

Consultative Document on the Revision of the Construction (Design and Management) Regulations (CDM) 1994, Construction (Health, Safety and Welfare) (CHSW) Regulations 1996, Approved Code of Practice (ACoP) and Guidance

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SUMMARY

1. This Consultative Document (CD) sets out the Health and Safety Commission's (HSC) proposals for a single set of Regulations, and supporting guidance, covering construction work in Great Britain. The proposed Regulations would consolidate and revise provisions in the Construction (Design and Management) (CDM) Regulations 1994¹ and the Construction (Health, Safety and Welfare) (CHSW) Regulations 1996², which implemented the Temporary or Mobile Construction Sites Directive (TMCS) (1992/57/EEC)³.
2. The proposals build on the general principles of CDM and experience of its implementation and take account of the responses to the 2002 Discussion Document (DD) *Revitalising health and safety in construction* and other feedback from industry. They reflect the HSC and Construction Industry Advisory Committee (CONIAC) commitment that the revision exercise should **improve the management of risk**, and therefore ensure responsibility is placed with those in the best position to influence or manage it.
3. They aim to simplify and clarify what duty holders need to do, so that they can easily identify and understand their own role (and those of other members of the project team). To make it easier to understand the various responsibilities, we have restructured the proposed Regulations, to group their requirements by duty holder. We have also tried to make application of the Regulations and guidance simpler and more suitable, and the proposals more compatible with less-traditional procurement methodology.
4. As part of this process, and reflecting responses to the DD, what remains of the CHSW Regulations, after the amendments due to the new Work at Height Regulations, now forms the basis of Schedules 2 and 3 of the proposed single set of revised CDM Regulations.
5. We have used the experience and knowledge gained, in the 10 years since the CDM Regulations were first in place, to make changes we believe will be effective in raising health and safety standards in the industry. We think they allocate responsibilities in a practical and proportionate way. If you believe they do not, or there are problems of practical application that have not been identified, we would like to hear from you in response to this consultation exercise.
6. The proposals recognise the influence of clients on the whole process, and seek to encourage clients and all members of their project teams to communicate and work effectively together, from the start to the end of the project, to ensure health and safety issues are identified and addressed. To ensure services and adequate welfare facilities are provided from the start of construction work, and to help provide a level playing field for prospective Principal Contractors (PC) to price for such facilities, clients are required to state at the tender stage how much notice of mobilisation will be given.
7. To assist clients in discharging their duties, we have replaced the Planning Supervisor (PS) with a new role "the co-ordinator" to provide advice and support. The co-ordinator's role has evolved from that of the PS, but is re-enforced (in tandem with the client's duties) to create an empowered and key advisor to the client, and pivotal figure in ensuring an effective and cohesive project team. We have not lost sight of the fact that good health and safety has commercial benefits too: better quality, and more chance of the project being completed on

¹ Statutory Instrument (SI) No. 1994/3140, as amended by SIs 1996/1592, 1998/494, 1999/3242 and 2000/2380

² SI No. 1996/1592, as amended by SIs 1998/494, 1998/2306, 1998/2307 and 1999/3242

³ The TMCS Directive is currently implemented in Great Britain mainly through the CDM and CHSW Regulations. The full text of Directive 57 of 1992 can be found at <http://europa.eu.int/>

time and coming in on budget because the site will be better managed. We see the co-ordinator as being instrumental in ensuring this.

8. Designers have considerable potential to reduce the risks associated with construction work, as well as those associated with building use, maintenance, cleaning, and eventual demolition. The proposals reflect this. The principles are largely unchanged, but revised requirements clarify the factors they must take into account when exercising their professional judgement. The aim is to encourage designers to focus on what they can do, in the design, to eliminate hazards, where possible, and reduce the risks resulting from any that remain.

9. There are no substantial changes regarding the PC or contractors, except to make explicit, in the proposed Regulations, the PC's key role in managing the construction phase; and the contractor's duty to plan, manage and monitor their own work to ensure that it is carried out in accordance with the plan and, so far as is reasonably practicable, safely and without risk to health. The PC's key role in promoting worker consultation and involvement is also emphasised.

10. Construction, design and management are inseparable links in the safe, healthy and effective construction project management chain. For this reason, CONIAC felt it was important to retain the current title of the CDM Regulations. The proposals focus on achieving effective planning and management, with the minimum of bureaucracy – concentrating on the provision of necessary and relevant information, rather than on generic documents adding to bureaucracy without adding value.

11. The proposals also recognise that competence is crucial, and that the person best placed to do something may not necessarily be the best suited. The Regulations therefore provide for necessary functions to be undertaken only by those who are competent; but also offer support – primarily in the role of the co-ordinator – for clients who may be unfamiliar with construction work.

12. The HSC understands that, although there is a clear desire for better Regulations, industry culture is the biggest hindrance to progress, and we cannot directly change this by the law. This consultation does offer a good opportunity, however, to promote risk management and to influence attitudes and behaviour.

Your role

13. We need to know your views on whether we have satisfactorily addressed the issues in the draft Regulations, and supporting guidance material. We would also welcome your suggestions on how we can maximise the positive impact of the proposed new Regulations, if they receive your support.

14. This CD includes a number of key questions on which we are seeking a response, and these are set out in the questionnaire on page [?]. They cover issues such as whether you prefer a single set of Regulations, or separate packages covering the management and practical requirements; and whether grouping the Regulations' requirements by duty-holder makes it easier to understand the various responsibilities.

15. Responding to this consultation gives you a real opportunity to influence the way in which these proposals are taken forward. We are particularly keen to know the reasons for your views, so would appreciate you taking the time to provide us with this extra information in the text boxes provided in the questionnaire. The questionnaire is not intended to restrict your response. Paragraph [?] explains how to respond on any other aspects of the draft Regulations or guidance. **The deadline for responses is [?]**

INTRODUCTION

16. HSC believes that consulting with stakeholders ensures an open and transparent approach to decision-making, which is essential if policies and decisions are to have widespread ownership and reflect the needs and aspirations of the people they will affect. The Commission then decides on the best way forward, based on an interpretation and analysis of the results of the exercise.

17. This Consultative Document (CD) sets out the HSC's proposals for a new set of consolidated construction regulations and supporting guidance, covering construction work in Great Britain. The proposed Regulations would consolidate and revise provisions in two sets of existing health and safety regulations: the Construction (Design and Management) (CDM) Regulations 1994 and the Construction (Health, Safety and Welfare) (CHSW) Regulations 1996, which implemented the Temporary or Mobile Construction Sites Directive (TMCS) (1992/57/EEC).

