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HEALTH AND SAFETY COMMISSION

Proposed Construction (Design and Management) (CDM) Regulations 2007 and related Approved Code of Practice (ACoP): draft regulatory package for approval by the Health and Safety Commission (HSC)

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Cleared by DCE / Board Member: Jonathan Rees on 2 October 2006

Issue

1. To confirm that the Commission is happy with the draft legislative package (Regulations, Approved Code of Practice (ACoP) and Regulatory Impact Assessment (RIA) to revise and combine the Construction (Design and Management) Regulations 1994 (CDM 94) and the Construction (Health, Safety and Welfare) Regulations 1996 (CHSW). Most of the package is agreed with and welcomed by the industry, but there remain three issues on which the views of the Commission are invited.

Timing

2. Routine. However, the Regulations' planned commencement date is 6 April 2007, with the ACoP available 3 months beforehand, and a significant delay at this stage will threaten the timetable.

Recommendation

3. That the HSC notes the contents of this paper, endorses the policy lines and suggested approach set out in paragraph 12 of this paper and paragraph 5 of the Supplementary Note, and approves the draft regulatory package for formal proposal to Ministers.

Background

4. The proposed CDM 2007 Regulations and associated ACoP are the product of the HSE's review of CDM 94 and CHSW. The draft Regulations and ACoP aim to help industry by simplifying and clarifying the law and raising health and safety standards through improved planning and management of construction projects. The **Annexes** to this paper explain:

- Key changes introduced by the new regulatory package (**Annex 1**)
- Contentious issues and HSE's work to address stakeholder concerns (**Annex 2**)
- Better Regulation advantages (**Annex 3**)

- Key HSC papers relating to review of the Construction (Design and Management) (CDM) Regulations 1994 and Construction (Health, Safety and Welfare) (CHSWR) Regulations 1996 (**Annex 4**)
 - Draft Construction (Design and Management) (CDM) Regulations 2007 (**Annex 5**)
 - Draft CDM 2007 ACoP (**Annex 6**)
 - Final RIA (**Annex 7**)
 - Draft letter from HSC Chair to Minister (**Annex 8**)
5. The aims of the revision are set out in paper **HSC/03/93** and are to reduce construction accidents and ill health by:
- being clearer – making it easier for duty holders to know what is expected of them;
 - being flexible and accommodating the wide range of contractual arrangements to be found in the construction industry;
 - emphasising the need to plan and manage work, rather than treating the paperwork as an end in itself;
 - emphasising the communication and co-ordination advantages of duty holders working in integrated teams; and
 - simplifying the way duty holders assess competence.

6. Full background information to the CDM/CHSWR review has been provided in a series of papers, most recently **HSC/05/123** (6 December 2005) and **HSC/06/76** (5 September 2006). The responses and an analysis of the formal consultation are now available on the HSE website.¹ On 6 December, the HSC decided that the revised Regulations should be supported by a ‘fit for purpose’ ACoP (**at Annex 6**) and industry-produced guidance. The ACoP has been developed with and is supported by CONIAC. A CONIAC sub-group has been set-up specifically to co-ordinate production of the industry guidance.

Argument

7. **Annex 1** describes the key changes introduced by the new regulatory package. The most significant changes are a strengthening of the client’s role; the creation of a new duty holder role- the CDM Co-ordinator, who replaces the CDM 1994 Planning Supervisor; and the bringing together of all construction specific requirements into a set of combined regulations. The practical requirements in the CHSW Regulations have largely been carried over unchanged.

8. The consultation revealed a high level of general support for the changes proposed, but some aspects needed more work, either to clarify and refine the proposals for stakeholders, or to address more fundamental and contentious issues. **Annex 2** and the Supplementary Note to this paper describe the contentious issues and HSE’s work to address stakeholder concerns; and **Annex 3** summarises the ‘better regulation’ advantages of the package.

9. One of the key contentious issues was the proposed extension of clients’ duties, outlined in **Annex 2**. In brief, some clients’ groups are concerned at the

¹ <http://www.hse.gov.uk/consult/2005.htm>

removal of the Client's Agent provision; and the requirement on the client to make reasonable checks that all remains well during the project. HSE recognises these concerns.

