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Dear Mr Cunningham

CIC Response to HSC Consultative Document 200 on the revision of the Construction (Design and Management) regulations 1994

This letter provides CIC's submission to the above Health and Safety Commission Consultative Document on the proposed CDM Regulations 2006 that may include the remaining Regulations from the Construction, Health Safety and Welfare Regulations 1996 (CHSW) left after the implementation of the Work at Height Regulations 2005.

As the UK umbrella body for the professional and consultant Institutions and organisations we have conducted a review of the draft proposals through our Health and Safety Panel. The comments we make broadly support the overall thrust of the changes but highlight critical issues that we believe the Commission and Executive should re-examine in both principle or purpose and in our perception of the meaning of proposed draft regulations.

1 Tackling the CD and moving the industry forward

1.1 This response has been guided by these overarching themes:

- That construction risk management includes health and safety
- That all professionals across the sector have a positive contribution they can make to improving the health and safety of projects
- That health and safety management should be an integral part of good business and project management
- That healthier and safer projects are profitable projects
- That an improving industry safety culture is in all our hands.
- That CIC represents a range of CDM duty holders.

1.2 More specifically having experienced the existing CDM Regulations (CDM'94) we inform our comments on these principles:

- We support the need for CDM2006 to develop from CDM'94;
- We accept that revised Regulations provide an important minimum standard;

- That we as the CIC and its Members expect standards of implementation to be higher than the statutory minimum whenever possible.
- That the industry as a whole should acknowledge that its response to CDM'94 was sporadic and inconsistent;
- That the lessons of CDM'94 will inform an improved CDM2006
- That we focus on the suggested process changes that only achieve effective communication amongst all project team members of health or safety risk information for the ultimate benefit of those engaged in construction, installing, servicing, maintaining, refurbishing or demolishing the structures we create.
- That we should be robust enough to defend the need for effective communication of risk information and at times necessary and proportionate paperwork will be necessary even under the 2006 proposals.
- To blame any single CDM'94 duty holder for unnecessary bureaucracy is pointless, we can all improve our systems and sharpen our focus on risk.
- In the drive for improved knowledge and competence we support the continued efforts of the Institutions and our Sector Skills Council to create opportunities to implement the Safety in Design Learning Aims and Occupational Standards.

2 CDM 2006 Issues for the Commission and Executive to consider

- 2.1 CIC recognises the improvements made in the current CDM ACoP/Guidance (HS(G)224) and the clarity brought to the industry. We would expressly support the need for an ACoP preferably with guidance and would leave the format to the Executive.
- 2.2 CIC would also support the need for sectoral guidance for all duty holders and would aim to provide support and encouragement to its creation by the industry and for the industry.

3 Detailed comments on the proposed CDM2006 Regulations

(e.g. R2 = Regulation 2).

- R2** That the reference throughout CDM 2006 to “co-ordinator” and where it refers to the re-defined role of Planning Supervisor should be unambiguously defined as “*CDM Co-ordinator*”

For consistency with the whole draft the word “planning” should be included in the definition of “design”, but only if its scope is clearly described in the ACoP to cover planning in a health and safety management context.

For the avoidance of doubt CIC would offer to provide clear guidance and examples (as necessary) for ACoP and guidance material to define what constitutes design, and particularly, when it actually begins and requires the necessary actions and responses by duty holders for Notifiable projects. The CDM2006 duties are clear enough but firm and accurate guidance will support all design based Institutions to underline the importance of early appointment and design risk management.

CIC is clearly well placed to co-ordinate provision of a clear view of this to the HSC.

We support the simplification to remove the “more than 4 people at work” application criterion but suggest that the change will create a dangerous position with the remaining proposed 30day/500 man-day notification threshold. The effect of this will be to disapply the benefits of CDM to a significant number of projects at a time when we are all seeking greater integration of safety in design and construction on all projects.

We suggest the HSE reviews this position most carefully. As a suggestion we propose two options.

1. Consider the introduction of a schedule of “high” or “significant” or “particular” risks (the latter cf. the Republic of Ireland Safety, Health and Welfare at Work (Construction) regulations 2001) or issues that would invoke full application of CDM2006 in addition to the current proposed 30/500 rule **or**
2. Consider a reduction in the threshold for notifiable projects to capture those projects that would otherwise be excluded from the benefits of CDM2006 and integrated construction and design risk planning, co-ordination and management.