18. The HSC is grateful to CONIAC, its CDM Review Working Group and others who have provided ideas, material and comments on early drafts. Their help in developing these proposals has been incalculable.

19. **We need your views on these proposals by [deadline].** A form with particular questions is provided at page [??], but we would also welcome your comments on any other aspect of the proposals or draft documents. You can help make our analysis easier by filling in the form on-line or downloading a copy and e-mailing your response to us. Providing an explanation of the reasons behind your answers will also help us understand why you hold the views you do. For full details on how to respond and the sort of information we need, see page [??]

Implementation timetable

20. How we proceed, and the timetable we work to, will be affected by the results of this consultation. If responses indicate general support for our proposals, we are aiming to have the new Regulations and guidance in place by October 2006. This allows for HSE analysis of responses, further HSC consideration of HSE's report on the consultation, and the usual Parliamentary process.

OUTLINE AND EXPLANATION OF HSC'S PROPOSALS

Background

21. The introduction of CDM 1994 marked an innovative approach to construction legislation, and an early review of its impact therefore followed. This concluded that, although the philosophy was widely understood and accepted, there was a need to clarify the CDM requirements for duty holders. This led to the ACoP being revised in 2001, which was well received, and the guidance we are now proposing builds on that and develops it further to reflect the clearer signposting of duties in the Regulations.

22. In Autumn 2002, HSE consulted the industry on a wide range of issues in *Revitalising health and safety in construction*. The responses received⁴ indicated that there was general agreement that the principles of CDM were correct, but that a number of issues still needed to be addressed to deliver the benefits that had been expected when CDM first came into force. Responses (relevant to the construction Regulations) suggested a need to:

⁴ A detailed summary of responses can be found at www.hse.gov.uk/consult/disdocs/dde20summary.pdf

- improve competence at all levels – professionals, managers and site workers. (Respondents saw this as the single biggest factor in improving standards.) This included raising the profile and value of site induction;
- recognise the influence that clients wield, either beneficially or detrimentally. Clients' attitudes and approach ('cheapest/quickest') was seen as the second biggest hindrance to progress – industry culture being the first. Linked to this was the importance of allowing enough time to plan and deliver projects effectively. Most respondents wanted clients' legal duties to be increased, though some regarded this as unreasonable;
- re-evaluate the PS role because many saw it as largely ineffective. The vast majority of respondents wanted changes, albeit incompatible ones, to address issues such as remoteness from "front-line" activity, lack of client and designer support, independence and late appointment. Although a substantial majority favoured changing and developing the role, there were various views as to what the changes should be;
- produce more specific legislation so that everyone knows exactly what they need to do – although many wanted more freedom to act, based on their assessment of the risks;
- improve consultation with the workforce (but attitudes were quite polarised).

23. Many respondents saw poor project management and fragmentation as major obstacles to progress in health and safety. Fragmentation and the associated adversarial attitudes encouraged people to pass risk down the supply chain – often to those that were least able to actually reduce or manage the risk.

24. There was strong support for integrated teams, which respondents said produced benefits in health and safety as well as other areas. However, few respondents thought that integrated teams should be required in health and safety law. Gateways⁵ to ensure that health and safety issues were properly addressed were seen as a way of improving project management, though, again, there was a preference that they should not be prescribed in law.

25. While there was a clear desire for better Regulations, industry culture (particularly its inertia and complacency) was seen as the biggest hindrance to progress. There was a recognition that law cannot itself directly change the industry's culture, but the actual process of changing the law does provide opportunities to positively influence the culture. **Although this CD focuses on proposed legal changes, we must not lose sight of the need to promote changes in attitudes and behaviour within the industry. Without such changes, no set of regulations can achieve the step-change in health and safety that we want to see.**

26. We would welcome your views on whether such issues are satisfactorily addressed in the draft guidance on good practice. We would also welcome your suggestions on how we can maximise the positive impact of the proposed new Regulations, if they receive your support. For example, it is very important that we do not appear to encourage unnecessary bureaucracy. Indeed, we want to encourage everyone to challenge existing procedures that do not contribute to better risk management and better value.

⁵ a checkpoint, to ensure a key activity has taken place before moving to the next stage of the project

Objectives of the revision

27. Taking account of the responses to *Revitalising health and safety in construction* and other feedback from industry, the HSC and its Construction Industry Advisory Committee (CONIAC) concluded that the key objectives for the revision of CDM should be to **improve the management of risk** by:

- simplifying the Regulations to improve clarity – so making it easier for duty holders to know what is expected of them;
- maximising their flexibility – to fit with the vast range of contractual arrangements;
- making their focus planning and management, rather than the plan and other paperwork – to emphasise active management and minimise bureaucracy;
- strengthening the requirements regarding co-ordination and co-operation, particularly between designers and contractors – to encourage more integration;
- simplifying the assessment of competence (both for organisations and individuals) to help raise standards and reduce bureaucracy.

28. We would appreciate your views as to whether our proposals deliver these objectives. We recognise there is some tension between the first two objectives, because it is impossible to provide total clarity and flexibility at the same time. Given the vast range of businesses and types of projects in the construction industry, it is difficult to provide the prescription that one part of the industry seeks, without restricting the flexibility that another part wants. We have tried to achieve a balance between these conflicting aims, enhanced by the supporting guidance material.

29. We are also conscious of the need to address the position of both small and occasional clients and small contractors, as these groups may find it harder to get to grips with the revised Regulations, and we would welcome your opinion on whether we have succeeded in doing so.

Q1. Responses to the DD indicated a clear view that the Regulations needed to be revised. Having seen the proposals do you:

- a) **support the changes proposed (in general terms);**
- b) **feel you would rather stick with the current Regulations and ACoP; or**
- c) **neither of the above?**

Q2. Do you think the proposals will:

- a) **help to reduce bureaucracy;**
- b) **encourage team -working; and**
- c) **support effective project management?**

If your answer is “No”, please say how you think this could be improved.

Key changes

30. This section sets out the background and rationale for some of the main proposals in the draft Regulations and seeks your views.

