



Legislative Base for Integrated Risk Management Plans:
Phase Two – Literature Review
Fire Research Report 11/2008



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Fire and Risk Management Support Services Ltd

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Department for Communities and Local Government

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Executive Summary

Introduction

This report details the findings from Phase Two of the Legislative Base for Integrated Risk Management Planning project. The literature reviewed specifically covers England and its interfaces with other UK and European countries.

Research methodology

It was considered essential that the views of external stakeholders were considered as part of the review. Due to the potentially limitless range of external stakeholders it was agreed that members of The Practitioners Forum and The Business and Community Safety Forum would provide a representative wide range of views.

A review team was established to identify the range and depth of Legislation, Regulation, Codes, Guidance, etc that could impact on the IRMP process. As a result the team identified 1,561 separate elements of Legislation, Regulations, Codes and Guidance (in the remainder of the reports these are generically referred to as 'documents') covering the above areas that it considered could place responsibilities on Fire & Rescue Authorities (FRAs) and/or Fire and Rescue Services (FRSs). Due to the very large number of 'documents' identified, it was recognised that it would be impractical within the constraints of the contract to carry out a complete review of all of them, and it was therefore agreed to review approximately 10 per cent of the total identified.

The project team carried out a further analysis of 210 of the 'documents' identified in the initial review and completed a pro-forma highlighting possible legal implications, consequences and also links to other documents. This initial review was then passed to David Stotesbury (Barrister) for consideration by him and his team.

The project team have developed a data base to record the findings, etc, from this project together with the findings and outcomes from the Operational Assessment of Service Delivery (OASD) process that had just been completed.

A Microsoft Excel™ spreadsheet is also available on the Communities and Local Government website that contains a fully-searchable list of the 1,561 'documents' identified. Headlines of the 210 'documents' analysed as part of the detailed review are also included within this spreadsheet. The contents of this spreadsheet will also be included within the database to be produced in the near future.

Legal analysis

David Stotesbury (Barrister) provided a legal view and analysis of a number of ‘key documents’ that are considered central to the IRMP process. It is considered that these ‘document’ reviews, although limited, will in themselves provide excellent guidance and support for FRAs/FRSs, and their legal support teams, as to the level and scope of detail required when considering implications, impacts and consequences when they are developing their local IRMPs.

The comments and observations in relation to the ‘documents’ that have been reviewed will be included within the new database and will assist FRAs/FRSs when they start to give wider consideration to Legislation, Standards, Codes, Regulations, etc when formulating both their local IRMPs and Operational Assessment processes. In addition a number of specific examples have been included in this report to indicate the possible legal implications when considering various Legislation, Standards, Regulations, Codes, advice, etc.

In order to place the guidance in as wide as possible context the Barrister was also asked to give a view on the following two questions:

What is the liability of a Fire & Rescue Authority where it continues to follow advice or guidance issued by an authoritative third party, although it now has good reason to believe that the advice or guidance is deficient or defective?

and

What is the liability of an organisation that has issued advice or guidance and now has good reason to believe that the advice or guidance is deficient or defective?

The view of the Barrister to these two questions is summarised in section 2.1 and given in further detail in Annex D.

Phase 3 – gap analysis

An analysis based on the findings within this report, and the Phase One report, will be produced within Phase Three of the project. Although it is called a gap analysis it also raises issues that were identified and considered to be relevant to maintaining the evidence base for IRMPs.

Chapter 1

Methodology

- 1.1 An essential element of the review was to seek the views of external stakeholders. After some careful consideration it was decided to approach the members of The Practitioners Forum and The Business and Community Safety Forum to represent the external stakeholders.
- 1.2 Due to the time constraints it was agreed with the Contract Manager that the Organisations/ Individuals within The Practitioners Forum and The Business and Community Safety Forum would be asked to complete a questionnaire (Annex A). In addition all organisations/individuals were offered the opportunity of personal interviews with members of the review team if they specifically requested them.
- 1.3 Whilst the responses from a number of the 'stakeholders' were detailed, these responses were very limited in number, and therefore, for the purposes of this project, it was not possible to draw any meaningful conclusions from an analysis of the responses received. However the project team would like to thank those individuals who did respond and who took part in the interviews.
- 1.4 In order to determine the extent of the literature review the project team conducted an initial search to identify the Legislation, Standards, Codes, Regulations, etc [for expediency these are subsequently referred to as 'documents'] that it considered could have an influence on, or should be considered within, the IRMP process. The project team used the resources of the Fire Service College library to identify appropriate documents and undertake an initial review of the possible impacts and the legal implications for FRAs/FRSs.
- 1.5 As a result over 2,000 'documents' were initially identified – this was subsequently revised to a total of 1,561, taking into account documents that were duplicated or found to be withdrawn. It was recognised that this list would be a 'living' document and that the total figure would potentially increase / decrease over the passage of time.
- 1.6 Due to the very large number of 'documents', agreement was reached with the Contract Manager to review up to 10 per cent of the total identified. A total of 210 of the 'documents' identified were subjected to a detailed review by the project team. An agreed pro-forma highlighting possible legal implications, consequences and also links to other 'documents' was completed for each of these (an example pro-forma is given in Annex B).

- 1.7 The pro-forma's were then passed to David Stotesbury (Barrister) and his team for a legal view upon the status of the 'documents' and their impact upon FRA's/FRS's IRMPs.
- 1.8 It was recognised that the number of 'documents' identified would result in a need for a data base to record the 'documents', and subsequent analysis/comment. In addition it was recognised that many of the issues identified would also be relevant to the findings and outcomes from the Operational Assessment of Service Delivery (OASD) process that had just been completed. It was therefore decided by Communities and Local Government that it was necessary to create a data base to both record the findings of both this project, and the OASD, and to provide a reference source and support tool for use by Fire & Rescue Services when developing their IRMPs.
- 1.9 The 'documents' referred to in paragraphs 1.5 and 1.6 are detailed in a spreadsheet which accompanies this report.

Chapter 2

Literature Review

2.1 Introduction

2.1.1 In order to illustrate clearly how the Legislation, Standards, Codes, Regulations, etc, that were identified could impact upon the FRAs/FRSs, three separate 'documents' have been selected from each of the general categories of Legislation and Guidance. These are:

Legislation

- Fire & Rescue Services Act 2004
- Regulatory Reform (Fire Safety) Order 2005
- Management of Health & Safety at Work Regulations 1999

Guidance

- Building Regulations: Approved Document B
- The ACAS Principles Regarding Discipline
- Fire & Rescue Service Circular 1-2006

2.1.2 An illustration of some of the legal issues identified are provided in sections 2.2 to 2.7. However it is important to note that these are recognised as illustrations only and by no means are intended to be a comprehensive review of the issues, implications or obligations for, or imposed on, FRAs and/or individuals.

2.1.3 It is also suggested that these are considered against the background of the views of the Barrister to the two questions that were raised with the Barrister. These were:

(a) What is the liability of a Fire & Rescue Authority where it continues to follow advice or guidance issued by an authoritative third party, although it now has good reason to believe that the advice or guidance is deficient or defective?

and

(b) What is the liability of an organisation that has issued advice or guidance and now has good reason to believe that the advice or guidance is deficient or defective?

2.1.4 The detailed answers to these questions are given in Annex D, but are summarised as follows

(a) *“.....reliance by fire and rescue authorities on Departmental advice is foreseeable; and it is also foreseeable that loss would be suffered if inadequate and/or outdated advice and guidance is made available to fire and rescue authorities. It is, moreover, arguable that a special relationship exists between central government and fire and rescue authorities in respect of advice and guidance specifically directed to such authorities; and that the Department has assumed responsibility to the claimant.”*

and

(b) *In respect of fire and rescue services which continue to follow advice or guidance issued by an authoritative third party, despite having good reason to believe that such advice or guidance is deficient or defective, such authorities will be unable to recover from the party which has provided the advice, under the Tort of Negligent Misstatement, since,, proving liability entails, inter alia, reasonable reliance by the recipient of the advice on the misstatement that resulted in loss; and knowledge that the advice was deficient or outdated clearly nullifies such reliance. Furthermore, if the advice received from an authoritative third party – such as Communities and Local Government – is then transmitted by fire and rescue authorities (which are aware of the defectiveness of the advice) to other individuals and organisations, the courts could hold that defendant authorities have assumed responsibility to the respective claimants who place reasonable reliance on such advice or guidance. It will, therefore, be prudent to fire and rescue authorities, too, to review advice received from (in particular) central government and identify and cull the advice and guidance that is no longer applicable, in order to prevent potential actions under the expanding Tort of Negligent Misstatement.*

Legislation

2.2 Fire & Rescue Services Act 2004

- 2.2.1 The expanded statutory functions of fire and rescue services and the substitution of IRMPs for national standards of fire cover, create proportionately increased risk of litigation.
- 2.2.2 In imposing its duties on FRAs, the Act refers to the provision of the personnel, services and equipment necessary to efficiently meet all '*normal requirements*' (emphasis added). There has been no statutory definition of the term, and no case law in point to illustrate this critical part of the Act. Notwithstanding this, read in the context of the obligations of FRAs to carry out dynamic IRMPs, normality will be the constellation of risk data, exemplified as aforementioned by demographics, which has a bearing on the discharge of FRA's statutory functions under the Act.
- 2.2.3 In reviewing circumstances which need to be factored into IRMPs, priority should be given to covering areas and times of highest risk to life, over the risk to property. This is because sections 7 and 8 of the Act should be read together with Article 2 of the **European Convention on Human Rights**, which makes the right to life absolute. Property rights under Article 1 of protocol 1 are qualified, and therefore, are lower in the hierarchy of Convention rights.
- 2.2.4 FRAs should also be mindful, when drawing up their IRMP, of duties under the **Civil Contingencies Act 2004** (CCA). These include:
- Assessing the risk of an 'emergency': ie including an event or situation, with the potential for serious loss of human life/and injury, and the creation of damage to property and homelessness (Sec. 2 (1)(a)).
 - Maintaining plans to ensure that so far as reasonably practicable, in the event of an emergency, the FRS can continue to discharge its statutory functions (Sec. 2 (1)(c)).
- 2.2.5 The aforementioned duty applies to FRS's in relation to emergencies (as defined) if the emergency would be likely to be a material impediment to the FRS's performance of its statutory functions (Sec. 2(2)).
- 2.2.6 As cases such as **Gorringe** indicate, it continues to be arguable that the duties imposed on FRAs under Sections 7 and 8 of the 2004 Act are 'target duties'. As aforementioned, the Court of Appeal held in **The Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority** (The Times 20th March 1997), that section 13 of the Fire Services Act

1947 did not confer a right of action on a member of the public, as the duty was in the nature of an administrative function for the FRS to procure a supply of water for fire fighting generally.

- 2.2.7 However, as case law, such as **R v Ilea Ex Parte Ali** [1990] 2 Admin LR 822 at 828, which dealt with sec. 8 of **the Education Act** 1944, which is also classed as a ‘target duty’, shows the non-compliance with such target duties must be “compelling and reasonable”.
- 2.2.8 Moreover, where there is a positive intervention from which the damages to the claimant flow, the vulnerability of FRSs is demonstrated by **Capital and Counties**. Furthermore, as discussed above, whether non-activity will remain a shield to consequential damage, remains in some doubt as a result of the **Human Rights Act 1998** (HRA), obliging public authorities to take positive action to protect life; and the cases establishing liability for omissions in respect of the police (**Osman**) and the ambulance service (**Kent v Griffiths**). Consequently, FRAs should not rely on the indefinite endurance of the principles in **Capital and Counties**; and the prudent course will be for FRAs to demonstrate that provision has been made for ‘all normal requirements’, by way of continuing to review their IRMP in the light of the material changes in respect of the circumstances in their areas.
- 2.2.9 If individual FRAs carry out effective IRMPs, aligned with the points of reference in the national framework in order to address in the most effective manner the FRA statutory functions, and translate these risk management plans into action, as far as is reasonably practicable, it will be difficult for a claim against the FRA to succeed. In rebutting negligence, a FRA can use (in addition to the research on which its risk assessment plans are grounded), the national framework, and national practices of the British Fire and Rescue Service, in particular the practices of FRAs with areas which contain broadly similar geography and demographics. Papers issued by government departments, including the central statutory documents, such as the national framework mentioned above, the Fire Service College and similar institutions on risk assessment, firefighting, fire safety etc. can also be used as evidence that the FRA facing a negligence action was conducting its affairs in accordance with generally accepted practices at the time of the incident.
- 2.2.10 Practical procedures which can be instituted to complement the above are exemplified by handover procedures, under which incident commanders hand over responsibility after an incident to bodies such as the police, and document the transfer of responsibility, the making of contemporaneous notes and the taking of photographs and videos to serve for training as well as to resist potential litigation is present.

2.2.11 The summary in Annex C provides further detailed comment on:

- Extension of statutory functions of FRAs
- IRMPs substituted for former national standards of fire cover
- Duty of FRAs to secure the provision of the personnel, services and equipment necessary to efficiently meet all normal requirements
- Dovetailing of IRMPs with other obligations of FRAs, exemplified by the Civil Contingencies Act 2004 and Equality Action Plans
- Provision of national framework under section 21 and the duty of FRAs to have regard to it
- Duty on FRAs to take reasonable steps to prevent or limit damage to property resulting from their action to extinguish fires, and protect life and property in the event of fires
- Potential for increased litigation affecting FRAs concurrent with their enlarged statutory functions
- Breach of Statutory Duty in relation to FRAs
- Current law of Negligence and protection afforded to FRAs regarding omissions
- Impact of Human Rights Act
- Decisions of European Court bearing on liability of emergency services
- Possible expansion of law of Negligence to align FRAs' liability with the position of other emergency services
- Standard of reasonable firefighter conduct against which FRAs' conduct will be measured
- Procedures assisting FRAs in litigation.

2.3 Regulatory Reform (Fire Safety) Order

- 2.3.1 On 1 October 2006 the Regulatory Reform (Fire Safety) Order 2005 (the FSO) came into force replacing the twin regimes of the Fire Precautions (Workplace) Regulations 1997, as amended (the Workplace Regulations), and the Fire Precautions Act 1971 (the FPA), which had uneasily co-existed since the **Framework and Workplace Directives** (EC Directives 89/391/EEC, and 89/654 EEC, resulted in the Workplace Regulations being introduced.
- 2.3.2 Under Art. 25 of the FSO FRAs have jurisdiction over the Order's provisions in *"the area in which premises are, or are to be, situated, in any case not falling within any of sub-paragraphs (b) to (e)."* This is made a duty under 26, which provides:
- " (1) Every enforcing authority must enforce the provisions of this Order and any regulations made under it in relation to premises for which it is the enforcing authority and for that purpose, except where a fire inspector or other person authorised by the Secretary of State is the enforcing authority, may appoint inspectors."*
- 2.3.3 Accordingly, in the great majority of circumstances where premises fall within the FSO, the enforcing authority will be the FRA for the area, and their respective IRMPs will need to reflect the strategy for carrying into effect this duty.
- 2.3.4 As outlined in this paper, FRAs will need to appoint inspectors trained in using their powers under Art. 27, since flowing from failure to do so could include a range of adverse consequences such as:
- actions for trespass, if there is entry into premises outside the scope of the Order; heavy costs against authorities could follow on service of notices on recipients who are not responsible persons within the meaning of Art. 3 and 5 of the Order 5 and 3, or in relation to premises outside the Order's scope;
 - the failure to follow the rules in **BT Fleet v McKenna** could similarly result in the requirements of enforcement notices being rejected on appeals under Art. 35, with costs against the authority; prohibition notices which overestimate the risks to relevant persons could close down premises unwarrantedly, with costs awarded against the authority on appeal, and civil damages subsequently sought for loss of profits;
 - failure to comply with the provisions of PACE will jeopardize enforcement, with financial penalties by way of costs, and inappropriate protection for relevant persons in premises in which FRAs should be enforcing the FSO.

2.3.5 In addition, though currently there is no liability for negligent omissions, if the rule in **Capital and Counties Plc and Another v Hampshire County Council; John Monroe (Acrylics) Ltd v London Fire and Civil Defence Authority and Others**; and **The Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority** (The Times 20th March 1997), was to alter to cover negligent omissions, as well as negligent positive acts, in consequence of the **Human Rights Act 1998**, and developments in the law of Tort, exemplified by **Osman v United Kingdom** (1998) The Times, 5 November 1998 and **Kent v Griffiths** (2000) 2 All ER 274, FRs may be liable if death or injuries flow from failure to enforce the FSO. FRAs should, accordingly, fully integrate in their IRMPs legislative fire safety with community safety and other statutory functions, and factor in training and support to protect relevant persons under the FSO, and address the complex legal issues that have been identified, with their potential for significant financial penalties, and inadequate protection for relevant persons reliant on enforcement of the FSO by FRAs.

2.3.6 **The summary in Annex C provides further detailed comment on:**

- Scope of Order
- Responsible Persons
- Risk Assessment
- Enforcement Notices
- Alterations Notices
- Prohibition Notices
- Maintenance and Record keeping
- Powers of Inspectors
- Application of Code B of PACE
- Offences
- Defences
- Formal Investigation of Offences
- Interviews
- Risk Assessment and Opinion – Criminal Cases

2.4 Management of Health and Safety at Work Regulations 1999

- 2.4.1 The Management of Health and Safety at Work Regulations provide supplemental obligations to the pre-existing basket of Health and Safety obligations imposed on employers. The FRAs will be required to implement the regulations in so far as they are employers and their employers will also be the subject of certain obligations under Regulation 14.
- 2.4.2 Both criminal and civil actions attach to a breach of the Regulations especially in the case of a serious breach resulting in injury or loss of life. The Regulations are essentially preventative in their aim and have as their goal a safe working environment. Thus protection of employees at work is the driving force for implementation closely followed by the potential for heavy financial consequences and embarrassment for a failure to do so.
- 2.4.3 The main purpose of the Management of Health and Safety at Work Regulations 1999 is to impose obligations on employers which supplement those found in the Health and Safety at Work Act 1974. Of course the enforcing authority is also an employer and therefore is subject to the same obligations in relation to its employees. If employees of a FRA are attending a fire or inspecting a premises to check compliance with the Regulations, they are also due to be protected under the Act by that Authority.
- 2.4.3 The Regulations are 'goal setting' in that they are intended to set out what must be achieved but not necessarily how it must be done. Thus the Regulations require employers and employees to implement systems for the protection against and prevention of harm at work.
- 2.4.4 The Regulations require employers to carry out risk assessments, make arrangements to implement necessary measures, appoint competent people and arrange for appropriate information and training.
- 2.4.5 Employers are placed under a number of duties under the MHSW Regulations. FRAs are required to carry out risk assessments under the Act and implement measures to prevent harm and protect employees. This includes provisions on health and safety assistance, information for employees, capabilities and training, risk assessment in relation to expectant mothers and the protection of young persons at work.
- 2.4.6 The principal duty is contained in Regulation 3. Regulation 3(1) requires every employer to 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.
- 2.4.7 These assessments are aimed at identifying the measures an employer needs to take to comply with the requirements and prohibitions imposed on him under relevant legislation and regulations. The Approved Code of Practice (ACoP) states that employers are required to undertake a systematic general examination of their work activity.
- 2.4.8 FRAs will undoubtedly be very familiar with the concept of risk assessment and will already have systems in place to carry out regular risk assessments and review. However, the purpose of risk assessment is to determine what measures should be taken to comply with the employer's duties under the 'relevant statutory provisions'. This phrase undoubtedly covers general duties under the Health and Safety at Work Act 1974 (HSW Act) and all Regulations associated with the HSW Act. The Regulations do not stipulate the measures, which are to be taken as a result of a risk assessment, and therefore much is left to the judgment of the employer as to the measures they ought to take to fulfil their statutory duties. The ACoP does however set out in Paragraph 16 the general principles that should be followed.
- 2.4.9 The Regulations state that the assessment should be "suitable and sufficient" but do not define what this means. The ACoP explains that this means it should identify the risks due to, or in connection with, the work. The assessment should be proportionate to the risk. Assessments should be appropriate to the nature of the work and should stipulate a review period indicating the period for which the assessments remain valid and when they become subject to such a review.
- 2.4.10 Regulation 3(6) requires that where an employer employs more than five employees he shall record the significant findings of the assessments and any group of employees who it identifies as being at significant risk. The ACoP confirms that the record should represent an effective statement of hazards and risks which then leads management to take the relevant actions to protect health and safety.
- 2.4.11 Employers are required under Regulation 5 to make appropriate arrangements for the effective planning, organisation, control, monitoring and review of protective and preventative measures. The measures which have to be taken depend on the relevant legislation and the employer's own risk assessment and some useful guiding principles are evinced in the ACoP.
- 2.4.12 Under Regulation 6, health surveillance must be provided where the risk assessment identifies that there is an identifiable disease or adverse health

condition related to the work being done; valid techniques are available to detect indications; there is a reasonable likelihood that the disease or condition may occur in the particular conditions of work and surveillance is likely to further the protection of the employees health. For example, FRs may implement monitoring and surveillance for post-traumatic stress disorder given that it is foreseeable that employees might suffer by reason of the nature of the work.

2.4.13 One or more competent persons must be appointed to assist in managing risk under Regulation 7. The competent person can be an employee or an external consultant but they must have sufficient training and experience or knowledge and other qualities to properly assist the employer. It is of course important to bear in mind that the legal duty to safeguard the health and safety of workers remains with the employer notwithstanding that the employer might choose to seek external help from a consultant.

2.4.14 The employer is required to plan and implement procedures for serious or imminent danger and for danger areas under Regulation 8. Employers are required to establish appropriate procedures, including but not limited to evacuations, for serious incidents such as fire and possibly bomb threats. They are also required to nominate sufficient persons to implement those procedures and ensure that untrained staff are not allowed access to danger areas.

2.4.15 **The summary in Annex C provides further detailed comment on:**

- Obligations on FRAs
- The Regulations and how they fit into the regulatory framework
- Duties under the Regulations
- Duty to Assess
- Health and Safety Arrangements, Surveillance and Assistance
- Information and Assistance
- Employees duties under the MHSW Regulations
- Criminal Liability for a Breach of the Regulations
- Civil Liability for Breach of the MHSW Regulations 1999

Guidance

2.5 Building Regulations Approved Document B: Impact on Fire and Rescue Authorities

- 2.5.1 Approved Document B (ADB) provides a vital role in assisting FRAs carrying out their statutory functions under section 6 of the Fire and Rescue Services Act 2004 and the Regulatory Reform (Fire Safety) Order 2005 (FSO). The ADB will be a reference point in respect of fire safety in premises and should dovetail with the suite of guides provided under Article 50 of the FSO, to be used by FRAs when enforcing the FSO when the premises are occupied and fall within FRA jurisdiction. Particularly useful is Regulation 16B, providing for fire safety information, which is developed in the new ADB, in respect of the erection or extension of a 'relevant building', one to which the FSO applies, or will apply after the completion of building work; and to a relevant change of use of a building.
- 2.5.2 FRA inspectors will, accordingly wish to make use of both the ADB and their suite of guides under Art. 50 in responding to the statutory consultation under Art. 45. Failure to respond to the statutory consultation process under Art. 45 will create significant problems in imposing fire precautions requirements under the FSO when the premises are occupied and come within the jurisdiction of the FRA. Though there is no statutory bar to the imposition of structural requirements under (say) an enforcement notice served under Art. 30 of the FSO, even if the FRA has not responded to the Art. 45 consultation, courts will be very sympathetic to appellants under Art. 35, who challenge FRA notices, and argue that the authority should have taken advantage of the consultation process to prevent occupiers from being required to carry out additional structural work under the FSO. Even if the authority resists the appeal, it is unlikely that a court will regard it "just and reasonable" to award costs in favour of the authority if the work required by its notice could have been materially carried out at an earlier point in time (thereby reducing expenditure) if appropriate recommendations had been made to building control under Art. 45.
- 2.5.3 However, the hypothetical case factored in above, indicates that ADB will not provide the solution for all premises, and certain complex buildings will not fit neatly into the ambit of the ADB: creating, thereby, the potential for disagreement between FRA and Building Control Body (BCB). In such circumstances, professional judgement will need to be applied by fire safety inspectors. Accordingly, though ADB is an invaluable reference point, in circumstances where there is disagreement between Fire Safety Inspectors and Building Control regarding the appropriate work in respect of premises that will prospectively come within the jurisdiction

of FRAs, clear procedures should be in place to resolve such differences, and the jurisdiction of the lead authority should be complied with by FRAs by not corresponding directly with prospective responsible persons under the FSO, but, rather, the implementation of mechanisms under which resolution of issues will be through the lead local authority. Failure to do so, could result in expensive litigation under the appeal provisions in Art. 35 when the premises become subject to FRA under Art. 25, and enforcement by FRA are challenged.

2.5.4 **The summary in Annex C provides further detailed comment on:**

- Impact of ADB on FRAs
- Applicability of Approved Document B
- The Authority's Powers Regarding Risks from the Design of Fire Precautions Provisions
- Inappropriateness of Directly Putting Prospective Responsible Persons on Notice of Possible Future Fire Safety Enforcement
- The Content of Draft Letters to Occupiers

2.6 The ACAS Principles Regarding Discipline: Impact on the Fire and Rescue Authorities

- 2.6.1 In an attempt to encourage settlement of employment disputes without recourse to the tribunal system, there has been a review of the statutory minimum standard for disciplinary and grievance procedures which employers and employees must use and the consequences of failing to use those minimum procedures. The new position is derived from a number of legislative provisions, orders, regulations and the ACAS Code of Practice on Disciplinary and Grievance Procedures.
- 2.6.2 The Department of Trade and Industry has published extensive information on the detailed provisions of the statutory disciplinary and grievance procedures and these are summarised below.
- 2.6.3 Since 1 October 2004, employment tribunals will not consider claims unless certain minimum standard 'dispute resolution' procedures have been followed. These 'dispute resolution procedures' take the form of straightforward minimum standard 'dismissal and disciplinary procedures' to be applied by employers and minimum standard 'grievance procedures' to be used by employees.
- 2.6.4 ACAS is an advisory service for employers and employees and has as one of its aims, an objective to assist with the early resolution of employment disputes where possible. It states as its aim, "to improve organisations and working life through better employment relations". As well as producing guidance and training, ACAS acts as an arbitration service under the ACAS Arbitration Scheme.
- 2.6.5 The ACAS Code of Practice on Disciplinary and Grievance Procedures has been rewritten to give effect to the changes in the legislation with effect from 1st October 2004. It can be argued that the new procedures fall short of the standards evinced in the previous Code.
- 2.6.6 The Code of Practice provides practical guidance to employers, workers and their representatives on the statutory requirements, what constitutes reasonable behaviour when dealing with disciplinary and grievance issues, the production and use of grievance procedures and the worker's right to bring a companion to hearings. A failure to follow the Code does not in itself make a person or organisation liable to proceedings but can be evidence supporting a claim for liability and severe penalties for the relevant party or parties.
- 2.6.7 The ACAS Code gives clear guidance on how to set up Dismissal and Disciplinary and Grievance Procedures and an evaluation of what constitutes a good procedure. Notwithstanding that the recommendations in the Code are not binding on employers, the existence of such guidance makes it almost indefensible for

employers not to follow as a minimum the best practice outlined in the Code. Tribunals and Arbitrators will certainly have regard to the Code when considering claims.

