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HEALTH AND SAFETY COMMISSION

Proposed option to address reserved health and safety issues in order to enable the development of new fire safety legislation for Scotland

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Issue

1. The Scottish Executive (SE) is developing new fire safety legislation for Scotland. They are seeking to develop equivalent legislation to that being developed by the Office of the Deputy Prime Minister (ODPM) for England and Wales. There are, however, certain issues which SE is unable to address due to the health and safety reservation in the Scotland Act 1998 (detailed in paragraphs 7 and 8). To do so would be outside the Scottish Parliament's legislative competence. SE is seeking assistance from HSE and other Government Departments to develop a solution. The objective is to achieve a consistent approach to the arrangements for policy handling and enforcement in England and Wales and Scotland, in relation to this issue.

Timing

2. Urgent. SE has requested HSE's response by mid-September. Timing is crucial. A section 30(2) Order under the Scotland Act 1998 (the proposed preferred option) would need to be laid as soon as possible (but only after agreement between HSC, SE and the UK Government). This would ensure that the order could come into force to allow the Scottish Executive to deal with those aspects of fire safety currently reserved by the Scotland Act in the Bill before the Scottish Parliament. The possibility of an intervening Spring general election could mean that the next opportunity for laying an Order would be Autumn 2005, which would be too late for the Scottish Bill to deal with the issues.

Recommendation

3. The Commission is invited to:
 - a) note the issues SE is unable to address (paragraphs 7 and 8) and possible options to resolve them (see annex 1);
 - b) agree the proposed option (see para 13).

Background

Changes to legislation

4. ODPM is at an advanced stage in developing new legislation for England and Wales. It comprises the Fire and Rescue Services Bill and the Regulatory Reform (Fire Safety) Order (RRO). Both are currently going through Parliament and are due to come into force in Spring 2005.
5. SE is developing equivalent legislation for Scotland. It will take the form of the Fire (Scotland) Bill, which was introduced in the Scottish Parliament on the 28 June 2004 and is expected to complete its passage in early 2005, and related secondary legislation. They intend essentially to replicate the England and Wales legislation. The aim is for the Scottish legislation to come into force as soon as possible after the commencement date of the England and Wales legislation.

Reserved issues

6. Fire safety is generally devolved to the Scottish Parliament but health and safety is not – it is reserved to the UK Parliament in Section H2 of Schedule 5 to the Scotland Act (see annex 2). The reservation includes certain matters covering fire safety. As a consequence SE is unable to address in the proposed legislation for Scotland issues which are addressed in the England and Wales RRO.
7. The intention of the reservation in the Scotland Act was to reserve process fire precautions to the Westminster Parliament and also to reserve fire safety in relation to certain categories of industrial premises where process risks are significant so that general fire precautions, such as means of escape, would be dealt with in the context of the process. However, policy has since changed and the RRO for England and Wales extends ODPM's policy reach in relation to the workplaces listed below (the areas which SE cannot currently address):
 - vessels and hovercraft (although some ships are not included in this);
 - premises specified in the Fire Certificate (Special Premises) Regulations;
 - construction sites;and general fire precautions at workplaces concerned with petroleum and petroleum spirit.
8. In addition the RRO for England and Wales confers on HSE, enforcement functions under the RRO, in relation to:
 - licensed nuclear sites;
 - certain Crown premises;
 - ships under construction;
 - certain construction sites.

SE is unable to replicate this position as Scottish Ministers are unable to confer enforcement functions on HSE.

Argument

9. ODPM's RRO for England and Wales recognises the overlap between fire issues and health and safety matters; the concept of general fire precautions and process fire precautions (both are defined in the draft RRO – an extract can be found in annex 3). The RRO extends ODPM's policy reach in relation to general fire precautions to the

workplaces listed in paragraph 7. If SE remains unable to replicate this position then a consistent, GB-wide application of the fire safety regime would **not** be achieved.

10. The Regulatory Reform Committees of the House of Commons and the House of Lords have, in their recent Committee Reports on the RRO, both stated the importance of the proposed fire safety legislative regime being applied consistently across GB. The House of Commons Committee also recommended that the legislative provisions come into effect simultaneously (i.e. Spring 2005).