Application and notification

31. The distinction in the current Regulations between their application and notification of projects is confusing. We therefore propose that, for the purposes of the Regulations, there should only be only two types of construction projects: notifiable and non-notifiable⁶. All of the proposed requirements would apply to notifiable projects, but the requirements relating to appointments, plans and other paperwork would not apply to non-notifiable projects. The practical effect of this would be that all projects would require:

- Non-domestic clients to check the competence of all their appointees; ensure there are suitable management arrangements for the project; and allow sufficient time and resources for all stages;
- designers to eliminate hazards and reduce risks due to design; and provide information about remaining risks;
- contractors to plan, manage and monitor their own work and that of workers; check the competence of all their appointees and workers; train their own employees; provide information to their workers; comply with the requirements for health and safety on site detailed in Schedule 3 and other regulations; and ensure there are adequate welfare facilities for their workers;
- everyone to assure their own competence; co-operate with others involved in the project; report obvious risks; take account of the general principles of prevention in planning or carrying out construction work; and comply with the requirements in Schedule 3 and other regulations for any work under their control.

32. As well as the above requirements, a notifiable project would require:

- Non-domestic clients to appoint a co-ordinator and ensure that job is performed properly; appoint a Principal Contractor (PC); provide information; check (before construction work starts) that there is a construction phase plan and suitable welfare facilities; and retain and provide access to the health and safety file;
- co-ordinators to advise and assist clients with their duties; notify HSE; co-ordinate design work; manage communication between client, designers and contractors; liaise with the PC on ongoing design issues; prepare and update the health and safety file;
- designers to check, before they start work, that clients are aware of their duties and a co-ordinator has been appointed; check HSE has been notified; and provide any information needed for the health and safety file;
- PCs to plan, manage and monitor the construction phase in liaison with contractors; prepare, develop and implement a written plan (the initial plan to be completed before the construction phase begins); make sure suitable welfare facilities are provided from the start and maintained throughout the construction phase; check the competence of all their appointees; provide site inductions; consult with the workers; liaise with the co-ordinator on ongoing design issues; and secure the site;
- contractors to confirm clients are aware of their duties and a co-ordinator has been appointed; co-operate with the PC in planning and managing work; check HSE has

⁶ A project is notifiable if the construction phase is likely to involve more than (a) 30 days, or (b) 500 person days, of construction work.

been notified; and provide any information needed for the health and safety file.

33. To ensure the revised Regulations are proportionate to risk and the needs of small businesses, and to minimise bureaucracy, we also propose to drop the current requirement for appointment of a Planning Supervisor (PS) and PC and written plans for projects involving 5 or more workers. This does not mean any lessening in the health and safety standards required by the Regulations, as we have strengthened or introduced other requirements. These place the emphasis on risk management, while avoiding disproportionate bureaucracy for smaller projects.

34. We would welcome views on this approach and also on whether the split between the requirements that apply to all projects and notifiable projects is correct. (The demarcation is set out in the introduction to the attached draft guidance.)

Competence

35. The current CDM Regulations require clients and others to appoint competent PSs, designers, PCs and contractors. While this principal is generally accepted, the common view is that the arrangements adopted by most clients (and other CDM duty holders) do not ensure competence. Instead, they have tended to become bureaucratic form filling exercises.

36. We must address the need to ensure competence both of individuals working on a project, and of businesses engaged to carry out the work. In doing so, we have built on current requirements in CHSW, regulation 28 and CDM, regulations 8 and 9. We recognise that assessing competence is not always easy, particularly for less experienced clients. HSE has therefore commissioned research⁷ to establish current good practice in this area. Some tentative ideas are set out in the draft guidance, but this will be revised in the light of your comments and the outcome of the research project.

Q3. How do you think we can make it easier for people to assess appointees' competence?
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37. How far should HSE promote, or allow people to rely on, industry standards and pre-qualification initiatives for assessing competence? We think that these are likely to be at least as effective, and much less bureaucratic, than some current approaches. However, it is always crucial for competence to be considered in relation to the actual work proposed. Industry standards may be adequate for 90% of projects, but some may require higher standards or degrees of assurance because of the risks involved.

38. Similar considerations apply to the competence of individual designers, managers and other workers. Here, the tentative approach is to encourage, through the guidance, the use of CSCS (and similar) certification as a minimum standard. We would welcome feedback on this idea and suggestions for alternative approaches.

39. There is also a proposed new duty on appointees to make sure that they are competent to do what they are appointed for. After all, they are usually in a better position to make that judgement than the person appointing them.

Co-operation

40. There are currently various duties on designers and contractors to co-operate with the PS, other designers or the PC. These have been drawn together into a single requirement for everyone involved in the project to co-operate with others to enable them to carry out their duties under the revised Regulations.

⁷ See www.hse.gov.uk/construction/cdmguides.htm for further information.

41. The draft Regulations also extend this duty to require co-operation between different projects on the same or adjoining sites. An example would be during the construction of an industrial estate, where different projects are dealing with roadways/construction of the shells and fitting them out. There needs to be co-operation to ensure safe access.

Worker engagement

42. Worker participation is widely recognised as a crucial element of effective health and safety management, and we recognise the role that unions and Safety Representatives play in improving worker health and safety consultation and standards on construction sites.

However, we also know that, in practice, only a small proportion of construction work where CDM applies will be carried out on sites with appointed TU Safety Representatives. We therefore believe it would be desirable to place a duty on PCs to carry out meaningful worker consultation. Draft regulation 18 aims to improve worker engagement on sites where CDM applies, thereby promoting a positive safety culture in the industry.

43. Through this requirement we are hoping to achieve proper consultation with the workforce, including:

- a management commitment to providing information to, and receiving information from, the workforce;
- effective procedures put in place for consultation dialogue and/or discussion;
- evidence that workers' views are properly taken into account;

44. We want to ensure that workforce consultation is achieved in a planned and structured way – including the participation of workers' representatives and committees in the consultation process, where appropriate. Procedures should, of course, be in proportion to the changing risks presented as a project develops, the numbers of workers involved, and take account of any cultural/language differences on site.

45. We see properly planned and managed worker participation as a valuable means of improving the risk assessment process, early identification of safety hazards, selection/development of safe systems of work, and standards of occupational health. As well as assisting the consultation process between the PC and the workforce, the requirement should also ensure the flow of necessary information between contractors' workers, where the activities of one contractor may affect the health or safety of other contractors' workers.

