



**JUSTICE 2 COMMITTEE**

**AGENDA**

**27th Meeting, 2004 (Session 2)**

**Tuesday 28 September 2004**

The Committee will meet at 2.00 pm in Committee Room 4.

- 1. Items in private:** The Committee will consider whether to take item 4 in private.
- 2. Fire (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—

Graham Setterfield, Chief Executive, Glyn Morgan Vice President, and John Russell, Fire Safety Lead Officer, Fire Officers' Association;

Hugh Henry, Deputy Minister for Justice, Ian Snedden, Head of Fire Services Division, and Robert Marshall, Solicitor, Scottish Executive.

- 3. Subordinate Legislation:** The Committee will consider the following negative instrument—

The Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices) Regulations 2004 (SSI 2004/383).

- 4. Fire (Scotland) Bill:** The Committee will consider emerging issues from the evidence received.

Gillian Baxendine / Lynn Tullis  
Clerks to the Committee  
Tel 0131 348 5054

Agenda item 2 – Fire (Scotland) Bill

Proposed areas for questioning  
(PRIVATE PAPER – MEMBERS ONLY)  
Letter from Scottish Executive Bill Team

J2/S2/04/27/1  
J2/S2/04/27/2

Agenda item 3 – Subordinate Legislation

Note by Clerk - [SSI 2004/383](#)

J2/S2/04/27/3

***Members are reminded to bring with them copies of the Fire (Scotland) Bill and accompanying documents and copies of the written evidence submitted on the bill.***

**Circulated for information**

Fire (Scotland) Bill

Additional written evidence received from James B Smith

J2/S2/04/27/4

Adults with Incapacity (Scotland) Act 2000 - letter dated 14 September from Hugh Henry

EU paper on priorities for the Dutch Presidency (July - December)

**Forthcoming meetings:**

- Tuesday 26 October – 2 pm

**JUSTICE 2 COMMITTEE**

**Late papers for the 27th Meeting of Justice 2, 2004 (Session 2)**

**Tuesday 28 September 2004**

I attach the following papers:

**Agenda Item 2: Fire (Scotland) Bill**

Letter from Scottish Executive Bill Team – additional statement
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<a href="#">J2/S2/04/27/2</a>
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27 September 2004



## SCOTTISH EXECUTIVE

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Your ref:  
Our ref: WJM/7/9/1

24 September 2004

Dear Miss Goldie,

### **FIRE (SCOTLAND) BILL – ADDITIONAL STATEMENT**

We have had an opportunity to study the additional written evidence from the Fire Brigades Union (FBU) and listen to the oral evidence session. I thought the Committee might find it helpful if I set out the Scottish Executive's position on some of the issues they raised on the Fire (Scotland) Bill ("the Bill").

#### **Competence of the Bill**

The written submission by the FBU asserts in places that certain provisions in the Bill are out with the competence of the Parliament. Whilst what we say below refers to some of the issues relating to the reserved/devolved elements of fire safety and in particular discusses the consequential restriction of the application of Part I of the Health and Safety at Work Act 1974, the Committee will be aware that the Minister has signed a section 31(1) statement under the Scotland Act 1998 indicating that the Bill, on introduction, would, if passed, be within the legislative competence of the Scottish Parliament.

The Presiding Officer has reached the same view and has issued a statement that the provisions as being within competence in terms of section 31(2) of the Scotland Act. We do not address those individual concerns here but if there are particular issues, among those raised by the Fire Brigade Union, about which the Committee has concerns, we would be happy to go further into those matters with the Committee.

#### **Section 15 Charging**

The situations in which third parties may be charged and the identities of such third parties will be laid down by order and this is where the FBU can expect to see greater detail.

#### **Section 45 – Statutory Negotiation Arrangements**

The FBU criticise section 45, stating that trade unions have a right to be heard. Section 45 gives Scottish Ministers a power to make provision for the establishment of one or more negotiating bodies for the purposes of negotiating the conditions of service of employees of relevant authorities.

Regulations made under that section must provide for the composition of a negotiating body to include persons representing the interests of some or all employees of fire and rescue authorities. Those representatives may be, but need not be, union representatives.

