



## Guidance Document

### Collected Perceived Insights Into and Application of

### The Regulatory Reform (Fire Safety) Order 2005 For the Benefit of Enforcing Authorities

Version	Description of alterations
2	Incorporating comments from Jonathan Herrick highlighted in red, appendix 1, including application to flats etc from Mark O' Meara ,appendix 2 – recording of maintenance & training- Andy Jack
3	Updated legislation. Updated text - original text with line through - new text underneath. This version encompasses everyone's comments without any deletions to the master document. Comments from North Wales
4	This version has all of the previous scored through text removed for final editing by Jonathan Herrick.
5	Proofing by Alan McEntire
6	Amended with comments from consultation

## Purpose and Disclaimer

The purpose of this guidance document is to provide enforcing authorities with a standardised approach to the articles contained within the Regulatory Reform (Fire Safety) Order 2005 (the Order), in the interests of promoting consistency of application. It should be consulted together with the Order itself, not instead of it. The guidance is founded upon current belief and legal advice. It must however be accepted that any definitive interpretation of the Order will be made by the courts.

Whilst CPL Publications Limited ('CPL') has co-ordinated the preparation of this guidance document in good faith, nothing in this guidance document constitutes advice or professional advice by CPL, the authors or other contributors. In relation to any particular matter or circumstance advice from a suitably qualified professional should always be sought. CPL, the authors and contributors shall not be liable for any loss or consequential damages whatsoever arising out of or in connection with the content of this guidance document or its use.

## Status of Document

This document is intended to offer an ongoing and progressive view of the Order. As the courts make decisions as to the meaning of the various articles and requirements of the Order, this document will be updated to reflect those decisions. Clear interpretation provided by the courts will be placed in an appendix to this document until a review takes place. In any case a review of this document will take place after three years.

Guidance Note 1<sup>1</sup>, issued by the Department for Communities and Local Government continues to be the statutory guidance to which enforcing authorities must have consideration. The interpretation and guidance given in this document is provided in addition to Guidance Note 1 and not instead of the information provided therein.

Having been produced by the Enforcement Working Group of the Chief Fire Officers Association (2010), this document is intended to provide an additional source of information to enforcing authorities, in pursuit of providing a consistent approach to the meaning of the Order. It aims to provide detailed information, based on experience and practice, to assist all enforcing authorities and their officers to deliver their enforcement responsibilities.

Enforcing authorities should have regard to: the principles of 'As Low As Reasonably Practicable'; the Hampton Principles<sup>2</sup>; the Regulators Compliance Code<sup>3</sup>; the Regulatory Enforcement and Sanctions Act<sup>4</sup>, and The Enforcement Concordat among others, some of which are referred to directly within the pages of this document.

It is hoped that this non-statutory guidance will help to secure uniformity of application of the Order. However, only the courts can give a binding interpretation on a point of law. Enforcing Authorities should bear this in mind when using this guidance and make it clear when giving advice on the application of the articles.

## Review

This document should be subject to a review every three years from the date of formal issue so that it can be updated with new learning together with new case law and best practice. Whenever case law supports this document, a reference will be included in the relevant areas of the document as a part of the review. Where case law contradicts the information in this document, the document should be amended as soon as is practicable, after it becomes clear that the outcome of the hearing will not be subject to appeal / further appeal. Reviews of this document will be undertaken by a person or group of persons nominated by CPL as being the most appropriate to conduct a review.

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<sup>1</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

<sup>2</sup> Reducing Administrative Burdens: Effective Inspection and Enforcement, Philip Hampton, March 2005.

<sup>3</sup> Better Regulation Executive. *Regulators' Compliance Code – Statutory Code of Practice for Regulators*, [online], 2007, London: Department for Business, Enterprise & Regulatory Reform. Available from: <<http://www.berr.gov.uk/files/file45019.pdf>> [Accessed 31<sup>st</sup> August 2010]

<sup>4</sup> Regulatory Enforcement and Sanctions Act 2008, Ch 13

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## **Part 1 General**

### **Article 1 - Citation, commencement and extent**

#### **The Regulatory Reform (Fire Safety) Order 2005**

##### ***Citation, commencement and extent***

*1. —(1) This Order may be cited as the Regulatory Reform (Fire Safety) Order 2005 and shall come into force in accordance with paragraphs (2) and (3).*

*(2) This article and article 52(1)(a) shall come into force on the day after the day on which this Order is made.*

*(3) The remaining provisions of this Order shall come into force on 1st April 2006.*

*(4) This Order extends to England and Wales only.*

### **FSO Guidance Notes**

The Order actually came into force on 1st October 2006<sup>5</sup> to allow for the construction of guidance for responsible persons prior to its implementation. The delay also assisted a combined release of similar laws in other parts of the UK.

### **FSO FAQ**

No questions have been raised in relation to this article at this time.

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<sup>5</sup> See S.I. 2006, no. 484 - the first amendment to the Order

## Article 2 - Interpretation

### The Regulatory Reform (Fire Safety) Order 2005

#### **Interpretation**

##### **2. In this Order—**

*"alterations notice" has the meaning given by article 29;*

*"approved classification and labelling guide" means the Approved Guide to the Classification and Labelling of Dangerous Substances and Dangerous Preparations (5th edition) approved by the Health and Safety Commission on 16th April 2002;*

*"the CHIP Regulations" means the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002;*

*"child" means a person who is not over compulsory school age, construed in accordance with section 8 of the Education Act 1996;*

*"dangerous substance" means—*

*(a) a substance or preparation which meets the criteria in the approved classification and labelling guide for classification as a substance or preparation which is explosive, oxidising, extremely flammable, highly flammable or flammable, whether or not that substance or preparation is classified under the CHIP Regulations;*

*(b) a substance or preparation which because of its physico-chemical or chemical properties and the way it is used or is present in or on premises creates a risk; and*

*(c) any dust, whether in the form of solid particles or fibrous materials or otherwise, which can form an explosive mixture with air or an explosive atmosphere;*

*"domestic premises" means premises occupied as a private dwelling (including any garden, yard, garage, outhouse, or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling);*

*"employee" means a person who is or is treated as an employee for the purposes of the Health and Safety at Work etc. Act 1974 and related expressions are to be construed accordingly;*

*"enforcement notice" has the meaning given by article 30;*

*"enforcing authority" has the meaning given by article 25;*

*"explosive atmosphere" means a mixture, under atmospheric conditions, of air and one or more dangerous substances in the form of gases, vapours, mists or dusts in which, after ignition has occurred, combustion spreads to the entire unburned mixture;*

*"fire and rescue authority" means a fire and rescue authority under the Fire and Rescue Services Act 2004;*

*"fire inspector" means an inspector or assistant inspector appointed under section 28 of the Fire and Rescue Services Act 2004;*

*"general fire precautions" has the meaning given by article 4;*

*"hazard", in relation to a dangerous substance, means the physico-chemical or chemical property of that substance which has the potential to give rise to fire affecting the safety of a person, and references in this Order to "hazardous" are to be construed accordingly;*

*"inspector" means an inspector appointed under article 26 or a fire inspector;*

*"licensing authority" has the meaning given by article 42(3);*

*"normal ship-board activities" include the repair of a ship, save repair when carried out in dry dock;*

*"owner" means the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for another person, or who would so receive the rackrent if the premises were let at a rackrent;*

*"personal protective equipment" means all equipment which is intended to be worn or held by a person in or on premises and which protects that person against one or more risks to his safety, and any addition or accessory designed to meet that objective;*

*"place of safety" in relation to premises, means a safe area beyond the premises.*

*"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;*

*"preparation" means a mixture or solution of two or more substances;*

*"preventive and protective measures" means the measures which have been identified by the responsible person in consequence of a risk assessment as the general fire precautions he needs to take to comply with the requirements and prohibitions imposed on him by or under this Order;*

*"prohibition notice" has the meaning given by article 31;*

*"public road" means a highway maintainable at public expense within the meaning of section 329 of the Highways Act 1980;*

*"rackrent" in relation to premises, means a rent that is not less than two-thirds of the rent at which the property might reasonably be expected to be let from year to year, free from all usual tenant's rates and taxes, and deducting from it the probable average cost of the repairs, insurance and other expenses (if any) necessary to maintain the property in a state to command such rent;*

*"the relevant local authority", in relation to premises, means—*

*(a) if the premises are in Greater London but are not in the City of London, the London Borough in the area of which the premises are situated;*

*(b) if the premises are in the City of London, the Common Council of the City of London;*

*(c) if the premises are in England in a metropolitan county, the district council in the area of which the premises are situated;*

*(d) if the premises are in England but are not in Greater London or a metropolitan county—*

*(i) the county council in the area of which the premises are situated; or*

*(ii) if there is no county council in the area of which the premises are situated, the district council in that area;*

*(e) if the premises are in Wales, the county council or county borough council in the area of which the premises are situated;*

*"relevant persons" means—*

*(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), other than in relation to a function under section 7(2)(d), 8(2)(d) or 9(3)(d) of that Act;*

*"responsible person" has the meaning given by article 3;*

*"risk" means the risk to the safety of persons from fire;*

*"risk assessment" means the assessment required by article 9(1);*

*"safety" means the safety of persons in respect of harm caused by fire; and "safe" shall be interpreted accordingly;*

*"safety data sheet" means a safety data sheet within the meaning of regulation 5 of the CHIP Regulations;*

*"ship" includes every description of vessel used in navigation;*

*"special, technical and organisational measures" include—*

*(a) technical means of supervision;*

*(b) connecting devices;*

*(c) control and protection systems;*

*(d) engineering controls and solutions;*

*(e) equipment;*

*(f) materials;*

*(g) protective systems; and*

*(h) warning and other communication systems;*

*"substance" means any natural or artificial substance whether in solid or liquid form or in the form of a gas or vapour;*

*"visiting force" means any such body, contingent, or detachment of the forces of any country as is a visiting force for the purposes of any of the provisions of the Visiting Forces Act 1952;*

*"workplace" means any premises or parts of premises, not being domestic premises, used for the purposes of an employer's undertaking and which are made available to an employee of the employer as a place of work and includes—*

*(a) any place within the premises to which such employee has access while at work; and*

*(b) any room, lobby, corridor, staircase, road, or other place—*

*(i) used as a means of access to or egress from that place of work; or*

*(ii) where facilities are provided for use in connection with that place of work,*

*other than a public road;*

*"young person" means any person who has not attained the age of 18.*

## **FSO Guidance Notes**

**'Adequate'** – Sufficient for the purpose stated.

**'Appropriate'** – this term, when taken together with "Where necessary (whether due to the features of the premises, the activity carried on there, any hazard present or any other relevant circumstances) in order to safeguard the safety of relevant persons ..." introduces the concept of scale and complexity to risk assessment under the Order. For example, a small premises (compliant with current UK building codes) is unlikely to require further consideration; whereas a large/complex building containing fire engineered solutions, will fall subject to greater scrutiny within the meaning of these articles due to the 'features of the premises and other relevant circumstances'. Therefore what is appropriate for one premises may not be appropriate for the next and as such the risk assessment methodology is supported.

**'Child'** – a person who is not older than the compulsory school leaving age (up to and including the last Friday in June in the academic year when the child attains the age of 16 years).

**'CHIP regulations'** – the most up to date version of these regulations is The Chemicals (Hazard Information and Packaging for Supply) (Amendment) Regulations 2008, which came into force on 1 October 2008. The regulations implement European Commission Directive 2006/8/EC, commonly known as the second Adaptation to Technical Progress of the Dangerous Preparations Directive (the 2nd ATP), bringing it into domestic legislation.

**'Competent Person'** – the Order clearly states that there are two means by which competent persons might be identified. He<sup>6</sup> must have both 'sufficient training *and* experience' or alternatively he must possess 'knowledge *and* other qualities', which will in both cases, enable him to properly carry out the task at hand. The nature of 'competent person' is clearly associated with 'competence'. The qualities present in the person must be akin to those expected of any person in that profession, but will by definition be limited by training, experience, knowledge or other qualities; in accordance with the complexity of the task at hand. It follows that as a task increases in complexity, so the expected ability of the competent person will also increase.

<sup>6</sup> Subject to the Interpretation Act 1978, Chapter 30, Section 6(a), in this document words importing the masculine gender include the feminine

Displaying an awareness of the requirements does not inherently meet the requirements of the role. "... when relevant competencies are absent, it shows in the end result and this, as the recent case [Lockwood<sup>7</sup>] shows, is proof enough for the courts ... The guidance associated with the [Management of Health and Safety at Work Regulations 1999] makes it clear that the level of knowledge and experience involved must be tied to the complexity of the problems to be tackled."<sup>8</sup> Whatever the level of ability, the competent person must be able to identify a problem when he sees it and must be suitably able to assess the relative importance of that defect in relation to the safety systems in place to satisfy the requirements of law and the premises. This person should be sufficiently familiar with relevant codes and standards (through experiential or formal learning, underpinning knowledge and an ability, when called upon to answer relevant questions) to be able to deal with the matter at hand e.g. the installation or maintenance of a fire alarm system.

**'Domestic Premises'** – this matter is intended to refer to the stereotypical 'Englishman's home is his castle' arrangement.

With regard to domestic premises, these are 'premises occupied as a private dwelling (including any garden, yard, garage, outhouse, or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling). The wording in parentheses is of particular importance. By excluding from the definition parts of premises that are used in common by the occupants of one dwelling, common parts of blocks of flats and similar premises, such as houses in multiple occupation, are brought in to the scope of the Order. Such common parts fall within the scope of the Order and as such all relevant articles apply to those parts.

It should also be noted that, by virtue of article 31(10), a prohibition notice may be served on e.g. a house in multiple occupation and that the scope of the notice is not limited purely to the common parts of the premises. Similarly, articles 17(2) & (3); and 38(2) & (3) may require action by the responsible person and therefore provide the responsible person with supposed rights of access<sup>9</sup>.

The Order does not apply to single private dwellings used entirely as the main residence of, and which is occupied by, a single person or single household; i.e. none of the articles apply.

Matters relating to domestic premises can become complicated with the variation in premises used as a dwelling and the nature and inter-relationship between occupants of such dwellings. It may be necessary to consult legal advice for matters relating to 'domestic premises' because the interpretation of this area of law is complex. Further information relating to the interpretation of Domestic Premises is given at article 31 to this document and in Appendix 1 to this document. Article 31(10) may apply to flats which form part of premises which comprise commercial as well as domestic uses but careful consideration should be given to duties imposed on each party before enforcement action is taken (see article 31 of this document for further information).

For the purposes of clarity, the front doors to flats are considered to be a common protective measure, typically under the control of the occupier as an article 5(4) duty holder, because an early failure of the door can pose a serious risk to the safety of other relevant persons on the premises (see Appendix 1 Implications of the Order as it applies to Flats in this document for further information).

**'Employee'** – "means an individual who works under a contract of employment or apprenticeship (whether express or implied and, if express, whether oral or in writing), and related expressions are to be construed accordingly; see also sections 11(3)(a), 12(2) and 13(3) (which apply for the purposes of

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<sup>7</sup> HSE, *Benchmarking the competent person in manufacturing and engineering sectors*, Research Report 121, [online], 2003, Suffolk, HSE, available from: <<http://www.hse.gov.uk/research/rrpdf/rr121.pdf>> [accessed 11 November 2010], p7, HSE v Lockwood (2001)

<sup>8</sup> HSE, *Benchmarking the competent person in manufacturing and engineering sectors*, Research Report 121, [online], 2003, Suffolk, HSE, available from: <<http://www.hse.gov.uk/research/rrpdf/rr121.pdf>> [accessed 23 January 2009], paragraph 3.3.2

<sup>9</sup> House of Commons Regulatory Reform Committee, *Draft Regulatory Reform (Fire Safety) Order 2005 Ninth Report of Session 2004-05* Report, together with formal minutes and written evidence, HC 495, [online], 2005, London, The Stationery Office Limited, Available from: <<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdereg/495/495.pdf>> [Accessed 21<sup>st</sup> February 2008], para.31

section 2);”<sup>10</sup> [An express contract is one in which the terms are stated in words. An implied contract is one in which the existence and terms are manifested by conduct.]

A judgement may have to be made about ... “the status of volunteers, as in the case of many charitable organisations who use them to operate their shops and raise funds. Where such persons are involved a reasoned judgement should be made about whether there is a form of employment contract (written, oral or implied). It should be borne in mind that payment is not necessary for a contract to be valid. It is usual for there to be a form of recompense for a service provided but the form of recompense can vary significantly. Some volunteers may therefore need to be considered as employees.”<sup>11</sup> In cases of doubt legal advice should be sought.

Where persons are termed an employee, they will be subject to all the relevant articles as they apply to employees.

**‘House occupied as a single private dwelling’** – used entirely as the main residence of, and which is occupied by, a single person or single household; the Order does not apply i.e. none of the articles apply. More information on this subject can be found in Appendix 1.

**‘Owner’** – legal advice may be required to identify the owner. Furthermore note should be taken of the information provided relating to the term ‘owner’ at article 3.

“Inclusion of “the owner” in the definition means that empty buildings are brought within the scope of the Order; for instance a new building which has received Building Regulations approval, but has not yet been occupied. They would now be under a duty to carry out a risk assessment [where relevant persons may be at risk], but this would largely involve ensuring that the building was secure [from fire]. The owner is the person who receives the rack-rent of the premises in question, or the person who would receive the rack-rent if the premises were let at a rack-rent.”<sup>12</sup> For rack-rent read ‘an amount not less than two-thirds of the market rent at which the property could be let once all deductions relating to repairs, taxes, rates, other expenses which are necessary to maintain the property in good order’.

**‘Place of safety’** – safe area beyond the premises where relevant persons are no longer at risk from fire. “ODPM would draw to the Committee’s attention that under the Order as drafted, it is necessary for the responsible person to consider the risk to persons in and around any place for which they have responsibility. Consequently provision of means of escape from the premises to a place of safety could not result in the means of escape ending in an area in the vicinity of the premises where relevant persons would still be at risk in case of fire.”<sup>13</sup>

It should be noted that refuges and protected control rooms in COMAH sites may be seen as a place of safety in accordance with those regulations but where danger from fire may still exist, the Order suggests that this may not be the case.

**‘Preventative and protective measures’** – are interchangeable with the term ‘general fire precautions’.

**‘Relevant persons’** – the true meaning of ‘relevant persons’ is difficult to determine precisely and the potential scope is such that persons affected by a smoke plume may be included or the meaning might

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<sup>10</sup> The Corporate Manslaughter and Corporate Homicide Act 2007, Section 25 - Interpretation

<sup>11</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, 2007, paragraph 101

<sup>12</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002*, London, The Office of the Deputy Prime Minister 2002, p19, 4.12

<sup>13</sup> House of Commons Regulatory Reform Committee, *Proposal for the Regulatory Reform (Fire Safety) Order 2004, Eleventh Report of Session 2003-04, Report, together with formal minutes, written and oral evidence, HC 684*, [online], 2004, London, House of Commons, Available from: <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdereg/684/68402.htm>> [Accessed 6<sup>th</sup> January 2010], EV33

be limited to being affected by flame and / or falling debris. The duty imposed on the responsible person in relation to relevant persons (lawfully on the premises or in the vicinity of them) is to take general fire precautions to ensure that the premises (or 'place') is safe. This notion includes the responsible person and employees as well as those persons lawfully on the premises. It is clearly stated at article 5(5) that the articles with which the responsible person must comply require only the "taking or observance of general fire precautions in respect of relevant persons." i.e. measures associated only with the premises but intended to protect persons somewhere beyond the premises e.g. where windows are expected / designed to fail (or otherwise fall away from a building), consideration must surely be given to the final destination of the resulting projectile. At this point the enforcing authority could consider the concept of relevant persons being somewhere beyond the premises. For existing premises, the duty-holder should consider the impact of fire on all those lawfully on the premises and those in the 'immediate vicinity' of the premises. It is probable that the weight of the duty owed to relevant persons will diminish with geographical proximity of the relevant person to the premises.

Previous rulings and judicial precedent imply that relevant persons should be afforded protection from harm arising on premises and that the duty is owed by the responsible person. Case law seems to support that this duty is owed to persons affected by fire beyond premises, if they suffer harm by it.

For a case claiming for damage or loss caused by smoke, the arguments are less clear but persuasive precedence<sup>14</sup> suggests that these cases too may hold the responsible person responsible for the welfare of persons beyond the premises. How far beyond the premises this welfare should extend is likely to depend on the circumstances of the case. Further information relating to the interpretation of relevant persons is given at Appendix 4 to this document.

Fire-fighters engaged in activities under Sections 7, 8 and 9 of the Fire and Rescue Services Act 2004 are not relevant persons.

**'Risk'** – contrary to the guidance issued for responsible persons, this guidance borrows its interpretation of 'Risk' from the Health and Safety Executive; "the risk is the chance, high or low, that somebody could be harmed ... together with an indication of how serious the harm could be."<sup>15</sup> Therefore 'risk' is a combination of the likelihood (of fire) and the consequences (of fire) being realised.

The term 'risk' may be read as a strict definition referring only to fire i.e. combustion or spread of flame. It excludes the effects of fire (like smoke, radiant heat, buildings left structurally unsafe following a fire etc) when those effects escape the premises. The risk from fire and from the effects of fire is appropriate while those effects are in the premises because persons cannot be safe when threatened by fire or any harm derived from it.

**'So Far As Is Reasonably Practicable' and 'As Low As Reasonably Practicable'** – The assessment-based approach of the Order and its primary aim to reduce risk and then to protect relevant persons from any remaining risk introduces the principles of 'as low as reasonably practicable' (ALARP) and 'so far as is reasonably practicable' (SFAIRP). These terms are well known within Health and Safety law and are to be adopted within this guide. The principle of ALARP makes the following suggestions:

*"... risk reduction action is to be taken using established relevant good practice as a baseline. Where relevant good practice is a good fit to the circumstances, then decisions on risk reduction action are straightforward.*

*In circumstances where established good practice does not exist, is out of date or, the situation is complex and the relevance of individual good practices is questionable ... the decision making process on risk reduction action is less straightforward."*<sup>16</sup>

<sup>14</sup> Sterling-Winthrop Group Ltd v Allan, 1987 S.L.T. 652

<sup>15</sup> Five Steps to Risk Assessment [online], London, Health and Safety Executive Available from: <<http://www.hse.gov.uk/risk/fivesteps.htm>> [accessed 6<sup>th</sup> January 2010].

<sup>16</sup> Health and Safety Executive. *HSE principles for Cost Benefit Analysis (CBA) in support of ALARP decisions*, [online], 2005b, London: Health & Safety Executive, Available from: <<http://www.info4education.com/tempimg/1440606-OHSIS2051900766225.pdf>> [Accessed 24<sup>th</sup> July 2008] p.1

It can be seen how this principle relates to the wording of the Order, in that more will be necessary where the risk reduction measures appropriate to the features of the premises are not straight forward. Under the ALARP principle, cost benefit analysis and gross disproportion also play their part in determining whether further risk reduction should be carried out. In most cases the required measure should be carried out unless the costs in time, effort or money are grossly disproportionate to any benefit gained.

*“The definition set out by the Court of Appeal (in its judgment in Edwards v. National Coal Board, [1949] 1 All ER 743) is:*

*“‘Reasonably practicable’ is a narrower term than ‘physically possible’ ... a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.”<sup>17</sup>*

The expectation is that the preventive / protective measure will be taken. The onus is on the duty holder to show that in taking the measure, the cost would have been grossly disproportionate to the benefits that would have been achieved. In the view of the Health and Safety Executive, ALARP and SFAIRP are interchangeable concepts<sup>18</sup>, each being closely related to the other and the same stance is to be taken by this guidance.

**‘Suitable and Sufficient’** – Enforcing authorities should note that the requirement for suitability and sufficiency is one and the same requirement as that in health and safety law. Detailed advice has been produced by the Health and Safety Commission as part of the *Approved Code of Practice and Guidance* to accompany the *Management of Health and Safety at Work Regulations 1999* (ISBN 0-7176-2488-9). That guidance is equally applicable to the suitability and sufficiency of risk assessments under the Order<sup>19</sup> and this approach has been adopted in this document.

The above ACOP also describes the term suitable and sufficient risk assessment as meaning one that:

- Identifies significant risks arising out of [the undertaking];
- Enables the employer to identify and prioritise the measures that need to be taken to comply with [the requirements of the Order];
- Is appropriate to the nature of the [undertaking]; and
- Remains valid for a reasonable period of time.

**‘Workplace’** – note should be taken of the impact of the term ‘made available’ on the meaning given. The mere presence of a room or part of a building does not mean that it is automatically classed as a workplace. Equally this term might be used to broaden the scope of the Order because the room or part of the building needs only to be ‘made available’ to employees for it to be classed as a workplace. Note should also be taken of the fact that ‘workplace’ also includes roads or other places used as a means of access to or egress from the premises.

**‘Where necessary’** – “... the caveat “where necessary” may allow the responsible person to decide that no fire-fighting equipment is necessary in his workplace ...”<sup>20</sup> “Both the FBU and CPL considered that the level of discretion afforded by the inclusion of the words “where necessary” in article 14 was

<sup>17</sup> Health and Safety Executive, *op. cit.*, 2005a, p.2

<sup>18</sup> *Ibid*

<sup>19</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, 2007

<sup>20</sup> House of Commons Regulatory Reform Committee, *Proposal for the Regulatory Reform (Fire Safety) Order 2004, Eleventh Report of Session 2003-04, Report, together with formal minutes, written and oral evidence, HC 684*, [online], 2004, London, House of Commons, Available from: <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdereg/684/68402.htm>> [Accessed 6<sup>th</sup> January 2010], 17

unacceptable.”<sup>21</sup> The determination is that safety systems should be provided where they might be needed to protect people and that (conversely) safety systems are not necessary where their presence will not protect people.<sup>22</sup> By way of example, if a given hazard can be realised then it becomes necessary to deal with that eventuality. Requirements that contain this wording should link closely with the principles of ALARP and SFAIRP insofar that where more can be done to provide safety, then more should be done. It is for the responsible person to prove that to do more would be grossly disproportionate to the benefits of doing more. This document takes the stance that in the vast majority of premises it will be necessary, for example; for them to provide adequate fire-fighting equipment and to nominate competent persons to carry out fire-fighting measures, therefore in cases where responsible persons deem it un-necessary to provide such measures, it will be for the responsible person to present their case.

**‘Young Person’** – although a young person has not yet reached the age of 18, it should be noted that this definition also incorporates persons who are defined as ‘child’. Therefore article 9(4) applies to any person under the age of 18 whereas article 19(2) applies to persons under the age of 16.

## FSO FAQ

### *Owner -*

**Q. If a managing agent is collecting rent but passing it on to the legal owner, can he still be classed as owner under this?**

A. In many cases the owner responsible person may not directly collect the rack-rent. Collection of the rent (and usually day-to-day responsibility for upkeep of the premises) may have been passed to an appointed agent. The agent will pass the rent (less their fees and costs) to the owner. Depending on the nature of the relationship between the owner and managing agent, either party could be held responsible for failures under the Order. The owner / managing agent is not held by the same strict liability as the employer responsible person (see article 3 of this document) and the responsibility is likely to rest with the party having the authority to rectify the failures.

In other cases the owner may have the rent paid into a trust (used for the maintenance of the premises or similar functions). In these circumstances the rent is paid to the trustees. For cases in which the responsible person is the owner of premises, this can be read as a reference to the trustees. In this way the trustees may be treated as a Responsible Person(s).

### *Preventative and protective measures -*

**Q. Are preventative and protective measures just the same as the general fire precautions?**

A. Yes, they are different ways of expressing the same thing - but noting that they are general fire precautions that have been identified by the responsible person’s fire risk assessment as being necessary.

### *Relevant Persons -*

**Q. What is meant by immediate vicinity?**

A. There is no fixed definition and the matter is subject to a subjective professional judgement according to the circumstances of the case. In making a professional judgement it will be necessary to consider the effect a fire may have and to consider all those who may be directly affected - that will be different if you are considering the local post office or considering the

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<sup>21</sup> Ibid, p18

<sup>22</sup> Ibid

Buncefield petrol depot or other premises where significant quantities of dangerous substances are present and may be involved in a fire. Most fire-related case law<sup>23</sup> deals expressly with the spread of fire (flaming combustion) to determine liability. More recently Health and Safety law has found liability in a case of noxious fumes that overcame passers-by due to incorrect mixing of chemical products, albeit that those passers-by were on a different side of the wall to the mixing process. This might be influential on future fire safety cases, but this is something for the Courts to determine. Where the Buncefield fire caused the necessary evacuation of some 2,000 home owners (a question remains as to whether these people would be considered as 'relevant' under the Order) there is likely to be an element of foresight and 'injury' sustained, balanced against a 'nuisance' and as such it is possible that the Courts would not find that the 2,000 home owners were 'relevant persons'. However, for premises built with an inherent (fire engineered-based) reliance on windows failing in fire to ensure that fire does not spread to common areas of the premises; the persons at street level having the potential to be struck by the resultant projectile may be determined by the Courts to be relevant due to the designed nature of the foreseeable injury.

**Q. Why are operational fire-fighters exempted but not other emergency services carrying out their function?**

- A. It was thought that it would be an excessive burden on business etc. to seek to make the responsible person responsible for the safety of fire-fighters when fighting a fire. Once the fire and rescue service is on the scene, the decisions about what fire-fighters do rests with the incident commander; and the responsible person for the premises cannot exercise control over that. It must be noted that fire and rescue personnel are relevant persons when not fighting a fire. Inspecting officers auditing premises under the Order and operational personnel carrying out information gathering under section 7(2)(d), 8(2)(d) or 9(3)(d) of the Fire and Rescue Services Act 2004 are included by the definition and are relevant persons.

*Special Technical etc-*

**Q. In DSEAR this was known as work process why was this changed?**

- A. Process fire risk was not a defined term and over time the demarcation between process and general fire precautions had become very blurred. The definitions of general fire precautions and special and technical fire precautions contained in the Order were designed to place policy agreements between HSE and CLG on a statutory footing and so redraw the line as far as possible.

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<sup>23</sup> For example *Balfour v Barty King*, [1957] 1 All ER 156, and [1957] 1 QB 496 and *Op Cit H&N Emanuel Ltd v Greater London Council*

## Article 3 – Meaning of “responsible person”

### The Regulatory Reform (Fire Safety) Order 2005

#### **Meaning of “responsible person”**

3. In this Order “responsible person” means—

(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.

### FSO Guidance Notes

The responsible person concept is established, as a hierarchy, at article 3. The hierarchy consists of three elements with the first being the employer (where there is one), being given this responsibility to bring the Order into compliance with European Directives.<sup>24</sup> The other responsible persons (in descending order) are, where there is no employer, the person in control of the premises (in connection with a trade business or other undertaking whether for profit or not) and finally the owner. The inclusion of the second responsible person on the hierarchy is to increase the scope of fire law to include many more premises than had previously been included<sup>25</sup>, such as voluntary sectors, places of religious worship, self-employed persons etc.

The employer is held by strict liability under the Order and will always be held to be the “responsible person” where the workplace is to any extent under his control. It is difficult to envisage an example whereby an employer does not have some form of control over the workplace. The very fact that a person decides to own a business or organisation which employs someone gives them a degree of control and therefore responsibility. Even if the employer has never visited the site and has put in place managers and administrators he is still the responsible person because he has, to some extent, control over the people that work on the premises.

The person who has control – the inclusion of this stage in the hierarchy makes the person who has control of the premises for whatever reason the responsible person where the premises is not a workplace i.e. there is no employer. The inclusion of such persons in the hierarchy was to encompass premises that have no employer such as village halls, scout huts, charity shops (where there is no employer / employee relationship) and the like.

The owner – a key reason for adding “owner” at the bottom of the hierarchy is to cover such places as unoccupied premises<sup>26</sup> and to ensure that in every conceivable case there will always be a “responsible person” upon whom a notice can be served and has a legal responsibility to provide a duty of care to relevant persons.

When issuing notices, further information is provided at article 48 of this document.

<sup>24</sup> House of Lords Delegated Powers and Regulatory Reform Committee, *27<sup>th</sup> Report of Session 2003-04 Proposal for the draft Regulatory Reform (Fire Safety) Order 2004, HL 153*, [online], 2004, London, The Stationery Office Limited, Available from:

<<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/153/153.pdf>> [Accessed 21<sup>st</sup> February 2008], para.6

<sup>25</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002*, London, The Office of the Deputy Prime Minister 2002, p.19, para.4.16

<sup>26</sup> GREAT BRITAIN, *op. cit.*, 2002, p.19

## FSO FAQ

**Q. In relation to a workplace who is the responsible person if the employer does not have control?**

A. It is hard to envisage a situation where the employer of persons who work in premises does not have control of the workplace “to any extent”. However if such circumstances were found the next in line would be the person who has control of the premises as occupier or otherwise and; failing that, the owner.

**Q. In the case of a limited company, who is the responsible person?**

A. The responsible person will typically be the employer as for other employer / employee situations, but notices may be addressed to the ‘Company Secretary’ if a named individual cannot be found.

## Article 4 – Meaning of “general fire precautions”

### The Regulatory Reform (Fire Safety) Order 2005

#### **Meaning of "general fire precautions"**

4. —(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 measures —*

*(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.*

(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.*

### FSO Guidance Notes

The general fire precautions are the ‘backbone’ of the Order, informing the responsible person of those measures that he will need to take to comply with its requirements. Some elements of the general fire precautions are dealt with in more detail in later articles.

