

# WHAT IS THE WORST THAT CAN HAPPEN TO A CONSULTANT IF THE HSE COME TO VISIT?

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*With a total UK consultancy market worth approximately £1.2 Billion[9] pounds per annum it is clear that there could be space for the development of noise and vibration work in the field of compliance with health and safety law. Improvements in measurement platforms, the application of mapping technologies combined with a greater emphasis on environmental issues has shifted focus away from industrial noise & vibration issues. As a result, fewer companies are offered control measures which go beyond basic personal protection equipment and fewer acousticians get involved in advising on noise and vibration. This leaves a gap that is sometimes filled by people working beyond their competencies. This paper will look at current poor practice and outline what is expected from the regulators from those who want to provide workplace noise and vibration exposure assessments.*

## 1 INTRODUCTION

The Health and Safety Executive (HSE) are enforcing criminal law against noise and vibration 'consultants'. This ranging from formal inspections through to written enforcement and prosecution. Enforcement was taken because the work being done by the 'consultants' was not at the standard expected: in some cases it lead to duty holders (the HSE's term for those who operate businesses) taking harmful action. The paper will describe; 1) the law consultants are expected to comply with, 2) examples of poor practice and the enforcement taken 3) work undertaken to produce a simple question set that can be used by duty holders to help them pick a suitable consultant. In all cases the paper will focus on consultancy in the control of noise at work or hand-arm vibration at work.

## 2 BACKGROUND - WHAT DOES THE HSE EXPECT FROM CONSULTANTS?

### 2.1 As an employer you have an obligation to ensure the safety of people you do not employ but who may be affected by your work

The Health & Safety at Work etc Act 1974[1] places a duty of care on employers to ensure, so far as is reasonably practicable, the health safety and welfare of their employees. The Act also places a duty of care on employers to consider those not in their employment. This is explained in Section 3(1) & 3(2) of the act[1];

*3(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*

*3(2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.*

An example of this duty in action can be demonstrated by the construction of scaffolding over a public pavement. The employer takes steps to ensure that employees are not hurt (e.g. quality of the scaffold, guard rails, safety inspections) but also undertakes steps to limit the chance of falling objects that could hurt pedestrians (e.g. limit gaps between boards, toe board, netting, lanyards for tools and training).

This obligation towards third parties (persons not in your employ) applies to those who run consultancy business, whether they are a sole trader or managing director of a large firm. If you do work for a client and offer advice which exposes that client's employees to a foreseeable risk, then you are failing to meet your obligations under Section 3 of the Health and Safety at Work etc. Act.

## 2.2 There is an expectation that you are competent to do the work

The obligation to appoint competent third-party advisors for health and safety matters rests with the duty holder, i.e. the client checks that the consultant is competent. This is written in the Management of Health and Safety at Work Regulations 1999[2].

*7.(1) Every employer shall, subject to paragraphs (6) and (7), appoint one or more competent persons to assist him in undertaking the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.*

If a consultant is contracted to give advice on Noise or Vibration at Work then the client should do due diligence and check that the consultant is competent.

Competency is defined in Health and Safety Guidance Document 65 'Management of Health and Safety'[3] as;

*Competence is the ability to undertake responsibilities and perform activities to a recognised standard on a regular basis. It combines practical and thinking skills, knowledge and experience.*

This definition is not prescriptive and is given as guidance. For some regulations the definition for competence is well defined, e.g. physicians diagnosing occupational disease.

Noise specific advice is given in The Guidance on the Control of Noise at Work Regulations 2005[4].