Employees of relevant authorities remain free to join a union. Unions representing these employees retain the freedom to lobby employers and, if not already represented on a negotiating body, to lobby that negotiating body. They can also bring pressure to bear on employers by means of a strike action. The Executive does not, therefore, consider that this section affects trade unions' rights to be heard. We would also note that any order made under section 45 must itself be compatible with the European Convention on Human Rights, and must comply with international conventions on collective bargaining.

## **Fire Safety**

### **Duties on employer/employee**

The FBU comment on the definition of “employee” in section 73(1). They suggest that the sections do not take into account the nature of modern working relationships. This formulation of the duty on employers reflects that in the Health and Safety at Work etc. Act 1974, which the United Kingdom regards as implementing the Framework Directive. We are satisfied that our approach complies with European Community law in this regard, and with its implementation in domestic law.

### **Duties in relation to the relevant premises**

In relation to any premises where there is no employer, the individuals with fire safety duties under Part 3 will be persons who have control of the premises. This is covered by section 50 of the Bill. This would include those with control in connection with the carrying on by them, whether for profit or not, an undertaking. This might also encompass the owner of the property. If a person has control of the premises, but they are not in control in connection with the carrying on of an undertaking, and they are not in control by virtue of being an owner, the owner is also to comply with the duties. Other people, such as landlords, may be in a position to exercise varying degrees of control over premises, and the Bill therefore proposes that they should bear a relevant share of the duties under the Bill. However, this would not detract from the primary responsibilities and duties placed on employers, those operating undertakings, and owners.

Equally, people might be appointed or employed to undertake duties which bear on the safety of relevant premises. These might include contractors employed to install, maintain or test fire safety equipment or systems. It would be for the person in control to ensure that any person he or she employs to carry out such work is competent to do so. However, where it can be established that an offence has been committed in respect of fire safety duties, and this has been caused by the negligence, failure etc of the contractor, the enforcing authority should be able to take action against the contractor. Action could also be taken against the person in control of the premises if that seemed to be justified in the circumstances of the case.

### **Scottish Executive, Scottish Parliament and Community Law**

Section 66 provides that certain enactments have effect only in their application in relation to reserved matters. The Executive acknowledges that, as a consequence, it will be necessary to implement these Directives afresh for Scotland. The requirements of European Directives, if not already addressed in the Bill, will be implemented by means of regulations under the Bill. In so far as these European Directives deal with devolved fire safety matters, Scottish Ministers can

competently legislate to implement them. There is no intention to disapply any fire safety Directives. We intend that the new regulations implementing their provisions will come into force at the same time as the repeal of the relevant current regulations.

Section 65 of the Bill disapplies, in its application to Scotland, fire safety aspects of Part 1 of the Health and Safety at Work etc. Act 1974 (“the 1974 Act”). This is because, in a general sense, fire safety is covered by Part 1 of the 1974 Act in so far as that Part is concerned with the safety of persons at work, and others, from risks to their health and safety arising out of work activities.

Fire safety, however, is generally a matter devolved to Scottish Ministers. The reservation in the Scotland Act (section H2 of Schedule 5) makes it clear that the reservation of the subject matter of Part 1 of the 1974 Act includes certain aspects of fire safety but does not include any other aspect of fire safety. The reserved aspects of fire safety are not covered by the Bill.

In the context of creating a new Scottish code for general devolved fire safety in the Bill, it was considered advisable to have a provision in the Bill that makes clear that the 1974 Act is disapplied in so far as it trespasses on matters that can properly be dealt with in the Bill. This ensures that general devolved fire safety is dealt with under the Bill and not through health and safety legislation.

It is therefore not correct to say that the Bill is seeking to disapply the Workplace Directive. Nor is it correct to say that any other Directives are being disapplied in relation to fire safety. General health and safety matters will continue to be dealt with under the 1974 Act. However, it is Scottish policy that fire safety matters within devolved competence will be dealt with under the Bill.

It is not the policy intention for there to be a period during which there will be no fire safety provision for Scotland. There is also a distinction between the date that a Bill is passed and the date that an Act comes into force.

### **Criminal offence of non-cooperation, section 67 and industrial action**

We do not agree with the FBU’s interpretation of sections 67(2) and 52(b).