2.6.8 **The summary in Annex C provides further detailed comment on:**

- Background
- New Position in respect of Disciplinary and Grievance Procedures
- Role of the ACAS Code of Practice
- Disciplinary Rules and Procedures
- Appeals
- Records
- Minimum standards for Grievance Procedures
- Raising a grievance
- Overlapping Disputes
- Right to be accompanied
- Summary of consequences for failure to follow new procedures
- Compensation
- Dismissal Automatically Unfair

2.7 FRS Circular number 1-2006 (Fire Investigation)

2.7.1 The introduction of a statutory power for fire investigators in the 2004 Act provides a framework for the conducting of investigations which must be complied with, notably in respect of the need to provide 24 hours notice in premises occupied, or occupied immediately before the fire, as a private dwelling. Alternatively, the gateways of permission from the occupier, or the obtaining of a warrant from a magistrate will need to be resorted to. Failure to operate *intra vires* could result in the evidence obtained by fire investigators being excluded by the court. Moreover, entry without a statutory power or permission could result in an infringement of Article 8 of the Human Rights Act, which prevents any interference by a public authority with the exercise of the right to respect for a person's private life and home, except such as in accordance with the law.

2.7.2 In addition, PACE will need to be observed by fire investigators, in that they should recognise that the police are the lead body in criminal investigations, as the Circular points out, and refrain from cautioning and interviewing suspects, once reasonable suspicion has arisen.

- 2.7.3 Fire investigators can anticipate being cross examined on their reports. Report writing is an important skill. It is critical that the reporter remembers that his/her duty is to assist the court reach a decision, rather than dispose of the issues falling within his field. The position has been clearly stated in the Scottish case of **Davie v. Edinburgh Magistrates** (1953) SC34, at p.40. Lord President Cooper said of experts: "Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence".
- 2.7.4 In that case, the Court of Sessions rejected the argument that a judge or jury is bound to accept the uncontradicted opinion of an expert. Lord President Cooper continued: "The parties have evoked the decision of a judicial tribunal and not an oracular pronouncement by an expert".
- 2.7.5 It follows from this clear exposition, that the investigator should phrase his/her report in terms comprehensible to the tribunal and jury. Jargon should be avoided, and if technical terms are used, they should be explained in clear English. Opinions (as the above discussion demonstrates) should always be grounded on factual matters, and should consist of logical inferences drawn from such facts. The writings of other experts should be used to assist in reaching the reporter's conclusion: never as a substitute for the reporter's own reasoning. The reporter must remember that his/her report may be tested by cross-examination coming from Counsel, informed by an expert, appearing for the other side.
- 2.7.6 The advice of the Circular should also be followed by fire investigators in not placing their findings on a par with that of forensic scientists. FRSs should provide ongoing training and support for their investigators – preferably on a regional level as the Circular indicates – so that they can discharge their statutory powers under the 2004 Act competently, and operate in a complementary manner with other organisations under other legislation, such as the Crime and Disorder Act.
- 2.7.7 **The summary in Annex C provides further detailed comment on:**
- The Investigation of Fires where the Supposed Cause is not Accidental
 - Powers of Entry
 - Search and Seizure
 - The Operation of the Police and Criminal Evidence Act to FRS Investigators
 - Regional Fire Investigation
 - A Professional Approach to Applying New Powers
 - Photographs and Videos

- Reports
- Disclosure
- Expert Evidence

Annex A

Questionnaire for external stakeholder interviews

As an individual or organisation:

1. Are you aware of the Integrated Risk Management Plan (IRMP) for your Fire & Rescue Authority (FRA)?
 - If so in what format is the IRMP available to you?
2. Did you respond to the consultation process?
3. How effective was the consultation process in terms of:
 - a. Timescales
 - b. Format of the documents
 - c. Background and supporting information
 - d. Being able to influence the process.
4. With regards to the consultation process were your comments reflected within the final version of the IRMP and was feedback given as appropriate?
5. Have you any observations / comments with regard to any of the questions raised above or with any other aspect of your FRA's IRMP and the related planning & consultation processes?

Annex B

Document Pro-forma (Example)

Environmental Protection Act 1990 (Insert Name of Individual Checking Document) 1/3/07			
Summary Description of the document			
Internet links www. Opsi. Gov. Uk/acts/acts1990/Ukpga_19900043_en_1. Htm			
Water Act 1989 www. Opsi. Gov. Uk/acts/acts1989/Ukpga_19890015_en_1. Htm			
Part	Section	Implication/Obligation	Consequence
I	33	Fire Services train using firefighting foam which is a pollutant. When this foam is deposited knowingly on any land and unless a waste management licence authorising the deposit is in force an offence is committed.	Fire Services when using foam for training or test purposes must deposit the foam in an authorised site. Otherwise an offence is committed.
II	107	All the above regarding the polluting of controlled waters	Fire Services when using foam for training or test purposes must deposit the foam in an authorised site. Otherwise an offence is committed.

Part	Section	Implication/Obligation	Consequence
III	79 (b)(c)	<p>Statutory nuisances and clean air. Fire services use real fires in training. These fires are either in the open or in buildings. This process often involves the production of dark smoke. This is deemed as a "Statutory Nuisance" and the Local Authority is satisfied that a Statutory Nuisance exists, or is likely to occur may serve an 'abatement notice'. If the notice is contravened then an offence is committed.</p>	

Annex C

Detailed Comments on Documents

Legislation

C1 Fire & Rescue Services Act 2004

- C1.1 The **Fire and Rescue Services Act 2004** (“the Act”) drastically extends the statutory functions of fire and rescue authorities (FRA). The core functions are: fire safety (sec. 6); fire-fighting (sec. 7); road traffic accidents (sec. 8); emergencies which by order is conferred on a fire and rescue authority functions relating to emergencies, other than fires and road traffic accidents in relation to which the authority has functions under section 7, 8 or 9; Other functions, under directions relating to particular fires and emergencies by the Secretary of State in relation to: “(a) a fire specified in the direction, or (b) an emergency of another kind specified in the direction”.
- C1.2 In fulfilling its statutory functions under sections 7 and 8, a FRA must, in particular, secure the provision of the personnel, services and equipment necessary to efficiently meet all normal requirements relating, respectively, to normal fire risks in their area, and conducting rescue operations under section 8.
- C1.3 The former special services provision in the **Fire Services Act 1947** is replaced by section 11, which provides:-
- “(1) A fire and rescue authority may take any action it considers appropriate:-
- (a) in response to an event or situation of a kind mentioned in subsection(2);
 - (b) for the purpose of enabling action to be taken in response to such an event or situation.
- (2) The event or situation is one that causes or is likely to cause:-
- (a) one or more individuals to die, be injured or become ill;
 - (b) harm to the environment (including the life and health of plants and animals).
- (3) The power conferred by subsection (1) includes power to secure the provision of equipment.”
- C1.4 From April 2003, local Integrated Risk Management Plans (IRMP) replaced the

national standards of fire cover. All fire and rescue authorities are expected to produce an IRMP that is currently in accordance with Communities and Local Government guidance. The rationale underlying the introduction of IRMPs was to give the senior Fire and Rescue Service managers flexibility to make decisions about fire cover based on existing and potential risks to their communities, within a strategic framework set by locally elected members.

- C 1.5 To be effective, IRMPs are required to provide a fully integrated, risk-managed approach to FRA's statutory functions: community safety, fire safety inspection and enforcement, and emergency response arrangements. Demographics must also be factored into IRMPs: fire and rescue authorities should give weight in their IRMPs to the diverse needs of the population in the respective areas in which they have jurisdiction. Furthermore, IRMPs should dovetail with other obligations on FRA: exemplified by provisions of the Crime and Disorder Act 1998, Equality Action Plans, etc.
- C 1.6 Under section 21 of the 2004 Act, the Secretary of State is obliged to prepare a national framework, including the matters set out in section 21(a) – (c). The framework is dynamic and must be kept under review, so that the Secretary of State “may from time to time make revisions to it” .
- C 1.7 The draft fire and rescue framework 2006 – 2008 includes:-
- “1.4 In summary, Fire and Rescue Authorities must each have in place and maintain an IRMP which reflects local need and which sets out plans to tackle effectively both existing and potential risks to communities. They should also:
- produce annual action plans on which they have fully consulted their local communities, allowing twelve weeks for the consultation;
 - have regard to central government guidance in producing their plans; and
 - make efficient and effective use of resources to implement the IRMP and the action plan, including using more efficient working practices where appropriate.”
- C 1.8 FRAs have a duty under S.21 of the 2004 Act to “have regard” to National Guidance; and the Secretary has power to intervene if he considers an FRA/FRS is failing or is likely to fail to act in accordance with that framework.
- C 1.9 The extension of functions of FRAs concurrently extends the potential for legal actions against FRSs because of their enlarged sphere of activity. There is a distinct Tort relating to breach of statutory duty. In interpreting statutes to determine whether parliament intended to provide a civil remedy for breach of statutory duty, the courts will look at matters such as whether the statute benefits a limited and ascertainable class of persons. If it does, it is more likely that a civil remedy will exist,

than if the statute benefits the public generally, since then civil actions would be limitless. Moreover, in the absence of any remedy in the statute (such as a criminal penalty or judicial review) it is said that a presumption arises that there is a right of civil action. However, in **Atkinson v Newcastle and Gateshead Waterworks Company** (1877) there was no remedy in the statute, yet the court held there was no right of a civil action. In that case there was inadequate water in the mains to extinguish a fire; consequently the fire destroyed the timber yard owned by the Plaintiff. The Plaintiff brought an action, and alleged that the defendant had breached a statutory duty to maintain the proper water pressure in the pipes. This was indeed the defendant's duty. However, the court held the action must fail. Instead of interpreting the absence of a remedy in the statute as indicating that a civil action could be brought, it interpreted the absence as meaning that those framing the statute did not intend that water authorities should be insurers of those suffering damage.

- C1.10 For a claimant to succeed in an action for breach of statutory duty, he/she must prove: (a) that the duty imposed by the relevant statute has been breached by the defendant; and (b) that the plaintiff comes within the class of persons the statute intends to protect; and (c) the damage suffered by the defendant resulted from the plaintiff's breach of his statutory obligations. An example of (b) is **Hartley v Mayoh & Co.** (1954). Here a fire-fighter was electrocuted while fighting a fire at the defendant's factory. The defendant had breached certain statutory regulations; but these regulations existed for the benefit of "persons employed". The fire-fighter was clearly not a person employed by the defendant.
- C1.11 Until recently it was thought that no action for the Tort of *negligence* lay against a fire authority during the *ultra vires* execution of a **duty**, as distinct from the exercise of a power. As mentioned above, it was held in **Atkinson v Newcastle and Gateshead Waterworks Company** that parliament did not intend to make water authorities providers of free insurance. The law, however, became considerably confused by the development of two (apparently conflicting) lines of cases. The position has now been clarified by the decision of the court of appeal in three cases which were consolidated because they raised similar points of law.
- C.12 In **Capital and Counties Plc and Another v Hampshire County Council; John Monroe (Acrylics) Ltd v London Fire and Civil Defence Authority and Others;** and **The Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority** (The Times 20th March 1997). The Court held that section 13 of the Fire Services Act 1947 did not confer a right of action on a member of the public. The duty was in the nature of an administrative function for the brigade to procure a supply of water for fire fighting generally. There was, accordingly, no remedy for breach of statutory duty to the plaintiffs in the cases.

- C1.13 As regards the common law, the ruling was that a brigade was under no duty at common law to answer a call for help, or to take care to do so. However, if the brigade *created* a danger negligently, and there was a causal link between this danger and the plaintiffs' injury, the FRS would be liable.
- C1.14 Applying these principles the Court of Appeal dismissed the appeals from Hampshire County Council, John Munroe (Acrylics) Ltd., and the Church of Jesus Christ of Latter Day Saints. In the first case, a servant of the defendant authority had turned off a sprinkler system in a building that had caught fire. Damages of £16m had been awarded. The Court of Appeal held that the turning off of the sprinkler system created the danger and was negligent.
- C1.15 In the second appeal, the second defendants, All Effects Ltd., which provided special effects, caused a deliberate explosion near the plaintiff's industrial premises. Burning debris was scattered over a wide area, causing small fires; and some of the debris was seen to fall on the plaintiff's premises. When the brigade arrived, the second defendant's staff had apparently extinguished the fires on the wasteland. The officers took steps to satisfy themselves that all fires had been extinguished, and that there was no residual danger. They then left the scene, without inspecting the plaintiff's premises. Later that evening a fire broke out at the plaintiff's premises. The judge had ruled that the brigade was not under a duty of care; there was insufficient proximity between the parties, and it was not fair and reasonable to impose such a duty on the brigade. The Court of Appeal upheld this.
- C1.16 In the final case, fire hydrants were ineffective, resulting in the destruction of the Plaintiff's classroom and chapel. The Plaintiff alleged that: (a) the defendant had failed to carry out regular inspections of the hydrants; and (b) that the defectiveness of the hydrants had not been detected, and consequently rectified. The Plaintiffs relied on S. 13 Fire Services Act, requiring a brigade to take all reasonable measures for ensuring the provision of an adequate supply of water. The lower court accepted the damage the Plaintiff had suffered was reasonably foreseeable. However, it dismissed the claim on the grounds that it was contrary to public policy to hold that the fire authority had a duty of care to the occupier, nor was it just and reasonable. On appeal the Court of Appeal ruled that members of the public could not rely on section 13 Fire Services Act in bringing an action.
- C1.17 The decision in **Capital and Counties**, though it imposed a heavy financial burden on Hampshire County Council on the facts of the case, was, in principle, very favourable to fire brigades. The ruling that there was no statutory or common law duty to fight fires meant, in effect, that only a negligent positive intervention by a FRS, which worsened matters for the Claimant, could make it liable for Negligence. Under the principle in **Capital and Counties**, non-intervention and defensive fire fighting were acceptable in all circumstances.

C1.18 Since **Capital and Counties**, the highest English court has clung to a residual version of the old Common Law distinction between *nonfeasance* (not performing a power or duty) and *misfeasance* (performing such power or duty wrongly). In **Gorringe v Calderdale Metropolitan Borough Council** (2003) UKHL 15, Lord Hoffman said (at paragraph 32):

“Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide. For example, the majority reasoning in *Stovin* was applied in *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 to fire authorities, which have a general public law duty to make provision for efficient fire-fighting services: see section 1 of the Fire Services Act 1947. The Court of Appeal held, in my view correctly, that this did not create a common law duty.”

C1.19 And Lord Hoffman rejected the submission that apparently mandatory duties on the Highway Authority, exemplified by “*Each local authority must prepare and carry out a programme of measures designed to promote road safety. ...*”, created statutory or common law liability ,

He said, at paragraph 19:

“These provisions, with their repeated use of the word “must”, impose statutory duties. But they are typical public law duties expressed in the widest and most general terms: compare section 1(1) of the National Health Service Act 1977: “It is the Secretary of State’s duty to continue the promotion... of a comprehensive health service ... “. No one suggests that such duties are enforceable by a private individual in an action for breach of statutory duty. They are enforceable, so far as they are justiciable at all, only in proceedings for judicial review.”

C1.20 However, even Lord Hoffman was unable to absolutely exclude a duty to protect. He acknowledged, at para 35, that **Reeves v Commissioner of Police of the Metropolis** was a highly exceptional case; and quoted from what he said in **Tomlinson v Congleton Borough Council** [2004] 1 AC 46, 85:

“A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2000] 1 AC 360).”

C1.21 It is a moot point whether the Court of Appeal would have been quite as sweeping in granting brigades immunity from liability for non-intervention if such inactivity placed lives at risk. Furthermore, there is a question as to the degree to which

Capital and Counties has been affected by the **Human Rights Act 1998** (HRA). Article 1 of the First Protocol under the HRA states that “every person is entitled to the peaceful enjoyment of his possessions.” Article 2 provides the right to life. These must be read together with section 6 of the HRA, which states that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right”; and section 6(5) defines an act as including “a failure to act”. Accordingly, the argument has been advanced that to comply with the right of life under Article 2 and the right of peaceful enjoyment of property under Article 1, fire authorities have a duty to take positive action to fight fires.

- C1.22 In respect of Article 1, this argument is not entirely persuasive. Article 1 is concerned with a prohibition on a person being “deprived of his possessions except in the public interest and subject to the provisions provided for by law and by the general principles of international law”. It can be seen, therefore, that Article 2 of the First Protocol is, in actuality, directed against the seizure of property by states, rather than with imposing a positive duty to act on public authorities to prevent some mischief, such as fire.
- C1.23 The right to life is more relevant in suggesting that, in certain circumstances, there may be a positive duty to intervene against life threatening fires. In **X v United Kingdom** (14 DR 31), the Commission established that the state must “but only refrain from taking life intentionally, but also take appropriate (positive) steps to safeguard life”. In **Osman v United Kingdom** (1998) The Times, 5 November 1998, an action for negligence was brought against the police after a youth was stabbed to death by his teacher who had developed a morbid attachment to him. The European Court held that “not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent the risk from materialising.” However, the court added that a claimant could succeed by *showing that the authorities failed to do all that could reasonably be expected of them to avoid a real and immediate risk to life, which they knew of, or should have known of.* This was a question needing to be answered in the particular circumstances of each case. The European Court also ruled that the blanket immunity given by the Court of Appeal to the police, on grounds of public policy, in actions of negligence was wrong.
- C1.24 The implications of the Court of Appeal’s decision in **Capital and Counties** must now be further reviewed in the light of **Osman** and the decision of the Court of Appeal in **Kent v Griffiths** (2000) 2 All ER 274. The issue before the court was whether the ambulance service owed a duty of care to a member of the public on whose behalf a “999” call was made. The claimant was an asthmatic who suffered a respiratory arrest and consequent brain damage when an ambulance took forty minutes to arrive. It was found that the ambulance could, and should, have taken 26 minutes for the journey. It was also found to be highly probable

that the respiratory arrest could have been avoided had the ambulance proceeded with due care. Lord Woolf MR, giving judgment for the Court of Appeal observed that unless **Capital and Counties**, and a subsequent case **Alexandrou**, could be distinguished, the London Ambulance Service would not be liable. Following Lord Hoffmann's approach in a case called **Stovin**, he held it that on the facts of the case before him it would have been irrational not to have provided an ambulance. **Capital and Counties** was distinguished on the basis that, like medical and nursing services, the providing of an ambulance service is part of the provision of a health service included in section 3 of the **National Health Service Act 1977**. He also said that the public policy arguments against making ambulance services liable are much weaker in the case of the ambulance service than in respect of the fire or police services, because brigades and the police protect the public *generally*, while ambulance services are concerned with more limited services: what he called "*services of the category provided by hospitals*".

"The police and fire services' primary obligation is to the public at large. In protecting a particular victim of crime, the police are performing their more general role of maintaining public order and reducing crime. In the case of fire the fire service will normally be concerned not only to protect a particular property where a fire breaks out but also to prevent fire spreading. In the case of both services, there is therefore a concern to protect the public generally ... But ... the ambulance is required to attend a scene of an accident in which an ambulance service is part of the health service ... providing services of the category provided by hospitals Cases could arise where a number of people need transporting to hospital. That could be said to be a different situation, but, as the numbers involved would be limited, I would not necessarily regard this as leading to a different result".

C1.25 The distinction does not seem a very convincing one. The police assist members of the public adversely affected by crime and disasters; brigades engage in the core services set out in the FRSA 2004; ambulance services transport persons to hospitals in numerous circumstances. The artificiality of Lord Woolf's distinction can be illustrated by a terrorist incident attended by all three services. All three engage in complementary activities to help the public adversely affected, but only the ambulance service is liable in Tort if it fails to take life saving action. The true distinction between **Capital and Counties** and **Kent v Griffiths**, was that the principle in **Capital and Counties** related to inaction regarding buildings which could be rebuilt with insurance monies, in **Kent** the inaction by the ambulance service threatened to destroy an irreplaceable life.

C1.26 Accordingly, it suggested that the European Court may, at some point, refuse to accept these inconsistencies and hold that inaction, or insufficient action, in respect of the saving of life will ground liability against the police and brigades,

as well as ambulance services. The right to life and not to suffer inhuman and degrading treatment is accorded the highest protection by the European Convention on Human Rights, and the cases of **Osman** and **Kilic** demonstrate that states (and public organizations which are the arms of states) have positive obligations to put into effect positive measures to protect life.

- C 1.27 Though the law of Negligence may well be extended to fire brigades with liability when they have taken insufficient positive action to protect life, it does not follow that brigades which carry out best practices in dealing with incidents – including civil disturbances – will face increased dangers.
- C 1.28 The courts will test fire officers' conduct against that of a reasonable fire-fighter. In **Capital and Counties**, the Court of Appeal held that the turning off of sprinklers before the seat of fire had been identified was contrary to best practice and the manuals of firemanship. The reasonable fire-fighter will not be expected to be infallible.
- C 1.29 In deciding whether the professional has acted with reasonable competence it will be necessary to test his conduct against the professional standards *at the time of the incident*. Medical negligence provides illustrations. In **Roe v Minister of Health** (1954) an anaesthetist failed to identify invisible cracks in a receptacle for anaesthetic, the anaesthetic becomes contaminated and a patient suffered injury. It was held that the anaesthetist was not negligent because the possibility of invisible cracks became known to the profession only after the operation in which the patient suffered injury.
- C 1.30 FRA officers do not hold themselves out to be professionals in the way that doctors and architects do. However, the court will test officers' conduct against that of a reasonable fire-fighter. For example, if a brigade attends a flammable release, which can result in a flash fire if the cloud is ignited, it will be necessary to apply fire fighting techniques relevant to that type of fire. Furthermore, in dealing with such risks there will be standard techniques for calculating the extent of the flammable material which has escaped over a period of time, and estimating the extent of the jet flames and the heat radiating from them. If there is failure to deal with the incident *in accordance with the state of knowledge relating to this particular type of hazard*, the Brigade may be liable in negligence if damage is consequently suffered. On the other hand, if it can be shown that established practices were followed, it will be difficult for the plaintiff to prove negligence, even though the standard of proof in Tort is lower than in criminal cases. It is on a balance of probabilities, and the *burden* of proving the ingredients of the Tort generally rests on the plaintiff.

C1.31 The reasonable fire-fighter will not be expected to be infallible. Nor will he/she be required to have available all the information about techniques of fire fighting which exist at the time of the trial. He/she will simply be expected to have a competent knowledge of fire fighting and other matters covered by the legislation relating to fire authorities' duties, *at the time of the incident which results in the action for negligence*. The importance of this is that if fire fighting techniques at the time of the incident become outdated, this will not go towards showing negligence. A competent application of techniques representing the state of knowledge *at the time*, is not negligence.

C1.32 Training will play an important role in meeting the criterion of the reasonable, competent fire-fighter. Brigade officers required to participate in fire fighting activities should receive training which familiarises them with accepted general practices in respect of the type of fire fighting they are expected to engage in. The following of these procedures by the officers will minimise the risk of a negligence action succeeding, as abovementioned.

C1.33 Particular areas in respect of which actions in Negligence can be anticipated is in respect of fire-fighters' use of their powers under Section 44 of the Act. The section provides sweeping powers in an emergency:

- “(1) An employee of a fire and rescue authority who is authorised in writing by the authority for the purposes of this section may do anything he reasonably believes to be necessary:-
- (a) if he reasonably believes a fire to have broken out or to be about to break out, for the purpose of extinguishing or preventing the fire or protecting life or property;
 - (b) if he reasonably believes a road traffic accident to have occurred, for the purpose of rescuing people or protecting them from serious harm;
 - (c) if he reasonably believes an emergency of another kind to have occurred, for the purpose of discharging any function conferred on the fire and rescue authority in relation to the emergency;
 - (d) for the purpose of preventing or limiting damage to property resulting from action taken as mentioned in paragraph (a), (b) or (c).
- (2) In particular, an employee of a fire and rescue authority who is authorised as mentioned in subsection (1) may under that subsection:-
- (a) enter premises or a place, by force if necessary, without the consent of the owner or occupier of the premises or place;
 - (b) move or break into a vehicle without the consent of its owner;

- (c) close a highway;
- (d) stop and regulate traffic;
- (e) restrict the access of persons to premises or a place.”

- C1.34 This must be read together with section 7(2), which requires fire and rescue authorities to *“make arrangements for ensuring that reasonable steps are taken to prevent or limit damage to property resulting from action taken for the purpose mentioned in subsection (1).”* Sub section (1) relates to FRA making provision for *“(a) extinguishing fires in its area, and (b) protecting life and property in the event of fires in its area.”*
- C1.35 A foreseeable common consequence of the use of section 44 powers will be entry into premises for fire fighting, or other statutory purposes. The premises could then be left derelict, with children entering and suffering injuries. Alternatively, trespassers could enter, set fire to the building, damaging thereby neighbours’ property.
- C1.36 In such situations, if a civil claim brought against the fire authority, the claimants in Negligence would (as shown in the discussion of the principles of Negligence above) have to prove that the FRA owed them a duty of care, that the duty was breached, and, in consequence, there loss was suffered. The test of whether a duty of care exists will be whether the damage suffered by the claimant was reasonably foreseeable: the damage must not be too remote a consequence of the defendant’s conduct.
- C1.37 In addition, the claimant must prove that there is a breach of the duty of care, in that the defendant failed to achieve the level of conduct to be expected of a reasonable professional man – a reasonable fire-fighter in these circumstances. The appropriate level of conduct will be determined by matters such as: the potential hazard in the circumstances in which the Service left the premises unsecured; and the Service’s degree of knowledge of the premises, and of associated circumstances which would be relevant to the foreseeability of particular harm resulting to the claimant from the Service’s conduct. Examples of relevant circumstances would include the serious state of the building, the propensity for trespassers to enter, the closeness of adjacent premises and its vulnerability to fire, the lack of an occupier to deter trespassers, etc.
- C1.38 The leading case to be applied in determining whether negligence exists in the foregoing scenario is, as seen above, the **Capital and Counties** case, which, in essence, requires that for an action in Negligence to succeed against brigades, the plaintiff must show that the damage resulted from a positive act by The Service, which reasonably foreseeably could bring about the damage complained of. Consequently, if the damage occurred after handover, the issues would be: (i) whether there was a causal connection between the activities of The Service before

handover and the damage, (ii) whether this was reasonably foreseeable, and (iii) whether there was a significant intervention by a 3rd party which broke the chain of causation between the brigade's action and the damage suffered by the plaintiff (the doctrine called *nova causa interveniens*).

