Construction Industry Council

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CIC

26 Store Street

London

WC1E 7BT

Tel: 020 7399 7400

Fax: 020 7399 7425

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CALL FOR EVIDENCE: LOFSTEDT REVIEW ON THE UK'S APPROACH TO HEALTH AND SAFETY

The Construction Industry Council (CIC)

The CIC is the representative forum for professional bodies, research organisations and specialist business associations within the construction industry. It provides a single voice for professionals in all sectors of the built environment through its collective membership of 350,000 individual professionals and 25,000 firms of construction consultants.

In response to the Lofstedt review's call for evidence the CIC and the Institution of Civil Engineers set up a working group with the aim of providing an active forum for discussion and analysis of the UK's approach to those aspects of health and safety legislation that apply to the construction industry. Our response to this call for evidence is based on the experience and expertise of those individuals working at the heart of the UK construction industry.

Members of this CIC/ICE working group have also been pro-actively contributing to the current CONIAC CDM 2007 Working Group in their evaluation of the Construction (Design & Management) Regulations (2007). We would also like to thank the Lofstedt Review Panel for this opportunity to contribute to a well overdue review of modern health and safety risk culture. As expert bodies in the fields of construction, the working group would like to offer its assistance to the Lofstedt Review panel. As the window for consultation has been somewhat short, this working group is more than willing to contribute further; playing an active role throughout the review process.

Yours sincerely,

Mike Battman

CIC/ICE Lofstedt Review Working Group Chair

Peter Capelhorn

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EXECUTIVE SUMMARY:

0.1 This response focuses on construction industry-related health and safety legislation, as this is where our expertise and experience lies. However, we do believe that some of the conclusions reached in this response can be applied to the overall health and safety framework.

0.2 The Health and Safety at Work etc Act 1974 (HASWA) sets out a solid framework from which to assess, evaluate and control risk in the work place. The promotion of a strong health and safety risk management culture throughout modern business is important, not only to instil an awareness of workplace risks and how to avoid them, but also to improve business generally The HASWA and accompanying regulations have succeeded in their aim of reducing work place fatalities and major injuries – the UK currently has the lowest figures in Europe. It has also, with some exceptions, created a risk aware and positive mentality in the workforce; however, misinterpretations of the supporting regulations and often overly complex Approved Codes of Practice (ACoPs) have created an unwelcome burden for the construction industry.

0.3 At the heart of these regulations is the concept of the 'risk assessment'. It is this 'risk assessment' and the concept of what is 'reasonably practicable' which often causes confusion and misinterpretation of the legal obligations leading to unnecessary bureaucracy.

0.4 The construction industry ranges from large multi-national corporations to small family run businesses. The problems and constraints faced vary due to the nature and scale of the work. An overview of the contemporary construction industry is illustrated in Fig 1.

Fig 1: An overview of the modern construction industry:

- **Construction is a "high risk" industry**
- **Accidents in the construction industry have high consequences for all involved; ill health is a major issue.**
- **A high percentage of firms in the construction industry have ten or fewer employees**
- **Most organisations and individuals move rapidly from project to project**
- **Every construction project is different; each site is different, having different risk profiles**
- **Most construction work deals with the forces of nature and is subject to environmental conditions.**

0.5 Thus the ever moving and changing nature of the construction industry creates large numbers of hazards which change from one project to the next. Assessing and managing the consequent risks can create major administrative difficulties if not handled appropriately. For small to medium sized businesses (SMEs)- particularly those very small organisations employing <10 persons- any unnecessary bureaucracy can be a major imposition.

0.6 Most regulations are supported by ACoPs, which provide greater explanation of the legal requirements. Unfortunately, this advice is not always clear and can be difficult to understand. This lack of comprehension can lead to the over implementation of safety procedures and the use of some H&S consultants who, while on paper are proficient, may not always understand the circumstances of the construction industry. This affects SMEs in particular, which make up by far the biggest grouping of businesses.

