

FIRE (SCOTLAND) ACT 2005

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 1 – Fire and Rescue Authorities

Section 1 – Fire and rescue authorities

9. This section defines what is meant by “fire and rescue authority”: the council for the local government area as constituted under section 2 of the Local Government etc. (Scotland) Act 1994 and, if its area extends into the sea, the low water mark shall constitute its seaward boundary.

Sections 2, 3, 4 and 5 – Joint fire and rescue boards

10. These provisions allow for the combining of fire and rescue authorities in an amalgamation scheme made by order by the Scottish Ministers on the grounds of improving efficiency, effectiveness and economy. Schemes may be varied or revoked by order. Any such scheme will constitute a joint fire and rescue board that will carry out the functions of each authority for the combined area. Schedule 1 makes supplementary provision in relation to the powers of joint boards.
11. In all cases, the Scottish Ministers will be required to consult the existing fire authorities which will, or may, be affected and such other persons as Ministers consider appropriate. Similar schemes already exist under section 36 of the 1947 Act or section 147 of the Local Government (Scotland) Act 1973. Section 5 provides that these schemes will continue to have effect despite the repeal of the 1947 Act and section 147 of the Local Government (Scotland) Act 1973; they will be deemed to be schemes under section 2(1) of this Act. This section also makes provision for the transfer of property, rights, liabilities and staff from an existing board to a joint fire and rescue board constituted by a section 2(1) scheme. The orders under section 2(1) and 5(3) are subject to draft affirmative resolution procedure in the Scottish Parliament (section 88(4)(a)).

Section 6 – Meaning of “relevant authority”

12. The term “relevant authority” is used throughout the Act and is defined at section 6 as a fire and rescue authority as constituted under section 1 or a joint fire and rescue board constituted under an amalgamation scheme under section 2(1). “Relevant authority” is used throughout these Notes in the same way.

Part 2 – Fire and Rescue Services

Chapter 1 – Appointment of Chief Officer

Section 7 – Appointment of Chief Officer

13. This section provides for the appointment by each relevant authority of a Chief Officer who will be responsible to that authority for the discharge of the authority's functions by its employees.

Chapter 2 – Principal fire and rescue functions

Section 8 – Fire safety

14. This provision places a statutory duty on relevant authorities to make provision for the purpose of promoting fire safety. At present, fire authorities undertake community fire safety initiatives. These take various forms, for example, schools education programmes, safety information advisory sessions for community groups and attendance at public events, fetes, etc. In some cases individual home fire safety advisory visits are undertaken and advice is given to homeowners on fire prevention issues. This work is currently carried out on a discretionary basis and the effect of section 8 is to make it a statutory duty.

Sections 9 and 10 – Fire-fighting and road traffic accidents

15. **Section 9** re-enacts the existing statutory duty for a relevant authority to plan and make arrangements for fighting fires and protecting life and property from fires within its area. A relevant authority is required to secure sufficient equipment etc. and training to discharge its duty in normal circumstances. It must also put in place effective arrangements for receiving and responding to calls for help and for obtaining information to exercise its functions; the latter might include, for example, information about the nature and characteristics of buildings within the authority's area or availability of, and access to, water supplies.
16. **Section 10** places a duty on a relevant authority to make provision for rescuing persons from road traffic accidents and for dealing with the aftermath of such accidents. Historically, the risk of fire was the trigger for attendance at such an incident. Whilst advances in vehicle design have seen the incidence of fire following an accident decrease, calls to assist with the rescue of people from wreckage and protect them from harm caused by spillage of hazardous substances have increased dramatically. A relevant authority is required therefore to secure sufficient resources and training to discharge its duties in all normal circumstances. It must also put in place effective arrangements for receiving and responding to calls for help and for obtaining information to exercise its functions (for example, knowledge of local road and trunk road networks).
17. Under both sections 9 and 10 relevant authorities must seek to prevent or limit damage to property in exercising these statutory functions.

Section 11 – Conferral of functions in relation to other emergencies

18. This section allows the Scottish Ministers to confer on a relevant authority specified functions by order (an "additional function order"). This might relate to such matters as flooding, chemical spills and terrorist incidents.
19. The Scottish Ministers will also have the power, by additional function order, to direct relevant authorities as to how they should plan, equip for, and respond to such emergencies. This may include, for example, directions as to the deployments of mass decontamination equipment for civil resilience purposes. The intention is to ensure

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consistency of approach towards emergencies, particularly in response to terrorist incidents.

20. This section also allows the order to require an authority to respond to an emergency that has arisen outside its own area if, for example, it has more appropriate equipment and training than the authority in whose area the emergency has occurred.
21. The term “emergency” is defined for the purposes of Part 2 of this Act at section 52.

Chapter 3 – Ancillary functions

Section 12 – Emergency directions

22. **Section 12** gives the Scottish Ministers power to direct relevant authorities to respond to a particular fire or emergency incident, either in its own area or in that of another authority. The Scottish Ministers will also be able to direct an authority not to take any action in the event of such an emergency if, for example, another authority is better equipped to do so.

Section 13 – Power to respond to other eventualities

23. This section provides relevant authorities with discretion to equip, and respond to, events beyond its core functions provided for at sections 8 to 11 and 61. Such an authority will be free to act where it believes there is a risk to life or the environment. This would allow, for example, specialist activities such as rope rescue.

Section 14 – Provision of other services

24. **Section 14** provides a relevant authority with the power to agree to the use of its equipment or personnel for any purpose it believes appropriate wherever it so chooses. For example, an authority may agree to help pump a local pond as a service to its community.