*185 Whether carrying out the work yourself, appointing other people, or a combination of the two, you need to make sure that the assessment and management of noise risks is carried out in a competent manner based on competent advice. This means making sure that all people involved in the process have the necessary training and experience to carry out their part of the work. The ability to understand and apply this guidance may be more important than formal qualifications. But there are some areas (such as noise-control engineering) where the person providing the advice would be expected to have formal qualifications.*

*187 To provide cost-effective advice on engineering control, the person would need to make a more thorough study of the principles of noise-control engineering. Some universities and technical institutes provide specialised courses at a range of levels, and general courses on noise control engineering are available...*

Vibration specific advice is given in The Guidance on the Control of Vibration at Work Regulations 2005[5] Appendix 5. This appendix expects that those who assess vibration risks and plan control actions on behalf of an employers should be able to follow the guidance in Parts 2 and 3 of the Guidance. In general, they should have:

- knowledge of the work processes in the industry concerned and familiarity with good practice;

- an understanding of the purpose of risk assessment and what information needs to be obtained;
- an understanding of how to obtain and interpret information on vibration risks, particularly manufacturers' declared emission values and any additional information about the likely vibration emitted by the equipment in use;
- the ability to assess daily exposures from information on vibration magnitudes and exposure durations;
- where required, competence in measurement of hand-arm vibration and interpretation of those measurements;
- the ability to record their findings and decisions, and explain them to others; and
- an understanding of their own limitations, whether of knowledge, experience or resources.

The duty to check that a consultant is competent rests with the client. The consultant is obliged to demonstrate their competence, but it is not the consultant's responsibility, either in regulation or guidance to offer this information. Professional bodies such as the Institute of Acoustics, the Institute of Safety and Health and the British Occupational Hygiene Society provide a platform that allows consultants to demonstrate competency.

### **2.3 There is an expectation that consultants will respond to HSE inspections and investigations like any other duty holder**

The enforcement of health and safety at work is split between the HSE, Local Authorities and several other specialised enforcement agencies (e.g. the Office of Rail and Road who regulate safety on the railways). The HSE does not usually regulate on health and safety in offices and as most consultants work out of an office, they may assume that HSE cannot regulate on their activities. If, however a consultant undertakes work on a site that the HSE regulate then Inspectors are permitted and expected to follow up on any and all reasonable lines of enquiry.

Inspectors 'powers' are detailed under Section 20(2) of the Health and Safety at Work etc. Act 1974 [1]. There are 13 specific powers in this section but the most relevant for consultants are:

*(j) to require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation...to answer...such questions as the inspector thinks fit to ask and to sign a declaration of the truth of his answers.*

*(k) to require the production of, inspect, and take copies of or of any entry in*  
*(i) any books, or documents which by virtue of any of the relevant statutory provisions require to be kept; and*  
*(ii) any other book or documents which it is necessary for him to see for the purposes of any examination or investigation...*

Inspectors powers may be used in the process of an investigation against a duty holder where the consultant may hold information that is relevant to the case. These powers can also be used when directly investigating a consultant if the actions of the consultant appear to have led to a material breach of law.

Inspectors can enforce where a material (non-trivial) breach of health and safety law occurs. If a consultant undertakes work that resulted in a material breach of law, enforcement, typically under Section 3(1) of the Health and Safety at Work etc Act 1974, will be taken. Enforcement follows the guidelines of the Enforcement Policy Statement [6]. The following enforcement options can be taken by the Inspector;

1 – A formal letter – This is one step up from giving verbal advice on site but it is issued when the inspector identifies a material breach of the regulations. It will not be recorded on the HSE website, but a 'Fee for Intervention' charge will apply [7]. Inspectors may provide written

information and advice regarding material breaches of the law following an inspection or investigation. This may include warning the dutyholder that, in the opinion of the inspector, they are failing to comply with the law. If no action is taken the Inspector may escalate the level of enforcement.

2 – An Improvement Notice – This is recorded on the HSE website's 'Register of Convictions and Notices' and a fee for intervention will be applied. An improvement notice can be served when an inspector is of the opinion that there is a material breach of the law which needs to be remedied within a certain period of time. Failure to comply is an offence and can result in prosecution.

3 – A Prohibition Notice - This is recorded on the HSE website's 'Register of Convictions and Notices' and a fee for intervention will be applied. A prohibition notice can be served when an inspector is of the opinion that there is a risk of serious personal injury associated with a particular work activity or process or, if a serious deficiency in measures is identified, to prevent or mitigate the effects of major hazards. There does not need to be a material breach of the law. Failure to comply is an offence and can result in prosecution. Prohibition notices have been served against individuals where their competency was at issue.