However it is worthy of note that the requirements at article 4(1)(a) centre about avoiding fire and passive measures taken to avoid its related spread. Specifically relating to the requirement to mitigate the effects of fire at Article 4(1)(f)(ii); the Order is intended to offer reasonable protection to relevant persons. Given that, in most circumstances, the only way to achieve this would be to prevent fire

occurring in the first place or to prevent it spreading, it is felt that provisions implementing such requirements would inevitably reduce the impact of fire on the environment, reduce property damage and reduce risks to fire fighters<sup>27</sup>.

The requirement to mitigate the effects of fire includes active intervention within its meaning. E.g. this implies that the presence of passive fire protection measures alone, does not wholly satisfy the requirement. The provision and use of first-aid fire-fighting equipment is expected to be seen as more positive 'action' to satisfy the requirements of this article. During post-fire inspections / audits, where unchecked fire spread has occurred in premises; the measures taken by the responsible person to comply with the requirement to mitigate should be considered.

Some clarification of paragraphs (2) and (3) is given below:

General Fire Precautions do not include special, technical or organisational measures, i.e.:

- Technical means of supervision;
- Connecting devices;
- Control and protection systems;
- Engineering controls and solutions;
- Equipment;
- Materials;
- Protective systems; and
- Warning and other communication systems,

which are required to be taken or observed in a workplace in relation to the use of plant or machinery; or the use or storage of dangerous substances.

The use or storage of dangerous substances are expressly removed from the definition of general fire precautions (as given at article 4(2) by virtue of the meaning given to 'work process' at article 4(3)), where measures stated at 4(2)(a) and 4(2)(b) apply.

To consider this from an alternative perspective, general fire precautions will include measures taken in relation to dangerous substances where:

1. The premises are not a workplace (and therefore not regulated by the HSE or subject to the Health and Safety at Work etc Act 1974)
2. The dangerous substance is not being 'used' or 'stored';
3. Special, technical or organisational measures<sup>28</sup> are required to be taken or observed in the workplace, if those measures have not been
  - i) Designed to prevent or reduce the likelihood of fire arising from the work process or reduce its intensity; or
  - ii) Required to be taken or observed to ensure compliance with the requirements of the 'relevant statutory provisions'<sup>29</sup> within the meaning given by the Health and Safety at Work etc Act 1974

Note should be taken of the fact that for dangerous substances to fall outside the scope of general fire precautions both 4(2)(a) and 4(2)(b) must apply, but for general fire precautions to include measures relating to dangerous substances within their scope, either 4(2)(a) or 4(2)(b) do not apply.

In each case for the exclusions in the bulleted list (above), their purpose must be designed to prevent or reduce the incidence of fire and / or the intensity of fire; or are required to be taken by other Health and Safety legislation.

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<sup>27</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002*, London, The Office of the Deputy Prime Minister 2002

<sup>28</sup> See article 2 for interpretation of these measures

<sup>29</sup> "the relevant statutory provisions' means—

- a) The provisions of Part 1 of the Health and Safety at Work Act 1974 and any provision of the Health and Safety Regulations and agricultural Health and Safety Regulations; and
- b) The existing statutory provisions" – the Health and Safety at Work etc. Act 1974 (c. 37), Part I

By way of example, consider an industrial fish fryer with an inherent cut-out through an automatic thermostat. This would qualify as a protective system to the fryer. The thermostat is provided under other Health and Safety legislation and as such does not constitute a general fire precaution. Where failures occur within the inherent safety device, remedial action falls under the jurisdiction of (typically) the Health and Safety Executive.

The provision for example of appropriate fire fighting equipment to deal with a fire in the fryer will constitute a general fire precaution.

The requirements and prohibitions imposed by articles 12 and 16 that relate directly to dangerous substances may be viewed as requirements of the Order which fall outside the scope of 'general fire precautions'

A further example is a spray booth. The spraying equipment has in place a dead-mans handle. This would be a control and protection system provided by virtue of the fact that it is connected to a piece of machinery for the purpose of reducing the incidence of fire (thus falling under the description of 'special, technical or organisational measures'), and this would not therefore be a general fire precaution. By contrast, the imposition of very short travel distances in the spray booth is a general fire precaution.

Where doubt occurs as to the impact of the listed exclusions on general fire precautions or the presence of the dangerous substance on general fire precaution then, where possible, officers should seek to carry out a joint inspection / audit with the HSE. If a joint inspection is to be carried out, it must be borne in mind that the Health and Safety Executive may charge for their inspection services.

## FSO FAQ

### **Q. Are paragraphs (2) & (3) solely for the HSE?**

A. Article 4(2) and (3) – with the definition of special, technical or organisational measures in article 2 sets out the matters which are not considered to be general fire precautions under article 4(1). These matters are enforced by HSE under health and safety legislation.

### **Q. Is there a difference between means for detecting fire and giving warning and fire detectors and alarms detailed in Article 13 (1)(a)?**

A. Yes. The description of “measures in relation to means for detecting fire on the premises and giving warning in case of fire on the premises” as part of the definition of general fire precautions under article 4 means that all premises must have appropriate detection and warning arrangements (which could vary from detection by staff and a shout of “fire” to a full AFD system). This applies even if it is not necessary to have detectors and alarms (article 13) – i.e. an electrical fire detection and warning system. The inclusion in article 13 is mostly to demonstrate to the European Commission that the relevant element of a European Directive has been properly implemented in England and Wales.

## Article 5 – Duties under this Order

### The Regulatory Reform (Fire Safety) Order 2005

#### **Duties under this Order**

5. —(1) *Where the premises are a workplace, the responsible person must ensure that any duty imposed by articles 8 to 22 or by regulations made under article 24 is complied with in respect of those premises.*

(2) *Where the premises are not a workplace, the responsible person must ensure that any duty imposed by articles 8 to 22 or by regulations made under article 24 is complied with in respect of those premises, so far as the requirements relate to matters within his control.*

(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.*

(5) *Articles 8 to 22 and any regulations made under article 24 only require the taking or observance of general fire precautions in respect of relevant persons.*

#### **FSO Guidance Notes**

This article details the requirements imposed on various persons and states what those duties are. It will be seen that the duties predominantly consist of complying with articles 8-22 but with subtle differences.

For workplaces i.e. there will be an employer and employees; the employer is responsible<sup>30</sup> for compliance in the premises.

For premises that are not workplaces i.e. no employer / employee relationship; the same articles must be complied with by the person having control<sup>31</sup>, but importantly this responsible person is not expected to necessarily provide compliance throughout the premises – only so far as the requirements relate to matters within his control. Therefore, where this responsible person has full control of the premises, he can expect to exercise that control by complying with the requirements; but where his control is limited, so is the level of compliance he is expected to achieve. Duty holders that have no employer / employee relationship may include for example: self-employed, those involved in charity work, community groups, risk assessors etc.

For those persons mentioned in sub-paragraphs (1) and (2) the duties imposed fall directly on responsible persons as stated at article 3.

<sup>30</sup> See article 3—responsible persons

<sup>31</sup> Ibid

For the sub-paragraphs (3) and (4), this article extends the concept of 'the responsible person' to persons that fall beyond the scope established at article 3. These persons may be seen as 'quasi-responsible persons'. Requirements imposed on these quasi-responsible persons are made in addition to (not instead of) those imposed on defined responsible persons.

The 'quasi-responsible person' incorporates those:

- having control over premises<sup>32</sup>; and
- with contracts<sup>33</sup> or tenancy agreements<sup>34</sup> in relation to the safety of premises, maintenance or repair of anything in or on the premises;

but in both cases, the responsibility extends only so far as the person has control or so far as his obligation extends.

Article 5(4) has been tested in the case of *GMFRA v Morris* (fire alarm engineer), in which the engineer was found guilty of offences under the Order in connection with a lack of maintenance of the fire alarm system in a care home. Trafford Magistrates Court heard the case, and the sentence was passed at Manchester Crown Court. This case indicates the binding nature of the duties imposed on all duty holders established at article 5 and that enforcing authorities should enforce the Order on the most appropriate duty holder available to them.

Article 5(5) makes the statement that the body of the requirements of the Order (articles 8-22 and article 24) only require general fire precautions (see article 4) to be taken. In addition these precautions need only be taken in relation to relevant persons i.e. life safety.

## FSO FAQ

### **Q. Can you explain the use of the word tenancy and does this have impact on tenants in domestic dwellings in say a HMO?**

A. The word has its usual dictionary definition and essentially means the right to occupy land or buildings as provided by the terms of a lease or other agreement. Because the Order does not apply to domestic premises (other than to the extent provided by article 31(10) and to a limited degree by articles 17 and 38) the effect for tenants of domestic premises in a HMO would be limited to the extent to which the tenant can exercise control over parts of the premises to which the Order does apply e.g. the common parts and potentially doors from flats that protect the means of escape.

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<sup>32</sup> 'Control' may extend, for example, to: managers who have responsibility within premises, but who are not the employer of those persons under his control; managing agents of premises; or simply those with the day-to-day occupation of the premises or activities carried on there but not the defined responsible person; etc.

<sup>33</sup> These persons are included to hold installers of safety systems to account where they hold the expertise but have failed in the provision of that safety system to the requisite standard e.g. fire alarm installers may be held responsible for those fire safety matters over which he has exercised control or for which he has an obligation.

<sup>34</sup> The nature of the tenancy agreement will require examination. Where a tenancy agreement incorporates reference to the safety of premises, the person having an obligation relating to a safety system (or general fire precaution), may be held responsible for that system/general fire precaution.

## Article 6 – Application to premises

### The Regulatory Reform (Fire Safety) Order 2005

#### **Application to premises**

6. —(1) *This Order does not apply in relation to —*

- (a) domestic premises, except to the extent mentioned in article 31(10);*
- (b) an offshore installation within the meaning of regulation 3 of the Offshore Installation and Pipeline Works (Management and Administration) Regulations 1995;*
- (c) a ship, in respect of the normal ship-board activities of a ship's crew which are carried out solely by the crew under the direction of the master;*
- (d) fields, woods or other land forming part of an agricultural or forestry undertaking but which is not inside a building and is situated away from the undertaking's main buildings;*
- (e) an aircraft, locomotive or rolling stock, trailer or semi-trailer used as a means of transport or a vehicle for which a licence is in force under the Vehicle Excise and Registration Act 1994 or a vehicle exempted from duty under that Act;*
- (f) a mine within the meaning of section 180 of the Mines and Quarries Act 1954, other than any building on the surface at a mine;*
- (g) a borehole site to which the Borehole Sites and Operations Regulations 1995 apply.*

*(2) Subject to the preceding paragraph of this article, this Order applies in relation to any premises*

#### **FSO Guidance Notes**

“... standards of safety in the home should continue to be governed by housing law. Housing authorities continue to be the primary enforcing authority for houses in multiple occupation but fire authorities continue to play a key role in providing advice to housing authorities, particularly on fire precautions in licensed HMOs.”<sup>35</sup>

Where an employee is featured in premises such as flats or sheltered housing, then the Order applies in full to the protection of those employees but the scope of the Order falls short to such employment as nannies or domestic cleaners in a domestic setting.

This does not detract from the duty owed by employers, landlords and owners in terms of maintenance and testing of common fire precautions installed for the benefit of multiple occupants.

In general the Order does not apply to domestic premises. However Fire Authorities have the power to prohibit premises, including areas of domestic living accommodation (flats, private rooms in HMOs etc) situated in premises to which the Order applies, where serious risk is present.

Further information is provided in Appendix 1 to this document.

<sup>35</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002*, London, The Office of the Deputy Prime Minister 2002, p38

## FSO FAQ

**Q. Article 6(1)(c) is clear that the Order does not apply to ships under the stated conditions, but under what circumstances does the Order apply to water going vessels?**

A. A Bulletin article released by the Department for Communities and Local Government seeks to clarify the application of the Order to boats; in particular narrow boats and cruisers primarily rented out for holiday or leisure purposes. The clarification is based on Communities and Local Government's current understanding.

The view held by Communities and Local Government is that the Order generally does not apply to boats hired for the purposes of holiday or leisure activities. It is considered that the Order applies to:

- a) permanently moored vessels (i.e. those which cannot travel) which are rented out on inland waterways; and
- b) boat yards.

Article 6(1) (c) exempts the application of the Order to a ship in respect of the normal ship-board activities of a ship's crew which are carried out solely by the crew under the direction of the master. The Communities and Local Government's view is that this exception is likely to include narrow boats, cruisers and other sorts of pleasure craft rented for the purposes of holiday accommodation or other commercial activities. These vessels fall within the scope of the Merchant Shipping (Fire Protection) (Small Ships) Regulations 1998. The application of these regulations is not limited to seagoing vessels. Any queries about the application of these regulations should be directed to the Department for Transport.

The aforementioned types and uses of boat also fall within the scope of the Boat Safety Scheme, operated by British Waterways and the Environment Agency. This scheme aims to promote safety on boats on inland waterways and sets fire safety standards which must be met in order to obtain a navigation license.

The Communities and Local Government Fire Safety Risk Assessment guidance for Sleeping Accommodation currently states that the Order applies to boats. The Communities and Local Government recognise that this may be open to misinterpretation and have plans to clarify this position in the future when the guidance is revised.

## Article 7 – Disapplication of certain provisions

### The Regulatory Reform (Fire Safety) Order 2005

#### **Disapplication of certain provisions**

7. —(1) Articles 9(4) and (5) and 19(2) do not apply in relation to occasional work or short-term work involving work regulated as not being harmful, damaging, or dangerous to young people in a family undertaking.

(2) Articles 9(2), 12, 16, 19(3) and 22(2) do not apply in relation to the use of means of transport by land, water or air where the use of means of transport is regulated by international agreements and the European Community directives giving effect to them and in so far as the use of means of transport falls within the disapplication in article 1.2(e) of Council Directive 1999/92/EC on minimum requirements for improving the safety and health of workers potentially at risk from explosive atmospheres, except for any means of transport intended for use in a potentially explosive atmosphere.

(3) Articles 19 and 21 impose duties only on responsible persons who are employers.

(4) The requirements of articles 8 to 23, or of any regulations made under article 24, do not have effect to the extent that they would prevent any of the following from carrying out their duties—

(a) any member of the armed forces of the Crown or of any visiting force;

(b) any constable or any member of a police force not being a constable;

(c) any member of any emergency service.

(5) Without prejudice to paragraph (4), article 14(2)(f) does not apply to any premises constituting, or forming part of, a prison within the meaning of the Prison Act 1952 or constituting, or forming part of, a remand centre, detention centre or youth custody centre provided by the Secretary of State under section 43 of that Act or any part of any other premises used for keeping persons in lawful custody or detention.

(6) Where paragraph (4) or (5) applies, the safety of relevant persons must nevertheless be ensured so far as is possible.

### FSO Guidance Notes

This article points out the limitations of the various prohibitions and requirements of the Order as they relate to certain circumstances. The circumstances in question take account of: children and young persons working in family undertakings; means of transport which are regulated by international agreements; non-employers; non-interference with armed forces, police forces or emergency services; and the locking of doors to prisons and similar detention centres.

Other Health and Safety laws deal with protecting children and young persons from general safety risks<sup>36</sup> and from over-working<sup>37</sup>. The Order seeks to extend those protections to children and young persons in relation to fire risks. However those articles of the Order that impose requirements or prohibitions in relation to children or young persons (principally due to their lack of maturity and inexperience) do not apply where the work is for a family undertaking; is short-term or occasional work; and is regulated as being not harmful, damaging or dangerous to young people. What is meant by harmful, damaging or dangerous in this context may be determined from reference to the Management of Health and Safety at Work Regulations 1999. HSE guidance suggests that "... family businesses, like

<sup>36</sup> Health and Safety (Young Persons) Regulations 1997; and the Management of Health and Safety at Work Regulations 1999

<sup>37</sup> Application of working time regulations to young people

other employers, need to comply with the general health and safety requirement to carry out a risk assessment and other relevant requirements in [specific health and safety law](#). The risk assessment will help establish if the work is harmful, damaging or dangerous to young people”<sup>38</sup>.

Although the Order does not apply to most means of transport by virtue of article 6; article 7(2) clarifies that those parts of the Order connected with dangerous substances and explosive atmospheres do not apply to means of transport that are subject to (stricter) international agreement or European Community Directives.

At article 7(4), compliance with articles 8-22 do not apply to armed forces, police forces and members of the emergency services but only insofar as compliance with the Order would prevent them from carrying out their primary duties. ‘Primary duties’ in this context refers to the operational-type duties of the various organisations e.g. officers that work in the various departments of the fire service are members of an emergency service but compliance with the Order will not prevent them from carrying out their duty and as such the responsible person is expected to comply; whereas an operational fire-fighter engaged in fire fighting duties should not be stopped from carrying his duty into effect because the general fire precautions in the (burning) building are not appropriate. Despite this apparent relaxation, it is necessary for the responsible person to ensure the safety of relevant persons as far as possible.

At article 7(4) the requirement to ensure that emergency doors should not be locked or fastened ... (compliance with article 14(2)(f)) is reasonably withdrawn in relation to prisons and similar detention centres. Despite this relaxation it is necessary for the responsible person to ensure the safety of relevant persons as far as possible.

## FSO FAQ

### **Q. Can you clarify occasional, short-term and family undertaking?**

A. The intention of this disapplication is to ensure the requirements of articles 9(4) and (5) (risk assessment for employment of young persons) and article 19(2) (providing information to a parent of the child before employing a child) do not apply in circumstances where the young person is a near relative of the employer. As a guide, young persons employed by fathers, mothers, grandfathers, grandmothers, step-fathers, step-mothers, brothers, sisters, half brothers and half sisters may be considered as ‘in a family undertaking’. Their employer will not therefore be considered subject to articles 9(4) and (5) and 19(2) if the work is not harmful, damaging or dangerous.

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<sup>38</sup> Guidance from HSE website, *The Management of Health and Safety at Work Regulations 1999*, [online], available from: <http://www.hse.gov.uk/youngpeople/law/management.htm> (last accessed 28<sup>th</sup> February 2011)

## **Part 2 Fire Safety Duties**

### **Article 8 – Duty to take general fire precautions**

#### **The Regulatory Reform (Fire Safety) Order 2005**

##### ***Duty to take general fire precautions***

**8. —(1) *The responsible person must—***

*(a) take such general fire precautions as will ensure, so far as is reasonably practicable, the safety of any of his employees; and*

*(b) in relation to relevant persons who are not his employees, take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe.*

#### **FSO Guidance Notes**

It is important to note the distinction made between the two separate requirements under this article. The first requirement is (to paraphrase) to ensure the safety of employees; whereas the second requirement is (again to paraphrase) to ensure the premises are safe for relevant persons.

The reason for this distinction is primarily due to the level of control that a responsible person can exercise over each of the different population groups, insofar as employees can be informed, instructed and trained and are subject to the requirements of the employer. The same is not true for a non-employee.

The requirements of this article indicate the strict liability to which ‘employer’ responsible persons are held. The strict liability will also be seen when considering other articles of the Order (in particular articles 33 and 34). This strict liability is an implicit duty that reflects the approach taken under general Health and Safety law; that the employer must do all that is required to safeguard the safety of an employee.

Note should be taken of the fact that article 8(1)(a) falls outside the scope of the usual defence of due diligence, made available to a responsible person under the Order (see article 33). Note should also be taken of the fact that the whole of article 8 is subject to the term ‘reasonably practicable’ and as such the onus is placed on the responsible person (instead of the enforcing authority) to prove that it was not reasonable for them to have done more than they did, to satisfy the requirements of this article.

#### **FSO FAQ**

- Q. Apart from one being employees and the other talking about other relevant persons what is the measure of the different protection this article offers to each group?**
- A.** Article 8(1)(a) reflects the absolute duty of an employer for the safety of his/her employees under European Law. That duty is subject only to the test of gross disproportionality provided for by use of the term “so far as is reasonably practicable” (see the FSO Guidance Notes for this term given in this document under article 2 – interpretation). Article 8(1)(b) provides that the premises must be safe for use by non-employees and is subject to a test of reasonableness.

## Article 9 – Risk assessment

### The Regulatory Reform (Fire Safety) Order 2005

#### **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.*

(2) *Where a dangerous substance is or is liable to be present in or on the premises, the risk assessment must include consideration of the matters set out in Part 1 of Schedule 1.*

(3) *Any such assessment must be reviewed by the responsible person regularly so as to keep it up to date and particularly if—*

*(a) there is reason to suspect that it is no longer valid; or*

*(b) there has been a significant change in the matters to which it relates including when the premises, special, technical and organisational measures, or organisation of the work undergo significant changes, extensions, or conversions,*

*and where changes to an assessment are required as a result of any such review, the responsible person must make them.*

(4) *The responsible person must not employ a young person unless he has, in relation to risks to young persons, made or reviewed an assessment in accordance with paragraphs (1) and (5).*

(5) *In making or reviewing the assessment, the responsible person who employs or is to employ a young person must take particular account of the matters set out in Part 2 of Schedule 1.*

(6) *As soon as practicable after the assessment is made or reviewed, the responsible person must record the information prescribed by paragraph (7) where—*

*(a) he employs five or more employees;*

*(b) a licence under an enactment is in force in relation to the premises; or*

*(c) an alterations notice requiring this is in force in relation to the premises.*

(7) *The prescribed information is—*

*(a) the significant findings of the assessment, including the measures which have been or will be taken by the responsible person pursuant to this Order; and*

*(b) any group of persons identified by the assessment as being especially at risk.*

(8) *No new work activity involving a dangerous substance may commence unless—*

*(a) the risk assessment has been made; and*

*(b) the measures required by or under this Order have been implemented.*

## FSO Guidance Notes

The concept of risk assessment is not new and has been involved with fire laws since 1997<sup>39</sup> and more broadly used in Health and Safety laws for significantly longer.

Any risk assessment produced under the Order must identify the general fire precautions that are required for the safety of people. These general fire precautions (or preventive and protective measures) include those which have been taken to protect people and those further requirements needed to provide additional safety from fire. The Order provides that once the risk assessment has been conducted the findings should be acted upon (as directed at article 8) and that certain findings of the assessment should be recorded. Responsible persons that have conducted a risk assessment are then expected “to apply measures to control risks and to mitigate the detrimental effects of fire”<sup>40</sup>.

The fire risk assessment is one requirement within the scope of articles 8-22 but it is not inherently a ‘general fire precaution’. Rather it sits outside the scope of those precautions as the ‘process’ from which the general fire precautions flow. At article 8 we identified that for example the employer in a workplace is ultimately responsible (strictly liable) for complying with the general fire precautions he needs to take and although not inherently a general fire precaution, the same strict liability applies to the carrying out of the risk assessment.

It should be noted that where premises comprise a workplace, and employees (managers or other staff) have been delegated to carry out the risk assessment; the employer continues to carry the burden of responsibility for carrying out that risk assessment<sup>41</sup>. For a person other than the employer to carry the burden for any consequences from an improperly conducted risk assessment, the employer must be able to demonstrate that they wholly complied with all the requirements of the Order. The responsible person may pass or at least share legal responsibility with an employee (as manager or other) where the act or omission giving rise to the failure can be shown to be entirely the fault of that employee. However to qualify this statement, the employer must have complied with his requirements under the Order e.g. where the employee is able to demonstrate that he did not have the required training and instruction i.e. the employer has not complied perfectly with the Order then the employer will remain responsible. If he is unable to demonstrate full compliance with those matters that are within his control, including the requirements to confirm the adequacy of completed risk assessments, provide instruction, and to train staff to enable them to carry out the assessment, the employer is unlikely to escape his burden.

The responsibility held by the employer (in a workplace) is demonstrable by considering article 5(1), which (to paraphrase) says – where premises are workplaces; the employer retains the duty to ensure that a risk assessment under article 9 is carried out in respect of those premises.

For premises that are not workplaces the requirement to carry out a risk assessment lies with the person having control of the premises in connection with the carrying on of a trade, business or other undertaking. Where there is no such trade, business or other undertaking the risk assessment should be conducted by the owner.

For premises that are multi-occupied; each tenant (as an employer or as an occupier engaged in a trade, business or other undertaking) must carry out a risk assessment for their occupancy, and for the routes to and egress from their occupancy. Where the risk assessment identifies failures in the premises (but beyond their occupancy) e.g. no emergency lighting within a common staircase the tenant’s risk assessment should identify that failure. The failure should be subsequently rectified through co-operation and co-ordination with the owner responsible person. The premises owner should take measures to address the failure but should not be necessarily expected to have a risk assessment of their own, since the requirements imposed on the employer take primacy.

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<sup>39</sup> The Fire Precaution (Workplace) Regulations 1997, SI 1997 No. 1840

<sup>40</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002*

<sup>41</sup> House of Commons Regulatory Reform Committee, *Proposal for the Regulatory Reform (Fire Safety) Order 2004, Eleventh Report of Session 2003-04, Report, together with formal minutes, written and oral evidence, HC 684*, [online], 2004, London, House of Commons

Article 9(3) “underlines the principle of dynamic risk assessment. In other words risk assessment is an ongoing process. The responsible person could not carry out his risk assessment and then forget about it; it must be kept constantly under review.”<sup>42</sup> This article indicates key triggers for the review of a risk assessment however, the use of the term ‘regularly’ may require some explanation:

- (a) As the nature of work changes, the appreciation of hazards and risks may develop. Monitoring under the arrangements required by article 11 may reveal near misses or defects in preventive and protective measures. Adverse events such as a fire or other dangerous occurrence may take place even if a suitable and sufficient risk assessment has been made and appropriate preventive and protective measures taken. Such events should be a trigger for reviewing the original assessment.
- (b) The responsible person needs to review the risk assessment if developments suggest that it may no longer be valid (or could be reasonably improved in line with the principles of ALARP and SFAIRP). In most cases, it is prudent to plan to review risk assessments at regular intervals. The time between reviews is dependent on the nature of the risks and the degree of change likely in the work activity. Such reviews should form part of standard management practice.

Any fire risk assessment must be reviewed by the responsible person regularly so as to keep it up to date. There is no definition of regularly but annually is generally accepted to be best practice.

Where children or young persons are working, inspectors should look for evidence that the assessment has been made or reviewed and that it has taken account of those matters listed at Part 2 of Schedule 1, in particular the lack of maturity and inexperience of young people.

If an organisation employs five or more people, the premises are licensed<sup>43</sup> or an alterations notice is in force (that requires it), then the significant findings of the fire risk assessment and the details of any group of persons considered as being especially at risk must be recorded.

For the avoidance of doubt, where employees are spread across different sites, e.g. the five employed persons are distributed between three premises a record of relevant information would be required at each location<sup>44</sup>.

Even where less than five persons are employed there is still a requirement to complete a risk assessment but the responsible person is not legally required to record the significant findings or people at risk etc. but best practice is to document the outcomes of a risk assessment regardless of numbers.

Information found as a result of the risk assessment should be recorded under the previously stated circumstances; the prescribed information is—

(1) the significant findings of the assessment, including the measures which have been or will be taken by the responsible person pursuant to this Order; and

Significant findings – should include:

- (a) a record of the preventive and protective measures which are already in place to control the risks; and
- (b) what further action, if any, needs to be taken to provide preventive and protective measures. Where further action is planned then it is reasonable to provide a time-scale for completion (such that the period of time is known that the premises are not as safe as they might be);

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<sup>42</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002, p. 23*

<sup>43</sup> See article 42(3)(b)

<sup>44</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, 2007, Paragraph 57

N.B. The measures taken and to be taken to comply with the Order should not only address the presence of measures taken but the purpose of those measures that are in place e.g. the provision of fire doors to a dead-end situation that ultimately result in the dead-end being an acceptable risk. This is also a good example of the usefulness of illustrating the protective measures on a plan<sup>45</sup>;

- (c) proof that a suitable and sufficient assessment has been made. In many cases it is also necessary to record sufficient detail of the assessment itself, so that the responsible person can demonstrate that they have carried out a suitable and sufficient assessment of: the hazards (to which relevant persons are exposed in case of fire); and the risks (which inherently accounts for the likelihood and the consequences of that event being realised). This record of the significant findings will also form a basis for a revision of the assessment.

(2) any group of persons identified by the assessment as being especially at risk.

Persons especially at risk – “Special consideration should be given to any group of persons who may be especially at risk in case of fire whether due to their location or any other factor.”<sup>46</sup>  
Persons that are unlikely to be protected by the general fire precautions should be considered within this group. The following list is illustrative of those that might be considered as being especially at risk in case of fire:

- Those with limiting disabilities
- Workers in remote locations
- Persons under the influence of drink or drugs
- Persons sleeping on the premises
- Separated groups (e.g. children in a crèche while parents are otherwise occupied, due to their likely behaviour in a fire situation)
- Those engaged in lone-working
- Young persons.

## FSO FAQ

**Q. Article 9(1) Does the Risk Assessment identify the general fire precautions that are needed?**

A. Yes. The assessment of risks to which relevant persons are exposed is for the purpose of identifying the general fire precautions the responsible person needs to take to protect relevant persons, in accordance with the Order.

**Q. In relation to article 9(2); would you expect to see compliance with Part 1 Schedule 1 outlined in the significant findings?**

A. Only to the extent that compliance with any element of Part 1 schedule 1 is of itself a significant finding e.g. the scale of the anticipated effects of a dangerous substance becoming involved in a fire would be likely to be a significant finding if the scale of effect would place relevant persons at risk

**Q. In relation to article 9(3); what is meant by ‘regularly’?**

A. There is no defined timescale. The assessment should be a living document that is subject to ongoing review of sufficient frequency to keep the assessment up to date with any changes to

<sup>45</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007, paragraph 62

<sup>46</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *THE REGULATORY REFORM (FIRE SAFETY) ORDER STATEMENT BY THE OFFICE OF THE DEPUTY PRIME MINISTER* [laid before Parliament in accordance with section 6 of the Regulatory Reform Act 2001 together with the draft of the Regulatory Reform (Fire Safety) Order 2004 which is proposed to be made under section 1 of that Act.], London, The Office of the Deputy Prime Minister, 2004a, para.11

the risks on the premises. Articles 9(3)(a) and 9(3)(b) identify matters which must automatically trigger a review.

**Q. Is article 9(3)(b) for the Health and Safety Executive only?**

A. No, these are for the authority enforcing the Order. Significant changes to the matters to which the risk assessment relates or changes of the specific types mentioned may well impact on the general fire precautions and so should trigger a review of the assessment by the responsible person.

**Q. Article 9(6) what is as soon as practicable?**

A. It means at the first reasonably available opportunity. It will not always be possible to write-up significant findings immediately but the responsible person should seek to do so as soon as possible after the assessment is made.

**Q. 9(7) what are significant findings?**

A. Significant hazards and risks to persons that were found by the assessment; precautions already in place to protect persons from fire; and preventative and protective measures (i.e. general fire precautions) that will be taken to address the hazards and risks identified by the risk assessment.

**Q. In relation to article 9(7); what is meant by measures that have been or will be taken?**

A. Things that the responsible person has done (e.g. has installed a fire alarm system, has trained staff to evacuate) or will do (e.g. will install a fire alarm and will train staff to evacuate). The types of measures the Order is concerned with are described in the definition of general fire precautions at article 4 of the Order.

**Q. In relation to article 9(7); how should the group of persons identified be recorded in the significant findings?**

A. A prose description of who (e.g. the window-cleaner in the cradle, workers on the roof, persons with mobility impairment, etc). Ideally a reason will be given regarding why they are especially at risk (e.g. workers on the roof may not hear the fire alarm or know it is from these premises. To evacuate they would have to re-enter the building).

**Q. Is there a standard means of recording the findings of the assessment?**

A. No. There are several recognised standards for recording risk assessments such as that which is stated in the guidance documents which make use of the five steps of risk assessment. The main point is to follow the risk assessment process and to act on findings. Where a person is 'out of their depth' or does not have the necessary abilities to properly carry out the risk assessment; someone else (that does understand the risk and the process) should be used and again, the findings should be acted upon within a reasonable timescale.

**Q. Does the assessment need to be kept on the premises?**

A. Keeping recorded information, required by the Order, on the premises is considered best practice so that they can be produced if requested by the enforcing authority. Inspectors may discover situations in which risk assessments are kept at a central location only. It should be noted that

there is no requirement under the Order to record the *assessment* and that, while risk assessments may be held centrally, the significant findings, together with all other information required to be recorded under the Order should be available at each discrete location. This will enable duty holders at each location to carry out the duties imposed on them by the Order.

The holding of important information relating to the business in some secondary location is equally good practice, if only for business continuity purposes.

**Q. Is there any reference that causes the prescribed information resulting from the risk assessment to be available at each discreet location?**

A. The reason that records should be available at each site is that the assessment process is concerned with general fire precautions (see article 4) as they relate to relevant persons (both employees and other persons). General fire precautions relate, by definition, to specific premises. The general fire precautions, relevant persons or both will vary from premises to premises and as such the prescribed information should relate to each discreet site and should be maintained there to allow duty holders to manage the fire safety of the site.

**Q. Does the prescribed information have to be recorded in a written format?**

A. Those parts of the assessment process that are required to be recorded should be recorded in a legible format. It is best practice for all responsible persons to record these prescribed features of the assessment, if only to avoid having to memorise all the necessary information. With regard to the assessment itself; the risk assessment is a process and as such does not have to be recorded, but having a written copy can help enforcing authorities if doubt arises. The enforcing authority has to be able to read recorded information to determine whether the Order is being complied with.