Section 15 – Provision of centres for education and training

25. This section re-enacts provisions in the 1947 Act that allow a relevant authority to establish training centres in respect of any function conferred under these provisions.

Section 16 – Charging

26. **Section 16** allows the Scottish Ministers to authorise relevant authorities to charge for services and to specify in an order the persons who may be subject to the charge. At present fire authorities have discretionary powers to charge for exercising certain functions. However, relevant authorities will not be able to charge for action taken in respect of extinguishing fires, protecting property in the event of fires or protecting life, except in relation to fighting fires at sea (which, for authorities with a seaward boundary, means beyond the low water mark). In such circumstances, the relevant authority has no statutory fire-fighting duty under section 9 because the incident is outwith their area.
27. Subsection (4) maintains the existing arrangement that allows fire authorities to set their own level of charge, and to vary the charge depending on the type of service provided and the circumstances of a particular incident, or to choose not to charge at all.
28. Subsection (5) sets out that in setting the amount of any charge a relevant authority shall secure that the income from charging does not exceed the cost to the relevant authority for providing the service for which charges are levied when looked at over any particular financial year.

Chapter 4 – Water supply

Section 17 – Duty to secure water supply

29. This section re-enacts section 13 of the 1947 Act, requiring relevant authorities to take all reasonable measures to ensure an adequate supply of water and the setting out of the purposes for which they should secure that supply.

Section 18 – Use of water

30. This section allows a relevant authority to use any suitable supply of water for specified purposes. Whilst it provides for payment of reasonable compensation for water this is limited by reference to section 9A of the Water (Scotland) Act 1980, which expressly forbids charging by a water undertaker in respect of: water taken for the purpose of extinguishing fires or for any other emergency purposes; water taken for testing apparatus used for extinguishing fires; or for fire fighting training. This section re-enacts section 15(2) of the 1947 Act.

Section 19 – Agreements in relation to water supply

31. This section re-enacts section 14(1) and 15(1) of the 1947 Act and allows a relevant authority to enter into agreements with Scottish Water or with persons other than Scottish Water in order to secure the use of water; to improve access to water; or to lay and maintain pipes and to carry out other works in connection with the use of water. Subsection (2) allows for any agreement to include terms for payment, other than for the purposes covered by section 9A of the Water (Scotland) Act 1980.
32. Subsection (3) places a requirement on Scottish Water not to unreasonably refuse to enter into an agreement in relation to water supply and subsection (4) provides that Scottish Ministers may determine whether any refusal by Scottish Water to enter into an agreement under this section is unreasonable.

Section 20 – Emergency supply by Scottish Water

33. This section re-enacts sections 30(4) and (4A) of the 1947 Act. Subsection (1) places an obligation on Scottish Water to take all necessary steps to increase supply or pressure of water if requested to do so by a relevant authority for the purposes in section 17(2). Subsection (2) allows Scottish Water to shut off water from the mains and pipes in any area to enable it to comply with a request to increase supply or water pressure. Subsection (3) safeguards the relevant authority, Scottish Water or any other person from any liability for anything done by Scottish Water in complying with its obligations. Subsection (4) makes it an offence for Scottish Water, without reasonable excuse, to fail to take any steps which it is obliged to take and provides for a level 5 fine (currently £5,000) on summary conviction.

Section 21 – Fire hydrants: provision etc.

34. Subsection (1) applies sections 19 to 22 of Schedule 4 to the Water (Scotland) Act 1980 to Scottish Water. Scottish Water are therefore required, at the request of a relevant authority (see paragraph 9 of schedule 3 to this Act) to fix fire hydrants on their mains, keep them in good order and renew them. As soon as such a hydrant is complete, Scottish Water must - if required by the relevant authority – deposit a key in appropriate places. The costs incurred shall be defrayed by the relevant authority. Scottish Water must also, at the request and expense of the owner or occupier of any factory or place of business near a road, where certain requirements are fulfilled, fix a hydrant, keep it in good order and from time to time renew it.
35. Subsection (2) requires Scottish Water to mark the location of every fire hydrant with a notice or distinguishing mark and under subsection (4) the costs of doing this can be charged to the relevant authority in whose area the hydrant is situated.

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36. Subsection (5) grants the Scottish Ministers power to make regulations providing for uniformity in fire hydrants and the distinguishing marks and notices indicating their location. This re-enacts section 14(6) of the 1947 Act.
37. Subsection (6) provides that, in circumstances where a hydrant is damaged as a result of authorised use which was not for the purposes of fire fighting or other relevant authority purposes, the liability for the cost of repair or replacement will not fall on the relevant authority. This re-enacts section 14(3)(b) of the 1947 Act.

Section 22 – Fire hydrants: recovery of costs

38. Section 21 of Schedule 4 to the Water (Scotland) Act 1980 provides that the cost of fire hydrants and of fixing, maintaining and renewing them is borne by the relevant authority. Section 22 amends the Water (Scotland) Act 1980 by inserting a new section 21A into Schedule 4, which provides Scottish Ministers with a power to make regulations setting out the persons (with the exception of Scottish Water) from whom, and the circumstances in which, a relevant authority may recover costs in respect of fire hydrants.

