing regulations 10 and 15).
- Definition style – for consistency, we suggest the definition of ‘Principal Designer’ (if retained) is worded in a similar style to that of ‘Principal Contractor’ i.e. “...means a designer appointed under regulation 6(1)(a) to perform...”.
- Exclusions – we disagree that the new definition of ‘construction work’ specifically excludes ‘pre-construction archaeological investigations’, given that these can involve significant excavations.
- Pre-construction phase – we suggest there is more information about what this includes (e.g. preparatory work, such as environmental investigations) and also, clearer indications of when this phase might commence.
- Temporary structures – we suggest there is greater clarity regarding temporary structures and what they may include e.g. those at major and other staged events.

3. The technical standards have remained effectively unchanged. These are contained in Part 4 of the proposed Regulations. Is this approach acceptable to you?

IOSH welcomes the retention of the technical standards in Part 4.

We would also advocate the inclusion of the need to manage off-site construction-related road risk. For example, in 2013 the Transport Research Laboratory reported that “…analysis of cyclist fatalities has shown that of the 16 in 2011 in London, nine involved a heavy goods vehicle (HGV), and seven of these were construction vehicles. Given that the construction industry is responsible for only a small
proportion of freight traffic in GB and London this suggests that construction vehicles may be overrepresented in cyclist fatalities in London.”

In terms of general requirements, we suggest Part 3 should contain more reference to the need for coordination by all duty holders concerned. For example, article 10 of 92/57/EEC requires ‘other groups of persons’ (self-employed) to take account of “…directions from the coordinator(s) for safety and health matters.” The new regulations have lost the general management duties (part 2) for ‘coordination’ (Reg 6) by all duty holders concerned. We therefore suggest coordination should also be incorporated in the new Part 3, Reg 8(2) general duties, along with the duty to cooperate.

4. CDM 2015 continues to place general duties on designers. HSE has redrafted the duties to make them clearer. In your opinion, are the designer duties clearer?

Given the explicit ‘principles of prevention’ reference in ‘Interpretations’ to schedule 1 of the Management of Health and Safety at Work Regulations 1999 (MHSWR), IOSH believes the new regulation 10 (duties of designers) is generally clear. However, we suggest it might be helpful to cross refer ‘principles of prevention’ within 10(2) directly to schedule 1 (MHSWR), rather than solely relying on readers finding it in ‘interpretations’. We would advocate the new Regulation 10(2)(ii) includes the phrase “…or parts thereof” to cover the old CDM 2007 Regulation 11(3)(c) and (d). And we suggest including an explicit duty for designers to ensure, so far as is reasonably practicable, that the design of structures meets the relevant health and safety requirements e.g. as contained in Regulatory Reform (Fire Safety) Order; Workplace (Health, Safety and Welfare) Regulations; Building Regulations; and Equality Act.

In addition, IOSH suggests it would be helpful for guidance to clarify who might take on the ‘Principal Designer’ role within the events and entertainment industries.

5. Do you think that these general duties on designers would be effective in considering relevant health and safety risks during subsequent construction work?

IOSH has concerns about the application and efficacy of these general duties given their vital importance for health and safety. A number of our members expressed the view that, in general, designers have little knowledge of on-site activities and the principles of prevention (managing health, safety and fire risk); and also, have little interest in this area. We note that RR920 also found this to sometimes be the case and attributed it partly to “…professional institutions that no longer required professionals to have a significant period of site experience as part of their qualification process.”

If the new PD role is introduced replacing the CDMc (which we are against) the new regulations and guidance should make clear that designers who do not possess sufficient health and safety expertise
will need to upskill and/or obtain competent health and safety advice (in-house, external or a combination of both). If this role is to replace the CDMc, the requirements need to include the provision of advice and assistance to the client. So, while we believe the general duties are good in principle, they need strengthening (see answer to Q4). Ensuring the efficacy and implementation of these duties will require improved explanation and demonstrable health and safety competence; and initially, concerted regulator attention.