List of information that should be recorded:

- The significant findings of the fire risk assessment (including measures that have been taken as well as those that are intended to be taken);
- Any persons that are especially at risk from fire; and
- The fire safety arrangements, relevant to the premises.

**Q. Does the assessment need to be specific to the premises to which it relates?**

A. It is important that the prescribed information is specific to the premises to which it relates. Since the prescribed information flows from the risk assessment process, it follows that the assessment too must be premises specific. Where premises are designed and built to a generic standard then a generic assessment of the risks may be an appropriate starting point but the specifics of the boundary, relevant persons and employees will have to be specific. For example, consider a building design that incorporates an inner room situation which is satisfied by the provision of some form of detection in the outer room. In the case of a deaf employee working in the inner room the generic solution will not be adequate or appropriate. An assessment of the risk specific to the premises will reveal the problem and a suitable protective measure can be put in place.

## Article 10 – Principles of prevention to be applied

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Principles of prevention to be applied***

*10. Where the responsible person implements any preventive and protective measures he must do so on the basis of the principles specified in Part 3 of Schedule 1.*

#### **FSO Guidance Notes**

Note should be taken of the wording used here. The requirement states “where the responsible person implements any preventive or protective measures he must ...”. It should be noted that, where the responsible person has not made such efforts, no requirement can be made to comply with article 10.

It is worthy of note that a person cannot be seen to have failed to comply with the requirements of article 10 if they have NOT implemented ANY preventive and protective measures.

Article 10 requires the responsible person to take measures to prevent fires occurring but is equally relevant to protection from fire as well as prevention of fire (see Part 3 of Schedule 1, in particular paragraph (g)).

The principles laid down in Part 3 of Schedule 1 appear to have been laid out in a descending order of possible application with ‘avoiding risks’ seen as the most ideal and ‘instructions to employees’ as the least favourable option. The apparent hierarchical approach used cannot necessarily be enforced as such on the grounds that any of the principles (a) – (h) may provide a legally acceptable solution. Where a number of different solutions may exist officers will of course recommend a hierarchical approach from the principles as shown.

The principles at Schedule 1, Part 3 follow a similar train of thought as laid down in Health and Safety guidance insofar as it is better to avoid risks than to simply address the problem with an additional protective measure e.g. a photocopier in a means of escape corridor being protected through the installation of Automatic Fire Detection rather than preventing the problem through the relocation of the hazard.

#### **FSO FAQ**

**Q. How would an Inspecting Officer check that this has been complied with?**

A. The likely indicators will be that there are fire hazards that have not been removed or reduced and the premises have not adapted to progress but have simply installed physical fire precautions to compensate for removable / reducible hazards present in the premises.

## Article 11 – Fire safety arrangements

### The Regulatory Reform (Fire Safety) Order 2005

#### Fire safety arrangements

11. —(1) The responsible person must make and give effect to such arrangements as are appropriate, having regard to the size of his undertaking and the nature of its activities, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures.

(2) The responsible person must record the arrangements referred to in paragraph (1) where—

- (a) he employs five or more employees;
- (b) a licence under an enactment is in force in relation to the premises; or
- (c) an alterations notice requiring a record to be made of those arrangements is in force in relation to the premises.

#### FSO Guidance Notes

The quality and depth of the fire safety arrangements put in place for any given premises will vary with the nature of the premises. The arrangements will range from something very simplistic (even virtually non-existent where there are no general fire precautions to speak of) through to a complex arrangement of maintenance contracts, method statements, a means for employees to report deficiencies in general fire precautions, schedules for periodic reviews and tests of the various preventive and protective measures in place, etc.

If management can demonstrate, in a recorded form (where required), that they have a general policy for the day-to-day running of the business, which includes recognition that fire safety is an important consideration; they are going some way to complying with this article. Compliance with this article may be shown through programmed maintenance dates, and training and instruction intervals for members of staff. Such actions might demonstrate the basic requirement of this article; that management can be seen to take an active role in promoting fire safety within the daily working routines of the business. It will demonstrate that not only have relevant preventive and protective measures been put in place by the responsible person, but that he understands the importance of those measures and the part they play in providing for the safety of relevant persons. Such understanding is crucial when something goes wrong for example. His level of understanding will not only identify the impact of the failure but also what must be done as a consequence of it.

The important aspect of this article is that fire safety is 'managed' and that the elements of the arrangements are being addressed. Responsible persons may choose to address these arrangements within the pages of a 'fire safety policy' but the over-riding consideration has to be that the management of fire safety has been addressed in some way. Such arrangements will also include the requirement (where necessary) to co-operate and co-ordinate with other responsible persons.

The requirement to effectively plan, organise, control, monitor and review each of their preventive and protective measures (as appropriate) may be different for each measure. By way of example consider the protective measures that are fire rated door-sets. The responsible person will be expected to effectively plan, organise, control, monitor and review for the relevant doors in the premises to ensure their continued effectiveness. The responsible person might for example:

- Plan – have a numbered door schedule to assist in the identification of relevant doors; and ensure that relevant information and training relating to the importance of doors is given to employees

- Organise – work out how the doors should be routinely inspected and nominate somebody to be in charge of this function
- Control – have in place a system that enables employees to report defects to the person in charge of door maintenance
- Monitor – ensure that the door-sets are routinely checked over a given period
- Review – make sure that the systems in place are operating as intended

This example is purely illustrative of how the arrangements might be addressed and it is possible that an overall policy might be put in place rather than considering each measure in isolation; indeed this is likely to be preferable. Whatever the system put in place by the responsible person, it should remain under review and should be flexible in its approach to enable prompt handling of matters when they go wrong.

Where fire safety arrangements are in place and deficiencies are found, the management may already have awareness of the deficiency and should be able to detail the issues, and state when the deficiency will be addressed. He should also be able to discuss the priority given to each deficiency in the premises.

Compliance with this article is likely to reflect many of the articles between articles 8-22 and article 24 with which responsible persons and duty holders have to comply, as a means of showing how those areas of compliance are arranged and brought into effect.

## **FSO FAQ**

### **Q. Is the emergency plan recorded here?**

A. No the emergency plan itself (as required by article 15(1)) would be a general fire precaution (article 4(1)(f)) and as such should be recorded as part of the significant findings under article 9. However the arrangements for keeping the emergency plan under review would be recorded by virtue of Article 11.

### **Q. What review period should be in place for these measures?**

A. At least in line with the review of the assessment but a review should be undertaken whenever changes are made.

### **Q. Is there a requirement under the order to maintain records of tests?**

A. The responsible person must have arrangements in place for the planning, organisation, control, monitoring and review of preventive and protective measures and under specified conditions, must record those arrangements. This means that general fire precautions provided should be subject to 'planning, organisation, control, monitoring and review'. These processes should be recorded under prescribed conditions, but there is no express requirement to record the results of routine testing, although this would be good practice and allow the responsible person to evidence that testing has taken place, should the need arise.

## Article 12 – Elimination or reduction of risks from dangerous substances

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Elimination or reduction of risks from dangerous substances***

**12.** —(1) *Where a dangerous substance is present in or on the premises, the responsible person must ensure that risk to relevant persons related to the presence of the substance is either eliminated or reduced so far as is reasonably practicable.*

*(2) In complying with his duty under paragraph (1), the responsible person must, so far as is reasonably practicable, replace a dangerous substance, or the use of a dangerous substance, with a substance or process which either eliminates or reduces the risk to relevant persons.*

*(3) Where it is not reasonably practicable to eliminate risk pursuant to paragraphs (1) and (2), the responsible person must, so far as is reasonably practicable, apply measures consistent with the risk assessment and appropriate to the nature of the activity or operation, including the measures specified in Part 4 of Schedule 1 to this Order to—*

*(a) control the risk, and*

*(b) mitigate the detrimental effects of a fire.*

*(4) The responsible person must—*

*(a) arrange for the safe handling, storage and transport of dangerous substances and waste containing dangerous substances; and*

*(b) ensure that any conditions necessary pursuant to this Order for ensuring the elimination or reduction of risk are maintained.*

### **FSO Guidance Notes**

For improved clarity and to aid understanding, the reader is advised to refer to Part 4 of Schedule 1 to the Order when reading this Guidance Note to article 12.

The Order defines a dangerous substance<sup>47</sup> at article 2.

For those circumstances where measures that fall within the scope of ‘general fire precautions’<sup>48</sup> are required to be taken in relation to dangerous substances, inspecting officers should audit with the intention of determining whether risk has been mitigated as far as is reasonably practicable.

Where a dangerous substance is present on premises, the responsible person must ensure that the risk related to the presence of the substance is either eliminated or reduced so far as is reasonably practical, doing so by replacing the dangerous substance or its use with something else that reduces the risk. Where this is not reasonably practical, the responsible person must, as far as is reasonably practical, apply measures consistent with the risk assessment and appropriate to the nature of the activity in order to control the risk and mitigate the detrimental effects of a fire.

Enforcing authorities are reminded that the requirements of this article are to provide such general fire precautions as might be required due to the presence of a dangerous substance. This does not extend to special technical and organisational measures related to the reduction of risk from work processes, which are dealt with under legislation enforced by the HSE<sup>49</sup>.

<sup>47</sup> See also The Dangerous Substances and Explosive Atmospheres Regulations 2002 - footnoted because this interpretation document is about the Order, not about DSEAR, albeit that the requirements have been taken from DSEAR.

<sup>48</sup> See the interpretation to article 4 in this document

<sup>49</sup> See article 4 of this interpretation for greater detail of the relationship between general fire precautions and dangerous substances.

Where a dangerous substance is present in or on the premises, the responsible person must ensure that the risk to relevant persons related to the presence of the substance is either eliminated or reduced so far as is reasonably practicable.

A simple example of this would be substituting oxy-acetylene cutting equipment for oxy-propane cutting equipment; thereby reducing the potential risk to relevant persons should the equipment become involved in fire.

The first thing to establish is whether or not dangerous substances are present on the premises. If so what are the additional risks in case of fire as a result of the presence of the dangerous substances, i.e. if a fire were to occur how would the dangerous substance affect the spread or intensity of fire? Would this increase the risk of a relevant person suffering harm? To help the inspecting officer determine whether this article has been complied with, consideration should be given to whether or not the responsible person has reduced the risk so far as reasonably practicable.

In some cases it may be difficult to determine if the responsible person has reduced the risk to the lowest level reasonably practicable; however the Enforcing Authority should be able to determine whether the responsible person has evaluated the risk and put measures in place to reduce and / or control it. In cases of doubt enforcing authorities / inspecting officers may wish to seek assistance; for example from the HSE to obtain more specialist knowledge as to the use and storage of dangerous substances. In addition, careful questioning of the Responsible Person and other duty holders should help determine the degree of compliance with this article; remembering that for this article, it is for the responsible person to demonstrate that he has done all that he could<sup>50</sup> to comply.

## Substitution

This article requires that preference be first given to substituting the dangerous substance(s) with a different substance or substituting a new or modified work process<sup>51</sup> so as to eliminate or reduce the risk. Substitution to eliminate risks is the best solution but in practice it is often difficult to achieve. It is likely that it will be more practicable to replace the dangerous substance with one that is less hazardous (e.g. by replacing a low flashpoint solvent with a solvent having a high-flashpoint).

An alternative is to design the process<sup>52</sup> so that it is less dangerous. This might include, for example, changing from a batch production to a continuous production process; or changing the manner or sequence in which the dangerous substance is added. However, care must be taken when carrying out these steps to ensure that no other new safety or health risks are created or introduced, which then outweigh the improvements implemented as a result of attempting to comply with this article. N.B. changes like these are process driven and as such do not fall under the Order but are dealt with under other legislation e.g. Control of Major Accident Hazards Regulations 1999 (as amended), and Health and Safety at Work etc. Act 1974, etc.

## Control and mitigation measures

Where risks cannot be completely eliminated through substitution, responsible persons should use a combination of control and mitigation measures to ensure the safety of relevant persons. In existing work situations, the current control and mitigation measures should be carefully reviewed, in the light of experience and subsequently improved, extended, or replaced as necessary to ensure that they are achieving, and sustaining the necessary level of risk reduction.

The measures selected should be appropriate to the nature of the work activity, consistent with the risk assessment and sufficient to reduce the overall risk 'so far as is reasonably practicable'. This is

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<sup>50</sup> See article 34

<sup>51</sup> Enforcing authorities other than the HSE should be aware that work process is generally removed from the meaning of general fire precautions and typically remain within the jurisdiction of Health and Safety law. See article 4 interpretation in this document

<sup>52</sup> Enforcing authorities other than the HSE should be aware that work process is generally removed from the meaning of general fire precautions and typically remains within the jurisdiction of the HSE. See article 4 interpretation in this document

particularly important where an explosive atmosphere contains a mixture of dangerous substances either in the same form, e.g. different combustible dusts, or in different forms, e.g. gases or vapours.

At article 12(3), the responsible person is directed to Schedule 1, Part 4 for measures intended to help control the risk and mitigate the detrimental effects of fire. It should be noted that Part 4 of Schedule 1 explicitly requires the responsible person to “ensure that suitable special, technical and organisational measures are designed, constructed, assembled, installed, provided and used so as to reduce risk”. This requirement does not sit well with the more general requirements of the Order and incorporates requirements that are explicitly removed from the meaning of general fire precautions. This presents an apparent conflict. In matters of conflict consideration should be given to conducting a joint inspection e.g. fire authority with HSE.

In many foreseeable encounters with dangerous substances, it is likely that inspecting officers will have an understanding of general fire precautions only and may not be in the possession of specialist knowledge relating to such things as ‘explosion pressure relief arrangements’, ‘explosion suppression equipment’, the ‘provision of plant which is constructed so as to withstand the pressure likely to be produced by an explosion’ etc.

Although such matters are written in the pages of the Order, their inclusion is not designed for enforcement by inspecting officers of Fire and Rescue Authorities, Defence Fire Services, Local Authorities or Crown Premises Inspectors, and that such matters should be referred to the HSE and that where possible a joint inspection between enforcing authorities should be arranged.

This article falls outside the scope of the usual defence of due diligence made available to the responsible person under the Order (see article 33). Note should also be taken of the fact that article 12 is a requirement subject to the term ‘reasonably practicable’ and as such the onus is placed on the responsible person (instead of the enforcing authority) to prove that it was not reasonable for them to have done more than they did, to satisfy the requirements of this article.

## FSO FAQ

**Q. Does the Responsible Person have to try paragraphs 12-(1) & 12-(2) before implementing Part 4 Schedule 1?**

A. Yes.

**Q. 12-(4)(a) Is this for HSE only?**

A. HSE have the lead in this area. However the duty under Article 12(4) is a direct duty applied by article 5 and so can be enforced as such.

**Q. Is there a minimum quantity to which this article applies?**

A. This is not explicitly stated but the test of reasonable practicability suggests that there should be according to the activity being undertaken and the risk to ‘relevant persons’. For example, it should not be necessary to enter a full assessment process for a bottle of bleach used for cleaning but a small cleaning cupboard, opening on to an escape route and containing 50 litres of bleach might be a different matter. As a general rule, corrosive liquids should be stored on the floor and substances that could give a vigorous chemical reaction should be stored separately.

**Q. What guidance is available for enforcing officers to determine if the risk is as low as reasonably practicable?**

A. The risk assessment should clearly identify/illustrate the determination process undertaken by the responsible person in reducing the risk to as low as reasonably practicable and at which point it became disproportionate to take further measures.

## Article 13 – Fire-fighting and fire detection

### The Regulatory Reform (Fire Safety) Order 2005

#### **Fire-fighting and fire detection**

**13.**—(1) *Where necessary (whether due to the features of the premises, the activity carried on there, any hazard present or any other relevant circumstances) in order to safeguard the safety of relevant persons, the responsible person must ensure that—*

*(a) the premises are, to the extent that it is appropriate, equipped with appropriate fire-fighting equipment and with fire detectors and alarms; and*

*(b) any non-automatic fire-fighting equipment so provided is easily accessible, simple to use and indicated by signs.*

(2) *For the purposes of paragraph (1) what is appropriate is to be determined having regard to the dimensions and use of the premises, the equipment contained on the premises, the physical and chemical properties of the substances likely to be present and the maximum number of persons who may be present at any one time.*

(3) *The responsible person must, where necessary—*

*(a) take measures for fire-fighting in the premises, adapted to the nature of the activities carried on there and the size of the undertaking and of the premises concerned;*

*(b) nominate competent persons to implement those measures and ensure that the number of such persons, their training and the equipment available to them are adequate, taking into account the size of, and the specific hazards involved in, the premises concerned; and*

*(c) arrange any necessary contacts with external emergency services, particularly as regards fire-fighting, rescue work, first-aid and emergency medical care.*

(4) *A person is to be regarded as competent for the purposes of paragraph (3)(b) where he has sufficient training and experience or knowledge and other qualities to enable him properly to implement the measures referred to in that paragraph.*

#### **FSO Guidance Notes**

This article substantially copies out the text of certain articles of the Framework and Premises Directives. The courts can be expected to have regard to the terms of the Directives in case of doubt.

It is important to note that what responsible persons provide to comply with the requirements of this article, is for the purpose of safeguarding the safety of relevant persons in case of fire; and that the extent of such provision will become clear from the findings of the fire risk assessment taking full account of all the relevant circumstances of the premises, including its size, contents and use. More comprehensive consideration of their needs may rely on the requirements of other legislation (including *the Disability Discrimination Act 1995* which took effect on 1 October 1999) or rest on guidance such as *Firecode* for hospital premises.

Against this background, premises must be provided with such fire extinguishers or other means for fighting fire as are appropriate. It will also be necessary to install fire detectors and fire alarms<sup>53</sup> where,

<sup>53</sup> Enforcers should be aware of the outcome of the Determination by the Secretary of State in connection with the means detection provided in hotel bedrooms (see article 36 of this document for further detail).

in all the circumstances referred to above, their provision is reasonably required for the protection of relevant persons.

Any non-automatic fire-fighting equipment provided in accordance with this article, such as fire extinguishers, must be simple to use, kept where it will be easily accessible and be indicated by signs as appropriate e.g. indicated in accordance with the requirements imposed by the Health and Safety (Safety Signs and Signals) Regulations 1996.<sup>54</sup> In relation to fire safety signs being appropriate and durable, (pictographic) signs should be placed at appropriate points, should be properly maintained and should comply with any applicable requirements set out in Parts I to VII of Schedule 1 to those Regulations.

Responsible persons are required to take measures for fire-fighting in the premises (e.g. the drawing up of a suitable fire-fighting plan) where necessary for the purpose of safeguarding relevant persons in case of fire. Such measures as are taken will be tailored to the circumstances of the premises. Responsible persons shall nominate a sufficient number of their employees to implement those measures and ensure that they are adequately trained and equipped to carry out their responsibilities. This provision should complement rather than replace fire and rescue authorities' fire-fighting role. The intention of the Order was to:

*“... make it clear that fire fighting equipment should be considered as a possible means of reducing a risk of fire spreading, providing protection and for providing assistance to others ... It should also be considered as a possible means of mitigating the detrimental effects of a fire.”<sup>55</sup>*

Nominated relevant persons should be able to tackle a fire if it is safe to do so and they know how to do it safely. They must not put themselves at risk to fight fire; their personal safety remains the priority. Nonetheless this priority must not be used by responsible persons to avoid compliance with this requirement. Many employers believe that to comply with this requirement involves a necessity to train some of their employees as fire-fighters. This is clearly not the case; and inspecting officers should be seeking compliance from employer responsible persons by training an adequate number of employees to undertake first aid fire-fighting duties and inherent in that training must be the teaching of employees to recognise when first-aid fire-fighting is or is not safe to implement.

In order to safeguard the safety of relevant persons in case of fire, a responsible person must also arrange such contacts with the emergency services as are necessary to give effect, in particular, to rescue work and fire-fighting. Such arrangements involve a degree of planning on the part of responsible persons. They must ensure that the emergency services are readily contactable in case a fire occurs (e.g. having a telephone available for calling the fire and rescue service and nominating a person or persons to make the call to summon the fire and rescue service). They must also liaise with the emergency services when an incident occurs, and should be asked to provide, wherever possible in advance, information required for rescue work and fire-fighting purposes (e.g. in respect of any special risks involved in the premises), so as to maximise the safety and efficiency of such work.

It is unfortunate that two very distinct requirements have been brought together under a single article in this way. There is (on the one hand) a requirement as to fire-fighting on the premises and (on the other hand) a requirement for fire alarms and fire detection. In each case our earlier interpretation at article 2 should indicate that where the hazard can be realised, something should be done to combat the hazard. In the case of providing for fire-fighting on the premises, enforcing authorities should require compliance with this article so that first aid fire-fighting can be implemented if it is safe for the trained person to do so.

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<sup>54</sup> S.I. 1996 No. 341

<sup>55</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002, p 28, 4.57*

## FSO FAQ

**Q. 13(1) is ‘where necessary’ decided by the risk assessment or by the features, activity, hazard etc?**

A. For an interpretation of ‘where necessary’, see the FSO Guidance Note to article 2 in this document. To directly answer the question, the limits of ‘where necessary’ should be determined by the risk assessment, which in turn, should take in to account the features of the premises, the activity carried on there, the nature of the hazard etc.

**Q. In relation to article 13(2) what is the difference between where necessary and what is appropriate? Does this paragraph only apply to paragraph 1?**

A. The “where necessary” refers to whether any fire fighting equipment is needed (i.e. where the three elements to the triangle of fire could potentially come together. Where those elements cannot so come together, there can be no fire and the provision of fire-fighting equipment is not necessary). The “extent that is appropriate” is referring to the type and quantity of equipment where it has been determined that equipment is necessary.

**Q. 13(3)(b) are there specific competent persons this is referring to?**

A. Yes. This applies in cases where fire-fighting forms an active part of the preventive and protective measures. That is to say some employees are expected to fight a fire. Those employees must be competent for that role. It must be noted that these persons are “nominated” and so have the ability to reasonably decline the nomination (subject to article 23). This is because the role if accepted could be argued to involve a higher degree of risk than is faced by other persons present at the time of a fire albeit that the contrary view may be argued insofar as a person trained to understand when to walk away from a fire and when to extinguish incipient fires may be safer than the person without such training and skills to tackle small fires. Declining the nomination should not, generally, be regarded as a breach of article 23 if the person nominated has reasonable doubts or fears about their own health and safety if the nomination were accepted.

**Q. 13(3)(c) What is meant by “necessary contacts with emergency services”?**

A. Where there is a need to liaise with the emergency services about any special circumstances that may affect fire-fighting, rescue work or emergency medical care, responsible persons should arrange this. It also includes the requirement that calls for emergency assistance are directed as appropriate e.g. an automatic fire alarm to directly notify the fire and rescue service (perhaps via an Alarm Receiving Centre) and having arrangements in place compelling a person or persons to make the fire call to report the fire.

## Article 14 – Emergency routes and exits

### The Regulatory Reform (Fire Safety) Order 2005

#### **Emergency routes and exits**

**14.** —(1) *Where necessary in order to safeguard the safety of relevant persons, the responsible person must ensure that routes to emergency exits from premises and the exits themselves are kept clear at all times.*

(2) *The following requirements must be complied with in respect of premises where necessary (whether due to the features of the premises, the activity carried on there, any hazard present or any other relevant circumstances) in order to safeguard the safety of relevant persons—*

- (a) emergency routes and exits must lead as directly as possible to a place of safety;*
- (b) in the event of danger, it must be possible for persons to evacuate the premises as quickly and as safely as possible;*
- (c) the number, distribution and dimensions of emergency routes and exits must be adequate having regard to the use, equipment and dimensions of the premises and the maximum number of persons who may be present there at any one time;*
- (d) emergency doors must open in the direction of escape;*
- (e) sliding or revolving doors must not be used for exits specifically intended as emergency exits;*
- (f) emergency doors must not be so locked or fastened that they cannot be easily and immediately opened by any person who may require to use them in an emergency;*
- (g) emergency routes and exits must be indicated by signs; and*
- (h) emergency routes and exits requiring illumination must be provided with emergency lighting of adequate intensity in the case of failure of their normal lighting.*

#### **FSO Guidance Notes**

Where necessary to safeguard the safety of relevant persons, the responsible person must ensure that routes to emergency exits and the exits themselves are kept clear at all times of combustible materials and other obstructions. In case of failure of normal lighting circuits, emergency routes and exits requiring illumination must be provided with emergency lighting.

In accordance with the management policy of checking escape routes, consideration should be given to the maximum number of persons who can safely occupy the premises and safely evacuate the premises in case of fire. Once this evidence is obtained, the purpose of the inspection is to verify the authenticity of the answers given by the responsible person. It is important to note that the measures implemented by the responsible person under this article are required for the purpose of safeguarding the safety of relevant persons in case of fire. The suitability of measures taken should be assessed against the findings of the inspection / audit, taking full account of all the relevant circumstances of the premises, including its size, contents, maximum number of persons likely to be present and the use of the premises.

Against this background, the emergency routes and exits must lead as directly as possible to a place of safety. There must be adequate emergency routes and exits for *everyone* to escape quickly and safely, since it is the total number of *persons* that may be present in the premises at any one time which will affect the adequacy of the emergency routes and exits provided for the purposes of evacuation. The fire

risk assessment will identify any persons for whom special arrangements may need to be made by virtue of their age, state of health and physical and mental abilities or, in some circumstances, their location and activity in the workplace.

It is important to emphasise the door requirements in the context of their purpose as set out in the preamble to the paragraph ("...where necessary ... in order to safeguard the safety of relevant persons in case of fire ..."). Therein lies the flexibility that moderates what would otherwise be prescriptive requirements.

With the exception of premises used for keeping persons in lawful custody or detention, exit doors (and, it follows, doors along escape routes) must not be so locked or fastened that they cannot be easily and immediately opened by any person who may need to use them in an emergency.

The emergency routes and exits must be indicated with signs where the use of signs will aid evacuation.

Where emergency routes and exits require illumination to safeguard the safety of relevant persons in case of fire, they must be provided with adequate alternative sources of illumination in case their normal lighting (natural or artificial) fails. What is provided will depend on, and be in proportion to, what is needed in all the relevant circumstances. For example, where borrowed light from street lighting is available this may be all that is required.

It should be noted that the requirements made under article 14(2) ((a)-(h)) are not absolute in their nature but are subject to being 'necessary' e.g. revolving doors may be adequate in premises that are used only by very small numbers of persons, where all persons that will use the premises are very familiar with the layout, the requirement to provide signs may not be necessary etc.

## FSO FAQ

**Q. 14(2)(b) What is the definition of danger in this context?**

A. Fire and associated risks.

**Q. What is the meaning of emergency lighting within the context of this article?**

A. Lighting, whether from luminaires in the premises or borrowed light from outside, of sufficient intensity to allow the means of escape to be safely used in the event of a failure to the main lighting system. The necessity for emergency lighting in addition to primary lighting may depend on the times at which escape routes may be required for use e.g. premises occupied purely during daylight hours and with adequate glazing to allow the passage of light may not require emergency lighting of any kind.

**Q. Can article 14(2) be used to require for example licensed premises to determine their own occupancy figures within the significant findings of their risk assessment?**

A. Yes, the acknowledgement of the hazards presented by licensed premises make them a good example of having to calculate occupancy figures as a part of their compliance with article 14(2)(c) in particular.

## Article 15 – Procedures for serious and imminent danger and for danger areas

### The Regulatory Reform (Fire Safety) Order 2005

#### **Procedures for serious and imminent danger and for danger areas**

15. —(1) *The responsible person must—*

*(a) establish and, where necessary, give effect to appropriate procedures, including safety drills, to be followed in the event of serious and imminent danger to relevant persons;*

*(b) nominate a sufficient number of competent persons to implement those procedures in so far as they relate to the evacuation of relevant persons from the premises; and*

*(c) ensure that no relevant person has access to any area to which it is necessary to restrict access on grounds of safety, unless the person concerned has received adequate safety instruction.*

(2) *Without prejudice to the generality of paragraph (1)(a), the procedures referred to in that subparagraph must—*

*(a) so far as is practicable, require any relevant persons who are exposed to serious and imminent danger to be informed of the nature of the hazard and of the steps taken or to be taken to protect them from it;*

*(b) enable the persons concerned (if necessary by taking appropriate steps in the absence of guidance or instruction and in the light of their knowledge and the technical means at their disposal) to stop work and immediately proceed to a place of safety in the event of their being exposed to serious, imminent and unavoidable danger; and*

*(c) save in exceptional cases for reasons duly substantiated (which cases and reasons must be specified in those procedures), require the persons concerned to be prevented from resuming work in any situation where there is still a serious and imminent danger.*

(3) *A person is to be regarded as competent for the purposes of paragraph (1) where he has sufficient training and experience or knowledge and other qualities to enable him properly to implement the evacuation procedures referred to in that paragraph.*

### FSO Guidance Notes

The responsible person has to establish procedures that will keep people safe from a fire on the premises. In every case, the responsible person has to bring these procedures in to being if it becomes necessary at any time i.e. if the premises experience a fire; the procedures must be implemented. Therefore the procedures must be practical for the circumstances of the case and as such are likely to vary from premises to premises and may vary with the number of trained staff members present, the training they have been given and the nature of the occupancy (among others).

In terms of the number of people needed; all that is required are enough people to effect the safe evacuation of relevant persons. A different number of people may be required to carry out duties under other enactments. Clearly these numbers could vary in the extreme. For example a single guard on a railway platform might be able to direct people off a platform that is affected by fire; whereas a fire in a nursing home with multiples of bed-ridden, dependent residents may require several trained nursing staff to move each resident to a safer area. In many cases this requirement may be satisfied through the role of a fire marshal but this will depend heavily on the nature of the training the fire marshal has been given and their ability to carry the role into effect.

15(2)(a) is a general requirement that whatever procedures the responsible person puts in place, they must enable relevant persons to be informed of the fire and of what's in place to protect them from it. In most cases this requirement is satisfied, for non-employees, by the provision of 'what to do in case of fire' notices that explain what relevant persons are expected to do. Although this article makes no requirement to provide any preventive or protective measures beyond 'people to implement the procedures', relevant persons are to be made aware of the nature of the hazard. In most cases this will be via a fire alarm system, which inherently informs people of the nature of the problem i.e. a fire in the premises, although the provision of the alarm is not made within this article. Equally the steps to be taken as a result of the sounding alarm are also generally well understood, but in many cases the role of the nominated persons (who could be fire marshals) may assist in this regard.

Sub-paragraphs 2(b) and 2(c) relate to workplaces and are therefore requirements for the 'employer' responsible person. These requirements hold respective expectations that employees will respond quickly to any notification of serious and imminent danger (taking it upon themselves to shut-down work processes or stop work as necessary), and that employees will not return to work until they have been informed that it is safe for them to do so. Employees are expected to follow the procedures put in place to protect them by proceeding to the nominated place of safety.

The enforcing authority should establish the presence of procedures to be followed in respect of danger from fire, and during an audit, needs to consider the following:

- Has the responsible person carried out drills to practice it?
- What training have staff members received (see article 21)?
- Is there any evidence that drills have taken place?
- Have persons been given specific roles during evacuation?
- What additional measures are in place for these areas?
- Have relevant persons been informed of the nature of the hazard and the steps to be taken?

## **FSO FAQ**

### **Q. 15(1)(a) is this the emergency plan?**

A. Yes, but only in relation to fire on the premises

### **Q. 15(1)(b) What specific competent persons are they referring to?**

A. Persons who will carry the emergency plan into action. A common example could be fire marshals / wardens. It must be noted that these persons are "nominated" and so have the ability to decline the nomination (subject to article 23). Declining the nomination should not, generally be regarded as a breach of article 23 if the person nominated has reasonable doubts or fears about their own health and safety if the nomination were accepted.

### **Q. 15(2) Does this only apply to HSE?**

A. No the specific issues under 15(2) are equally applicable to general fire precautions and the emergency procedures to be followed. For example under 15(2)(c) the emergency plan must include that people other than those specially nominated, cannot go back into a building until it has been confirmed there is no fire and / or it has been confirmed that those persons will not be risk as a result of a fire that has now been extinguished (e.g. the roof isn't likely to collapse).

**Q. 15(1)(a) How does the responsible person ensure that procedures to be followed in the event of fire are appropriate and effective for circumstances in which premises have no staff to implement those procedures, e.g. a hotel without the presence of overnight staff?**

A. The requirements of 15(1)(b) suggest that such premises do not comply with the requirements and prohibitions imposed under the Order. The responsible person would have to demonstrate that zero persons are sufficient to implement the procedures. Alternatively, it may be adequate for the responsible person to demonstrate that staff members are 'on call' and located sufficiently close that in the event of fire, they will be able to implement the procedures required under article 15(1)(a). (It is likely that this approach will rarely be appropriate).