4 – Prosecution – In England & Wales the HSE can prosecute you for breaking health and safety laws or for failing to comply with an improvement notice or a prohibition notice (In Scotland the HSE recommends prosecutions to the Procurator Fiscal). The courts can fine you or in some cases send you to prison. Prosecutions are typically accompanied with an improvement notice and/or a Prohibition notice, therefore fee for intervention costs will also apply in addition to any court costs or fines. Successful prosecutions are recorded on the HSE website's 'Register of Convictions and Notices'.

### **3 TWO EXAMPLES OF ENFORCEMENT AGAINST CONSULTANTS**

#### **3.1 Example A – Description of Case**

During a routine inspection on a metal fabrication workshop the HSE Inspector noticed employees using impulsive power tools (impact drills and needle guns). When she asked how long the tools were used for manager told her that it was ok to use them all day every day. The Inspector knew that more than 15 minutes of work with an impulsive power tool can be enough to put the user above the Exposure Action Value for hand-arm vibration; she asked how the manager thought all day use was OK. He replied, "we had a vibration survey a few months ago and the consultant told us that all our tools are low vibration and are not likely to be a problem". The Inspector asked to see a copy of the report and was concerned that the results were not correct. A copy of the report was sent to the HSE Noise and Vibration team for comment. The Vibration Inspector found that; 1) a vibration timing device had been incorrectly used as if it were a vibration measurement system; 2) the consultant claimed membership of RoSPA (Royal Society for the Prevention of Accidents) as proof of competence; 3) that the report advised the duty holder that tools could be used all day without being likely to exceed the exposure action or limit value.

A discussion between the Vibration Inspector and the duty holder indicated that actual use of the power tools was greater than the Exposure Action Value but below the Exposure Limit Value. Health Surveillance and employee training was in place and so advice on risk assessment and vibration control was given to the duty holder.

The Inspectors visited the home address of the Consultant. A notebook interview was undertaken. The Consultant confirmed their belief that the timing device was capable of undertaking vibration measurements. The Consultant also confirmed that they believed the measurement results showed

that all tools could be used all day. The Vibration Inspector explained that the timing device was set at  $1\text{m/s}^2$  for all the tools it was used on and that no measurements had been taken. When asked if the Consultant thought it strange that every tool they had tested (around 35 tools) all gave the same result they said "I have not used it very often but it looked fine".

The Consultant stated that 'they had only bought the timing device a few months ago and had only done one job with it'. They also stated that given how badly things were going they had no intentions of ever doing a vibration survey again particularly as they were retiring in a few months.

The Vibration Inspector then asked to view all the Consultants files to see if there were any other vibration reports. All the files were inspected, and no other vibration reports were found. There was no indication that the Consultant had done any other vibration work.

### **3.2 Example A – Action Taken**

A formal letter was issued to the Consultant. The breach was Section 3(1) of the Health and Safety at Work etc. Act 1975. The guidance given in Appendix 5 of HSE guidance on hand-arm vibration[7] was referenced to outline what should be expected from a competent advisor.

The letter required the Consultant to either stop doing vibration consultancy work or commit to completing suitable training and supervision before undertaking any further vibration work. The Consultant was given the option to prove compliance either by a written statement outlining their intention to stop vibration work or by providing evidence that they had committed to suitable training and supervision. A signed statement was issued to the HSE from the Consultant indicating that no further vibration work would be done, and the case was closed.

### **3.3 Example B – Description of Case**

Inspections undertaken at three separate steel fabrication companies identified a Consultant charging for reports that made incorrect assessments of risk and gave poor advice on control and management. The issues were specific to noise and hand-arm vibration at work. An Investigation team was formed, and evidence of significant uncontrolled risks were identified due to the Consultants actions. The duty holders were given advice by HSE on control and management; it was recommended that they find alternative third-party advice.

Evidence was gathered from each duty holder and the Consultant was asked to come to the HSE offices for an 'interview under caution'. An Interview under caution is used when it is likely that the person being interviewed may incriminate themselves. Significant material breaches of health and safety law are criminal offences which can result in fines or time in prison if an individual is found guilty in court.

During the interview the Consultant stated that they did not agree that their work was creating a risk or that they were insufficiently competent to do the work. The Consultant also indicated that they would not stop doing noise and vibration work or undertake competency training.