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0.7 In October 2010 Lord Young produced a report "Common Sense, Common Safety" which spawned a much needed debate on H&S regulations in the UK. However, the report only focussed on low-risk activities and provided no solution to the higher risks faced in the construction industry. This working group is very supportive of the government's agenda in requesting a review of all H&S legislation. We believe it is essential that all legislation should be periodically reviewed in order to maintain the best framework from which an evolving workplace can operate.

0.8 The key recommendations from this response are:

- **All regulations and ACoPs need to be regularly reviewed with input from professionals working in that field**
- **In places, Regulations and, more generally, ACOPs need to be simplified and/or their requirements clarified to reduce opportunities for misinterpretation - with input from professionals working in that field.**
- **Benefit could be obtained by consolidating a number of regulations and in avoiding 'amendment' regulations.**
- **An urgent review is required to bring improved definition to 'reasonable practicability'**
- **A specific review is required to consider the application of 'reasonable practicability' as applied to construction designers**
- **We do not believe that inappropriate litigation or compensation is related to the current regulations.**

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1 Are there any particular health and safety regulations (or ACoPs) that have significantly improved health and safety and should not be changed?

1.1 It is difficult to provide empirical evidence which supports the claim that any of the particular regulations relating to the construction industry are significantly improving H&S. However our view, as experienced construction professionals, is that all those regulations which cover construction activities are having a beneficial effect. While these regulations do not need altering to any significant degree they should nonetheless be periodically reviewed by those working within the industry. This would ensure that regulations are contributing as effectively as possible to work place H&S.

1.2 An example of regulations which have helped change the overall approach to H&S in specific areas in the UK include:

- Manual handing regulations: have led to the use of lifting equipment and improved operating methods being improved to reduce accidents.
- Work at heights regulations: have improved access arrangements, the use of nets and other equipment. They have also led to technological innovation to overcome risks and continued development of operating methods.
- Noise at work regulations: have increased the use of ear defenders and monitoring equipment. They have also led to lower noise tolerance limits and development of noise defending technology.
- Vibration at work regulations: have transformed working practice by improving technology and working methods, with beneficial effect.

1.3 The CDM regulations which were introduced in 1995 have also played a significant role in promoting a safer working environment. Introduced in response to an EU directive, the opportunity was taken to review and remove a variety of individual regulations, thus simplifying the overall approach. However there remain a number of concerns with these particular regulations, on which we would urge action (see Q2).

1.4 Generally there is a greater awareness of risk throughout the industry. The adoption of innovative techniques and the promotion of a strong risk management approach have greatly reduced the number of fatal accidents at work, with the UK having the lowest rates in Europe[1]. However, more effort is required, supported by the statutory framework, to bring about further improvement and to tackle occupational ill health.

1.5 The accompanying ACoPs have also assisted. However, in some instances they are insufficiently clear in their intent, or are written in a formal manner which is difficult for some to understand. We recommend that the ACoPs be reviewed to assess:

- Whether the content would be better placed in guidance, thus giving greater freedom in the text (this would need to be balanced against any resulting reduction in status)
- Whether clarification is required

[1] http://www.hse.gov.uk/statistics/european/fatal.htm

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2 Are there any particular health and safety regulations (or ACoPs) which need to be simplified?

2.1 The majority of regulations are in themselves not unduly complex; while some may need updating, simplification of individual regulations is not a major concern. The most common problem with H&S regulations is their **misinterpretation** e.g. unnecessary stipulation of PPE, or restrictions on working at height. Often the source of the misinterpretation is those who are expected to know better, i.e. the safety advisors and the regulators. Much of this stems from their safety and health education where misinterpretations of some of the basics of the HASWA are taught as fact with people failing to question the source of myths and misinterpretations. It is therefore the ACoPs and the guidance provided which are in need of review.