## Article 16 – Additional emergency measures in respect of dangerous substances

### The Regulatory Reform (Fire Safety) Order 2005

#### **Additional emergency measures in respect of dangerous substances**

**16.** —(1) *Subject to paragraph (4), in order to safeguard the safety of relevant persons arising from an accident, incident or emergency related to the presence of a dangerous substance in or on the premises, the responsible person must ensure that—*

*(a) information on emergency arrangements is available, including—*

*(i) details of relevant work hazards and hazard identification arrangements; and*

*(ii) specific hazards likely to arise at the time of an accident, incident or emergency;*

*(b) suitable warning and other communication systems are established to enable an appropriate response, including remedial actions and rescue operations, to be made immediately when such an event occurs;*

*(c) where necessary, before any explosion conditions are reached, visual or audible warnings are given and relevant persons withdrawn; and*

*(d) where the risk assessment indicates it is necessary, escape facilities are provided and maintained to ensure that, in the event of danger, relevant persons can leave endangered places promptly and safely.*

(2) *Subject to paragraph (4), the responsible person must ensure that the information required by article 15(1)(a) and paragraph (1)(a) of this article, together with information on the matters referred to in paragraph (1)(b) and (d) is—*

*(a) made available to relevant accident and emergency services to enable those services, whether internal or external to the premises, to prepare their own response procedures and precautionary measures; and*

*(b) displayed at the premises, unless the results of the risk assessment make this unnecessary.*

(3) *Subject to paragraph (4), in the event of a fire arising from an accident, incident or emergency related to the presence of a dangerous substance in or on the premises, the responsible person must ensure that—*

*(a) immediate steps are taken to—*

*(i) mitigate the effects of the fire;*

*(ii) restore the situation to normal; and*

*(iii) inform those relevant persons who may be affected; and*

*(b) only those persons who are essential for the carrying out of repairs and other necessary work are permitted in the affected area and they are provided with—*

*(i) appropriate personal protective equipment and protective clothing; and*

*(ii) any necessary specialised safety equipment and plant,*

*which must be used until the situation is restored to normal.*

*(4) Paragraphs (1) to (3) do not apply where—*

*(a) the results of the risk assessment show that, because of the quantity of each dangerous substance in or on the premises, there is only a slight risk to relevant persons; and*

*(b) the measures taken by the responsible person to comply with his duty under article 12 are sufficient to control that risk.*

## **FSO Guidance Notes**

This article imposes various duties on the responsible person to make sure that employees and other relevant persons are safe in the event of an accident or emergency involving dangerous substances. In the case of an accident or emergency involving dangerous substances the immediate vicinity could be quite wide.<sup>56</sup>

The responsible person, subject to the risk assessment, must ensure that

- (a) information on emergency arrangements is available,
- (b) suitable warning and other communication systems are in place,
- (c) any necessary pre-explosion warning is given and people withdraw,
- (d) escape facilities are provided and maintained,
- (e) information is provided to relevant accident and emergency services,
- (f) information is displayed at the premises, and
- (g) steps are taken to mitigate fires, restore the situation to normal and inform relevant persons.

In the event of the premises requiring post-incident repair or other necessary work, the responsible person must

- (a) take immediate steps and permit only essential persons to the affected area and
- (b) provide PPE, specialised equipment and plant.

This article does not apply if the results of the risk assessment show that, because of the quantity of each dangerous substance in or on the premises, there is only a slight risk to relevant persons and the measures taken by the responsible person to comply with his duty under article 12 are sufficient to control that risk. This article looks at the extra measures the responsible person needs to take in respect of the dangerous substances in or on the premises.

In similarity with article 12, this article appears to step beyond the requirement to provide 'general fire precautions'<sup>57</sup> insofar as, at paragraph (1) it discusses safeguarding the safety of relevant persons arising from "an accident, incident, or emergency related to the presence of a dangerous substance in or on the premises".<sup>58</sup>

It is clear from the title of article 16 that this article is intended to provide 'additional emergency measures', implying a requirement for more than those measures provided for elsewhere under the Order. This presents another conflict within the pages of the Order because the requirements imposed by its various articles should be provided to a standard that will provide safe premises for relevant persons and ensure the safety of employees. This would imply that where the safety provided from the various articles of the Order are insufficient, that more would be expected to be done under those articles so that safety is maintained.

When the requirements of article 16(3) are considered, which are concerned with "fire arising", the generality of article 16(1) clearly goes beyond the parameters of the Order, which are limited to the

<sup>56</sup> See article 2 – Interpretation "Relevant Persons" in this document

<sup>57</sup> See interpretation to article 4 and its relationship to dangerous substances.

<sup>58</sup> This requirement could be based on an old requirement of the Fire Precautions Act 1971 at Section 3(1)(b), which dealt with the keeping of explosives or highly flammable materials anywhere under in or on the building.

provision of general fire precautions<sup>59</sup>. Within the requirements at article 16(3) is the requirement to 'restore the situation to normal' (article 16(3)(a)(i)), which may be taken to mean the risk to human health has been adequately controlled or removed.

Many of the requirements made at paragraph (1) of this article should be satisfied from other parts of the Order e.g. the provision of warning devices at 16(1)(b) and 16(1)(c) may be dealt with adequately by article 13(1)(a), the provision of suitable escape should be provided by article 14 etc.

Article 16(2) requires the responsible person to make information available to those emergency services (whether internal or external) that might be called on to help in an emergency. The information to be provided is:

- The procedures put in place for serious and imminent danger and for danger areas;
- Details of hazards and how hazards can be identified;
- Specific hazards likely to arise in an emergency; and
- Escape facilities provided for relevant persons to safely leave dangerous places

The information must, not only be provided, but where necessary must also be displayed at the premises.

To satisfy paragraph 3 – in the event of fire, the responsible person must ensure that immediate steps are taken to mitigate the effects of the fire, restore the situation to normal, and inform relevant persons who may be affected. The responsible person must also ensure that only essential personnel are permitted in the affected area, and they are issued with protective equipment and clothing, and safety equipment.

Again (as with article 12) where inspecting officers encounter dangerous substances and are in any doubt as to the relationship between general fire precautions and the presence of dangerous substances; a joint inspection with the HSE should be arranged. This might imply that the requirements of article 16 are provided for enforcement by the HSE.

Responsible persons are not required to make these additional emergency arrangements where they assess that there is only a slight risk because of the quantity of each substance present and because the control measures they have put in place to fulfil the requirements of other safety or fire legislation are sufficient to control that risk. For example, in respect of fire, the normal emergency procedures, including escape routes and means of giving warning already provided in the workplace may be assessed to be sufficient.

Further information relating to this article and guidance for enforcing authorities is contained in Appendix 3 to this document.

## FSO FAQ

### **Q. Does this only apply when measures taken in article 12 are not sufficient?**

A. The article applies unless (a) the results of the risk assessment show that because of the (small) quantity of each dangerous substances in or on the premises there is only a slight risk to relevant persons; and (b) the measures for elimination or reduction of risk from dangerous substances taken in accordance with article 12 are sufficient to control the slight risk that is present. Both (a) and (b) must be satisfied for article 16 to be disapplied.

### **Q. 16(1)(b)(c) Are these HSE?**

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<sup>59</sup> See article 5(5)  
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A. Predominantly yes, but this can also be considered in relation to the adequacy of the emergency plan and the fire warning arrangements.

**Q. 16(2) Is this to replace HAZCHEM?**

A. No. HAZCHEM is typically associated with dangerous substances being carried on vehicles and it should be noted that where a vehicle excise license is in force, the Order does not apply.

HAZCHEM<sup>60</sup> signage may be encountered on buildings and might be suitable and sufficient but other legislation<sup>61</sup> that affects the premises or substances stored therein might require it to be updated.

More generally, signage might be required under the Order in respect of making information available for emergency services and ensuring that information is displayed under 16(1)(a) to satisfy article 16(2)(b).

**Q. 16(3) Does this only affect a fire arising from an accident or spillage?**

A. No. It affects any accident, incident or emergency that gives rise to a fire involving dangerous substances. The key point is that there is a fire that has arisen because of, or involving, dangerous substances on the premises.

**Q. 16(3)(a)&(b) How much of this is HSE?**

A. It is not all for HSE. These matters include risk reduction through mitigation of the effects of the fire and removing the risk through extinguishing a fire.

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<sup>60</sup> N.B. With the introduction of 'The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2004' on 10th May 2004, UK legislation became almost totally aligned with ADR

<sup>61</sup> Other legislation might be required by e.g. The Dangerous Substances (Notification and Marking of Sites) Regulations 1990, The Health and Safety (Safety Signs and Signals) Regulations 1996, Petroleum (Consolidation) Act 1928 c.32, Dangerous Substances and Explosive Atmospheres Regulations etc.

## Article 17 – Maintenance

### The Regulatory Reform (Fire Safety) Order 2005

#### **Maintenance**

*17. —(1) Where necessary in order to safeguard the safety of relevant persons the responsible person must ensure that the premises and any facilities, equipment and devices provided in respect of the premises under this Order or, subject to paragraph (6), under any other enactment, including any enactment repealed or revoked by this Order, are subject to a suitable system of maintenance and are maintained in an efficient state, in efficient working order and in good repair.*

*(2) Where the premises form part of a building, the responsible person may make arrangements with the occupier of any other premises forming part of the building for the purpose of ensuring that the requirements of paragraph (1) are met.*

*(3) Paragraph (2) applies even if the other premises are not premises to which this Order applies.*

*(4) The occupier of the other premises must co-operate with the responsible person for the purposes of paragraph (2).*

*(5) Where the occupier of the other premises is not also the owner of those premises, the references to the occupier in paragraphs (2) and (4) are to be taken to be references to both the occupier and the owner.*

*(6) Paragraph (1) only applies to facilities, equipment and devices provided under other enactments where they are provided in connection with general fire precautions.*

#### **FSO Guidance Notes**

Essentially this means that any equipment and devices provided to protect relevant persons from the dangers of fire, such as fire extinguishers, alarm systems and emergency lighting, shall be subject to a suitable system of maintenance: they must be regularly checked and properly maintained (including inspection and testing by a competent person, as necessary) at suitable intervals and any faults found rectified as quickly as possible. This article covers anything that has been provided for the purposes of fire safety.

The requirement for maintenance is a three part test. The test consists of maintaining the equipment, facilities and devices:

- In an efficient state;
- In efficient working order; and
- In good repair.

Using the example of a fire alarm system, the three part test would apply as follows. The fire alarm would have to be in working order i.e. when operated, the fire alarm is capable of raising a warning of fire (audible, visual etc. as designed and appropriate to the risk). Although working as it should it is possible the fire alarm system incorporates sounders hanging off the wall dangling by its cabling, call points are not properly fixed to the wall etc. In this case, although working as it should, the alarm is not in good repair. Having checked that the fire alarm is in working order and in good repair, it remains to determine whether the fire alarm is in an efficient state. Evidence of e.g. a weekly test being conducted tests circuitry from the operated call point to the panel and from the panel to the sounder or warning device. This test does not however check other devices associated with the system or all the cabling throughout the system etc. To satisfy the requirement to maintain the system, in this example, in an efficient state it is reasonable to expect a system of servicing to be in place, maintaining the system to some recognised standard (usually a British Standard). British Standards tend to include requirements

or guidance pertaining to the keeping of records, usually in a log book, which may ensure that records are kept, but no requirement can be made to this effect directly under the Order.

Clearly equipment and devices need to do their job properly and must therefore be in a capable state when needed. For example, where any equipment (e.g. a fire alarm) is electrically operated, the necessary supply of electricity must (unless switched off for the purpose of altering, maintaining or testing the electrical system) be kept switched on at all times when the premises are occupied.

When maintenance is being undertaken it may be necessary to make adequate alternative provision to compensate for any deficiencies in the normal fire precautions. Therefore where the fire risk assessment is required to be recorded, any alternative provision needs to be accounted for within that assessment. An example would be the maintenance of a sprinkler system provided in accordance with Ordinary Hazard or High Hazard systems – clearly arrangements must be made for some alternative solution for the period that the sprinklers are inactive due to servicing or maintenance.

Enforcing authorities cannot impose frequencies on maintenance (e.g. requiring that the fire alarm must be maintained annually) though a recommendation to this effect may be made. Where the fire alarm has been provided and installed to a British Standard; it is reasonable to expect that standard to be met by the responsible person, in terms of maintenance and recording systems etc, however there is no requirement under the Order for records of test to be kept. It should be noted that the enforcing authority cannot take action against the responsible person under this article for fire safety measures they do not have (e.g. a missing fire door cannot be recorded as a maintenance failure on the grounds that it is not there to maintain).

All responsible persons and duty holders of any premises (inclusive of single private dwellings where they form part of the building), which may have an impact on the provision and maintenance of fire safety provisions have a duty to co-operate.

Of particular interest here are situations in which a common fire safety system is installed; and extends into parts of the premises to which the Order does not apply. The responsible person is expected to be allowed access to those areas for the purposes of maintaining the common protective system in its entirety.

For example, consider premises in which a common fire alarm and emergency lighting system is installed throughout. The premises are occupied both commercially (to which the Order applies) and as domestic dwellings (to which the Order does not apply). The protective systems have detector heads and luminaires in the domestic dwellings in addition to the commercial and common areas of the premises. The responsible person is imposed with a duty to maintain the whole of each system (even in those areas to which the Order does not apply). The CLG, at the time the Order was written, held an expectation that:

*“under the terms of any lease, tenancy or licence agreement, the responsible person would be allowed reasonable access for the purpose of maintaining fire safety equipment throughout any premises, including those used as private dwellings.”<sup>62</sup>*

## FSO FAQ

- Q. Can it be necessary to maintain it in efficient state, in efficient working order and in good repair but not subject to a suitable system of maintenance?**
- A. The system of maintenance is inherent to the requirement. The ‘three part test’ of efficient state, efficient working order and good repair is an “and” requirement so all must be complied with. This is a very useful tool during audits as the Order allows for an auditor to ‘dig’ in to the maintenance practices for the premises. E.g. fire doors to not close fully, the process can be

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<sup>62</sup> House of Commons Regulatory Reform Committee, Draft Regulatory Reform (Fire Safety) Order 2005 Ninth Report of Session 2004-05 Report, together with formal minutes and written evidence, HC 495, [online], 2005, London, The Stationery Office Limited, Available from: <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdereg/495/495.pdf> [Accessed 21<sup>st</sup> February 2008], Para 31

audited by checking means by which employees<sup>63</sup> might be enabled to report the door faulty, how that information is received by the responsible person and the maintenance schedule under which the repair is listed and prioritised and the proposed date for repairing the door.

**Q. 17(3) Can you explain this in relation to HMO or premises with private flat e.g. caretaker?**

A. It must be noted that the occupier is required to co-operate by virtue of article 17(4) therefore it is possible to enforce on a occupier of a domestic premises where that person's premises may impact upon the fire safety of the remainder of the premises. However, the extent to which that occupier may be considered to be a person on whom duties are imposed by virtue of article 5(3) will depend on the circumstances of the case. The article was intended to provide landlords with some backing that they could cite in the civil courts. Where the responsible person breaches article 17 because the occupier of parts of the premises to which the Order does not apply will not co-operate (for example over maintenance of a fire alarm system that extends into a private flat) then that occupier could be prosecuted by virtue of article 32(10) or may be held as a duty holder under article 5(4).

**Q. 17(4) Is this in addition to article 22?**

A. Yes, this is a specific co-operation requirement about persons who occupy premises to which other parts of the Order (such as article 22) do not apply. See also 17(3) above.

**Q. Can a system be accepted that does not comply with a current British Standard?**

A. The standard has to be suitable sufficient and appropriate to the risk. Where these standards are met it is not unreasonable to accept some other recognised standard such as a US standard for example

**Q. Is there a requirement under the Order to maintain records of scheduled maintenance?**

A. The responsible person must have arrangements in place for the planning, organisation, control, monitoring and review of preventive and protective measures and under specified conditions, must record those arrangements (see article 11 of this document). This means scheduled maintenance should be subject to 'planning, organisation, control, monitoring and review' (and should record these processes under prescribed conditions) but there is no express requirement to record the results of routine testing, although this would be good practice and allow the responsible person to evidence that testing has taken place, should the need arise.

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<sup>63</sup> See article 23(1)(c)(ii) Employee Duties

## Article 18 – Safety assistance

### The Regulatory Reform (Fire Safety) Order 2005

#### **Safety assistance**

**18.** —(1) *The responsible person must, subject to paragraphs (6) and (7), appoint one or more competent persons to assist him in undertaking the preventive and protective measures.*

(2) *Where the responsible person appoints persons in accordance with paragraph (1), he must make arrangements for ensuring adequate co-operation between them.*

(3) *The responsible person must ensure that the number of persons appointed under paragraph (1), the time available for them to fulfil their functions and the means at their disposal are adequate having regard to the size of the premises, the risks to which relevant persons are exposed and the distribution of those risks throughout the premises.*

(4) *The responsible person must ensure that—*

(a) *any person appointed by him in accordance with paragraph (1) who is not in his employment—*

(i) *is informed of the factors known by him to affect, or suspected by him of affecting, the safety of any other person who may be affected by the conduct of his undertaking; and*

(ii) *has access to the information referred to in article 19(3); and*

(b) *any person appointed by him in accordance with paragraph (1) is given such information about any person working in his undertaking who is—*

(i) *employed by him under a fixed-term contract of employment, or*

(ii) *employed in an employment business,*

*as is necessary to enable that person properly to carry out the function specified in that paragraph.*

(5) *A person is to be regarded as competent for the purposes of this article where he has sufficient training and experience or knowledge and other qualities to enable him properly to assist in undertaking the preventive and protective measures.*

(6) *Paragraph (1) does not apply to a self-employed employer who is not in partnership with any other person, where he has sufficient training and experience or knowledge and other qualities properly to assist in undertaking the preventive and protective measures.*

(7) *Paragraph (1) does not apply to individuals who are employers and who are together carrying on business in partnership, where at least one of the individuals concerned has sufficient training and experience or knowledge and other qualities—*

(a) *properly to undertake the preventive and protective measures; and*

(b) *properly to assist his fellow partners in undertaking those measures.*

(8) *Where there is a competent person in the responsible person's employment, that person must be appointed for the purposes of paragraph (1) in preference to a competent person not in his employment.*

## FSO Guidance Notes

These 'safety assistants' are persons the responsible person appoints to help do things such as maintenance or to implement training or prepare the emergency plan. The requirement is a general one and is without prejudice to specific requirements relating to specific precautions (such as nomination of competent persons under article 13(3)(b)). It should be noted that these persons are 'appointed' to a job or function and are not 'nominated'.

For an interpretation of competent person as it applies to this article, see the interpretation contained in article 2 of this document.

Competent persons may be appointed in a number of guises, such as:

- Fire Alarm Engineer
- Maintenance Engineer
- Specialist advisor for dangerous substances etc.

Note should be taken of the fact that the requirement made by article 18 is for assistance in providing the preventive and protective measures; i.e. those measures required as a consequence of carrying out a fire risk assessment. The requirement does not relate to the carrying out of a fire risk assessment. The fire risk assessment is a duty placed directly on the responsible person at article 9. Article 18 concerns itself with the physical undertaking of preventive and protective measures (or general fire precautions).

The responsible person must ensure all appointees co-operate in fulfilling the function and ensure that those they appoint to assist, are given all the information, support and facilities in relation to the premises, risks and layout, to be able to assess all the risks. This applies to non-employed persons – essentially anyone who is appointed to assist with fire safety preventative and protective matters must be given the tools to do the job.

More complicated situations will require the competent persons to have a higher level of knowledge and experience. More complex or highly technical situations will call for specific applied knowledge and skills, which can be offered by appropriately, qualified specialists.

Where self employed persons or an employed person has the relevant skills to satisfy the undertaking of necessary preventive and protective measures, the responsible person does not need to employ another competent person to do this for them.

An employee must be chosen as the safety assistant in preference to bringing in an external safety assistant. If there is no employee with relevant competence to give safety assistance with general fire precautions in the organisation; the responsible person should enlist an external service or person to give relevant safety assistance. In some circumstances a combination of internal and external competence might be appropriate, recognising the limitations of the internal competence.

The appointment of such competent persons to provide safety assistance does not absolve the employer from responsibilities for fire safety under the Order. It can only give added assurance that these responsibilities will be discharged adequately.

## FSO FAQ

### **Q. Can a person appointed to give assistance under article 18 be prosecuted?**

A. If a person has been given the relevant and necessary information to carry out a task, and has sufficient training and experience and knowledge and or other qualities to be deemed competent for the task appointed, then failure to undertake their duties to a competent standard gives rise to the potential to prosecute<sup>64</sup>.

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<sup>64</sup> See *GM FRA v Morris*  
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## Article 19 – Provision of information to employees

### The Regulatory Reform (Fire Safety) Order 2005

#### **Provision of information to employees**

**19.** —(1) *The responsible person must provide his employees with comprehensible and relevant information on—*

- (a) the risks to them identified by the risk assessment;*
- (b) the preventive and protective measures;*
- (c) the procedures and the measures referred to in article 15(1)(a);*
- (d) the identities of those persons nominated by him in accordance with article 13(3)(b) or appointed in accordance with article 15(1)(b) ; and*
- (e) the risks notified to him in accordance with article 22(1)(c).*

*(2) The responsible person must, before employing a child, provide a parent of the child with comprehensible and relevant information on—*

- (a) the risks to that child identified by the risk assessment;*
- (b) the preventive and protective measures; and*
- (c) the risks notified to him in accordance with article 22(1)(c),*

*and for the purposes of this paragraph, "parent of the child" includes a person who has parental responsibility, within the meaning of section 3 of the Children Act 1989, for the child.*

*(3) Where a dangerous substance is present in or on the premises, the responsible person must, in addition to the information provided under paragraph (1) provide his employees with —*

- (a) the details of any such substance including—*
  - (i) the name of the substance and the risk which it presents;*
  - (ii) access to any relevant safety data sheet; and*
  - (iii) legislative provisions (concerning the hazardous properties of any such substance) which apply to the substance; and*
- (b) the significant findings of the risk assessment.*

*(4) The information required by paragraph (3) must be—*

- (a) adapted to take account of significant changes in the activity carried out or methods or work used by the responsible person; and*
- (b) provided in a manner appropriate to the risk identified by the risk assessment.*

#### **FSO Guidance Notes**

This article applies to the employer responsible person only.

Where the responsible person is an employer then he must provide his employees with detailed information regarding issues relating to fire safety, relevant to them and to their area(s) of work. (Note should be taken of articles 40 and 41 relating to employers not charging employees for providing anything done to comply with the Order, and the general duty to consult employees respectively).

Provision of information to employees should be identified as part of the fire risk assessment. Inspectors may have ascertained evidence for this section through previous questioning; however it may be useful to ask if there is a staff notice board where information is displayed, check with their intranet site or question staff during an audit / inspection.

Relevant information on; risks identified by the fire risk assessment, on the preventive measures taken to prevent fires occurring, and protective measures to help keep relevant persons safe from an outbreak of fire, should be provided. Explicitly this article requires information on emergency procedures and the identities of those with duties under articles 13(3)(b) and 15(1)(b) (first aid fire-fighters and fire wardens respectively). In addition, article 19(1)(e) requires the responsible person to ensure other responsible persons are made aware of any risks arising out of his undertaking (for example in multi-occupied premises).

The information should be provided to employees in a form which takes account of any language difficulties or disabilities. Information can be provided in whatever form is most suitable in the circumstances, as long as it can be understood by all employees; it could include providing translation, using interpreters, or replacing written notices with clearly understood symbols or diagrams.

This article applies to all employees, including trainees and those on fixed-duration contracts.

While a child<sup>65</sup> is at work, the requirements to provide information are the same as for other employees but the information is to be provided to the parent or guardian of that child. This information can be provided in any appropriate form, including verbally or directly to the parents or guardians, or in the case of work experience, via an organisation such as a school, the work experience agency or, if agreed with the parents, via the child him or herself, as long as this is considered a reliable method. Good practice would see some record being maintained of the information that has been provided to parents / guardians.

Employees should also be informed of dangerous substances and the potential danger they pose, along with the provision of the relevant safety data sheets and any regulations that apply. Where the work practice with the dangerous substance changes the risk then the information needs to be adapted accordingly, for example the way in which the substance is used may present a different risk from that presented by its storage.

## FSO FAQ

### **Q. What is the best way to show compliance with these articles?**

A. Written records are ideal because they are more easily audited and offer a straight forward way in which the responsible person can demonstrate compliance. Where written records are not maintained, then employees and employers (and self employed from outside undertakings) should be able to demonstrate an appropriate level of knowledge. This may be achieved by way of questioning. Where a written risk assessment is required, then provision of information should be a significant finding and the inspecting officer should ensure this is provided.

### **Q. Can volunteers be classified as employees?**

A. They can, it will depend on the existence of an employer / employee relationship, which may be express or implied – see FSO Guidance Notes for ‘employee’ at article 2 in this document.

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<sup>65</sup> See Article 2 for interpretation of ‘child’

## Article 20 – Provision of information to employers and the self-employed from outside undertakings

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Provision of information to employers and the self-employed from outside undertakings***

**20.** —(1) *The responsible person must ensure that the employer of any employees from an outside undertaking who are working in or on the premises is provided with comprehensible and relevant information on—*

*(a) the risks to those employees; and*

*(b) the preventive and protective measures taken by the responsible person.*

(2) *The responsible person must ensure that any person working in his undertaking who is not his employee is provided with appropriate instructions and comprehensible and relevant information regarding any risks to that person.*

(3) *The responsible person must—*

*(a) ensure that the employer of any employees from an outside undertaking who are working in or on the premises is provided with sufficient information to enable that employer to identify any person nominated by the responsible person in accordance with article 15 (1)(b) to implement evacuation procedures as far as those employees are concerned; and*

*(b) take all reasonable steps to ensure that any person from an outside undertaking who is working in or on the premises receives sufficient information to enable that person to identify any person nominated by the responsible person in accordance with article 15 (1)(b) to implement evacuation procedures as far as they are concerned.*

### FSO Guidance Notes

The responsible person must ensure that information is provided to the employer of employees from outside undertakings who are working on the responsible person's premises. This information must present the risks faced by that employer's employees in an understandable manner so that the employer can quantify those risks, as they relate to his employees. The information must be relevant to the work the employees will be undertaking.

This article is written from the aspect of the premises (meaning that to which the Order applies). In this article the term 'outside undertakings' refers to employees not under the direct control of the responsible person for the premises, for example contractors. This is to ensure that the employer who may be requiring his employees to enter premises to carry out work is aware of the risks and the control measures that have been put in place.

The responsible person must ensure that any person working in the premises from outside undertakings are aware of the risks to them and any relevant information and instructions i.e. fire procedures. Article 20(3) requires that the employer and employees (or other working persons) from outside undertakings are made aware of the person nominated to implement fire procedures (fire wardens).

Information may be provided through a written permit-to-work system. Where the visiting employees are specialists, brought in to undertake specialist tasks, the host employer's instructions need to be concerned with those risks which are peculiar to the activity and premises. The visiting employee may also introduce risks to the permanent workforce (e.g. from equipment or substances they may bring with them). The responsible person for the employees from the outside undertaking has a general duty

under section 3 of the Health and Safety at Work Act 1974 to inform the host employer of such risks and to co-operate and co-ordinate with the host employer to the extent needed to control those risks.

## **FSO FAQ**

**Q. Does this article relate only to employees?**

A. No - it is a requirement imposed on responsible persons, in their various guises, to pass information to the employees and employers from outside undertakings. It does not make requirements on the responsible person in relation to his own employees. Essentially it is about providing information to (visitor) workers who are working 'in or on' the premises, and, where those workers are employed, then that employer needs information.

## Article 21 – Training

### The Regulatory Reform (Fire Safety) Order 2005

#### **Training**

**21.** —(1) *The responsible person must ensure that his employees are provided with adequate safety training—*

*(a) at the time when they are first employed; and*

*(b) on their being exposed to new or increased risks because of—*

*(i) their being transferred or given a change of responsibilities within the responsible person's undertaking;*

*(ii) the introduction of new work equipment into, or a change respecting work equipment already in use within, the responsible person's undertaking;*

*(iii) the introduction of new technology into the responsible person's undertaking; or*

*(iv) the introduction of a new system of work into, or a change respecting a system of work already in use within, the responsible person's undertaking.*

*(2) The training referred to in paragraph (1) must—*

*(a) include suitable and sufficient instruction and training on the appropriate precautions and actions to be taken by the employee in order to safeguard himself and other relevant persons on the premises;*

*(b) be repeated periodically where appropriate;*

*(c) be adapted to take account of any new or changed risks to the safety of the employees concerned;*

*(d) be provided in a manner appropriate to the risk identified by the risk assessment; and*

*(e) take place during working hours.*

## **FSO Guidance Notes**

Note: This article only applies to 'employer' responsible persons.

The responsible person must ensure that his employees are provided with adequate safety training. The enforcing authority needs to ascertain whether or not training is being carried out and if it meets the requirements of the Order.

This training must be suitable and sufficient and must be to a level which allows the employee to safeguard himself and other relevant persons on the premises.

The enforcing authority needs to ascertain evidence of the training, but cannot require that records be kept. The keeping of records does however offer best practice because records may be audited and offer a straightforward way in which the responsible person can demonstrate compliance. In the absence of records the enforcing authority may be able to ascertain the adequacy of training by questioning a sample of the employees during audit / inspection. A recommendation may be made to maintain training records.

Fire safety training should take place during working hours. If it is necessary to arrange training outside an employee's normal hours, this should be treated as an extension of time at work. Employees must not pay for their training<sup>66</sup>.

The fire risk assessment (and subsequent reviews of the assessment) will help determine the level of training and competence needed for each type of work. All employees, including senior management, should receive relevant training. This may need to include, among others, basic skills, specific on-the-job training and training in fire safety or emergency procedures. The issue of management training is of particular interest for positions of fire safety responsibility (i.e. those with control by virtue of article 5(3)). Training for managers is of particular importance for those occasions on which the usual manager is away for some reason, leaving a (normally) subordinate manager in control for the purposes of complying with the Order.

Training needs are likely to be greatest for new employees on recruitment. They should receive basic induction training on fire safety, fire and evacuation. Particular attention should be given to the needs of young workers. The fire risk assessment should identify further specific training needs. In some cases, training may be required even though an employee already holds formal qualifications (e.g. for an update on new technology). Training and competence will have to be reviewed if the work activity in which a person is involved or if the working environment changes. This may include a change of department or the introduction of new equipment, processes or tasks.

An employee's competence will decline if skills are not used regularly (e.g. in emergency procedures, operating a particular item of equipment or carrying out a task). Training therefore needs to be repeated periodically to ensure continued competence. Information from personal performance monitoring, fire safety checks, accident investigations and near-miss incidents can help to establish a suitable period for re-training.

## FSO FAQ

**Q. Could this article be prosecuted, considering that written records of training are not required?**

A. Whilst there is no requirement to provide written records, there is a requirement to comply with the article and therefore a need (if required) to show compliance. Article 11 imposes a duty to record fire safety arrangements under prescribed conditions (see article 11). These arrangements relate to the preventive and protective measures. Preventive and protective measures are synonymous with general fire precautions, which include within their meaning '*measures relating to the instruction and training of employees*'. It is therefore a reasonable expectation that the arrangements for training, including effective: planning, organisation, control, monitoring, and review of training given will be recorded and available for audit by the enforcing authority.

Although written records / certificates indicating the results of individual training given and received cannot be expressly required under the Order, they will, if kept, be helpful to the responsible person when demonstrating compliance.

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<sup>66</sup> See article 40; responsible persons are prohibited from charging employees for anything they have to do or are required to do in respect of carrying out specific requirements of the relevant statutory provisions.

## Article 22 – Co-operation and co-ordination

### The Regulatory Reform (Fire Safety) Order 2005

#### Co-operation and co-ordination

22. —(1) Where two or more responsible persons share, or have duties in respect of, premises (whether on a temporary or a permanent basis) each such person must—

(a) co-operate with the other responsible person concerned so far as is necessary to enable them to comply with the requirements and prohibitions imposed on them by or under this Order;

(b) (taking into account the nature of his activities) take all reasonable steps to co-ordinate the measures he takes to comply with the requirements and prohibitions imposed on him by or under this Order with the measures the other responsible persons are taking to comply with the requirements and prohibitions imposed on them by or under this Order; and

(c) take all reasonable steps to inform the other responsible persons concerned of the risks to relevant persons arising out of or in connection with the conduct by him of his undertaking.

(2) Where two or more responsible persons share premises (whether on a temporary or a permanent basis) where an explosive atmosphere may occur, the responsible person who has overall responsibility for the premises must co-ordinate the implementation of all the measures required by this Part to be taken to protect relevant persons from any risk from the explosive atmosphere.

#### FSO Guidance Notes

The intention of this article is to require responsible persons and duty-holders who share premises to take all reasonable steps to co-ordinate the measures they take to provide general fire precautions in respect of relevant persons.

Where two or more responsible persons share, or have duties in respect of premises (whether on a temporary or a permanent basis) each such person must co-operate with the other. They must also take all reasonable steps to co-ordinate their respective safety measures, and provide each other with information relevant to the risks from each other's undertaking and the provision of general fire precautions.

Responsible persons in premises with multiple occupiers must comply with article 22 by co-ordinating their risk assessments and co-operating with each other when implementing preventive and protective measures.

The need to co-operate with other occupiers is part of the significant findings under the risk assessment.

Enforcing authorities should ascertain what efforts are made to co-ordinate emergency plans, safety drills or testing and maintenance.

To meet the requirements of this article, it is necessary to account for the whole premises, e.g. responsible persons should come together when carrying out a fire risk assessment under article 9 or establishing procedures to follow in the event of serious and imminent danger under article 15 etc. When any place is occupied by more than one responsible person, this will require some degree of co-ordination and co-operation. All responsible persons involved should satisfy themselves that the arrangements adopted are adequate to provide safety for the relevant persons for which they are responsible. Specific co-ordination arrangements may be required by other regulations.