### **3.1 Example B – Action Taken**

A Prohibition Notice was issued to the Consultant. This required the Consultant to stop working on noise and hand-arm vibration projects. The Consultant did not comply with the Prohibition Notice. This, along with the risks created at the metal fabrication sites resulted in the HSE initiating criminal proceedings. The Crown found the Consultant to be incompetent at advising his clients in the assessment and control of risks from workplace noise, hand arm vibration and substances hazardous to health. The Consultant pleaded guilty to breaching Section 3(2) of Health and Safety at Work Act 1974 and was fined £1,400.

## 4 IMPROVING UNDERSTANDING FOR DUTY HOLDERS

### 4.1 Underlying Problem

Since 2010 HSE Specialist Group 2, which only deals with occupational health concerns, has investigated or enforced on over 60 separate consultancies for failures to provide suitable and sufficient advice [8]. In some cases, these consultants have been members of relevant professional associations. In other cases, these consultants have claimed that their competency in one area made them competent in workplace health and safety. A recent example; our inspectors have taken action against consultants who have used sound insulation accreditations as proof of their competence to conduct workplace noise surveys.

Competency is a common issue in cases against consultants. The example that resulted in prosecution prompted the following statement from HSE Specialist Inspector, Parmjit Gahir.

*“Employers are more likely to use external consultants to provide assistance in complex situations where a higher level of competence is required. How consultants achieve competence is up to them, however they will have to be able to satisfy employers that they have a sufficient level of competence for the job in hand. Being a member of a relevant professional body, which sets competence standards for its members and operates continuing professional development schemes is one way of helping; as is presenting evidence of relevant experience such as references from previous clients; or obtaining qualifications.”*

The examples and Parmjit’s statement show the need for duty holders to have a better understanding of what competent looks like and to make it easier for professional bodies to signpost what their members can do. Health and safety regulators do not have the resource to check and follow up on every single third-party consultancy report or piece of advice. Preventing poor consultants from being engaged is a credible solution.

### 4.2 A Buyer’s Guide for Duty Holders

Work was undertaken in the Scotland to develop buyer’s guide that duty holders could use as a check list when engaging a noise consultant. Support on the development of the document was provided by members of The Institute of Acoustics(IOA), The Association of Noise Consultants(ANC), The Royal Environmental Health Institute of Scotland(REHIS), The Royal Society for the Prevention of Accidents(RoSPA), The British Occupational Hygiene Society(BOHS), The Institute of Occupation Safety & Health(IOSH) and Health Working Lives.

The document was aimed at small to medium size businesses who may have no experience of using a third-party consultant. A two-page document was created that has a set of instructions on one side and a check list on the other side. The document is reproduced in Figures 1 and 2.

### Control of Noise at Work Regulations 2005 – How do I select a workplace noise consultant?

This document is a buyer's guide to help you pick a consultant who will be able to help you understand the level of noise risk in your workplace and provide you with advice on noise control methods.

**Making a start yourself.** Before you hire a consultant look at the [HSE Noise Topic Pack](#). This details noise control methods that you should already be using.

**What will a consultant's noise at work survey give me?** A starting point for your risk assessment. There are other issues that you will still have to deal with (for example, should you provide health surveillance and/or training to your employees?). Remember that it is up to you to act on the advice you get.

**Helpful information** - Consider issuing a tender document outlining what you expect and/or ask the consultant to sign off on the first two sections in the table on the back of this document.

**If you think there is something in the report that could cause harm to somebody's health and safety,** take your concern to the consultant. If their reply does not fix the problem, contact their professional association. If there is still a risk to health and safety as a direct result of the actions of the consultant, consider raising a concern with HSE via [their concerns page](#).