R4 The CIC would wish to pursue through the renewed HSE CDM Working Group and separately, directly as appropriate, the developing themes from the results of the HSE sponsored research through John Carpenter on competence and resource (not due for submission to HSE until July 2005).

The CIC’s objective would be to support competence benchmarks, the adoption of core principles, the avoidance of unnecessary (and duplicated) enquiries by any duty holder) and to repeat our belief that there was no “oversight” by the HSE when it commissioned the research report into competence and resources that “overlooked” the need to include in the scope of work for the research Planning Supervisors as well as contractors and designers.

Designers:- For designers, CIC recommends that the guidance/ACoP responds appropriately and unequivocally to the published (April 2005) industry benchmark safety in design standards for knowledge and competence (respectively the Learning Aims and Occupational Standards)

CDM Co-ordinators:-

The required “skill” set for the CDM Co-ordinator (as currently defined) is different from that of the PS. As for other roles anyone accepting the role of CDM Co-ordinator would have to only accept appointment if “competent”. Most PS’s have industry experience and other components needed for the role. Not all industry practitioners may have the personal blend but as for all CDM appointments they are for “persons” which legally mean both individuals and bodies corporate. The linked resource issue is important to fulfil any CDM duty holder role. All should be seen as essential players in an integrated project team covering the range of specialists and consultants a client will require.

R8 Is Reg 8(4) worded strongly enough to achieve the expected outcome that Clients would default to appointing a competent CDM Co-ordinator and Principal Contractor or by reading this would they be tempted to “wing it” themselves?

CIC recognises the need for Regulation 8 but the “deeming” clause at 8(4) reads too much like an invitation. It cannot be left to guidance to say what a rigorous duty should express; that the regulations expect competent, independent third party appointments or Principal Contractor and CDM Co-ordinator, unless and only unless the client has completely satisfied himself that all consequential duties can be delivered competently if they believe they are competent “in-house”.

R9 For simplicity and clarity the CDM Co-ordinator should be required to notify to the HSE with the Client still left with a duty to ensure it is done.

R10 It appears that the duty on a Client to provide information is only applicable to Clients procuring “Notifiable” projects. If this interpretation is correct we see the need for an amendment to ensure that essential health and safety information is made available for all projects. In this respect it is important to bear in mind that contractors and designers will always have CDM2006 duties to meet for all projects.

- R11**
- (a) To better reflect the importance of the Client's role in allowing construction work to start (on Notifiable projects) the strength of CDM'94 Reg 10(1) should be reflected in new R11 by referring to "the Client shall not permit the construction phase to commence until.."
 - (b) The start of a project on site represents the moment when the benefits of good design, pre-planning and preparations for effective site management really mean something (*or not*). We suggest that the Regulation (and Schedule 1) should reflect this importance by ensuring that the mobilisation period before work starts on site should be agreed between the Client, the CDM Co-ordinator and Principal Contractor and specified on the Form 10.
- R13**
- (a) All other CDM roles are given "duties", the CDM Co-ordinator should have "duties" and not "functions". (There is probably no legal difference in the end so why potentially waste the industry's time and that of the Court's trying to work it out.)
 - (b) Without the prefixed words "health and safety" to the described appointment further difficulty is encouraged by the confusion of the role of the CDM Co-ordinator for health and safety risk management with that of traditional "co-ordination" activity required of a lead designer with other design disciplines.
 - (c) We support the development of the role of Planning Supervisor to CDM Co-ordinator.
 - (d) The CDM Co-ordinator should be required to advise the Client of the suitability of the Principal Contractor's proposed construction phase Plan.
 - (f) The CDM'94 duty on the Planning Supervisor to respond to the "design" appears to have been diluted. We would suggest re-introducing the phrase "adequate regard" into R13(1)(c) if it is considered that the phrase "suitability and compatibility" is not at least as good.
 - (g) Considering the importance of the role of CDM Co-ordinator with the Client and the Designer the option in R13(2) " .. for which he is appointed" is effectively made redundant (by virtue of R8) and should, we suggest, be deleted.
 - (h) The role of the CDM Co-ordinator during the construction phase should be clearly explored and informed through guidance and the ACoP to clarify the planning and co-ordination roles but to avoid any misinterpretation that there is a monitoring in respect of the Principal Contractor's management performance.