- C1.39 In the case of property damaged in the course of fire fighting and left unsecured, fire authorities could argue in many cases that no exceptional circumstances existed. However, militating against this would be their positive act of breaking into premises; which, a claimant could argue, had worsened the situation by increasing the vulnerability of the premises that had been subsequently left unsecured.
- C1.40 Applying these principles to situations where in fire fighting and other activities the Service's operations have included positive acts, such as the breaking down of doors to obtain access, and these positive acts result in damage, such as, in the example given above, children wandering in through the broken doors and injuring themselves, FRA might well be liable if there is no proper handover and the injuries are foreseeable unless the doors are secured. Accordingly, The Service will need to ensure that they take all reasonably practicable steps before withdrawing to ensure that the premises are as safe as possible, and that there has been a handover to responsible persons, who have authority to address any residual dangers in the premises.
- C1.41 Accordingly, a handover form used by certain FRA would be of material use; and though such a form will not prevent liability if the three ingredients of Negligence mentioned above are present, where The Service has taken reasonable precautions (a critical part of which is a proper handover to responsible persons) the Form will serve as a most valuable piece of evidence that handover occurred to a person/s with sufficient authority to act for the agency/organisation who takes control and on whose behalf he/she signs. The signatories will then be expected to address (within their respective powers) risks they encounter after brigade personnel have withdrawn. Generally, the signatories will include the most senior representative of the agency on site, and the occupier or his/her manager. To reflect this, there should be provision in the form for the *position* held by the person to be inserted. In addition, "Agency/Organisation" should be inserted, as not all signatories will be from an agency.
- C1.42 Should any responsible person refuse to sign, a contemporaneous note could be made of this by the OIC. The note should state the name of the individual refusing to sign, his/her position, the time of the refusal, and any reasons given for it. The note should be made either in the OIC's notebook, or on a separate sheet which should be drafted for attachment to the form. If The Service has acted with all reasonable precautions, the contemporaneous note, like The Form, will provide valuable evidence of this.

- C1.43 While In all circumstances The Service will be mindful of the role of the police and local authorities, since they are, respectively, concerned with the prevention of crime, and important aspects of public health, these agencies (and any other relevant agencies) will be of greater importance should one, or more, responsible persons refuse to sign The Form. Consequently, when there is a refusal to sign, even greater care should be taken that the police are notified of the full situation at the site and that the responsible person/s have refused to accept handover.
- C1.44 The name of the officer spoken to, his/her rank, time, and any other relevant details should be captured in The Form, or (in exceptional circumstances where the police do not sign The Form) in the OIC's contemporaneous note. If brigade personnel are being withdrawn, this, in particular, should be emphasised to the police. A similar approach should be taken when there are issues which might fall within the jurisdiction of the local authority, or other relevant agencies.

Conclusion

- C1.45 The expanded statutory functions of fire and rescue services and the substitution of IRMPs for national standards of fire cover, create proportionately increased risk of litigation.
- C1.46 In imposing its duties on FRA, the Act refers to the provision of the personnel, services and equipment necessary efficiently to meet all "*normal requirements*" (emphasis added). There has been no statutory definition of the term, and no case law in point to illustrate this critical part of the Act. Notwithstanding this, read in the context of the obligations of FRA's to carry out dynamic IRMPs, normality will be the constellation of risk data, exemplified as aforementioned by demographics, which has a bearing on the discharge of FRA's statutory functions under the Act.
- C1.47 In reviewing circumstances which need to factored into IRMPs, priority should be given to covering areas and times of highest risk to life, over the risk to property. This is because sections 7 and 8 of the Act should be read together with Article 2 of the **European Convention on Human Rights**, which makes the right to life absolute. Property rights under Article 1 of protocol 1 are qualified, and therefore, are lower in the hierarchy of Convention rights.
- C1.48 FRA should also be mindful, when drawing up their IRMP, of duties under the **Civil Contingencies Act 2004** (CCA). These include:-

- Assessing the risk of an “emergency”: ie including an event or situation, with the potential for serious loss of human life/ and injury, and the creation of damage to property and homelessness. (Sec.2 (1)(a)).
- Maintaining plans to ensure that so far as reasonably practicable, in the event of an emergency, the FRS can continue to discharge its statutory functions (Sec.2 (1)(c)).
- The aforementioned duty applies to FRS in relation to emergencies (as defined) if the emergency would be likely to be a material impediment to FRS’ performance of its statutory functions (Sec. 2(2)).

- C1.49 As cases such as **Gorrington** indicate, it continues to be arguable that the duties imposed on FRA under Sections 7 and 8 of the 2004 Act are “target duties”. As aforementioned, the Court of Appeal held in **The Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority** (The Times 20th March 1997), that section 13 of the Fire Services Act 1947 did not confer a right of action on a member of the public, as the duty was in the nature of an administrative function for the brigade to procure a supply of water for fire fighting generally.
- C1.50 However, as case law, such as **R v Ilea Ex Parte Ali** [1990] 2 Admin LR 822 at 828, which dealt with sec. 8 of the **Education Act 1944**, which is also classed as a “target duty”, shows the non-compliance with such target duties must be “compelling and reasonable”.
- C1.51 Moreover, where there is a positive intervention from which the damages to the claimant flow, the vulnerability of fire and rescue services is demonstrated by **Capital and Counties**. Furthermore, as discussed above, whether non-activity will remain a shield to consequential damage, remains in some doubt as a result of the **Human Rights Act 1998** (HRA), obliging public authorities to take positive action to protect life; and the cases establishing liability for omissions in respect of the police (**Osman**) and the ambulance service (**Kent v Griffiths**). Consequently, fire and rescue authorities should not rely on the indefinite endurance of the principles in **Capital and Counties**; and the prudent course will be for fire and rescue authorities to demonstrate that provision has been made for “*all normal requirements*”, by way of continuing to review their IRMP in the light of the material changes in respect of the circumstances in their areas.
- C1.52 If individual fire and rescue authorities carry out effective IRMPs, aligned with the points of reference in the national framework in order to address in the most effective manner the FRA statutory functions, and translate these risk management plans into action, as far as is reasonably practicable, it will be difficult for a claim against the FRA to succeed. In rebutting negligence, a FRA can use (in addition to the research on which its risk assessment plans are grounded), the

national framework, and national practices of the British Fire Service, in particular the practices of FRAs with areas which contain broadly similar geography and demographics. Papers issued by government departments, including the central statutory documents, such as the national framework mentioned above, the Fire Service College and similar institutions on risk assessment, firemanship, fire safety etc. can also be used as evidence that the FRA facing a negligence action was conducting its affairs in accordance with generally accepted practices at the time of the incident.

- C1.53 Practical procedures which can be instituted to complement the above are exemplified by handover procedures, under which incident commanders hand over responsibility after an incident to bodies such as the police, and document the transfer of responsibility, the making of contemporaneous notes and the taking of photographs and videos to serve for training as well as to resist potential litigation is present.

C2 Regulatory Reform (Fire Safety) Order: A New Regime

Background

- C2.1 On 1 October 2006 the Regulatory Reform (Fire Safety) Order 2005 (the FSO) came into force replacing the twin regimes of the Fire Precautions (Workplace) Regulations 1997, as amended (the Workplace Regulations), and the Fire Precautions Act 1971 (the FPA), which had uneasily co-existed since the **Framework and Workplace Directives** (EC Directives 89/391/EEC, and 89/654 EEC, resulted in the Workplace Regulations being introduced.
- C2.2 Both the FPA and the Workplace Regulations had significant shortcomings as a framework for fire safety in the 21st Century. The former was prescriptive and so long as material changes (as defined by section 9 did not occur) the certificate could not be amended. This created the absurdity of certificates issued under OSRA and the Factories Act, co-existing with certificates reflecting advances in fire safety at the point in time when the certificate was issued.
- C2.3 In sharp contrast to traditional fire safety law, the Workplace Regulations were dynamic: as is illustrated by r. 17(4) which provided that fire certificates “shall not have effect to the extent that it would require a person to contravene any provision of the workplace fire precautions legislation; and the fire authority may amend the certificate to the extent necessary to prevent the certificate requiring such contravention.” This made it clear that where there was a conflict between the (generally static) provisions in a fire certificate and the regulations, the latter would prevail.

Scope of Order

C2.4 The Workplace Regulations, in themselves, however, had serious shortcomings. Most importantly, they took into account non-employees only insofar as the presence of such persons in workplaces impinged on the safety of employees. This resulted in some of the most vulnerable persons in workplaces (exemplified by transients in hotels) being protected only by the Fire Precautions Act 1971.

C2.5 Bringing all persons in premises under the umbrella of a single piece of fire legislation was, therefore, the central reason for proposals for reform. Thus the Proposals stated:

“The intended reform set out in this document should, so far as possible, remove legislative overlap and bring fire safety law into one place, the Regulatory Reform (Fire Safety) Order, which will be enforced, in the main, by fire authorities. The proposed Order would replace both the Fire Precautions Act and the Fire Precautions (Workplace) Regulations and as much of the remaining legislation as is practical. This means that occupiers of premises designated under the Fire Precautions Act will no longer need to apply for a fire certificate. Annex ‘A’ sets out the legislation we propose to amend or repeal. The proposed Order would also create a new duty on fire authorities to promote community fire safety. ”

C2.6 Without such an extension, the repeal of the 1971 Act would have been untenable. On many occasions, non-employees are the most vulnerable persons in premises. This is exemplified by hotel guests (who are transients and, therefore, unfamiliar with the lay out of the building), and elderly residents in care homes. Under the Workplace Regulations it has been necessary to protect such persons by intertwining their safety with that of employees: for example, protecting guests because the duties of certain employees include shepherding such persons to a place of safety. The FSO gives these persons protection in their own right, rather than being taken into account only insofar as their presence could adversely affect employees’ safety. There has, accordingly, been a radical shift in the input into risk assessments by responsible persons, and the auditing of such assessments by inspectors. This can be illustrated by contrasting the current situation with similar circumstances under the Order. If the employer in a bank can show that members of staff can evacuate the workplace safely, the fire authority cannot deny the adequacy of his/her risk assessment: even though fire safety may put customers resorting to the bank at hazard. Under the Order, in contrast, if the risk assessment cannot demonstrate that these customers can escape within a margin of safety in the event of fire, the risk assessment will be inadequate, as a matter of law; and (if necessary) can be cured by way of an enforcement notice.

C2.7 The scope of the Order (and therefore the requirements of the risk assessment) goes beyond protecting just persons on premises. The term relevant persons is defined in Article 2 as:

“(a) any person (including the responsible person) who is or may be lawfully on the premises; and

(b) any person in the immediate vicinity of the premises who is at risk from a fire on the premises, but does not include a fire-fighter who is carrying out his duties in relation to a function of a fire and rescue authority under section 7, 8 or 9 of the Fire and Rescue Services Act 2004 (fire-fighting, road traffic accidents and other emergencies);”

C2.8 The term “vicinity” is not defined. The Proposals from the ODPM stated:-

“We also wish the proposed Order to offer reasonable protection to people in the *vicinity* of a place who might be affected by a fire, as well as the occupants.”

C2.9 The absence of a definition in the Order, and in the draft enforcers’ guide, regrettably indicates that clarification may need to come through litigation. It can be suggested that the term should be given a restricted meaning, since in Art. 4 (1) (a) reference is made to the spread of fire on the premises, but not also and from the premises. This, appears to indicate an intention to limit the ‘applicability’ and impact of this part of the Order – in geographical terms – quite closely.

C2.10 Some further assistance is provided by the reference in Redgrave’s *Health and Safety* (3rd Edition Butterworths 1998 at para 3.19) to **Sterling Winthrop group Ltd v Allan** 1987 SCCR 25, which concerned Section 3(1) of the **Health and Safety at Work Act** 1974. This section imposes a duty on employers and the self employed to avoid exposing persons other than their employees to health and safety risks, and it was held that the section “...could encompass people outside of the place where the employer conducted his undertaking; the example given was where passers-by were endangered by escaping fumes”.

Responsible Persons

C2.11 The European pedigree of the Fire Safety Order is clear in its shift of primary responsibility for fire safety from fire and rescue authorities to persons it identifies as responsible. Article 3 defines “responsible persons” as:

“(a) in relation to a workplace, the employer, if the workplace is to any extent under his control;

(b) in relation to any premises not falling within paragraph (a)—

(i) the person who has control of the premises (as occupier or otherwise) in connection with the carrying on by him of a trade, business or other undertaking (for profit or not); or

(ii) the owner, where the person in control of the premises does not have control in connection with the carrying on by that person of a trade, business or other undertaking.”

C2.12 An employer is, therefore, retained as the person with primary responsibility in workplaces: without such retention the UK would not have been in compliance with its obligations under the **Framework and Workplace Directives**

C2.13 Article 5 develops the concept of responsibility, by stating:-

“(3) Any duty imposed by articles 8 to 22 or by regulations made under article 24 on the responsible person in respect of premises shall also be imposed on every person, other than the responsible person referred to in paragraphs (1) and (2), who has, to any extent, control of those premises so far as the requirements relate to matters within his control.

(4) Where a person has, by virtue of any contract or tenancy, an obligation of any extent in relation to—

(a) the maintenance or repair of any premises, including anything in or on premises; or

(b) the safety of any premises, that person is to be treated, for the purposes of paragraph (3), as being a person who has control of the premises to the extent that his obligation so extends. ”

C2.14 The test of responsibility will, therefore, be a twofold one: (i) does the employer have control? If so, he/she is responsible; (ii) if someone other than the employer has a degree of control – what exactly is this degree, since he/she will be responsible for carrying out fire safety measures within the limits of the control he/she retains. An example will be where a landlord has control over common parts of a workplace. Another is where agency staff work in a place operated by another person. Clearly the direct employer has no control over fire safety in the premises where his/her employees work; and in such circumstances the person having control over the premises which constitute the workplace of such agency staff will be responsible for their safety in the event of fire.

C2.15 Responsibility is developed in Article 5. Thus paragraphs 3 and 4 state that:-

“(3) Any duty imposed by articles 8 to 22 or by regulations made under article 24 on the responsible person in respect of premises shall also be imposed on every person, other than the responsible person referred to in paragraphs (1) and (2), who has, to any extent, control of those premises so far as the requirements relate to matters within his control.

Where a person has, by virtue of any contract or tenancy, an obligation of any extent in relation to—

- (a) the maintenance or repair of any premises, including anything in or on premises; or
- (b) the safety of any premises, that person is to be treated, for the purposes of paragraph (3), as being a person who has control of the premises to the extent that his obligation so extends.”

C2.16 Consequently, an employee can have duties under the Order, if his/her contract of employment covers the matters referred to in Article 5(3) and (4). Furthermore, Article 30 explicitly provides, in paragraph (1), that an enforcement notice may be served on “the responsible person or *any other person mentioned in article 5(3)* (emphasis added) (who) has failed to comply with any provision of this Order or of any regulations made under it.”

C2.17 *Prima facie*, this is an invitation to the inspector to identify levels of responsibility and direct notices, accordingly. However, the courts have historically treated unsympathetically endeavours to apply legislation to subordinates in businesses, an instructive case being **R v Boal** (1992) 1QB 591. Here the LFCDA prosecuted the manager of Foyles’ bookshop, and obtained a conviction (and a suspended sentence) in the Crown Court. The Divisional Court, however, quashed the conviction, on the grounds that the section was intended to fix with criminal liability only those with positions of real authority: the decision makers within the company who have both the power and responsibility to decide corporate policy and strategy.

C2.18 Accordingly, it can be suggested that in the hierarchy of responsibility under the FSO, the enforcer should initially ascertain whether the person purporting to be responsible for premises is the employer, and if not, whether he/she falls within any of the other categories in Article 3. Focusing on the employer is in conformity with the **Framework and Workplace Directives** (EC Directives 89/391/EEC, which obliges the UK to make employers responsible for safety in workplaces.

C2.19 Should the employer, or the other types of responsibility in Art. 3, not be responsible in the enforcer’s view, then it would appear appropriate to descend to the types of responsibility in Art. 5. An example would be where an employer has instructed a contractor to carry out certain technical fire safety work in the premises. Here, once the employer has exercised due diligence in identifying and instructing an appropriate contractor, there would be difficulty in superintending the contractor’s technical work, and enforcement can be taken against the contractor. Again, where certain day to day fire safety matters, such as ensuring that means of escape are clear, is entrusted to a headmaster, employed by the local authority, an enforcement notice could be issued to the head, once it was ascertained that his/her contract required fire safety in the school. The reference to a contract here, is of importance. If the enforcer serves a notice on a person whose

contract does not cover the matters in the notice, the notice will be wrongly served and could result in heavy costs against the fire and rescue authority.

Risk Assessment

- C2.20 In theory, the transfer of “ownership” of fire safety in premises to responsible persons, from fire and rescue authorities, under the prescriptive provisions of the FPA, entailed the responsible person carrying out a risk assessment. From this core duty in Art. 9 radiate out the duties in Articles 8 to 22, and complementary duties, including those relating to the taking of fire fighting and detection measures, the ensuring of the facilitation of escape, the taking of measures to reduce the risk and spread of fire, and the taking of measures to mitigate its detrimental effects
- C2.21 This will be the document which inspectors will need to make first resort to in all instances. Though the risk assessment is required to be “suitable and sufficient” (see Art. 9), unfortunately these terms are not defined. In *Health and Safety – the Modern Legal Framework*, by Smith, Goddard, Killalea and Randall, consideration was given to the possible future interpretation of the phrase, and it was suggested that: “*Dictionary definitions might be a starting point, but at the end of the day these terms [would] have to be interpreted in the light of the Regulations [in question] overall, on which the guidelines given in the appropriate ACoP or Guidance Notes could well be determinative in practice.*” (2nd Edition Butterworths 2000 at para 2.21). In the introductory chapter to this work, the authors further state “...that when considering the impact and coverage of the [Health and Safety] Regulations it is necessary to look first at the wording and overall scheme of the Directive from which they are all taken” (at para 1.3).
- C2.22 The draft enforcers’ guide advises that “The nature of the assessment will vary according to the type and use of the premises, the persons who use the premises, and the risks associated with that use(p19) “This is clearly correct as the risk assessment will depend on the nature of premises; and professional judgement will be called for on the part of the enforcing authority.
- C2.23 Under Art. 9, the requirement in the Workplace Regulations that the recording of significant findings were only needed when there were 5, or more, employees, is retained. The Order retains the requirement to record the significant findings of the risk assessment (article 9(7)); and any group of persons identified by the RA as being especially at risk. In addition, Art. 9 (6)(b) and (c), respectively, a record must be kept if the premises are subject to a license under legislation, or an alterations notice is in force in relation to it.
- C2.24 The dynamic nature of the RA in the Workplace Regulations is continued under Art. 9(3) of the FSO, which requires the RA’s review, where there is any reason to suspect it is no longer valid, or there has been a significant change in the matters to which it relates.

Enforcement and Alterations Notices

C2.25 Identifying the correct responsible person/s on whom statutory notices should be served will be crucial to the effective enforcement of the new regime under the Order. There has been an impression on occasions that notices can be served on the local management of national chains for all types of work, including structural matters. This is incorrect, and such service will invalidate the notices, since Art. 48 provides that in the case of a body corporate service should be on the “secretary or clerk of that body; and (b) in the case of a partnership, be served on or given to a partner or a person having control or management of the partnership business.”

C2.26 Inspectors will, therefore, need to use their powers to ensure that they identify the correct responsible persons in respective premises before serving enforcement notices. This may necessitate inspecting sample contracts of employment (to determine the employer) and leases, to determine whether the employer has sufficient control to carry out structural work in the workplace.

C2.27 Turning to the types of notices, a major vehicle for enforcement purposes will be the proposed “enforcement notices”. Art. 30 provides:

“(1) If the enforcing authority is of the opinion that the responsible person or any other person mentioned in article 5(3) has failed to comply with any provision of this Order or of any regulations made under it, the authority may, subject to article 36, serve on that person a notice (in this Order referred to as “an enforcement notice”).

(2) An enforcement notice must—

- (a) state that the enforcing authority is of the opinion referred to in paragraph (1) and why;
- (b) specify the provisions which have not been complied with; and
- (c) require that person to take steps to remedy the failure within such period from the date of service of the notice (not being less than 28 days) as may be specified in the notice.

(3) An enforcement notice may, subject to article 36, include directions as to the measures which the enforcing authority consider are necessary to remedy the failure referred to in paragraph (1) and any such measures may be framed so as to afford the person on whom the notice is served a choice between different ways of remedying the contravention. ”

C2.28 The drafting suggests that the model in respect of such notices are notices served by the HSE under HASWA. It is, therefore, instructive to consider how the Divisional Court has recently dealt with an imprecise notice served by the Executive. In **BT Fleet Ltd v McKenna** (the Times, March 17, 2005), Mr Justice Evans-Lombe ruled

that “An improvement notice issued by a health and safety inspector had to enable the recipient to know what was wrong and why it was wrong and should be clear and easily understood.” The Notice under section 21 of the HASWA had stated BT Fleet had failed, so far as reasonably practicable, to avoid the need for its employees to undertake manual handling operations. It went on to provide that in order to comply with the notice BT Fleet had to provide mechanical aids or any other equally effective measures of complying with the notice. The employment tribunal held that the phrase “any other equally effective measures” included ensuring that the claimant’s written procedure on manual handling was properly followed and monitored. It affirmed the notice but modified it by adding the words “such as ensuring that adequate training and supervision is in place”. It concluded that in order to comply with the notice BT Fleet had to provide mechanical aids or any other equally effective measures of complying with the notice.

- C2.29 On appeal, Mr Justice Evans-Lombe relied on the dicta of Lord Justice Evans in **Bexley London Borough Council v Gardner Merchant Plc** (119931 COD 383), notwithstanding that the notice in that case was given under different legislation. It transpired in **BT Fleet Ltd** that the inspector was willing to contemplate alternative, staff training on how manual handling should be undertaken. The court found that this could not be read into the notice, or the letter under cover of which the notice was sent.
- C2.30 The court rejected the argument that the defects in the schedule to the notice should not prove fatal, because HASWA did not make it compulsory for the notice to contain directions as to the measures to be taken to remedy any contravention. Rather, if the provisions of the statute provided an option to prescribe how the recipient could comply with the notice, and that option was taken; then the specification of how compliance could be effected formed part of the notice. If this specification was confusing, it might operate to invalidate the notice. In **BT Fleet Ltd** the notice did not properly enable the recipient to know (i) what was wrong, (ii) why it was wrong, and (iii) how the inspector intended the flaws to be rectified.
- C2.31 Applying these principles to fire and rescue authorities’ notices, the notices must identify: (i) in what respect the circumstances in the responsible person’s premises/workplace fall short of the standards in Part II of the Workplace Regulations; (ii) why the workplace falls short of those standards; and (iii) what steps precisely need to be taken to rectify the flaws. If alternative steps can achieve compliance, these alternatives must be precisely stated: there must be no scope for “confusion” on the part of the notice’s recipient.

- C2.32 *Prima facie*, the ruling in the case sits rather uneasily with the current distaste for prescription. Notwithstanding that, it is implicit in the court's ruling that without precision the recipient cannot properly comply because of the potential for confusion. Moreover, the judgment does not exclude alternative requirements being set out in the schedule: if these alternatives are not framed in a vague way.
- C2.33 It must be remembered that enforcement notices will only be served once negotiations have broken down, consequently, a degree of precision will be appropriate at that point, as the courts will need thereafter to adjudicate on the appropriateness of the requirements in the notice. The case certainly does not rule out alternative requirements, but these alternatives must be specified so as prevent confusion on the recipient's part.

Alterations Notices

- C2.34 As regards Alterations Notices under Art 29, these, must have as their preconditions, the premises constituting a present serious risk to relevant persons; or may constitute a serious risk if a change is made to them or the use to which they are put. Alterations notices are subject to appeal in the courts (Art. 35(1)). Consequently, enforcing authorities must be prepared to defend the preconditions of a present, or prospective, serious risk to relevant persons, if they are challenged. Moreover, under Art. 29(2), the enforcing authority must state that the premises are, or will, constitute a serious risk to relevant persons, in accordance with 29(1), and specify why the FRA is of this opinion.
- C2.35 Care will, therefore, need to be taken in the serving of alteration notices. They will generally be used in high life risk premises where inappropriate changes could be dangerous, as exemplified by a multi occupied Mall where critical fire protection elements such AFD and sprinklers require co-operation by the various occupiers, and there is intelligence that certain occupiers are jeopardising the overall arrangements by inappropriate unilateral conduct.
- C2.36 The effect of the alterations notice will, in effect, be to freeze changes listed in Art. 29(4)(a) – (d), unless the enforcing authority is notified. Paragraph 5 sets out the requirements which can be specified in the notice, including bring the notice to the attention of any other person who has duties under Art. 5(3). Furthermore, under Art. 9(5)(d), the recipient can be required, before carrying out any of the changes in Art. 29(4)(a) – (d), to send the enforcing authority a copy of the risk assessment and the proposed changes to general fire precautions.
- C2.37 The other requirements are the recording of the RA's significant findings, persons identified by the RA as being especially at risk (Art. 9(5)(b)); and the fire safety arrangements in Art. 11.

Prohibition Notices

- C2.38 The section 10 FPA power to serve prohibition notices is imported into the FSO by way of Art. 31, “If the enforcing authority is of the opinion that use of premises involves or will involve a risk to relevant persons so serious that use of the premises ought to be prohibited or restricted.”
- C2.39 Art. 31(10) ensures that Prohibition Notices can be served in respect of HMOs, and the common parts of premises where there are private dwellings, by providing that: *“In this article, “premises” includes domestic premises other than premises consisting of or comprised in a house which is occupied as a single private dwelling and article 27 (powers of inspectors) shall be construed accordingly.”* This enables inspectors to enter all parts of a building (other than single private dwellings) to serve prohibition notices.

Maintenance and Record keeping

- C2.40 As seen in the context of risk assessments, records need to be kept, where there are five, or more, employees, of the significant findings of the risk assessment; and any group of persons identified by the RA as being especially at risk. Where the premises contain a dangerous substance, or is liable to be in or on the premises, the risk assessment must include consideration of the matters in Part I of Schedule I of the FSO.
- C2.41 In addition, Art. 9(6)(b) and (c), respectively, a record must be kept if the premises are subject to a license under legislation, or an alterations notice is in force in relation to it.
- C2.42 However, no record is specified in respect of maintenance under Art. 17; and, in this particular, accordingly, the FSO falls far short of the FPA, under which enforcing authorities could make it a requirement of a certificate that records should be kept of maintenance, and be available for inspection. To be sure, inspectors can use their powers under Art. 27 to require the production of records. However, they cannot require these records to be kept on the premises for scrutiny; and there is the potential for concoction of records by unscrupulous persons.
- C2.43 It may be possible to argue that Art. 11, pertaining to fire safety arrangements, includes records for the maintenance of fire precautions on the premises. Maintenance under A 17 of the Order concerns *“facilities, equipment, and devices”*. Arrangements in Article 11 relate to the *“effective planning, organisation, control, monitoring and review of the preventive and protective measures”*. Normally, the phrase *“preventive and protective measures”* is wider than *“facilities, equipment, and devices”*, and would include facilities, equipment, and devices, which are subject to maintenance. However, the Principles of Prevention in Schedule 1, does not explicitly refer to maintenance: though

maintenance of facilities, equipment, and devices might arguably fall within “avoiding risks” (Sched. 13(a)) and “combating the risks at source (Sched. 3(c)).

C2.44 This interpretation is supported by the rule of statutory construction that the legislation should be interpreted so as to prevent an absurdity. In **Noakes v Doncaster Amalgamated Collieries** (1940) AC 1014, it was said at p 1022 that:-

“ If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.”