By way of example consider the following situation; a multi-occupied building designed for phased evacuation. The various occupant responsible persons need to understand the strategy in place for the building. An occupant responsible person that intends to evacuate when the pre-alarm sounds (rather

than on the full alarm evacuation signal), will put the design capacity of the staircases at risk. This will risk the lives of relevant persons on floors requiring evacuation, because they may not be able to evacuate as quickly and as safely as possible. It is therefore imperative that occupant responsible person's co-operate and co-ordinate their actions in case of fire.

Where one particular responsible person controls the workplace, other responsible persons and duty-holders should assist in assessing the shared risks and in co-ordinating necessary preventive and protective measures. In many situations providing information may be sufficient. A controlling responsible person who has established site-wide arrangements will have to inform new persons of those arrangements so that they can integrate themselves into the established procedures. Take for example, a large commercial building with external staff providing catering and cleaning services to a main employer. The host employer's premises constitute the normal workplace for the external staff (who have a different employer). The responsible person for those external staff would be expected to co-operate and co-ordinate the measures put in place for those staff with the measures in place for the premises by the host responsible person.

Where the activities of different responsible persons interact, for example where they share premises or workplaces, they may need to co-operate with each other to make sure their respective obligations are met. For example a small shared building with a single staircase. Each responsible person must understand the other's reliance on the staircase enclosure for their means of escape and as such must co-operate and co-ordinate with one-another to ensure the staircase remains free of combustible materials (deliveries, waste, storage etc) and that the integrity of the staircase is maintained by ensuring fire doors remain closed. Where one responsible person intends to use the building in a different way for any reason, then he must co-operate and co-ordinate to ensure they provide safe premises for relevant persons. This article does not extend to the relationship between a host employer and a contractor, which is covered in article 20.

The duties to co-operate and co-ordinate measures relate to all duties under the Order. Therefore, they concern all people who may be at risk, both on and off site, and not just where responsible persons and self-employed people permanently share a workplace.

## FSO FAQ

**Q. 22(2) Why are explosives singled out and how can you find out who has overall responsibility or is this for HSE?**

A. It is not explosives. It is explosive atmospheres e.g. where the levels of flammable gases, dusts etc. may be sufficient to cause an explosion if an ignition source is introduced. Enforcement of the co-operation requirement can be done using the Order.

**Q. When enforcing this article, is it necessary to enforce on all responsible persons involved?**

A. It will depend on the circumstances of the case. If one responsible person is making efforts to co-operate and co-ordinate, but another responsible person will not respond, it may be appropriate to issue enforcement on the second responsible person only.

## Article 23 – General duties of employees at work

### The Regulatory Reform (Fire Safety) Order 2005

#### **General duties of employees at work**

**23.** —(1) Every employee must, while at work—

(a) take reasonable care for the safety of himself and of other relevant persons who may be affected by his acts or omissions at work;

(b) as regards any duty or requirement imposed on his employer by or under any provision of this Order, co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with; and

(c) inform his employer or any other employee with specific responsibility for the safety of his fellow employees—

(i) of any work situation which a person with the first-mentioned employee's training and instruction would reasonably consider represented a serious and immediate danger to safety; and

(ii) of any matter which a person with the first-mentioned employee's training and instruction would reasonably consider represented a shortcoming in the employer's protection arrangements for safety,

*in so far as that situation or matter either affects the safety of that first-mentioned employee or arises out of or in connection with his own activities at work, and has not previously been reported to his employer or to any other employee of that employer in accordance with this sub-paragraph.*

#### **FSO Guidance Notes**

Article 23 in conjunction with articles 19 and 21 creates a means by which the responsible person should be made aware of any failures or shortcomings in his preventive and protective measures. Articles 19 and 21 respectively deal with the provision of information and training to employees. Assuming that these articles have been adequately satisfied then article 23 assists the employer to identify and subsequently deal with failures.

In particular having been informed and trained with regard to preventive and protective measures (at article 19(2)(b)) the employee is held by a duty at article 23(c)(ii) to inform the employer (or his representative) of any shortcomings in the employer's protection arrangements for safety. By implication, where there is a requirement to report on any given situation it is reasonable to expect a mechanism whereby the employee can communicate the shortcoming to the employer. In a practical sense this is simply a means for employees to report defects.

This consideration should assist the employer to comply with his duties by keeping him up-to-date with any identified shortcomings in his protection arrangements. Where inspecting officers identify numerous failures in protection arrangements for safety, it will be worthwhile to pursue a line of questioning relating to this article and the ability of employees to identify problems. Such a line of questioning might lead to a discovery of further failures relating to the provision of information and training of employees. Where employees are informed and trained as required and appropriate information is being passed to the employer, it might be worth enquiring as to how the observed failures are corrected and how a determination is made as to the priority given to each identified failure.

Where such reporting mechanisms can be established, the employer is more likely to be able to demonstrate that he is already aware of any failures and that those failures are being dealt with through their usual routine maintenance systems. In cases that such systems can be adequately demonstrated,

the enforcing authority can be reasonably satisfied that the employer is relatively self-compliant with the requirements imposed on him.

Additionally, article 23 places duties upon employees to take reasonable care for their own safety and the safety of others and also to co-operate with their employer to enable his compliance with the duties imposed on him.

It is worthy of note that it is an offence for an employee to fail to comply with article 23 where that failure places one or more relevant persons at risk of death or serious injury in case of fire. For such a prosecution to be realised the employer would have to prove that he had fulfilled his duties to enable the employee to participate as required.<sup>67</sup> However where the actions of an employee give rise to the risk of death or serious injury to relevant persons through reckless behaviour, the preceding comment (regarding proof of fulfilling the employer's duties) need not apply.

## **FSO FAQ**

No questions have been raised in relation to this article at this time.

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<sup>67</sup> SI 2005 No. 1541 article 32(2)(a)

## Article 24 – Power to make regulations about fire precautions

### The Regulatory Reform (Fire Safety) Order 2005

#### **Power to make regulations about fire precautions**

**24.** —(1) *The Secretary of State may by regulations make provision as to the precautions which are to be taken or observed in relation to the risk to relevant persons as regards premises in relation to which this Order applies.*

*(2) Without prejudice to the generality of paragraph (1), regulations made by the Secretary of State may impose requirements—*

*(a) as to the provision, maintenance and keeping free from obstruction of any means of escape in case of fire;*

*(b) as to the provision and maintenance of means for securing that any means of escape can be safely and effectively used at all material times;*

*(c) as to the provision and maintenance of means for fighting fire and means for giving warning in case of fire;*

*(d) as to the internal construction of the premises and the materials used in that construction;*

*(e) for prohibiting altogether the presence or use in the premises of furniture or equipment of any specified description, or prohibiting its presence or use unless specified standards or conditions are complied with;*

*(f) for securing that persons employed to work in the premises receive appropriate instruction or training in what to do in case of fire;*

*(g) for securing that, in specified circumstances, specified numbers of attendants are stationed in specified parts of the premises; and*

*(h) as to the keeping of records of instruction or training given, or other things done, in pursuance of the regulations.*

*(3) Regulations under this article—*

*(a) may impose requirements on persons other than the responsible person; and*

*(b) may, as regards any of their provisions, make provision as to the person or persons who is or are to be responsible for any contravention of that provision.*

*(4) The Secretary of State must, before making any regulations under this article, consult with such persons or bodies of persons as appear to him to be appropriate.*

*(5) The power of the Secretary of State to make regulations under this article—*

*(a) is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament;*

*(b) includes power to make different provision in relation to different circumstances; and*

*(c) includes power to grant or provide for the granting of exemptions from any of the provisions of the regulations, either unconditionally or subject to conditions.*

## FSO Guidance Notes

This article empowers the Secretary of State to make regulations about fire precautions. It re-enacts (with some modifications) Section 12 of the Fire Precautions Act 1971, and gives the Secretary of State power to impose requirements including the power to impose requirements on persons other than the responsible person.

The Secretary of State is under a duty to consult with such persons as appear to be appropriate before making any regulations under this article. Regulations are made as secondary legislation, a Statutory Instrument, which is subject to being cancelled if (on its progression through the House of Commons and then the House of Lords), it is not positively passed (i.e. voted 'in') by both Houses of Parliament.

The following have been introduced by use of article 24:

- The Fire Precautions (Sub-surface Railway Stations) Regulations 2009<sup>68</sup>; and
- The Fire Safety (Employees' Capabilities) (England) Regulations 2010<sup>69</sup>

The Fire Precautions (Sub-surface Railway Stations) Regulations 2009 have been put in place to ensure that the reform of fire safety law has not increased the risks in sub surface railway stations.

The principal regulatory requirements that are retained in the new Regulations relate to:

- Automatic suppression systems (exemptible)
- Automatic detection and fire alarms (exemptible)
- A minimum of two staff on duty (exemptible)
- Control of combustible materials and building works
- Additional training and instruction for staff
- Premises Information Boxes
- Fire and rescue authorities will continue to have powers to grant exemptions on a case by case basis from some of the requirements.
- The new Regulations are prescriptive and set out measures that must be taken or put in place to ensure compliance.
- They do not replace anything prescribed under the Fire Safety Order; rather they serve as an addition to those legal obligations.
- The Regulations only apply to sub surface railway stations.

The Fire Safety (Employees' Capabilities) (England) Regulations 2010 ensure that every employer must, in entrusting tasks to employees, take into account their capabilities as regards health and safety, so far as those capabilities relate to fire.

## FSO FAQ

**Q. Is a failure to comply with requirements made under article 24 a failure under article 24 or some other part of the Order?**

**A.** It is a requirement under the Order for all duty holders to comply with articles 8-22 and regulations made under article 24. As such a failure to comply with regulations made under article 24 are a failure in their own right and should be dealt with as such.

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<sup>68</sup> SI 2009 No. 782

<sup>69</sup> SI 2010 No. 471

## **Part 3 Enforcement**

### **Article 25 – Enforcing authorities**

#### **The Regulatory Reform (Fire Safety) Order 2005**

##### **Enforcing authorities**

**25. For the purposes of this Order, "enforcing authority" means—**

*(a) the fire and rescue authority for the area in which premises are, or are to be, situated, in any case not falling within any of sub-paragraphs (b) to (e);*

*(b) the Health and Safety Executive in relation to—*

*(i) any premises for which a licence is required in accordance with section 1 of the Nuclear Installations Act 1965 or for which a permit is required in accordance with section 2 of that Act;*

*(ii) any premises which would, except for the fact that it is used by, or on behalf of, the Crown, be required to have a licence or permit in accordance with the provisions referred to in sub-paragraph (i);*

*(iii) a ship, including a ship belonging to Her Majesty which forms part of Her Majesty's Navy, which is in the course of construction, reconstruction or conversion or repair by persons who include persons other than the master and crew of the ship;*

*(iv) any workplace which is or is on a construction site within the meaning of regulation 2(1) of the Construction (Health, Safety and Welfare) Regulations 1996 and to which those Regulations apply, other than construction sites referred to in regulation 33 of those Regulations.*

*(c) the fire service maintained by the Secretary of State for Defence in relation to—*

*(i) premises, other than premises falling within paragraph (b)(iii), occupied solely for the purposes of the armed forces of the Crown;*

*(ii) premises occupied solely by any visiting force or an international headquarters or defence organisation designated for the purposes of the International Headquarters and Defence Organisations Act 1964;*

*(iii) premises, other than premises falling within paragraph (b)(iii), which are situated within premises occupied solely for the purposes of the armed forces of the Crown but which are not themselves so occupied;*

*(d) the relevant local authority in relation to premises which consist of—*

*(i) a sports ground designated as requiring a safety certificate under section 1 of the Safety of Sports Grounds Act 1975 (safety certificates for large sports stadia);*

*(ii) a regulated stand within the meaning of section 26(5) of the Fire Safety and Safety of Places of Sport Act 1987 (safety certificates for stands at sports grounds);*

*(e) a fire inspector, or any person authorised by the Secretary of State to act for the purposes of this Order, in relation to—*

*(i) premises owned or occupied by the Crown, other than premises falling within paragraph (b)(ii) and (c);*

(ii) premises in relation to which the United Kingdom Atomic Energy Authority is the responsible person, other than premises falling within paragraph (b)(ii).

## FSO Guidance Notes

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>70</sup>.

## FSO FAQ

**Q. Who enforces the Order at a designated Sports Ground when there is no event happening?**

A. If the Sports Ground is designated as requiring a certificate, the relevant local authority is the enforcing authority. The terms of the license are of no consequence, only that the ground is designated as requiring the certificate. This prevents the ground switching enforcing authorities at different times, such as when the certificate is not in force.

**Q. Does the Order take precedence over Construction (Design and Management) Regulations 2007 on an occupied construction site?**

A. The CDM regulations have no offences but do state what needs to be done to satisfy the regulations on a construction site i.e. comply with regulations 39, 40 and 41 ('emergency procedures'; 'emergency routes and exits'; and 'fire detection and fire-fighting' respectively) insofar as they relate to fire. The enforcing authority should use the Order to require compliance with the standards laid down in the CDM regulations – rather than to the standard laid down in the Order.<sup>71</sup> Useful information relating to the standards of general fire precautions applicable to construction sites can be found in HSG 168, Fire Safety In Construction Sites<sup>72</sup>

**Q. Who enforces the Order in occupied construction sites?**

A. Where premises are under construction and are also occupied i.e. there is no distinction between the construction site and occupied premises, the fire and rescue authority is the enforcing authority. This is also the case for occupied premises that have means of escape which are dependent on passing through the construction site. Where there is a clear distinction between construction and occupied sites, the construction site is enforced by the HSE and the occupied site is enforced by the relevant enforcing authority under the Order.

Where construction is carried on within a fenced site, the area within the fence is enforced by the HSE, and those areas without the fence are enforced by the relevant enforcing authority detailed in the Order at article 25. In the case of sites occupied solely as construction sites, the HSE is the enforcing authority.

<sup>70</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

<sup>71</sup> See SI 2007 No. 320, Regulation 46 (1)

<sup>72</sup> HSE Books, *HSG 168 Fire Safety In Construction Sites*, HMSO, 1997

## Article 26 – Enforcement of Order

### The Regulatory Reform (Fire Safety) Order 2005

#### **Enforcement of Order**

26. —(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) In performing the duty imposed by paragraph (1), the enforcing authority must have regard to such guidance as the Secretary of State may give it.

(3) A fire and rescue authority has power to arrange with the Health and Safety Commission or the Office of Rail Regulation for such of the authority's functions under this Order as may be specified in the arrangements to be performed on its behalf by the Health and Safety Executive or the Office of Rail Regulation, as the case may be, (with or without payment) in relation to any particular workplace.

#### **FSO Guidance Notes**

This article directs enforcing authorities to enforce the requirements of the Order, which includes not only those articles with which the responsible person (and duty holders) must comply (principally articles 8-22) but also the other provisions of the Order; incorporating all articles. For the purpose of affecting the enforcement of the Order, enforcing authorities are given the liberty to appoint inspectors. Any enforcement action is taken at the discretion of the enforcing authority.

Any inspectors appointed by enforcing authorities should be provided with written authority, which should be provided in a form that the inspector can produce to demonstrate the evidence of his authority to exercise the powers conferred on him by article 27.

In bringing the requirements of the Order into effect, enforcing authorities must have regard to such guidance as the Secretary of State may issue. An example of this guidance would be Guidance Note No.1<sup>73</sup>.

Further applicable guidance includes the Enforcement Concordat<sup>74</sup> and the Regulator's Compliance Code<sup>75</sup> which together set out the principles of good enforcement policy and procedure. Enforcing authorities and appointed inspectors are expected to be familiar with this guidance. The Enforcement Concordat sets out the expectations of enforcing authorities regarding how they go about delivering their enforcement actions including that enforcing authorities should be:

- clear about the standards to which they work;
- helpful to regulated entities;
- open and transparent about how they deliver their enforcement;
- proportional in the level of enforcement they apply to risks;
- consistent in the approach they take to enforcement; and
- clear about the complaints procedure that they have in place if regulated entities feel aggrieved by an enforcing authority.

<sup>73</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, 2007

<sup>74</sup> Department of Trade and Industry. *Enforcement Concordat: Good Practice Guide for England and Wales*, [online], 2008, London: Department of Trade and Industry. Available from: <<http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file10150.pdf>> [Accessed 31<sup>st</sup> August 2010]

<sup>75</sup> Better Regulation Executive. *Regulators' Compliance Code – Statutory Code of Practice for Regulators*, [online], 2007, London: Department for Business, Enterprise & Regulatory Reform. Available from: <<http://www.berr.gov.uk/files/file45019.pdf>> [Accessed 31<sup>st</sup> August 2010]

For further information regarding the Enforcement Concordat or the Regulator's Compliance Code, readers are encouraged to read the source documents.

## **FSO FAQ**

**Q. 26(2) to what guidance does this article refer?**

A. This would be formal guidance from the Department for Communities and Local Government (DCLG). It may form part of the National Framework, Integrated Risk Management Planning guidance or simply a circular or letter – though in the case of the latter two, CLG should identify in it that it is article 26 guidance. Basically Guidance issued under article 26 is whatever guidance DCLG say is 'article 26' guidance.

**Q. 26(3) Why the Office of Rail Regulation when they are not an enforcer?**

A. The Office of Rail Regulation (ORR) have taken over the HSE's roles and functions in respect of railways. The ability to authorise the HSE or the ORR to enforce is the same as can be done for local authorities using section 101 of the Local Government Act 1972.

**Q. 26(3) Can we use this to make arrangements with local authorities?**

A. No. Arrangements with local authorities would be made using section 101 of the Local Government Act 1972.

**Q. What is the difference between the Enforcement Concordat and the Regulators Compliance Code?**

A. The Concordat is a voluntary, non-statutory code of practice to which all local authorities in the United Kingdom can sign up, whereas The Regulators Compliance Code is a statutory code of practice that came into force on 6 April 2008 as specified in the Legislative and Regulatory Reform Act 2006 and draws on the Hampton principles for improved inspection, enforcement and outcomes.

## Article 27 – Powers of inspectors

### The Regulatory Reform (Fire Safety) Order 2005

#### **Powers of inspectors**

**27.** —(1) *Subject to the provisions of this article, an inspector may do anything necessary for the purpose of carrying out this Order and any regulations made under it into effect and in particular, so far as may be necessary for that purpose, shall have power to do at any reasonable time the following—*

*(a) to enter any premises which he has reason to believe it is necessary for him to enter for the purpose mentioned above and to inspect the whole or part of the premises and anything in them, where such entry and inspection may be effected without the use of force;*

*(b) to make such inquiry as may be necessary for any of the following purposes—*

*(i) to ascertain, as regards any premises, whether the provisions of this Order or any regulations made under it apply or have been complied with; and*

*(ii) to identify the responsible person in relation to the premises;*

*(c) to require the production of, or where the information is recorded in computerised form, the furnishing of extracts from, any records (including plans)—*

*(i) which are required to be kept by virtue of any provision of this Order or regulations made under it; or*

*(ii) which it is necessary for him to see for the purposes of an examination or inspection under this article,*

*and to inspect and take copies of, or of any entry in, the records;*

*(d) to require any person having responsibilities in relation to any premises (whether or not the responsible person) to give him such facilities and assistance with respect to any matters or things to which the responsibilities of that person extend as are necessary for the purpose of enabling the inspector to exercise any of the powers conferred on him by this article;*

*(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).*

*(2) An inspector must, if so required when visiting any premises in the exercise of powers conferred by this article, produce to the occupier of the premises evidence of his authority.*

*(3) Where an inspector proposes to exercise the power conferred by paragraph (1)(f) he must, if requested by a person who at the time is present in and has responsibilities in relation to those premises, cause anything which is to be done by virtue of that power to be done in the presence of that person.*

*(4) Before exercising the power conferred by paragraph (1)(f) an inspector must consult such persons as appear to him appropriate for the purpose of ascertaining what dangers, if any, there may be in doing anything which he proposes to do under that power.*

## FSO Guidance Notes

The powers of inspectors set out in article 27 are those necessary to ensure that the Order can be effectively enforced. Nothing in article 27 provides for a power of forcible entry, search or seizure. Article 27 can be used to request information from any person that will assist an inspector to exercise his powers, i.e. those powers listed at 27(1)(a)-(f).

Records and plans may be obtained for the purpose of determining the status of contracts or tenancies so that Notices or legal action is directed at the correct duty holder. Inspectors can also require samples of things which appear to him to have created (or appears likely to present) a danger to relevant persons or to ascertain fire resistance or flammability. Any samples so required must be given freely by the responsible person (or duty holder) as the power bestowed on inspectors does not amount to a power of seizure.

*“... an investigating officer might be refused permission to remove an item or sample if there are reasonable grounds for doing so. It should, where necessary, be for the courts to determine the reasonableness of any refusal.”<sup>76</sup>*

The powers of inspectors under this Order and any regulations made under it can only be exercised at a reasonable time. What constitutes a reasonable time will depend upon the circumstances of the case, the use to which the premises are put and the professional judgement of the inspecting officer. There may be a difference for these purposes between premises which provide sleeping accommodation and those that do not. There may also be a difference between routine inspections and those carried out where dangerous conditions are suspected (see article 31).

For example, this document considers that it is reasonable to inspect premises used for sleeping accommodation, in the case of a complaint, at any time due to the potential risk to relevant persons. This could be late evening or early morning. In the case of a bar, which is open for trading until midnight, it would be reasonable to inspect at any time when the premises are occupied by the public, but it would not be reasonable to inspect at 3am when the premises is closed.

Enforcing authorities should note that by virtue of article 31(10) powers of inspectors are extended to domestic premises in HMOs where there are reasonable grounds for the inspector to believe that conditions exist that may require action under article 31 (prohibition notices).

For authorities enforcing the Order in Crown owned or occupied premises, it should be noted that by virtue of article 49(2) powers of inspectors under this article apply only in respect of premises owned by the Crown but not occupied by it. For this purpose, visiting forces are treated as Crown premises.

Health and Safety Executive inspectors should note the differences between the powers that they have under Section 20 of the Health and Safety at Work etc Act 1974 and the powers that are available to them under this Order.

## FSO FAQ

### Q. 27(c) What records is this referring to?

A. There are two types (a) any records the Order requires to be kept e.g. the significant findings of the risk assessment and any persons especially at risk, where five or more people are employed etc.; and (b) any other records that may reasonably be regarded as having some relevance to the fire safety arrangements for the premises.

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<sup>76</sup> GREAT BRITAIN. The Office of the Deputy Prime Minister, *A consultation document on the reform of fire safety legislation, Amending various Acts and statutory instruments to Simplify, rationalise and consolidate the law with respect to fire safety in buildings in use A Consultation Paper issued by The Office of the Deputy Prime Minister, July 2002*, London, The Office of the Deputy Prime Minister 2002, p 55, Para 6.7

**Q. What if a request for information is not forthcoming from the responsible person?**

A. If a responsible person does not respond to requests for information under article 27 then this may constitute an offence under article 32. Following successful prosecution<sup>77</sup> courts have stated that the requirement to provide information is the starting point of an effective risk management regime, and if this is not taken seriously doubt would be raised as to the overall management attitude towards general fire precautions.

**Q. In what format should information under article 27(b)(ii) be provided?**

A. The Order is silent on this issue however it may be interpreted that a verbal response may be acceptable. Where such verbal communications are received to provide this information it is considered best practice for the enforcing officer to make a note of the event in a contemporaneous notebook.

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<sup>77</sup> HFRS v Solitaire Property Management

## Article 28 – Exercise on behalf of fire inspectors of their powers by officers of fire brigades

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Exercise on behalf of fire inspectors etc. of their powers by officers of fire brigades***

**28.** —(1) *The powers conferred by article 27 on a fire inspector, or any other person authorised by the Secretary of State under article 25(e), are also exercisable by an employee of the fire and rescue authority when authorised in writing by such an inspector for the purpose of reporting to him on any matter falling within his functions under this Order; and articles 27(2) and (3) and 32(2)(d) to (f), with the necessary modifications, apply accordingly.*

*(2) A fire inspector, or other person authorised by the Secretary of State, must not authorise an employee of a fire and rescue authority under this article except with the consent of the fire and rescue authority.*

### FSO Guidance Notes

The Chief Fire and Rescue Adviser is responsible for the management of the enforcement of the Order in Crown premises in England. This is carried out by Crown Premises Fire Inspectors who work as part of the Office of the Chief Fire and Rescue Adviser. This article allows Crown inspectors, and inspectors appointed by the Secretary of State to use the services of the local Fire and Rescue Service to carry out fire safety audits within Crown property. This arrangement must be agreed by the local Fire and Rescue Authority prior to work taking place. This power of inspection, on behalf of Crown Inspectors, must be given in writing and does not empower the local fire officer to take enforcement action due to the requirements of article 49 (Application to the Crown and to the Houses of Parliament). Following the audit of Crown premises the findings should be reported to the Crown Fire Inspector or other person authorised by the Secretary of State.

### Further background information on Crown Premises

The Order binds the Crown, except for the provisions relating to enforcement and prosecution. To safeguard Crown employees from a Crown failure to comply with fire safety legislation, all Crown departments and agencies are required to provide compliance with the provisions of the Order. Where the Crown is subject to any of the general fire safety duties contained in the Order, Crown Inspectors, as enforcing authorities appointed by the Secretary of State under article 25(e)(i), will follow a similar process to that used by Fire and Rescue Authorities for non-crown premises. This means that, where appropriate, a notification will be served on the employer and any other person who may be deemed to be responsible, in the same way as if the legal enforcement provisions apply where a failure to comply with the requirements is found. The notice is intended to inform the responsible person that, in the opinion of the Crown Fire Inspector, they have failed to comply with the requirements imposed on them by the Order. The notice cannot be legally enforced.

### FSO FAQ

#### **Q. Why can't enforcement action under the Order be taken within Crown premises?**

A. Article 49 should be referred to for full detail but in summary it restricts the application of some of the articles within Crown premises in that there is no ability to issue enforcement or alterations notices. Part 4 of the Order (Offences and Appeals) does not apply and in the case of Prohibition, this only applies if the Crown owns premises but does not occupy it.

## Article 29 – Alterations notices

### The Regulatory Reform (Fire Safety) Order 2005

#### **Alterations notices**

**29.** —(1) *The enforcing authority may serve on the responsible person a notice (in this Order referred to as "an alterations notice") if the authority is of the opinion that the premises—*

*(a) constitute a serious risk to relevant persons (whether due to the features of the premises, their use, any hazard present, or any other circumstances); or*

*(b) may constitute such a risk if a change is made to them or the use to which they are put.*

*(2) An alterations notice must—*

*(a) state that the enforcing authority is of the opinion referred to in paragraph (1); and*

*(b) specify the matters which in their opinion, constitute a risk to relevant persons or may constitute such a risk if a change is made to the premises or the use to which they are put.*

*(3) Where an alterations notice has been served in respect of premises, the responsible person must, before making any of the changes specified in paragraph (4) which may result in a significant increase in risk, notify the enforcing authority of the proposed changes.*

*(4) The changes referred to in paragraph (3) are—*

*(a) a change to the premises;*

*(b) a change to the services, fittings or equipment in or on the premises;*

*(c) an increase in the quantities of dangerous substances which are present in or on the premises;*

*(d) a change to the use of the premises.*

*(5) An alterations notice may include a requirement that, in addition to the notification required by paragraph (3), the responsible person must —*

*(a) take all reasonable steps to notify the terms of the notice to any other person who has duties under article 5(3) in respect of the premises;*

*(b) record the information prescribed in article 9(7), in accordance with article 9(6);*

*(c) record the arrangements required by article 11(1), in accordance with article 11(2); and*

*(d) before making the changes referred to in paragraph (3), send the enforcing authority the following —*

*(i) a copy of the risk assessment; and*

*(ii) a summary of the changes he proposes to make to the existing general fire precautions.*

*(6) An alterations notice served under paragraph (1) may be withdrawn at any time and, for the purposes of this article, the notice is deemed to be in force until such time as it is withdrawn or cancelled by the court under article 35(2).*

*(7) Nothing in this article prevents an enforcing authority from serving an enforcement notice or a prohibition notice in respect of the premises.*

## FSO Guidance Notes

The difference between an alterations notice and a prohibition notice is thin. The two are separated by the words “so serious ...” in terms of risk. The alterations notice allows for risks that are actually present and for risks that may be present at some future time. For a risk that is present on premises; serious consideration should be given to issuing a prohibition notice due to the fact that the premises present a serious risk to relevant persons. Indeed there is no barrier to the enforcing authority issuing an alterations notice in combination with any other notice where this is reasonable and appropriate.

For the situation whereby the premises potentially present a risk to relevant persons; the enforcing authority must be sure that it is reasonably foreseeable that the risk might come to pass. Article 29 was re-drafted as it progressed through parliament to make this the case<sup>78</sup>. The argument centred about the use of ‘any change’ (wide ranging) and ‘a change’ (specific) in the drafting of article 29(2)(b). The way in which the article was originally drafted gave enforcing authorities an unlimited power to issue alterations notices because it is possible in (almost) every premises to make a change (of any nature) to the premises that would lead to the premises posing a serious risk to relevant persons. The re-drafted article requires the enforcing authority to state what the change (a particular change) is that might be made that will lead to the premises posing a serious risk to relevant persons. Hence the risk to relevant persons will either be present or reasonably foreseeable.

Whereas article 29(3) requires the responsible person to inform the enforcing authority before making changes, the responsible person is not precluded from making the intended changes once the enforcing authority has been informed. It is therefore in the interests of the responsible person, the enforcing authority and relevant persons that notification received in accordance with article 29(3) is acted upon swiftly following receipt of the notification.

Where it is mandatory for the alterations notice to include the matters listed at 29(2) and for the responsible person to notify the enforcing authority of the relevant changes listed at 29(4) before making those changes; the requirements listed at 29(5) are discretionary to the enforcing authority and therefore may be included in the requirements of an alterations notice (or not). The relevant changes listed at 29(4) are noted because, where the changes listed will not result in the significant increase in foreseeable risk, they need not be included in the notice.

The discretionary nature of the requirements listed at 29(5) is of particular importance where the premises in question do not ordinarily meet the criteria for having to record the prescribed risk assessment information, as the alterations notice may go beyond the usual requirements of recording information given at article 9(6). Where such information has been required in an alterations notice, it should be noted that any failure of the responsible person to comply with the requirements of 29(5) is not an offence. The requirements listed at 29(5)(b) and 29(5)(c) become enforceable when made subject of an enforcement notice.

The requirement to provide the enforcing authority with a copy of the risk assessment at 29(5)(d)(i) is the only place in the Order where the responsible person is required to supply a ‘risk assessment’ (instead of prescribed information stemming from the assessment) and it is a requirement that is not enforceable by virtue of the fact that non-compliance is not an offence.

By contrast it is an offence for any responsible person or article 5(3) duty holder to fail to comply with article 29(3) or 29 (4). Once served, an alterations notice that is not subject to an appeal and that has not been withdrawn or cancelled will remain in force.

## FSO FAQ

No questions have been raised in relation to this article at this time.

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<sup>78</sup> See House of Commons Regulatory Reform Committee, *Draft Regulatory Reform (Fire Safety) Order 2005 Ninth Report of Session 2004-05 Report, together with formal minutes and written evidence*, HC 495, [online], 2005, London, The Stationery Office Limited, Available from: <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdereg/495/495.pdf> [Accessed 21<sup>st</sup> February 2008], Para 45-53

## Article 30 – Enforcement notices

### The Regulatory Reform (Fire Safety) Order 2005

#### **Enforcement notices**

**30.** —(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.*

*(4) Where the enforcing authority is of the opinion that a person's failure to comply with this Order also extends to a workplace, or employees who work in a workplace, to which this Order applies but for which they are not the enforcing authority, the notice served by them under paragraph (1) may include requirements concerning that workplace or those employees; but before including any such requirements the enforcing authority must consult the enforcing authority for that workplace.*

*(5) Before serving an enforcement notice which would oblige a person to make an alteration to premises, the enforcing authority must consult—*

*(a) in cases where the relevant local authority is not the enforcing authority, the relevant local authority;*

*(b) in the case of premises used as a workplace which are within the field of responsibility of one or more enforcing authorities within the meaning of Part 1 of the Health and Safety at Work etc Act 1974, that authority or those authorities; and section 18(7) of the Health and Safety at Work etc Act 1974 (meaning in Part I of that Act of "enforcing authority" and of such an authority's "field of responsibility") applies for the purposes of this article as it applies for the purposes of that Part;*

*(c) in the case of a building or structure in relation to all or any part of which an initial notice given under section 47 of the Building Act 1984 is in force, the approved inspector who gave that initial notice;*

*(d) in the case of premises which are, include, or form part of, a designated sports ground or a sports ground at which there is a regulated stand, the relevant local authority, where that authority is not the enforcing authority; and for the purposes of this sub-paragraph, "sports ground" and "designated sports ground" have the same meaning as in the Safety of Sports Grounds Act 1975 and "regulated stand" has the same meaning as in the Fire Safety and Safety of Places of Sport Act 1987;*

*(e) any other person whose consent to the alteration would be required by or under any enactment.*

*(6) Without prejudice to the power of the court to cancel or modify an enforcement notice under article 35(2), no failure on the part of an enforcing authority to consult under paragraphs (4) or (5) makes an*

enforcement notice void.