- R14**
- (a) In 14(1) as “design” is the defined term in these regs. then this should be worded “No designer shall commence design work...”
 - (b) To link with the same comments in the role of CDM Co-ordinator 14(3) should also be qualified by the phrase “adequate regard”.
 - (c) In 14(5) since the regs. define construction work to include maintenance the word could be removed from here.
 - (d) 14(3) is supported as it underlines the principle that any design should be safe not just to construct (etc.) but also to use as a place of work, as long as the HSE is clear that the concept of “fitness for purpose” is not implied by this duty or in the consequential ACoP and guidance. (14(3) links with (effective) existing designer duties under the Workplace, Health Safety and Welfare Regs 1992 and the Building Regulations for completed (and occupied) buildings but not all CDM structures). It should be clear, though, that the designer involved in the construction is not required to deal with risks through use that are a normal (and therefore changeable) aspect of a client’s undertaking. These would be part of the employer’s normal duties to manage under all other relevant statutory provisions.

Some helpful explanation and information will be needed on this in the revised ACoP and guidance. In particular the delineation between design origination of a structure used as a place of work and the general maintenance of it (which would not always attract the definition of “construction work”) will need to be explored. We see an important difference between a major plant provision (for example for air handling and temperature/humidity control) and the failure of the client/employer to adopt and maintain safe systems of work to protect their own personnel and third parties against a Legionella risk, which cannot be laid at the door of the designer as originator. If such plant was not adequately designed to provide safe access at height (for example) then that might more properly be a consequential action arising from the proposed Regulation 14.

- (e) CIC supports the clarity that proposed R14 brings to the principles of design risk management. We further support this reinforcement of the need to move away from traditional “risk assessment” and any requirements to record them since these can defeat the iterative and developmental design processes of most projects.
- (f) To follow the necessary two-way demand and need for information flow (e.g. on contractors in 14(b)) we suggest that a similar duty needs to be included as 14(c) for the CDM Co-ordinator to comply with their duties under R13.

- (g) A replacement for CDM94 Reg 13(1) is needed as the proposed “awareness checking” duties on contractors and designers do not actually require any duty holder to check *and inform*. This seems vital as many clients are one-off and will need a member of the team to advise them. It would be logical therefore for Reg 14 to be revised to include an express duty on the CDM Co-ordinator to check the client’s awareness and inform as necessary.
- (h) CIC would also support clear guidance on the issue of design work within architectural competitions and the clear message that the designer duty applies to feasibility studies.

R16 (a) Some Principal Contractors could overlook their other duties in R19 (that apply to all contractors). We suggest adding the duties at R19(1)(a,b & e) in R16.

R19 (a) The two-way nature of information flows should also be repeated here for the contractor to provide information for the H&S File (for Notifiable projects).

(b) 19(2) should reflect the need for the contractor to plan, manage and monitor construction work based on the information supplied by the PC, CDM Co-ordinator or Client (and as modified by on-going design change).

R22 The concept of having no effective transitional provision does not seem correct. As drafted, at one minute past midnight the 23:59 Planning Supervisor is deemed to become the CDM Co-ordinator. In contract this cannot be so easily reconciled especially as the draft duties of the new role of CDM Co-ordinator are not the same as that of Planning Supervisor. A phased commencement date is probably needed.

Out of pragmatism CIC believes that there is a need for appointments and projects to be reviewed and approved by Clients especially since the Client is projected as being at centre stage in the proposals. CIC is concerned that the time for clients to respond to this will be compressed into late summer 2006 to meet the anticipated HSC/HSE programme for coming into force in October. Our experience suggests that the HSE’s CDM review programme has always slipped and if this happens next summer the period of “reaction time” to adjust to the (or any) new contractual regime that will be required between Client and CDM Co-ordinator will be even further compressed. It is our belief that a statutory review or transition period must be included.

The real reason to urge a re-think is more fundamental. A short transitional period of say, three months, should be provided for clients and their project team to review, terminate and re-appoint duty holders as necessary. CIC's concern here is over the proposed role change from Planning Supervisor to CDM Co-ordinator. We believe that without this the cultural change message to the industry on competence and the role would be fatally wounded from the very point we all need to making a combined stand on the need for all appointments to be competent.

CIC remains willing to engage directly in the development of the proposals both through the HSE's CDM Working Group and by other direct means to ensure that the duty holders we represent get the right regulatory package that they will be so instrumental in delivering in the years to come.

Yours faithfully

Graham Watts
Chief Executive