Section 23 – Fire hydrants: offences

39. This section makes it an offence for any person to use a fire hydrant provided by Scottish Water other than for fire fighting or any other purpose of a relevant authority, or other than for any purpose authorised by Scottish Water. It also makes it an offence to damage or obstruct a fire hydrant provided by Scottish Water other than as a consequence of its use for those purposes.
40. Under subsection (3) a person guilty of an offence under subsection (1) is liable on summary conviction to a maximum of a level 5 fine (currently £5000).
41. This section re-enacts section 14(5) of the 1947 Act.

Section 24 – Notice of works affecting water supply and fire hydrants

42. This section re-enacts sections 16(1) to (3) of the 1947 Act and requires any person who proposes to carry out any works for the purpose of supplying water to any part of the area of a relevant authority to give written notice to the authority under subsection (1). The notice period for doing so is either 14 days in a case where proposed works are to be carried out under a requirement under any enactment other than the Water (Scotland) Act 1980, or 6 weeks in any other case. A person proposing to carry out any works affecting a fire hydrant is required to give at least seven days' notice in writing.
43. Under subsection (4), if it is not practicable for written notice to be given in accordance with the timescales set out in subsections (1) and (3), the person is regarded as having given such notice if it is given as soon as practicable. It is an offence under subsection (5), if, without reasonable excuse, a person fails to give notice as required. Under subsection (6) a person is liable on summary conviction to a maximum of a level 5 fine.

Chapter 5 – Powers of employees and constables

Section 25 – Powers of authorised employees in relation to emergencies

44. This section provides an employee of a relevant authority who has written authorisation from that authority with powers to do what he reasonably thinks necessary to deal with fires, road traffic accidents and other emergencies. It replaces section 30(1) of the 1947 Act which was limited to dealing with extinguishing or preventing the spread of fires and recognises the wider range of duties of fire fighters, including the work which fire authorities do in responding to road traffic accidents.

Section 26 – Powers of constables in relation to fires

45. This section sets out the powers of constables to do whatever he or she reasonably thinks necessary in the event that the constable reasonably believes a fire has broken out. It replicates powers under the 1947 Act.

Section 27 – Powers of authorised employees in relation to obtaining information.

46. This section allows an authorised employee of a relevant authority to enter premises to obtain information that is needed for the discharge of the core functions of fire fighting (section 9), dealing with road traffic accidents (section 10) and specified emergencies (section 11). Such entry must be at a reasonable time, cannot be forcible and 24 hours notice must be given to the occupier of a private dwelling, but these safeguards may be overridden if a warrant is obtained from a sheriff or justice of the peace.

Section 28 – Giving of notices required by section 27

47. Section 28 provides for the means by which a notice under section 27 may be served.

Section 29 – Powers of authorised employees in relation to investigating fires

48. This section allows an authorised employee of a relevant authority to enter premises where a fire has occurred (including land and premises on which there is a vehicle in which there has been a fire (such as a garage)) in order to investigate the cause and progression of the fire that has occurred there, and grants that officer powers, including the power to take samples.

Section 30 – Exercise of powers under sections 27 and 29: securing of premises

49. Section 30 obliges an authorised employee of a relevant authority who has entered a place under section 27 or 29 to leave the premises as secure against unauthorised entry as they were when found.

Section 31 – Sections 27 and 29: offences

50. Section 31 makes failure (without reasonable excuse) to comply with any requirement under sections 27(4)(b) and 29(2)(g) an offence and a person may be liable on summary conviction to a maximum of a level 4 fine (currently £2500).

Section 32 – Use of commercially sensitive information

51. Section 32 replicates the provisions of the 1947 Act which made it an offence for any person to make use of or disclose any commercially sensitive information which they obtain in the course of exercising their powers under sections 25, 26, 27 or 29. A person is liable on summary conviction to a fine not exceeding level 4 or to 3 months' imprisonment.

Chapter 6 – Mutual assistance etc.

Sections 33 and 34 – Reinforcement schemes and directions about reinforcement schemes

52. These sections re-enact the provisions of the 1947 Act on reinforcement schemes and extend them to apply to road traffic accidents and other serious emergencies (as set out by additional function order under section 11). Section 33 obliges relevant authorities to group together (so far as practicable) to provide mutual assistance. If there are cases where such authorities are unable to come to an agreement about forming such a group then, at the request of one of the authorities concerned, section 34 gives the Scottish Ministers the power to direct authorities involved to make, vary or revoke such a scheme.

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53. Before giving a direction, the Scottish Ministers must give all authorities concerned the opportunity to make representations to them and may also instruct an inquiry.

Section 35 – Assistance other than from relevant authorities

54. This section will extend powers in the 1947 Act to allow fire authorities to enter into agreements with organisations including those that employ their own fire-fighters. For example, a relevant authority could arrange with an industrial company for their in-house fire-fighters to provide assistance to the authority outwith the company premises if requested and required. In addition, assistance may be provided by a non fire-fighter if approved by the Chief Officer. For example, a Chief Officer may approve a forestry worker to assist fire-fighters engaged in extinguishing a heathland fire. The cost of this assistance could be reimbursed. These arrangements can also apply to any of the authority's functions covered by sections 8 to 11, 13 and 61.
55. The arrangements under this section cannot be between two relevant authorities as this type of relationship would be covered by sections 33 and 34.

