Introduction

The third version of the Construction (Design and Management) Regulations was published twenty years after the original version (31 March 1995) became part of the construction industry’s legislative framework. The interim period has also seen the publication of the second version on the 6 April 2007. This development route has attracted criticism at every stage, partly from dissatisfaction with some of the legal requirements, partly from a lack of managerial judgment and partly from self-interest, to the detriment of regulatory achievement.

The Regulations, as always, attempt to endorse the holistic, team-based approach for the effective delivery of construction health and safety management, within a dynamic and often fragmented construction industry. Successful delivery is dependent upon the concept of shared objectives, delivered through dutyholder integration, but such success is constantly challenged by the disparate nature of construction teams and the disenfranchisement that often exists.

Whilst this third version of the Regulations has been drafted to account for a closer alignment with the original European Directive, it also embraces a response to the criticism collated by the corresponding panels associated with the reviews of the two previous versions of the Regulations. It is prudent to highlight some of these criticisms so that their messages are not lost and so that the spectral focus of future concerns is directed elsewhere. Many of the criticisms remain as challenges in respect of all future dutyholder management models.

The following tabulation provides an insight into the salient issues that must be addressed so that the ‘best practice model’ can indeed signal progression.

<table>
<thead>
<tr>
<th>Critical point</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>added value</td>
<td>failure to articulate the value of service provision</td>
</tr>
<tr>
<td>bureaucracy</td>
<td>generation of excessive and irrelevant paperwork</td>
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<tr>
<td>communication</td>
<td>ineffective; lack of meaningful dialogue</td>
</tr>
<tr>
<td>dutyholder invisibility</td>
<td>lack of dutyholder presence within the project team</td>
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<tr>
<td>generic approaches</td>
<td>absence of a project-specific focus</td>
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<tr>
<td>inflexibility</td>
<td>lack of appreciation that numerous options exist as evidence of the discharge of duties</td>
</tr>
<tr>
<td>interpretation</td>
<td>dogmatic mis-interpretation of Regulations</td>
</tr>
<tr>
<td>intransigence</td>
<td>the inability to appreciate valid arguments</td>
</tr>
</tbody>
</table>

(Continued)
Critical point | Commentary
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non-integration | inability to function as a team member
philosophical alignment | failure to appreciate underlying principles
process ignorance | mis-understanding of design and construction processes
third party appointments | additional and unnecessary resource cost

Further insights into the underlying tensions within the construction industry can be gained from the two seminal reports of the 1990s, namely the Latham Report\(^1\) and the subsequent Egan Report.\(^2\) Both were designed to strategically position the construction industry for the challenges of the new millennium and to simultaneously provoke debate on the future direction of the industry. Change was demanded as a factor of competitiveness and economic viability, and promoted on the concepts of partnering, risk management and the integrated team ethos. Whilst the more enlightened moved with aspirational intent, others peddled the concepts without conviction or philosophical commitment, and subsequently targets remained largely undelivered. Thus, change has always proved challenging and will continue to do so.

The ‘Collaboration for Change’\(^3\) report provides the following insight on industry reform:

> Few in the industry believe that it is organised in a way that works well for clients and the full depth of the supply chain. There is little or no integration between design, product manufacture, construction, operation and asset management; no feedback loop that increases the chances of a completed asset performing as it should, and of future projects learning from the past; and no alignment of interests within the supply chain and between the supply chain and the client. This fragmentation of interests destroys value.

These identifiable characteristics represent indicators of entrenchment and resistance, which, unless dismantled, remain as barriers to progress and restrain the possibility of achievement of ‘best practice’ standards and the symbiotic relationship between project and health and safety success.

The philosophical foundations of project management address the criticisms above, and provide the bedrock for asset delivery improvement via the integrated team, through effective communication and cooperation. These are relevant perspectives for the construction industry in the general sense and for the delivery of health and safety outcomes compliant with the Regulations in the specific sense. The Regulations are one more stage in the evolution of construction-related legislation, traceable back to the Health and Safety at Work etc. Act 1974 (H & S W Act 1974).\(^4\)

This Act represented the culmination of the findings from the Robens Report of 1972,\(^5\) which was charged with appraising the state of workplace legislation and providing direction for long overdue improvements across many sectors of industry. It expressed concern over and identified such issues as: a lack of coherence in the way existing laws had been drafted; reliance on implementation by the factory inspectorate; failure to keep pace with technological advancements and the lack of inclusion of the health and education sectors.

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\(^4\) The Health and Safety at Work etc. Act 1974, July 1974, HMSO.
These findings initiated the subsequent launch of the H & S W Act 1974, which remains the primary piece of legislation covering occupational health and safety in Great Britain.