C2.45 It would be something of an absurdity if the legislation required the maintaining of facilities, equipment, and devices, without there being any provision for ascertaining whether such maintenance was indeed occurring. However, as aforementioned, only a ruling by the higher courts, or the amendment of the legislation, will put the issue beyond doubt.

Powers of Inspectors

C2.46 Under Art. 27, inspectors have powers of entry, and can carry out these and the other powers given by the article “*at any reasonable time*” (Art. 27(1)). The requirement of giving of 24 hours notices before entry into certain premises under section 19 of the FPA is, accordingly, abolished.

C2.47 Notwithstanding this, there are important limitations on the power of inspectors to enter certain premises. Thus premises falling within Art. 6, notably “*domestic premises, except to the extent mentioned in article 31(10)*”, being wholly outside the FSO, cannot be entered by inspectors using their Art. 27 powers.

C2.48 This creates a considerable difficulty in respect of premises where the means of escape includes the front doors of private dwellings, and the fire alarm system for the building is interconnected, so as to require inspection of the domestic premises. In such circumstances inspections may need to be arranged with agents for the building, or LHA officers, who can enter the domestic parts of the premises.

C2.49 The empowering of inspectors under the Order to “take copies” of specified documents is an overdue extension of their powers. It must be noted that the Order generally stops short of providing inspectors with a power to seize items, such as hotel registers. However, the responsible person will, subsequent to the Order, be obliged to provide inspectors with copies of the relevant documentation. Moreover, seizure will be available in exceptional circumstances, where an object endangers, or has the potential to endanger, persons. Thus Art. 27 enables inspectors:-

“(e) to take samples of any articles or substances found in any premises which he has power to enter for the purpose of ascertaining their fire resistance or flammability; and

(f) in the case of any article or substance found in any premises which he has power to enter, being an article or substance which appears to him to have caused or to be likely to cause danger to the safety of relevant persons, to cause it to be dismantled or subjected to any process or test (but not so as to damage or destroy it unless this is, in the circumstances, necessary). ”

C2.50 The exercise of powers by inspectors will be of great importance in enabling the effective enforcement of the Order. For example, there is no obligation on suspects to attend interviews under PACE: consequently, the requisitioning of records relating to training and the superintendence of fire safety in premises where apparent contraventions of the FSO have occurred will be of considerable importance in carrying out the enforcement duty on fire and rescue authorities in Art. 26. Again, if the standards set down in the guides are not present in premises, in the light of the risk based nature of the new regime, inspectors, when considering whether there are indeed compensatory features as claimed in risk assessments, will need to examine (in conjunction with the physical fire precautions provided in the premises) matters such as management and training records, etc. in order to arrive at decision whether fire precautions do reach an appropriate standard.

C2.51 Seizure of items given to inspectors under Art 27, requires institution of a system to store the items in secure circumstances, so as to preclude accusations of contamination, through insecure storage, and uncontrolled access, to them.

Application of Code B of PACE

C2.52 In addition to the above procedures an inspector’s search of premises and seizure of objects brings their activities within Code B of the **Police and Criminal Evidence Act 1984** PACE. The new Code B, which came into effect on 31 July 2004, states:

“This Code of Practice deals with police powers to:

- search premises
- seize and retain property found on premises and persons.”

C2.53 Clearly the Code extends beyond police officers to all those concerned with investigating offences and charging offenders, as recognised by section 67(9) of PACE. In **Dudley Metropolitan Borough Council v Debenhams Plc** (1994) 159 JP 18, the Divisional Court held that Code B of PACE applied to trading standards officers. Mrs. Justice Smith stated that a search within the ambit of Code B took place when an officer entered premises on an inspection and “looked about”. In those circumstances “*an employee ought to have the benefit of Code B which included being given a notice of the powers and rights of search*”. Subsequent revisions of Code B restricted the decision in Dudley MBC by providing that:

“2.5 This Code does not apply to the exercise of a statutory power to enter premises or to inspect goods, equipment or procedures if the exercise of that power is not dependent on the existence of grounds for suspecting that an offence may have been committed and the person exercising the power has no reasonable grounds for such suspicion.”

- C2.54 It would appear to follow that if an officer enters premises and conducts an inspection under a statutory power (such as Article 27), then Code B does not apply while there is “no reasonable grounds for ... Suspicion “ that “an offence may have been committed”. A routine inspection will, therefore, not attract Code B. However, once an inspection uncovers evidence that an offence has occurred, Code B appears to be triggered and its provisions apply to the inspector’s conduct thereafter in respect of the inspection and taking of samples (search and seizure). At the point of reasonable suspicion arising, therefore, a notice under Code B should, it seems, be handed to the responsible person, setting out the inspector’s powers and the rights of the responsible person. The content of the Notice will include under 6.7 of Code B, a summary of the extent of the powers of search and seizure conferred by PACE and an explanation of the rights of the occupier and the owner of the property seized.
- C2.55 The notice should also include a reference to applications for compensation by persons whose property has been seized.
- C2.56 Turning to the keeping of records after a Search 8 in Code B requires a record including matters such as, the address of the searched premises, the date, time and duration of the search, the authority used for the search, the statutory power under which the search was made, a list of any articles seized or the location of a list, the grounds for their seizure and details of any damage caused during the search and the circumstances.
- C2.57 Turning to whether receipts need to be issued if items are taken under A27(1)(e) or (f), under 7.16, if property is retained, the person who had custody or control of it immediately before seizure must, on request, be provided with a list or description of the property within a reasonable time.
- C2.58 Furthermore, Code B requires:
- “7.17 That person or their representative must be allowed supervised access to the property to examine it or have it photographed or copied, or must be provided with a photograph or copy, in either case within a reasonable time of any request and at their own expense, unless the officer in charge of an investigation has reasonable grounds for believing this would:
- (i) prejudice the investigation of any offence or criminal proceedings; or

- (ii) lead to the commission of an offence by providing access to unlawful material. A record of the grounds shall be made when access is denied.”

It can be seen from the above, therefore, that Code B of PACE imposes a range of obligations. Therefore, once reasonable suspicion has arisen that an offence has occurred, a notice (i) will be issued giving a summary of the extent of the powers of search and seizure conferred by PACE; and an explanation of the rights of the occupier, and the owner of the seized property. The notice will also make reference to applications for compensation (ii) by persons whose property has been seized.

- C2.59 It follows that a record should be kept (iii) of the results of the search and will include such details as address of the premises, date time and duration of the search, a list of the seized articles and the grounds for seizure. The records will be kept in a secure location with access strictly controlled.
- C2.60 Code B of PACE contains a further range of rights and responsibilities relating to seizure and inspectors must refer to the Code when formulating their policy.

Guidance

- C2.61 The importance of the suite of guides published by the DCLG to the effective implementation of the Order was emphasised by the Regulatory Reform Committee (H. C. 684 para 233). Moreover, the Regulatory Reform Committee advocated a statutory duty on the Secretary of State *requiring* him to make the guidance, their view being that a statutory duty would arguably enhance its status (H. C. 684, at paras 239 and 240). This has resulted in a statutory duty to ensure the availability of such guidance as the Secretary of State considers appropriate (Art. 50).
- C2.62 However, Art. 50 makes no provision that compliance with the provisions of the guidance tend to show that the FSO is being complied with, as in the case of the old *Red Guide*. This is arguably a serious flaw. The principle in **Peagram v Peagram** (1926) 2 KB 165 is that government circulars are inadmissible in court proceedings; *Stones Justices Manual* quotes the rule as follows: “*Circulars from government departments are not admissible in evidence and those departments have no power to bind themselves as servants of the Crown by pronouncements.*”
- C2.63 This doctrine, which derives from the separation of powers between the executive and the judiciary in the Bill of Rights, has been eroded somewhat by an increased willingness of the judiciary to admit into their deliberations matters issuing from the executive. In *Pepper v Hart* (1993) AC 593, the House of Lords ruled that where there was an ambiguity in legislation, extracts from Hansard were admissible to assist in resolving the ambiguity.

C2.64 In the specific area of disciplinary hearings, **R v Chief Constable of the British Transport Police, Ex Parte Farmer** (The Times, September 4 1998), Lightman J. considered the *Guidance to Chief Officers on Police Complaints and Discipline Procedures*, as part of the evidence in the case.

C2.65 Notwithstanding the above, it is unfortunate that in each case objections can be raised to the admissibility of the guides; and that those representing enforcing authorities will need to argue for their admission.

Offences

C2.66 Article 32 contains a detailed list of offences:-

- “1) It is an offence for any responsible person or any other person mentioned in article 5(3) to—
- (a) fail to comply with any requirement or prohibition imposed by articles 8 to 22 and 38 (fire safety duties) where that failure places one or more relevant persons at risk of death or serious injury in case of fire;
 - (b) fail to comply with any requirement or prohibition imposed by regulations made under article 24 where that failure places one or more relevant persons at risk of death or serious injury in case of fire;
 - (c) fail to comply with any requirement imposed by article 29(3) or (4) (alterations notices);
 - (d) fail to comply with any requirement imposed by an enforcement notice;
 - (e) fail, without reasonable excuse, in relation to apparatus to which article 37 applies (luminous tube signs)—
 - (i) to ensure that such apparatus which is installed in premises complies with article 37(3) and (4);
 - (ii) to give a notice required by article 37(6) or (8), unless he establishes that some other person duly gave the notice in question;
 - (iii) to comply with a notice served under article 37(9).
- (a) 2004 c. 34..23

- (2) It is an offence for any person to—
 - (a) fail to comply with article 23 (general duties of employees at work) where that failure places one or more relevant persons at risk of death or serious injury in case of fire;
 - (b) make in any register, book, notice or other document required to be kept, served or given by or under, this Order, an entry which he knows to be false in a material particular;
 - (c) give any information which he knows to be false in a material particular or recklessly give any information which is so false, in purported compliance with any obligation to give information to which he is subject under or by virtue of this Order, or in response to any inquiry made by virtue of article 27(1)(b);
 - (d) obstruct, intentionally, an inspector in the exercise or performance of his powers or duties under this Order;
 - (e) fail, without reasonable excuse, to comply with any requirements imposed by an inspector under article 27(1)(c) or (d);
 - (f) pretend, with intent to deceive, to be an inspector;
 - (g) fail to comply with the prohibition imposed by article 40 (duty not to charge employees);
 - (h) fail to comply with any prohibition or restriction imposed by a prohibition notice;
- (3) Any person guilty of an offence under paragraph (1)(a) to (d) and (2)(h) is liable—
 - (a) on summary conviction to a fine not exceeding the statutory maximum; or
 - (b) on conviction on indictment, to a fine, or to imprisonment for a term not exceeding two years, or to both.
- (4) Any person guilty of an offence under paragraph (1)(e)(i) to (iii) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (5) Any person guilty of an offence under paragraph (2)(a) is liable—
 - (a) on summary conviction to a fine not exceeding the statutory maximum; or
 - (b) on conviction on indictment, to a fine.

- (6) Any person guilty of an offence under paragraph (2)(b), (c), (d) or (g) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (7) Any person guilty of an offence under paragraph (2)(e) or (f) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (8) Where an offence under this Order committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of that offence, and is liable to be proceeded against and punished accordingly.
- (9) Where the affairs of a body corporate are managed by its members, paragraph (9) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- (10) Where the commission by any person of an offence under this Order, is due to the act or default of some other person, that other person is guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this paragraph whether or not proceedings are taken against the first-mentioned person. "

C2.67 It can be seen from the above that most of the offences are "either way" matters. And that under Art 32(2)(a) an immediate prosecution can be taken against any person who "fails to comply with article 23 (general duties of employees at work) where that failure places one or more relevant persons at risk of death or serious injury in case of fire." Fire and Rescue Authorities are, therefore, (as in the case of R11 of the Workplace Regulations) able to take an immediate prosecution if non-compliance by the responsible person places a relevant person/s at risk of death or serious injury.

C2.68 This raises a question whether such immediate action is compatible with the Enforcement Concordat. The Concordat dovetails with **The Human Rights Act 1998** in requiring "proportionality". This will be discussed in the context of The 1998 Act. Under "Principles of Good Enforcement", an approach is set out which has the most potential (in The Concordat) for challenge. It states:-

"Before formal enforcement action is taken, officers will provide an opportunity to discuss the circumstances of the case and, if possible, resolve points of difference, unless immediate action is required (for example in the interests of health and safety or environmental protection or to prevent evidence being destroyed).

Where immediate action is considered necessary, an explanation of why such action was required will be given at the time and confirmed in writing in most cases within 5 working days and, in all cases, within 10 working days.”

C2.69 The Concordat, therefore, does not preclude an immediate prosecution where “immediate action is required (for example in the interests of health and safety or environmental protection or to prevent evidence being destroyed)”. Whether such immediate action is required will be assisted by the Enforcement Management Model, adopted by CFOA from the HSE, which provides guidance as to the type/s of enforcement action which will be appropriate in a range of circumstances.

Defences

C2.70 The classic defence of “due diligence” is retained under the draft Order, with certain significant modifications. Art.33 states:-

“Subject to article 32(11), in any proceedings for an offence under this Order, except for a failure to comply with articles 8(a) or 12, it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence.”

C2.71 Art. 32(11)provides:-

“Nothing in this Order operates so as to afford an employer a defence in any criminal proceedings for a contravention of those provisions by reason of any act or default of—

(a) an employee of his; or

(b) a person nominated under articles 13(3)(b) or 15(1)(b) or appointed under 18(1).”

C2.72 This highly significant change displaces the principle in **Tesco v Natrass** (1971) 2AER 127, that when the defendant is a limited company it is not liable for the act or default of one of its subordinate managers to adequately supervise other servants of the company. Nevertheless, the House of Lords still ruled that even when a subordinate manager had through an act or default breached legislation, the company employing him would be liable if it did not have an effective system, under which superior servants supervised inferior servants whose acts could cause offences. Art 32(11) now prevents an employer from raising the defence that its subordinates had caused the breach of the legislation.

Formal Investigation of Offences

C2.73 The retention of due diligence as a defence suggests that interviews should be conducted under PACE with suspects to determine whether they can avail themselves of the defence. Before the interview, however, the offences under the Order will need to be captured by inspectors in a contemporaneous note, which can be used to refresh memory from it in court. A contemporaneous note is a note made *at the time of the incident, or as soon as practicable after it*.

- C2.74 Trials occur a considerable time after the event(s) which ground the offence(s) against a defendant in a criminal case; or from which damages have resulted, in civil cases. Statements cannot always be referred to when the case is heard. Whether or not reference is permitted will depend on whether the statement has been written or checked either at the time of the incident or shortly afterwards when the facts remained fresh in the witness's memory. (**R v Simmonds** (1969) 1QB 685). In **R v Langton** (1876) 2QB 296, it was said that delay of a fortnight was not fatal; nor was delay of 22 days in **R v Fotheringham** (1975) Crim. LR 710. On the other hand, in **R v Graham** (1973) Crim LR 628, delay of 27 days prevented the document being referred to; and there was the same result in **R v Woodcock** (1963) Crim. LR.
- C2.75 Each case will turn on its own facts, and the only safe guidance is that there is no certainty that a statement can be referred to in court to refresh memory, *unless it has been made at the time of the incident or as soon as practicable after it*. This makes it essential for the investigating officers to make a contemporaneous note of all salient matters which relate to the investigation. This will, subsequently, be put into statement form if the matter becomes the subject of legal proceedings.
- C2.76 Each set of notes should commence with the time, location and date and the recording officers details. The note should contain adequate information about each contravention, its location and any other relevant matters (such as when a photo is taken). If a plan is used the prose note should be cross referenced with the plan.
- C2.77 The names and ranks of any other officers present who may have witnessed the same event and whose recollection of it is the same should be recorded in the notebook contemporaneously. This will remove the need to keep separate notes of each officer's recollections. Such other officers who have observed the matters recorded in the note, they can sign date and time the note: thereby making it their note, too.
- C2.78 Section 139 **Criminal Justice Act 2003** (CJA 2003) creates a presumption in favour of a witness in criminal proceedings refreshing memory from a document whilst giving evidence provided that:
- He/she states that the document represents his or her recollection at the time he or she made it; and
 - The witness's recollection was likely to be significantly better at the time the document was made (or verified).
- C2.79 The fact that the witness has read the statement before giving his or her testimony does not affect this presumption. Because of the practical difficulties of refreshing memory in the witness box from an audio or video recording, section 139 also

makes provision for a witness to refresh memory from a transcript of such a recording. The common law rules, including “contemporaneity” are removed. However, the best practice will remain one where the notes are made at the time or as soon as practicable after the incident, to minimize challenges.

Interviews

C2.80 Interviews will be done under caution. Codes C and E significantly extend the rules on interview records. Interviews are at the heart of PACE, and Code C 11.1A provides the following definition:-

“An interview is the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences which, by virtue of paragraph 10.1 of Code C, is required to be carried out under caution”.

C2.81 Case law has refined the matter further. In **R v Weeks** (1992) Crim LR 211, it was held that where a conversation involving explanations led to admissions, an interview was occurring. This can be contrasted with **R v Menard** (1994) 158 JP 854, where the Court of Appeal held that where a suspect volunteers information to officers in a police station an interview has not occurred: as an interview within the meaning of Code C necessarily involved questioning. (see also **R Pullen** (1991) Crim LR 450, C of A; and **R Oransaye** (Cr LR 772). In **Oransaye**, the Court of Appeal held that in circumstances where police officers suspected out of hours drinking, their question to the landlord about what arrangements there were in the pub amounted to an interview.

C2.82 Immediately prior to the commencement, or re-commencement, of an interview (at a police station or other place of detention but best practice will in any place) the interviewer should remind the suspect of their entitlement to free legal advice, and that the interview can be delayed for such advice to be obtained, unless one of the exceptions in paragraph 6.6 applies. It is the interviewer’s responsibility to make sure all reminders are recorded in the interview record. (C 11.2). Though reference is made to a police station, it will be good practice to follow the reference to free legal advice wherever the interview is being conducted. In **R v Absolam** (1988) 88 Cr. App R 332, the Court of Appeal quashed a conviction because the suspect was questioned by the police before being informed of his right to legal advice. This was coupled with a failure to keep an interview record.

C2.83 Under the **Human Rights Act 1998**, offering the opportunity to have access to a solicitor is important, even in circumstances where detention does not obtain. Article 6.3 states:-

“Everyone charged with a criminal offence has the following minimum rights.....

- (c) to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.....”
- C2.84 An accurate record must be made of each interview, whether or not the interview takes place at a police station (C 11.7 (a))
- C2.85 The record must state (i) the place of interview, (ii) the time it begins and ends, (iii) any interview breaks and, (iv) subject to paragraph 2.6A, the names of all those present; and must be made on the forms provided for this purpose or in the interviewer’s pocket book or in accordance with the Codes of Practice E or F (C 11.7 (b)).
- C2.86 At the beginning of an interview the interviewer, after cautioning the suspect, must put to him any significant statement or silence, which occurred in the presence and hearing of an inspector before the start of the interview, and which have not been put to the suspect in a previous interview. The interviewer shall ask the suspect whether they confirm or deny that earlier statement, or silence, *and* if they want to add anything (C 11.4).
- C2.87 Note 11E states: “Significant statements described in paragraph 11.4 will always be relevant to the offence and must be recorded. When a suspect agrees to read records of interviews and other comments and sign them as correct, they should be asked to endorse the record with, e.g. *‘I agree that this is a correct record of what was said’* and add their signature. If the suspect does not agree with the record, the interviewer should record the details of any disagreement and ask the suspect to read these details and sign them to the effect that they accurately reflect their disagreement. *Any refusal to sign should be recorded.*”
- C2.88 No interviewer may try to get answers or a statement by oppression. Except as in paragraph 10.9 of Code C, no interviewer shall indicate, except to answer a direct question, what action will be taken by the enforcing authority if the interviewee (i) answers questions, (ii) makes a statement or (iii) refuses to do either. If the person asks directly what action will be taken if they answer questions, make a statement or refuse to do either, the interviewer may inform them what action the enforcing authority propose to take – provided that action is proper and warranted (C 11.5).
- C2.89 It may be necessary to show to the court that nothing occurred during an interview break or between interviews, which influenced the suspect’s recorded evidence. Consequently, after a break in an interview, or at the beginning of a subsequent interview, the interviewing officer should summarise the reason for the break and confirm this with the suspect. A note should be made of the summary (Note C 10E).
- C2.90 When practicable the suspect shall be given the opportunity to read that record and to sign it as correct or to indicate how they consider it inaccurate. (C 11.13)

- C2.91 Under C.11.6, the interview must cease when the investigating officer: (a) is satisfied all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect (this includes giving the suspect an opportunity to provide an innocent explanation, and asking questions to test if the explanation is accurate and reliable, e.g. to clear up ambiguities or clarify what the suspect said); (b) taken account of any other available evidence; and (c) the O. I. C. *reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence if the person was prosecuted for it.*
- C2.92 Note C11B advises that the **Criminal Procedure and Investigations Act 1996** Code of Practice, paragraph 3.4 states ‘In conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. What is reasonable will depend on the particular circumstances.’ Interviewers should keep this in mind when deciding what questions to ask in an interview.
- C2.93 There is an important distinction between sufficient evidence to bring a prosecution, and sufficient evidence for prosecution to succeed. In **Prouse v DPP** (1999) All ER (D) 748, it was said that what was relevant in determining whether there was sufficient evidence was the quality of the evidence, rather than its quantity. However, if there was sufficient qualitative evidence to prosecute, it remained necessary to continue the interview to cover potential defences. The judgement is particularly relevant to fire safety inspectors. It is generally not over difficult to establish that offences have occurred; indeed there should be a contemporaneous note and photographs of the contraventions before the interview has been arranged.
- C2.94 Failure to explore the defence could result in a classical ambush by the defence once the prosecution case has closed; and/or the court refusing to draw adverse inferences under section 34 of the 1994 Act. In **R v McGuinness** (1999) Crim LR 318, the court held that the words “sufficient evidence to prosecute” and “sufficient evidence for a prosecution to succeed” in C11.4 (in the previous PACE Code of Practice) involves consideration of any explanation (or lack of one) from the suspect, in respect of the alleged offences under investigation. It was a matter of fact in each case when the stage at which there is sufficient evidence to charge a suspect is reached. The court added the caveat that under C16.1 and C11.4 a suspect could not be questioned beyond the point at which he should be charged. Crossing this forbidden threshold made the interview potentially inadmissible.
- C2.95 Unless it is impracticable, the person interviewed shall be given the opportunity to read the interview record and to sign it as correct or to indicate how they consider it inaccurate. If the person interviewed cannot read or refuses to read the record or sign it, the senior interviewer present shall read it to them and ask whether they

would like to sign it as correct or make their mark or to indicate how they consider it inaccurate. The interviewer shall certify on the interview record itself what has occurred. (C11.11)

- C2.96 If the interviewee's solicitor is present, he should be given the opportunity to read and sign the record (C11.12).
- C2.97 Any refusal by a person to sign an interview record when asked in accordance with this Code must itself be recorded (C11.14).
- C2.98 The interview record "must be timed and signed by the maker" (C11.9)

Risk Assessment and Opinion

Criminal Cases

- C2.99 Inspectors enforcing the FSO will need to give their professional judgement in a range of areas, exemplified by the suitability and sufficiency of risk assessments, the potential for serious risk in premises subject to an alterations notice, and the putting of relevant persons at serious risk if an immediate prosecution is taken under Art. 32. All these relate to opinion, rather than fact, since a risk based regime necessarily involves the drawing of inferences from fact, rather than reliance on pure facts, when disputes arise as to the suitability and sufficiency of matters. Under the law of evidence, in general, opinion evidence can only be advanced by experts.
- C2.100 The reception of expert evidence by courts is venerable. In **Buckley v Rice-Thomas** (1554) 1 Plowd 118 at 124 Saunders J gave the rationale: "If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculties which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation".
- C2.101 The field in which a person can be called to give expert evidence must be an adequately established one. Thus in an Australian case expert evidence about the behaviour of bush fires was excluded (**Casley-Smith v F. S. Evans and Sons Pty Ltd** (1988) 49 SASR 314)
- C2.102 The cases show that it is a matter for the judge to rule on whether a witness has sufficient degree of study of, experience in, a field to be an expert. In **R v Silverlock** (1894) 2 QB 766 the Court for Crown Cases reserved held that a solicitor, who as an *amateur*, had gained knowledge of handwriting, could be an expert. In **Hopes and Lavery v HM Advocate** (1960) JC 104, a stenographer who had become familiar with a tape recording's contents was treated as a temporary expert, as to the contents, in **R v Oakley** (1979) RTR 417, a police officer had served 15 years

in a traffic division and had attended a course of accident investigation, and had attended more than 400 road accidents was allowed to give opinion about his theories and conclusions regarding an accident.

- C2.103 *R v Somers* (1963) 3 AER 808, confirms the principle that an expert may refer to professional treatises, statistics, reports, etc to refresh his memory; but their contents are admissible only insofar as he incorporates them into his evidence. It is his evidence which is admissible. When the expert draws on work in his field of expertise, he must refer to such work in his evidence, so that challenges to the cogency and probative value of his conclusions can include challenges relating to the work(s) drawn on (**R v Abadom** (1883) 1AER 364). Drawing on the works of others in this situation does not breach the rule against hearsay. An important caveat is that the condition precedent for an expert giving his opinion and drawing on the work(s) of others in his field, is that the primary facts grounding that opinion must be proved by way of admissible evidence from the expert, or other competent person; and these facts must be elicited during the examination in chief. (**R v Turner** (1975) QB 834, at 840). For example, a senior officer, who has not visited the premises, but is called to support the opinion of an inspector that fire precautions in premises fall short of certain standards in the FSO, cannot testify that the premises contained (say) only a hand bell for giving warning in case of fire, since he has not seen this, Rather, the inspector must give evidence about the factual situation in the premises; and the senior officer can then tell the court that those circumstances were insufficient to result in the premises meeting the requirements in the FSO to have an appropriate fire alarm.
- C2.104 Section 30 **Criminal Justice Act 1988** provided that an expert's report may (with the leave of the court) be admissible, even if the expert does not attend to give evidence. The court has to consider a number of matters before determining whether to admit the report; which include: the content of the report; the reasons why it is sought to admit the report without the maker testifying; any risks resulting from the report's admission, or (conversely) its exclusion; and any other relevant circumstances.
- C2.105 Statement writing is an important skill. It is critical that the maker remembers that his/her duty is to assist the court reach a decision, rather than dispose of the issues falling within his field. The position has been clearly stated in the Scottish case of **Davie v Edinburgh Magistrates** (1953) SC34, at p40. Lord President Cooper said of experts: "Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence".

- C2.106 In that case, the Court of Sessions rejected the argument that a judge or jury is bound to accept the uncontradicted opinion of an expert. Lord President Cooper continued: " The parties have evoked the decision of a judicial tribunal and not an oracular pronouncement by an expert " .
- C2.107 It follows from this clear exposition of the expert's role, that the expert should phrase his/her report in terms comprehensible to the tribunal and jury. Jargon should be avoided; and if technical terms are used, they should be explained in clear English. Opinions (as the above discussion demonstrates) should always be grounded on factual matters, and should consist of logical inferences drawn from such facts. The writings of other experts should be used to assist in reaching the reporter's conclusion: never as a substitute for the reporter's own reasoning. The reporter must remember that his/her report may be tested by cross-examination coming from Counsel informed by another expert, appearing for the other side.
- C2.108 In guidance of experts, Sir Michael Davies, former High Court Judge, now Chairman of the Expert Witnesses' Institute, warned " Don't use buzz words or words you think are impressive..... Judges like a clear report written in plain English and no waffling. Self-importance can show in a report as well as in the witness box. Do not try to put yourself over as self-important, don't try to put yourself over as condescending and do not pontificate " .