Sections 36 and 37 – Arrangements for carrying out of functions by others

56. **Section 36** extends powers in the 1947 Act to provide relevant authorities with the ability to enter into contractual arrangements with others (including other relevant authorities) to provide services in the execution of their functions (covered by sections 8 to 11, 13 and 61). An example would be an agreement where a relevant authority contracts with a local authority to promote fire safety within its schools. Another example would be where a relevant authority specialises in rope rescue and a neighbouring relevant authority contracts with it to provide some, or all, of its response to incidents requiring rope rescue.
57. However, a relevant authority can only delegate its fire-fighting functions to another authority or others that employ fire-fighters.
58. **Section 37** re-enacts provisions in the 1947 Act that provide the Scottish Ministers with the ability to require relevant authorities to enter into contractual arrangements under section 36 (or to vary or cancel any such arrangements). The Scottish Ministers can exercise the power on their own initiative, but the power must be exercised in the interests of economy, efficiency and effectiveness.
59. Before issuing a direction, the Scottish Ministers must give the relevant authorities concerned the opportunity to make representations to them and they may hold an inquiry.

Chapter 7 – Assaulting or impeding employees and others

Section 38 – Amendment of Emergency Workers (Scotland) Act 2005

60. This section makes it an offence under the Emergency Workers (Scotland) Act 2005 to assault, obstruct or hinder a person acting in the capacity of an employee of a relevant authority or someone providing assistance to them in carrying out functions under sections 9 to 13 (fire fighting, road traffic accidents, other emergencies, emergency directions and other eventualities) or exercising powers under sections 25 (powers of authorised employees in relation to emergencies), 27 (powers to obtain information) and 29 (powers in relation to investigating fires). The penalty for such an offence under the Emergency Workers (Scotland) Act 2005 is, on summary conviction, imprisonment for a period not exceeding 9 months or a fine not exceeding level 5 on the standard scale or both.

Section 39 – Assaulting or impeding employees discharging certain functions

61. Section 39 makes it an offence to assault, obstruct or hinder an employee of a relevant authority whilst carrying out their duties under sections 8 (fire safety), 17 (duty to secure water supply) or 61 (enforcing authorities). It also covers persons providing assistance to the relevant authority by virtue of arrangements made for assistance under section 35 and those undertaking a function of the authority by virtue of arrangements made under section 36. The offence is punishable on summary conviction with a period of imprisonment not exceeding 9 months or a fine not exceeding level 4 on the standard scale.

Chapter 8 – Central supervision and support

Section 40 – Framework document

62. This section requires the Scottish Ministers to prepare and consult on a Fire and Rescue Service National Framework (“the Framework”), keep the Framework under review and consult on any significant revisions made to it. The Framework (and any significant revision) will come into effect by order.

Section 41 – Adherence

63. This section requires relevant authorities to have regard to the Framework when carrying out their functions. The Scottish Ministers have the power to intervene if they consider an authority is failing to act in accordance with the Framework by requiring an authority, by order, to act in accordance with the Framework. They may also cause an inquiry to be held into the matter. Before making such an order, the Scottish Ministers must consult the authority.

Section 42 – Reporting

64. This section requires the Scottish Ministers to report to the Parliament on the extent to which relevant authorities are acting in accordance with the Framework and any action Scottish Ministers have taken to ensure the authorities do so.

Sections 43 and 44 – Inspectors of Fire and Rescue Authorities and functions of Inspectors of Fire and Rescue Authorities

65. Section 43 sets out the arrangements for appointing inspectors of relevant authorities.
66. Section 44 allows the Scottish Ministers to call for reports from inspectors on the general performance of relevant authorities and on how they are carrying out their functions under the Act. The Scottish Ministers are required to lay a copy of any report submitted on the state and efficiency of relevant authorities generally before Parliament.

Section 45 – Directions for public safety purposes

67. This section provides the Scottish Ministers with the power to give general or specific directions (a “property and facilities order”) to relevant authorities as to the use and disposal of property or facilities for the purposes of public safety. Such a direction may cover all kinds of property and facilities. An example of when this power might be used is during a period of industrial action when official relevant authority cover to deal with emergencies is insufficient to deal with local risks and, in order to ensure public safety, their equipment needs to be used by others providing emergency fire cover.

Section 46 – Requirements concerning equipment and services

68. This section confers on the Scottish Ministers the power (by order) to oblige relevant authorities to use and maintain equipment and services as specified. An example would be the new Firelink radio system where in order to ensure inter-operability between

the emergency services, and to enable relevant authorities to work across their own boundaries in the event of an emergency, it is essential that all authorities use the same radio system.

Section 47 – Provision of equipment etc.

69. This section allows the Scottish Ministers to provide, contribute to and maintain equipment, facilities, organisations and services which may be used by relevant authorities. This power must be exercised in the interests of economy, efficiency and effectiveness. For example, this section will give the Scottish Ministers the specific authority to provide equipment to deal with civil resilience incidents and standardised systems for radio communications. This will help to ensure consistency of approach in the case of major emergencies such as a terrorist incident.

Section 48 – Central institution and other centres for education and training

70. This section allows the Scottish Ministers to set up and maintain a central training institution for the purposes set out in subsection (2). Some training which is best suited to local delivery may be undertaken by relevant authorities under powers in section 15 and the Scottish Ministers may make arrangements with relevant authorities for central training (for the purposes set out in subsection (2)) to be delivered at local centres.

Chapter 9 – Employment

Section 49 – Statutory negotiation arrangements

71. This section provides the Scottish Ministers with power to establish negotiating machinery in respect of the conditions of service under which employees of relevant authorities work. The power allows the Scottish Ministers to determine the number, composition and chair of such a negotiating body or bodies.
72. Subsection (2) requires that any such body include representatives of employers and employees (which may include trade unions (as defined in section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992)) and an independent chair.
73. Subsections (5), (6) and (7) would allow the statutory body to make arrangements for some conditions of service to be negotiated locally either in their entirety or within nationally agreed parameters. Subsection (8) makes an agreement between a relevant authority and employees of a particular type a legally enforceable contract; but the agreement is only enforceable where it was made by means of the statutory negotiation body which contained representatives of employees of that type, or if made in accordance with the local negotiation arrangements described in section 49(5) to (7).