2.2 The training process is also worthy of review and revision, and if the principles of the Quebec City Protocol and European Union Occupational Safety and Health Agency (EUOSHA's) "Mainstreaming Occupational Safety and Health into University Education" were applied across UK, the problems should in time reduce. UK Government, Employers and Trade Unions all support the principles and are committed to their implementation. Construction-related degrees in the UK do have provisions for the teaching of risk issues. The question is whether this is delivering the required outputs

2.3 The CDM regulations in particular would benefit from simplification: These are currently the subject of a CONIAC Working Group study and proposals are being debated (although this is 'on hold' due to this current Consultation (and the 'Red Tape Challenge')). Notwithstanding, we believe there are a number of significant issues that require amendment and clarification e.g.

(a) Information provision
(b) Competence (both individual and corporate)
(c) The Health and Safety File

The ICE has produced a report on these points which is due for publication shortly.

2.4 In order to better promote understanding and accurate interpretation, this response proposes that cross-industry professional bodies are better utilised in assessing all H&S regulations and ACoPs. They should provide expert advice and undertake reviews with the aim of tackling identified uncertainties.

2.5 An example on such a simplification is given in Appendix 1.

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Appendix 1 – An example of complication in Regulation 21 of the Management of Health and Safety at Work Regulations

Simplification and the correct interpretation of regulations reduce the amount of time duty holders spend conducting H&S assessments. One area of legislation which needs to be simplified is Regulation 21 of the Management of Health & Safety at Work Regulations 1999 (MHSWR). This Regulation provides:

"Nothing in the relevant statutory provisions shall operate so as to afford an employer a defence in any criminal proceedings for a contravention of those provisions by reason of any act or default of –

(a) An employee of his, or

(b) A person appointed by him under Regulation 7."

This Regulation was enacted only a few months after the Court of Appeal's decision in R v Nelson Group Services (Maintenance) Limited [1998] All ER (d) 392. Nelson Group Services had been involved in the installation, servicing and maintenance of gas appliances. One of its employees had, while removing the gas fire from a house, left the gas fittings in an unsafe condition. The fitter had been properly trained.

The Court of Appeal concluded that an employer should not be criminally liable for an isolated act for negligence by an employee performing the work where the employer can show that "everything reasonably practicable has been done to see that a person doing the work has appropriate skill and instruction, has had laid down for him safe systems for doing the work, has been subject to adequate supervision and has been provided with safe plant and equipment for the proper performance of the work".

Regulation 21 appeared an attempt to reverse the Court of Appeal's decision and duty holders were potentially faced with prosecution for the act or omission of a properly trained and supervised individual.

In a subsequent case, R v HTM Ltd ([2006] EWCA Crim 1156) revisited this question and the Court concluded that the defendant was permitted to ask the jury to consider whether, when considering that he had done all that is reasonably practicable, could adduce evidence as to the likelihood of the incident of the relevant risk eventuating, and also the nature of the training the employees had had. In coming to its decision the Court of Appeal took a legal point that under Sections 2, 3 and 4 of the HASWA that reasonable practicability is not a "defence" but a "qualification" of the general duties. As such Regulation 21 did not bite.

The difficulty with this approach is that it is uncertain (each case a defendant will have to bring themselves within the scope of the decision in HTM) and it appears that it can not be applied to regulations which are strictly liability, or strict liability but with a due diligence defence.

It is important that employers are certain that there are clear benefits to properly training staff. If not it will lead to a lack of certainty, over complication and ultimately a reduction in trust in the regulatory framework.

Whilst this is clearly a very specific point it is potentially one which would significantly reduce the regulatory burden and improve simplification if it was withdrawn.

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3 Are there any particular health and safety regulations (or ACoPs) which it would be helpful to merge together and why?

3.1 Due to the evolution of conditions in the work place and implementation of current requirements there are a number of regulations which overlap and would benefit from being merged. To conduct a review of every clause in every regulation would be overly resource intensive. This response suggests that when a regulation or group of regulations is due for renewal or review they should be assessed and merged with any overlapping statutory instrument.