Conclusion

- C2.109 Under Art. 25 of the FSO fire and rescue authorities have jurisdiction over the Order's provisions in " *the area in which premises are, or are to be, situated, in any case not falling within any of sub-paragraphs (b) to (e).* " This is made a duty under 26, which provides:
- " (1) Every enforcing authority must enforce the provisions of this Order and any regulations made under it in relation to premises for which it is the enforcing authority and for that purpose, except where a fire inspector or other person authorised by the Secretary of State is the enforcing authority, may appoint inspectors. "
- C2.110 Accordingly, in the great majority of circumstances where premises fall within the FSO, the enforcing authority will be the fire and rescue authority for the area, and their respective IRMPs will need to reflect the strategy for carrying into effect this duty.
- C2.111 As outlined in this paper, FRAs will need to appoint inspectors trained in using their powers under Art. 27 , since flowing from failure to do so could include a range of adverse consequences : exemplified by actions for trespass, if there is entry into premises outside the scope of the Order; heavy costs against authorities could follow on service of notices on recipients who are not responsible persons

within the meaning of Art. 3 and 5 of the Order 5 and 3, or in relation to premises outside the Order's scope; the failure to follow the rules in **BT Fleet v McKenna** could similarly result in the requirements of enforcement notices being rejected on appeals under Art. 35, with costs against the authority; prohibition notices which overestimate the risks to relevant persons could close down premises unwarrantedly, with costs awarded against the authority on appeal, and civil damages subsequently sought for loss of profits ; while failure to comply with the provisions of PACE will jeopardize enforcement, with financial penalties by way of costs, and inappropriate protection for relevant persons in premises in which fire and rescue authorities should be enforcing the FSO. In addition, though currently there is no liability for negligent omissions, if the rule in **Capital and Counties Plc and Another v Hampshire County Council; John Monroe (Acrylics) Ltd v London Fire and Civil Defence Authority and Others; and The Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority** (The Times 20th March 1997) , was to alter to cover negligent omissions, as well as negligent positive acts, in consequence of the **Human Rights Act 1998**, and developments in the law of Tort, exemplified by **Osman v United Kingdom** (1998) The Times, 5 November 1998 and **Kent v Griffiths** (2000) 2 All ER 274, brigades may be liable if death or injuries flow from failure to enforce the FSO. Fire and rescue authorities should, accordingly, fully integrate in their IRMPs legislative fire safety with community safety and other statutory functions, and factor in training and support to protect relevant persons under the FSO, and address the complex legal issues that have been identified, with their potential for significant financial penalties, and inadequate protection for relevant persons reliant on enforcement of the FSO by fire and rescue authorities.

C3 Management of Health and Safety at Work Regulations 1999

Obligations on Fire and Rescue Service Authorities

C3.1 This paper is an assessment of The Management of Health and Safety at Work Regulations 1999 *vis-a-vis* the obligations they place on fire and rescue authorities, and the potential consequences of failures by such authorities to carry out their statutory functions under them.

The Regulations and how they fit into the regulatory framework

C3.2 The main purpose of the Management of Health and Safety at Work Regulations 1999 is to impose obligations on employers which supplement those found in the Health and Safety at Work Act 1974. Of course the enforcing authority is also an employer and therefore is subject to the same obligations in relation to its employees. If employees of a Fire and Rescue Authority are attending a fire or inspecting a premises to check compliance with the Regulations, they are also due to be protected under the Act by that Authority.

C3.3 Since the Management of Health and Safety at Work Regulations 1992 (MHSW Regs) came into effect they have been subject to 3 amendments:

- The Management of Health and Safety at Work (Amendment) Regulations 1994
- The Health and Safety (Young Persons) Regulations 1997 and
- The Fire Precautions (Workplace) Regulations 1997.

C3.4 Further modifications were required in order to demonstrate full compliance with the European Framework Directive. These were subject to consultation during summer 1999 as the draft Health and Safety (Miscellaneous Modifications) Regulations, together with a revised Management Regulations approved code of practice (ACoP).

C3.5 By way of example, for the most part the Fire Precautions (Workplace) Regulations 1997 were subsumed into the MHSW Regulations. This meant that in most cases fire safety is to be enforced by the health and safety authorities rather than the fire services.

C3.6 The Management of Health and Safety at Work Regulations 1999 were further amended in 2003, in response to concerns raised by the EC Commission, to enable employees to claim damages from their employer in a civil action where they suffered injury or illness as a result of the employer being in breach of those Regulations. They were also intended to enable civil claims to be brought against employees for a breach of their duties under those Regulations that resulted

in injury or illness. Employees have duties under those Regulations to use any equipment, dangerous substance etc. in accordance with any training and instruction provided by the employer. Employees are also required to alert their employer of serious and imminent danger in the workplace or any shortcomings in the health and safety arrangements. The previous civil liability provisions are contained in Regulation 22 of the MHSW Regs.

- C3.7 On 6 April 2006, the Health and Safety Executive announced a new amendment, which came into force on that day. The amendment changes the civil liability provisions in the Regulations so as to exclude the right of third parties to take legal action against employees for contraventions of their duties under these Regulations. This extends to employees the same protection against third party action as that provided for employers. The amendment neither creates any new duties, nor does it remove any. The practical effect will be to reduce the likelihood of claims against employees by third parties.
- C3.8 The amended Regulations supersede and extend previous versions and incorporate other legislation. The Regulations are published with an Approved Code of Conduct (ACoP)¹ which has special legal status (courts will take account of adherence to the ACoP in prosecutions for breaches of health and safety law) and with Guidance² (adherence to Guidance is not compulsory).

Duties under the Regulations

- C3.9 The Regulations are “goal setting” in that they are intended to set out what must be achieved but not necessarily how it must be done. Thus the Regulations require employers and employees to implement systems for the protection against and prevention of harm at work.
- C3.10 The Regulations require employers to carry out risk assessments, make arrangements to implement necessary measures, appoint competent people and arrange for appropriate information and training.
- C3.11 Employers are placed under a number of duties under the MHSW Regulations. Fire Service Authorities are required to carry out risk assessments under the Act and implement measures to prevent harm and protect employees. This includes provisions on health and safety assistance, information for employees, capabilities and training, risk assessment in relation to expectant mothers and the protection of young persons at work.

¹ Management of health and safety at work – Approved Code of Practice L21 (HSE)

² Management of Health and Safety at work a short guide: www.hse.gov.uk/pubns/hsc13.pdf

Duty to Assess

C3.12 The principal duty is contained in Regulation 3. Regulation 3(1) requires every employer to make a suitable and sufficient assessment of:

- The risks to the health and safety of his employees to which they are exposed whilst they are at work and
- 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.

C3.13 These assessments are aimed at identifying the measures an employer needs to take to comply with the requirements and prohibitions imposed on him under relevant legislation and regulations. The ACoP states that employers are required to undertake a systematic general examination of their work activity.

C3.14 The ACoP assists with various definitions crucial to the understanding of the obligation to undertake risk assessments: In the ACoP

- A hazard is something with the potential to cause harm (this can include substances or machines, methods of work and other aspects of work organisation)
- Risk expresses the likelihood that the harm from a particular hazard is realised
- The extent of the risk covers the population which might be affected by a risk; i.e. the number of people who might be exposed and the consequences for them³.

C3.15 Risk therefore reflects both the likelihood that harm will occur and its severity. Fire and Rescue Authorities will undoubtedly be very familiar with the concept of risk assessment and will already have systems in place to carry out regular risk assessments and review. However, the purpose of risk assessment is to determine what measures should be taken to comply with the employer's duties under the "relevant statutory provisions". This phrase undoubtedly covers general duties under the Health and Safety at Work Act 1974 (HSW Act) and all Regulations associated with the HSW Act. The Regulations do not stipulate the measures, which are to be taken as a result of a risk assessment, and therefore much is left to the judgment of the employer as to the measures they ought to take to fulfil their statutory duties. The ACoP does however set out in Paragraph 16 the general principles that should be followed.

C3.16 The Regulations state that the assessment should be "suitable and sufficient" but do not define what this means. The ACoP explains that this means it should identify the risks due to, or in connection with, the work. The assessment should

³ ACoP; Paragraph 5

be proportionate to the risk⁴. Assessments should be appropriate to the nature of the work and should stipulate a review period indicating the period for which the assessments remain valid and when they become subject to such a review.

C3.17 Regulation 3(6) requires that where an employer employs more than five employees he shall record the significant findings of the assessments and any group of employees who it identifies as being at significant risk. The ACoP confirms that the record should represent an effective statement of hazards and risks which then leads management to take the relevant actions to protect health and safety.

C3.18 The ACoP explains that significant findings are:

- Significant hazards identified (those that pose the most serious risk)
- Existing control measures in place and the extent to which they control the risks
- The population which may be affected by these significant risks or hazards

Health and Safety Arrangements, Surveillance and Assistance

C3.19 Employers are required under Regulation 5 to make appropriate arrangements for the effective planning, organisation, control, monitoring and review of protective and preventative measures. The measures which have to be taken depend on the relevant legislation and the employer's own risk assessment and some useful guiding principles are evinced in the ACoP.

C3.20 Under Regulation 6, health surveillance must be provided where the risk assessment identifies that there is an identifiable disease or adverse health condition related to the work being done; valid techniques are available to detect indications; there is a reasonable likelihood that the disease or condition may occur in the particular conditions of work and surveillance is likely to further the protection of the employees health. For example, Fire and Rescue Services may implement monitoring and surveillance for post-traumatic stress disorder given that it is foreseeable that employees might suffer by reason of the nature of the work.

3.21 One or more competent persons must be appointed to assist in managing risk under Regulation 7. The competent person can be an employee or an external consultant but they must have sufficient training and experience or knowledge and other qualities to properly assist the employer. It is of course important to bear in mind that the legal duty to safeguard the health and safety of workers remains with the employer notwithstanding that the employer might choose to seek external help from a consultant.

⁴ Approved Code of Practice at paragraph 9

C3.22 The employer is required to plan and implement procedures for serious or imminent danger and for danger areas under Regulation 8. Employers are required to establish appropriate procedures, including but not limited to evacuations, for serious incidents such as fire and possibly bomb threats. They are also required to nominate sufficient persons to implement those procedures and ensure that untrained staff are not allowed access to danger areas.

Information and Assistance

C3.23 Under Regulation 10 every employer is required to provide his employees with comprehensible and relevant information on:

- The risks to their health and safety identified by the assessment
- The preventative and protective measures
- The procedures for serious and imminent danger and for danger areas⁵ and the measures referred to in regulation 4(2) a of the Fire Precautions (Workplace) Regulations 1997
- The identity of those persons nominated to implement the abovementioned procedures and evacuations etc and nominated under Regulation 4(2)b of the Fire Precautions (Workplace) Regulations
- Any risks notified to him as a result of co-operation with other employers under Regulation 11

C3.34 Employers are also required under Regulation 13 to take into account the capabilities of employees as regards health and safety. Employers must ensure that adequate health and safety training is provided when staff are recruited, when they are exposed to new risks such as the introduction of new equipment, technology or systems of work.

C3.35 In the case of **Pennington v Surrey County Council and Surrey Fire and Rescue Service [2006]** a system of work which permitted a fire fighter to use a particular type of rescue equipment (1040 Holmatro ram in place of a 1020 ram) in a stressful situation when he had not previously been trained or experienced in its use was not a safe system of work. Accordingly the employer was held to be negligent in failing to provide adequate training and was in breach of its statutory duty under the Provision and Use of Work Equipment Regulations 1998, Reg 11. The fire fighter injured the top of his finger when his hand came into contact with the top of the ram during a severe and stressful and life saving operation.

C3.36 It was a question of law for the judge when determining whether the training was adequate in all the circumstances, which the employer could reasonably have been expected to foresee. The appeal court took into account that the training took

⁵ See Regulation 8

place in a controlled environment at the fire station and in a relaxed atmosphere. The court found that simulated conditions of an accident would have been more appropriate or at the least some concretisation of the basic advice applicable to the actual situation with which an operator is likely to be faced⁶.

Employees duties under the MHSW Regulations

- C3.37 Regulation 14 complements the existing duties placed on employees under relevant Health and Safety legislation (HSW Act). Employees are required to use equipment provided by employers in accordance with training and instructions that the employer provides (under the requirements of Regulations 10 and 13). In addition employees are required to notify employers of any serious hazards they may encounter. Employees can discharge this duty to notify by informing appointed Health and Safety representatives where in existence.
- C3.38 Under Regulation 18, new and expectant mothers are required to provide written notification to their employers so that the employer can activate any additional preventative or protective measures deemed necessary under the relevant risk assessment⁷.
- C3.39 Additional protections are afforded to young persons by Regulation 19, which prohibits certain types of employment and exposure to certain chemical or physical agents. Also under Regulation 10, employers have obligations to inform the parents or guardians of children (under 16) in their employ.

Criminal Liability for a Breach of the Regulations

- C3.40 Breach of the MHSW Regulations 1999 can constitute a criminal offence under S.33 (1) c of the HSW Act 1974. The offence can be tried summarily or on indictment. When tried summarily the maximum fine available is £5000. When tried on indictment the Crown Court's powers are unlimited. Regulation 21 expressly prevents anything in the Regulations as affording an employer a defence in any criminal proceedings for a contravention of those provisions by reason of any act or default of an employee of his or a person appointed by him under Regulation 7.
- C3.41 The Health and Safety Executive provide a useful summary of penalties available to the criminal courts for breaches of Health and Safety Legislation and related provisions⁸. Where the defendant has been convicted of more than one offence, a magistrates' court is entitled to impose a penalty for one offence and make an order of no "separate penalty" for the remaining offences, if it is thought that an adequate sentence has already been imposed⁹. This is an extremely rare occurrence in health and safety cases.

⁶ Ibid, Judgment of LJ Arden at paragraph 54

⁷ Employers have to include the assessment of risks to new and expectant mothers as part of their obligation under Regulation 3.

⁸ www.hse.gov.uk/enforce/enforcementguide/court/sentencing/penalties.htm#_ftn11

⁹ Stones 2000: 3-174.

- C3.42 Both the magistrates and the Crown Court have a discretionary power to make an order requiring a convicted defendant to pay compensation for any personal injury, loss or damage resulting from the offence. If the court does not make a compensation order when it is empowered to do so, it must give reasons for its decision¹⁰.
- C3.43 A compensation order can be imposed alongside a separate sentence or as a penalty in its own right¹⁰. Where both a fine and a compensation order are appropriate but the offender lacks the means to pay both, the compensation order payments will take priority¹¹.
- C3.44 The amount of compensation should be such as the court considers appropriate. In making the order, the court must have regard to the defendant's means, and the defendant and the prosecutor can make representations to the court as to the loss suffered by the victim. A victim personal statement may be provided to the court after conviction and would contain information that is relevant to the court in considering an order. Compensation paid to the victim is deducted from any damages received in civil proceedings. For this reason, the existence of a pending civil claim should not in itself prevent an award of compensation.
- C3.45 Where the injury or loss is not easily quantifiable or is disputed by the defendant (for example, the extent of injuries suffered), the court may well require additional evidence (such as an independent medical report). In these circumstances, the court may adjourn the hearing until the injured party can provide further evidence or the court may decide not to make an order, leaving the issue of compensation to the civil proceedings.
- C3.46 In the case of **R v Howe & Son (Engineers) Ltd**¹² the Court of Appeal held that when setting a level of fine for health and safety offences, the court is required to give sufficient weight to the financial circumstances of the offending company amongst the many other relevant factors. Other relevant factors cited include how far short of the appropriate standard the defendant fell in failing to meet its obligations; whether death or serious injury resulted from the serious breach and the need to compensate the level of public disquiet or loss of life. Particular aggravating factors include a failure to respond to warnings and where safety is compromised by a profit motive.

¹⁰ Powers of Criminal Courts (Sentencing) Act 2000 s.130(1). HSE guidance provides that the damage must result from either the offence of which the defendant has been convicted or another offence taken into consideration by the court in determining sentence. A compensation order could not therefore be made where the only offence before the court did not cause, or contribute to, the injury or loss.

¹¹ Powers of Criminal Courts (Sentencing) Act 2000 s.130(4)

¹² R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249

C3.47 Another case of note is the **R v Milford Haven Port Authority**¹³ case where the Court of Appeal held that the sentencing judge should consider the possible impact of a large fine on the port authority's ability to perform its public functions and the impact on the local economy of such a fine.

Civil Liability for Breach of the MHSW Regulations 1999

C3.48 Until 27 October 2003 there was a "civil liability exclusion" which applied to both the MHSW Regulations 1999¹⁴ and to the Fire Precautions (Workplace) Regulations 1997¹⁵. This meant that employees could not sue their employers for injury resulting from a breach of the regulations.

C3.49 Employees can now claim damages from their employer in a civil action, where they suffer injury or illness as a result of the employer breaching the MHSW Regulations or the Fire Precautions (Workplace) Regulations 1997. Employers will also be able to bring actions against employees for breach of their duties under the 1999 Regulations. The changes are implemented by the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003¹⁶. However employees cannot bring claims against employers if the employer's duty is imposed for the protection of persons not in their employment, that is, third parties.

C3.50 Thus civil claims can be brought against a Fire and Rescue Authority in negligence and/ or as a breach of statutory duty for failure to carry out its duties under the MHSW Regulations 1999. The claimant would have to establish that a statutory or common law duty of care existed, that there was a breach of that duty and that the breach caused damage or loss.

C3.51 Following 2005 Health and Safety Executive proposals for further amendments to the civil liability rules¹⁷, a subsequent amendment expressly removes the (certainly unintended and probably in practice remote) possibility of third parties suing employees for any breach of duty arising under the MHSWR – this amendment is in force from 6th April 2006¹⁸.

C3.52 If death of an employee is caused by any actionable "wrongful act, neglect or default" by the employer the dependants of the deceased can bring an action for damages against the employer¹⁹.

¹³ R v Milford Haven Port Authority [2000] 2 Cr App R 423

¹⁴ Management of Health and Safety at Work Regulations 1999, SI 1999/3242

¹⁵ Fire Precautions (Workplace) Regulations 1997, SI 1997/1840

¹⁶ SI 2003/2457

¹⁷ Proposals for new Regulations amending the Management of Health and Safety at Work Regulations 1999 and the Health and Safety (Consultation with employees) Regulations 1996

¹⁸ See Management of Health and Safety at Work (Amendment) Regulations 2006, SI 2006/438

¹⁹ Fatal Accidents Act 1976 s.1

Conclusion

C3.53 The MSHW Regulations provide supplemental obligations to the pre-existing basket of Health and Safety obligations imposed on employers. The Fire and Rescue Authorities will be required to implement the regulations in so far as they are employees and their employees will also be the subject of certain obligations under Regulation 14.

C3.54 Both criminal and civil actions attach to a breach of the Regulations especially in the case of a serious breach resulting in injury or loss of life. The Regulations are essentially preventative in their aim and have as their goal a safe working environment. Thus protection of employees at work is the driving force for implementation closely followed by the potential for heavy financial consequences and embarrassment for a failure to do so.

Key Documents

- The Management of Health and Safety at Work Regulations 1999 – SI 1999/3242
- Management of Health and Safety at Work (Amendment) Regulations 2006 – SI 2006/438 The Stationery Office Limited
- Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 – SI 2003/2457
- Fire Precautions (Workplace) (Amendment) Regulations 2003 SI 1997/1840
- Management of health and safety at work – Approved Code of Practice L21 (HSE)
- Management of Health and Safety at work a short guide www.hse.gov.uk/pubns/hsc13.pdf
- HSG 122 – New and Expectant Mothers at Work – A Guide for Employers (Second edition), HSE Books 2000
- HSG 165 – Young People at Work – A Guide for Employers, HSE Books 2000
- INDG 163(rev 1) – Five Steps to Risk Assessment, HSE Books 2003

C4 Approved Document B: Impact on Fire and Rescue Authorities

- C4.1 Building Regulations are made under the **Building Act 1984**, as amended. The revisions to Part B (Fire safety) of the **Building Regulations 2002** and supporting guidance in *Approved Document B Parts 1 and 2* had as their rationale lessons derived from actual fires, and refinements in respect of construction. *The Building and Approved Inspectors (Amendment) (No. 2) Regulations 2006 (S. I. 2006/3318)* (“the Amendment Regulations”) incorporated a revised requirement B3 (3) (Internal fire spread (structure)) into Schedule 1 of the Building Regulations, and revoked the current requirement B3 (3).
- C4.2 Regulation 16B provided for the provision of fire safety information, which, under the amended Regulation 17(1)(b) and (3), is a “relevant requirement”. The consequence is that local authorities must consider whether it has been complied with in determining whether to issue a completion certificate. Regulation 16B applies to the erection or extension of a “relevant building”, defined as one to which the Regulatory Reform (Fire Safety) Order 2005 applies, or will apply after the completion of building work. This catches both non-domestic premises and the common parts of blocks of flats, in which the FSO is enforced by FRAs. It also applies to a relevant change of use of a building. The definition of a building covers both to the whole or part of a building (see regulation 2(1) of the Building Regulations). FRAs should take note that the consultation procedures need to be followed. Should FRAs not comment at design stage, and subsequently impose requirements on the premises falling within the FSO, there is likely to be a challenge under Article 35, if the matter required is one which could have been addressed at an early stage.
- C4.3 The information provided should relate to the design and construction of the building or extension, and the services, fittings and equipment provided in or in connection with the building or extension, which will assist the responsible person to operate and maintain the building or extension with reasonable safety.
- C4.4 Guidance on what information may be appropriate is set out in Approved Document B Volume 2.
- C4.5 The Amendment Regulations identifies situations where it is not necessary to give a building notice or full plans. A direct impact of the Amendment Regulations on the Regulatory Reform (Fire Safety) Order, enforced by FRA is that a consequence of the FSO was that common parts of blocks of flats fell within the definition of “relevant use”, which reduced the time limit between occupation of blocks of flats and the expiry of an initial notice from 8 weeks to 4 weeks. The amendment reinstates the 8 week time limit for buildings comprised of blocks of flats *and their common parts*.

- C4.6 Approved Document B constitutes guidance in support of the **Building Regulations 2000**, as amended. Under section 6(1) of the Building Act 1984, two new Approved Documents were issued containing guidance regarding the requirements of Part B of Schedule 1 to, and regulation 16B of, the Building Regulations 2000. The previous edition of Approved Document B remains in force, insofar as it relates to transitional building work, within the meaning of the transitional provisions in the Amendment Regulations. The new Approved Documents are: Approved Document B (Fire safety) – Volume 1: Dwelling houses (2006 Edition, ISBN: 978 1 859 6 261); and Approved Document B (Fire safety) – Volume 2: Buildings other than dwelling houses (2006 Edition, ISBN: 978 1 859 6 262). “Dwelling-houses” are defined in regulation 2(1) of the Building Regulations as dwellings which do not include a flat or a building containing a flat. ADB 2006 (both parts) comes into effect, on 6th April 2007, and any subsequent design submissions (received at the Building Control Body) that use ADB as a guidance document, will need to refer to the 2006 edition. While ADB is used by Fire Officers to check design submissions, it remains the statutory responsibility of the Building Control Body to decide whether building designs meet the requirements of the Building regulations. Fire and the Rescue Services (FRS) will, of course, be concerned in exercising their legislative statutory function with non-domestic buildings, and material changes include the inclusion of a maximum unsprinklered compartment size for single storey warehouses, while residential care homes receive guidance on matters such as use of sprinklers. Also included is a requirement that aims at making occupiers mindful of their building’s fire protection: which dovetails with compliance with the requirement under Article 9 of the Fire Safety Order to carry out a risk assessment: which constitutes the hub from which a range of obligations under the FSO radiate out.
- C4.7 In more detail, Volume 1: Dwelling houses introduce changes which include new guidance on third party certification and accreditation schemes; the use of residential sprinkler systems conforming to BS 9251:2005. Smoke alarms should be installed in accordance with BS 5839-6:200. The guidance on means of escape has been recast to dovetail with new guidance on the provision of galleries and inner inner rooms; and there is clarification of the provision of smoke alarms in extensions.
- C4.8 Alternative design protection has been introduced, including the important option of providing sprinkler protection instead of alternative escape routes for dwelling houses with a floor more than 7.5m above ground level; and the provision of a sloping floor as an alternative to the 100mm step between dwelling houses and integral garages.
- C4.9 Since FRAs do not enforce fire safety in dwelling houses, other than common parts, most of the fire safety matters in Volume I will relate to consultation with the

Building Control Authority and community fire safety advice under section 6(2)(b) of the Fire and Rescue Services Act 2004.

- C4.10 In Volume 2, the changes include revised guidance on third party certification and accreditation schemes. Sprinkler systems are referred to and these have to conform to BS 9251:2005; while smoke alarms should be installed in accordance with BS 5839-6:200. A formula is introduced for calculating the appropriate widths of final exits. In unsprinklered single-storey warehouse buildings, a maximum compartment size is introduced. Revised guidance is given on sprinkler systems in blocks of flats exceeding 30m in height; and the need to make allowance when designing compartment walls for the deflection of a wall in a fire.
- C4.11 Where there are tall buildings and the evacuation will occur in a phased manner, the ADB includes consideration to be given to the intervention of firefighters in respect of their activities vis-a-vis escapees: an example being discounting a stair.
- C4.12 In respect of self-closing devices, only in respect of doors between a flat and the common parts will fire doors need not be provided with self-closing devices. However, in premises in multi occupation, such self closers will be needed between private areas and the shared parts. In addition, self closers will be required to fire doors in the common parts of blocks of flats and fire doors in non-domestic premises.
- C4.13 To reflect the risk based nature of current doctrine, design flexibilities have been acknowledged, exemplified by sprinkler protection and/or a protected stairway instead of alternative escape routes for multi-storey flats. A further example is the design of residential care to use sprinklers and/or free swing door closing devices.

Impact of ADB on Fire and Rescue Authorities

- C4.14 As pointed out above, for FRAs there is a statutory duty of consultation between Building Control and FRAs. Thus Article 45 states:

“Duty to consult enforcing authority before passing plans

45. —(1) Where it is proposed to erect a building, or to make any extension of or structural alteration to a building and, in connection with the proposals, plans are, in accordance with building regulations, deposited with a local authority, the local authority must, subject to paragraph (3), consult the enforcing authority before passing those plans.

(2) Where it is proposed to change the use to which a building or part of a building is put and, in connection with that proposal, plans are, in accordance with building regulations, deposited with a local authority, the authority must, subject to paragraph (3), consult with the enforcing authority before passing the plans.”