Identification of possible options to address the reserved issues

11. Discussions have taken place involving policy/legal representatives from HSE, SE, ODPM, DWP, OSAG and the Scotland Office. The Scotland Office (part of the Department for Constitutional Affairs (DCA)) has policy lead on the process aspects of secondary legislation under the Scotland Act. They consider proposals, such as amending reservations, in line with the broad principles of Scotland's devolution settlement. Their Ministers would lead any secondary legislation through its UK Parliamentary process. The Scotland Office gave assistance in considering the ('legal') options identified as possible means of enabling SE to achieve in the Scottish legislation, the equivalent effect as the draft legislation for England and Wales.

The options

12. The options (details can be found in annex 1) put forward and discussed were:

- a) Primary legislation in Westminster
- b) An RRO for Scotland covering reserved issues
- c) A section 30(2) Order under the Scotland Act amending the scope of the health and safety reservation
- d) A section 104 Order to make provision for areas outwith the legislative competence of the Scottish Parliament.

Taking no action to address this issue would not be an option, as it would leave Scotland subject to two different regimes.

The proposed preferred option

13. After detailed consultation one means was clearly identified as the best way of achieving the agreed policy objective; a section 30(2) Order amendment of the Scotland Act combined with a section 104 Order. This option would achieve a consistent approach to the arrangements for policy handling and enforcement across GB and would enable SE to duplicate for Scotland, the effect of provisions in the draft England and Wales RRO.
14. The practical consequence of amending the reservation under a section 30(2) Order is that policy and legislative responsibility in relation to general fire precautions at workplaces listed in paragraph 7 would pass from HSE to SE and the Scottish Parliament. A section 104 Order would achieve the conferral of enforcement functions on HSE at workplaces listed in paragraph 8.
15. The combination of section 30(2) and 104 Orders is the preferred option of SE and is supported by ODPM and the Scotland Office/DCA. The section 30(2) Order is also mentioned in the House of Commons Regulatory Reform Committee's Report as one of the options, which could be used to bring about conformity. From an HSE perspective, the proposed option appears to be the simplest and most effective way to achieve consistency.

Consultation

16. Apart from the OGD's mentioned above the following HSE contacts have also been consulted; Solicitors Office; Open Government Section (dealing with devolution issues); and the Director for Scotland. Policy and operational colleagues with an interest in this issue have been consulted and are in general agreement that we need to have consistency across GB as a whole.

Presentation N/A

Costs and Benefits

17. Enabling SE to include what are currently reserved health and safety matters in the proposed legislation for Scotland would provide a consistent application of the fire safety regime across GB and would assist industry and commerce by ensuring a level playing field.

Financial/Resource Implications for HSE

18. Approximately two weeks work for HSE (policy and solicitors office). A section 30(2) Order would be drafted by the Scottish Parliamentary Counsel (PC) with remit for UK matters and a section 104 Order would be drafted by the Office of the Solicitor to the Scottish Executive. SE would take the lead in drafting instructions to both. Those instructions and the drafts prepared by PC would be jointly agreed with HSE. There will be no other resource implications for HSE in relation to the new arrangements.

Environmental Implications N/A

Other Implications N/A

Action

19. If the Commission agrees the recommendation in paragraph 3, HSE will work with SE and the Scotland Office/DCA in the drafting of instructions for section 30(2) and 104 Orders.

Options for addressing the reserved health and safety issues in the Scotland Act 1998

Option (a) - Primary legislation in Westminster

This would require a legislative 'slot' at Westminster to be obtained and the various departments that the reserved issues fall to, including HSE, would have to coordinate their input. This would be logistically difficult.

More importantly this option would result in Scottish fire legislation being spread over 2 Acts; a Westminster Bill covering only the matters which are the subject of the reservation and the Fire (Scotland) Bill. This would be undesirable given that the overall aim is to simplify fire safety legislation and would considerably delay the reforms for Scotland as the earliest possible slot for a Westminster Bill would be in the next Parliamentary session.

Option (b) - An RRO for Scotland covering reserved issues

In theory the RRO for England and Wales could be extended to Scotland for the relevant reserved premises. However, this would necessitate a further consultation for the RRO and would seriously jeopardise the timetable for the RRO (it is due to return to Parliament in October or November to complete its passage).