Section 52(b) imposes a duty of co-operation on the employee, so far as his or her co-operation is necessary for the purpose of enabling the employer to comply with requirements imposed on him or her by virtue of Part 3. Section 67(2) provides that where an employee fails to carry out their section 52 duty, and that failure puts a relevant person at risk of death, or serious injury, in the event of fire, the employee shall be guilty of an offence.

The duties of an employer under Part 3 – whether in the Bill or in regulations – are, generally, to ensure so far as is reasonably practicable the safety of their employees in the event of fire in the workplace. The employee’s duty is limited, so that they only need co-operate so far as is necessary to enable the employer to meet their obligations. The offence is only committed when the consequences of their failure to co-operate with their (limited) duty is particularly serious. The duty to co-operate with the employer, and to take reasonable care for one’s own and other people’s safety, is proportionate to the desired outcome. The offence will also be subject to the due diligence defence in section 67(9).

It would be appropriate to impose criminal sanctions on an employee of a fire and rescue authority/joint board - as it would with any other employee - where their own dereliction of duties in relation to fire safety in their own workplace led to risk to relevant persons of death or serious injury in the event of fire. It is not considered that the offence would automatically be committed by those on

strike. The “due diligence” defence would be made out if they acted reasonably, for example, before they left their posts.

Finally in my letter of 16 September I undertook to get back to the Committee on the issue of whether it would be appropriate for the Bill to include an offence of ‘masquerading as a firefighter’. We have now had an opportunity to give this issue some consideration.

Currently impersonation of a firefighter is not a statutory offence. As a parallel, impersonation of a police officer is and the offence can be found at section 43 of the Police (Scotland) Act 1967. In the case of the police, exceptions are made in respect of wearing a uniform in a stage play, music hall or circus, or on television. Our concerns would lie where pretending to be a firefighter brought about a practical gain - for example a bogus caller attempts to gain money from an elderly person, dressed as a firefighter and purporting to check the smoke alarm. However we think in such cases that the common law offence of fraud would be sufficient to cover these and similar circumstances.

I hope this information is helpful.

Yours sincerely

Ian Snedden  
**Head of Fire Services Division**

**JUSTICE 2 COMMITTEE**

**27th Meeting 2004 (Session 2)**

**Tuesday 28 September 2004**

The Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices)  
Regulations 2004

(SSI 2004/383)

Note by the Clerk

The Instrument

1. These Regulations relate to the free movement of legal services and modify the Solicitors (Scotland) Act 1980 and other enactments to allow Scottish solicitors and incorporated practices and lawyers from other jurisdictions outside Scotland to enter into multi-national practices.
2. The Regulations provide for a statutory framework for regulation by the Law Society of Scotland.

Procedure

3. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 25 October 2004.
4. The Subordinate Legislation Committee considered this instrument on 21 September 2004 and raised a couple of minor technical points. The instrument was laid on 9 September and comes into force on 1 October 2004.
5. Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

23 September 2004

Clerk to the Committee

## SUBMISSION FROM JAMES B SMITH

I have read with interest the various submissions to the Bill.

I think my written submission is the only one which suggests removing the Power of Constables from the proposed legislation.

My response was a knee-jerk submission after reading the proposed Bill as I was very surprised to see it still there under a banner of 'A modern Fire Service – fit for the 21<sup>st</sup> Century' – something which should have been dealt with long before this new Bill was introduced. I didn't even give myself the opportunity of editing my script before submission.

I had lectured at the Police College for eight and a half years as an invited speaker on the safety and conduct of police officers on the fireground and have responded to the Bill because of my concern at the role inflicted on the recruit policeman. He is given the same powers as a firefighter under the new Bill as it was in the old 1947 act. I think my type of input plus now, a question and answer forum on paper is the only input that a policeman will receive in his thirty plus years service on what to do at a fire. To train policemen up to an acceptable standard for fire brigade purposes isn't possible however well intentioned the suggestions might be.

It would appear that there was a lot of discussion and support including two Brigades suggesting that in rural areas policemen should take on the role of part time firefighters. It was interesting also to hear from the RFU who have a microscopic membership compared to the main representative body but democratically invited to contribute that they too see the need to have policemen as voluntary or part time firefighters.