- C4.15 Similarly, there is a duty on FRA under, for example, Article 30 (5), to consult, among others, the relevant local authority, where that authority is not the enforcing authority in respect of the FSO.
- C4.16 Failure to consult will not invalidate the notice (see Art. 30(6)). However, such failure will inevitably result in the court hearing an appeal under Art. 35, to award costs against the FRA, if the appeal is successful. Even if the appeal fails, since costs are awarded on the basis of what is “just and reasonable”, the FRA would be unlikely to recover its costs, if the failure to consult had resulted in his unnecessary expenditure in the light of his reasonable belief that the FRA would take advantage of its duty to consult under Art. 30 (5).
- C4.17 FRAs should also build into their procedures situations where consultation has not resulted in the local authority, or approved inspector, accepting their position. They are then faced with enforcement under the FSO, should the premises fall within their jurisdiction.
- C4.18 A hypothetical case can be used to illustrate this. There premises are a complex development under construction in a city centre. The building under construction (“the Building”) consists of podium levels, a tower with hotel bedrooms extending up to level 25, a bar at level 26, plant areas at level 27 and residential apartments from levels 28 to 48 A penthouse apartment is situated on level 49, the top floor. The construction will include basement car parking levels with some plant.
- C4.19 The Authority is not satisfied with fire precautions at the residential apartment levels. The Authority has made fire safety recommendations, but the developer has not adopted these into the design stage. The five-week consultation period under the Building Regulations process has passed without refusal of building regulation approval by the LA, and accordingly, there is a deemed approval.
- C4.20 The Authority’s concerns centre on the provision of a single staircase serving as a means of escape for the residential areas. The developer has relied on Building Regulations Approved Document B (ADB), which is being used under transitional provisions. It permits, in principle, a single staircase in flats and maisonettes. The Authority’s response is that the residential features of this development should not be taken in isolation, but, rather, that in this complex development the apartments are distinct from conventional buildings containing flats or maisonettes. Furthermore the travel distance from the dwelling entrance door to the staircase for one of the apartments is 18 metres, the recommended distance being 7.5metres.
- C4.21 The Authority believes that initially a second staircase was proposed to serve the residential levels, but that this was reduced to just the single staircase. As an alternative to a second staircase providing a means of escape, the Authority has recommended the installation of sprinklers throughout the residential areas. They

have written to the LA that the recommendation appeared to commend itself to the LA. The developer is proposing a smoke clearance system as an alternative solution. However, the Authority is not satisfied that such a system will deliver adequate fire safety, as described in the strategy.

- C4.22 Their concerns appear to have some foundation, if the following circumstances are factored into the scenario. The fire safety strategy does not appear to provide integrated consideration of the building as a whole, in particular in terms of its construction, and the simultaneous use and effective management of the various “occupancies” during any number of reasonably assumed fire scenarios. It does not therefore; demonstrate a robust and effective response to the likely risks from a fire in the building.
- C4.23 Bearing in mind the height of the apartments, the unusual nature and complexity of the mixture of uses and the experience of the World Trade Centre, assumptions that occupants may be prepared to wait in their apartment while a fire burns elsewhere in the building, could be seriously flawed. With this in mind, the ability of the Fire & Rescue Service to carry out effective fire fighting at that height, whilst allowing normal/evacuation use of the single staircase, is strongly questioned. Therefore it is also questioned whether sufficient means of warning of fire will be provided for people in the apartment areas of the building.
- C4.24 There appears insufficient ventilation of the Staircase in the section serving apartments, particularly considering the need to be able to ventilate the corridors serving apartments on non-fire floors during fire-fighting operations;
- C4.25 There is a lack of validated information about water-mist suppression system as a compensatory feature for the protection of life in the situations proposed;
- C4.26 Insufficient evidence has been provided to demonstrate adequacy of smoke control arrangements for residential reception; on which depends the questionable assumption that both stairs available to occupants of apartment floors can discharge into that same space;
- C4.27 The significant potential for the area in which the interfaces / panels for the active fire safety systems are located to be affected by fire, therefore impacting on the ongoing management of the evacuation of the building during an incident.
- C4.28 Insufficient account appears to have been taken of the risks from fire, which originates in the hotel or apartment areas, spreading up the face of the building;
- C4.29 The fire and rescue service must not be relied upon, as part of the fire safety strategy, to enable occupants to complete their escape from the premises.

C4.30 ADB, therefore, does not provide a clear solution; and at the construction stage, the Authority considers that it cannot go beyond recommending what it considers to be an acceptable fire safety design solution. However, once the building is completed, the Authority will have jurisdiction under fire safety legislation, in particular the **Regulatory Reform (Fire Safety) Order 2005** (the FSO). Manifestly structural alterations after completion of the construction will be more disruptive and expensive, then if they were incorporated during the present phase.

C4.31 This raises a number of issues:-

- The degree of the application of Building Regulations Approved Document B to a complex building such as this development
- The Authority's powers to address risk caused by the design of fire safety provision
- The Authority's strategy of putting occupiers on notice of possible fire safety enforcement in the future
- The content of the draft letters to occupiers.

Applicability of Approved Document B

C4.32 The Approved Document B is a widely used document for building situations more common than the hypothetical development, though the text 'Use of Guidance' does not preclude it from being applied to such a building. However, the implication is that the guidance was formulated for smaller less complex buildings. This is supported by the following from page 5 of ADB under the heading 'Use of Guidance':

"The Approved Documents are intended to provide guidance for some of the more common building situations (emphasis added). However, there may well be alternative ways of achieving compliance with the requirements. Thus there is no obligation to adopt any particular solution contained in an Approved Document if you prefer to meet the relevant requirement in some other way."

C4.33 The building in question is, relatively, a very high building, which appears to be at around 130 metres high; and it contains a mix of uses that appear to interrelate with each other, as exemplified by shared escapes. ADB has reference to buildings over 30m tall but it can be questioned whether its provisions are applicable to buildings over four times that height. Such tall buildings will, for example, present increased problems regarding means of escape & fire-fighter access. ADB is, of course, guidance, and as an example of its flexibility, possibly relevant to this development, in appendix D, the classification of purpose groups, paragraph 5 states *"In other cases, particularly in some large buildings, there may be a complex mix of uses. In such cases it is necessary to consider the possible risk that one part of the complex may have on another and special measures to reduce the risk may be necessary"*.

- C4.34 ADB itself seems to suggest that for such a building the designers would wish to use other solutions such as the various BS 5588 or similar. In such cases the FRA should, as early as possible in dealing with a building such as this, seek to obtain confirmation from the Local Authority, as to which Code or Standard has been used by the designer for the development of the proposed building.
- C4.35 The ADB, therefore, is not wholly appropriate for this type of building, though there are certainly aspects of the development regarding which the ADB will apply, though a number of issues raised in relation to this project may initially appear to be no different to those that might be found in other, less innovative, “code compliant”, developments. For example, the risks from falling debris/glass, smoke entering stairs during fire-fighting operations, single stair means of escape from apartments and the need for robust, construction standards.

The Authority’s Powers Regarding Risks from the Design of Fire Precautions Provisions

- C4.36 In the event of disagreement between the FRA and Building Control in circumstances where the ADB provides limited guidance because of the complexity of the building, during the obligatory consultation under the FSO(see Art 45), there is no statutory bar on the fire and rescue authority imposing requirements relating to “structural or other alterations relating to escape from the premises” when the premises come within its jurisdiction.
- C4.37 Article 9 provides:-
- “Risk assessment 9. (1) The responsible person must make a suitable and sufficient assessment of the risks to which relevant persons are exposed for the purpose of identifying the general fire precautions he needs to take to comply with the requirements and prohibitions imposed on him by or under this Order.”
- C4.38 The term relevant persons is defined in Article 2 as:
- “(a) any person (including the responsible person) who is or may be lawfully on the premises; and
- (b) any person in the immediate vicinity of the premises who is at risk from a fire on the premises, but does not include a fire-fighter who is carrying out his duties in relation to a function of a fire and rescue authority under section 7, 8 or 9 of the Fire and Rescue Services Act 2004 (fire-fighting, road traffic accidents and other emergencies);”
- C4.39 The term “vicinity” is not defined. It can be suggested that the term should be given a restricted meaning, since in Art. 4 (1)(a) reference is made to the spread of fire on the premises, but not also and from the premises. This appears to indicate an intention to limit the ‘applicability’ and impact of this part of the Order – in geographical terms – quite closely.

C4.40 Some further assistance is provided by the reference in Redgrave's *Health and Safety* (3rd Edition Butterworths 1998 at para 3.19) to **Sterling Winthrop Group Ltd v Allan** 1987 SCCR 25, which concerned Section 3(1) of the **Health and Safety at Work Act 1974**. This section imposes a duty on employers and the self employed to avoid exposing persons other than their employees to health and safety risks, and it was held that the section "...could encompass people outside of the place where the employer conducted his undertaking; the example given was where passers-by were endangered by escaping fumes".

C4.41 The scope of relevant persons is, therefore, very broad; and as "vicinity" is not interpreted, there is the potential for litigation as to exactly what the term entails.

C4.42 The definition of "premises" caught by the Order is also very broad in Article 2:

"premises" includes any place and, in particular, includes:

- (a) any workplace;
- (b) any vehicle, vessel, aircraft or hovercraft;
- (c) any installation on land (including the foreshore and other land intermittently covered by water), and any other installation (whether floating, or resting on the seabed or the subsoil thereof, or resting on other land covered with water or the subsoil thereof); and
- (d) any tent or movable structure '.

C4.43 Article 2 needs to be read together with Article 6 which excludes, *inter alia*, domestic premises; this being defined in Article 2 as: "*premises occupied as a private dwelling (including any garden, yard, garage, outhouse, other appurtenance of such premises which is not used in common by the occupiers of more than one dwelling.* " Common parts used by occupiers of more than one private dwelling, therefore, will fall within the jurisdiction of fire authorities".

C4.44 The introduction of the FSO, therefore, broadens the ability of an Authority to impose fire precautions in the building, which covers not just employees, but also protect in their own right persons resorting to the building, and using the common parts.

Inappropriateness of Directly Putting Prospective Responsible Persons on Notice of Possible Future Fire Safety Enforcement

C4.45 Communications between Fire and Rescue Authorities and other interested parties, other than Building Control, in respect of buildings, was dealt with in the document: *Building Regulations and fire safety: procedural guidance* ("the Procedural Guidance") The then DETR pointed out that: "*Although this guide has no legal force the Department of the Environment, Transport and the Regions, the National Assembly for Wales and the Home Office would expect relevant bodies*

and authorities to follow its recommendations. “The general position is set out in paragraph 1.13:

“During the design and construction phase of a project the building control body will check on compliance with the requirements of the Building Regulations. In order to facilitate the consultation process they should take a **co-ordinating role** with fire authorities and, where appropriate, with other regulatory bodies. Any recommendations and advice given should be channelled through the building control body to the applicant (emphasis added).”

C4.46 In respect of the preliminary design stage, *the Procedural Guidance* acknowledges that fire authorities can respond to requests for goodwill advice under the **Fire Services Act 1947**. That Act has, of course, been repealed and replaced by the **Fire and Rescue Service Act 2004** (the 2004 Act). However, the 2004 Act retains the giving of goodwill advice through the following provision:

“Core functions 6 Fire Safety

- (1) A fire and rescue authority must make provision for the purpose of promoting fire safety in its area.
- (2) In making provision under subsection (1) a fire and rescue authority must in particular, to the extent that it considers it reasonable to do so, make arrangements for
 - (b) the giving of advice, on request, about
 - (i) how to prevent fires and restrict their spread in buildings and other property;
 - (ii) the means of escape from buildings and other property in case of fire.”

C4.47 The *Procedural Guidance* addresses such goodwill advice as follows:-

“2.5.2 In responding to an independent approach from a designer or occupier, for goodwill advice under the Fire Services Act 1947 (see appendix D), the fire authority should point out that in respect of the Building Regulations, or other legislation for which they are not directly responsible, they can offer only informal opinions. They should refer the applicant to a building control body, and where appropriate other enforcing authorities, for guidance on what may be required to meet the legislation for which those bodies or authorities are responsible.

Any advice the fire authority does give should be in writing and should clearly indicate which matters in their opinion:

- “will have to be complied with under the Fire Precautions Act 1971 or the Workplace Fire Regulations when the building is occupied

- will have to be complied with to meet other fire safety legislation
- are only advisory and not enforceable under legislation. A copy of the advice should be sent to the local authority and the approved inspector where it is known that a relevant initial notice is in force."

C4.48 It is significant that the *Procedural Guidance* refers to goodwill advice "*In responding to an independent approach from a designer or occupier*". Accordingly, the implication is that the goodwill advice should be reactive, in response to an approach by a designer or occupier, rather than volunteered unilaterally. *The Procedural Guidance* continues:

"2.16 The fire authority should make its observations to the building control body in writing and within agreed timescales (usually within 15 working days) so that the building control body can meet its own obligations.

2.17 The fire authority's comments must clearly distinguish between matters:

- which will have to be complied with under the Fire Precautions Act 1971 or considered under the Workplace Fire Regulations when the building is occupied
- which will have to be complied with to meet other fire safety legislation other than Building Regulations
- which are only advisory and not enforceable under legislation (see appendix D).

Note: In addition to giving such comments the fire authority may wish to offer observations to the building control body in relation to the Building Regulations. These should be clearly and separately identified.

- will have to be complied with to meet other fire safety legislation other than Building Regulations
- which are only advisory and not enforceable under legislation (see appendix D).

Note: In addition to giving such comments the fire authority may wish to offer observations to the building control body in relation to the Building Regulations. These should be clearly and separately identified."

C4.49 The *Procedural Guidance*, therefore, discourages the giving of advice to designers and occupiers directly, unless such advice is sought under the provisions of the 1947 Act (now the 2004 Act). In the light of this, the FRA should write to Building Control and request them to transmit its recommendations to the applicant in line with paragraph 1.13 of the *Procedural Guidance*.

The Content of Draft Letters to Occupiers

- C4.50 An important issue is whether a FRA can write to the prospective occupiers of premises in the building, and whether the letters can be coupled with a copy of the Authority's response to fire safety issues, made when the application for building regulation approval; was made to the local authority. The recipients are asked to assist the Authority in advising them of potential fire safety requirements by submission of their provisional fire risk assessment.
- C4.51 When a building is to be put to use as a workplace, the employer must have completed the risk assessment required under Art. 9 of the FSO and the documentation and fire safety measures required by virtue of the risk assessment must be in place directly the workplace is occupied.
- C4.52 While an Authority's approach in putting responsible persons on notice about their responsibilities under the workplace fire precautions legislation appears, prima facie, a common sense one. It must be subject to the caveat of the advice in the *Building Regulations and fire safety: procedural guidance* that "During the design and construction phase of a project Any recommendations and advice given should be channelled through the building control body to the applicant. "Accordingly, to conform to the Guidance, the content of the letters should be adjusted to refer to the fire authority's recommendations to the local authority, but to request the local authority to forward the recommendations to the responsible persons. In short, the recommendations should prudently be sent to Building Control with a request that the Fire Authority's recommendations are passed on to the prospective occupiers.

Conclusion

- C4.53 As discussed above, Approved Document B provides a vital role in assisting fire and rescue authorities carrying out their statutory functions under section 6 of the Fire and Rescue Services Act 2004 and the Regulatory Reform (Fire Safety) Order 2005. The ADB will be a reference point in respect of fire safety in premises and should dovetail with the suite of guides provided under Article 50 of the FSO, to be used by FRA when enforcing the FSO when the premises are occupied and fall with FRA' jurisdiction. Particularly useful is Regulation 16B, providing for fire safety information, which is developed in the new ADB., in respect of the erection or extension of a "relevant building" , one to which the Regulatory Reform (Fire Safety) Order 2005 applies, or will apply after the completion of building work; and to a relevant change of use of a building.
- C4.54 Fire and Rescue Authorities' inspectors will, accordingly wish to make use of both the ADB and their suite of guides under Art. 50 in responding to the statutory consultation under Art. 45. Failure to respond to the statutory consultation process under Art. 45 will create significant problems in imposing fire precautions

requirements under the FSO when the premises are occupied and come within the jurisdiction of the fire and rescue authority. Though there is no statutory bar to the imposition of structural requirements under (say) an enforcement notice served under Art. 30 of the FSO, even if the FRA has not responded to the Art. 45 consultation, courts will be very sympathetic to appellants under Art. 35, who challenge FRA notices, and argue that the authority should have taken advantage of the consultation process to prevent occupiers from being required to carry out additional structural work under the FSO. Even if the authority resists the appeal, it is unlikely that a court will regard it “just and reasonable” to award costs in favour of the authority if the work required by its notice could have been materially carried out at an earlier point in time (thereby reducing expenditure) if appropriate recommendations had been made to building control under Art. 45.

- C4.55 However, the hypothetical case factored in above, indicates that ADB will not provide the solution for all premises, and certain complex buildings will not fit neatly into the ambit of the ADB: creating, thereby, the potential for disagreement between FRA and LA Building Control. In such circumstances, professional judgement will need to be applied by fire safety inspectors. Accordingly, though ADB is an invaluable reference point, in circumstances where there is disagreement between Fire Safety Inspectors and Building Control regarding the appropriate work in respect of premises that will prospectively come within the jurisdiction of fire and rescue authorities, clear procedures should be in place to resolve such differences, and the jurisdiction of the lead authority should be complied with by FRAs by not corresponding directly with prospective responsible persons under the FSO, but, rather, the implementation of mechanisms under which resolution of issues will be through the lead local authority. Failure to do so, could result in expensive litigation under the appeal provisions in Art 35 when the premises become subject to FRA under Art. 25, and enforcement by FRA are challenged.

C5 The ACAS Principles Regarding Discipline: Impact on the Fire and Rescue Authorities

C5.1 This paper is an assessment of the Advisory and Conciliation and Arbitration Service (ACAS) principles regarding disciplinary and grievance procedures in terms of the requirements they place on Fire and Rescue Authorities as employers and the consequences of failing to comply with such requirements.

Background

C5.2 In an attempt to encourage settlement of employment disputes without recourse to the tribunal system, there has been a review of the statutory minimum standard for disciplinary and grievance procedures which employers and employees must use and the consequences of failing to use those minimum procedures. The new position is derived from a number of legislative provisions, orders, regulations and the ACAS Code of Practice on Disciplinary and Grievance Procedures²⁰.

C5.3 The Department of Trade and Industry has published extensive information on the detailed provisions of the statutory disciplinary and grievance procedures²¹ and these are summarised below.

New Position in respect of Disciplinary and Grievance Procedures

C5.4 Since 1 October 2004, employment tribunals will not consider claims unless certain minimum standard “dispute resolution” procedures have been followed. These “dispute resolution procedures” take the form of straightforward minimum standard “dismissal and disciplinary procedures” to be applied by employers and minimum standard “grievance procedures” to be used by employees.

Role of the ACAS Code of Practice

C5.5 ACAS is an advisory service for employers and employees and has as one of its aims the objective to assist with the early resolution of employment disputes where possible. It states as its aim, “to improve organisations and working life through better employment relations”. As well as producing guidance and training, ACAS acts as an arbitration service under the ACAS Arbitration Scheme.

C5.6 The ACAS Code of Practice on Disciplinary and Grievance Procedures has been re-written to give effect to the changes in the legislation with effect from 1 October 2004²². It can be argued that the new procedures fall short of the standards evinced in the previous Code.

²⁰ Employment Rights Act 1996 s.98A, Employment Act 2002 ss.29 to 40 and sch 2, Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752, Employment Code of Practice (Disciplinary and Grievance Procedures) Order 2004, SI 2004/2356, ACAS Code of Practice on Disciplinary and Grievance Procedures CoP 1

²¹ www.Dti.Gov.Uk/er

²² ACAS Code of Practice on Disciplinary and Grievance Procedures (CoP 1) 2004

- C5.7 The Code of Practice provides practical guidance to employers, workers and their representatives on the statutory requirements, what constitutes reasonable behaviour when dealing with disciplinary and grievance issues, the production and use of grievance procedures and the worker's right to bring a companion to hearings. A failure to follow the Code does not in itself make a person or organisation liable to proceedings but can be evidence supporting a claim for liability and severe penalties for the relevant party or parties.
- C5.8 The ACAS Code gives clear guidance on how to set up Dismissal and Disciplinary and Grievance Procedures and an evaluation of what constitutes a good procedure. Notwithstanding that the recommendations in the Code are not binding on employers, the existence of such guidance makes it almost indefensible for employers not to follow as a minimum the best practice outlined in the Code. Tribunals and Arbitrators will certainly have regard to the Code when considering claims.

Disciplinary Rules and Procedures

- C5.9 In summary, Employers must draw up disciplinary rules and procedures²³, operate disciplinary procedures²⁴, hold appeals and keep records for future reference. The standard minimum procedure for dismissal and discipline which must be followed by employers in almost all cases is set out in full in Schedule 2 to the Employment Act 2002 and Annex A to the ACAS Code of Practice. It can be summarised into three steps as follows:

STEP 1: Write to the employee notifying them of the allegations against them and the basis of the allegations and invite them to a meeting to discuss the matter

STEP 2: Hold a meeting to discuss the allegations – at which the employee has the right to be accompanied – and notify the employee of the decision

STEP 3: If the employee wishes to appeal, hold an appeal meeting at which the employee has the right to be accompanied – and inform the employee of the final decision.

- C5.10 There is a modified (two step) procedure for use in special circumstances involving gross misconduct and details of this are also set out in full in Schedule 2 to the Employment Act 2002 and Annex B of the ACAS Code of Practice. Even where there is cause to believe an employee is guilty of gross misconduct, care must be taken to establish the facts before taking action and employees are given an opportunity of putting their case at a disciplinary meeting before formal action is taken. The Act allows for a modified procedure in these circumstances and so a dismissal will be found to be automatically unfair if an employer fails to follow that procedure.

²³ For guidance see *ibid* at paragraphs 52-62

²⁴ For guidance see *ibid* at paragraphs 8-37

- C5.11 Employers and employees will usually be expected to go through the minimum statutory procedure unless they have “reasonable grounds to believe that by doing so they might be exposed to a significant threat, such as violent, abusive or intimidating behaviour, or they will be harassed”. Stress and anxiety alone are not sufficient as there would need to be a threat of serious physical or mental harm. Equally where it can be shown that circumstances beyond the control of either party prevent one or more of the steps being followed within a reasonable period, such as long term illness or absence, there may be justification for failing to adhere to the procedure.
- C5.12 The ACAS code advises that special arrangements are made to consider disciplinary matters for special situations e.g. nightshift workers or employees in isolated locations. This will obviously be a consideration for Fire and Rescue Authorities.
- C5.13 Caution is also advised when taking disciplinary action against a trade union representative in that consultation with a senior trade union representative or trade union official may be prudent to protect against allegations that the action is an attack on the union’s functions. The Code also advises that when an employee is charged, convicted or remanded in custody in relation to an offence not related to work, employers cannot automatically regard this as grounds for dismissal and should in principle consider the effect of such an offence or alleged offence on the employee’s suitability for that type of work.
- C5.14 The employee’s conduct can also lead to a termination of the requirement to follow the minimum steps where, for example, the employee has failed to attend a meeting held as part of the statutory procedure without good reason. In such circumstances the employee’s compensation may be reduced. A successful employee’s award may also be reduced as a result of failure to comply with the procedure.
- C5.15 The provisions on Dismissal and Disciplinary Procedures only apply to dismissals and suspensions on no or reduced pay. They do not apply to oral or written warnings or suspension on full pay.

Appeals

- C5.16 The Act provides that employees who have had disciplinary action taken against them must have a right to appeal. The Code advises that employers set a time limit from relevant determination for the employee to ask for an appeal. The appeal stage is part of the statutory procedure and failure on the part of the employee to use an available appeal stage may result in a reduction in the amount of any amount awarded at tribunal.

Records

C5.17 Records must be kept of all stages of the Dismissal and Disciplinary procedure. These must be maintained and stored in line with relevant data protection legislation and special care must be taken when considering the use of such records when writing references.

Time Limits

C5.18 **The Employment Act 2002 (Dispute Resolution) Regulations 2002** provide in Regulation 15 for a 3 month extension to the “normal time limit”²⁵ for submitting a claim to the Employment Tribunal to give employers and employees more time to use the statutory procedures before applying to the Tribunal. The 3 month extension commences on the day after the day on which it would have expired.

C5.19 In relation to dismissal and disciplinary procedures, a claim can only be submitted outside the “normal time limit” (3 months for Employment Tribunal) where the employee had reasonable grounds for believing, when that time limit expired, that a dismissal or disciplinary procedure, whether statutory or otherwise, was being followed in respect of matters that consisted of or included the substance of the Tribunal complaint²⁶. This position is to be contrasted with the less restrictive availability of a time extension with grievance procedures (see below).

C5.20 There are certain situations when it is not necessary to follow the minimum Dismissal and Disciplinary procedure which are listed in Annex E to the ACAS Code.

Minimum standards for Grievance Procedures

C5.21 Schedule 2 to the Employment Act 2002 sets out a similar 3 step process for Grievance procedures. These are summarised in Annex C of the ACAS Code as follows:

STEP 1: The employee must set out the grievance in writing and send the statement or copy of it to the employer

STEP 2: The employer must invite the employee to a meeting to discuss the grievance. After the meeting the employer must inform the employee of its decision in response to the grievance and notify him/her of the right to an appeal

STEP 3: If the employee wishes to appeal, s/he must inform the employer, who in turn must invite the employee to a further meeting, where reasonably practicable, with a more senior manager than the first meeting.

C5.22 Step 2 must not occur until the employee has informed the employer what the basis for the grievance was when they made it under Step 1 and the employer has had a reasonable opportunity to consider their response to that information.

²⁵ See Regulation 15(5) for a definition of the term “normal time limit”

²⁶ Regulation 15(2)

C5.23 The employee must make all reasonable steps to attend the meetings whether under step 2 or step 3 and has a right to be accompanied at either/both²⁷.

Raising a grievance

C5.24 The ACAS stipulates that grievances should be raised by employees to their line managers where possible unless someone else is specified in the organisation's procedure. It is best practice to appoint an alternative where it is possible the employee wishes to raise a grievance against the person to whom the grievance would normally be raised.

C5.25 While an employer should respond to all grievances made, if an employee does not put their grievance in writing under step 1 above, and wait a further 28 days before presenting a claim to the Tribunal, they will not be permitted to take the case to the Tribunal. The Code advises that where employees may have difficulty in putting a complaint into writing, the employer should encourage the employee to seek assistance. In particular, under the Disability Discrimination Act 1995, an employer would be required to make reasonable adjustments to assist an employee who was unable to formulate a written grievance themselves because of a disability.

C5.26 As for disciplinary procedures, employers and employees are normally expected to go through the statutory grievance procedures unless they have reasonable grounds to believe that by doing so they might be exposed to a significant threat, such as violent, abusive or intimidating behaviour, or they will be harassed. Stress and anxiety alone are not sufficient as there would need to be a threat of serious physical or mental harm.

C5.27 There are certain situations when it is not necessary to follow the minimum grievance procedure, which are listed in Annex E to the ACAS Code.