Client's role

46. The role of clients is one of the most difficult areas to cover in law, because of the vast range of interest and expertise in construction, and clients have real questions as to why they should be involved. We are very conscious of the substantial influence and control that clients exert over construction projects in practice. For example they:

- set the tone for projects
- control contractual arrangements
- make crucial decisions (eg budget, time, suitability of designs)
- select procurement method and construction team/supply chain
- may have essential information about site/building

47. It would not, however, be reasonable or sensible to force clients to become experts in construction health and safety or to take on the management of construction projects. (Indeed we believe that there must be one party, the PC, who has clear, uncompromised responsibility

for the management of the construction work on larger projects.) We are therefore proposing a new duty on clients to ensure that suitable project management arrangements for health and safety are in place. (See regulation 7, which is a development of material in the existing ACoP.)

48. Clients are not expected to develop these arrangements themselves and few have the expertise to do so. They should be able to rely on the advice and support of their construction team and, in particular, the co-ordinator. What we expect is for them to exercise their influence and control responsibly and with due regard for those who will construct, maintain and demolish the structure.

Q4. Taking account of clients' influential role, but also of their frequent lack of construction expertise, do you think the proposed new duties on clients (particularly to ensure that there are suitable management arrangements) are reasonable and appropriate?

If your answer is "No", please explain what you think is needed instead.

49. We do not propose to retain the current provisions on agents; with the anomalous freedom this gives clients to absolve themselves of their legal obligations. The aim is to prevent anyone retaining control while avoiding accountability. However, where several clients have related projects it can be useful for them to be brought under common management. We therefore propose to allow several clients to agree among themselves that one should be treated as the sole client for the purposes of the Regulations – except for any ongoing involvement or information that they have.

50. In addition, we propose to omit the current provisions (regulation 5) regarding developers. We believe the general provisions are sufficient to cover this particular client group.

Q5. Do you think the Regulations make it clear that the intention of the proposed new duty on clients is for them to ensure that things are done – but not necessarily for them to do those things themselves?

If your answer is "No", how do you think this could be made clearer?

Q6. Do you think the duties on clients (supported by co-ordinators) to ensure there are arrangements for managing projects are likely to have a beneficial effect on safe planning and arrangements for work?

Q7. Do you think the explicit duty on clients to allocate sufficient time and resources is helpful?

If your answer is "No", please say how you believe this could otherwise be achieved.

Planning Supervisors

51. There is widespread agreement that the role, as currently developed, has not proved as effective as intended. However, views on this tend to be highly polarised. The main problems are that they:

- are not seen as a natural part of the construction team. To be effective they need to be better integrated with the rest of the design and construction team;

- are often appointed too late in the project so that they cannot do their job;
- frequently have to operate at a disadvantage, due to insufficient allocation of resources by the client, in terms both of money and time;
- have no authority to carry out their duties unless the client effectively empowers them and others co-operate; and
- have, fairly or not, become the scapegoat for the bureaucracy linked to CDM.

52. To address these points we propose to:

- create a new function – the co-ordinator⁸ – to advise and assist the client;
- place responsibility on clients to ensure that the co-ordinator's duties are carried out – only they have the information and authority to empower the co-ordinator.
- explicitly require the co-ordinator to be appointed before design work starts with corresponding duties on designers and contractors not to begin work unless a co-ordinator has been appointed; and
- require the client to ensure that the arrangements for managing projects include the allocation of adequate resources (including time).

53. Although the role of co-ordinator has been developed from that of the PS, we see the two roles as being substantially different in their duties and structure – with the co-ordinator's function being to assist the client, designer and contractor in achieving better health and safety on site. The client will instruct the co-ordinator and be required to ensure they carry out their duties.

54. In developing these proposals we have focused on the tasks that need to be carried out, rather than the person performing them. These tasks are set out in draft regulation 13. The key task is a duty to advise and assist the client in undertaking the measures to comply with these Regulations. The intention of this requirement is to position the co-ordinator as the client's *friend*. Responsibility for ensuring the co-ordinator carries out the necessary functions rests with the client.

⁸ The name comes from the term pre-construction health and safety co-ordinator, which is used in the Temporary or Mobile Construction Sites Directive (TMCS). This may be changed in the event of a better suggestion. We have deliberately chosen not to include health and safety in the name as some or all of the tasks may be integrated into the project management arrangements.

The TMCS is currently implemented in Great Britain mainly through the CDM and CHSW Regulations. The full text of Directive 57 of 1992 can be found at <http://europa.eu.int/>

Q8. Will the proposed role of the co-ordinator provide the support needed by clients, particularly inexperienced ones?

If your answer is “No”, please explain what you think could be done to achieve this.

Q9. Do the proposed changes address the late appointment and lack of influence issues currently faced by the Planning Supervisors?

If your answer is “No”, please provide any suggestions you have for an alternative approach.

55. The co-ordinator could be an individual or a company, as with the existing PS and PC, and the tasks could be allocated within other roles.

Designers

56. We fully recognise that, as well as health and safety considerations, designers need to take into account issues such as aesthetics, buildability, and cost. The challenge is to ensure that health and safety considerations are not outweighed by aesthetic and commercial priorities and, conversely, that health and safety does not inhibit aesthetics. However, it is a truth, almost universally acknowledged, that designers have considerable potential to eliminate hazards and reduce risks associated with construction work, as well as those associated with building use, maintenance, cleaning, and eventual demolition.

57. As part of balancing their design priorities, designers must take positive steps to use that potential and pay sufficient regard to health and safety in their designs to ensure that in the construction, use, maintenance and demolition of the resulting structures, hazards are removed **where possible** and any remaining risks reduced. Although this is already stated in the guidance, we propose to explicitly acknowledge the need for such balanced decisions in the Regulations. We want to be clear that we expect designers to exercise their professional judgement in a responsible way, not to unreasonably restrict their creativity.

58. We also recognise that the wording of the current CDM regulation 13 is not well understood. It does not communicate simply the factors that designers must take into account when exercising their judgement, and we have improved on this in the revised Regulations. One of the primary aims of the revised Regulations is to clarify the designers' duties, so that the wording is clearer and less subjective. We also want designers to focus on how their decisions are likely to affect those constructing, maintaining, using or demolishing the structures that they have designed and what they can do, **in the design**, to remove the hazards, eg by not specifying hazardous materials and avoiding the need for processes that create hazardous fumes, vapours, dust, noise or vibration, and reduce the resulting risks where the hazard cannot be removed. The current ACoP and guidance already sets out most of this and there is no plan to change these standards.