10. Removing the Client's Agent provision does not stop small or occasional clients appointing a construction professional to help them, but it does remove the legal confusion (see **Annex 2**) created by the existing provision and overlapping provisions in the Health and Safety at Work Etc Act (HSWA).

11. Clients are fundamental in achieving improved health and safety, and HSE and the CDM WG strongly believe they should have duties commensurate with their level of influence. Larger clients have generally welcomed the clarification of their role in ensuring that adequate arrangements for health and safety management remain in place throughout the project. HSE has addressed the concerns of smaller and one-off clients by making it clear in the ACoP that reasonable enquiries, rather than second guessing the management role of contractors and construction professionals, is what is required, which is in line with existing HSWA duties. Concerns over client competence have been addressed by making regulation 9 simpler and less onerous, and (as stated above) by strengthening the guidance in the ACoP to give clear and simple messages about what clients are expected to do. This will be supplemented by publicity and further industry produced guidance (developed in partnership with the CCG for small clients), which will be made available through LAs for all clients applying for planning permission or Building Regulations approval.

12. HSE remains committed to achieving improved health and safety performance on smaller projects – responsible for a disproportionately high number of fatal accidents - and believe that the changes are justified. We believe we have now convinced those who were opposed to these duties that a reasonable balance has been struck, but HSC should be aware that there may yet be further lobbying on these issues. Against this background, **the HSC is invited to:**

- **note continued concerns of clients, especially smaller clients and steps we have taken to meet them;**
- **agree we should develop simple tailored guidance for small clients in collaboration with CCG and DTI;**
- **agree we continue to work with DCLG better to integrate CDM, Building Control and Planning regimes; and**
- **agree that HSE reports back on both by January 2007.**

Consultation

13. The proposals have been developed in close consultation with stakeholders, and reflect over 10 years' practical industry and HSE experience. HSE has taken forward the work in partnership with CONIAC, and both are satisfied that the proposals reflect HSC/E and industry needs. Key Government stakeholders² have also been consulted, as was HSC's Small Business Trade Association Forum (SBTAF) on 11 April 2006 and 4 July 2006. This paper has been cleared through

² The Department of Trade and Industry (DTI), Department for Communities and Local Government (DCLG) [formerly the Office of the Deputy Prime Minister (ODPM)], Office for Government Commerce (OGC), Small Business Service (SBS), the Better Regulation Executive (BRE), Cabinet Office (CO) and the Foreign and Commonwealth Office (FCO)

CONIAC and colleagues in HSE's Construction Division, Policy Group, and Local Authority, Finance Policy and Economic Analysis Units. HSE also discussed the issues with its Challenge Panel on 11 November 2005.

Presentation

14. Development of CDM 2007 has been an important part of HSE's ongoing engagement with construction stakeholders, aimed at encouraging and supporting cultural change in the industry. The proposals have stimulated lively ongoing debate in the industry - highlighting the issues to be addressed, offering useful insights as to how this might be done, and galvanising many stakeholders into CDM 2007 action. HSE and the industry are working together to produce a joint launch programme, to be followed up with a full Benefits Realisation Plan (incorporating our communications plan) to ensure that the benefits of the package are realised. Key target audiences will be small clients, designers and CDM Co-ordinators, with key messages based on driving out bureaucracy and emphasising sensible risk management, for example:

- focus on effective planning and management of risk;
- keep paperwork risk-focused and project specific;
- provide the right information to the right people at the right time; and
- all dutyholders need to be competent.

15. HSE will continue to work hard to engage with the sector to explain the issues and correct misunderstandings.

16. There is Ministerial interest in the proposals, but indications from the SBS and Cabinet Office BRE are that further scrutiny by the Ministerial Panel on Regulatory Accountability (PRA) will not be necessary. There may be further lobbying by some stakeholder groups; and there is also likely to be considerable media coverage, some of which may be adverse in relation to small client issues as explained above.

Costs and Benefits

17. As with most health and safety RIAs, potential costs are more easily quantifiable than benefits. The PRA cleared the (partial) RIA for inclusion in the Consultative Document (CD), and the CD itself specifically sought information to inform the final RIA, although very little hard data was actually received to support respondents' contentions.

