

Thompsons Solicitors' Response to Health and Safety Executive

CD261 - Consultation on replacement of the Construction

(Design and Management) Regulations 2007

Q1. 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:

We have no objection in principle to plainer English or wording that is more accessible to business but that must not be at the expense of the protection that workers should be entitled to expect from their employers or contractors.

Workers in the construction industry are increasingly peripatetic, increasingly forced to class themselves as self-employed (even if in reality they aren't) and, given the risk of catastrophic injury in the work they carry out or is carried out around them, uniquely vulnerable. They need all the assistance they can get.

Between September 2008 and December 2013 the number of construction workers categorising themselves as self-employed rose approximately ten-fold and now account for over a third of the construction work force.

(Sources: <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/may-2014/table-jobs04.xls>; <http://www.rbs.com/content/dam/rbs/Documents/News/2013/02/self-employment-in-the-UK.pdf>)

Q2. Please comment on any of the definitions in draft regulation 2 that you think are problematic.

The definition of "domestic client" might cause some confusion as to what is in the "course or furtherance of a business".

Q3. The technical standards have remained effectively unchanged. These are contained in Part 4 of the proposed Regulations. Is this approach acceptable to you?

Yes, we consider it important that technical standards remain unchanged.

Q7. 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?

We strongly disagree with the plan to withdraw the approved code of practice. Codes of Practice have a legal authority over and above Guidance and there is therefore a real risk that Guidance will be ignored, especially by those enterprises which are the most reluctant to engage in health and safety, usually have the worst safety records and therefore require the most "encouragement".

The status of a document is relevant to how it will be dealt with and therefore what outcomes it produces.

The objection (in paragraph 36) is that the ACoP is inaccessible and too long. It does not seem to us that this is a reason for removing an ACoP, but rather one for making it more comprehensible and accessible.

In paragraph 39 there is reference to "a suite of tailored guidance" which though sounding impressive does nothing to address the relative importance and legal status point above. One can have as many tailored guidance notes as one may wish but if they have little enforceability or power behind them they are worth very little. We see no reason why there cannot be an ACoP *and* tailored guidance.

Further in paragraph 39 there is the suggestion that the HSE would intend to support "better-organised parts of the industry to produce their own guidance which meets their own purposes". This is, in the absence of full equal status representation for unions representing workers in the industry, an opportunity for those parts of the industry to write rules that suit them. If there is nothing else to learn from the scandal of Blacklisting it is that, allowed to run their own show without external oversight, the major construction companies focus on what is best for them not what is best for those they employ.

Q11. 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 clearer to those reading the Regulations.

Thompsons Solicitors does not think that regulation 5 is sufficiently clear that there is a requirement to check the competency of organisations.

Our experience is that assumptions about the competence of other parties, particularly in the construction area are a fertile source of accidents and injury. Assumptions are dangerous.

Expecting those who may choose to wilfully ignore anything but the most explicit legal obligation to choose to understand an implicit duty is naive and runs entirely contrary to the suggestion above in question 1 (and apparently underpinning this entire consultation) that clarity is key.

(Note, needs consideration of questions 12 and 13 as well).

Q12. 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?

This is a specialist issue largely outside our areas of expertise. However, we consider that it should be part of any checklist that all stakeholders are able to demonstrate by providing documentary proof that they have taken out Employers and Public Liability insurance for the period of the project, unless they are genuinely self-employed and do not sub contract any part of their work to others.

Inadequate insurance arrangements may not in themselves directly cause accidents or injuries; however, a failure to have adequate (compulsory) insurance is indicative of an attitude that pays lip service to health and safety. It has perennially been the bane of the construction industry and a cause of much satellite litigation. Those with insurance are more likely to address safety issues

directly because of the need to demonstrate compliance with standards to obtain and keep that insurance.

Q13. The draft Regulations replace the specific requirements for individual worker competence in CDM 2007 with a more general requirement. Under CDM 2014 those arranging for or instructing workers to carry out construction work should ensure 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.

Sufficiency in instruction, training, and adequate supervision are more specific requirements than a general requirement as to 'competence'.