**6. Construction phase health and safety plans, proportionate to the risks involved, will be required for all projects. Currently, only projects lasting more than 30 days or 500 person-days need plans. Will there be any impacts for projects that currently do not require a plan?**

IOSH believes the impact of requiring construction phase health and safety plans for projects that do not currently require them, assuming duty holders are aware and comply, will be to reinforce the need to plan the health and safety requirements for construction projects of all sizes, proportionate to the risk. However, we note that the regulations and interpretations do not specifically refer to proportionality, which we suggest would be helpful. Duty holders will also benefit from guidance on producing appropriate construction phase health and safety plans.

**Replacing the ACoP with targeted guidance**

**7. HSE proposes to withdraw the CDM 2007 ACoP and replace it with a tailored suite of sector-specific guidance. Do you agree with this approach?**

While IOSH fully supports improvement and appropriate simplification of guidance, we disagree with the withdrawal of this ACoP and loss of its quasi-legal status. We note from the evaluation study (RR 920) that, though there was some concern about implementation and interpretation related to the ACoP, certain elements were praised, for example its design and layout. Given the special status that ACoPs have within industry, it could be argued that this ACoP may have contributed to the improved performance in the larger and more structured part of the construction sector, as reported in CD261. We would be concerned if withdrawal of the ACoP and regulation 4 (competence) gave the wrong message to clients or the construction industry that health and safety and competence are no longer considered as important as previously.

IOSH would support reduction and simplification of the ACoP and the development of additional, tailored guidance to meet particular stakeholder need and would be pleased to assist with this. For example, it has been suggested that the regulations could be ‘linked to’ from the guidance to reduce overall ACoP length and it has also been pointed out that the original ‘Managing health and safety in construction: Principles and application to main contractor/subcontractor projects’ (HSE, 1987), covered the key principles in just 45 pages.
8. Please comment on whether there is any additional guidance that would be helpful.

As indicated in answer to Q4, IOSH suggests it would be helpful to clarify who might take on the ‘Principal Designer’ role within the events and entertainment industries and provide guidance. These projects can be innovative and push the boundaries of technology and the competency of those involved given factors such as the speed of construction and disassembly; reconstruction in multiple locations; and the number and type of attendees, who may be excited and/or unfamiliar with the environment.

Clarification and guidance would also be welcome on activities such as maintenance of wind turbines and other structures related to emerging technologies.

In addition, as contained in our answer to Q6, IOSH believes there is a need for guidance on construction phase health and safety plans for projects that do not currently require them. And if the CDM ACoP is withdrawn (which we are against), additional guidance on health and safety competence and the future use of structures will also be needed.

Replacing the CDM co-ordinator with the principal designer

9. HSE believes that there is a need to bring the pre-construction coordination function into the project team that is in control of the pre-construction phase. This will be an effective way of achieving the aim of integrated risk management. Do you agree with this approach?

While IOSH agrees with the principle of embedding the coordination role within the project team and more effective integrated risk management, we disagree with transferring this role to a Principal Designer. The reasons for this are based on concerns as follows:

- A view that, in general, designers do not have adequate knowledge of site operations; do not understand ‘principles of prevention’; and are not sufficiently motivated about health and safety
- The proposed change will lead to a loss of independent advice, with clients no longer advised by someone independent of the design function and so they may not necessarily be assured that a design has taken consideration of all relevant health and safety issues
- Principal Designers may feel a conflict of interest between their involvement in the design process and ensuring satisfactory health and safety outcomes
- The problems identified in RR920 of CDMcs appointed late; lacking sufficient expertise and resource; and not being ‘embedded’ in the construction process, should be addressed by more definitive guidance and rigorous enforcement (and not by reassigning the role, especially to individuals who may lack health and safety expertise)
- Suitable CDMcs could act as ‘Project Supervisor’ (as 92/57/EEC) coordinating activities related to the broader project preparation (and not only design); whereas assigning the role to a PD means a
designer is likely to be appointed and they may not be equipped for wider planning issues. (Note: 92/57/EEC does not prescribe who should fulfil the coordination role or require that it is prescribed as the current (CD261) proposal does)

IOSH believes an effective tool for ensuring an integrated risk management approach is for projects to operate an appropriate ‘project risk register’ that all parties contribute to and discuss at regular intervals. This can help ensure everyone is aware of each other’s risks and how they can be managed and controlled collectively. Well-designed and maintained project risk registers can help ensure that good practice solutions are shared, duplication is avoided and costs are lowered.