Section 50 – Guidance

74. Any negotiating body, whether established voluntarily or under section 49, is required by this section to have regard to any guidance given by the Scottish Ministers in connection with the negotiation of conditions of service.

Section 51 – Prohibition on employment of police

75. This section re-enacts section 32 of the 1947 Act and provides that a relevant authority may not employ a police constable as a fire#fighter. If an off-duty constable was employed by a relevant authority, for example as a fire#fighter on the retained duty system and available for response by pager call, difficulties may arise at the scene of a fire or other emergency due to confusion over which employer has the primary claim on the constable's services.

Chapter 10 – Interpretation

Section 52 – Interpretation of Part 2

76. This section gives meanings to three terms used in Part 2 of the Act – in particular it provides a definition of “emergency”, for the purposes of this Part.

Part 3 – Fire Safety

Chapter 1 – Fire safety duties

Section 53 – Duties of employers to employees

77. **Section 53** provides that employers have a general duty to ensure so far as is reasonably practicable the safety of their employees in respect of harm caused by fire in the workplace. The formulation of this duty is very similar to that in section 2 of the **Health and Safety at Work etc. Act 1974 (c.37)** (“the 1974 Act”). In that context the words “so far as is reasonably practicable” have been considered by the Court of Appeal in **Edwards v NCB [1949] 1 All ER 743**, where the court held that it is a narrower term than “physically possible” and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk is placed in the other. If it can be shown that there is a gross disproportion between them, the risk being insufficient in relation to the sacrifice, the person on whom the burden is placed discharges the burden of proving that compliance was not reasonably practicable. This interpretation has been consistently applied by the courts in subsequent decisions.
78. Subsection (2) sets out specific duties of employers in relation to carrying out a risk assessment to identify fire safety risks, and taking the necessary fire safety measures to ensure that they comply with their general duty under subsection (1). The obligations apply whether or not the requirements relate to matters within their control. There is therefore a difference between this duty and that found in section 54, where persons who have control of premises to a certain extent, have a duty to the same extent. This reflects the high standard which is expected of employers in domestic and European legislation.
79. Fire safety measures are defined in schedule 2. Paragraph 2 of schedule 2 makes it clear that these measures do not include process fire precautions which are a reserved matter under Section H2 of Schedule 5 to the Scotland Act 1998. The term “process fire precautions” is not defined anywhere in statute but is widely used and understood as being distinct from general fire safety. Essentially, “process fire precautions”, which include risk assessment, are designed to prevent the outbreak or spread of fire from any work processes, taking into account process risk which can be perceived as the danger, due to the work process, that fire will break out. This is to be distinguished from “general fire precautions” which relate to the means of fire warning, fire fighting and escape, thereby dealing with the means to ensure people can escape safely once a fire has started.
80. Subsection (3) imposes a duty on the employer to review the risk assessment in accordance with regulations under section 57 and to take the necessary fire safety measures to ensure compliance with the general duty under subsection (1).

Section 54 – Duties in relation to relevant premises

81. **Section 54** provides that a person who has control of premises must carry out a risk assessment to identify fire safety risks to relevant persons in respect of harm caused by fire on the relevant premises. There is a definition of “relevant premises” in section 78. The person in control of the relevant premises would include the employer (where there is one), a person in control of the premises in connection with the carrying on of a trade, business or other undertaking, and the owner. For example, a shopkeeper who is

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a sole trader with no employees carrying out a business in leased premises would have duties under section 54 on the basis that the shopkeeper has control of the premises to an extent. In this example, the owner of the premises may also have section 54 duties. Other people, such as landlords or contractors who take responsibility for installation and maintenance of fire precautions or fire safety measures may be in a position to exercise varying degrees of control over premises and they may bear a relevant degree of responsibility under section 54.

82. The term “relevant person” is defined in section 79 and means persons who are or may be lawfully on the premises and persons in, or who may be in, the immediate vicinity of the premises whose safety would be at risk in the event of fire in the premises. Employees of fire and rescue authorities and joint boards are excluded from the definition when they are carrying out operational tasks (also defined in section 79). Where the person subject to the duty in section 54 is an employer their employees are excluded because they are already protected by the section 53 employer/employee duty. Following the risk assessment the obligation is to take such fire safety measures as would be reasonable for a person in that position to take to ensure the safety of relevant persons in respect of harm caused by fire in the premises, bearing in mind all the circumstances. Where the person in control of the premises is not the owner or a person carrying on an undertaking then the owner is also subject to the subsection (2) duties.
83. Subsection (4) imposes the subsection (2) duties on persons who have obligations under contracts or tenancies in relation to maintenance or repair or in relation to fire safety. The subsection (2) duty is imposed but only to the extent that those persons have such obligations. This would include for example contractors who take responsibility for installation and maintenance in relation to fire alarms.
84. Subsection (5) imposes an obligation on the persons subject to the subsection (2)(a) duty to review their risk assessment in line with the regulations made under section 57 and to take measures to ensure safety in line with their subsection (2)(b) duty.