3.2 A number of the regulations restate the 'risk assessment' requirement and the associated ACoP normally devotes space to explaining what this means. Moderating the latter, so that one single explanatory description is given would be very beneficial as there are differences between ACOPs

3.3 As there is a degree of overlap consideration should be given to merging the following sets of regulations covering similar issues:

- The Construction (Head Protection) Regulations 1989 and the Personal Protective Equipment Regulations 1992.
- The Gas Safety (Installation & Use) Regulations 1998, the Gas Safety (Management) Regulations 1996 and the Gas Appliances (Safety) Regulations 1995.
- The Health and Safety (Consultation with Employees) Regulations 1996 and the Safety Representatives and Safety Committees Regulations 1977.
- The Notification of Tower Cranes Regulations 2010 and the Lifting Operations and Lifting Equipment Regulations 1998.
- The Pressure Equipment Regulations 1999 and the Pressure Systems Safety Regulations 2000.
- The Workplace (Health, Safety and Welfare) Regulations 1992, the Regulatory Reform (Fire Safety) Order 2005 and Fire Safety (Scotland) Regulations 2006

3.4 The Factories Act 1961 and Offices, Shops and Railway Premises Act 1963 (Repeals and Modifications) Regulations 2009 should also be merged into the relevant regulations rather than being a separate set of legislation.

3.5 The various amendments, repeals and revocation regulations should be incorporated into the actual regulations rather than being issued separately, e.g. the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003, the Health and Safety Information for Employees (Amendment) Regulations 2009, the Health and Safety (Repeals and Revocations) Regulations 1995/1996, the Health and Safety (Miscellaneous Amendments) Regulations 2002, the Notification of Conventional Tower Cranes (Amendment) Regulations 2010, etc.

3.6 The merging of these regulations and avoidance of any future 'amendment' regulations, etc. would ensure that all relevant information on a specific activity or topic is included in a single regulatory document. This would avoid any doubt or confusion for individuals aiming to identify their obligations in the risk management of a process and would be a significant benefit and reduction in the business burden.

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4 Are there any particular health and safety regulations (or ACoPs) that could be abolished without any negative effect on the health and safety of individuals?

4.1 We are not aware of any regulation, relevant to the construction industry, which should be abolished. We consider that simplification of regulations and ACoPs is the greater priority. As previously stated, simple H&S legislation is extremely important in promoting a strong safety culture in any organisation. Abolition of specific regulations may be required in the future, as risks and work places evolve. Instead of abolition, the positive aspects of outdated regulations should be combined with others, discarding the negative and unnecessary clauses. Simplification of regulations and ACoPs is much more of a priority than abolition. Simple check lists for low risk situations would be of great help (please see question 5).

5 Are there any particular health and safety regulations that have created significant additional burdens on business but that have had limited impact on health or safety?

5.1 The regulatory system as a whole necessarily puts burdens on modern business. The key is to ensure the burden is proportionate to the risk and adds value to the business. Poor interpretation of the law by some organisations e.g. insurance companies, and the over-zealous interpretation of regulations generally, exacerbate the burden particularly for the smaller organisation. It is therefore extremely important for the simplification of regulations to be a priority, creating effective ACoPs (supported by industry guidance) and giving duty holders the ability to assess risks efficiently and proportionately. Simplification would allow a significant reduction in the bureaucracy inherent in today's H&S system.

5.2 Lord Young's report suggested the creation of a series of downloadable, simple, checklists which could be used by SMEs in low risk industries to quickly assess whether they have met their legal obligations or not. This is a good concept; however, the documents need to be adaptable and easy to use by organisations of all sizes and all industries where there is low risk. This group believes they could be extended to cover lower risk activities routinely encountered in the construction industry i.e. the criteria should be the level of risk rather than the industry itself. They should be created in conjunction with leading industry professionals to ensure all aspects of the risk assessment and legal requirements are met. We accept that the more complex risk environments continue to require bespoke approaches, but in a proportionate manner.

5.3 The Seoul Declaration (2008) views workplace health and safety as a fundamental human right and calls on national governments to perpetuate a "national preventative safety and health culture". Instilling risk management as a societal responsibility and endorsed by all is highly important. Whatever it takes to achieve a safe working environment and to produce safe products cannot be considered burdensome but should be deemed necessary.