10. **CDM 2015 requires the appointment of a Principal Designer (PD) and Principal Contractor (PC) if a project involves more than one contractor. What would be the impacts for projects that do not currently require such appointments:**

**a) at the pre-construction phase?**

IOSH members feel that without considerable awareness-raising and enforcement, the requirement to appoint a PD and PC where there is more than one contractor will largely be unknown and so will have little impact. However, where it is complied with, as currently drafted, there could be unintended results for domestic clients. For example, where a householder is commissioning a number of home improvements (e.g. new kitchen, windows, roof and landscaped garden) using different contractors over a short period of time and with more than one contractor working simultaneously. If the first contact was with a local DIY store for the new kitchen and a salesperson visited the house and produced a kitchen design, under the proposed regulations, this could mean that they become the PD. This would then require them to take responsibility for coordinating all the other design activities, which seems wholly inappropriate. More clarity and practicality is required here.

**b) at the construction phase?**

IOSH members feel that, again, without considerable awareness raising and enforcement, most of those affected by this new responsibility will probably remain unaware and so it will have little impact. However, it is possible that some will take their duties seriously and for these it would mean assigning appropriate responsibilities to individuals at the pre-construction and construction phase.
Replacing the explicit requirement for individual competence with new regulation 8 and removing CDM’s explicit requirement for corporate competence

11. The draft Regulations do not explicitly require clients to check the competence of organisations, before they are appointed to carry out construction work. However, this requirement is implicit in the duty in regulation 5 for clients to ensure adequate management arrangements. HSE believes that this will be clear to those reading the Regulations. Do you agree or disagree?

IOSH disagrees that the implicit competence element of Regulation 5 is necessarily clear to readers. We would suggest that it should be supported by reference to standards (such as PAS91), the SSIP scheme and guidance that provides examples of the different types of evidence that can help in assessing competence for a task, such as contained in the ACoP, while avoiding unnecessary paperwork. The ‘General Duties’ (Part 3, Regulation 8) should require the client to take reasonable steps to ensure the competence of those they appoint under CDM. We note that one of the specific aims of CDM 2007 was to focus on competence assessment.

12. What should be required of clients to ensure the competence of those they appoint and/or engage in addition to ensuring project management arrangements are adequate and effective?

As in the answer to Q11, IOSH believes clients will benefit from the use of standards like PAS91 and the SSIP scheme, together with guidance from HSE. In terms of professional expertise, we would suggest clients seek guidance from the relevant professional body. It will also be important that the client has a reliable monitoring system in place to ensure standards are met in practice. We are aware that the UK construction industry (post the RR877 ‘routes to competence’ report) is currently exploring the best way forward for ensuring a competent construction workforce.

13. The draft Regulations replace the specific requirements for individual worker competence in CDM 2007 with a more general requirement. Under CDM 2015 those arranging for or instructing workers to carry out construction work should ensure that they have received sufficient information, instruction and training, and have adequate supervision. HSE believes that this will have no adverse effects on health and safety. Do you agree or disagree?

IOSH disagrees that this change will have no adverse effects on health and safety. We believe that appointees need to have suitable competence and are concerned that replacing the competence requirement with a more general one (duty holders obliged to ensure sufficient information, instruction, training and supervision) could give a negative impression and potentially lead to incompetent site practice, accidents, injury and ill health. To avoid this, we believe the requirement for competence should be explicitly included in the new regulations. Adequate information, instruction, training and
supervision are all absolutely vital, but (as stated in CD261, regarding supervision), they are not a substitute or proxy for competence (see also our answers to previous questions on competence). Supervision of those still developing their competence, e.g. new and inexperienced workers, by a competent person, was particularly specified in CDM 2007. Given the increased vulnerability of such workers, this requirement should also be highlighted in CDM 2015.

