

HEALTH AND SAFETY EXECUTIVE			
CONSTRUCTION INDUSTRY ADVISORY COMMITTEE (CONIAC)			
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Future of the CDM Approve Code of Practice. Update

A paper by Sue Brandrick, HSE Construction Sector

For information, discussion and decision

Summary or Purpose of paper

1. To:

- Report the views expressed by CONIAC members on the need and content of a CDM Approved Code of Practice (ACOP); and
- Agree the recommendation at paragraph 8.

Background

2. At the meeting on 14 July 2015, CONIAC members' views were invited on a CDM ACOP. In doing so, members were asked to be mindful of a number of matters – including:

- that the original intent of the ACOP in the 1974 Health and Safety at Work Act was to provide practical guidance on the standards needed to achieve compliance with a goal-setting approach, thus bridging the gap between such law and the former more prescriptive requirements. However, where the requirements are mainly about having proportionate management arrangements in relation to risk and complexity (such as CDM 2015), there is no readily defined standard;
- the conclusions of the HSE review of ACOPs following Professor Löfsted's review of health and safety regulations and the set of principles (endorsed by the Board – see Annex) against which consideration of ACOPs should be considered;
- the Board's view in August 2014 that, should a new ACOP be developed, it should be shown to add value, be considerably shorter and be 'signposting' in nature;
- Government policy on ACOPs which, as well as requiring formal consultation and approval by Ministers, would require compelling evidence that an ACOP would not 'gold-plate' the Regulations or introduce unnecessary costs and bureaucracy and would support small businesses and growth; and

- any argument for an ACOP must be based on a rationale which supports embedding CDM 2015 and compliance with its requirements.

Discussion

3. The majority of views put forward were not in favour of an ACOP. The reasons for this included:

- the CDM Regulations are generally well established and in these circumstances an ACOP was not seen as necessary or adding any value;
- it would not meet the needs of SMEs and those most at risk. The 2007 ACOP failed in this respect and any new ACOP is likely to do the same. The CITB industry guidance and *CDM Wizard* App and HSE's Busy Builder leaflets have been developed with the needs of this group in mind and are much more accessible and likely to be used by them;
- its inflexibility could block or undermine progress. The time it takes to amend an ACOP (because of the need to formally consult and seek Ministerial approval) means it would not be responsive enough to changes in practices and innovations;
- it could restrict good or best practice in a sector by becoming the accepted (only) standard and take precedence over agreed sector guidance;
- it could undermine a holistic approach to managing construction work where health and safety is part of whole business planning;
- the lack of evidence that prosecution outcomes would be affected by the lack of an ACOP. It is the authority that guidance derives from its provenance that is important, not the particular legal status that ACOPs have.

4. The main view put forward in favour of an ACOP was based on its special legal status. It was felt that an ACOP:

- allows concerns to be raised and acted on without fear of victimisation;
- reinforces messages about employer duties;
- creates a level playing field; and
- is the only true definitive benchmark for compliance.

It was also felt that it is not the time to be without an ACOP given the numbers of fatalities and accidents across the industry and the suggestion that these might rise as the construction industry expands.

5. Views were also expressed about the need for further guidance - whether in addition to an ACOP, or not. Suggestions included:

- additional Q&As to those that have already been issued for inspectors and shared widely with the industry, where particular issues needing further guidance are identified. Those issued so far have been seen as a welcome addition to L153;

- additional FAQs to those HSE has recently published on the construction pages of its website where the need is identified;
- further guidance on the requirements relating to skills, knowledge, experience and training;
- production of proportionate guidance by industry sectors without the involvement of HSE which contextualises what is necessary to comply with duties within the sector depending on the size of business or project; and
- possible consolidation of some of the examples in the 2007 ACOP into case studies by industry working collaboratively with HSE, in addition to any other case studies that industry might suggest.

Conclusion

6. On the balance of views expressed, there is no strong support for an ACOP. The main argument 'for' revolves around the legal status of an ACOP and the greater certainty of compliance that it could provide. But there are doubts about the validity of this argument because CDM 2015 primarily sets out requirements on the management arrangements needed to carry out construction projects without harm to those affected by the work. The huge range in size and nature of construction projects carried out, means that a single, short, signposting ACOP is unlikely to bring greater certainty to compliance and the management and control of risks than, for example, L153. Addressing this with a number of separate ACOPs directed at sub sectors would only serve to duplicate and proliferate guidance. There is no evidence that compliance or prosecution outcomes will be affected by the lack of an ACOP. On the contrary, the experience is that courts regard ACOPs and guidance as having the same standing.

7. On this basis, there is not a sufficiently convincing case to make to either the Board or to Ministers that an ACOP should be developed. However, HSE would encourage the industry to continue to work on its own sub-sector guidance and will also consider the suggestions for further guidance made, as well as any others that may be made in the future.

Recommendation

8. CONIAC advises the HSE Board that a case has not been made that an ACOP is needed, and that any further clarification to achieve compliance with CDM 2015 and secure health and safety outcomes is addressed primarily by means of industry guidance.

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Principles for producing ACOPs

Designed to provide users with confidence in how to comply with the law

ACOPs should:

- Be considered as a format to provide guidance only where:
 - There are certain preferred or recommended methods to be used (or standards to be met) to achieve compliance; and
 - The nature of the issue being addressed is such that in most cases users should be strongly encouraged to pursue those methods.
- Be considered as a format to provide guidance only where:
 - Provide practical guidance on what users can do to comply with the general duties of the Health and Safety at Work Act or the requirements of associated goal-setting regulations
 - Provide clear and succinct guidance proportionate to the nature and complexity of the subject area, relevant legislation and risks to be managed.
 - Not require reference to other standards or guidance except where the additional information is not suitable for inclusion in the ACOP.
 - Clearly indicate the regulation(s) each section of the ACOP relates to and provide a brief summary in plain language of what the regulation(s) requires.

Easy for the intended users to understand

ACOPs should:

- State the purpose and status of the ACOP and the guidance it provides upfront.
- Be written in concise, jargon-free language and avoid unnecessary duplication of content.
- Be supported by glossaries, diagrams, flowcharts and examples where they can assist with understanding.
- Be consistent with other HSE guidance.

Based on good understanding of users

ACOPS should:

- Be developed in discussion with users and consulted on prior to publication.

Easy to access

ACOPs should:

- Be accessible online and be kept and presented so that it is easy to find, identify, and obtain required information

Reviewed and maintained

ACOPs should:

- Be clearly dated and reviewed at regular intervals so that they remain correct, accurate and current.