18. **Annex 7** provides a comprehensive final RIA, updating the earlier partial RIA and presenting matters in a more user-friendly way. It takes account of information received during consultation, plus detailed research on CDM 94 compliance costs and the predicted CDM 2007 costs, conducted for HSE by BOMEL Ltd. The cost/benefit balance has improved in the final RIA, largely as a result of changes in the way in which costs are attributed. (A number of the revisions in the Regulations will result in cost reductions to business, and in the partial RIA these were counted as 'benefits'. We have been advised that in fact these should appear as negative figures on the 'costs' side of the equation, to reflect that they are cost savings.) Estimated costs and benefits are now as follows:

- Costs £M -2,671 to 1,393
- Benefits £M 740 to 3232

Financial/Resource Implications for HSE

19. The CDM 2007 project is funded from existing HSE Construction Programme resources. Project costs from 2003 to 31 March 2006 were estimated at around £704,354, including the cost of the 25 CDM presentations undertaken during formal consultation, plus two industry secondees engaged to further explore client and designer concerns (see **Annex 2**). The cost of completing the project over 2006/2007 is estimated at around £295k. This includes development and launch costs, training of inspectors, evaluation and publicity. We do not envisage any long-term need for additional resources from the proposals as currently drafted.

Environmental Implications

20. The CDM approach involves addressing health and safety issues at the design stage, which tends to reduce whole life costs. Better project planning and management should also reduce waste – all of which fits well with the Government's sustainable development strategy.

Other Implications

European: the Temporary or Mobile Construction Sites (TMCS) Directive

21. CDM 2007 is the main vehicle for implementing the Temporary or Mobile Construction Sites (TMCS) Directive, with some implementation via other health and safety legislation. European issues regarding TMCS implementation were documented in **HSC/05/02 and HSC/05/123** and our position on these remains unchanged. The Supplementary Note to this paper covers these issues further.

Better Regulation

22. CDM 2007 has been developed in line with Better Regulation principles, and is intended to reduce bureaucracy and improve the general business management of construction projects, while improving (not reducing) health and safety standards. (The resulting improved health and safety management should also lead to increased profitability). **Annex 3** explores the issues further.

Local Authorities

23. The extent of Local Authority (LA) enforcement responsibility for these Regulations is governed by the Health and Safety (Enforcing Authorities) Regulations 1998, and these have not changed. LAs remain responsible for enforcement where unsegregated, minor construction work takes place inside LA enforced premises, and where the normal activities associated with the workplace are unaffected by the construction work. As before, if the work becomes notifiable, enforcement responsibility passes to the HSE. LAs do not have powers to enforce CDM 94, but they do have powers to enforce CHSWR. CDM 2007 combines the two regulatory packages, and LAs are given powers to enforce all parts of the revised package. The effect is to maintain the status quo, and HSE will provide LAs with necessary implementation guidance. HSE has also provided briefing for the 3 October LACORS Policy Forum meeting, and will brief the HSE LA Employers' Forum in early 2007. LAs did not raise any substantial objections to the proposals during consultation.

Small and Medium Enterprises (SMEs)

24. CDM 2007 will apply to large numbers of SMEs, as clients, designers and contractors, and concerns over their impact on small and occasional clients have been well documented in post-consultation HSC papers (i.e. **HSC/05/123** and

HSC/06/76). HSE recognises the needs of small business and is taking steps to address these. Concerns centre on regulation 9 (client's duty to ensure suitable management arrangements are in place throughout the project); and the removal of the Client's Agent provision. **Annex 2** covers the contentious issues in detail.

Action

25. The HSC is invited to note the contents of this paper; endorse the policy lines and suggested approach outlined in paragraph 12 of this paper and paragraph 5 of the Supplementary Note; and formally approve the draft CDM 2007 regulatory package for formal proposal to Ministers. A formal submission will then be made to Ministers, with the associated legal necessities, in time for the Regulations to come into force on the next Common Commencement Date, i.e. 6 April 2007.