The Act changed the face of workplace legislation and championed the concept of health and safety responsibility for those who controlled and contributed within the workplace environment. It is sometimes referred to as an empowering Act, and gave rise to:

- the Health and Safety Commission\(^6\)
- the Health and Safety Executive
- the formation of the Employment and Medical Advisory Service (EMAS)
- the publication of Approved Codes of Practice and Guidance Notes, and
- a mechanism by which secondary legislation could get onto the statute books without going through the full time-consuming parliamentary process.

This Act established the ‘duty of care’ to be exercised towards all those affected by the work outcomes of the relevant industries and established a ‘deemed to satisfy’ approach based on ‘management by objectives’ and the avoidance of prescriptive legislation.

This modernisation process was further accelerated through membership of the European Union and its harmonisation policy, via associated European Directives. Such Directives require member states to introduce their own legislation to achieve the objectives set out in the relevant Directive. Their purpose is to achieve compatibility of legal outcomes across all member states, with each member state having flexibility of interpretation in respect of its mechanism for delivery.

Directive 89/391 EEC\(^7\) gave rise in the UK to the following six workplace regulations:

- Management of Health and Safety at Work Regulations (1992, now 1999)
- Provision and Use of Work Equipment Regulations (1992, now 1998)
- Workplace (Health, Safety and Welfare) Regulations (1992)
- Personal Protective Equipment Regulations (1992)

Although all the above have impacted on working lives, it was the Management of Health and Safety at Work Regulations (1992) that first introduced the legal requirement of the risk assessment approach, which was fundamental to the development of hazard identification and workplace method statements.

Regulation 3 states that

Every employer shall make a suitable and sufficient assessment of—

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking, for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.

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\(^6\) The HSC and HSE merged on the 1 April 2008 into one unified body, the Health and Safety Executive (HSE).

\(^7\) European Framework Directive on Safety and Health at Work.
A similar duty is placed on the self-employed.

Thus the concept of risk assessment has been part of statutory duty since 1 January 1993, and through the associated ‘general principles of prevention’ forms the key management response underpinning the various versions of the CDM Regulations.

Construction-related legislative development continued with European Directive 92/57, ‘Temporary or Mobile Construction Sites’. This was passed on the 24 June 1992, and required the implementation of minimum health and safety measures to prevent risks on civil engineering and building sites by establishing a chain of responsibility for all parties involved. It also linked with the relevant provisions of Directive 89/391 EEC, ‘the Framework Directive’, and imposed a deadline of 31 December 1993 for transposition by member states.

In principle, this Directive identified the role and responsibilities of:

- client
- supervisor
- coordinator
- notification
- health and safety plan
- file for future work

and endorsed the requirements for

- cooperation and coordination
- general principles of prevention
- minimum health and safety goals
- prohibition of entry to the unauthorised
- supply of information to the workforce, and
- consultation with workers and/or their representatives.

The UK’s response to the above Directive has been translated into the Construction (Design and Management) Regulations and the Construction (Health, Safety and Welfare) Regulations 1996 (CHSW) (now enshrined in PART 4 of the current Regulations).

The former implements the planning and management aspects of the Directive and the CHSW implements the practical implementation aspects. It is to be noted that the narrative of the Directive has not changed since its launch on 24 June 1993, whilst the CDM Regulations are now in their third version, with each revision attempting to achieve closer alignment with the objectives of the Directive itself.

The journey of legislative development has been varied and often torturous, with the CDM management model intent on continuing with this journey of constant improvement, which itself resonates with the key principles of project management. Thus, the career professional will never arrive, but must constantly seek to learn lessons from the last experience to enhance future performance in all areas of project and health and safety construction management.

Complacency must always be challenged and management systems continually reviewed, updated and revised to ensure that controls remain effective and that any

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project changes/variations/alterations with a health and safety implication are fully appreciated and due responses undertaken. Such perspectives are evident in dutyholder statutory obligations associated not only with these Regulations but also with all other construction-related legislation.

Successful project outcomes are delivered by the integrated team based on good communication and cooperation, within the embrace of the holistic approach. If there is a problem on a construction site then it has an impact on all parties involved on that site. In the project management sense there is no benefit in the ‘blame game’ at any project stage, since fragmentation ensures that other agendas persist to the detriment of team deliverables. Furthermore, such fragmentation ensures that safe and suitable systems of work are likely to be compromised and successful outcomes undermined.

The CDM Regulations 2015 implicitly depend on the integrated team, with many of the philosophical threads described above woven into the associated narrative. In reality there is nothing new in the factors that deliver successful projects, and ‘best practice’ would indeed have highlighted most of the agenda items. The underlying principles of project management are therefore endorsed through the perspectives associated with dutyholder roles enshrined in these Regulations.

Change must be accommodated and improvements made acknowledging the argument that today’s issues stem more from the failure of the construction industry to evolve culturally than from shortcomings in the legislation itself.

Success will only be delivered to the requisite best standard when all team members share the same philosophy and own the means of deliverance, in a mutually appreciative team-based manner. This applies to all aspects of project management, with the underlying philosophy offering a vehicle for delivery. The cultural climate must support this, since reliance on legislation itself will not create the necessary change now expected.