Time Limits

C5.28 As for the minimum Disciplinary procedures, the Regulations permit a 3 month extension on the normal time limit for filing a claim to the Employment Tribunal. This extension will only be granted to an employee in two situations²⁸. The first is where the employee has presented a complaint within the normal time limit but the Tribunal has rejected that complaint because the complainant has either failed to put their grievance in writing²⁹ or waited 28 days from putting the complaint in writing before applying to the Tribunal³⁰. The second situation is where the normal time limit has expired but the employee had completed step 1 of the minimum procedure before the expiration of that time limit (3 months)³¹.

²⁷ See below on right to be accompanied

²⁸ Regulation 15 (3)

²⁹ As required under paragraph 6 or 9 of Schedule 2 and section 32 (2) of the Act: See Regulation 15(3)a

³⁰ As required under section 32 (3) of the Act

³¹ See Regulation 15 (3) b

C5.29 Hence in respect of the Employment Tribunal, the employee has to act within the original 3 month time limit³², either by applying to the Tribunal (having forgotten to complete step 1 of the procedure or rushed into applying following step 1) or by commencing the minimum statutory grievance procedure by putting the grievance in writing and sending it to the employer with the original time limit. Only in these circumstances will the extension be permitted.

Overlapping Disputes

C5.30 It is not always clear where the dismissal and disciplinary procedures or the grievance procedures apply, or where both apply. Where both might apply the position is governed by the “overlapping disputes” provisions found in Regulations 6 and 7 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752).

C5.31 By way of example where the employee is subject to the dismissal and disciplinary procedures but believes that the real reason for the disciplinary action being taken is discriminatory or for another reason other than that stated by an employer, they may raise a grievance against that employer. In such a situation, the 2004 Regulations provide that the statutory procedures can be satisfied in a single process, providing that the employee sends the employer the “Step 1” statement of grievance before the appeal meeting stage of the dismissal and disciplinary procedures. This would allow for a combination of the disciplinary and grievance aspects of the dispute and for both to be addressed at the meeting stage. However, it may be prudent to separate the two stages when the grievance is made against the person or persons conducting the disciplinary process.

Right to be accompanied

C5.32 With effect from 4 September 2000 a worker has the legally enforceable right to be accompanied by a fellow worker or trade union representative of his choice at internal disciplinary procedure and grievance procedure hearings³³. This right has been extended in several ways by the Employment Relations Act 2004, s.37.

C5.33 As a result, dismissal of an employee for exercising his or her right to be accompanied would be automatically unfair under the Employment Relations Act.

Summary of consequences for failure to follow new procedures

C5.34 A failure to follow the minimum dismissal and disciplinary procedures by an employer gives rise to a risk that if the employee takes the matter to an employment tribunal a dismissal will be deemed to be automatically unfair and or in the alternative, that compensation will be increased. It has long been the case that a dismissal can be held to be unfair where an employer does not follow

³² See Regulation 15 (5) for a definition of the term “normal time limit”

³³ Employment Relations Act 1999 s.10

an appropriate procedure but it is only since 1 October 2004 that there have been statutory rules requiring employers to follow such procedures to a specified minimum standard.

- C5.35 For employees, failure to follow the minimum grievance procedure requirements when required means that in some cases the employment tribunal will simply refuse to consider a claim and in others that any compensation awarded will be reduced.
- C5.36 The ACAS Code of Practice is supplemented by an ACAS handbook entitled “Discipline and Grievances at Work” which also includes information on the Disability Discrimination Act 1995, Data Protection Act 1998 and relevant parts of the Human Rights Act 1998.

Compensation

- C5.37 The Tribunal can of course order such amount as it deems just and equitable in all of the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer³⁴. Such an award will consist of a basic award and a compensatory award³⁵.
- C5.38 Employment Act 2002, section 31 stipulates that employment tribunals must adjust awards by a minimum of 10% (up to a maximum of 50%), either up or down in cases where there has been a failure by employer or employee to abide by the new rules.
- C5.39 As described below, where a dismissal is considered to be automatically unfair as a result of a failure to follow the statutory minimum procedures, the employee will be entitled to an award of at least four weeks pay³⁶. The Tribunal is not required to make such an award if it considers it would result in injustice to the employer³⁷.
- C5.40 Where a compensatory award is made under section 123 of the Employment Rights Act 1996, the 2002 Act provides a further amendment which means that the any award of four weeks pay made under section 112(5) of the Employment Rights Act 1996 will also be deducted when reinstatement or re-engagement is order under section 113 of the same.

34 Section 112 (4) or 117 Employment Rights Act 1996

35 Section 118 Employment Rights Act 1996

36 Section 34 (3) Employment Act 2002 amends section 112 Employment Rights Act 1996. The Tribunal is not required to make such an award if it considers it would result in injustice to the employer.

37 Section 34 (3) inserting Section 12 paragraph (6)

Dismissal Automatically Unfair

- C5.41 Where an employer has dismissed an employee³⁸ and the employer did not adhere to the minimum specified procedures, the dismissal will be considered automatically unfair.
- C5.42 A dismissal on the grounds of the exercise by an employee of a right under the legislation may also be automatically unfair, for example where an employee is dismissed for exercising his right under section 10 of the Employment Relations Act 1999.
- C5.43 Compliance with the new statutory minimum standard does not however mean that a dismissal is bound to be procedurally fair. A Tribunal may for example make a determination of fairness as a result of an Employer failing to follow its own internal procedures³⁹.
- C5.44 Dismissal without complying with the minimum procedures will be automatically unfair and will result in the employee receiving a minimum award of **four weeks pay**⁴⁰ provided the normal qualification period of continuous service has been completed (one year) and the employee's age doesn't prevent him/her from claiming dismissal.
- C5.45 There is a well established principal that where dismissal is held to be procedurally unfair but it can be shown on the balance of probabilities by the employer that had they complied with the procedural requirements, the dismissal would still have taken place and been unfair, but any award for unfair dismissal may be the subject of a *Polkey* reduction and reduced by up to 100 per cent⁴¹. It was therefore open to the employer to show that compliance would have made no difference to the resulting dismissal. The Tribunal would have to be satisfied that the employee's conduct was such that they would have been dismissed anyway if proper procedures had been followed⁴².
- C5.46 The Employment Act 2002 inserts a new section 98A into the Employment Rights Act 1996 which partly reverses the decision in *Polkey*. The rule now is that if an employer fails to complete all of the requirements in the minimum statutory procedure, the dismissal will be automatically unfair. It should be noted that the minimum procedure will often fall short of the fuller procedures already adopted by some employers. Where the employer fails to follow their own fuller procedure (having complied with the statutory one), they can now argue that they would

³⁸ Who has sufficient continuous employment to qualify and is not prevented from claiming dismissal by virtue of their age

³⁹ In the case of *Morris v Freightliner Ltd* [2001] EAT a dismissal was held to be fair notwithstanding that the employer had departed from its own internal policy

⁴⁰ Employment Act 2002, section 34 (3)

⁴¹ *Polkey v A. E. Dayton Services Ltd* HL [1988] ICR 142, HL

⁴² *Mofunanya v Richmond Fellowship and anor*, EAT on 15th December 2003, case UKEAT/0449/03/TM: where it was held the employee would have been made redundant in any event.

have still have dismissed the employee and Tribunals will have to find that such a dismissal is fair. This is clearly advantageous to employers and disadvantageous to employees.

C5.47 In the Scottish Court of Appeal case *King v Eaton No 2*⁴³ which concerned redundancies, the tribunal acknowledged that, when a dismissal is unfair because of a serious flaw in procedure, compensation might be reduced if the outcome would not have been any different, even if a fair procedure had been followed. However, it also noted that there would be situations in more serious cases “riddled with unfairness throughout”, where a full award would usually be made.

C5.48 The Employment Appeal Tribunal agreed as did the Scottish Court of Appeal in that case that the crucial question was whether it was possible to “reconstruct the world that never was”. It said:

“To ask whether the same method and criteria would have been adopted, if there had been consultation beforehand, or to try to show what method and criteria would have been adopted, in the light of consultation, is in our opinion to embark upon a sea of speculation, where the opinions of witnesses could have no reliable factual starting point. “In such a situation, a tribunal is in our opinion well justified in refusing to allow evidence as to whether the unfair act or omission ‘made a difference’.”⁴⁴

C5.49 The Court of Appeal in the case of *Lambe v 186K*⁴⁵ has endorsed the view in *King v Eaton No 2* that a search for differences between procedural and substantive failures is unhelpful and in certain circumstances a *Polkey* reduction is inappropriate. There has undoubtedly been a partial reversal of *Polkey* brought about by the insertion of Section 98A(2) into the Employment Rights Act 1996, and the extent to which it is possible to “reconstruct the world that never was” is likely to be just as important, in certain cases, in deciding whether there was an unfair dismissal at all.

C5.50 The percentage reduction principle in *Polkey* as a result of an assessment that there would be no difference is still central to deciding the appropriate level of compensation in a case that is unfair contrary to sections 98A(1) (automatically unfair dismissals), or 98(4) ERA 1996 (dismissals outside the range of reasonable responses). While, applicants are likely to try to persuade the Tribunal that it should not speculate too much about what might have been if the procedures had been followed correctly, employers can rest assured that Tribunals will not be awarding huge sums for applicants where it is clear that dismissal was inevitable notwithstanding failure to follow a fuller procedure.

⁴³ [1998] IRLR 68

⁴⁴ *Ibid*

⁴⁵ [2004] EWCA Civ 1045

Conclusion

C5.51 The new provisions on statutory minimum Dismissal and Disciplinary Procedures and Grievance Procedures are not unduly onerous but the consequences of failing to follow them can be costly. Employers have clear guidance in the ACAS Code and accompanying handbook as to how to devise and implement minimum procedures and indeed Fire and Rescue Authorities may already have in place fuller procedures for the protection of their employees. The reversal of the Polkey principle mitigates against the harsher compensatory powers given to the Tribunals and other jurisdictions under the 2002 Act but employers will undoubtedly aim to avoid the embarrassment and risk of going to Tribunal without following at least the minimum procedures set out in the legislation.

Key Documents

Employment Act 2002 ss.29 to 40 are Part 3 of the Act, headed "Dispute Resolution etc" (notably inserting Employment Rights Act 1996 s.98A)

Employment Act 2002 Sch 2 is entitled "Statutory dispute resolution procedures"

The Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752 came into force on 1st October 2004

The ACAS Code of Practice on Disciplinary and Grievance Procedures CoP 1 (2004 version) is effective from 1st October 2004

The ACAS Advisory Handbook: Discipline and Grievances at Work

The Employment Code of Practice (Disciplinary and Grievance Procedures) Order 2004, SI 2004/2356 came into force on 1 October 2004

C6 Fire and Rescue Service Circular number 1-2006 date issued 18 January 2006

The Investigation of Fires where the Supposed Cause is not Accidental

C6.1 *Circular number 1-2006* ("the Circular") is Relevant to the National Framework, and was issued in consequence of the provision of a statutory framework for fire investigation in the **Fire and Rescue Services Act 2004** ("the 2004 Act").

C6.2 Fire Brigades are creatures of statute: their creation, and consequently their powers and duties, stem from statute. In the post-war world which re-shaped the British Fire Service, brigades were seen as positioned on two main pillars: fire fighting and fire precautions. Thus Section 1(1)(d) of the **Fire Services Act 1947** empowered brigade officers to enter premises to obtain information for fire-fighting purposes: the availability of water supplies, means of access, and other material local circumstances. Section 30 of the same Act gave FRSs, and police officers access to premises (if necessary, using force, and without the owner's consent) "in

which a fire has or is reasonably believed to have broken out, or any premises or place which it is necessary to enter for the purposes of extinguishing a fire or of protecting the premises or place from acts done for fire-fighting purposes". In 1971, in the aftermath of catastrophic fire, Section 19 of the **Fire Precautions Act 1971** empowered fire safety inspectors to enter premises to enforce the FPA. In both 1947 and 1971 Acts fire investigation was conspicuous by its absence. This resulted in Britain, which had provided the legislative model for fire law in much of the world, being leapfrogged by other countries. One example was an Act in Singapore, which generally copied out the 1947 Act, providing explicit powers for fire investigators.

- C6.3 In the United Kingdom fire investigation grew: indeed certain brigades developed specialist fire investigation teams. But this growth was always independent of statute; and was dictated by matters such as the need to identify regional and national patterns of causes of fire. This statistical exercise furthered particular studies of the cause and effects of fires, and projects to minimise the start and spread of fires through fire safety measures and operational improvements. It also materially assisted community fire safety.
- C6.4 This absence of a statutory underpinning made the role of the fire investigator legally precarious. In **Sands v. DPP** (1990) Cr. LR 585 DC a fire-fighter sought access through the appellant's premise, to investigate a fire in adjoining premises. He was obstructed, the appellant using physical force and unleashing his dog. The appellant was convicted at first instance, and appealed to the Divisional Court. The High Court's decision was based on the particular facts of the case. However, the conviction was quashed on the grounds that the fire had not broken out in the appellant's premises; and on the facts of the case it was not necessary for the fire-fighter to enter the appellant's premises for fire fighting purposes, or to rescue persons or property. In these circumstances the fire-fighter had no statutory power to enter the premises, other than that provided by Section 30.
- C6.5 The Arson Scoping Report, *Safer Communities: Towards effective Arson Control* ("the Report") while acknowledging widespread support in the British Fire Service for a statutory power to investigate, concluded that "The study has not found overwhelming evidence that such a power is necessary but believes that the Home Office should examine the case for its inclusion with any future fire safety legislation. After October 2 2000, when the **Human Rights Act 1998** came into force, the absence of a statutory power was no longer tenable. The Act provided that the interpretation of legislation and the activities of public authorities come within its scope, which intertwines the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") with the domestic law of the United Kingdom. Section 3 of The Act requires primary and subordinate legislation to be interpreted and applied, as far as is possible, in conformity with

Convention rights: a provision embracing legislation enacted before The Act, as well as subsequent to it. Public Authorities are expressly brought within The Act's scope, through the important section 6 stating: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except *such as in accordance with the law* (italics added) and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

- C6.6 In **Halford v United Kingdom** (1997) 24 EHRR 523, the Strasbourg court held that it was unacceptable to interfere with a Convention right without any legal regulation. Internal codes used by the police for phone tapping were inappropriate, as the appellant in the case had no ability to assess the basis of law on which surveillance of him would be made. **Malone v Metropolitan Commissioner** (1984) 7 EHRR 14. The consequence was that the interception of Communications Act 1985 had to be introduced. **Sunday Times v United Kingdom** (1979) 2 EHRR 245 para 49, the Strasbourg court defined the terms to be "prescribed by law" or "in accordance with law". It ruled that: (a) the law must be to enable citizens to ascertain adequately the legal rules applicable to the circumstances of a given situation, and (b) a normative matter cannot be taken as a law, unless it is sufficiently precise to enable the citizen to determine his/her conduct thereby. Criterion (b) enables matters like the principles of the Common Law to be treated as laws. However, as abovementioned codes were seen as inadequate to meet the requirement that interference with a convention right must be "prescribed by law".
- C6.7 Applying the above principle of the Human Rights Act and relevant case law, the absence of a statutory power for fire investigation prevents the opportunity for challenge under The Act. Consequently the proposed **Regulatory Reform Order** provided, in its earlier drafts, fire investigators with a power to enter premises, investigate fires, conduct searches and take samples.
- C6.8 While the initial intention was to include the power to investigate fire in the Regulatory Reform Order. However, the creation of new "burdens" on the citizen cannot be brought in under the Regulatory. Accordingly, the power for fire investigators was transferred to the **Fire and Rescue Services Act 2004**; which for the first time, sets out a framework for fire investigation.

Powers of Entry

C6.9 Section 45 provides:-

“45 Obtaining information and investigating fires

- (1) An authorised officer may at any reasonable time enter premises-
 - (a) for the purpose of obtaining information needed for the discharge of a fire and rescue authority’s functions under section 7, 8 or 9, or
 - (b) if there has been a fire in the premises, for the purpose of investigating what caused the fire or why it progressed as it did. ”

C6.10 It follows that the statutory purposes of fire investigation are: to obtain information facilitating the core functions of brigades as set out in sections 7, 8 or 9; and to investigate the causes, and progression, of fires.

C6.11 The power to conduct fire investigation in private dwellings is restricted. Thus 45(3) states:-

- “(1) An authorised officer may at any reasonable time enter premises-
- (a) for the purpose of obtaining information needed for the discharge of a fire and rescue authority’s functions under section 7, 8 or 9, or
 - (b) if there has been a fire in the premises, for the purpose of investigating what caused the fire or why it progressed as it did.
- (2) In this section and section 46, “authorised officer” means an employee of a fire and rescue authority who is authorised in writing by the authority for the purposes of this section.
- (3) An authorised officer may not under subsection (1)-
- (a) enter premises by force, or
 - (b) demand admission as of right to premises occupied as a private dwelling unless 24 hours’ notice in writing has first been given to the occupier of the dwelling.
- (4) An authorised officer may not under subsection (1)(b) enter as of right premises in which there has been a fire if-
- (a) the premises are unoccupied, and
 - (b) the premises were occupied as a private dwelling immediately before the fire,

unless 24 hours’ notice in writing has first been given to the person who was the occupier of the dwelling immediately before the fire. ”

- C6.12 *The Circular* advises that the powers of entry “are balanced by safeguards for the public”. Notwithstanding this, the restriction places a clog on the activities of fire investigators; if they wish to preserve a scene, they will have to rely on the police to ensure this. Otherwise, evidence will be subject to contamination while the 24 hour period elapses.
- C6.13 To be sure, section 45(5) enables application to a justice of the peace for warrant if the authorised officer considers it necessary to enter a dwelling for the purposes of subsection (1) without giving notice as required by subsection (3)(b) or (4). Under 45(8), if on an application a justice is satisfied that “if is necessary for the authorised officer to enter the dwelling for the purposes of subsection (1) without giving notice as required by a subsection (3)(b) or (4), the justice may issue a warrant authorising the officer to enter the premises at any time (by force if necessary).” However, the application for a warrant can be a cumbersome process before warrants are issued; nevertheless, FRA should put in place procedures whereby they can apply for warrants when entry before the lapse of 24 hours is necessary to obtain evidence that could otherwise evaporate, or be otherwise be diminished in importance by virtue of a 24 hour wait.
- C6.14 The Act leaves open entry with consent, by way of the words “*as of right*” in s. 45(3)(b). Accordingly, if the occupier consents to the investigation, the 24 hours notice is arguably waived. This is reinforced by the advice in *the Circular* that the powers of entry of FRA which “*may be used in cases where permission for fire investigation cannot be obtained from, or are withheld by, the person responsible for the premises in question.*”
- C6.15 Fire investigators should, accordingly, seek consent, and note this, before contemplating any application to a Justice for a warrant.
- C6.16 Certain FRA have put in place written procedures, reinforced by *pro formas*, to obtain permission from responsible person to enter premises before the lapse of 24 hours.

Search and Seizure

- C6.17 The term “seizure” is absent from the Act: it employs the more neutral phrase of take(ing) samples and possession of an article or substance found on the premises in Sec. 46(2) (d) and (f). Nevertheless, the powers given by section 46 amount to seizure, and there is little doubt that the courts will treat them as such.
- C6.18 The *rationale* underlying the provision of power of seizure were set out when it was considered that such powers would be brought in under the RRO, The Proposals advised that:

“It may be essential to a fire officer, investigating the cause of a fire, to be able to remove items for examination. Such a power would also be useful to a fire safety

officer who needs to determine whether dangerous materials are being stored on a site which is subject to fire safety legislation. The power could also require production of any test certificates. Such provision – when linked to the proposed offence provision of obstructing an officer of the fire authority – would provide enforcing authorities with appropriate and necessary powers.”

- C6.19 The wide powers of search and seizure are subject to important conditions, such as the service of notices. Section 45(3) and (4) stipulate service of a notice when a fire investigator seeks to enter premises occupied as a private dwelling, or occupied as a private dwelling immediately before the fire, as of right under section 45(1). Furthermore notices are required in the event of the exercise of a 46(2)(d) and (f). scale.

The Operation of the Police and Criminal Evidence Act to Brigade Investigators

- C6.20 As seen above, section 45 lays down the fundamental statutory reason for the investigation by fire brigades. The power of entry is provided: “(a) for the purpose of obtaining information needed for the discharge of a fire and rescue authority’s functions under section 7, 8 or 9, or (b) if there has been a fire in the premises, for the purpose of investigating what caused the fire or why it progressed as it did.”
- C6.21 This is reinforced by *the Circular*, which advises in 2.4 that “*The police service is responsible for the prevention and detection of crime and for reporting to the Coroner any death that results from a fire. The Police Act (1964) charges the senior police officer with primary responsibility for the direction and control of any criminal investigation into the cause of any suspicious fire. In order to facilitate such investigation, access to the scene of a suspicious fire post-extinction should be at the discretion and direction of the senior police investigating officer.*”
- C6.22 The Circular also correctly advises that it would be good practice to draw up a “Memorandum of Understanding” (MoU) between the fire and rescue service and their relevant police force. It also points out that co-operation is necessary “*with other organisations within the Criminal Justice System, local authorities and Crime and Disorder Partnerships, the insurance industry, commercial bodies and research organisations.*”
- C6.23 This makes clear that the investigator is not tasked with the investigation of crimes. To be sure, the cause of a fire may also be a crime, so the two may intersect. But as the investigator is not charged with investigating fire related criminal activity, he/she is precluded from important matters: notably the questioning of suspects.

C6.24 PACE, while primarily directed at police officers, clearly extends to the actions of investigators who are not policemen. Thus section 67(9) of PACE states:-

“Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a Code”, (i. E. the Codes of Practice under PACE). Brigade fire investigators who do not fall within section 67(9) because they have no duty to investigate offences, their “purpose” is to determine “what caused the fire or why it progressed as it did” .

C6.25 The exclusion of fire investigators from s. 67(9) does not mean, of course, that they are free from legal restraints. The opposite is true, they should scrupulously avoid assuming the role of police officers who are under a duty to investigate criminal offences of murder, manslaughter, arson and criminal damage; and, therefore, must abide by the principles of PACE.

C6.26 Under PACE a suspect’s rights are safeguarded by the provision for cautioning “a person whom there are grounds to suspect of an offence”. The cautioning of a suspect is necessary, “if his answers or his silence (i.e. failure or refusal to answer a question or answer it satisfactorily) may be given in evidence to a court...” (C.10.1). It follows that as soon as there are grounds to suspect a person of a criminal offence the fire investigation officer should refer the matter to the police; or (if there is a breach of the **Fire Precautions Act**) to a fire safety officer who has been duly appointed. The fire investigation officer should make a contemporaneous note of the time the matter was referred to the police, or fire safety inspector, and the name and rank of the officer to whom the matter was handed over. This harmonises with the guidance in *Fire Service Circular No. 21/2000 Home Office Circular No. 44/2000*, dated 21 December 2000 which states that:

“The police are responsible for the prevention and detection of crime and for reporting to the coroner any death that results from a fire,” (Reinforced by): “The police are solely responsible for the direction and control of any criminal investigation into the cause of any non-accidental fire.”

C6.27 There can be no objection, under PACE, to fire investigation officers taking statements or other evidence from *persons against whom there is no suspicion*: though it must be remembered that the police will have charge of any criminal investigation, and the taking of any such statements must be with the approval for the police officer in charge. Witnesses providing statements must be with the approval of the police officer in charge. Witnesses providing statements should, of course, be asked to sign their statements; and the signature should be witnessed.

Regional Fire Investigation

C6.28 Turning to the question whether fire investigators can be authorised to operate outside the boundaries of their fire and rescue authority, section 16 of the **Fire and Rescue Services Act 2004** states:

“Discharge of functions by others

16 Arrangements for discharge of functions by others

- (1) A fire and rescue authority (the first authority) may enter into arrangements with-
 - (a) another fire and rescue authority, or
 - (b) any other person, for the discharge to any extent by that other authority or person of a function conferred on the first authority under any of sections 6 to 9 and 11”.

C6.29 The functions that can be discharged, therefore, are those “*under any of sections 6 to 9 and 11.*” These functions are: 6 Fire safety, 7 Fire-fighting, 8 Road traffic accidents, 9 Emergencies, and 11 Power to respond to other eventualities. It can be seen that none of these sections expressly cover fire investigation, which is addressed by section 45.

C6.30 Since section 16, on a reading of its express language, does not cover discharge of an authority’s fire investigation by another authority, it is necessary to consider the more general section 12, which provides:

“12 Other services

- (1) A fire and rescue authority may provide the services of any persons employed by it or any equipment maintained by it to any person for any purpose that appears to the authority to be appropriate.
- (2) A fire and rescue authority may provide services under this section outside as well as within the authority’s area.”

C6.31 Accordingly, unlike section 16, section 12 does not limit the services, which can be furnished by an authority under it, to any specified sections of the Act. An important question, however, is whether another fire and rescue authority is a “person” within the meaning of the Act. The wording of the Act suggests that the term is broad enough to catch F&RAs. For, as seen above, section 16 states that: “A fire and rescue authority *May enter into arrangements with- (a) another fire and rescue authority, or (b) any other person (emphasis added).*” Fire and rescue authorities are, therefore, expressly regarded as persons for the purposes of that particular section, and impliedly in respect of the Act generally.

- C6.32 The construction of “persons” to include corporate bodies is well known in English Law (see 2 *Inst.* 722; **St. Leonards v Franklin** (1878) 3 C. P. D. 377; and **Pharmaceutical Society v London & Provincial Supply Assoc.** (1880) 5 App. Cas. 857). It is, consequently, possible to argue that under section 12 fire and rescue authorities can carry out investigations outside their territorial jurisdiction, for other fire and rescue authorities.
- C6.33 Turning to the second issue – which authority authorises fire investigators operating across territorial boundaries – section 45(2) of the Act states that: “*In this section and section 46, “authorised officer” means an employee of a fire and rescue authority who is authorised in writing by the authority for the purposes of this section.*” It follows, therefore, that an authorised officer is an investigator who is: (a) an employee of the authority authorising him/her; and (b) is authorised in writing by that authority for the purposes of section 45. The Service’s investigators should, accordingly, be authorised by the Service, and arrangements should be made under s. 12 with other fire and rescue authorities for the carrying out of investigations within those Services’ jurisdictions. The wording of the authorisation will need to reflect fire investigation outside the Service’s boundaries.
- C6.34 In 3.3, the Circular advocates regional training for fire investigation, pointing out that: “*The Fire and Rescue National Framework recommends that using the model protocol and the supporting National Occupational Standards, Fire and Rescue Authorities should, through Regional Management Boards, ensure appropriately trained specialist fire investigation capacity is pooled to provide an effective and efficient regional capability.*”

A Professional Approach to Applying New Powers: The Contemporaneous Note

- C6.35 The placing of brigade investigators on a statutory footing, and the provision of powers of entry and seizure, will result in their functions being more closely audited by the courts when they attend to give evidence. Trials occur a considerable time after the event(s) which ground the offence(s) against a defendant in a criminal case; or from which damages have resulted, in civil cases. Statements cannot always be referred to when the case is heard. Whether or not reference is permitted will depend on whether the statement has been written or checked either at the time of the incident or shortly afterwards when the facts remained fresh in the witness’s memory **R v Simmonds** (1969) 1QB 685. In **R v Langton** (1876) 2QB 296, it was said that delay of a fortnight was not fatal; nor was delay of 22 days in **R v Fotheringham** (1975) Crim. LR 710. On the other hand, in *R v Graham* (1973) Crim. LR 628, delay of 27 days prevented the document being referred to; and there was the same result in **R v Woodcock** (1963) Crim. LR 273. Each case will turn on its own facts, and the only safe guidance is that there is no certainty that a statement can be referred to in court to refresh memory, unless it has been made at

the time of the incident or as soon as practicable after it, this makes it essential for the investigating officers to make a contemporaneous note of all salient matters which relate to the investigation. This will, subsequently, be put into statement form if the matter becomes the subject of legal proceedings.