Notwithstanding the above, IOSH also fully supports the need to bear down on unhelpful or repetitive paperwork, which should not be part of demonstrating competence.

Notification

14. CDM 2015 changes the notification threshold to cover projects lasting more than 30 working days and having more than 20 workers working simultaneously at any point in the projects; or exceeding 500 person-days. This will reduce the number of projects that need to be notified, but will require notification of domestic clients’ projects that exceed this threshold.

What do you think will be the impact of this?

IOSH believes that extending the notification threshold is a backward step, particularly given HSE’s statistics (as highlighted in CD261) indicating that two-thirds or more of fatalities now occur on small building sites with fewer than 15 workers. We believe the impact of this change will be fewer notifications of potentially dangerous building projects, less regulator attention and poorer health and safety outcomes. IOSH believes in evidence-based policy and practice and advocate that HSE should make the case to the Government for leaving the notification requirements as they are and not extending them to require more than 20 workers working simultaneously. Though we understand that, strictly speaking, the Government guidelines consider failure to include this criteria is ‘gold plating’, we believe a counter-argument can be made on the basis of taking a risk-based approach to enforcement and ensuring that potentially dangerous projects continue to be notified, helping to prevent accidents and costs to business and the economy.

Clients including domestic clients

15. Clients’ duties in proposed regulations 5, 7 and 8 maintain a strong focus on the way that construction work is carried out on their behalf. Do you think this is the best approach for commercial clients’ projects?

IOSH agrees with this approach, but feels that in serious cases, appropriate enforcement against irresponsible clients will be needed to press home the crucial role they have. If clients are to lose the independent advice that the CDM coordinator role provided (which we are against), it is even more important that they have increased awareness of, and clear guidance on, their role and responsibilities and access to necessary, competent health and safety advice.
16. HSE’s preferred approach in relation to domestic clients’ projects is set out in regulation 4. By default this deems that their duties will be fulfilled by the contractor (or principal contractor where there is more than one contractor). There is also the possibility that a domestic client can instead have a written agreement with a principal designer that the principal designer will fulfil those duties. HSE believes this would be a proportionate approach. Do you agree with this approach for domestic clients’ projects?

Though recognising the difficulty of placing these sort of duties on domestic clients, we believe there are problems associated with the default mechanism proposed, so disagree with it. The areas of concern are:

- The duty as it is currently written does not allow for delegation, Regulation 4(4) says “...the client must appoint in writing as soon as practicable...” We suggest this is reworded to make clear that the domestic client can make these appointments, but is not legally compelled to do so.
- The proposed default appointment may mean that coordination is assigned to an inappropriate designer, as described in the IOSH answer to Q10; or that the default appointment is to someone who is not involved with the project after completing their particular part of the work (e.g. a demolition designer / contractor). Consideration should be given to amending the ‘deeming’ clause (Regulation 4(5)(a)) that states “…the first designer appointed…”
- There is no reference to appropriate use of the derogation available under article 3(2) of the Directive, which could be considered for certain domestic clients projects, where this would not compromise health and safety and with criteria established based on risk profile. Any change needs to be workable and proportionate and avoid attracting negative public comment and criticism about health and safety.

Impact assessment

17. Do you agree with the analysis of the impacts (including costs and benefits) on commercial projects presented in the IA? Yes/No

No, IOSH disagrees with the analysis of impacts, believing that some benefits are overestimated and some costs are underestimated (see below).