Section 55 – Taking of measures under section 53 or 54: considerations

85. **Section 55** details the considerations which a person taking fire safety measures under section 53 or 54 must take into account. The measures set out in the section correspond with those set out in article 6(2) of the Framework Directive.

Section 56 – Duties of employees

86. This section places a duty on employees while “at work” to take, in respect of fire safety, reasonable care of themselves and any other relevant person who may be affected by their acts or omissions. Employees must also co-operate with their employers so far as is necessary to enable the employers to meet their obligations and duties under Part 3 of the Act.

Sections 57 and 58 – Risk assessments: power to make regulations and Scottish Ministers’ power to make regulations about fire safety

87. These sections provide the Scottish Ministers with the necessary powers to make regulations in connection with the carrying out of risk assessments, including their review, and to make regulations in connection with fire safety in premises to which Part 3 applies.
88. It is intended that regulations will cover – among other things - duties to record fire safety arrangements in particular circumstances; duties not to employ certain types of employee before assessments are made which take into account factors relevant to, for example, young employees; the need to equip premises with fire-fighting equipment and fire detection equipment; requirements to provide safe routes to emergency exits; the standards required of such emergency exits; the need to establish appropriate safety

procedures and the provision of information in connection with risks and fire safety measures in particular premises.

Section 59 – Power to make further provision for protection of fire-fighters

89. This provision enables Scottish Ministers to apply provisions in regulations concerning maintenance requirements in respect of measures provided for the protection of fire-fighters (e.g. rising mains), to the common areas of private dwellings.

Section 60 – Special case: temporary suspension of Chapter 1 duties

90. This section provides that in circumstances where the carrying out of the duties imposed by sections 53 to 56 and regulations under sections 57 and 58 (defined in section 79 as the “Chapter 1 duties”) would prevent a member of the armed forces of the Crown, a visiting force, a police constable or any other person of a description prescribed in regulations from carrying out their operational duties (as defined in subsection (4)), the Chapter 1 duties are temporarily suspended during that period. Subsection (3) provides that in these circumstances a person whose duties are temporarily suspended must still ensure so far as is possible the safety of relevant persons in respect of harm caused by fire.

Chapter 2 – Enforcement

Section 61 – Enforcing authorities

91. This section imposes an obligation on enforcing authorities to enforce the Chapter 1 duties. In most cases the enforcing authorities will be the fire and rescue authority or the joint fire and rescue board. However it is recognised that there are some special areas where it is more appropriate for another authority to enforce fire safety matters. The other enforcing authorities are: the local authority for major sports grounds; and the Chief Inspector of Fire and Rescue Authorities for Scotland (the “Chief Inspector”) for Crown owned or occupied premises generally and for the United Kingdom Atomic Energy Authority premises. Subsections (7) and (8) enable relevant authorities to make arrangements with other persons in respect of the carrying out of their functions under Part 3 in relation to particular workplaces
92. Subsection (2) requires enforcing authorities to have regard to any guidance issued by the Scottish Ministers when carrying out their duties. Subsection (3) gives enforcing authorities the power to appoint “enforcement officers”. The Chief Inspector can appoint as an enforcement officer a person who has been appointed as an enforcement officer by a relevant authority, as long as the relevant authority consents and the appointment is made in writing.

Section 62 – Powers of enforcement officers

93. Section 62 sets out the powers of enforcement officers in relation to the carrying out of the enforcing authorities’ duties. Subsection (3) provides that enforcement officers exercising powers of entry must produce evidence of their authority to exercise these powers, if required to do so.
94. These powers include a power of entry and powers to take possession of, or samples of, articles found in the premises. Subsection (2)(c) requires persons on the premises to provide the enforcement officer with information, documents or other assistance that the officer reasonably requests. Subsection (6) requires the enforcement officer to undertake any activities mentioned in subsection (2)(d), (e) or (g) in the presence of any person with Chapter 1 duties in relation to the relevant premises, if requested. Subsection (4) obliges an enforcement officer exercising the power under subsection (2) (f) to take samples to leave a notice at the premises. Similarly, subsection (7) requires an enforcement officer exercising the power under subsection (2)(h) to take possession

of articles to leave a notice at the relevant premises indicating what has been removed and by whom.

95. Subsection (8) requires enforcement officers, in circumstances where they have exercised their powers of entry, to leave the premises as secure as they found them.

Section 63 – Prohibition notices

96. Where an enforcing authority considers that the use of relevant premises involves or will involve a risk to relevant persons so serious that their use ought to be prohibited or restricted, an enforcing authority may prohibit or restrict their use until such time as the matters giving rise to the risk have been remedied. This is done by the issuing of a prohibition notice. The process is similar to provisions that appear in section 10 of the [Fire Precautions Act 1971 \(c.40\)](#). Under section 66 there is an appeal against the service of a prohibition notice to the sheriff court. The sheriff can make an order suspending the operation of the prohibition notice pending the determination of the appeal. Subsection (8) provides for the withdrawal in writing of a prohibition notice by the enforcing authority.