C6.36 Contemporaneous notes can be used in a range of circumstances to protect the investigator and his/her brigade. Thus, if a householder waives the 24 hours notice required to enter as of right, the investigator would be prudent to note this, and invite the householder to adopt it. Similarly, the salient facts in the investigation, which will ground the conclusions arrived at, must be noted. Subsequently, these notes can be used when drafting reports and (if necessary) statements.

C6.37 Section 139 **Criminal Justice Act 2003** (“CJA 2003”) creates a presumption in favour of a witness in criminal proceedings refreshing memory from a document whilst giving evidence provided that:

He/she states that the document represents his or her recollection at the time he or she made it; and

The witness’s recollection was likely to be significantly better at the time the document was made (or verified).

C6.38 The fact that the witness has read the statement before giving his or her testimony does not affect this presumption. Because of the practical difficulties of refreshing memory in the witness box from an audio or video recording, section 139 also makes provision for a witness to refresh memory from a transcript of such a recording. The common law rules, including “contemporaneity” are removed. However, the best practice will remain one where the notes are made at the time or as soon as practicable after the incident, to minimize challenges.

Photographs and Videos

C6.39 Photographs are admissible as evidence; but they must be certified on oath by a person (not necessarily the photographer) able to swear to their accuracy **R v Tolson** (1984) F 7 F 103; **Hindon v Ashby** (1896) 2 Ch 1 CA. Photographs can clearly be usefully employed to complement notes and statements, not as alternatives to the note. The same principles apply regarding video evidence. Digital photography is admissible, provided a specified evidence trail is followed.

Reports

C6.40 Historically the function of reports was to inform. The information about primary fires received from the *Fire Damage Report Form* (FDR1) was incorporated by the Home Office in its annual *Statistical Bulletin*. The Form FDR3 was designed to capture details relating to secondary fires.

- C6.41 With brigades now operating within a statutory framework, reports will increasingly be used in court proceedings and will be caught by the rules on disclosure to be discussed below. Where a fire is accidental, no significant problems arise, the terms “malicious” and “deliberate”, however, require some discussion. The word “maliciously” in ordinary parlance means a wicked intention or improper motive. By the mid 19th century, cases such as **Fordham** (1839) 4 JP 397 and **Prestney** (1849) 3 Cox CC 505, however, indicate that the term had developed a legal meaning. To act “maliciously” means that a defendant has *mens rea* (a guilty mind) by intending all the circumstances and consequences comprising the non-mental elements of the crime he is charged with (*the actus reus*); or being reckless as to the occurrence of the *actus reus*. It follows, therefore, that for a person to be “malicious”, as the word is generally understood in law, he/she must have foresight of the circumstances and consequences of the crime in question, and either intend them, or be reckless about whether they occurred. For example: a person is “malicious” if he pushes a petrol soaked rag through a letterbox, in the awareness that this can cause death or serious injury, either intending to kill the inhabitants of the house or to frighten them, while being reckless about whether the foreseen death or serious injury results. Foresight and intention, or recklessness, are, therefore, preconditions for “malicious” to be accurately used at law.
- C6.42 Judging a person’s mind to all the circumstances and consequences of a crime such as murder, manslaughter, or arson, should not be a matter for the prudent fire investigator. Judgement about malice is a matter for the jury, properly directed by the judge. It is an “ultimate issue” to be determined when all the evidence (properly tested by cross-examination) has been heard. An officer reaching a judgement about “malice” could be regarded by the court as a usurpation of its function. A submission that this officer had prejudged a central issue in the case, and should be prevented from giving evidence because the prejudice in his report counterbalanced the probative value of the report, could conceivably succeed. To avoid such potential dangers, the term “deliberate” can more safely be employed in FDR1 Reports.
- C6.43 This advice has now been implicitly acknowledged as correct in *Fire Service Circular No 21/2000, Home Office Circular No 44/2000*, dated 21 December 2000. It accepts that: “The terms ‘malicious’ and ‘doubtful’ should be avoided and the term ‘deliberate’ used.”
- C6.44 The term “most likely” also deserves some mention. A conclusion as to the most likely cause of fire will be reached on the evidence available to the officer at the time of completion of the report. The conclusion should logically follow from the evidence the reporter has collated, rather than be a leap in the dark. For example, the deliberate origin of a fire will need to be based on matters such as multiple seats of fire, the presence of accelerants, fire spread, combustible material evidencing

attempts to start fires, such as manipulated newspapers at the several seats of fire, etc. This matter will be returned to in the context of expert's reports.

Disclosure

C6.45 On 1 April 1997 the **Criminal Procedure and Investigations Act 1996** came into force. It introduces a framework for the disclosure of unused material in criminal proceedings. The Act introduces "Primary disclosure by the prosecutor", "compulsory disclosure by the accused", and "secondary disclosure by the prosecutor".

C6.46 The prosecutor must:

"disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused, or give to the accused a written statement that there is no material of a description mentioned in paragraph (a)".

C6.47 It is important to note that these provisions relate to *unused* material. Consequently, initially the prosecution must disclose the material on which it intends to rely, such as statements, exhibits, etc, after which it discloses the unused material caught by the test of 3(1)(a).

C6.48 The statutory provisions are supplemented by a Code of Practice. The Code, *inter alia*, require schedules of unused material to be prepared by the "disclosure officer". In general each item of material should be listed separately on the Schedule and numbered consecutively. The description of each item should make clear the nature of the item. Provisions exist for the disclosure officer to review the case after the defence statement and provide an amended Schedule, if necessary. There is also a continuing duty on the prosecutor to review the situation regarding disclosure.

C6.49 Whether or not reports by FI officers will be relevant to a criminal investigation will turn on the facts of each case. *Fire Service Circular No 21/2000 Home Office Circular No 44/2000* pointed out that:

"Care must be taken to ensure that only accurate and factual information is recorded on the FDR1. All information (including notes) may be presented or disclosed (Criminal Procedures and Investigation Act 1996)."

C6.50 This will result in fire investigators' reports and other documents having to be disclosed to the defence by the CPS, if it tends to undermine the prosecution case if the officer is then called as a witness, he/she will need to justify the contents of the report under cross-examination. This underlines the need for conclusions/opinions in the report to be solely grounded on factual matters, as above mentioned; and for leaps in the dark to be avoided. There will be occasions when the reporter's

conclusion has been undermined by subsequent evidence that has emerged. This does not necessarily undermine the reporter's credibility. If the reporter can demonstrate that his/her conclusion logically followed from the evidence available at the time the report was compiled his credibility can be preserved, even though further evidence now suggest an alternative conclusion.

Expert Evidence

- C6.51 The reception of expert evidence by courts is venerable. In **Buckley v Rice-Thomas** (1554) 1 Plowd 118 at 124 Saunders J gave the *rationale*: "If matters arise in our law which concern other sciences of faculties we commonly apply for the aid of that science or faculties which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation".
- C6.52 The field in which a person can be called to give expert evidence must be an adequately established one. Thus in an Australian case expert evidence about the behaviour of bush fires was excluded **Casley-Smith v F. S Evans and Sons Pty Ltd** (1988) 49 SASR 314).
- C6.53 The cases show that it is a matter for the judge to rule on whether a witness has sufficient degree of study of, experience in, a field to be an expert. In **R v Silverlock** (1894) 2 QB 766 the Court for Crown Cases reserved held that a solicitor, who as an *amateur*, had gained knowledge of handwriting, could be an expert. In **Hopes and Lavery v HM Advocate** (1960) JC 104, a stenographer who had become familiar with a tape recording's contents was treated as a temporary expert, as to the contents, in **R v Oakley** (1979) RTR 417, a police officer has served 15 years in a traffic division and had attended a course of accident investigation, and had attended more than 400 road accidents was allowed to give expert opinion about his theories and conclusions regarding an accident.
- C6.54 **R v Somers** (1963) 3 AER 808, confirms the principle that an expert may refer to professional treatises, statistics, reports, etc. to refresh his memory; but their contents are admissible only insofar as he incorporates them into his evidence. It is *his* evidence which is admissible. When the expert draws on work in his field of expertise, he must refer to such work in his evidence, so that challenges to the cogency and probative value of his conclusions can include challenges relating to the work(s) drawn on **R v Abadom** (1883) 1 AER 365. Drawing on the works of others in this situation does not breach the rule against hearsay. An important *caveat* is that the condition precedent for an expert giving his opinion and drawing on the work(s) of others in his field, is that the primary facts grounding that opinion must be proved by way of admissible evidence from the expert, or other competent person; and these facts must be elicited during the examination in chief. **R v Turner** (1975) QB 834, at 840.

C6.55 Though the general principle is that non-experts cannot give opinion evidence, section 3(2) of the Civil Evidence Act 1872 introduced a limited area in which non-expert opinion evidence could be received. It stated:

“ It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made by way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived. ”

C6.56 As Murphy on Evidence points out: “It is an open question whether this declaration accurately reflects the state of the Common Law, and therefore whether it may apply in effect to criminal cases also.” (8th edition p388).

C6.57 Examples of matters regarding which non-expert opinion evidence can be given are: opinion that persons, objects or documents are the same as such respective things which the witness claims to have seen before. A further example is identifying the sound of a voice with which the witness is familiar (**Robb** (1991) 93 Cr App R 161). Again non-expert opinion evidence can be given regarding observable matters such as physical and mental condition of the witness himself. He may not, however, state his opinion about the condition of others (**Townsend v Moore** (1905) p66).

C6.58 Section 30 **Criminal Justice Act 1988** provides that an expert’s report may (with the leave of the court) be admissible, even if the expert does not attend to give evidence. The court has to consider a number of matters before determining whether to admit the report; which include: the content of the report; the reasons why it is sought to admit the report without the maker testifying; any risks resulting from the report’s admission, or (conversely) its exclusion; and any other relevant circumstances.

C6.59 *The Circular* correctly advises that “It is a matter for the Courts to determine whether fire or police officers should be regarded as “expert witnesses” but it is clearly unrealistic to proceed on the basis that the routine training courses in fire investigation for fire or police officers can provide a level of qualified scientific expertise equal to that possessed by a forensic scientist.” While this is accurate, fire investigators can arguably give expert (“opinion”) evidence within the perimeters of their field of study. Without this ability to give opinion evidence, they would be unable to refer to conclusions (opinions) as to the cause of fire, inferred from facts. There might also be objections to a non-expert witness taking a report into the witness box.

Conclusion

- C6.60 The introduction of a statutory power for fire investigators in the 2004 Act provides a framework for the conducting of investigations which must be complied with, notably in respect of the need to provide 24 hours notice in premises occupied, or occupied immediately before the fire, as a private dwelling. Alternatively, the gateways of permission from the occupier, or the obtaining of a warrant from a magistrate will need to be resorted to. Failure to operate *intra vires* could result in the evidence obtained by fire investigators being excluded by the court. Moreover, entry without a statutory power or permission could result in an infringement of Article 8 of the Human Rights Act, which prevents any interference by a public authority with the exercise of the right to respect for a person's private life and home, except such as in accordance with the law.
- C6.61 In addition, PACE will need to be observed by fire investigators, in that they should recognise that the police are the lead body in criminal investigations, as *the Circular* points out, and refrain from cautioning and interviewing suspects, once reasonable suspicion has arisen.
- C6.62 Fire investigators can anticipate being cross examined on their reports. Report writing is an important skill. It is critical that the reporter remembers that his/her duty is to assist the court reach a decision, rather than dispose of the issues falling within his field. The position has been clearly stated in the Scottish case of **Davie v Edinburgh Magistrates** (1953) SC34, at p40. Lord President Cooper said of experts: "Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence".
- C6.63 In that case, the Court of Sessions rejected the argument that a judge or jury is bound to accept the uncontradicted opinion of an expert. Lord President Cooper continued: "The parties have evoked the decision of a judicial tribunal and not an oracular pronouncement by an expert".
- C6.64 It follows from this clear exposition, that the investigator should phrase his/her report in terms comprehensible to the tribunal and jury. Jargon should be avoided, and if technical terms are used, they should be explained in clear English. Opinions (as the above discussion demonstrates) should always be grounded on factual matters, and should consist of logical inferences drawn from such facts. The writings of other experts should be used to assist in reaching the reporter's conclusion: never as a substitute for the reporter's own reasoning. The reporter must remember that his/her report may be tested by cross-examination coming from Counsel, informed by an expert, appearing for the other side.

C6.65 In conclusion, the advice of the Circular should also be followed by fire investigators in not placing their findings on a par with that of forensic scientists. Fire and Rescue Services should provide ongoing training and support for their *investigators* – preferably on a regional level as the Circular indicates – so that they can discharge their statutory powers under the 2004 Act competently, and operate in a complementary manner with other organisations under other legislation, such as the Crime and Disorder Act.

Annex D

Liability for Defective Advice

- D1. The relevant area of Tort for liability in respect of defective advice and guidance is Negligent Misstatement; and, since 1964, the leading case has been the decision of the House of Lords in **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] A. C. 465. Before **Hedley Byrne**, the position with regard to negligent misstatement was that there could be no liability apart from contract or a fiduciary relationship, or, perhaps, in a case of physical damage to the person or to property. Pure economic loss was not recoverable for such statements. The facts of **Hedley Byrne** were that the claimants, who were advertising agents and had entered into advertising contracts with a company named Easipower, sought references from the defendants, Easipower's bankers, to determine whether they could extend credit in connection with an advertising contract. On two occasions, the defendants gave references favourable to Easipower; which were forwarded to the claimants by their bankers. The defendants were unaware who the claimants were, and had marked their communications to the plaintiffs' bankers "Confidential. For your private use . . ." Nor did they know that the inquiry concerned an advertising contract: though they would have been aware that the references would be sent to a customer, as Lords Reid and Morris pointed out (*ibid.* pages 482 and 503 respectively).
- D2. Relying on these references, the claimants incurred expenditure regarding Easipower; and when the company went into liquidation, they suffered substantial loss. They sought to recover this from the defendants by alleging that the defendants' favourable references regarding Easipower was negligent. At first instance, McNair J. held that the defendants owed no duty to the claimants, this being affirmed in the Court of Appeal. The House of Lords held that the defendants were not liable; but they did so on the facts of the case: rather than any general rule that there was no liability for negligent misstatement. Rather, Lords Reid, Devlin and Pearce exonerated the defendants on the narrow ground that the references had been given "*without responsibility*". Lords Hodson and Morris considered that even without this disclaimer, there was no duty of care on the facts. However, they agreed that it was legally possible for a duty of care to exist in respect of statements.
- D3. **Hedley Byrne** left it unclear as to the precise circumstances which create liability for negligent misstatement. Notwithstanding that, it was a landmark case in holding that a duty of care may exist in some circumstances where information or advice is provided and there is "special relationship" between the parties. It was, accordingly, accepted that there could be liability for "words" as well as

“deeds”: though the general principles of Negligence in **Donoghue v Stevenson** [1932] AC 562 (HL) is not wholly relevant here. The rationale underlying the restriction in **Hedley Byrne** of liability for words to circumstances where there is a “special relationship”, was to prevent the floodgates being opened to actions. It was considered, as Cardozo J. had put it in the American case of **Ultramares Corporation v Touche** 255 N. Y. Rcp. 170 (1931), that if such a limitation was not set, there would be liability “*in an indeterminate amount for an indefinite time and to an indeterminate class.*”

- D4. As to what the criteria were for liability where negligent advice or information was provided, these were never laid down in **Hedley Byrne**. Instead, broad principles were identified; Lord Morris said:

“ ... it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such a skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise (ibid. p 514).”

- D5. It can be seen from the above passage that: (a) the giver of information should possess a “special skill” ; and (b) the plaintiff must be able to place reasonable reliance on the defendant’s judgement or skill, or ability to make careful enquiry. In **Mutual Life and Citizens’ Assurance Co Ltd v Evatt**, [1971] A. C. 793, the matter of a special skill was developed by the majority of the Privy Council. They held that a precondition for a duty of care was the existence an ascertainable actual or purported skill, competence and diligence on the part of the defendant. If the defendant was not commercially concerned with supplying information or advice, he could not reasonably be expected to know the standard at which such information or advice had to be furnished; and could not be said to have accepted responsibility for providing advice or information at such a standard.
- D6. The facts of the case were that the plaintiff, who was a policy holder in the defendant company, sought advice from the company about the financial condition of an associated company, ‘Palmer’. Relying on the information, the Plaintiff invested further sums in that company; which he lost due to the information being incorrect. The majority of the Privy Council held that the defendant company was not in the business of supplying information or advice, nor had it represented that it possessed the necessary skill to do so and would exercise due diligence to give reliable advice. Consequently, no liability existed.

- D7. A constellation of more recent cases have expanded on what constitutes a 'special relationship'. Two central tests have emerged from them: (a) whether the defendant has 'assumed responsibility' for the effect of his statements on the claimant; and (b) whether it is reasonable for the claimant to rely on the defendant's statements. Unfortunately, the law in this area is not entirely settled; there being considerable differences as to what gives rise to reasonable reliance, in the decisions arrived at by the courts.
- D8. In **Chaudhry v Prabhakar** (1989) 1 WLR 29 (CA), the claimant recovered in Negligence for the defendant's incompetent advice to her regarding the purchase of a particular second-hand car. The decision appears to be based on the general principle in Tort that if a person holds himself out as possessing a particular skill, he should work to a standard compatible with that claim. The court held that whether it was reasonable for a person to rely on another's claims of competence would depend on the circumstances of each case. However, on the facts of the case it was reasonable for the Claimant to do so.
- D9. **Chaudhry v Prabhakar** marks an extremely broad judicial view of liability; and in **Smith v Eric S Bush** (1990) 1 AC 831, the House of Lords drew in the boundaries. A valuer instructed by a mortgagee was held to have a duty of care to a Mortgagor when the valuation was materially wrong. The purported disclaimer of liability for negligence was only effective to the extent that it complied with the reasonableness test in the **Unfair Contract Terms Act 1977**. However, their Lordships held that whether it was reasonable for the claimant to rely on the valuation would be determined on the facts of each case. If a modest house was being purchased, then the buyer might reasonably be expected to rely on the valuation of the lender's surveyor. If the property was in the more expensive part of the market, reliance became less reasonable.
- D10. The important case of **Caparo v Dickman** (1990) 2 AC 605, was also decided by the House of Lords. The defendant auditor provided a statutory audit of a company, which investors relied on in deciding whether to purchase company shares. However, the auditors' report failed to clearly disclose that the company was making a loss; and the investors sued the auditors in Negligence for damages, these being pure economic loss, not normally recoverable. The claimants argued that the facts came within the scope of **Hedley Byrne**, which, they asserted, enabled recovery of pure economic loss flowing from Negligent Misstatement. The leading speech was that of Lord Bridge. He said that in order to identify whether a duty of care exists, if the facts of any given case is covered by precedent holding the existence of a duty of care, the duty can be attributed without further analysis. However, if the facts are sufficiently novel to fall outside precedent, the initial test is whether the loss was foreseeable. If so, there should be an examination of whether there was a sufficient relationship of proximity between the parties. If the answer

is affirmative, the subsequent question is whether it is ‘fair, just, and reasonable’ to impose liability. In **Caparo** the loss was foreseeable, and it could be argued that there was sufficient proximity between the parties. However, the claimants failed on the next part of the test. It was held that the auditors were carrying out a duty to the company directors; and, while they could have foreseen that their report would be viewed by the investors, it was not reasonable for investors to place reliance on it.

- D11. The decision in **Caparo** emphasized whether it was ‘fair, just, and reasonable’ to impose liability, a formulation that has become important in other areas of negligence as well.
- D12. In **Henderson v. Merrett** (1995) 2 AC 145, action was brought against insurance underwriting agents by ‘names’ at Lloyds, who had suffered serious losses, which they alleged was due to the agents’ negligent advice. The agents argued that they had no liability because there was no contractual relationship between them and the claimants, and because their liability was defined by the contract and excluded liability in tort. Lord Goff’s speech indicates that the test of whether it was ‘fair, just, and reasonable’ to impose liability for negligent advice was not a separate test from whether the defendant had assumed responsibility to the claimant. If there was an assumption of responsibility, and it was reasonably foreseeable that the claimant would rely on the defendant’s advice, it was automatically fair, just, and reasonable to assume a duty of care.
- D13. Following **Henderson v Merrett Syndicates Ltd**, it is now clear that contractual and tortious duties can exist on the same facts. Consequently, there may be liability in tort even where the parties are in a contractual relationship, although the existence of any duty may be determined by the allocation of responsibility between parties under the contract.
- D14. The application of Hedley Byrne was again considered by the House of Lords in **White v Jones** (1995) 2 AC 207 (HL), which concerned professional services, rather than a negligent misstatement. The facts were that a solicitor was instructed by his client to modify the client’s will. The solicitor failed to act on this before the client died; and the beneficiaries under the will sued the solicitor in negligence, to recover the money they would have obtained under a properly attested will. By a bare majority, the House held that the defendant was liable. Lord Goff said that **Hedley Byrne** and **Henderson** were not applicable. Despite the solicitor having “assumed responsibility” to his *client*, he had not assumed responsibility to the claimants, who were uninvolved in the transaction. However, the Claimants could succeed on the basis that the solicitor’s assumption of responsibility to his client could be “transferred” to the beneficiaries under the principle laid down by the House of Lords in **Linden Garden v Lenesta Sludge Disposal** (1993), where the lessee of a building contracted with the defendants that they would remove

- asbestos, then assigned his lease to the claimant. Though the claimant had no contractual relationship with the defendant, the defendant was held to have assumed a responsibility to him on the basis that the original lessee's assignment of the lease was foreseeable.
- D15. Disagreeing with Lord Goff, Lord Browne-Wilkinson took the view that the claimants in **White v Jones** should succeed under **Hedley Byrne**. He said that the defendant solicitor had assumed responsibility for attesting the will, and reliance had been placed on this. The assumption of responsibility to persons who had no direct connection with the solicitor's professional duties, when they were being carried out, was indeed an extension of the Hedley Byrne principle. However, it was said to be only an incremental extension of it. Lord Browne-Wilkinson identified the important features in **Hedley Byrne** as being that special relationship which existed between the claimant and the defendant, and that the relationship was founded on the assumption of responsibility to the claimant on the part of the defendant. However, he said that the category of 'special relationships' was not closed and, applied to the facts of **White v Jones**, it could be extended to catch situations in which a professional person should foresee that inadequate performance of his duties will cause economic loss to a person who later had good reason to rely on his actions.
- D16. In dealing with the point that the extension of liability would result in opening the "floodgates" of pure economic loss claims, Lord Browne-Wilkinson argued that there were brakes on such claims; since, in order for cases such as **White v Jones** to succeed, it must be shown that: (a) it was reasonably foreseeable that the defendant's services would be relied on, and (b) it was also foreseeable that loss would be suffered if they were performed inadequately. Reasonable foreseeability in isolation, therefore, would not ground liability.
- D17. In summary, therefore, the constellation of cases show that pure economic loss might be recoverable (i) where the defendant has assumed responsibility to the claimant, and (ii) it is reasonably foreseeable that the claimant would rely on the services of the defendant. Such an assumption of responsibility can be direct or (as in **White v Jones**) oblique. In addition, (iii) it must also be foreseeable that loss would be suffered if the defendant's services were performed inadequately. The liability may stem from negligent statements, as in Hedley Byrne; or the provision of services in **Henderson**, and **White v Jones**. Omissions, as well as acts, can ground liability, as the latter case establishes.

Exclusion of liability by Disclaimer

D18. The reminder must be added that in **Hedley Byrne** the defendants were not liable because they had introduced a disclaimer which excluded liability. Currently, a contractual term which seeks to exclude liability for misrepresentation must, under s.3 of the **Misrepresentation Act 1967** (as amended), meet the requirements of reasonableness, as set out in s.11 of the **Unfair Contract Terms Act 1977** (UCTA). In respect of negligent misstatement, s.2 of UCTA shows that any disclaimer must also satisfy the test of reasonableness. As the constellation of cases, discussed above, with varying circumstances, shows, this will need to be determined on the facts of each given case.

Contributory Negligence

D19. **The Law Reform (Contributory Negligence) Act 1945** provides as follows:

“ 1. Apportionment of liability in case of contributory negligence

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage...

4. Interpretation

“fault” means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence. ”

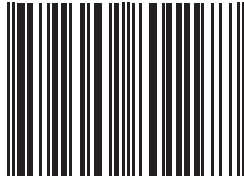
D20. Since an ingredient of an allegation of negligent misstatement is the assertion that there was reasonable reliance on the misstatement that resulted in loss, contributory negligence will generally not be applicable.

Summary

D21. Applying the above principles to the existence of guidance from the Department which is deficient, reliance by fire and rescue authorities on Departmental advice is foreseeable; and it is also foreseeable that loss would be suffered if inadequate and/or outdated advice and guidance is made available to fire and rescue authorities. It is, moreover, arguable that a special relationship exists between central government and fire and rescue authorities in respect of advice and guidance specifically directed to such authorities; and that the Department has assumed responsibility to the claimant.

- D22. As regards parties (other than fire and rescue authorities) who receive the advice given by central government to fire and rescue authorities, as **White v Jones** shows, Lord Browne Wilkinson's speech indicates that, in his view, the category of "special relationships" is not closed and, it could be extended to cover situations in which a professional person should foresee that inadequate performance of his duties will cause economic loss to someone who later had good reason to rely on his actions.
- D23. In the light of the unsettled law and the trend of extending **Hedley Byrne** liability for negligent misstatements, it would be prudent for the Department of Communities and Local Government to review its advice and withdraw those items that are no longer current or are deficient in other ways. In addition, a system could usefully be followed for the revision of advice, and the timely withdraw of such items that no longer reflect extant law and best practice.
- D24. In respect of fire and rescue services which continue to follow advice or guidance issued by an authoritative third party, despite having good reason to believe that such advice or guidance is deficient or defective, such authorities will be unable to recover from the party which has provided the advice, under the Tort of Negligent Misstatement, since, as seen above, proving liability entails, inter alia, reasonable reliance by the recipient of the advice on the misstatement that resulted in loss; and knowledge that the advice was deficient or outdated clearly nullifies such reliance. Furthermore, if the advice received from an authoritative third party – such as Communities and Local Government – is then transmitted by fire and rescue authorities (which are aware of the defectiveness of the advice) to other individuals and organisations, the courts could hold that defendant authorities have assumed responsibility to the respective claimants who place reasonable reliance on such advice or guidance. It will, therefore, be prudent to fire and rescue authorities, too, to review advice received from (in particular) central government and identify and cull the advice and guidance that is no longer applicable, in order to prevent potential actions under the expanding Tort of Negligent Misstatement.

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