Q10. Do you think the proposed designers' duties are appropriate, reasonable and proportionate?

If your answer is “No”, please explain what you think is needed.

Q11. Do you think the proposed duties on designers, when read with the supporting guidance, are clearer and easier to understand?

If your answer is “No”, please explain what you think is needed.

59. The draft regulation 14 is intended to require designers to eliminate hazards where they can, and then reduce those risks which remain. It does not ask designers to minimise all risks, as we do not expect structures to be restricted to a height of 1metre! There are also often too many variables and no obvious *safest* design. Practical guidance on these judgements is provided and more has been published or is under development in collaboration with some of the professional institutions.

60. The duty regarding maintenance is currently limited to structural matters, but it is important that designers also consider safety during routine maintenance that is affected by their designs – eg how are high-level lights and ventilation systems to be maintained?

61. Currently, designers have no duty under CDM to ensure that their designs are safe to use. However, occupiers of workplaces have to ensure that the finished structure complies with other health and safety law, particularly the Workplace Regulations.⁹ To ensure that these issues are addressed at the design stage we propose to extend designers’ duties for fixed workplaces (eg offices, shops, schools, hospitals and factories) to cover safe use. Competent designers should be doing this already – so this is likely to require minimal additional work in practice.

Q12. Do you agree with the explicit duty on designers to consider the health and safety of users of offices, shops, factories and other fixed workplaces that they design?

If your answer is “No”, please explain why.

62. At present, there is a tendency for designers to provide generic risk information, (i.e. sometimes merely statements of the obvious), rather than the project specific information that other designers and contractors are likely to need. We would appreciate views as to whether the current proposals clearly scope the types of information that designers should provide.

Q13. Does the proposed duty on designers, to provide the information needed by contractors and others to comply with their duties under these Regulations, describe the information needed and discourage unhelpful generic risk information?

If you think not, we would welcome your suggestions for improvement.

Q14. Do you think buildability/maintainability/usability reviews provide a practical way of reviewing designs to ensure they satisfy the requirements of the Regulations?

Principal Contractors

63. The role of Principal Contractor (PC), introduced when CDM came into force, was built on the longstanding role of main or managing contractor and did not, therefore, require any substantial changes in industry practice. Because of this, as a role, it has worked fairly well since CDM came into force, and we have not identified any need to change it significantly.

⁹ The Workplace (Health, Safety and Welfare) Regulations 1992 [Statutory Instrument (SI) No 1992/3004, as amended by SIs 1995/2036, 1996/1592 and 1999/2024]

64. The only substantial proposal is to make explicit, in the Regulations, the PC's key role in managing the construction phase, to ensure that it is carried out, so far as is reasonably practicable, safely and without risk to health. This does not mean that the PC has to manage the work of contractors in detail – that is the contractors' own responsibility. They do have to make sure that they themselves are competent to address the health and safety issues likely to be involved in the management of the construction phase; satisfy themselves that the designers and contractors that they engage are competent and adequately resourced; and ensure that the construction phase is properly planned, managed and monitored, with adequately resourced, competent site management appropriate to the risk and activity.

65. We believe that single point overall responsibility for the management of health and safety on the construction site is crucial. We therefore propose to explicitly say that there can only be one PC for a project. In addition, the duties and guidance on the client's role have been drafted to encourage their participation, but to discourage interference in site management.

66. We do not feel it is necessary, legally or otherwise, to specify in the Regulations that the PC must be a contractor. In over 90% of projects, contractors discharge the role of PC and those with contractor's experience and expertise are most likely to have the competence and resources to manage the work. We believe that few clients have the competence or resources to manage significant construction work and do not want to encourage them to do so, although there is nothing to prevent this if they are competent – which is most likely in simple, low-risk projects.

Contractors

67. The only substantive change proposed regarding contractors, is to make explicit their duty to plan, manage and monitor their own work. The intention is that the proposed management duties on PCs and contractors should complement one another, with the contractor's duty focusing on their own work and the PC's on the co-ordination of the work of the various contractors.

68. It may be useful to provide brief guidance about the level of competence that contractors need for high-risk work like deep excavations, explosives, structural alterations and demolition. We would welcome views and suggestions on this.

Mobilisation periods

69. One of the biggest complaints in the responses to the DD was that adequate time is often not allowed for contractors to plan and prepare for construction. We, therefore, want to make sure that prospective PCs, and all other contractors involved in a project (whether directly engaged by the client, or through the PC) have sufficient time to plan and make proper preparations for the work on site. A key issue is the period between being told to start and actually starting work. To address this issue in the Regulations, we propose to require:

- clients to allow sufficient resources – this explicitly includes time;
- the co-ordinator to tell prospective PCs and contractors that are appointed by the client (and similarly for the PC to tell other prospective contractors) the minimum notice which they will be allowed between appointment and commencement of work to plan and prepare for construction work; and
- the client and the PC to ensure that adequate welfare facilities are in place at the start of the construction phase of notifiable projects – an additional means of ensuring that services are in place at the start and reasonable time is allowed.

70. Some sections of the industry suggested that we specified a minimum period in the Regulations which must be allowed between notice of mobilisation and the start of construction work. Although we are sympathetic to the idea, we do not believe it is feasible to prescribe this in law, because of the variety in the nature and scale of construction projects. This has to be determined for each project, taking into account the principles of good management, communication and co-operation enshrined in the Regulations.

Q15. Do you think the new duty to spell out the minimum time between mobilisation and actually starting work will help to ensure sufficient time is available to prepare properly for construction?

If your answer is “No”, please explain how else you think this could be achieved.

Pre-tender / Pre-construction plan

71. We want to encourage the communication of relevant information, rather than a focus on particular documents. As part of this, we propose to replace the current pre-tender or pre-construction plan with a requirement to provide information to:

- focus attention on communication of the information that designers and contractors need to plan and do their work – not a particular document or plan setting out what is to be done; and
- make it clear that this is not about producing one document for everyone, at one particular stage in the project, but providing the right information, to the right people at the right time, throughout the project.

For convenience this has been called the information pack, but it is really about the flow of information around the project team during the early stages of a project. Although all members of the project team will play a part in ensuring the right information gets to the right people at the right time, we see this as a particularly important function of the co-ordinator.