Section 64 – Enforcement notices

97. This section provides for the issue of an enforcement notice by the enforcing authority in cases where the enforcing authority considers that there is non-compliance with the Chapter 1 duties (except the employee's duty of co-operation in section 56). The provisions are similar to equivalent provisions in section 20 of the 1974 Act and provisions that appeared in the [Fire Precautions \(Workplace\) Regulations 1997 \(S.I. 1997/1840\)](#). An enforcement notice sets out what duty has not been complied with, the reason why it is considered that the duty has not been complied with and what action should be taken within a specified time frame to remedy the position.
98. Where an enforcement notice requires the making of alterations to relevant premises, the enforcing authority must consult other bodies that have enforcement or approval responsibilities in respect of the premises prior to the issue of the notice to ensure that the measures required are appropriate in the light of other restrictions that may apply to the premises. Failure to comply with the consultation requirement does not affect the validity of the notice. Subsection (8) provides for the withdrawal in writing of an enforcement notice by the enforcing authority. Under section 66 it is possible to appeal against the service of an enforcement notice in the sheriff court. The bringing of the appeal has the effect of suspending the notice whilst the appeal is ongoing.

Section 65 – Alterations notices

99. Where relevant premises pose a serious risk to relevant persons, or it is likely that they would pose a serious risk to relevant persons in respect of harm caused by fire if changes were made to the premises, the enforcing authority can issue an alterations notice. The effect of the notice is to require the “appropriate person” (that is, the person subject to requirements in respect of the premises in terms of section 53 or 54) to notify the enforcing authority of their intentions prior to making any specified changes. The alterations notice advises recipients that where they intend to make changes of a type falling within subsection (5), and where the change or changes would constitute a serious risk to relevant persons in respect of harm caused by fire, they must notify the enforcing authority of the changes they intend to make. This enables the enforcing authority to be alerted to any potential problems and allows an intervention before changes are made which significantly increase the risk.
100. The issue of an alterations notice does not preclude the appropriate person from undertaking the changes proposed. However, it requires them to notify the enforcing authority in advance of the change or changes being made. Subsection (7) provides for the withdrawal in writing of an alterations notice by the enforcing authority.

Section 66 – Appeals

101. The rights of individuals are protected in relation to the service of prohibition notices, enforcement notices and alterations notices by rights of appeal. An application to the sheriff must be made before the expiry of 21 days beginning with the service of the notice.

Section 67 – Determination of disputes

102. This section provides a right to seek a determination where the enforcing authority considers that there has been a failure to comply with the Chapter 1 duties but there is a difference of opinion on the action that requires to be taken to rectify this. The person considered to have failed to comply with the Chapter 1 duties and the enforcing authority must jointly agree to seek such a determination. The matter will be referred to the Chief Inspector unless the enforcing authority is the Chief Inspector (in which case the matter will be referred to Scottish Ministers). The determination might avoid the need to go before the courts on appeal against an enforcement notice when the matter to be considered is purely technical– for example where the disagreement concerns the standard of fire alarm which is appropriate in the circumstances of the case.
103. Where a determination has been made, an enforcing authority may not issue an enforcement notice which conflicts with the determination. However, this provision will not apply in circumstances where a change has been made in relation to the premises or their use which significantly increases the risk posed to relevant persons.

Chapter 3 – Miscellaneous

104. This chapter deals with a number of miscellaneous issues.

Section 68 – Prohibition on charging employees

105. **Section 68** prohibits the charging of employees in respect of anything employers may do in pursuance of their Chapter 1 duties. This implements article 6(5) of the Framework Directive.

Section 69 – Civil liability for breach of statutory duty

106. **Section 69** prevents civil proceedings being pursued in respect of failures to comply with the Chapter 1 duties. The exclusion does not, however, apply in relation to a breach of Chapter 1 duties by an employer that causes damage to an employee. This implements Article 4 of the Framework Directive which requires an effective legal remedy to be available to employees for breach by their employers of the obligations imposed by the Directive.

Section 70 – Consequential restriction of application of Part I of the Health and Safety at Work etc. Act 1974

107. **Section 70** ensures that Part I of the 1974 Act, and regulations or orders made under that Part, do not apply in relation to devolved fire safety matters except where the enforcing authority is also an enforcing authority under Part I of the 1974 Act. At present, the 1974 Act and the regulations or orders made under it are capable of making provision for certain matters of general fire safety that are dealt with in the Act. It is therefore appropriate to disapply the 1974 Act in the context of creating a new devolved fire safety code.

Section 71 – Suspension of terms and conditions of licences dealing with same matters as this Part

108. This section ensures that fire safety matters are dealt with under Part 3 (and related regulations) and not in licensing, certification or registration provisions in other enactments.

Chapter 4 – Offences

Sections 72 and 73 – Offences and offences by bodies corporate and partnerships

109. These sections set out the offences and associated penalties in respect of the provisions contained in Part 3. The most serious offences under Part 3 are subject to a maximum penalty on summary conviction of a fine not exceeding £20,000 or on conviction on indictment to imprisonment not exceeding 2 years or to a fine, or to both. In other cases on summary conviction the statutory maximum applies (currently £5,000) and on conviction on indictment the penalty is a fine. Other less serious offences are subject to lesser maximum penalties. The offences of failing to comply with the duties under sections 53 to 56 and any requirement or prohibition under regulations apply only where the failure puts a relevant person at risk of death, or serious injury, in respect of harm caused by fire. The offence would therefore only be committed where serious consequences might result.
110. More minor contraventions might be dealt with either through informal advice or through the service of an enforcement notice (failure to comply with such a notice being an offence under section 72(4)(f)(i)). In relation to the offence under subsection (1) in respect of a failure to comply with the duty in section 53 (duty to ensure fire safety of employees so far as is reasonably practicable), subsection (11) provides that the onus of showing that it was not reasonably practicable to do more than was done is on the accused. This is similar to the provision on the burden of proof in section 40 of the 1974 Act (relating to the employer's duty in section 2 of the 1974 Act to ensure the safety of employees at work so far as is reasonably practicable). The reverse legal burden of proof set out in section 40 of the 1974 Act was considered by the Court of Appeal in **R v Davies (David Janway) [2002] EWCA Crim 2949** and found to be compatible with the European Convention on Human Rights since it was justified, necessary and proportionate.
111. Subsection (9) provides for a defence of due diligence but subsection (10) disapples the due diligence defence in relation to the employer's duties under section 53 and in relation to duties contained in regulations made under sections 57 or 58 concerning the duty to do something so far as is reasonably practicable. Again, the exclusion of the employer from this defence reflects the high standards required of employers under the relevant European legislation.
112. Subsections (12) and (13) create an automatic reverse burden of proof (i.e. the onus is on the accused) whenever the regulations under section 57 or 58 impose a "so far as is practicable" or "so far as is reasonably practicable" duty or requirement, the breach of which results in an offence under section 72(3).