(7) Where an enforcement notice has been served under paragraph (1)—

(a) the enforcing authority may withdraw the notice at any time before the end of the period specified in the notice; and

(b) if an appeal against the notice is not pending, the enforcing authority may extend or further extend the period specified in the notice.

## FSO Guidance Notes

Article 30 provides a statutory duty for enforcement notices to contain certain information, specifically: to state that the responsible person (or article 5(3) duty holder) has failed in some way to comply with the requirements of the Order; to state in particular those provisions which have not been complied with; and to require the responsible person (or article 5(3) duty holder) to remedy the failure. It should be noted that enforcement notices cannot be issued on duty holders defined directly at article 5(4) (those having obligations in relation to contract or tenancy). These duty holders are accounted for as if included in article 5(3) as a person having control of the premises.

This statutory duty is supplemented by a statutory power to include in an enforcement notice directions as to how the failure might be rectified and additionally that any such direction can allow for other methods of compliance. Most enforcing authorities have determined that this statutory power will be routinely exercised. Indeed the Hampton Principles<sup>79</sup> and The Regulators Compliance Code (Approved Code of Practice)<sup>80</sup> suggests that in cases of higher risk, greater direction should be given and that where there is only one reasonable means by which to correct the failure, the direction given should be specific to that one reasonable means. Where the risk is lower, greater flexibility as to how failures may be rectified may be appropriate.

In cases where the action of the enforcement notice is likely to require corrective action in premises that lie beyond the boundary jurisdiction of the issuing enforcing authority; the issuing enforcing authority must consult with those enforcing authorities relevant to the notice that lie beyond the boundary of jurisdiction.

Enforcing authorities are required to consult with such other persons and authorities as listed at article 30(5)(a)-(e) before issuing an enforcement notice, but a failure on the part of the enforcing authority to consult, as directed, does not make the enforcement notice void.

Where an appeal is pending the enforcing authority cannot extend the time specified in an enforcement notice, neither can the enforcement notice be withdrawn. The minimum time that may be given for compliance with an enforcement notice is 28 days and the latest (stated) opportunity the recipient has to lodge an appeal is 21 days. Many courts will allow an appeal to hold beyond this specified time to allow for delays in postage etc. The limit of time allowed for appeal rests on the discretion of the court. Therefore, where the minimum time period has been given to a recipient for compliance with an enforcement notice, the enforcing authority will have no option but to attend the appeal, if an appeal is requested, since the notice cannot be withdrawn by the authority (including instances where the notice has been served in error, in some way).

## FSO FAQ

<sup>79</sup> Op Cit Philip Hampton, March 2005

<sup>80</sup> Better Regulation Executive. *Regulators' Compliance Code – Statutory Code of Practice for Regulators*, [online], 2007, London: Department for Business, Enterprise & Regulatory Reform. Available from: <<http://www.berr.gov.uk/files/file45019.pdf>> [Accessed 31<sup>st</sup> August 2010]

- Q. 30(4) Can this be used to rectify the same deficiencies in different premises? e.g. if we inspect 2 or more premises with the same responsible person and find the same or similar problems can we issue one enforcement notice to cover all the premises?**
- A. 30(4) is about acting out of normal jurisdiction (i.e. where a company has premises in another County) or the premises would not normally be enforced by the authority serving the notice i.e. to cover a branch of a shop in a designated sports stadium. A notice under 30(1) served on a responsible person could cover multiple outlets (e.g. if it appeared that the management policy was flawed or no risk assessments had been carried out) but whether that is appropriate or separate notices should be served will depend on the circumstances of the case.
- Q. 30(5)(a) was there an expectation that we would wait for a reply before issuing a notice?**
- A. There is an expectation that consultees will be given a reasonable opportunity to comment.
- Q. 30(5)(d) in this case where would the local authority not be the enforcing authority?**
- A. There can be a number of cases where this could arise e.g. hotels or other premises which are linked to the stadium but not covered by the safety certificate or simply parts of a non-designated sports ground (changing rooms, concession stands, the pitch) that contains a regulated stand but are not part of that stand.
- Q. Can more than one enforcement notice be served with stepped timescales for completion?**
- A. Yes, there may be occasions whereby it is appropriate to serve an enforcement notice and based upon the risk the timescale should be staged. A practical example would be where it may be appropriate to expect a responsible person to undertake a fire risk assessment in a shorter timescale than that expected for them to procure and install a fire alarm and detection system. Therefore two notices could be issued with different timescales for completion.
- Q. What would be an example of the authorities that need to be consulted to satisfy article 30(5)(e)?**
- A. An example is the conservation officer in relation to heritage sites.
- Q. What is the effect of an enforcement notice in the event that premises are vacated, undergo a change of use or undergo a change in ownership?**
- A. The notice is served on a person and as such does not rest on the premises, despite the fact that the premises may pose a risk to relevant persons.
- Q. Would a single enforcement notice that specified different timescales for completion be legally robust?**
- A. No. The wording of the Order allows for one period to be specified within a notice. Where there is an indication from responsible persons that they would prefer to complete any works over various periods of time, it may be more expedient to agree an action plan with the responsible person, which is periodically monitored by the enforcing authority.

## Article 31 – Prohibition notices

### The Regulatory Reform (Fire Safety) Order 2005

#### **Prohibition notices**

**31.** —(1) *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, the authority may serve on the responsible person or any other person mentioned in article 5(3) a notice (in this Order referred to as "a prohibition notice").*

(2) *The matters relevant to the assessment by the enforcing authority, for the purposes of paragraph (1), of the risk to relevant persons include anything affecting their escape from the premises in the event of fire.*

(3) *A prohibition notice must—*

(a) *state that the enforcing authority is of the opinion referred to in paragraph (1);*

(b) *specify the matters which in their opinion give or, as the case may be, will give rise to that risk; and*

(c) *direct that the use to which the prohibition notice relates is prohibited or restricted to such extent as may be specified in the notice until the specified matters have been remedied.*

(4) *A prohibition notice may include directions as to the measures which will have to be taken to remedy the matters specified in the notice 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 matters.*

(5) *A prohibition or restriction contained in a prohibition notice pursuant to paragraph (3)(c) takes effect immediately it is served if the enforcing authority is of the opinion, and so states in the notice, that the risk of serious personal injury is or, as the case may be, will be imminent, and in any other case takes effect at the end of the period specified in the prohibition notice.*

(6) *Before serving a prohibition notice in relation to a house in multiple occupation, the enforcing authority shall, where practicable, notify the local housing authority of their intention and the use which they intend to prohibit or restrict.*

(7) *For the purposes of paragraph (6)—*

*"house in multiple occupation" means a house in multiple occupation as defined by sections 254 to 259 of the Housing Act 2004, as they have effect for the purposes of Part 1 of that Act (that is, without the exclusions contained in Schedule 14 to that Act); and*

*"local housing authority" has the same meaning as in section 261(2) of the Housing Act 2004.*

(8) *Without prejudice to the power of the court to cancel or modify a prohibition notice under article 35(2), no failure on the part of an enforcing authority to notify under paragraph (6) makes a prohibition notice void.*

(9) *Where a prohibition notice has been served under paragraph (1) the enforcing authority may withdraw it at any time.*

(10) *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.*

## FSO Guidance Notes

'Prohibition notice' is a general term given to any notice issued to prohibit or restrict the use of any premises because the standard of general fire precautions provided has fallen so far below the expected standards that relevant persons are placed at risk of death or serious injury, and consequently the use must be prohibited or restricted in order to assure the safety of relevant persons. The aspect of reasonable foresight that occurs with an alterations notice does not apply. The hazard bringing about the risk of death or serious injury to relevant persons must be either present at the time of the inspection / audit, or be certain to occur at some specified future time. An example of the former is that life is currently at risk due to some failure to provide general fire precautions, whereas an example of the later may be a situation in which the relevant persons are not currently present, but will arrive at a later (known / predictable) time.

The notice may be served on the responsible person or article 5(3) duty holder but not other duty holders (with obligations in relation to contract or tenancy agreements). In the case of prohibition notices the risk to relevant persons must be present.

Similarly to enforcement notices, the prohibition notice includes statutory duties as to what must be included in the notice and statutory powers (regarding what may be included in the notice at the discretion of the enforcing authority). Where prohibition notices have been served (being associated with the most severe level of risk) corrective direction subsequently issued by enforcing authorities should include specific direction as to how the risk can most easily be reduced.

Dissimilar from an enforcement notice, where there is an appeals process open to the responsible person when issued with a prohibition notice, the appeal does not have the effect of suspending the notice, because of the severity of the risk involved.

Paragraph 10 acts to extend the meaning of the term premises to include those domestic dwellings that would usually sit outside the scope of the Order. Premises constituting or comprised in a house which is occupied as a single private dwelling continue to lie outside the meaning of 'premises'. By so doing, relevant persons (occupying premises that do not constitute a house occupied as a single private dwelling) may be saved from the risk of death or serious injury that might impact upon them from hazards posed by the undertaking of a responsible person who, in turn, owes a duty to provide premises that are safe to the relevant persons. In this sense a prohibition notice may not be issued on the relevant person<sup>81</sup> in the domestic premises above a commercial undertaking; rather the notice may extend the scope of the term 'premises' to include the domestic dwelling within the prohibition. A prohibition notice may only be served on a direct responsible person or an article 5(3) duty holder.

For situations in which relevant persons in domestic premises over commercial premises are at risk so serious that the premises ought to be prohibited or restricted, enforcing authorities should consider prohibiting the commercial premises in the first instance. Where this action does not spare relevant persons from the risk of death or serious injury e.g. commercial and domestic premises share a common staircase which terminates in a kitchen and the prohibiting of the commercial premises does not reduce the risk to relevant persons, the scope of the term 'premises' may be broadened to include the domestic premises that do not constitute a house occupied as a single private dwelling.

Where an enforcing authority intends to use a prohibition notice to such an extent as to bring domestic dwellings (forming a house in multiple occupation) within its scope, the enforcing authority is expected to liaise with the local housing authority; albeit that if the enforcing authority fails to do so, the notice continues to be valid.

## FSO FAQ

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<sup>81</sup> Notwithstanding the limitations imposed on whom the notice may be served, it should be noted that a failure to comply with the terms of the notice by any person, may constitute an offence.

- Q. Does article 31(2) suggest that only matters that affect means of escape can be used to prohibit / restrict premises?**
- A. Prohibition or restriction can be applied in any case where an enforcing authority considers that continued use of the premises in current form involves or will involve serious risk to relevant persons in case of fire. Although 31(2) highlights anything affecting escape from the premises in case of fire, the article is not limited to prohibition or restriction on just that basis. 31(2) specifies that the matters relevant “include” anything affecting escape from the premises in case of fire and doesn’t make use of the article exclusive to means of escape issues.
- Q. Why was a definition of HMO used in article 31(7) which is different from the definition given for domestic premises?**
- A. Use of the definition of HMO in article 31(7) is limited in its context to the requirement to notify the housing authority contained in 31(6). The purpose of this notification is, so far as is reasonably practicable to let the housing authority know that multiple persons (possibly multiple families) may be about to be made temporarily homeless and so that it may be necessary to put emergency arrangements into action. There is also a need for the housing authority to be aware as they may need to deal with other, non-fire safety issues in the premises.
- Q. 31(10) Explain house in this context?**
- A. It is a specific class of domestic premises and should be read in the way “house” is understood in common form. The purpose of this paragraph is to allow an article 31 notice to be served on the whole of an HMO, a block of flats or a maisonette despite the fact that the individual bedsits, flats or floors would otherwise be outside the scope of the Order as “domestic premises”.
- Q. Where domestic premises have means of access / egress that are independent of commercial premises below but the fire resistance between commercial and domestic premises is insufficient, does article 31(10) apply?**
- A. It depends on whether the failure to provide fire resistance amounts to placing relevant persons at risk of death or serious injury. Where relevant persons are at such risk, the premises may be seen as constituting one premises, despite the use of part of the premises as a dwelling.
- Q. Where can I find additional practical guidance on prohibition notices?**
- A. CPL have produced guidance ‘Circular 2010-023 The Regulatory Reform Fire Safety Order 2005, Article 31 Guidance Notes’
- Q. Is it necessary to issue an enforcement notice whenever a prohibition notice has been served?**
- A. A prohibition notice should be issued with a notice giving direction as to the measures that are required to be taken sufficient to lifting the notice. The standard of fire safety within premises that pose a risk so serious that the premises ought to be prohibited is such that there are likely to be failures in fire safety matters that are not so serious. These subsequent matters should be dealt with by virtue of an enforcement notice. There is no reason why different types of notice may not be issued simultaneously.
- Q. What is the status of a prohibition notice in the event that premises:**  
**i) change ownership;**

- ii) become unoccupied;
- iii) undergo a change of use;
- iv) undergo a change of responsible person; or
- v) self impose a voluntary prohibition?

A. To answer each element of the question in turn:

- i) The notice is served on the responsible person (or article 5(3) duty holder) in relation to the premises for which they are responsible. A change in ownership may not affect the status of the notice if the person on whom the notice has been served is different from the owner. Where the owner is the person on whom the notice has been served, that person's control of the premises will cease when the ownership changes. There is undoubtedly a moral duty to pass on this information to the new owner but in any case the notice would have to be re-issued. The new owner is required to carry out an assessment of the risk posed by fire and should identify the serious deficiencies in fire safety standards.
- ii) For premises having a prohibition notice, subsequently becoming unoccupied, the risk to relevant persons is removed. The notice may stay in force until the matters stated therein have been complied with but the notice may be seen as effected. It may be prudent for the enforcing authority to issue an alterations notice in addition to the prohibition notice if the re-occupation of the premises and associated risk to relevant persons is reasonably foreseeable.
- iii) Where the use of premises has changed, the risk associated with that use may differ from that which gave rise to the prohibition notice being issued. Where this is the case a re-assessment of the situation will be required to determine whether the prohibition notice should continue to stand, should be amended and re-issued or withdrawn as the case may be.
- iv) Similarly to (i) above, where the notice has been issued on the responsible person and they no longer have any control of or relation to the premises, the notice will have to be re-issued.
- v) A voluntary prohibition has no standing in law. Any subsequent non-compliance with the voluntary prohibition will not constitute an offence since no formal notice was issued. Any voluntary prohibition should have been identified within the fire risk assessment and the associated control measures highlighted therein.

**Q. How do we check for compliance with a prohibition notice?**

A. Periodic re-inspection is appropriate where a prohibition notice has been served. The risk in the premises will be high and there is a duty on enforcing authorities to address places of highest risk. Confirming compliance may be difficult to prove in the case of sleeping accommodation, because the process of gaining access to premises to check if persons are sleeping often involves the rousing of potentially sleeping people.

**Q. Can a prohibition notice remain in force on a premises forever?**

A. There is no expiration date associated with a prohibition notice and as such it will remain in force until satisfied, withdrawn or is cancelled or modified by the courts.

## **Part 4 Offences and Appeals**

### **Article 32 – Offences**

#### **The Regulatory Reform (Fire Safety) Order 2005**

##### **Offences**

**32.** —(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, or having effect as if 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).*

**(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 (8) 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.*

*(11) 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).*

## **FSO Guidance Notes**

This article sets out the offences that may be committed. These offences are separated into those offences for which responsible persons or article 5(3) duty holders can be held responsible and those for which 'any person' can be held responsible. There are no offences directed specifically at article 5(4) duty holders (those with obligations in relation to contract or tenancy). These duty holders are accounted for as if included in article 5(3) as a duty holder for the premises. The offences directed at responsible persons and article 5(3) duty holders are listed at 32(1)(a)-(e). It is here that the Order reveals that it is not an inherent offence to fail to comply with the requirements of the Order; only where that failure places one or more relevant persons at risk of death or serious injury. Other failures become offences when, under direction from a notice issued by an enforcing authority, the responsible person or article 5(3) duty holder fails to comply with the requirements of the notice.

The offences directed at 'any person' are listed At 32(2)(a)-(h) albeit that certain of those provisions are directed at employers 32(2)(g) and employees 32(2)(a).

Article 32 also provides for the sanctions that may be imposed following conviction for the various offences.

For offences committed by corporate bodies, both the corporate body and the individual officers of that body may be held to account for the offence.

Further advice as to the meaning of the offences and this article are dealt with in Guidance Note 1<sup>82</sup>.

In all cases of pursuing responsible persons, relevant duty holders or persons in general for the commissioning of an offence under the Order; enforcing authorities are encouraged to seek legal advice to assist them in this capacity.

## FSO FAQ

**Q. 32(1)(a) Give an example of where failure of article 38 can place a relevant person at risk?**

A. Measures provided under B5 of the current Building Regulations are on the basis that: "The building shall be designed and constructed so as to provide reasonable facilities to assist fire-fighters in the protection of life."

If the facilities provided are not maintained and as a result cannot be used (or fully used by fire-fighting personnel) then the relevant persons may be at risk of death or serious injury. The facilities were installed to assist fire-fighters to protect relevant persons. A lack of maintenance may increase the risk to relevant persons of death or serious injury in case of fire.

**Q. Please explain article 32(11) in relation to due diligence?**

A. 32(11) qualifies article 33. In essence a responsible person cannot claim to have taken all reasonable precautions and exercised all due diligence if an offence is due to the act or default of an employee (something they did or something they should have done but did not) or is due to the act or default of a nominated or appointed "competent person". In the latter case this is because the onus is on the responsible person to make sure the competent person is indeed 'competent' for the task they have been nominated or appointed for.

**Q. What is meant by level 3 and level 5 on the standard scale?**

A. There is a standard scale of penalty associated with summary cases (such as those principally taken under the Order). The scale is established in the Criminal Justice Act<sup>83</sup>. at present, level 3 equates to £1,000 (per offence) and level 5 equates to £5,000 (per offence).

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<sup>82</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

<sup>83</sup> Criminal Justice Act 1982, 1982 CHAPTER 48, Section 37

## Article 33 – Defence

### The Regulatory Reform (Fire Safety) Order 2005

#### **Defence**

*33. Subject to article 32(11), in any proceedings for an offence under this Order, except for a failure to comply with articles 8(1)(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.*

#### **FSO Guidance Notes**

Those with duties under the Order may be able to shield themselves in the event of an action being taken against them for a fire-related offence. This shield of defence is that they ‘took all reasonable precautions and exercised all due diligence to avoid the commissioning of the offence’.

The shield is removed for failures under article 8(1)(a) and article 12.

For responsible persons who are not employers and for ‘employer’ responsible persons where the risk of death or serious injury from fire has been caused to a non-employee; the defence is more readily available as all they must show is that they did all they could reasonably do to make the premises safe.

Where an employee has been put at risk of death or serious injury, the employer responsible person does not have the defence at article 33 available to him. This is an example of the strict liability under which an employer is held by the Order. Their responsibility for their employees is absolute.

The potential absence of a defence may demonstrate that the employer can control the actions of employees and as such can avoid harm being caused to them, even if this can only be achieved by not opening for business.

This does not mean that the employee cannot be equally or partly liable for any failure, but that the employer is not provided with a defence.

#### **FSO FAQ**

**Q. Why are Articles 8(1)(a) and 12 not included in the defence?**

**A.** These requirements relate to absolute duties under European law and a defence of due diligence is not allowed in respect of them.

**Q. What is meant by the term “all reasonable precautions and exercised all due diligence to avoid the commission of the offence?”**

**A.** “Taking reasonable precautions involves setting up a system and due diligence relates to securing the proper operation of that system.”<sup>84</sup> Both are required for the defence to be successful. That the responsible person has implemented general fire precautions that are reasonable to the circumstances of the case and that those precautions withstand the tests of As Low As Reasonably Practicable and So Far As Is Reasonably Practicable. By making every effort to comply with the requirements and prohibitions imposed on them by the Order, the responsible person may demonstrate that they have exercised all due diligence to avoid committing an offence.

<sup>84</sup> ‘Due Diligence In The Prosecution Of Fire Safety Offences - When ‘All’ Is Not As It Seems’ [online], Weightmans.com, Chris Green, Available from: <http://www.means-of-escape.com/press-releases/press57.aspx> [Accessed 23<sup>rd</sup> November 2010]

## Article 34 – Onus of proving limits of what is reasonably practicable

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Onus of proving limits of what is practicable or reasonably practicable***

*34. In any proceedings for an offence under this Order consisting of a failure to comply with a duty or requirement so far as is practicable or so far as is reasonably practicable, it is for the accused to prove that it was not practicable or reasonably practicable to do more than was in fact done to satisfy the duty or requirement.*

#### **FSO Guidance Notes**

There are only certain situations for which the burden of proof operates in this way. Only those requirements that should be satisfied by the responsible person ‘so far as is practicable’ or ‘so far as is reasonably practicable’ are subject to article 34 and appear only three times in the Order:

- article 8(1)(a)—duty owed to employees;
- article 12 (at sub-paragraphs 1, 2, 3)— relating to dangerous substances; and
- article 15(2)(a)— informing relevant persons of the nature of serious and imminent danger and of the steps taken or to be taken to protect them from it.

Where compliance is required with other articles under the Order, article 34 does not apply. Other requirements (those that do not require compliance ‘so far as is practicable’ or ‘so far as is reasonably practicable’) are not subject to this reversal in the burden of proof and the burden falls on the enforcing authority to prove that an offence was committed.

The burden of proof for an offence under the Order (where the article requires compliance ‘as far as practicable’ or ‘as far as is reasonably practicable’) rests with the accused to prove that the actions they took to comply with those requirements were at the limit of what was practicable. Similar to other requirements and articles of the Order this is likely to result in reference to the principles of SFAIRP and ALARP<sup>85</sup>. These requirements could be viewed to have been satisfied if the impact of having done more would have been grossly disproportionate to the benefit gained.

Where (in the case of harm or the risk of death or serious injury to an employee) an employer successfully proves the actions he has taken are sufficient to comply with the Order; such a demonstration might be seen to amount to a defence. Note should be taken that no defence is available to an employer for failures to comply with the duties of an employer under articles 8(1)(a), 12 and 15(2)(a) according to article 33<sup>86</sup>. Although the employer might prove that the actions taken were reasonably practicable, he continues to have no defence by virtue of article 33.

#### **FSO FAQ**

##### **Q. What is considered to be reasonably practicable?**

A. For information relating to requirements of ‘so far as is reasonably practicable’ refer to the FSO Guidance Notes to article 2 in this document.

<sup>85</sup> See article 2 of this interpretation document for detail of SFAIRP and ALARP

<sup>86</sup> See article 33 of this interpretation document

Additionally, an Australian bulletin<sup>87</sup> referring to their Workplace Health and Safety Act 2007 provides one definition of the term, which may be viewed as persuasive in cases relating to the Order.

*“The question whether particular risk management measures are reasonably practicable is to be decided with regard to:*

- (a) the likelihood that the risk could result in injury;*
- (b) the seriousness of any injury that could result from realisation of the risk;*
- (c) the availability, suitability, effectiveness and cost of the measures; and*
- (d) any other relevant factors.”*

**Q. What does this article mean for the responsible person?**

A. In essence, the responsible person must prove that the measures that have been taken would have been taken by any other reasonable and competent person in the same position and in the same circumstances.

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<sup>87</sup> NT Worksafe, 'Workplace Health and Safety Act 2007' [online] 2009 Northern Territory Government, available from: <http://www.worksafe.nt.gov.au/corporate/bulletins/pdf/06-10/09.01.14.pdf> [Accessed 23<sup>rd</sup> November 2010]

## Article 35 – Appeals

### The Regulatory Reform (Fire Safety) Order 2005

#### **Appeals**

**35.** —(1) *A person on whom an alterations notice, an enforcement notice, a prohibition notice or a notice given by the fire and rescue authority under article 37 (fire-fighters' switches for luminous tube signs) is served may, within 21 days from the day on which the notice is served, appeal to the court.*

*(2) On an appeal under this article the court may either cancel or affirm the notice, and if it affirms it, may do so either in its original form or with such modifications as the court may in the circumstances think fit.*

*(3) Where an appeal is brought against an alterations notice or an enforcement notice, the bringing of the appeal has the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal.*

*(4) Where an appeal is brought against a prohibition notice, the bringing of the appeal does not have the effect of suspending the operation of the notice, unless, on the application of the appellant, the court so directs (and then only from the giving of the direction).*

*(5) In this article "the court" means a magistrates' court.*

*(6) The procedure for an appeal under paragraph (1) is by way of complaint for an order, and—*

*(a) the Magistrates' Courts Act 1980 applies to the proceedings; and*

*(b) the making of the complaint is deemed to be the bringing of the appeal.*

*(7) A person aggrieved by an order made by a magistrates' court on determining a complaint under this Order may appeal to the Crown Court; and for the avoidance of doubt, an enforcing authority may be a person aggrieved for the purposes of this paragraph.*

#### **FSO Guidance Notes**

This article provides for appeals to be brought against the notices issued in accordance with the Order.

It is here that the effect of the bringing of the appeal on the various notices can be determined. Appeals may be brought within 21 days of the notice being issued, although to some extent, whether an appeal is accepted or not is at the discretion of the court. Reasonable allowances for postage may be taken into account.

For alterations notices and enforcement notices the bringing of the appeal suspends the notice. Where the notice is not withdrawn, the appeal must be heard and disposed of by the (magistrates) court. When an appeal against an issued enforcement notice has been registered, the notice may not be withdrawn by the enforcing authority if the end of the period specified in the notice has passed (article 30(7)(a)). This means that, if for example the minimum period of 28 days has been given to complete work, the notice may not be withdrawn after 28 days has passed. Furthermore, no extension of time to comply with the notice can be granted for an enforcement notice where an appeal is pending (article 30(7)(b)). Conversely appeals brought against prohibition notices do not have the effect of suspending the notice unless the court so directs.

Where an appeal is heard and the decision of the court is unsatisfactory to either party, an appeal may be made to the Crown Court.

## FSO FAQ

**Q. What is the difference between a formal appeal and an informal appeal?**

A. A formal appeal is one which has been registered with the courts; an informal appeal is generally from the responsible person to the enforcing authority.

**Q. What should I do if I receive notification of an appeal?**

A. Acknowledge the appeal through the courts and enter into dialogue with the responsible person to try and resolve the issue out of court. This will reduce the burden on court time. If successful, both parties will write to the courts explaining the issue is resolved and will bear their own costs.

If negotiations fail to resolve the issue, then the enforcing authority will need to gather evidence to present to the court to justify its enforcement decision.

**Q. Can an enforcing authority appeal against the judgment of a magistrate's court?**

A. Yes. Article 35 (7) makes provision for an enforcing authority to be considered as an aggrieved person.

## Article 36 – Determination of disputes by Secretary of State

### The Regulatory Reform (Fire Safety) Order 2005

#### **Determination of disputes by Secretary of State**

**36.** —(1) *This article applies where—*

*(a) a 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; and*

*(b) the enforcing authority and that person cannot agree on the measures which are necessary to remedy the failure.*

*(2) Where this article applies, the enforcing authority and the person referred to in paragraph (1)(a) may agree to refer the question as to what measures are necessary to remedy the failure referred to in paragraph (1)(a) to the Secretary of State for his determination.*

*(3) The Secretary of State may, by notice in writing to both parties, require the provision of such further information, including plans, specified in the notice, within the period so specified, as the Secretary of State may require for the purpose of making a determination.*

*(4) If the information required under paragraph (3) is not provided within the period specified, the Secretary of State may refuse to proceed with the determination.*

*(5) Where the Secretary of State has made a determination under this article, the enforcing authority may not, subject to paragraph (6), take any enforcement action the effect of which would be to conflict with his determination; and in this article, "enforcement action" means the service of an enforcement notice or the inclusion of any directions in an enforcement notice.*

*(6) Paragraph (5) does not apply where, since the date of the determination by the Secretary of State, there has been a change to the premises or the use to which they are put such that the risk to relevant persons has significantly changed.*

#### **FSO Guidance Notes**

For the bringing of any dispute to determination by the Secretary of State, a number of conditions must be met. Failure to meet any of the following conditions indicates that the dispute is not suitable for a determination.

The conditions for the bringing of a dispute are:

- the responsible person or article 5(3) duty holder must agree with the enforcing authority that they have failed to comply with the requirements of the Order;
- there is disagreement between the parties of how best to rectify the failure; and
- the two parties agree to take the matter to dispute.

Disputes have been heard under the Order<sup>88</sup> and tend to involve the Secretary of State requiring information from both sides of the dispute and attaching very short periods of compliance to those demands for more information. Where demands for information are not met by either party the determination may fail.

<sup>88</sup> Communities and Local Government Fire and Rescue Service Circular 48/2009, *Secretary of State determination under article 36 of the Fire Safety Order*, Determination in respect of the fire safety adequacy of fire detection in a hotel (Ref 004/006/003)

When the Secretary of State has received all required information within the periods specified, any determination reached by the Secretary of State is binding on both parties and in particular, the enforcing authority may not take enforcement action which is in conflict with the determination made.

## FSO FAQ

**Q. Does the responsible person have to admit they have failed to comply with the requirements of the Order for a dispute to be taken forward under this article?**

A. Yes. The purpose of the article is to resolve cases where there is agreement that works are needed but disagreement about the acceptable technical solution to be used to achieve the desired outcome.

**Q. Can the Secretary of State make a determination on a point of law?**

A. No. This determinations procedure can only be used to resolve a technical issue and not a point of law, such as if an enforcing authority was to request that a responsible person should provide a written risk assessment and the responsible person disagrees that one is needed<sup>89</sup>.

**Q. What information does the enforcing authority need to provide?**

A. Refer to FSO Guidance Note 2<sup>90</sup>, but in reality as much information to substantiate the enforcing authority's opinion regarding the matter in dispute. It would be useful to provide evidence of proportionality and cost effectiveness balanced against risk.

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<sup>89</sup> Communities and Local Government. *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 2 Determinations by the Secretary of State*, [online], 2010, London: CLG. Available from: <<http://www.communities.gov.uk/documents/fire/pdf/1497577.pdf>> [Accessed 23<sup>rd</sup> November 2010]

<sup>90</sup> 2010, CLG, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No.2 Determinations by the Secretary of State*, March 2010

## **Part 5 Miscellaneous**

### **Article 37 – Fire-fighters’ switches for luminous tube signs etc**

#### **The Regulatory Reform (Fire Safety) Order 2005**

##### ***Fire-fighters' switches for luminous tube signs etc.***

**37.** —(1) *Subject to paragraph (11), this article applies to apparatus consisting of luminous tube signs designed to work at a voltage normally exceeding the prescribed voltage, or other equipment so designed, and references in this article to a cut-off switch are, in a case where a transformer is provided to raise the voltage to operate the apparatus, references to a cut-off switch on the low-voltage side of the transformer.*

*(2) In paragraph (1) the "prescribed voltage" means—*

*(a) 1000 volts AC or 1500 volts DC if measured between any two conductors; or*

*(b) 600 volts AC or 900 volts DC if measured between a conductor and earth.*

*(3) No apparatus to which this article applies is to be installed unless it is provided with a cut-off switch.*

*(4) Subject to paragraph (5), the cut-off switch must be so placed, and coloured or marked as to satisfy such reasonable requirements as the fire and rescue authority may impose to secure that it must be readily recognisable by and accessible to fire-fighters.*

*(5) If a cut-off switch complies in position, colour and marking with the current regulations of the Institution of Electrical Engineers for a fire-fighter's emergency switch, the fire and rescue authority may not impose any further requirements pursuant to paragraph (4).*

*(6) Not less than 42 days before work is begun to install apparatus to which this article applies, the responsible person must give notice to the fire and rescue authority showing where the cut-off switch is to be placed and how it is to be coloured or marked.*

*(7) Where notice has been given to the fire and rescue authority as required by paragraph (6), the proposed position, colouring or marking of the switch is deemed to satisfy the requirements of the fire authority unless, within 21 days from the date of the service of the notice, the fire and rescue authority has served on the responsible person a counter-notice stating that their requirements are not satisfied.*

*(8) Where apparatus to which this article applies has been installed in or on premises before the day on which this article comes into force, the responsible person must, not more than 21 days after that day, give notice to the fire and rescue authority stating whether the apparatus is already provided with a cut-off switch and, if so, where the switch is placed and how it is coloured or marked.*

*(9) Subject to paragraph (10), where apparatus to which this article applies has been installed in or on premises before the day on which this article comes into force, the fire and rescue authority may serve on the responsible person a notice—*

*(a) in the case of apparatus already provided with a cut-off switch, stating that they are not satisfied with the position, colouring or marking of the switch and requiring the responsible person, within such period as may be specified in the notice, to take such steps as will secure that the switch will be so placed or coloured or marked as to be readily recognisable by, and accessible to, fire-fighters in accordance with the reasonable requirements of the fire and rescue authority; or*

*(b) in the case of apparatus not already provided with a cut-off switch, requiring him, within such period as may be specified in the notice, to provide such a cut-off switch in such a position and so*

*coloured or marked as to be readily recognisable by, and accessible to, fire-fighters in accordance with the reasonable requirements of the fire and rescue authority.*

*(10) If a cut-off switch complies in position, colour and marking with the current regulations of the Institution of Electrical Engineers for a fire-fighter's emergency switch, the fire and rescue authority may not serve a notice in respect of it under paragraph (9).*

*(11) This article does not apply to—*

*(a) apparatus installed or proposed to be installed in or on premises in respect of which a premises licence under the Licensing Act 2003 has effect authorising the use of premises for the exhibition of a film, within the meaning of paragraph 15 of Schedule 1 to that Act; or*

*(b) apparatus installed in or on premises before the day on which this article comes into force where, immediately before that date—*

*(i) the apparatus complied with section 10(2) and (3) (requirement to provide cut-off switch) of the Local Government (Miscellaneous Provisions) Act 1982; and*

*(ii) the owner or occupier of the premises, as the case may be, had complied with either subsection (5) or subsection (7) (notice of location and type of switch) of section 10 of that Act.*

## **FSO Guidance Notes**

This article refers to discharge lighting installations, which include installations such as:

- Neon advertising signs.
- Floodlights.
- Luminous discharge signs.