In addition, the impact assessment predicts no immediate changes to competence assessments (and thereby savings), but expects the industry to improve in time. It should be pointed out that the current competence schemes and cards, though regulator supported, have been industry-led and not mandated by statute. For this reason, there is no guarantee that the situation will change as stated in the impact assessment, without regulator pressure on the industry to “…increasingly rely on PAS91 accreditation.”
18. Do you agree with the analysis of the impacts (including costs and benefits) on domestic projects presented in the IA? Yes/No

IOSH cannot assess the impacts on domestic projects without knowing how the new requirements will be communicated, implemented and enforced. We understand that ‘home services’ (gas, electric, water) may be affected by the proposed new requirements, with one major gas company estimating that this would potentially impact millions of domestic projects per year.

19. Are there any costs or benefits (positive or negative) that we have missed that you believe should be taken into account? Yes/No

Yes, IOSH believes there are costs and benefits that have been missed and that should be taken into account, as indicated below.

We believe that replacing the CDM coordinator with the Principal Designer (PD) is unlikely to save the amounts estimated in the impact assessment. This is because the impact assessment fails to acknowledge that in many cases, the PD will need to be upskilled (at a cost) and/or engage the services of a competent health and safety professional to assist them. Clearly, the PD’s time spent on coordination, the additional training cost and any health and safety professional’s time will all have an associated cost.

Also, in our opinion, the estimated times given in the impact assessment for familiarisation are lower than would generally be the case and therefore the costs to clients and the UK construction industry would be higher than presented.

20. Do you have any other comments on the proposals covered by this questionnaire? Please provide comments if you wish.

IOSH suggests that the need to manage off-site construction-related road risk should be incorporated in the requirements. For example, in 2013 the Transport Research Laboratory reported that “…analysis of cyclist fatalities has shown that of the 16 in 2011 in London, nine involved a heavy goods vehicle (HGV), and seven of these were construction vehicles. Given that the construction industry is responsible for only a small proportion of freight traffic in GB and London this suggests that construction vehicles may be overrepresented in cyclist fatalities in London.”

In addition, we note that in the transitional provisions (the proposed Regulation 36(2)) it currently says: “Where a project began before the coming into force of these Regulations, the client must appoint the principal designer and, subject to paragraph (3), the principal contractor, as soon as is practicable.”
However, where projects are advanced and well into the construction phase, it may be too late to appoint a PD to be effective, so we suggest this should be reworded appropriately.

And in relation to Regulation 12(d), we believe the duty of the Principal Contractor (PC) should also include the protection of others affected by the work activity.

References

About IOSH

Founded in 1945, the Institution of Occupational Safety and Health (IOSH) is the largest body for health and safety professionals in the world, with around 44,000 members in over 100 countries, including over 13,000 Chartered Safety and Health Practitioners. Incorporated by Royal Charter, IOSH is a registered charity, and an ILO international NGO and CIS collaborating centre. The IOSH vision is:

“A world of work which is safe, healthy and sustainable”

The Institution steers the profession, providing impartial, authoritative, free guidance. Regularly consulted by Government and other bodies, IOSH is the founding member to UK, European and International professional body networks. IOSH has an active research and development fund and programme, helping develop the evidence-base for health and safety policy and practice. Summary and full reports are freely accessible from our website. IOSH publishes an international peer-reviewed journal of academic papers twice a year titled Policy and practice in health and safety. We have also developed a unique UK resource providing free access to a health and safety research database, as well other free on-line tools and guides, including websites for business start-ups and young people; an occupational health toolkit; and a risk management tool for small firms.

IOSH has 34 Branches worldwide, including the Caribbean, Hong Kong, Isle of Man, Middle East, Oman, Qatar, the Republic of Ireland and Singapore, 17 special interest groups covering aviation and aerospace; communications and media; construction; consultancy; education; environment; fire risk management; food and drink; hazardous industries; healthcare; international; offshore; public services; railways; retail and distribution; rural industries; and sports grounds and events. IOSH members work at both strategic and operational levels across all employment sectors. IOSH accredited trainers deliver health and safety awareness training to all levels of the workforce from shop floor to managers and directors, through a professional training network of more than 1,600 organisations. We issue around 100,000 certificates per year.

For more about IOSH, our members and our work please visit our website at www.iosh.co.uk.

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