5.4 This is further supported by the Organisation for Economic Cooperation and Development (OECD) Principles, the UK Corporate Governance Code UN Declaration on Human Rights. These declare the right to safe work is included. This all relies upon correct understanding of statutory obligations and adherence to the general principles. All should agree that the primary task is achieving safe workplaces and in so doing declared this to be a fundamental human right.

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6. To what extent does the concept of 'reasonably practicable' help manage the burden of health and safety regulation?

6.1 The concept of 'reasonable practicality' is a long-established concept which provides the flexibility necessary for a changing workplace. However this ceases to be of benefit if its meaning in real projects is uncertain and subject to misinterpretation. Hence it is essential that sufficient clarity is available to duty holders to allow effective implementation within a contractual context.

6.2 For contractors there exists much established guidance for most high risk activities and although some doubts do exist as to 'what should be done', as noted below in paragraph 6.5 et seq., these need to be tackled through improved industry-led, but HSE endorsed, guidance.

6.3 For designers little guidance exists as no-one is sure how to interpret the 'reasonably practicable' requirement in this context. In addition, the duty holder is usually divorced from the action on site and does not have control over the party undertaking the work. As designers play a significant role in designing structures which are safe and easy to build, maintain and demolish clarifying this issue is crucial. Appendix 2 provides greater detail.

6.4 The uncertainty described in the paragraph above also creates problems for CDM Co-ordinators[2] as they are equally unsure as to what designers should be doing (or more precisely, how far they should go in their endeavours).

6.5 Smaller organisations are often reliant on less experienced and less competent advice. There is a real risk that when faced with the question of 'what are the reasonably practicable steps required', the advice is risk adverse and recommends taking steps that go beyond what is actually necessary. This should be tackled by improving the available guidance and taking steps to raise the competency level of those providing advice. However, we do not argue for a lowering of standards to meet these difficulties.

6.6 The impact of the current accepted definition of reasonably practicable cannot be underestimated:

> *"reasonably practicable … seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them." Edwards v National Coal Board [1949] 1 All ER 743*

6.7 What is clear is that duty holders should and must take all proportionate actions to control "their" risks. It is also clear that duty holders do not need to take actions which are grossly disproportionate. The issue at hand here is that once all proportionate steps have been taken, regulatory policy does not require any further steps to be made, the job can be defined as "safe to start". This is however not understood and steps which do not seem reasonable or sensible are taken in the false belief that it creates an additional layer of protection from legal ramifications.

[2] CDM Co-ordinators are introduced under the CDM Regulations. Their prime role is to aid the client in discharging the latter's duties, to ensure designers are complying, and to promote co-operation and co-ordination.

6.8 Following Philip Hampton's report – *Reducing administrative burdens: effective inspection and enforcement*, published in 2005[3], it is generally accepted that regulation should be proportionate[4]. For example, current Treasury Guidance on risks confirms that [5]

> "*Government needs to take action that addresses risks in a proportionate, consistent way, based on the evidence of what is most cost effective…Government will act proportionately and consistently in dealing with risks to the public"…Government will base all decisions about risks on what best serves the public interest. Action taken to tackle risks to the public will be proportionate to the level of protection needed and targeted to the risk.*"

6.9 Since the Hampton report the HSE has promoted sensible initiatives to emphasise that good safety management is not about the elimination of risk, with "conkers" type stories being decried as myths. However, this sits at odds with the legal requirements, and it is not surprising that duty holders and those which advise them assume the worst case. Meaning required actions may, or may not, be taken.

6.10 The consequence of getting it wrong for all duty holders is potentially a criminal prosecution and the challenging position of effectively proving themselves innocent rather than the more normal burden of the prosecution proving guilt. This situation can result in safety advisors being overly cautious and recommending rather more steps than are necessary. Some employers will not employ anyone with a criminal record and it would also show up on CRB checks. This has two potential outcomes – duty holders taking unnecessary steps which end up discrediting safety management, or even worse, no steps being taken at all.