Section 74 – Offence due to fault of other person

113. This section enables the prosecution under Part 3 of a third party whose act or default has resulted in an offence being committed under Part 3 by a person with fire safety duties under that Part. This is a similar provision to that which appears in section 24 of the Fire Precautions Act 1971.

Section 75 – Employee’s act or omission not to afford employer defence

114. This section ensures that the acts or omissions of employees, or other persons specified in regulations, will not afford the employer a defence in relation to proceedings for any offence.

Chapter 5 – General

Section 76 – Service of documents

115. This section sets out the methods by which documents issued under Part 3 may be served and subsection (6) further provides that the Scottish Ministers may make regulations as to the procedures to be followed in relation to the service of documents.

Section 77 – Crown application

116. This section provides that Part 3 and any regulations made under it shall bind the Crown. Subsection (2) ensures that instead of making the Crown criminally liable for any contravention, the Court of Session may declare unlawful any act or omission of the Crown which constitutes a contravention. The powers of entry conferred in Part 3 cannot be exercised in relation to Crown premises.

Section 78 – Meaning of “relevant premises”

117. This defines the meaning of relevant premises for the purposes of Part 3: most non-domestic premises used or operated by employers, the self-employed and the voluntary sector. It also applies under subsection (5) to houses licensed under the [Civic Government \(Scotland\) Act 1982 \(Licensing of Houses in Multiple Occupation\) Order 2000 \(S.S.I. 2000/177\)](#) (as amended), such as hostels. Other types of premises to which Part 3 applies are listed in subsection (5). These include premises used for the provision of a care home service, those used for the provision of a school care accommodation service, and those used for the provision of an independent health care service.
118. Types of premises which are not affected by Part 3 are certain means of transport, boreholes and fields, woods and agricultural land. There are special considerations associated with these areas and consequently separate safety regimes shall continue for the areas.
119. In addition, ships and hovercraft, mines and offshore installations are excluded from the definition. Fire safety on these premises is a reserved matter by virtue of Section H2 of Schedule 5 to the Scotland Act 1998 (as amended). Various defence premises are also excluded from the definition of “relevant premises” under subsections (2)(e) to (g) in consequence of the reservation of defence in paragraph 9 of Part I of Schedule 5 to the Scotland Act 1998, since fire safety on defence premises is regarded as being directly linked to the defence reservation and is regarded as having a direct impact on defence functions.
120. Under subsections (8) and (9), Scottish Ministers have power by regulations to modify the definition of “relevant premises” to which Part 3 applies, and to modify the application of Part 3 to relevant premises when the subsection (8) power is exercised.

Part 4 – Miscellaneous

Sections 80 and 81 – Inquiries and inquiries: supplementary

121. These sections re-enact with amendments section 33 of the 1947 Act. The Scottish Ministers will be able to hold a public inquiry into the performance of a relevant authority or its handling of a particular incident. Section 81 provides that the Scottish Ministers may make regulations about inquiries under the Act (other than inquiries under section 44).

Section 82 – Pre-commencement consultation

122. **Section 82** sets out that where consultation is required under a provision in the Act and before that provision comes into force consultation takes place, any such consultation will count as consultation required by and to the extent set out under that provision. In effect this will allow consultation prior to Royal Assent to be treated as consultation under the relevant provision. An example where this may be the case is preparation of the Framework Document.

Section 83 – Payments in respect of advisory bodies

123. **Section 83** gives the Scottish Ministers powers to pay the expenses of any body established for the purpose of offering them advice on matters in relation to which provision is made under the Act.

Section 84 – Abolition of Scottish Central Fire Brigades Advisory Council

124. **Section 84** abolishes the Scottish Central Fire Brigades Advisory Council which was established for Scotland under section 36(18) of the 1947 Act to provide general advice to the Scottish Ministers on matters relating to the operation of that Act. The Council also served as statutory consultee prior to the exercise by the Scottish Ministers of certain of their regulation making powers under the 1947 Act. Where such regulation making powers are re-enacted elsewhere in the Act the Scottish Ministers will consult any such persons as they consider appropriate.

Section 85 – False alarms

125. **Section 85** supersedes section 31 of the 1947 Act. It provides that a person who knowingly gives or causes someone else to give a false alarm of fire, road traffic accident or emergency of another kind to a person acting on behalf of a relevant authority is liable to a maximum of a level 5 fine, a prison sentence not exceeding 3 months or both.

Section 86 – Disposal of land

126. This section provides relevant authorities with powers to sell or dispose of land which they no longer require. It makes provision similar to section 36(20) of the 1947 Act.