KEY CHANGES INTRODUCED BY THE NEW REGULATORY PACKAGE

Dutyholder	Changes	Welcomed?
General issues	<u>CDM and CHSW combined</u> : new Regulations restructured by dutyholder and to show general duties and those only applicable to notifiable projects.	Generally welcomed.
	<u>Application</u> : no change in that the CDM 2007 Regulations apply to all construction work (domestic and non-domestic); but minor clarification changes to some definitions, e.g. “client”, “construction work” and “structure”. (Issues relating to requirements on specific dutyholders and the trigger for them are covered elsewhere in this table.)	Non-contentious.
	<u>Notification</u> : no change to the definition of a notifiable project. Domestic projects no longer need to be notified.	Non-contentious, but see the Supplementary Note .
	Simplified trigger for appointments of Principal Contractor (PC), CDM Co-ordinator and preparation of health and safety plan and file.	Slightly Contentious – see the Supplementary Note
	<u>Demolition</u> : is treated in the same way as any other construction activity, except a written plan is required for all demolition work.	Initially contentious, but now resolved, following discussions with the demolition industry and clarification of the proposals.
	<u>Competence</u> : those appointing or engaging need to ensure dutyholder competence and the dutyholders themselves ensure they are competent to take on the role. New, simplified assessment (including core criteria) guidelines in the ACoP.	Generally welcomed as a simplification measure, particularly the core criteria, but some issues over particular accreditation schemes; and over the competence of small and one-off clients - see Annex 2 .
Client	<u>Domestic clients</u> : no change - the client’s duties do not apply to domestic clients.	Contentious – see the Supplementary Note

Dutyholder	Changes	Welcomed?
	Clients enhanced duty (revised reg 9, making explicit duties which already existed under HSWA and the Management Regs) to ensure that the arrangements other duty holders have made are sufficient to ensure the health and safety of those working on the project.	Contentious – see Annex 2
	Clients must tell PC and contractors they appoint how much time they have allowed, before work starts on site, for appointees to plan and prepare for the construction work.	Generally welcomed, particularly by contractors.
	Removal of formal provision allowing appointment of Client’s Agent and transfer of CDM liability.	Contentious – see Annex 2
Designer	New duty to eliminate hazards and reduce remaining risks, so far as is reasonably practicable New duty on designers to ensure that any workplace they design complies with relevant sections of the Workplace (Health Safety and Welfare) Regulations 1992	Generally welcomed
Planning Supervisor (PS)	No longer exists. Replaced by the CDM Co-ordinator.	Initial PS concern but now accepted; general stakeholder curiosity over how the new CDM Co-ordinator role will work – see Annex 2 .
CDM Co-ordinator	New empowered dutyholder, to provide the client with suitable and sufficient advice to help and advise the client; to co-ordinate the planning and design phase and to prepare the health and safety file.	Initially contentious, but now largely resolved – see Annex 2
Principal Contractor	No substantial changes to duties. Must tell those they appoint how much time they have allowed, before work starts on site, for appointees to plan and prepare for the construction work.	Generally welcomed, and particularly by contractors.
Contractor	No substantial changes to duties. Will be required to plan and manage their own work and tell those they appoint how much time they have allowed, before work starts on site, for them to plan and prepare for the construction work.	Generally welcomed, and particularly by contractors.

CONTENTIOUS ISSUES AND HSE'S WORK TO ADDRESS STAKEHOLDER CONCERNS

1. We recognise the concerns raised by certain industry groups, and have taken action to address these with the help of our industry partners. We believe that some of these concerns stem from a misunderstanding of how the proposals will actually apply in practice, and can be resolved through appropriate presentation and effective communication of the right messages. To this end, we are developing (with our CONIAC and CDM WG partners) a Benefits Realisation Plan which includes a communications plan and key messages for the launch and roll-out of the CDM package. The key remaining contentious issues and HSE's work to address them are set out below or covered in the Supplementary Note to this paper:

Enhanced client's duties

2. CDM 2007 enhances clients' duties by making their current management responsibilities in generic health and safety law more explicit in relation to CDM; and clarifying their other more specific CDM duties. The combined effect of the Regulations and ACoP is to set out clear duties which reflect clients' management responsibilities, and are proportionate to the size of a project and the extent of each client's influence and involvement in it.

3. The enhancements (draft regulation 9) require clients to take reasonable steps to ensure that there are suitable management arrangements in place throughout the project. These arrangements must ensure the construction work can be carried out without risk to health and safety; that welfare arrangements are in place before work starts on site; and that any structure designed for use as a workplace complies with the Workplace Regulations. Clients are also required to ensure that these arrangements include allocation of sufficient time and resources to achieve this, and their separate duty in relation to provision of information has been enhanced to require them to indicate how much time will be allowed for planning and preparation before construction work starts.