The government rationale for the promotion of these Regulations cites the following objectives: simplification; a reduced level of bureaucracy; regulatory consistency; real risk focus; risk management by risk creators; and retaining responsibility within the supply chain, thus avoiding third party involvement.

Such promotional objectives have now been delivered through:

- Simplification;
- Fewer regulations;
- A team-based and integrated holistic process;
- Critical appointments from within the professional team;
- Closer alignment with the contractual process;
- Promotion of project management principles;
- Key appointments unrelated to notification;
- Greater integrative liaison between principal designer and principal contractor;
- No exemption for domestic clients;
- Removal of direct reference to the Workplace (Health, Safety and Welfare) Regulations 1992;

\(^9\) Note: Compliance with this and other construction-related legislation remains a bare minimum of performance. A best practice approach could well be set above the minimum level of compliance.
• Competence clarified and now based on skills, knowledge, training and experience as well as organisational capability;
• Document management related to best practice professional standards;
• Greater proactive involvement of the design team (principal designer) in the construction phase plan and the health and safety file.

However, detractors may offer counter-arguments about
• less robust process controls,
• over-reliance on the professional team, together with
• the removal of the CDM coordinator,

all leading to an unsatisfactory overall process.

Despite concerns and counter-arguments, the construction industry must now deliver a compliant response as a bare minimum, and champion, over a period of time, a benchmark standard above this minimum that serves the longer-term aims and aspirations of the industry.

The championing of an improved standard is dependent on cultural change and cannot be perceived as simply aspirational, since health and safety is a factor of statutory provision and criminal law.

Statistically, any improvement in the health and safety aspects of the construction industry can be crudely appreciated by direct reference to the HSE’s annual publication of workplace statistics, as correlated by the Office of National Statistics. These annual figures do not account for the level of occupational ill-health associated with the industry’s procedures and methodologies, nor can they account for the acknowledged under-reporting of related issues.

The process of reporting occupational ill-health is neither robust nor absolute in terms of accuracy, and any analysis must account for associated discrepancies arising from:
• acknowledged level of under-reporting
• time lapse between ill-health cause and effect
• transient nature of the work-force
• variation in the categorisation of accidents
• changes in reporting procedures over given time periods
• drift of workforce into other industries.

However, improvements can be identified, with the last ratifiable year (up to 31 March 2015) representing the lowest number of construction-related fatalities since records began and the incidence rate being far lower than the 5.5/100,000 workers recorded in the 1990s.

<table>
<thead>
<tr>
<th>Period</th>
<th>Fatalities</th>
<th>Incidence Rate</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014/2015</td>
<td>35</td>
<td>1.62/100,000</td>
<td>Lowest number and rate of construction worker deaths on record</td>
</tr>
</tbody>
</table>

There is much to be pleased about, although the statistics merely provide a limited insight into an ongoing and ever-changing situation of complexity. The CDM Regulations undoubtedly contribute, but cannot be cited as the lone initiator of progress.

The industry owes a debt to the large- to medium-sized contractors, who for some time have appreciated the necessity for health and safety resource compatibility in support of their workforce. Acknowledgement must also be made of the alignment of the design professions over the last twenty years, which has provided greater transparency and illumination of their vital contribution to the Regulations, as well as of those clients who promote best practice and who have the vision and understanding to fully appreciate the influence they are able to exert on the project.

The continuation of this improvement is a necessity to be augmented by the performance of the small to medium construction enterprises that have been targeted by a number of specific legal obligations enshrined in the current changes.

There is still much to be done and this journey of improvement remains a never-ending challenge.

These Regulations are supported by a Guidance Document (L153), unlike the previous versions, which were accompanied by an Approved Code of Practice (ACoP). The guidance document states that:

Following the guidance is not compulsory, unless specifically stated, 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.

This is a lower legal standard than that presented by the previous ACoP, which established a reverse burden of proof requiring the dutyholder to provide evidence of compliance. This evidential trail must still be there but the move from an ACoP to guidance facilitates the drafting of any future amendments into the document itself, with the document intended to be further supported by sectoral guidance. Large sections of the previous ACoP have been taken into the body of the guidance, but not all.

There are many stakeholders on construction projects who do not carry statutory duties, but who nonetheless have an impact, whether positive or negative, on the project. All have to be managed by the project team and particularly by the project manager.

It is imperative that a team ethos dominates the project since it is a fundamental parameter for successful delivery. Fragmentation has no place in the challenging and dynamic construction environment, for it ensures that goals are fudged and attainable objectives masked to the detriment of health and safety as well as other project factors.

The CDM management model must attain more than the sum of its parts, through enhanced levels of communication, cooperation, contribution and coordination aimed at health and safety deliverables.

The CDM Regulations 2015 provides the vehicle for that delivery, driven by the commitment of the construction professional, with failure and non-compliance not options for consideration.

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