*The Health and Safety Executive provided support to the ANC, BOHS, IOA, and IOSH in producing this guidance, which is aimed at improvements within the Workplace Noise Consultancy industry. This guidance may go further than the minimum you need to do to comply with the law regarding health and safety.*

Figure 1 – Page 1 of simple buyer's guide



















Selecting a consultant.		
You should expect <b>Yes</b> answers to the questions highlighted in <b>GREEN</b>  and hope to get yes answer to the questions in <b>AMBER</b> . 		
<b>You should make sure the consultant is competent to do the work</b>	<b>Yes</b>	<b>No</b>
 Are they qualified to measure and assess workplace noise (e.g. completed IOA, BOHS or IOSH certificate/module in workplace noise assessment)?		
 Are they a member of a professional body ( <a href="#">ANC</a> , <a href="#">BOHS</a> , <a href="#">IOA</a> or <a href="#">IOSH</a> )?		
 If advice on control is to be provided can they show that they, or the project supervisor, have a suitable level of experience.		
 If they have not completed a workplace noise assessment course can they otherwise show that they have suitable experience?		
 Can they give examples of previous reports or examples of good work?		
<b>To help you complete the risk assessment you need specific details regarding your employees' noise exposure. Check the report will include:</b>		
 What your employee's exposure levels are in relation to the action and limit values stated in the noise at work regulations.		
 Advice on if you need to provide health surveillance.		
 The required performance of any hearing protection you may need give to your employees and/or an assessment of existing hearing protection used.		
 An executive summary for ease of understanding		
 A list of practical measures that you can implement to both reduce risk posed to your employees by exposure to noise and improve compliance		
<b>You should provide suitable information to help the consultant do their job</b>		
 Tell them if you need a noise survey or advice on control or both		
 Give them information about the work that you do, staff numbers and rolls, equipment operating and any areas where access may be difficult		
 Issue your site safety requirements for visiting contractors (e.g. time required for induction, PPE requirements)		
 Issue details of your existing hearing protection, " <a href="#">buy quiet scheme</a> " and <a href="#">health surveillance</a>		
 Provide a floorplan showing the location of equipment and noisy processes		
 Issue copies of any previous noise surveys you have had completed		

Figure 2 – Page 2 of simple buyer's guide

## 4.3 Future Work

The HSE is working with professional associations to develop industry held guidance on competency in other fields such as the work undertaken with the British Occupational Hygiene Society and the Institute of Local Extraction and Ventilation Engineers.

The working group formed to develop the buyer's guide highlighted additional issues that should be addressed to improve health and safety around noise and hand-arm vibration:

- 1 – Shifting duty holders' focus to control.
- 2 – Proving competence of consultants.
- 3 – Engagement with duty holders.
- 4 – Simple information for very small companies.
- 5 – HSE's messaging on noise and vibration and holding people to account.
- 6 – Need for a community of noise and vibration at work professionals.

With reference to issue number 2 it is proposed that a joint group can be set up consisting of relevant participants from the IOA, ANC, BOHS and IOSH. This paper and the presentation invites the participation of members of the IOA.

With reference to issue number 5 the HSE sees consultant's noise reports and reviews their quality and content. Where poor practice is found enforcement action will be taken in line with HSE policy.

## **5 CONCLUSIONS**

Existing legislation allows the HSE to act against poor performing consultants. Consultants should be aware of Section 3 of the Health and Safety at Work etc Act 1975 and the duties it places on them.

The enforcement options available to HSE Inspectors when dealing with non-compliance of health and safety in the workplace can be applied to consultants whose work is not sufficiently competent.

Poorly performing consultants exist. Ensuring that consultants are competent is the responsibility of the duty holder but duty holders are not experts at assessing competency. A short buyers guide has been produced to help duty holders to vet consultants before they hire them.

Poor consultants damage the reputation of all consultants. The authors encourage links between professional bodies to agree a framework on what competent looks like.

## **6 THANKS**

The work undertaken during the drafting of the simple buyers guide was facilitated by Fife Council with the help of Peter Auger and Lisa McCann. Technical advice during the forum discussions and the working group was provided by Russell Atkinson, Rupert Balfry, Anne Budd, Jane Duffy, Susan Donnelly, Alan Gow, Sarah Jones, Richard MacKenzie, Karen McDonnell, Helen Pearson, Alistair Somerville, Ross Valentine and David Wright.

## **7 DISCLAIMER**

Personal views expressed in this paper are those of the authors and do not necessarily reflect HSE policy.

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