These systems may operate at voltages that pose a hazard when fire-fighting operations are being undertaken. This is especially so when an exterior or interior discharge lighting installation is encountered, which is operating unattended.

The systems will normally be operating at “high” voltage (exceeding the minimum voltage for a “low” voltage categorisation). These systems should be controlled by an emergency switch commonly known as a fireman switch. These should be installed and situated in accordance with the Institution of Electrical Engineers Wiring Regulations for electrical installations and may be supplemented as necessary by the requirements of the individual fire and rescue the authority within whose jurisdiction the premises are situated.

The initial commentary and the reasoning behind this section come from the first edition of BS 5588. The reference for this particular section is taken from part 2 (section 6 of the 1985 edition), page 37. Although this document has been withdrawn in part, it is considered that some of the advice contained therein is still of interest in this context.

## **FSO FAQ**

**Q. Why was this included in the Order?**

**A.** This provision was brought forward from the Local Government (Miscellaneous Provisions) Act 1982. Similar (though not identical provision) was also made in a number of local Acts. Repealing the various provisions and re-enacting them in the Order removed overlap and ensured nationally consistent controls.

## Article 38 – Maintenance of measures provided for protection of fire-fighters

### The Regulatory Reform (Fire Safety) Order 2005

#### **Maintenance of measures provided for protection of fire-fighters**

**38.** —(1) *Where necessary in order to safeguard the safety of fire-fighters in the event of a fire, the responsible person must ensure that the premises and any facilities, equipment and devices provided in respect of the premises for the use by or protection of fire-fighters under this Order or under any other enactment, including any enactment repealed or revoked by this Order, are subject to a suitable system of maintenance and are maintained in an efficient state, in efficient working order and in good repair.*

*(2) Where the premises form part of a building, the responsible person may make arrangements with the occupier of any premises forming part of the building for the purpose of ensuring that the requirements of paragraph (1) are met.*

*(3) Paragraph (2) applies even if the other premises are not premises to which this Order applies.*

*(4) The occupier of the other premises must co-operate with the responsible person for the purposes of paragraph (2).*

*(5) Where the occupier of the other premises is not also the owner of those premises, the reference to the occupier in paragraphs (2) and (4) are to be taken to be references to both the occupier and the owner.*

#### **FSO Guidance Notes**

Where premises are equipped with protective measures designed for the use of fire-fighters; regardless of how those measures came to be in the premises, they must be maintained. It will be noted that fire-fighters engaged in operational duties are not relevant persons and that this article requires the maintenance of measures installed for the use of fire-fighters. This is to ensure that measures required under other legislation are not allowed to fall into disrepair. Also it further safeguards the safety of relevant persons who, in a fire situation, may depend on fire service intervention. The intervention in turn relies on installed measures for the use of fire-fighters. If the measures are not adequately maintained and fail to function correctly when required, the lives of relevant persons may be put at risk.

Compliance with this article is not seen as providing another general fire precaution as it falls outside the scope of the meaning of general fire precautions given in the Order. The requirements for maintenance under this article are the same as those for maintenance at article 17 with regard to access to all parts of premises and maintaining the measures in an efficient state, efficient working order and in good repair.

#### **FSO FAQ**

**Q. Explain ‘premises, facilities, equipment and devices’ in this context?**

A. The phrase is a ‘catch-all’ and covers passive and active fire prevention and protection systems and equipment required by building regulations or any other legislation to be provided in premises for the use of or protection of fire-fighters. Common examples would be the elements that go to make up a fire-fighting shaft, including fire resistance, fire-doors, the lift and any wet or dry rising main. Requirements under local acts are also included e.g. roof water tanks provided under the London Building Acts as a source of water for fire fighting and hard standing for aerial appliances such as hydraulic platforms would also be covered.

**Q. How does this article apply to private hydrants?**

A. It applies in the same way and to the same extent as to a rising main or any other facility equipment or device.

## Article 39 – Civil liability for breach of statutory duty

### The Regulatory Reform (Fire Safety) Order 2005

#### **Civil liability for breach of statutory duty**

39. —(1) Subject to paragraph (2), nothing in this Order is to be construed as conferring a right of action in any civil proceedings (other than proceedings for recovery of a fine).

(2) Notwithstanding section 86 of the Fires Prevention (Metropolis) Act 1774, breach of a duty imposed on an employer by or under this Order, so far as it causes damage to an employee, confers a right of action on that employee in civil proceedings.

#### FSO Guidance Notes

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>91</sup>.

#### FSO FAQ

**Q. What is ‘Civil Liability’?**

A. The potential responsibility for payment of damages or other court-enforcement in a lawsuit, as distinguished from criminal liability which means open to punishment for a crime.

**Q. What is ‘Statutory Duty’?**

A. A duty imposed by an Act of Parliament, otherwise known as legislation.

**Q. What is ‘Breach of duty’?**

A. Breach of duty may be found to exist where the defendant fails to meet the standard required by law.

**Q. What are ‘Damages’?**

A. Damages attempt to measure in financial terms the extent of harm a plaintiff has suffered because of a defendant's actions. Damages are distinguishable from costs, which are the expenses incurred as a result of bringing legal action and which the court may order the losing party to pay. Damages also differ from the verdict, which is the final decision issued by the court. The purpose of damages is to restore an injured party to the position the party was in before being harmed. As a result, damages are generally regarded as remedial rather than preventive or punitive. However, Punitive Damages may be awarded for particular types of wrongful conduct. Before an individual can recover damages, the injury suffered must be one recognised by law as warranting redress, and must have actually been sustained by the individual.

<sup>91</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

## **Article 40 – Duty not to charge employees for things done or provided**

### **The Regulatory Reform (Fire Safety) Order 2005**

#### ***Duty not to charge employees for things done or provided***

*40. No employer may levy or permit to be levied on any employee of his any charge in respect of anything done or provided in pursuance of any requirement of this Order or of regulations made under it.*

#### **FSO Guidance Notes**

This article is self-explanatory.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

## Article 41 – Duty to consult employees

### The Regulatory Reform (Fire Safety) Order 2005

#### **Duty to consult employees**

41. —(1) In regulation 4A of the Safety Representatives and Safety Committees Regulations 1977 (employer's duty to consult and provide facilities and assistance), in paragraph (1)(b), for "or regulation 4(2)(b) of the Fire Precautions (Workplace) Regulations 1997" substitute "or article 13(3)(b) of the Regulatory Reform (Fire Safety) Order 2005".

(2) In regulation 3 of the Health and Safety (Consultation with Employees) Regulations 1996 (duty of employer to consult), in paragraph (b), for "or regulation 4(2)(b) of the Fire Precautions (Workplace) Regulations 1997" substitute "or article 13(3)(b) of the Regulatory Reform (Fire Safety) Order 2005".

#### **FSO Guidance Notes**

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>92</sup>.

#### **FSO FAQ**

##### **Q. What must employers consult employees about?**

- A. In order to ensure that employees work in healthier and safer workplaces the employer must consult their employees on a number of points, these are;
- The introduction of any measure which may substantially affect their health and safety at work; for example the introduction of new fire fighting equipment.
  - The arrangements for getting competent people to help them comply with the Order as well as other health and safety laws.
  - The information given to employees on the risks and dangers arising from their work, measures to reduce or remove these risks and the actions expected to be taken by employees should they be exposed to risk.
  - The planning and organisation of fire safety training; and
  - The fire safety consequences of introducing new technology.

##### **Q. What does consultation with employees involve?**

- A. Consultation involves employers not only giving information to employees but also listening to and taking account of what they say before making any fire safety decisions in respect of general fire precautions.

The requirements within this article do not establish when employers must consult, or for how long, but does say it must be 'in good time'. In practice, this means they have to allow enough time for employees to consider the matters being raised and to provide informed responses.

##### **Q. Why are there 2 parts to this article, rather than a single requirement to consult?**

<sup>92</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

A. Article 41 reflects existing Health and Safety Laws on employee consultation.

Article 41(1) is for the circumstances where the employer recognises trade unions in any part of the business and a safety representative has been appointed.

Article 41 (2) is provided for:

- employers that do not recognise trade unions
- employers that recognise a trade union but safety representatives have not been appointed.
- employees who do not belong to a trade union and any recognised trade union has not agreed to represent them.

**Q. Is further information available?**

A. The Health and Safety Executive have produced a brief guide to the law on employee consultation, this is available on their website, leaflet INDG232(rev1).

## Article 42 – Special provisions in respect of licensed etc. premises

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Special provisions in respect of licensed etc. premises***

**42.** —(1) *Subject to paragraph (2), where any enactment provides for the licensing of premises in relation to which this Order applies, or the licensing of persons in respect of any such premises—*

*(a) the licensing authority must ensure that the enforcing authority for the premises has the opportunity to make representations before issuing the licence; and*

*(b) the enforcing authority must notify the licensing authority of any action that the enforcing authority takes in relation to premises to which the licence relates; but no failure on the part of an enforcing authority to notify under this paragraph shall affect the validity of any such action taken.*

*(2) Paragraph (1) does not apply where the licensing authority is also the enforcing authority.*

*(3) In this article and article 43(1)(a)—*

*(a) "licensing authority" means the authority responsible for issuing the licence; and*

*(b) "licensing" includes certification and registration and "licence" is to be construed accordingly; and*

*(c) references to the issue of licences include references to their renewal, transfer or variation.*

#### **FSO Guidance Notes**

This article provides that for licensing purposes, the enforcing authority must be given the opportunity to make representations under the Licensing Act 2003<sup>93</sup> before a license is issued. Where an enforcing authority takes enforcement action in premises to which a license relates, the enforcing authority should endeavour to notify the licensing authority of the action they intend to take. If the enforcing authority fails to do this; the enforcement action remains valid.

#### **FSO FAQ**

**Q. Why is the term ‘licensing of persons’ used in this article?**

A. Some licensing regimes (such as some for door supervisors or personal licences under the Licensing Act 2003) can impose safety requirements on individuals as well as, or instead of, on the premises. Such regimes can duplicate or conflict with management arrangements and responsibilities required under the Order.

**Q. How does this article apply to certificates, registrations etc?**

A. The article is equally applicable to certificates, registrations etc, as they are captured by virtue of article 42(3)(b).

<sup>93</sup> Licensing Act 2003, c. 17

## Article 43 – Suspension of terms and conditions of licences dealing with same matters as this Order

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Suspension of terms and conditions of licences dealing with same matters as this Order***

**43.** —(1) *Subject to paragraph (3), paragraph (2) applies if—*

*(a) an enactment provides for the licensing of premises in relation to which this Order applies, or the licensing of persons in respect of any such premises;*

*(b) a licence is issued in respect of the premises (whether before or after the coming into force of this Order); and*

*(c) the licensing authority is required or authorised to impose terms, conditions or restrictions in connection with the issue of the licences.*

*(2) At any time when this Order applies in relation to the premises, any term, condition or restriction imposed by the licensing authority has no effect in so far as it relates to any matter in relation to which requirements or prohibitions are or could be imposed by or under this Order.*

*(3) Paragraph (1) does not apply where the licensing authority is also the enforcing authority.*

### **FSO Guidance Notes**

Any condition contained in a license that deals with general fire precautions has no effect, because such matters are dealt with under the Order, which takes primacy for such matters.

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>94</sup>.

### **FSO FAQ**

**Q. Can licensing authorities still impose conditions relating to fire for their own enforcement?**

A. Licensing authorities may, subject to the terms of the licensing legislation concerned, include terms, conditions or restrictions in a licence. However, where the subject matter of the condition(s) relates to any matter covered by the Order (or which could be covered if regulations were made about it under article 24) then a licensing authority cannot enforce it and the licensee is not obliged to comply with it.

**Q. Can the provisions of the Order be enforced in domestic accommodation above licensed premises?**

A. This will depend on the terms of the leasing arrangements and whether the domestic accommodation is provided as part of the workplace e.g. for a pub manager. If the accommodation is deemed to be 'private' accommodation, the Order, with the exception of article 31(10), cannot generally be enforced. However, the escape route for the relevant persons from the domestic premises, if affected by the use of the licensed premises, can be addressed under the Order. Whenever the licensed premises and domestic premises co-exist

<sup>94</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

in the same building, persons in the domestic premises can be protected by fire precautions and fire warning requirements in the licensed premises. These requirements must be the minimum required to ensure adequate means of escape to a place of safety as quickly and as safely as possible.

## **Article 44 – Suspension of byelaws dealing with same matters as this Order**

### **The Regulatory Reform (Fire Safety) Order 2005**

#### ***Suspension of byelaws dealing with same matters as this Order***

*44. Where any enactment provides for the making of byelaws in relation to premises to which this Order applies, then, so long as this Order continues to apply to the premises, any byelaw has no effect in so far as it relates to any matter in relation to which requirements or prohibitions are or could be imposed by or under this Order.*

#### **FSO Guidance Notes**

Any byelaws that deal with general fire precautions have no effect, because such matters are dealt with under the Order, which takes primacy for such matters.

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>95</sup>.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

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<sup>95</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

## Article 45 – Duty to consult enforcing authority before passing plans

### The Regulatory Reform (Fire Safety) Order 2005

#### ***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.*

*(3) The duty to consult imposed by paragraphs (1) and (2)—*

*(a) only applies in relation to buildings or parts of buildings to which this Order applies, or would apply following the erection, extension, structural alteration or change of use;*

*(b) does not apply where the local authority is also the enforcing authority.*

#### **FSO Guidance Notes**

This article provides for consultation between local authority building control bodies and enforcing authorities in relation to premises to which the Order applies or to which the Order will apply when the premises are completed. It reinforces the position of fire and rescue authorities as statutory consultees under the Building Act 1984.

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>96</sup>.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

<sup>96</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

## Article 46 – Other consultation by authorities

### The Regulatory Reform (Fire Safety) Order 2005

#### **Other consultation by authorities**

46. —(1) *Where a government department or other public authority intends to take any action in respect of premises which will or may result in changes to any of the measures required by or under this Order, that department or authority must consult the enforcing authority for the premises before taking that action.*

(2) *Without prejudice to any power of the court to cancel or modify a notice served by a government department or other authority, no failure on the part of the department or authority to consult under paragraph (1) invalidates the action taken.*

(3) *In paragraph (1), "public authority" includes an approved inspector within the meaning of section 49 of the Building Act 1984.*

#### **FSO Guidance Notes**

This article provides for consultation between other building control bodies such as approved inspectors and enforcing authorities in relation to premises to which the Order applies or, when the premises are completed, the Order will apply. It reinforces the position of fire and rescue authorities as statutory consultees under the Approved Inspectors Regulations.

No further interpretation or guidance can be provided at this time to supplement that given in Guidance Note 1<sup>97</sup>.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

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<sup>97</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, October 2007

## Article 47 – Disapplication of the Health and Safety at Work etc. Act 1974 in relation to general fire precautions

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Disapplication of the Health and Safety at Work etc. Act 1974 in relation to general fire precautions***

**47.** —(1) *Subject to paragraph (2), the Health and Safety at Work etc. Act 1974 and any regulations made under that Act shall not apply to premises to which this Order applies, in so far as that Act or any regulations made under it relate to any matter in relation to which requirements are or could be imposed by or under this Order.*

(2) *Paragraph (1) does not apply—*

*(a) where the enforcing authority is also the enforcing authority within the meaning of the Health and Safety at Work etc Act 1974;*

*(b) in relation to the Control of Major Accident Hazards Regulations 1999.*

### **FSO Guidance Notes**

This article principally gives the Order primacy over the Health and Safety etc Act 1974 for matters that could be satisfied through the application and enforcement of the Order. There are certain exceptions to this rule:

1. Where an enforcing authority is the enforcing authority for both pieces of legislation; then the enforcing authority may use the legislation that is most suitable in the circumstances of the case. For example where a Fire and Rescue Authority is the enforcing authority for the purposes of licensing and enforcing explosives such as fireworks; then the Fire and Rescue Authority may use that legislation that most applies to the problem in hand. Equally the HSE may choose to apply the provisions of The Health and Safety at Work etc Act 1974 or the Management of Health and Safety at Work Regulations 1999 instead of the Order, where they are the enforcing authority for both enactments.
2. This article does not give primacy to the Order for matters relating to premises to which the Control of Major Accident Hazards Regulations 1999 (COMAH sites) apply<sup>98</sup>; although it might be argued that the control of general fire precautions in premises to which those regulations apply amount to a requirement for process fire precautions to which the Order does not apply in any case.

### **FSO FAQ**

**Q. Please explain – what is disapplied?**

A. The whole of the Health and Safety at Work etc. Act 1974 (HSWA), including the relevant statutory provisions (RSP) and regulations made under the Act is disapplied (i.e. it does not apply) insofar as the requirements of the Act relate to matters covered by the Order or which could be covered by regulations made under article 24 of the Order. The two main exceptions are where the enforcing authority for the Order and for HSWA is the same body; and where the premises are subject to the Control of Major Accident Hazards Regulations 1999. In addition it is taken, by virtue of intent, that where health and safety regulations are amended to refer to the Order then those regulations are effectively part of the Order and are not disapplied insofar as they are needed to give effect to requirements of the Order, (e.g. in relation to consultation with employees legislation).

<sup>98</sup> GREAT BRITAIN. Department for Communities and Local Government, *Regulatory Reform (Fire Safety) Order 2005 Guidance Note No. 1: Enforcement*, London, Department for Communities and Local Government, 2007, p36

## Article 48 – Service of notices etc.

### The Regulatory Reform (Fire Safety) Order 2005

#### **Service of notices etc.**

**48.** —(1) Any notice required or authorised by or by virtue of this Order to be served on any person may be served on him either by delivering it to him, or by leaving it at his proper address, or by sending it by post to him at that address.

(2) Any such notice may—

(a) in the case of a body corporate, be served on or given to 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.

(3) For the purposes of this article, and of section 7 of the Interpretation Act 1978 (service of documents by post) in its application to this Order, the proper address of any person is his last known address, except that—

(a) in the case of a body corporate or their secretary or clerk, it is the address of the registered or principal office of that body;

(b) in the case of a partnership or person having control or the management of the partnership business, it is the principal office of the partnership,

and for the purposes of this paragraph the principal office of a company registered outside the United Kingdom or of a partnership carrying on business outside the United Kingdom is their principal office within the United Kingdom.

(4) If the person to be served with or given any such notice has specified an address in the United Kingdom other than his proper address as the one at which he or someone on his behalf will accept notices and other documents, that address is also to be treated for the purposes of this article and section 7 of the Interpretation Act 1978 as his proper address.

(5) Without prejudice to any other provision of this article, any such notice required or authorised to be served on or given to the responsible person in respect of any premises (whether a body corporate or not) may be served or given by sending it by post to him at those premises, or by addressing it by name to the person on or to whom it is to be served or given and delivering it to some responsible individual who is or appears to be resident or employed in the premises.

(6) If the name or the address of the responsible person on whom any such notice is to be served cannot after reasonable inquiry be ascertained by the person seeking to serve it, the document may be served by addressing it to the person on whom it is to be served by the description of "responsible person" for the premises (describing them) to which the notice relates, and by delivering it to some responsible individual resident or appearing to be resident on the premises or, if there is no such person to whom it can be delivered, by affixing it or a copy of it to some conspicuous part of the premises.

(7) Any notice required or authorised to be given to or served on the responsible person or enforcing authority may be transmitted to that person or authority—

(a) by means of an electronic communications network (within the meaning given by section 32 of the Communications Act 2003); or

(b) by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible.

*(8) Where the recipient of the transmission is the responsible person, the transmission has effect as a delivery of the notice to that person only if he has indicated to the enforcing authority on whose behalf the transmission is made his willingness to receive a notice transmitted in the form and manner used.*

*(9) An indication to an enforcing authority for the purposes of paragraph (8)—*

*(a) must be given to the authority in any manner it requires;*

*(b) may be a general indication or one that is limited to notices of a particular description;*

*(c) must state the address to be used and must be accompanied by any other information which the authority requires for the making of the transmission;*

*(d) may be modified or withdrawn at any time by a notice given to the authority in any manner it requires.*

*(10) Where the recipient of the transmission is the enforcing authority, the transmission has effect as a delivery of the notice only if the enforcing authority has indicated its willingness to receive a notice transmitted in the form and manner used.*

*(11) An indication for the purposes of paragraph (10)—*

*(a) may be given in any manner the enforcing authority thinks fit;*

*(b) may be a general indication or one that is limited to notices of a particular description;*

*(c) must state the address to be used and must be accompanied by any other information which the responsible person requires for the making of the transmission;*

*(d) may be modified or withdrawn at any time in any manner the enforcing authority thinks fit.*

*(12) If the making or receipt of the transmission has been recorded in the computer system of the enforcing authority, it must be presumed, unless the contrary is proved, that the transmission—*

*(a) was made to the person recorded in that system as receiving it;*

*(b) was made at the time recorded in that system as the time of delivery;*

*(c) contained the information recorded on that system in respect of it.*

*(13) For the purposes of this article—*

*"notice" includes any document or information; and*

*"transmission" means the transmission referred to in paragraph (7).*

## **FSO Guidance Notes**

This article deals with the means by which a notice may be served on a recipient. There are a range of means by which notices may be served.

It is expected that most notices will be sent by post to the necessary responsible person or duty holder and this is perfectly acceptable. Where notices are served by post, the notice should be addressed to the recipient's proper address. For most cases the proper address is the last known address of the recipient. Enforcing authorities should make every reasonable effort to ensure that notices are served

on the correct person at the correct address. The address may be the recognised main business address or registered office.

A notice is deemed to be served<sup>99</sup> when it has been properly addressed, pre-paid and posted, with the relevant documents. The notice is deemed to have been effected<sup>100</sup> at a time when the letter would have been delivered in the normal course of postal delivery.

Intended recipients of notices are at liberty to nominate some alternative address providing that he indicates that he is willing to receive notices at this address, and for the purposes of this article, that other address is taken as being the recipient's proper address.

Article 48(6) identifies a situation in which, after making efforts to find the identity of the recipient and the proper address of the premises, that the serving of a notice may be affected by addressing the notice to the 'responsible person' for premises that are described in the best way possible and by delivering it to a person or by affixing it to some part of the premises in which the notice is likely to be found. Albeit that the Order allows for service of a notice in such a manner, the legal position of notices served in such a manner, is tenuous at best. Notices issued in such a manner are open to robust attack if the matter is ever taken to court and the position of the enforcing authority will be severely weakened.

The electronic service and effect of notices is permissible provided that the recipient has identified a willingness to receive the notice in this format and that the respective means of sending and receiving the notice are electronically compatible and will result in the recipient receiving a notice that is legible.

## FSO FAQ

### **Q. How do enforcing authorities go about issuing notices on Private Limited Companies and Public Limited Companies – and what's the difference between the two?**

A. The Companies Act states that private limited companies do not have to appoint a company secretary, whereas Public Limited Companies must (by law) appoint a company secretary. Therefore the notice will be issued on the body corporate in both cases but may be addressed to the company secretary only in the case of a Public Limited Company. For the addressee in the case of a Private Limited Company, efforts will have to be made to determine a person to which the notice should be addressed. Companies House or other appropriate search facility should be used to assist in this regard.

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<sup>99</sup> 1978, Interpretation Act 1978 (chapter 30)

<sup>100</sup> 1978, Interpretation Act 1978 (chapter 30)

## Article 49 – Application to the Crown and to the Houses of Parliament

### The Regulatory Reform (Fire Safety) Order 2005

#### **Application to the Crown and to the Houses of Parliament**

**49.** —(1) *Subject to paragraphs (2) to (4), this Order, except for articles 29, 30 and 32 to 36, binds the Crown.*

*(2) Articles 27 and 31 only bind the Crown in so far as they apply in relation to premises owned by the Crown but not occupied by it.*

*(3) For the purposes of this article—*

*(a) the occupation of any premises by the Corporate Officer of the House of Lords for the purposes of that House, by the Corporate Officer of the House of Commons for the purpose of that House, or by those Corporate Officers acting jointly for the purposes of both Houses, is to be regarded as occupation by the Crown;*

*(b) any premises in which either or both of those Corporate Officers has or have an interest which is that of an owner are to be regarded as premises owned by the Crown; and*

*(c) in relation to premises specified in sub-paragraphs (a) and (b), the relevant Corporate Officer is the responsible person.*

*(4) Nothing in this Order authorises the entry of any premises occupied by the Crown.*

*(5) Nothing in this Order authorises proceedings to be brought against Her Majesty in her private capacity, and this paragraph shall be construed as if section 38(3) of the Crown Proceedings Act 1947 (interpretation of references in that Act to Her Majesty in her private capacity) were contained in this Order.*

### FSO Guidance Notes

With the exception of certain articles, the Order applies to the Crown. The exceptions are predominantly that enforcement and alterations notices cannot be issued on the Crown. Prohibition notices may apply to the Crown. Articles 32-36 are excepted because (starting with article 32 – Offences) these articles would imply that the Crown can commit offences against itself, that the Crown can make and hear an appeal against itself in one of its courts, and that it can submit itself to the bringing of the matter to determination by the Secretary of State.

Those powers that may be brought to bear on the Crown by an enforcing authority (powers of entry and the issuing of a prohibition notice) may only be brought in cases where the premises in question are the property of the Crown but are not occupied by it. Various premises and circumstances of occupier are established at article 49(3) as being occupied or owned by the Crown.

In cases where premises are occupied by the Crown, there are no powers of entry.

### FSO FAQ

**Q. This seems to say there is little enforcement or offences against the crown. Is this correct?**

**A.** At present the Crown is immune from prosecution under the Order. Non-Crown employers and occupiers who occupy Crown premises can have formal enforcement action (including

prosecution) taken against them. This would be done by Fire Inspectors appointed by the Secretary of State. Because the Crown cannot be prosecuted, the alterations, enforcement and prohibition procedures are not currently legally applied. However, Fire Inspectors often issue "Crown notices" which are identical to usual notices other than that they note compliance is expected due to assurances given by the Secretary of State.

## Article 50 – Guidance

### The Regulatory Reform (Fire Safety) Order 2005

#### **Guidance**

**50.** —(1) *The Secretary of State must ensure that such guidance, as he considers appropriate, is available to assist responsible persons in the discharge of the duties imposed by articles 8 to 22 and by regulations made under article 24.*

*(2) In relation to the duty in paragraph (1), the guidance may, from time to time, be revised.*

*(3) The Secretary of State shall be treated as having discharged his duty under paragraph (1) where—*

*(a) guidance has been made available before this article comes into force; and*

*(b) he considers that the guidance is appropriate for the purpose mentioned in paragraph (1).*

#### **FSO Guidance Notes**

This article simply holds the Secretary of State to have produced some guidance for the purpose of assisting responsible persons to comply with the requirements of the Order before the Order came into effect. This was essentially achieved by the publication of the various guidance documents, distinguished by premises types and aimed at responsible persons.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

## Article 51 – Application to visiting forces, etc.

### The Regulatory Reform (Fire Safety) Order 2005

#### ***Application to visiting forces, etc.***

*51. —This Order applies to a visiting force or an international headquarters or defence organisation designated for the purposes of the International Headquarters and Defence Organisations Act 1964 only to the extent that it applies to the Crown.*

#### **FSO Guidance Notes**

This article aims to assist the understanding of the Defence Fire Service in relation to the extent of its obligations under the Order. Article 51 serves to instruct the Defence Fire Service that visiting forces are brought under the Order but only insofar as the Order binds the Crown and not further.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

## Article 52 – Subordinate provisions

### The Regulatory Reform (Fire Safety) Order 2005

#### **Subordinate provisions**

**52.** —(1) *For the purposes of section 4(3) of the Regulatory Reform Act 2001 (subordinate provisions) the following are designated as subordinate provisions—*

- (a) article 1(3);*
- (b) in article 2, the definition of "relevant local authority";*
- (c) article 9(6) and (7);*
- (d) in article 10, the reference to "Part 3 of Schedule 1";*
- (e) article 11(2);*
- (f) article 14(2);*
- (g) article 16(1)(a) to (d);*
- (h) article 16(4);*
- (i) article 18(6) and (7);*
- (j) article 25;*
- (k) article 45(3);*
- (l) article 49; and*
- (m) Schedule 1.*

*(2) A subordinate provisions order made in relation to article 1(3) shall be subject to annulment in pursuance of a resolution of either House of Parliament.*

*(3) A subordinate provisions order made in relation to any of the provisions mentioned in article 52(1)(b) to (m) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.*

#### **FSO Guidance Notes**

It should be well understood that the Order was produced under the umbrella legislation of the Regulatory Reform Act 2001 and that the Order represented the greatest and most wide ranging use of that Act at that time.

Certain articles are designated as subordinate provisions. Being designated as subordinate provisions allows changes to those articles to progress through parliament more quickly and easily than would otherwise be the case (relatively speaking).

*"Subordinate provisions are appropriate to minor ancillary or technical provisions*

*...<sup>101</sup>*

<sup>101</sup> The Stationery Office Limited, House of Commons Regulatory Reform Committee, Regulatory Reform (Fire Safety) Subordinate Provisions Order 2006, Fourth Report of Session 2005-06, Report, together with formal minutes, 23<sup>rd</sup> March 2006  
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As the Order progressed through the Order-making process, there was some debate relating to articles 9-22 and whether or not they should be designated as 'subordinate provisions'. The proposal to designate all articles (9-22) as subordinate was over-turned and consequently only those articles listed at article 52 have been so designated and are intended to be limited to those articles (or parts thereof) that are "*technical or procedural*"<sup>102</sup> in nature.

A Subordinate Provisions Order was used<sup>103</sup> to delay the coming into force date of the Order from 1<sup>st</sup> April 2006 to 1<sup>st</sup> October 2006. This provision of the Order was subject to amendment by order subject to 'negative resolution'.

Those other articles listed at article 52 are subject to amendment by order subject to positive resolution. To make changes to subordinate provisions, those changes must be subject to further 'Order-making', hence 'by order'. That order may be subject to either 'positive' or 'negative' resolution. The principal difference between a 'positive' and 'negative' resolution is that the former will not come into force unless positive action is taken by the House<sup>104</sup> to accept it e.g. it must be voted 'in', whereas the latter will automatically come into force after a period of time, unless it is seen and debated to the contrary.

By way of illustration, the whole of article 14(2) has been designated as subordinate, which includes the provision of article 14(2)(e), which states:

*"sliding or revolving doors must not be used for exits specifically intended as emergency exits;"*

Should a sliding or revolving door be invented that is highly efficient in terms of evacuating people from premises in case of fire (perhaps more efficient than doors currently in use), then it would follow that responsible persons and building designers should be allowed to make full use of such a door. In this case article 14(2)(e) may be amended by order subject to positive resolution.

## **FSO FAQ**

No questions have been raised in relation to this article at this time.

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<sup>102</sup> House of Commons Regulatory Reform Committee, Draft Regulatory Reform (Fire Safety) Order 2005 Ninth Report of Session 2004-05 Report, together with formal minutes and written evidence, HC 495, [online], 2005, London, The Stationery Office Limited, Available from: <<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdereg/495/495.pdf>> [Accessed 21<sup>st</sup> February 2008], para.57-60

<sup>103</sup> The Regulatory Reform (Fire Safety) Subordinate Provisions Order 2006, SI 2006 No. 484

<sup>104</sup> In practice the resolution for change must be approved by both Houses of Parliament (i.e. the House of Commons and the House of Lords).

## Article 53 – Repeals, revocations, amendments and transitional provisions

### The Regulatory Reform (Fire Safety) Order 2005

#### **Repeals, revocations, amendments and transitional provisions**

**53.** —(1) *The enactments and instruments referred to in Schedules 2 and 3 are amended, repealed and revoked in accordance with those Schedules.*

(2) *The enactments and instruments specified in column 1 of Schedules 4 and 5 are repealed or revoked, as the case may be, to the extent specified in the corresponding entry in column 3.*

(3) *Any conditions imposed under section 20(2A) or (2C) of the London Building Acts (Amendment) Act 1939 before the date when this Order comes into force and which relate to maintenance, shall cease to have effect from that date*

#### **FSO Guidance Notes**

This article acts to make changes to previous legislation, which is a fundamental part of the Order being produced i.e. to simplify and rationalise fire safety law. By so removing (or amending as appropriate) previous legislation the number of burdens imposed on responsible persons would be reduced.

Significant to an understanding of this article is an appreciation for the difference in meaning between a 'repeal' and 'revocation'.

Enactments and instruments that have been repealed are no longer in force, in law. Revocations are equally no longer in force but the difference lies in the standing of the enactment or instrument when it is no longer in force. Where an enactment or instrument has been repealed it is as if the enactment or instrument has been put on a shelf and is simply not to be used. Recognising that the enactment or instrument is not to be used however does not preclude reference being made to it or indeed the potential for it to be taken off the shelf and brought back into force.