Health and safety file

72. Under the current requirements a separate health and safety file is required for each project. We believe that it would be more useful to have one file for each site, structure or, occasionally, group of structures – eg bridges along a road. The file can then be developed over time as information is added from different projects.

73. There are also opportunities to link the health and safety file with other documents such as the Buildings Regulations Log Book. We want to ensure that such links can be made to make the file as useful and easy to maintain as possible. The potential practical value of the information contained in the file is also likely to increase as more clients make use of the Internet to share this information with designers and contractors. (For example, maintenance contractors could check what access equipment and parts they are likely to need to repair a fault before leaving for the site, saving them and their clients inconvenience, time and money.)

Domestic Clients

74. As with all projects, designers and contractors working for domestic clients will have to be competent and take reasonable steps to ensure that anyone they arrange for, or instruct, to manage design or construction work is also competent. They will also have to co-operate with others involved in the project, to safeguard the health and safety of everyone involved. When preparing or modifying a design, designers will have to avoid risks to the health and safety of anyone constructing, maintaining, using or demolishing the structures concerned, by

removing the hazards (and reducing the risks arising from any that remain). Contractors will have to plan, manage and monitor their own work; and ensure that there are suitable welfare facilities.

75. In principle there is no reason why projects for domestic clients should be treated differently from commercial projects. In reality, however, imposing CDM duties is not straightforward and we do not believe that it is practical to place legal duties on domestic clients, particularly to appoint competent people. We therefore propose to continue the exemption. The net effect of our current proposals is that, as now, the Regulations would apply to all domestic projects, but there would be no need for a domestic client to appoint a principal contractor or co-ordinator, to notify HSE of the project, or to produce a health and safety plan or file. Our view is that this places responsibilities with those best placed to manage the risk, and that there would be no added value from placing duties on domestic clients.

Structure of the Regulations

76. We have altered the structure of the proposed Regulations, so that the duties are now grouped by duty-holder. We believe this will make it easier for people to identify what they (and other members of the project team) need to do.

Q16. Does grouping the Regulations' requirements by duty-holder make it easier to understand the various responsibilities?

If you think not, please say how you would you organise the Regulations.

77. The proposed Work at Height Regulations will replace a significant part of the CHSW Regulations. In the discussion document *Revitalising health and safety in construction* we asked for your views as to what we should do as a result. We only had 54 responses on this point, but 80% expressed a clear preference for merging the CDM and CHSW Regulations. The draft Regulations have been prepared in line with those views.

78. Some respondents thought that merging the Regulations would compromise their clarity and make them unwieldy. Others believed that this would make life simpler and easier, drawing clients' and designers' attention to practical site safety issues and might even address some of the misconceptions as to when the Regulations apply. It is these issues that we need your views on, and we hope that being able to compare the existing structure with that of the combined Regulations in the draft will put you in a better position to make an informed judgment on the point.

79. In drawing your conclusions on this point, please bear in mind that:

- merging allows some links to be made between the CDM roles and the practical issues – eg welfare provision; and
- legally it makes no difference whether the Regulations are merged or separate, except that merging them is a bit tidier because it avoids repetition of the definitions and some other legal technicalities.

80. If the preference were for separate Regulations we would not propose to consult again with two separate sets of Regulations, we would simply make the necessary legal changes to split the requirements. It is therefore important that, whatever your view on the best structure, you comment on any drafting issues regarding the Regulations as they are set out.

Q17. Responses to the DD indicated a preference for a single set of construction regulations. Now that you can see what that looks like, would you prefer:

- a) a single set (as proposed); or
- b) separate packages covering the management and practical requirements?

Please give the reasons for your preference.

Old CHSW Regulations requirements

81. The Construction (Health, Safety and Welfare) Regulations 1996 (CHSW) requirements, without the work at height provisions (regulations 6, 7 and 8), form the basis of Schedules 2 and 3 of the draft Regulations. The revision is mainly intended to simplify and clarify the wording of the Regulations, without making substantive changes to what is expected in practice. One substantive change, however, has been to broaden the duty regarding explosives to cover the important issues of security and safety of storage and transport, as well as safety in use.

82. A number of requirements in the TMCS Directive are of limited relevance to most construction work. This includes those regarding doors and gates, workers with disabilities, air-conditioning or mechanical ventilation, avoiding glare from sunlight, floors, cleaning walls and ceilings, safety glazing, safe opening and cleaning of windows, travelators and escalators and room dimensions.

83. We propose to use the Workplace Regulations to implement these requirements, as a large part of the TMCS Directive was copied over from the Workplace Directive¹⁰. This enables our draft Regulations to focus on the issues that contribute significantly to injuries during construction work.

84. However, some issues already covered by the Workplace Regulations are particularly important in construction. These include traffic management and lighting. Because these are so important we propose to duplicate aspects of the Workplace Regulations requirements in the new construction regulations, although that is not legally necessary.

85. We have also introduced a new requirement regarding energy distribution installations, to ensure a closer match with the TMCS Directive. Electricity and gas installations are a significant issue on construction sites.

Q18. Do the definitions of “construction work” and “structure” at [regulation 2(1)] satisfactorily cover everything that the Regulations should apply to and nothing else?

If not, we would welcome your suggestions for improvement.

Demolition

86. We are concerned to ensure that demolition and, indeed, other high-risk activities are carried out safely. This is why we raised the issue in the 2002 DD. The conclusion was that the focus should be on planning, management and competence. To deliver this and to simplify the current CHSW, regulation 10 requirement, the draft requires that “the demolition or dismantling of a structure, or part of a structure, shall be planned and carried out in such a manner as to prevent, so far as is practicable, danger”.¹¹ It also introduces a new, explicit requirement to record the arrangements for carrying out demolition and dismantling in

¹⁰ Council Directive 89/654/EEC concerning the minimum safety and health requirements for the workplace.

¹¹ Schedule 3, paragraph 4(1)

writing. (This is in addition to the general requirements that all work is properly planned, managed and carried out by competent contractors and workers.)

87. Some people would like us to make all demolition notifiable. But ownership of health and safety management rests with those commissioning and carrying out the work, not HSE. It might also lead to a false sense of security, since HSE would be unable to make use of the additional notifications without additional resources, or diverting them from other priorities.

88. Finally, it is difficult to define “demolition” in legal terms, for example to distinguish between knocking a hole in a wall to install a new window or door, and “proper” demolition such as pulling down the whole, or large part, of a building. (Projects involving substantial demolition would continue to be notifiable, as at present, under the proposals.)