6.11 We recommend that:

- Reasonable Practicability should be defined in the HASWA. This does not require primary legislation. Section 15(3)(a) of the HASWA 1974 enables the Act itself to be amended by Statutory Instrument. Producing a definition would though be the first step to address the uncertainty.

- A formal review should be instigated relating specifically to construction designers because of the special circumstances relating to their duty (see 6.3)

An example of the issues surrounding this definition is given in Appendix 2.

[3] http://www.berr.gov.uk/files/file22988.pdf

[4] And HSE Guidance and Codes of Practice themselves increasingly use the language of proportionality – see for example Para 4 of the Managing Health and Safety in Construction (CDM) ACOP

[5] Managing risks to the public: appraisal guidance June 2005

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7. Are there any examples where health and safety regulations have led to unreasonable outcomes, or to inappropriate litigation and compensation?

7.1 We do not believe that the existence of the HASWA and its subordinate regulations have created the environment for the compensation culture. Few of the regulations give a cause of action for breach of statutory duty. All the regulations do is indicate the standard to be achieved. If the meaning of reasonably practicable was better defined this would bring benefit in this regard.

7.2 It is also suggested that a simple briefing note be produced for the Press explaining, in layman's terms, the difference between criminal and civil law in this respect. This might reduce the incidence of misleading reports.

7.3 The following examples demonstrate simple construction procedures which, because of risk adverse interpretation of regulatory requirements, required (or require) unreasonable steps to be taken:

Example 1

A significant unreasonable outcome is the burden on design organisations and contractors of having to complete the endless core competence questionnaires resulting from the over-zealous interpretation of CDM ACoP Appendix 4, despite organisations having third party OHSAS18001 or other accreditation. Safety Schemes in Procurement (SSIP) and the new PAS91 standard do not yet appear to be alleviating this burden and more should be done through the CDM ACoP to address this issue.'

8. Are there any lessons that can be learned from the way other EU countries have approached the regulation of health and safety, in terms of (a) their overall approach and (b) regulating for particular risks or hazards?

8.1 In the time available we have not have a strong foundation from which to comment on EU approaches. As a generalisation, the UK, along with some other EU states, has tended to deliberate about the detail of the implementation of EU Directives. Whilst this may take longer than just translating the Directive word for word and setting it in national legislation we consider that it is a much more effective practice because the resulting regulations reflect and are consistent with the UK approach to risk management. Notwithstanding, it would be beneficial to understand the manner in which other EU countries work so as to inform the UK debate.

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9 Can you provide evidence that the requirements of EU Directives have or have not been unnecessarily enhanced ('gold-plated') when incorporated into UK health and safety regulation?

9.1 We do not have any specific evidence of 'gold plating'. The HSE's statistical analysis of accidents and work place fatalities in Europe demonstrate that the UK H&S regulations are working[6], despite any element of over-application. As always these statistics should not be taken for granted; to retain its standards of excellence, the UK should continue to strive towards better and more robust systems. The measures for review, suggested elsewhere, can be used to identify any element of 'gold plating' which can then be treated on its merits.

10 Does health and safety law suitably place responsibility in an appropriate way on those that create risk? If not what changes would be required?

10.1 Generally, Yes. Specifically, the CDM regulations have placed a duty on all involved to assess their own risks and take responsibility for their actions.

10.2 Within ACoPs, additional emphasis should be placed on the competency of the individual (while taking care not to move any responsibility away from employers) and whole-life learning. This would emphasise to employers the need for improved training for all individuals, developing their skills in the awareness and management of risk.

[6] HSE European Statistics on work place fatalities and serious injuries:
http://www.hse.gov.uk/statistics/european/tables.htm#table4

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11. Conclusion

11.1 The continued drive for improvement in the way health and safety risk is managed in the UK is greatly appreciated and welcomed. The UK has the lowest rates of industrial accidents and fatalities in Europe. However, within the UK construction activities have one of the highest accident and fatality rates and ill health is a major issue: for example, exposure to asbestos and dust, which are less dramatic than accidents, but more difficult to police and are examples of long term issues which will be with us for many years to come.

