

# **FIRE (SCOTLAND) ACT 2005**

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## **EXPLANATORY NOTES**

### **THE ACT – SECTION BY SECTION**

#### **Part 3 – Fire Safety**

##### *Chapter 1 – Fire safety duties*

##### *Section 53 – Duties of employers to employees*

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

### ***Section 54 – Duties in relation to relevant premises***

81. **Section 54** provides that a person who has control of premises must carry out a risk assessment to identify fire safety risks to relevant persons in respect of harm caused by fire on the relevant premises. There is a definition of “relevant premises” in section 78. The person in control of the relevant premises would include the employer (where there is one), a person in control of the premises in connection with the carrying on of a trade, business or other undertaking, and the owner. For example, a shopkeeper who is a sole trader with no employees carrying out a business in leased premises would have duties under section 54 on the basis that the shopkeeper has control of the premises to an extent. In this example, the owner of the premises may also have section 54 duties. Other people, such as landlords or contractors who take responsibility for installation and maintenance of fire precautions or fire safety measures may be in a position to exercise varying degrees of control over premises and they may bear a relevant degree of responsibility under section 54.
82. The term “relevant person” is defined in section 79 and means persons who are or may be lawfully on the premises and persons in, or who may be in, the immediate vicinity of the premises whose safety would be at risk in the event of fire in the premises. Employees of fire and rescue authorities and joint boards are excluded from the definition when they are carrying out operational tasks (also defined in section 79). Where the person subject to the duty in section 54 is an employer their employees are excluded because they are already protected by the section 53 employer/employee duty. Following the risk assessment the obligation is to take such fire safety measures as would be reasonable for a person in that position to take to ensure the safety of relevant persons in respect of harm caused by fire in the premises, bearing in mind all the circumstances. Where the person in control of the premises is not the owner or a person carrying on an undertaking then the owner is also subject to the subsection (2) duties.
83. Subsection (4) imposes the subsection (2) duties on persons who have obligations under contracts or tenancies in relation to maintenance or repair or in relation to fire safety. The subsection (2) duty is imposed but only to the extent that those persons have such obligations. This would include for example contractors who take responsibility for installation and maintenance in relation to fire alarms.
84. Subsection (5) imposes an obligation on the persons subject to the subsection (2)(a) duty to review their risk assessment in line with the regulations made under section 57 and to take measures to ensure safety in line with their subsection (2)(b) duty.

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

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

### ***Section 56 – Duties of employees***

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

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

87. These sections provide the Scottish Ministers with the necessary powers to make regulations in connection with the carrying out of risk assessments, including their

review, and to make regulations in connection with fire safety in premises to which Part 3 applies.

88. It is intended that regulations will cover – among other things - duties to record fire safety arrangements in particular circumstances; duties not to employ certain types of employee before assessments are made which take into account factors relevant to, for example, young employees; the need to equip premises with fire-fighting equipment and fire detection equipment; requirements to provide safe routes to emergency exits; the standards required of such emergency exits; the need to establish appropriate safety procedures and the provision of information in connection with risks and fire safety measures in particular premises.

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

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

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

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

## ***Chapter 2 – Enforcement***

### ***Section 61 – Enforcing authorities***

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

### ***Section 62 – Powers of enforcement officers***

93. **Section 62** sets out the powers of enforcement officers in relation to the carrying out of the enforcing authorities’ duties. Subsection (3) provides that enforcement officers exercising powers of entry must produce evidence of their authority to exercise these powers, if required to do so.

94. These powers include a power of entry and powers to take possession of, or samples of, articles found in the premises. Subsection (2)(c) requires persons on the premises to provide the enforcement officer with information, documents or other assistance that the officer reasonably requests. Subsection (6) requires the enforcement officer to undertake any activities mentioned in subsection (2)(d), (e) or (g) in the presence of any person with Chapter 1 duties in relation to the relevant premises, if requested. Subsection (4) obliges an enforcement officer exercising the power under subsection (2) (f) to take samples to leave a notice at the premises. Similarly, subsection (7) requires an enforcement officer exercising the power under subsection (2)(h) to take possession of articles to leave a notice at the relevant premises indicating what has been removed and by whom.
95. Subsection (8) requires enforcement officers, in circumstances where they have exercised their powers of entry, to leave the premises as secure as they found them.

### ***Section 63 – Prohibition notices***

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

### ***Section 64 – Enforcement notices***

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

### ***Section 65 – Alterations notices***

99. Where relevant premises pose a serious risk to relevant persons, or it is likely that they would pose a serious risk to relevant persons in respect of harm caused by fire if changes were made to the premises, the enforcing authority can issue an alterations notice. The effect of the notice is to require the “appropriate person” (that is, the person subject to requirements in respect of the premises in terms of section 53 or 54) to notify the enforcing authority of their intentions prior to making any specified changes. The alterations notice advises recipients that where they intend to make changes of a type falling within subsection (5), and where the change or changes would constitute

a serious risk to relevant persons in respect of harm caused by fire, they must notify the enforcing authority of the changes they intend to make. This enables the enforcing authority to be alerted to any potential problems and allows an intervention before changes are made which significantly increase the risk.

100. The issue of an alterations notice does not preclude the appropriate person from undertaking the changes proposed. However, it requires them to notify the enforcing authority in advance of the change or changes being made. Subsection (7) provides for the withdrawal in writing of an alterations notice by the enforcing authority.

### ***Section 66 – Appeals***

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

### ***Section 67 – Determination of disputes***

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

### ***Chapter 3 – Miscellaneous***

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

### ***Section 68 – Prohibition on charging employees***

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

### ***Section 69 – Civil liability for breach of statutory duty***

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

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

107. **Section 70** ensures that Part I of the 1974 Act, and regulations or orders made under that Part, do not apply in relation to devolved fire safety matters except where the enforcing authority is also an enforcing authority under Part I of the 1974 Act. At present, the

1974 Act and the regulations or orders made under it are capable of making provision for certain matters of general fire safety that are dealt with in the Act. It is therefore appropriate to disapply the 1974 Act in the context of creating a new devolved fire safety code.

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

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

### ***Chapter 4 – Offences***

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

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

#### ***Section 74 – Offence due to fault of other person***

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

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

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

***Chapter 5 – General***

***Section 76 – Service of documents***

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

***Section 77 – Crown application***

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

***Section 78 – Meaning of “relevant premises”***

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