89. The guidance also stresses the benefits of getting specialist advice and recording the arrangements for all complicated or high-risk work, to ensure that it is properly planned and that the plan is understood by those involved.

Civil liability

90. Regulation 21 of CDM 1994 currently excludes any civil liability for breach of the Regulations, except for a breach of the client’s duty to ensure that the construction phase of any project does not start unless a health and safety plan has been prepared (regulation 10); or of the PC’s duty to take reasonable steps to ensure there is no unauthorised access to the site (regulation 16(1)(c)). There is no equivalent exclusion in CHSW.

91. The Management Regulations were amended in 2003 to provide employees with a right of action in civil proceedings, in relation to breach of duties by their employer. To maintain consistency we propose to carry forwards the current rights of civil action in CDM and CHSW and also to allow employees to take action in the civil courts for injuries resulting from a failure to comply with duties under these Regulations. We expect the impact of this approach on the overall level of civil litigation to be minimal.

92. This approach would not give any additional right of civil action to self-employed workers, for example if they were injured as the result of a failure by a client, designer or contractor to comply with their duties under the proposed Regulations. However, in most cases, injured workers already have a right to take action for negligence or breach of contract and those rights would not be affected.

93. We would welcome views on whether this approach to self-employed workers, who make up such a large part of the construction workforce, is right. The alternative is to completely remove the civil liability exclusion. CONIAC’s view is that was likely to lead to an increase in litigation and defensive management, with the associated bureaucracy. On the other hand, it could also lead to more attention to improved risk management because of the fear of litigation.

Q19. Do you agree that (apart from the exceptions already in CDM 1994), civil liability for breaches of the Regulations should be limited to employer/employee relationships?

If you have answered “No”, please explain why you disagree.

Enforcement

94. The enforcement demarcation between HSE and Local Authorities (LAs) in respect of construction work is currently set out in the Health and Safety (Enforcing Authority) Regulations 1998, and in regulations 3(4) and 22 of CDM 94. Interpretation of these requirements is not straightforward, but the practical effect is that LAs are currently prevented from enforcing CDM. We propose to simplify this by omitting regulations 3 (4) and 22. HSE would then be the enforcing authority for:

- all notifiable construction work, except that undertaken by people in LA-enforced premises who normally work on the premises;
- work done to the exterior of the premises; and
- work done in segregated areas.

95. This would not change the Enforcing Authority on any particular site, but would give LAs the opportunity to use CDM.

Q20. Do you agree with our suggested changes to CDM enforcement demarcation?

If not, please give your reasons.

96. The Office of the Deputy Prime Minister (ODPM) is currently finalising new fire safety legislation for England and Wales in the form of a Regulatory Reform Order (RRO). The Scottish Executive is developing similar legislation for Scotland. While HSE does not expect significant changes, they may result in some amendments to the requirements dealing with fire precautions in the final Regulations.

Transitional provisions

97. For practical reasons, to allow for projects partly overlapping the Regulations’ implementation date, the CDM 1994 Regulations included (at regulation 23 and Schedule 2), transitional provisions for projects which had started, but where the construction phase had not ended, when the Regulations came into force. Certain regulations (6, 7, 10, 11, 13 and 14 (a)) did not apply, came into force at a later date or had an otherwise modified effect.

98. For the same reasons of practicality, we are proposing to include similar transitional provisions in the revised Regulations (regulation 24). These will allow people to take advantage of the flexibility of the new Regulations, and essentially mean they will not need to revisit actions already taken or agreed under CDM 1994.

99. If you consider that additional transitional provisions are needed please tell us what they are and why they are needed.

Status of guidance

100. We know that people are sometimes confused by the difference between the legal status of Approved Code of Practice (ACoP) guidance material and that of ordinary guidance. The difference is explained below:

- ACoPs provide practical guidance on how to comply with legal duties, and have a special status (under section 16 of the Health and Safety at Work etc Act 1974) in

that if a breach of those duties is alleged, and the guidance in the ACoP has not been followed, the burden of proving that the duty has been complied with by some other means falls on the duty holder. This reversal of the burden of proof in legal proceedings gives an ACoP more persuasive force than other guidance;

- ordinary guidance explains, in plain terms, what the law means or sets out best practice, but it has no formal legal status. Following the guidance is not compulsory, but if people do so, they will normally be doing enough for them to comply with the law.

101. There is currently ordinary guidance and ACoP material on the CDM Regulations (HSG 224), but only guidance material on the CHSW Regulations (particularly HSG 150). We do not believe that any ACoP material is needed for the old CHSW requirements, but there have been strong calls for us to provide ACoP material on the CDM elements.

102. ACoP material is particularly useful where the law is very general, as it can give people confidence that they have complied, because of its special legal status,¹² without forcing everyone to follow exactly the same approach. Members of CONIAC have advised HSE that they would prefer to see publication of a CDM ACOP. CONIAC's view reflected concerns that construction SMEs and one-off clients greatly valued the certainty and authority that ACOP material provided when they were adopting management arrangements. There is a tendency, however, for people to focus on the ACoP material in the CDM guidance, and to overlook the ordinary guidance because they think its lack of specific legal status makes it less important. In fact, the "ordinary" guidance material is often equally as important, and we are keen to ensure that it is not disregarded.

103. We want to provide you with supporting guidance material in the format which is the clearest and easiest to understand, and is therefore the most likely to be used and followed. As yet, we are undecided as to whether ordinary guidance only, or a mixture of ACoP and guidance (as in HGS 224) would be the most suitable – and we want to hear your views. To get as informed a response as possible, we thought it would be helpful if, for the purposes of this CD, we presented the material as ordinary guidance only. This enables you to compare it with the existing publications, and decide which format you prefer. Having taken the above points into account, we would appreciate your views on whether you feel guidance only, or ACoP and guidance would be the most effective.

¹² As the introduction to HSG 224 says:

Approved Code of Practice

This Code has been approved by the Health and Safety Commission, with the consent of the Secretary of State. It gives practical advice on how to comply with the law. If you follow the advice you will be doing enough to comply with the law in respect of those specific matters on which the Code gives advice.

You may use alternative methods to those set out in the Code in order to comply with the law. However, the Code has a special legal status. If you are prosecuted for breach of health and safety law, and it is proved that you did not follow the relevant provisions of the Code, you will need to show that you have complied with the law in some other way or a Court will find you at fault.