An additional RRO just to address the reserved areas for Scotland was not supported due to restrictions on provisions that can be made through an RRO. The Regulatory Reform Act 2001 includes statutory constraints (including that burdens must be removed or reduced) and there are concerns as to whether such an RRO would meet the stringent tests under that Act.

Option (c) - A section 30(2) Order under the Scotland Act 1998 to amend the scope of the health and safety reservation

Subject to approval by both Westminster and the Scottish Parliament, a section 30(2) Order made under the Scotland Act would be used to amend the fire safety reservation in the Scotland Act to reflect the new policy position, which will apply in England and Wales. It would be used only in relation to the areas listed in paragraph 7 of the paper, which would give the Scottish Parliament legislative competence in those areas.

The position of certain categories of workplaces (some ships, mines and offshore installations) would remain unchanged in the reservation and would therefore remain the policy responsibility of HSE.

Option (d) - A section 104 Order to make provision for areas outwith the legislative competence of the Scottish Parliament

A section 104 Order, made under the Scotland Act that is consequential and necessary or expedient following upon provisions of an Act of the Scottish Parliament (Fire (Scotland) Bill), is subject to proceedings at the Westminster Parliament only. It could be used to address all the fire safety issues in the reservation, however, this would be a short-term solution as it would only provide for the extension of the fire safety regime to the specified premises; it would not give the Scottish Executive legislative competence (and, hence policy lead) in these areas and would not therefore reflect the new policy position which will apply in England and Wales.

A section 104 Order would, however, be used to achieve the conferment of enforcement functions on HSE (paragraph 8 of the paper) to achieve the same enforcement effects as the RRO for England and Wales.

Extract from the Scotland Act 1998

H2. Health and safety

<http://193.114.251.8/cgi-bin/sld.cgi?session=0823350111&srch=1&action=I0 - 354>Section H2.

The subject-matter of Part I of the Health and Safety at Work etc. Act 1974

The Health and Safety Commission, the Health and Safety Executive and the Employment Medical Advisory Service

Interpretation

For the purposes of the reservation of the subject-matter of Part I of the Health and Safety at Work etc. Act 1974—

(a) "work" and "at work" in that Part are to be taken to have the meaning they have on the principal appointed day;

(b) that subject-matter includes—

(i) process fire precautions;

(ii) fire precautions in relation to petroleum and petroleum spirit;

(iii) fire safety on construction sites, ships and hovercraft, in mines and on offshore installations; and

(iv) fire safety on any other premises which, on the principal appointed day, are of a description specified in Part I of Schedule 1 to the Fire Certificates (Special Premises) Regulations 1976

but does not include any other aspect of fire safety.

Article 4 of the draft Regulatory Reform (Fire Safety) Order

Meaning of “general fire precautions”

1.—(1) In this Order “general fire precautions” in relation to premises means, subject to paragraph (2)—

- (a) measures to reduce the risk of fire on the premises and the risk of the spread of fire on the premises;
- (b) measures in relation to the means of escape from the premises;
- (c) measures for securing that, at all material times, the means of escape can be safely and effectively used;
- (d) measures in relation to the means for fighting fires on the premises;
- (e) measures in relation to the means for detecting fire on the premises and giving warning in case of fire on the premises; and
- (f) measures in relation to the arrangements for action to be taken in the event of fire on the premises, including—
 - (i) measures relating to the instruction and training of employees; and
 - (ii) measures to mitigate the effects of the fire.

(2) The precautions referred to in paragraph (1) do not include special, technical or organisational measures required to be taken or observed in any workplace in connection with the carrying on of any work process, where those precautions—

- (a) are designed to prevent or reduce the likelihood of fire arising from such a work process or reduce its intensity; and
- (b) are required to be taken or observed to ensure compliance with any requirement of the relevant statutory provisions within the meaning given by section 53(1) of the Health and Safety at Work etc 1974⁽¹⁾.

(3) In paragraph (2) “work process” means all aspects of work involving, or in connection with—

- (a) the use of plant or machinery; or
- (b) the use or storage of any dangerous substance.

⁽¹⁾ 1974 c. 37.