11.2 These statistics demonstrate how although H&S regulations are working and helping business retain a healthy and a safe work force, we have some way to go and must remain vigilant. We recognise that we must strive to continually improve our record and demonstrate the UK as one of the leading figures in risk management and specifically so in respect of occupational ill health.

11.3 Regulation is not in itself a problem in the UK. The interpretation of regulation (and its associated guidance) has however had a negative impact, particularly on small business. Government should examine reducing/merging and clarifying ACoPs and other guidance notes.

11.4 We must also ensure that UK regulations, while attaining the best standards, are simple and easily followed. Full comprehension and confidence in the legislative framework by all duty holders and individuals can provide a work environment in which worker satisfaction is high and productivity is boosted as a result.

11.5 This increased productivity and efficiency will in turn lead to a greater competitive edge for the UK. Promoting the UK to the kind of foreign investment we sorely need during difficult economic times.

General recommendations from this response:

- **All regulations and ACoPs need to be regularly reviewed with input from professionals working in that field**
- **In places, Regulations and, more generally, ACOPs need to be simplified and/or their requirements clarified to reduce opportunities for misinterpretation - with input from professionals working in that field.**
- **Benefit could be obtained by consolidating a number of regulations and in avoiding 'amendment' regulations.**
- **An urgent review is required to bring improved definition to 'reasonably practicable'**
- **A specific review is required to consider the application of 'reasonably practicable' as applied to construction designers**
- **We do not believe that inappropriate litigation or compensation is related to the current regulations.**

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Appendix 2 - Reasonably Practicable

The extension of this principle to construction designers under the CDM Regulations (Regulation 11) has brought uncertainty (often accompanied by significant bureaucracy) to the point where the working group believes the Regulation is discredited and un-enforceable. Generally speaking, Designers are remote from the manual tasks (of construction or maintenance), have no control over it, and no contact with those undertaking the work. This was not the scenario envisaged when the test was originally introduced. We support the concept, but the manner in which it has been introduced as a statutory obligation has shown itself to be unworkable.

The legal definition of 'so far as is reasonably practicable' has been established; however, as shown by ICE's study [2], it offers no assistance in a practical sense. There is no case law which offers any substantive clarification for **construction Designers**. Therefore the key issue remains 'how far is far enough?'

After 16 years of its existence, no-one in industry knows how to apply Regulation 11 in a practical project related manner in order to satisfy the law. As mentioned, there is no substantive case law to assist this practical understanding. Whilst there are examples of good practice, that is not necessarily the same as compliance in the absence of endorsement by the Health and Safety Executive. As a consequence of this position, a significant number of Designers ignore the requirement; a further significant number waste valuable time and energy producing unnecessary or worthless paperwork, i.e. the ubiquitous 'Risk Assessment', for no benefit.

Those who wish to encourage compliance are prevented from doing so as they cannot be sure what 'compliance' looks like. At a time when industry should be looking for efficiency and added value this is an unacceptable and wasteful use of resource and a missed opportunity for what is essentially a good concept.

This issue is not concerned with a peripheral requirement, or some issue of interest only to a few. It goes to the heart of the design process, affecting not only designers but also CDM Co-ordinators who are unable to be satisfied that designers are discharging their obligations. For such major players in such an important industry to have this gross uncertainty is unacceptable.

Recommendation:
Regulation 11, and its accompanying ACoP text, needs to be re-drafted to allow clear explanation, execution and enforcement. Such action would have a significant beneficial effect upon our built infrastructure: in terms of reducing accidents and ill health, but also in terms of improved projects over their lifespan.

References

1 Appendix C of reference 2.
2 At http://www.ice.org.uk/Information-resources/Document-Library/So-Far-As-Is-Reasonably-Practicable