4. The consultation revealed a general acceptance that duties on clients should reflect the amount of influence they have over projects, but should be reasonable for small, one-off or occasional clients. The TUC particularly welcomed the enhanced client's duties (reflecting the views of the majority of respondents, including individual trade unions). The CBI (echoing others' concerns), accepted that the client's role in setting the overall framework in which the construction work takes place (including the provision of adequate information, time, resources etc) was pivotal, but felt this needed to be balanced by the fact that, in many cases, the client had absolutely no construction background or expertise.

5. The hoped for step change in health and safety performance arising from the changes in the Regulations is largely based on the expected impact of this consolidated duty. HSE understands clients' concerns, particularly those of inexperienced clients for smaller projects, but our view is that guidance provided in the ACoP and issued by the industry should be sufficient to enable these clients to discharge their duties without undue difficulty. This will generate business benefits (plus health and safety benefits) for these clients, with improved standards of

management making it more likely that the work will be delivered on time, within budget and to the expected quality standards.

6. The public consultation indicated that, although there was strong overall support from the key industry players, there was concern – particularly from client stakeholders such as the Construction Clients' Group (CCG) - about small clients' ability to comply with parts of the package, particularly the enhanced client's duty. The Department of Trade and Industry (DTI) and former Office of the Deputy Prime Minister (ODPM - now the Department for Communities and Local Government (DCLG)) echoed this view.

7. To address concerns that the duties were not reasonable and appropriate in relation to SMEs and clients inexperienced in construction, and because such clients were under-represented in responses to the consultation, HSE engaged Tim Kind (an independent industry consultant, who is a Senior Policy Adviser with the FPB, and a member of the HSC's SBTAf). He further consulted organisations representative of this group and his report is available on the HSE website. HSE's response to his finding is dealt with below.

8. ODPM, Tim Kind's report, the CCG and the SBTAf had suggested that CDM 2007 and the Building Regulations and Planning regimes could be better integrated, and would particularly benefit small clients. In response to the report, and related CCG and SBTAf representations, HSE has committed itself to continuing its work with the DCLG on scope for better integration of the CDM, Building Control and Planning regimes. The aim would be, where feasible, to simplify the requirements, reduce burdens on those subject to the Regulations and bring corresponding compliance improvements. If the work is fruitful HSE will, following consultation with DCLG, put a Simplification Proposal to the Cabinet Office Better Regulation Executive (BRE).

9. Tim Kind's report also expressed concerns about whether smaller clients had enough knowledge of the construction process to comply with the enhanced duty on management arrangements. The SBTAf also shares others' concerns over the balance between client responsibilities and competence – believing there is a lack of understanding within small businesses regarding client responsibilities and that effective communications and awareness raising is crucial to rectifying this. Some members support the package - recognising the intention to improve standards on small projects and reduce bureaucracy.

10. In response to concerns over client competence, HSE has altered the regulation to make it simpler and less onerous, and strengthened the guidance in the ACoP to give clear and simple messages about what smaller clients are expected to do. This partly satisfies the call (from the CCG, DTI and others) for better guidance as to what was required of small clients, and more detail on competence assessment. It will be supplemented by further guidance and publicity, and HSE is working with the CCG to develop similar industry guidance for small clients. To ensure availability of the information at the point of need, HSE is working with its LA partners to make this free guidance available to all clients applying for Building Regulations approval or planning permission.

Removal of the Client's Agent provision

11. Under the CDM 94 Regulations, clients could appoint a 'Client's Agent' who would take on the duties and liabilities of the client. Under CDM 2007, this provision has been removed. The CCG and some other stakeholders have concerns that this

will remove a level of available support for SMEs and inexperienced clients, and generally restrict clients' ability to engage people to manage their projects for them. This is not the case. Clients can still engage someone to carry out their client duties on their behalf, but (as with other health and safety legislation) the duty to comply with the Regulations stays with the client.

12. The provision was removed because it causes confusion over criminal liability, and serves no useful purpose. Appointing a 'Client's Agent' meant that client's CDM 94 duties were transferred to the Agent, along with criminal liability. However, clients also have duties under the Health and Safety at Work Etc Act 1974 and under the Management of Health and Safety at Work Regulations 1999. Appointing a 'Client's Agent' did not relieve the original client of these duties. By removing the 'Clients Agent' provision in CDM 2007, we have removed this area of confusion, and put the Regulations on the same footing as all other health and safety legislation.