The suggestion beggars the question that if the police have the time and the funding to engage as full time officers in these various activities in rural areas should it therefore not be the case that the police could operate on Fire Brigade lines i.e. volunteer policeman, part time policeman, full time policeman? I don't think any Chief Constable would be party to that suggestion. It is not within perceived police thinking that you could have 'stand alone' special constables in rural communities responding to police incidents on a part time basis although the practice of having the time to engage in other activities for full time officers possibly suggests otherwise.

If there is funding for full time policemen in areas where they are not fully engaged in police work but can engage in mountain rescue and lifeboat activity surely to assist the retained and volunteer recruiting situation with fire brigades there should be a case and funding for full time firefighters who can engage in firefighting and also become involved in extra curricular activity whether it be mountain rescue or fire safety visiting also for the good of the community.

I perceive a danger that if a policeman in a rural community had to engage in a firefighting role then he becomes a firefighter under the control of the officer in charge. If lightning should strike twice whilst the police officer is attending a fire and his presence is required for a domestic violence how long does the victim have to receive a beating before she gets help from a back up police resource in a rural community? He cannot leave the fire engine en route and his presence is required as a firefighter at the incident from which no firefighter can disengage.

I think you will find a common thread in fire brigade thinking that we welcome police involvement at fire incidents provided they are supportive and not leading. There would be no justification in retaining policemen for firefighting since their involvement would necessitate attendance at the local and national fire service training establishments – a process to which every volunteer, retained and full time firefighter has to conform. They would require to attend drill nights and attend the fire station to receive regular input of new procedures plus continuous attendance at courses. They could not be engaged "I will come if I am not too busy doing something else" basis. They are either 'employed and trained and subject to the fire brigade' or not at all and I think the Chief Constables would prefer them not to be employed at all.

I came from a generation of firefighters who had to work under various interferences at fires and incidents from well intentioned sources, although fortunately the strength and authority of the Firemaster precluded any takeover at incidents. I think on one occasion in the 1960's at a fatal fire at a nurse's residential accommodation in Scotland someone outwith the fire brigade ordered on an RAF helicopter to assist. This further added to the worry of the Fire Brigade that the down draft of the helicopter and the abseiling by the RAF personnel on to the roof of the property added to the danger which they had to contend with. The services were not asked for but were inflicted on the Fire Brigade by well meaning but inexperienced agencies presuming wrongly on their authority at a fire incident.

Fortunately in my service experience when there was the likelihood of interference it was quickly dealt with.

I wish to draw your attention to the mind set of the firefighter and why and how he views non fire brigade professional involvement with his job.

I don't think it is well understood that the very nature of firefighting and rescue work produces an individual who is required to work in situations where nobody else can or will work. That no agency can take over and that his/her stand and personal courage will determine the outcome of the incident. I think this encourages his/her unique and the justifiable emotive awareness of his/her personal value to colleagues, the job he/she does and their value to the community.

I think this also reflects in the stand he/she takes industrially when he/she perceives their employers are reining them in on their salaries and working conditions. They resent comparison and are deeply offended that their work and worth is deemed of less value than other agencies.

It befits the lack of understanding of the mind set of the firefighter when it is suggested that someone other than a Chief Officer could take over the role of leading the Fire Brigade.

If it is the intention to go down that road in an operational capacity I can safely say that you are legislating for a situation which would result in regular dispute. Firefighters are very jealous of who they see as a fit person to command their Brigade. Unless the Chief or whatever his designation might be has a solid thorough grounding in firefighting from recruit firefighter onwards firefighters would be very wary of him or her entering the fire service on two tier entry. There would be also the problem of obeying his commands at an incident. It is seen as entry to the fire brigade through the back door. I doubt if the police would operate either with a Chief Constable who came in through the back door.

I would like to finish with that recently members of the public in the north of Scotland received a warning shot across their bows from the Fire Brigade for attempting to rescue members of the public from a fire situation. The fire brigade were on route to the incident very quickly and the actions of the public could have exacerbated the fire situation to the detriment of the people involved. I don't think that the police should be put in a similar position with the fire brigade and the removal of that section of the act of Constables powers at a fire would preclude the need for the fire brigade to issue a warning to them.

23 September 2004