Guidance

This guidance is issued by the Health and Safety Commission. Following the guidance is not compulsory and you are free to take other action. But if you do follow the guidance you will normally be doing enough to comply with the law. Health and Safety Inspectors seek to secure compliance with the law and may refer to this guidance as illustrating good practice.

Q21. Having compared the current ACoP and guidance (HSG 224) with the revised draft guidance, which do you think communicates most clearly what duty-holders need to do to comply with the Regulations?

- a) ACoP and guidance (HSG 224 style)
- b) Guidance only style (as in the CD draft)

Please explain why you take this view.

Sectoral guidance

104. The HSC strategy¹³ says: *HSE will continue to produce authoritative independent written guidance whenever that is necessary and consistent with our priorities. But we accept that others may be better placed to produce good practice guidance for particular industries or topics and we will encourage that wherever we can.*

105. We are not planning to produce sector specific versions of the material contained in this CD. There could, however, be significant advantages if some sectors produced their own guidance. This could be much more specific than the generic material which has to cover all aspects of construction. For example, it could set out how particular issues like competence will be addressed in practice, rather than setting out the options as HSC/E material must.

106. Industry guidance can also be drafted widely, whereas HSC/E material inevitably focuses on health and safety issues – although we try to set this in the wider business context where appropriate.

107. Industry guidance for one-off and occasional clients, for example, has the major advantage that it can address the possible impact of construction work on their business, the procurement and finance options, the broad project management issues, as well as the legal issues like health and safety. Well drafted guidance like this is more likely to be read by the target audience because it can address the key points that they need to know about and include case studies which help them to understand the issues through relevant, real world examples.

108. HSE would be happy to work with sectors that wish to develop such guidance.

Q22. Would there be a benefit from specific, integrated guidance drafted for your sector of the industry? (This would probably work best if it addressed health and safety alongside other relevant issues.)

If you are willing to develop such guidance in discussion with the key players in that sector, please let us know.

Regulatory Impact Assessment

109. A draft Regulatory Impact Assessment (RIA) is attached for your comments. We would particularly like to know if the major costs and benefits have been correctly identified and if the amounts suggested are realistic. If you consider the figures suggested for any of the potential costs and benefits to be unrealistic, we would like to know what you think they should be and why – i.e. what basis or evidence do you have for that view?

¹³ <http://www.hse.gov.uk/aboutus/hsc/strategy2010.pdf>

Q23. The draft RIA is based on our “best guess” estimates of the likely impact of the proposals. Do you believe them to be reasonable?

If you answer “No”, we would particularly welcome any hard evidence that you can provide to support a more realistic calculation of the proposed Regulations’ likely impact

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HOW TO RESPOND AND WHO TO CONTACT

How to let us have your response

We would much prefer to have your responses in electronic format. This makes it easier for us to analyse the responses accurately, and process the returns more quickly. However, we know that many of you may not have access to a computer, so responses in any format will be gratefully received. Having said that, the preferred methods of response are:

- electronically – using the separately provided electronic questionnaire (either filled in on-line on the HSE website or down-loaded and sent to us by e-mail);
- in writing – by filling in the hard copy of the questionnaire at the end of this Consultation Document and posting it back to us.

Many of the questions are posed to enable “yes/no” or numeric answers, to make statistical analysis of the responses easier. It is, however, very important for us to understand the reasons behind your answers, and so a free-text box is also provided for most of the questions. If you disagree with the proposals it is particularly important that you explain why, and suggest an alternative where possible. **More weight will be given to responses that provide such information.**

In addition to the specific questions in the questionnaire we would also welcome comments on and suggestions for improvements to the draft documents. Again, it would help us with the analysis if you would provide your comments electronically, in a Microsoft Word or Rich Text Format table that is set out in the following format:

Name:		Reference No (from questionnaire):
Doc.	Ref.	Comments and suggestions
Regs	13.2.c	
Guide	general	
Guide	[para]12–18	
RIA	[para] 56	

Many people who responded to the *Revitalising health and safety in construction* Discussion Document did not answer the questions about their company and business. This information is very helpful to us when analysing the responses, so please do take the time to provide this background information.

Where to send your response

Please e-mail your queries or responses to: [\[????@hse.gsi.gov.uk\]](mailto:????@hse.gsi.gov.uk)

If you wish to respond in writing, or have any other questions, please contact:

Cathy Kerby, Construction Policy,
Health and Safety Executive
5SW, Rose Court,
2, Southwark Bridge,
London
SE1 9HS

Telephone: 020 7717 6315

What we will do with your response

We will acknowledge all responses and give full consideration to the substance of arguments in the development of proposals. We may also contact you again if, for example, we have a query.

Your response will normally be made public, unless you request us to keep it confidential. Please see the information on confidentiality of responses and standard confidentiality e-mail statements which appears on the front cover of this CD.

A summary of the responses, and the text of non-confidential ones, omitting addresses, etc., will be posted on our web site (<http://www.hse.gov.uk/consult/live.htm>) as soon as possible after the conclusion of the consultation period.

Data Protection

If you reply to this consultation document in a personal capacity, rather than as a post holder of an organisation, you should be aware that information you provide may constitute “personal data” in the terms of the Data Protection Act 1998. For the purposes of this Act, HSE is the “data controller” and will process the data for health, safety and environmental purposes. HSE may disclose this data to any person or organisation for the purposes for which it was collected, or where the Act allows disclosure. You have the right to ask for a copy of the data and to ask for inaccurate data to be corrected.

WHAT TO DO IF YOU ARE UNSATISFIED WITH THE WAY THIS CONSULTATION HAS BEEN DONE

If you are not satisfied with the way in which this consultation exercise has been conducted you can complain by contacting:

Stephen Wright,
Head of Construction Policy – Legislation,
Health and Safety Executive
5SW, Rose Court,
2, Southwark Bridge,
London
SE1 9HS

Telephone: 020 7717 6308

E-mail: stephen.pg.wright@hse.gsi.gov.uk

We aim to reply to all complaints within 10 working days. If you are not satisfied with the outcome of your complaint, you can raise the matter with the Director General of HSE – Timothy Walker, at the same address. You can also write to ask your MP to take up the case with us. Your MP may refer the matter to the Parliamentary Commissioner for Administration (the Ombudsman) who will investigate your complaint.