Where an enactment or instrument has been revoked it is as if the enactment or instrument has been removed entirely from existence, as if it was never in force. There is no opportunity for it to return.

For a full list of repeals, revocations, amendments and transitional provisions, the various schedules to the Order should be consulted. A number of County, Council and County Council Acts have been amended by the Order coming into force and as such individuals should look through the Order to see how any amendments impact their particular area.

#### **FSO FAQ**

No questions have been raised in relation to this article at this time.

# Appendix 1

## Application to residential premises

This appendix sets out how the Order applies to different types of residential accommodation.

The Order does not apply to premises (or parts of premises) that are occupied as a private dwelling with exception of the extent detailed at article 31. Most cases of doubt arise where the premises potentially consist of more than one dwelling or where one dwelling is occupied by people who appear to have no family connection. Each case must be considered on its merits and according to the risk there present. Matters for consideration include:

- (a) Whether the extent of the individual units of domestic accommodation is sufficient to consider each unit to be a “dwelling” in its own right. A lack of toilets, washing facilities or cooking facilities in each unit may be generally disregarded for this purpose. A situation in which occupiers rely on the use of common facilities, such as common cooking facilities, lounges or “living rooms” and they regard the premises (i.e. their unit and the common facilities) as their dwelling, tends to suggest the individual unit is not a dwelling in its own right.
- (b) Whether the accommodation that comprises the “dwelling” can be regarded as “private”.

The following is provided as guidance on application for many common circumstances:

### Houses, maisonettes, flats and bed-sits

#### Individual houses (family/single occupancy)

The Order does not apply to individual houses whether detached or terraced, which are in traditional format (individual bedrooms, kitchen, lounge etc) occupied by a single household as domestic dwellings.

#### Private Flats (including those over commercial premises)

Private flats provided on premises as living accommodation for the owner or manager is to be regarded as a single private dwelling and as such sits outside the scope of the Order. However, even where private staff accommodation is provided, article 31 may be applied to the whole premises including that occupied as private staff accommodation.

#### Individual houses (shared)

The Order does not apply to traditional format (individual bedrooms, kitchen, lounge etc) houses (detached or terraced), which are occupied by a group of persons (e.g. a few students or friends) under a shared tenancy or individual tenancies under a head tenant. The use of locks on bedroom doors to provide a degree of privacy or security is irrelevant because the individual bedrooms are not considered to be separate dwellings. The whole premises consists a house occupied as a single private dwelling.

#### Individual flats, maisonettes and bed-sits (family / single occupancy)

Individual flats, maisonettes and bed-sits contained in purpose built or converted properties are not subject to the main provisions of the Order (articles 8 to 22). However, article 31(10) may be applied to the whole premises including those elements occupied as a private dwelling. The parts of the property that are, or may be, used by the occupants of more than one flat or bed-sit (e.g. common entrance hall, stairs, lift, corridors, gardens) are subject to the full provisions of the Order. Where the occupant of a flat or bed-sit may exercise control over a common fire precaution, such as parts of a fire alarm system that extends into the flat, or the fire resisting nature of the front door to the flat (which are provided to protect the common means of escape corridor), then the occupant may be regarded as having duties under the

Order. These duties may be applied by virtue of article 5(4) if the terms of the contract or tenancy agreement so dictate, or by virtue of article 5(3) as a person with control over the premises (albeit that control is very limited). Predominantly this will relate to maintenance requirements under articles 17 and 38. The carrying on of maintenance falls to the responsible person but there is an expectation that the tenant will co-operate with him to ensure that common safety systems are adequately maintained.

Where a property contains common parts to which the Order applies and falls within the definition of a 'house in multiple occupation', under sections 254 to 259 of the Housing Act 2004, a prohibition notice served in accordance with article 31 of the Order may be applied to the whole premises, including those elements comprising the private dwellings.

### **Individual flats (including maisonettes) and bed-sits (shared)**

The sharing of an individual flat or bed-sit is subject to the same considerations as the sharing of an individual house. These properties (the individual flats etc.) are not subject to the Order other than as described for "Individual flats, maisonettes and bed-sits (family / single occupancy)".

### **Student Halls of residence (further education)**

Student's study bedrooms within a University or University halls of residence are treated as individual dwellings. The Order is not considered to apply to them other than to maintenance requirements for common fire precautions that extend into the individual dwellings. The order applies in full to the common areas of such premises. Article 31 may be applied to the whole premises including those elements comprising private dwellings. The considerations for application described for flats are largely applicable though it should be noted that students will have little control over matters such as the replacement of room doors that protect the means of escape.

**N.B.** *Outside term-time, halls of residence are often used as conference accommodation or hotel accommodation for backpackers and other tourists among others. At these times, study bedrooms are available for rent in the same way as hotel rooms and the "private" element of the study bedroom ceases to have effect. The Order will apply in full to the whole property. Care should be taken, if some students still occupy parts of the premises, because their rooms remain as private dwellings while they remain in residence.*

### **Nurses Homes**

Accommodation for nurses and other medical staff in a dedicated accommodation unit are treated as individual dwellings. The Order does not apply to them other than to the extent it applies maintenance requirements for common fire precautions that extend into the individual dwellings. Article 31(10) may be applied to the whole premises including those elements comprised in private dwellings. The Order applies in full to common parts of the premises (stairs, corridors, lifts, lounges, kitchens etc. together with common fire precautions). The considerations applied to flats are applicable to these premises, although it should be noted that the residents of individual rooms or flats may have extremely limited control over any fire safety measures.

### **Hospitals**

Patient areas, including wards and private rooms, in hospitals (whether public or private sector) are not private domestic dwellings and the Order applies. Where sleeping accommodation and other facilities are provided for staff (such as on-call doctors) it is not private domestic accommodation. The Order applies to the entire hospital.

### **Residential care homes**

Although residents in care homes may have individual rooms, reliance is placed on use of facilities outside those rooms (lounges, dining rooms, gardens, terraces etc.) and residents tend to regard the home (and not their individual room) as their dwelling. Consequently, the whole care home should be regarded as one dwelling. Due to the nature of the premises and the way it is used, that dwelling is not

“a single private dwelling”. The Order applies to the whole premises including residents’ rooms and the common areas together with areas used exclusively by staff. Sleeping accommodation provided for staff is not a dwelling.

## **Children’s Homes**

Sleeping accommodation in children’s homes may comprise single rooms, shared rooms or dormitory style accommodation. In each case, reliance is placed on use of facilities outside those rooms (lounges, dining rooms, TV rooms, gardens, terraces etc.) and the whole home forms the dwelling. The individual sleeping accommodation (bedroom / dormitory) is not considered to form a private dwelling in its own right and as the home as a whole is used by various people it is not considered to form a single private dwelling. The Order applies to the whole premises including any sleeping accommodation used only by staff working night shifts. Where a flat or flats are provided as domestic dwellings for staff on a permanent or semi-permanent basis; the Order does not apply to the flats. However, even where private staff accommodation is provided, article 31 may be applied to the whole premises including that occupied as private staff accommodation.

## **Nursing Homes**

Homes providing medical care (including hospices) may provide accommodation as single, shared or dormitory rooms. As with hospitals and residential care homes, accommodation for residents and sleeping / rest accommodation for staff on night shift does not constitute a private dwelling. The Order applies to the whole premises with the exception of any flat provided for a manager or owner who lives on the premises. However, even where private staff accommodation is provided, article 31 may be applied to the whole premises including that occupied as private staff accommodation.

## **Sheltered Housing**

Accommodation may be provided as either flats or as separate houses. The common features of these types of accommodation are likely to include daily (or more frequent visits) to residents by a warden and / or arrangements for a warden to be summoned quickly if a resident is encountering difficulties. Residents of this type of accommodation may also have day carers or even 24 hour assistance by carers or nurses. These premises are treated as private dwellings. The Order does not apply to the dwellings but may apply to any common facilities and office accommodation where this is provided on site. The considerations for “Individual flats, maisonettes and bed-sits (family / single occupancy)” apply equally to blocks of flats and converted houses used as sheltered housing.

## **Boarding Schools**

Accommodation for pupils may be in the form of single, shared or dormitory rooms. In each case, conditions or restrictions will apply to the use of the room and the pupils will have to occupy any part of the premises as required by the school. Teaching and other staff will have access to pupil’s rooms in the role as being ‘in loco parentis’. Consequently pupil’s rooms are not regarded as being private dwellings. The boarding accommodation should be regarded as one non-private dwelling and the Order applies. However, flats or living accommodation occupied by staff as their residence is a single private dwelling and outside the scope of the Order. However, article 31 may be applied to the whole premises including parts occupied as private staff accommodation.

## **Hostels**

The term “hostel” can be widely construed to cover a variety of accommodation types. These vary from hostels for the homeless to refuges for people who have suffered assault or abuse. Due to the imprecise nature of the term, inspecting officers will have to exercise professional judgement to determine the circumstances of each case. Residents may well regard their room or bed-sit as their dwelling even though they only occupy it on a temporary basis. Of key consideration will be whether the resident can rightly regard their occupation of the relevant accommodation as “private”. To a reasonable degree this will depend on the extent of the occupier’s right to exclusive possession of the accommodation.

In most cases there are restrictions imposed on occupiers relating to their: use of rooms; entitlement to any particular room; having to share rooms; and entitlement to exclusively possess a room. These restrictions tend to indicate that the units are not occupied as private dwellings and therefore the Order applies to the whole premises.

Flats or living accommodation solely occupied by “live-in” staff as their residence are treated as private dwellings and as such fall outside the scope of the Order. However, even where private staff accommodation is provided, article 31 may be applied to the whole premises including parts occupied as private staff accommodation.

### **Staffed hotels including bed and breakfast accommodation**

Guest rooms and suites are not considered to be private dwellings. The Order is considered to apply to all guest accommodation and common facilities including those used by staff. Private flats provided for the owner or manager as their residence are considered to be outside the scope of the Order other than for the purposes of article 31. Sleeping accommodation provided for other staff may take the form of individual or shared rooms or dormitory type accommodation. In each case, the accommodation will be subject to control and restriction of use by the hotel management and staff may have to occupy any space as required by management. The Order applies to any such accommodation.

### **Un-staffed Hotels**

Premises may include those which consist of letting rooms above another business and for which registration and access to keys is through that second business. For all or part of the time, the hotel accommodation may be un-staffed. The whole premises are subject to the Order.

### **Holiday camps**

Residential accommodation for guests on holiday camps is as for any hotel room available to the public. The Order applies in full.

The Order does not apply to those tents or caravans owned and used by members of the public. They are the occupiers’ private dwellings. Tents or caravans hired from commercial companies are subject to the Order as for any other guest accommodation.

Staff accommodation in chalets, flats or caravans provided by a commercial undertaking as with staff accommodation in hotels, is subject to the Order in full.

### **Caravan Parks and Park Homes**

The site (comprising the premises) is subject to the Order. However, caravans / park homes (including any private garden associated with them) which are owned or leased by individuals as a first or second home for their own use are private dwellings and as such fall outside the scope of the Order. Common facilities and caravans / park homes which are used for holiday letting purposes are considered to be within scope of the Order.

### **Implications of the Order as it applies to Flats**

This section will discuss in particular the responsibilities relating to individual front doors of flats accessed from common areas. It is frequently the case that individual front doors belong to the individual flat owners rather than the landlord / managing agent. Similar issues also arise in relation to fire alarms, fire detection and other warning / prevention devices within the flat itself<sup>105</sup>. Of significant interest are those flats within a block that are under different ownerships.

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<sup>105</sup> See the FSO Guidance Notes given at article 17 of this document.

The Order imposes obligations on the responsible person to take general fire precautions in respect of the common parts of a block of flats (but not the individual flats themselves). One of the principal obligations is to undertake an assessment of the risks from fire in respect of the common areas of the block. Preventive and protective measures should be taken as a consequence of this risk assessment. Statutory guidance relating to sleeping accommodation details these responsibilities under the Order.

The common parts of blocks of flats (e.g. halls, stairs, landings, lifts etc) are subject to the Order<sup>106</sup> but individual flats fall outside its scope (with the exception of Article 31(10)).

Where individual flat owners refuse to co-operate with the landlord / managing agent in relation to requirements under the Order e.g. the front door to the flat has to be changed to a fire door, and the flat owner is unwilling to comply, action may be taken to assist.

Duties are imposed (among others) on persons having, by virtue of any contract or tenancy, an obligation of any extent in relation to the safety of the premises. Where contracts or tenancy agreements give flat owners control over their front door and the front door constitutes a protective measure providing a degree of safety to fellow occupiers, that person is to be treated as being a person who has control of the premises. In these circumstances the terms of the lease require careful consideration. The lease may contain appropriate provisions which could address problems without the need to enforce duties under the Order itself.

Parts of the flat which do not also form a part of the common areas fall outside the scope of the Order.

Where a flat owner has exercised control of his front door by installing a door of his choice (that may not be appropriately fire resistant), the flat owner may be viewed as a duty holder under article 5(3). Since the front door to the flat forms a part of the common areas (i.e. premises within the scope of the Order) the extension of the duty to every person who has to any extent control of the premises applies. Article 5(3) imposes a duty on those with control “so far as the requirements relate to matters within his control”. The scope of the Order and the flat owners control typically extend only to the front door of the flat. The requirement relates to providing appropriate fire resistance that in the event of danger, other occupiers can evacuate quickly and safely via the common areas of the block. The occupiers’ control of the door has been demonstrated already and the requirements relate to the flat owner only so far as the Order applies to his flat i.e. the front door.

An enforcement notice can be served either on the responsible person or article 5(3) duty holder (as a person having to any extent, control of the premises). This extends to the flat owner (as an owner of the front door of the flat).

## Supported living

Where occupants of single private dwellings receive regular health care from the employees of external agencies, the Order does not apply to the single private dwelling because the principal use of the premises is as a single private dwelling, to which the Order does not apply. Where supported living is provided within an institutional setting, the Order does apply. Guidance relating to the standards of fire safety to be provided in premises to which the Order does apply can be found in ‘Fire Precautions in housing providing NHS – Supported Living in the community - An Update of Health Technical Memorandum 88’.<sup>107</sup> It should be noted that this document pre-dates the Order and that it provides advice commensurate with acknowledging that the premises are a home to the residents and that the application of fire safety should maintain a homely, non-institutional environment.

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<sup>106</sup> See Westminster City Council - v - Select Management

<sup>107</sup> The Stationery Office, *Fire Precautions in housing providing NHS – Supported Living in the community - An Update of Health Technical Memorandum 88*, London, NHS Estates, 2001

## Appendix 2

### Recording of Training and Maintenance under The Regulatory Reform (Fire Safety) Order 2005

Individual articles relating to specific fire prevention and protection measures (articles 8 to 22) do not explicitly contain requirements to record actions taken. The reason for this is that the recording requirements, which have application across articles 8 to 22 are contained in articles 9 and 11.

Article 9 requires the responsible person to record (where five or more people are employed, a licence is in force or an alterations notice requires it) the significant findings of the fire risk assessment and that they must keep the risk assessment up to date. Where a fire safety measure has been taken, or is proposed, the responsible person must record that as a significant finding. Once a proposed measure has been implemented (e.g. fire safety measures have been carried out), that will be a new or revised significant finding. The risk assessment must be updated to record the revised finding.

Article 11 of the Order requires the responsible person to make and give effect to appropriate arrangements for the “planning, organisation, control, monitoring and review of the preventative and protective measures”. The article further requires (where five or more people are employed, a licence is in force or an alterations notice requires it) that these arrangements must be recorded. Effective arrangements for monitoring and review will need to be reasonably informed by appropriate information. If not so supported the arrangements are unlikely to be effective.

Some preventative and protective measures can be reasonably monitored by physical inspection (e.g. the presence of fire fighting equipment) but others cannot (e.g. whether the fire alarm has been maintained at appropriate frequency). Consequently, the management arrangements required by article 11 should include an appropriate mechanism for informing the responsible person about these types of issues so these preventative and protective measures can be monitored and reviewed.

Where it appears to an inspecting officer that:

- (a) Article 9 has not been complied with because the significant findings of the risk assessment are not up to date (implemented measures not recorded); and / or
- (b) Article 11 has not been complied with because the arrangements for planning, organisation, control, monitoring and review of the preventative and protective measures are not effective,

The authority may require the responsible person to update the significant findings of the risk assessment as appropriate and / or make arrangements for information necessary for the effective planning, organisation, control, monitoring and review of the preventative and protective measures to be provided. An enforcement notice may direct the responsible person (or other person with responsibilities) to take measures to remedy a failure to comply with the Order i.e. could specifically require information to be recorded relating to the arrangements that are in place for e.g. training that has been given or maintenance that has been carried out.

## Appendix 3

### Additional information (incorporating guidance for enforcing authorities) in relation to article 16—additional emergency measures in respect of dangerous substances

In relation to premises having dangerous substances, the responsible person must ensure, subject to the risk assessment, that:

- (a) information on emergency arrangements is available,
- (b) suitable warning and other communication systems are in place,
- (c) any necessary pre-explosion warning is given and people withdraw,
- (d) escape facilities are provided and maintained,
- (e) information is provided to relevant accident and emergency services,
- (f) information is displayed at the premises, and
- (g) steps are taken to mitigate fires, restore the situation to normal and inform relevant persons.

The enforcing authority may need to establish some or all of the following:

- (a) What information is available for staff and emergency personnel?
- (b) Where is this information kept?
- (c) Are there additional emergency procedures in place in respect of dangerous substances?
- (d) What warning and communications systems are in place?
- (e) What measures are in place to allow only essential persons into the affected area?
- (f) What special PPE and equipment is available on site?

The responsible person is required to provide information on emergency arrangements to the emergency services to enable them to prepare their response to an incident. The responsible person is also required to display this information, unless the results of the risk assessment make this unnecessary.

In the event of fire, the responsible person must ensure that immediate steps are taken to mitigate the effects of the fire, restore the situation to normal<sup>108</sup>, and inform relevant persons who may be affected. The responsible person must also ensure that only essential personnel are permitted in the affected area, and they are issued with protective equipment and clothing, and safety equipment. These obligations do not apply, however, where the risk assessment shows that the quantity of dangerous substances is such that the risk to relevant persons is only slight.

An accident, incident or emergency is any unplanned event which has the potential to cause harm and which may require the evacuation, escape or rescue of one or more people. This article requires responsible persons to assess the likelihood and scale or magnitude of the effects that may result from any foreseeable accident, incident, emergency or other event involving dangerous substances present at the workplace. On the basis of this assessment, responsible persons should put in place appropriate emergency arrangements to safeguard people on their premises, mitigate the effects of any such event and restore the situation to normal.

The precautions to deal with accidents, incidents and emergencies are without prejudice to the precautions to be taken to eliminate and reduce risk as required by article 12. The possibility of such events is minimised by good plant design and layout, sound engineering and good operating practice, and proper instruction and training of personnel. However, despite these measures, accidents, incidents and emergencies can still occur and therefore appropriate procedures are required.

It is not expected that responsible persons will necessarily be able to achieve full mitigation of all foreseeable accidents, incidents and emergencies solely by their own means. Rather, it will typically be a combination of the workplace emergency arrangements and those of the emergency services that will provide overall, the safety of relevant persons. The fire service will in any case assume responsibility for tackling any fire upon their arrival, but they may also be able to assist in dealing with other non-fire emergencies such as released or spilled dangerous substances. The primary requirement for protecting

<sup>108</sup> 'Normal' in this context may be understood to mean the removal of the danger to persons

relevant persons is to ensure that they are able to evacuate or be evacuated to a place of safety. The requirement to mitigate the effects of the accident, incident or emergency should have regard to this objective and to the need not to expose people to any unnecessary risks. In many cases evacuation of people to a safe place will be the correct course of action. Particular attention should be given in choosing the safe place to ensure that it will not be affected by the event should it escalate.

Responsible persons are expected to take reasonable steps to ensure that they have sufficient knowledge to properly carry out the risk assessment e.g. referring to appropriate sources of information including relevant guidance, trade-information and advice from manufacturers and suppliers. It is important for responsible persons to consult with their employees and representative bodies during the assessment process and when procedures are being created.

Responsible persons should also liaise as necessary with the relevant accident and emergency services on the assistance they can provide.

### **Slight risk**

Responsible persons are not required to make additional emergency arrangements where they assess that there is only a 'slight risk' because of the quantity of each substance present and because the control measures they have put in place to fulfil the requirements of other safety or fire legislation are sufficient to control that risk. For example, in respect of fire, the normal emergency procedures, including escape routes and means of giving warning already provided in the workplace may be assessed to be sufficient.

Responsible persons must be satisfied that control measures will continue to be effective if an accident, incident or emergency occurs e.g. where an accompanying event such as an explosion is possible that might compromise an escape route, regard would need to be given to the alternative measures needed to ensure safe evacuation. This might include a specially strengthened escape route and / or refuge.

In order to decide whether the risk is slight, responsible persons should take into account:

- (a) the quantity of each dangerous substance;
- (b) the work activity involving that dangerous substance;
- (c) information from the risk assessment carried out under regulation 15(1);
- (d) the potential scale of any release;
- (e) interactions between substances; and
- (f) the effect of the measures taken under article 12 to reduce the risk.

### **Assessing the risks**

Responsible persons should adopt a systematic approach for identifying potential accidents, incidents, emergencies or other events and consider how they can be detected when they have occurred, or are occurring. They also need to determine, for the various stages of the accident, incident or emergency, the appropriate intervention to both mitigate the consequences of the event and prevent its further escalation. The impact of an accident, incident or emergency can often be greatly reduced if prompt and correct action is taken as soon as the event occurs.

Responsible persons will need to determine the degree of intervention appropriate to the circumstances of the emergency. This could range from those with sophisticated response teams who have been specially trained and equipped to deal with emergencies to those who will undertake minimal intervention at the workplace, but predominantly rely on external emergency services.

## Safety Drills

Depending on the findings of the risk assessment and measures already taken, responsible persons will also need to consider what additional safety drills may need to be developed and tested. The frequency of practicing any such drills will depend on a number of factors including;

- (a) the quantity of dangerous substances on site and the level of risk they present;
- (b) the size of the workplace and workforce; and
- (c) the success, or otherwise of previous tests.

## Warning and Communication Systems

Warning and communication systems (including visual and audible alarms) should be provided to alert people to an actual or potential incident involving dangerous substances. The system should be appropriate to the level of risk presented by foreseeable accidents, incidents or emergencies and provide sufficient time and information to allow the necessary emergency actions to be carried out.

When considering what warning and communication systems will be appropriate, responsible persons should take into account:

- (a) the size of their workplace and workforce;
- (b) who needs to be alerted and why;
- (c) quantities of substances involved and the level and type of risk those substances present; and
- (d) the emergency actions to be taken in the event of an incident and the required response times for these.

The warning system should not require persons to remain in the affected area to give the alarm during an emergency. Examples of warning systems include:

- (a) a continuous or intermittent ringing bell;
- (b) a klaxon or hooter;
- (c) warning lights;
- (d) an intercom or public address system.

Warning systems are not necessarily restricted to signalling the need for withdrawal or evacuation of people who might be affected by the incident. They can also be provided to alert employees of an incident or emergency, so that they can take appropriate emergency action to contain or mitigate the incident.

Where there are multiple alarm systems in a work place, responsible persons should ensure that these are clearly distinguishable and that their employees have the necessary training and equipment to be able to safely and correctly carry out any actions required.

Responsible persons should ensure that any warning or communication system can be seen or heard in all parts of the workplace likely to be affected by the incident. Responsible persons should also have procedures in place to keep employees informed of situations as they develop and any actions that may be needed as a consequence.

## Escape facilities

Responsible persons should ensure through the fire risk assessment that adequate escape facilities are provided to enable employees and any relevant persons to readily and safely reach a place of safety.

The presence of a dangerous substance can significantly enhance the speed at which a fire develops and also the amount of smoke and fumes evolved. When considering escape facilities responsible persons should consider the potential for explosions, rapid fire development and ingress of dangerous substances into escape routes which might compromise escape. Responsible persons should consider how these events may be prevented and / or mitigated in such circumstances, e.g. by appropriate design

of the escape route and / or means of suppressing or containing the fire. Steps to mitigate the effects of an incident may include:

- (a) Evacuating people who may be affected (taking into account possible escalation of the incident) to a place of safety;
- (b) Isolating plant or equipment from where uncontrolled releases of a dangerous substance are occurring;
- (c) Removing dangerous substances that are under threat to a safe place;
- (d) Preventing the further spread of a spilt or leaking dangerous substance by the use of barriers, booms or absorbent materials;
- (e) Limiting the extent of any flammable vapour cloud arising from a release of the dangerous substance by, e.g. the use of water sprays and curtains, or applying fire-fighting foam over the surface of the spilt or leaking liquid materials;
- (f) Increasing natural or mechanical ventilation to dilute hazardous concentrations of dangerous substances arising from an incident;
- (g) Controlling potential ignition sources in non-hazardous areas that are now affected by an uncontrolled release of dangerous substance;
- (h) Protecting the vessels or plant containing the dangerous substance against the effects of fire by such means as water deluge systems, water monitors and passive fire protection coatings; and
- (i) Applying appropriate fire-fighting materials to a fire involving a dangerous substance.

Responsible persons must implement those measures necessary to achieve control or containment of an accident, incident or emergency in order to allow sufficient time for people to escape or be evacuated to a place of safety.

After an incident, responsible persons must assess whether any danger remains and implement necessary measures to make the situation safe. If there are any doubts, expert assistance should be sought e.g. from emergency services. Implementation of necessary measures should be achieved without exposing employees or others to unnecessary risk, although this needs to be balanced against the overall risk to people of doing nothing or taking only limited measures.

### **Restoring the Situation to Normal**

Under article 16, measures to 'restore the situation to normal' following an incident are limited to those measures needed to achieve the normal level of safety for the premises. They do not include measures to re-build a plant or restore it to normal production or operation. Suitable measures could include:

- (a) Repair or decommissioning leaking or unsafe plant;
- (b) Safe recovery and clean up of spilt or leaked dangerous substances;
- (c) Making any damaged or unstable buildings safe;
- (d) Repair or replacement of any equipment, monitoring devices or alarms necessary for the safety of relevant persons or others present on the premises;
- (e) Neutralising or disposing of any unstable or dangerous substances resulting from an incident.

### **Persons Carrying Out Repairs and Other Necessary Work**

Measures taken to deal with accidents, incidents and emergencies will need to be adaptable to deal with the specific situation. This will similarly be the case with the remedial action following the accident, incident or emergency. It is therefore imperative for responsible persons to ensure that those of their employees expected to respond in the event of an accident, incident or emergency involving a dangerous substance have the necessary skills, expertise and training to carry out the functions expected of them. Additionally suitable plant and equipment necessary to carry out these functions should be available and properly maintained for immediate use.

Equipment to be provided should include appropriate personal protective equipment (PPE) that is determined to be necessary to enable employees to safely carry out the emergency actions required. However, employees should not be exposed to unnecessary risk in carrying these actions into effect.

Unless the risk assessment indicates otherwise, responsible persons should also display the emergency procedures in a prominent position at key locations on the premises. Appropriate information on emergency arrangements should also be communicated to non-employees who may be affected.

Sufficient information on the nature of any foreseeable emergencies involving dangerous substances should be made available to the relevant accident and emergency services that are likely to be asked to deal with such incidents. As a minimum, responsible persons should contact the external emergency services and offer to make this information available. Responsible persons should also make this information available to any on-site emergency responders.

Information on the responsible persons' emergency arrangements will help the emergency services to prepare their own response procedures and precautionary measures to be followed in the event of an incident occurring at the workplace. If requested by the emergency services, responsible persons should be prepared to send the information to them and / or meet with their representatives to discuss the emergency procedures. It is also useful to provide details of the responsible persons designated contact who will advise the emergency services of the situation on their arrival at an emergency. Responsible persons should also keep the emergency services updated on significant changes, such as the quantities and nature of dangerous substances present.

Responsible persons will need to consider which external emergency services need to be aware of their emergency arrangements. External emergency services include the fire and rescue service, ambulance service and the police. In some cases all may need to be informed. In some circumstances other emergency services may need to be included, for example the coastguard for offshore installations etc.

The information made available should include:

- (a) The identity, location and approximate quantities of dangerous substances;
- (b) The foreseeable types of accident, incident or emergency that could occur and the risks that may result;
- (c) Where such events could occur on site, consideration should be given to the effect they could have, other areas that may be affected (in case the event escalates) and the possible repercussions escalation may cause; and
- (d) The emergency arrangements drawn up by the responsible persons to deal with accidents, incidents and emergencies, the procedures prepared by the responsible persons to deal with any such event, the warnings and other communication systems, and escape facilities.

In addition to external emergency services, responsible persons should also make this information available to any on-site emergency services.

## Appendix 4

### Additional information relating to the interpretation of ‘relevant persons’

Special attention should be given to the term “... *in the immediate vicinity of the premises* ...” which seems unrelated to ‘general fire precautions’, because by definition it relates to ‘premises’.

The meaning of what constitutes ‘the immediate vicinity’ must be determined. In its broadest meaning, the term could be argued to include e.g. the 2000 people evacuated from their homes during the Buncefield explosion and fire and those affected by smoke from that fire up to 40 miles away<sup>109</sup>.

It is not believed that the scope of ‘vicinity’ is intended to be this broad. A narrower definition should be adopted. It should also be noted that a ‘risk from smoke’ is not believed to be equivalent to a ‘risk from fire’.

The narrower interpretation extends (among limited others) to those areas of a workplace that by definition are beyond the premises i.e. roads used as a means of access to or egress from the place of work or otherwise used in connection with that place of work.

Where direct harm to relevant persons in the vicinity of premises may result from a fire on the premises, it is reasonable to expect that harm to be mitigated in some way. For example, a building designed to vent fire from external windows by ensuring that windows fail early in the development of the fire can be reasonably expected to result in a projectile hazard to passers-by. A further example may be a residential building with a ‘stay put policy’ in which each relevant person has a duty of care to all other relevant persons insofar as having control over the fire resistance of his front door, so that the fire does not spread unexpectedly quickly. ‘Risk from fire and from the effects of fire’ is appropriate while those effects are in the premises, since persons cannot be safe when threatened by fire or any harm derived from fire.

*“The Department has stated that the draft Order requires the responsible person to consider the risks to persons from fire “in and around any place for which they have responsibility.” It considered that the requirement to provide a means of escape to a place of safety could not be construed as providing a means of escape to any area in the vicinity of premises where relevant persons would still be at risk in case of fire.”<sup>110</sup>*

Case law has determined<sup>111</sup> that the occupier can be held liable for a fire on the premises which spreads to some other premises. Further cases seem to indicate that a duty is owed for direct fire spread through some means, whether by direct burning<sup>112</sup> or by the flight of burning embers<sup>113</sup>.

Relevant persons may form a part of a multiple occupied building, commercial, residential or other. In such circumstances the relevant person, including ‘any person in the immediate vicinity of the premises ...’ has clearer meaning, since the immediate vicinity of the premises will be within the same building. In the case of residential multiple occupied buildings, the duty owed by the responsible person extends to all relevant persons on the premises, despite the fact that individual parts of the premises may fall beyond the scope of the Order.

<sup>109</sup> (11 December 2005), *Massive fire at Buncefield oil depot*, [online], last accessed 20 March 2007 at [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/11/newsid\\_4972000/4972524.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/11/newsid_4972000/4972524.stm)

<sup>110</sup> House of Commons Regulatory Reform Committee, *Proposal for the Regulatory Reform (Fire Safety) Order 2004, Eleventh Report of Session 2003-04, Report, together with formal minutes, written and oral evidence, HC 684*, [online], 2004, London, House of Commons, Available from: <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdereq/684/68402.htm>> [Accessed 6<sup>th</sup> January 2010], EV33, para 86

<sup>111</sup> *H & N Emanuel Ltd v Greater London Council and another* [1971] 2 All ER 835. The case deals with deliberate ignition and subsequent fire spread.

<sup>112</sup> *Johnson (trading as Johnson Butchers) v BJW Property Developments Ltd*, 86 Con. L.R. 74

<sup>113</sup> *Op Cit H & N Emanuel v Greater London Council*

A case brought through the Scottish courts under the Health and Safety at Work etc. Act 1974 may set persuasive precedent<sup>114</sup> for risk to relevant persons from smoke. The case held that duties imposed under the aforementioned Act extended to include persons beyond the premises:

*“Counsel for the appellants eventually conceded that the section [Section 3(1) Health and Safety at Work etc. Act 1974] could cover persons outside of the place where the employer conducted his undertaking. For example, if the undertaking were conducted in such a way that dangerous fumes escaped and endangered members of the public passing by, it would be open to the court to hold that the employer had been in breach of his duty under s. 3(1).”*

This case may hold persuasive precedent for English courts in a case for an escape of fire and smoke causing harm to persons beyond the premises. It may also be noted that this case was held at a time before the Management of Health and Safety at Work Regulations and before the philosophy of risk assessment had been embraced.

However this case involved known chemicals with known properties, used under controllable conditions and it may be counter-argued that an accidental outbreak of fire is not controllable to the same extent, thereby diluting the accountability imposed on the responsible person.

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<sup>114</sup> Sterling-Winthrop Group Ltd v Allan, 1987 S.L.T. 652