Introducing an empowered co-ordinator

13. CDM 2007 introduces "the CDM Co-ordinator" in place of the planning supervisor required under the existing Regulations. The client is required to appoint a co-ordinator if the project meets the notification threshold- i.e. that the project will last longer than 30 days, or will involve more than 500 person days of construction work.

14. As with the CDM 94 Regulations, the co-ordinator is given the co-ordination duties required by the TMCS Directive. The key difference between the co-ordinator and the planning supervisor is that the co-ordinator is also required to advise and assist the client in the discharge of his duties, in particular to advise on the adequacy of other duty holders' arrangements for controlling risk arising from the project. If the co-ordinator has concerns about the arrangements for health and safety made by any member of the project team, they should advise the client of these concerns, and the client (as the person for whom the project is being carried out) will have the power to make sure that these concerns are addressed. HSE and the CDM Working Group believe this will be particularly beneficial to SME and occasional clients, will address industry concerns that the planning supervisor was largely a 'toothless role', and help raise standards and credibility levels not always associated with the planning supervisor.

15. Both the APS and the Institution of Planning Supervisors support the strengthened role of the co-ordinator, but the APS seeks the appointment of a co-ordinator for all projects, regardless of size. HSE's view, which is generally shared by industry, is that below the notification threshold, co-ordination can be achieved through good communication and co-operation between project team members, and that this is made easier on small projects because there are fewer people involved in project delivery. Some clients have suggested that the co-ordinator should assume all of the (criminal) duties of the client under CDM 2007, but this would defeat the objective of placing responsibilities in proportion to the influence which the party has on health and safety standards on the project, and would not address the concerns of industry that the current planning supervisor is a largely toothless role.

BETTER REGULATION ADVANTAGES

Better Regulation

1. As stated in paragraph 19 of the main paper, CDM 2007 is based on Better Regulation principles, and aims to raise health and safety standards through increased compliance, by simplifying and clarifying duties and reducing bureaucracy and associated burdens on business, particularly SMEs. Key changes framed to reflect and progress the Better Regulation agenda, while maintaining or improving health and safety standards, are:

- Consolidation of existing key construction legislation and restructuring of Regulations: to simplify and clarify requirements for dutyholders;
- Simplified trigger for formal appointments and plans: This makes the Regulations more transparent and eliminates unnecessary bureaucracy – particularly for smaller sites - where such formalities add no health and safety (or other) value;
- Enhanced client duties: to make existing health and safety duties more explicit for them, while remaining proportionate to the extent of client's influence on the project, and clarified in supporting guidance;
- New CDM Co-ordinator role introduced: to act as the client's key project adviser on health and safety risk management - a more empowered dutyholder than the former Planning Supervisor;
- Clarification of designer duties: to remove the confusion which existed under CDM 94, and strengthen existing duties;
- Simplification of competence assessment: to make demonstration and assessment of competence easier (particularly for SMEs), level the playing field and improve standards;
- Work underway with DCLG and LAs investigating scope for better integration of CDM, Building Control and Planning regimes: to simplify matters for small clients and provide simple, clear information at the point of need;

2. A good deal of work has been done to refine the proposals since the Cabinet Office and PRA scrutinised and cleared the Partial RIA in January 2005. The RIA is now based on more robust data (see paragraphs 17 and 18 of the main paper) and further consideration has been given to the specific needs of those who are particularly affected by the changes. HSE has liaised with the BRE, Cabinet Office and SBS on this, and taken their comments on board.

Key HSC papers relating to review of the Construction (Design and Management) (CDM) Regulations 1994 and Construction (Health, Safety and Welfare) (CHSWR) Regulations 1996

HSC/00/02 - Proposal for publication of a consultative document on revision of the CDM ACoP

HSC/03/55 – Actions arising from the Discussion Document on revision of the CDM ACoP

HSC/03/93 - Proposal for review of the CDM/CHSW Regulations

HSC/05/02 - Proposed consultative document on revision of the CDM/CHSW Regulations

HSC/05/123 - Report on emerging findings of the consultation

HSC/06/76 – Responses to the consultation