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**Justice Committee**

# **Armed Forces LCM**



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# Justice Committee

To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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## Background

1. Introduced in the House of Commons on 16 September 2015, the Armed Forces Bill<sup>1</sup> (the “UK Bill”) contains a number of provisions which apply to Scotland, some of which relate to devolved matters.
2. Under the Sewel Convention, the UK Parliament does not normally legislate on devolved matters, or alter the executive competence of Scottish Ministers, unless the Scottish Parliament has given its consent. The Armed Forces Bill engages the Convention by virtue of the changes it makes to the role of Ministry of Defence (MoD) firefighters. Under the Convention, the Parliament should normally signify its consent before the final amending stage in the House of introduction – which, in this instance, means Third Reading in the House of Lords. The Second Reading took place on 11 February and will be considered again by Committee on 1 March.
3. Accordingly, under section 9B.3.1a of the Parliament’s Standing Orders, the Cabinet Secretary for Justice lodged a Legislative Consent Memorandum (LCM) on the Bill on 1 December 2015.
4. The Committee notes Rule 9B.3 of Standing Orders, which says that an LCM should “normally” be lodged within two weeks of the introduction of the UK Bill containing provisions that trigger the Sewel Convention. We note that the provisions discussed in the LCM have been in the UK Bill since its introduction in September. We are not aware of any public comment from either administration as to the reasons for the gap between the introduction of the UK Bill and the lodging of the LCM. We should make clear that the delay has not prevented us scrutinising the LCM to what we consider an adequate degree.

## Outline of the UK Bill

5. The explanatory notes accompanying the UK Bill explain that:
  - ” “Since the 1950s, an Armed Forces Act has been required every five years to continue in force the legislation enabling the armed forces to be recruited and maintained as disciplined bodies.”<sup>2</sup>
6. The Armed Forces Act 2006 introduced a single system of law, which applies to all armed service personnel. The majority of the provisions contained within the Bill itself amend the 2006 Act and relate to the armed forces disciplinary system.
7. However, a number of clauses (explained in more detail below) fall within the Sewel Convention as they could be exercised in Scotland for a devolved purpose. They relate exclusively to MoD firefighters and seek to convey upon them the same powers afforded to Scottish Fire and Rescue Service (SFRS) personnel, when operating in Scotland.

8. The LCM states that the UK Bill in no way changes the provision of civilian fire and rescue services in Scotland, and does not affect the duties or responsibilities of the SFRS. The LCM also states that it is expected that these provisions will only be used in very rare occasions should MoD forces be in closer proximity to an incident than their SFRS counterparts, for example, if an incident occurs near an MoD facility.

## **Provisions which relate to Scotland**

9. The Bill contains three specific provisions which relate to devolved competence. The section below examines the specific provisions in more detail and explains how they might relate to Scotland. The information on the three provisions is mainly taken from the LCM.

### **Emergency power**

10. Clause 16 (powers of Ministry of Defence firefighters in an emergency) introduces a power for MoD firefighters to act in an emergency. At present, all civilian fire and rescue authorities across the UK (including the SFRS) have statutory functions, including an emergency power enabling firefighters to act in order to protect life or property. MoD fire fighters do not currently have a similar emergency power, and the Bill seeks to address this discrepancy by giving them statutory powers to act in an emergency in order to protect life or property.
11. The new powers would predominately be used by MoD firefighters when protecting MoD land, property and personnel, and for defence-related purposes. However, the new powers are not solely limited to reserved matters, allowing MoD fire fighters to respond to non-defence related emergencies. As stated above, the expectation is that this would happen rarely, if ever. However, these are emergencies which currently fall within the responsibility of the SFRS in Scotland, and, as such, this provision would be being used for a devolved purpose and therefore requires the consent of the Scottish Parliament.

### **Noise pollution**

12. The Bill amends a number of Acts to give MoD firefighters the same exemptions from provisions in those Acts as employees of Fire and Rescue Authorities (including the Scottish Fire and Rescue Service). One of these is Clause 17(3) which amends the Control of Pollution Act 1974 (COPA) to provide MoD firefighters with an exception to the prohibition on the use of loudspeakers in streets. Again, because of the potential prospect of MoD firefighters using such powers in Scotland, consent is required from the Scottish Parliament.



## **Obstruction offence**

13. Clause 16(5) and (6) of the Bill amend the Emergency Workers (Obstruction) Act 2006 to introduce an offence for obstructing or hindering MoD fire-fighters who are acting in an emergency. Again, if MoD fire-fighters were to be obstructed or hindered in Scotland when responding to an emergency for which the SFRS has responsibility, they would be acting for a devolved purpose and this incident would fall within devolved competence.

## **Scottish Government consultation**


14. In the LCM, the Scottish Government deem the relevant provisions to be minor and technical in nature and accordingly state that they decided not to conduct a wide reaching public consultation. Instead, they sought the views of the SFRS who were said to be content with the extension of the Bill's provisions to Scotland.
15. The MoD also consulted the Chief Fire Officers Association and a letter from the MoD Chief Fire Officer was posted on their members' forum. The LCM states that the response received was supportive.<sup>3</sup>

## **Financial/Resource implications**

16. The LCM states that "no additional direct costs to the Scottish Government or any significant additional direct costs to the Scottish Criminal Justice Sector are envisaged as a result of the MoD fire-fighter provisions". It adds that, as the powers are expected to be used only in "rare circumstances", the obstruction offence is expected to see few prosecutions and so any additional costs could be met within the current running costs of the judicial system.

## **Committee scrutiny**

17. At its meeting on 15 December 2015, the Committee noted the Scottish Government's view set out in the LCM that the proposed reforms were "minor and technical", while also noting that the Fire Brigades Union (FBU) appeared not to have been consulted on them. The Committee therefore agreed to write to the FBU seeking its comments on the LCM.
18. The attached FBU response of 13 January 2016 (Annexe A) highlights a number of concerns, including:
  - how the term "firefighter" under the employ of the MoD is defined in the Bill, as it appears to include the use of private contractors. The FBU said it was concerned that the use of private contractors could have potentially negative consequences on an incident attended by MoD personnel;
  - the potential for conflicting operational procedures to be used by the SFRS and MoD firefighters when attending an incident;

- the arrangements in place to inform SFRS personnel that MoD firefighters are attending an incident.
  - the need for clarification as to who will assume primary command and control over any incident where there is dual attendance.
19. The Committee agreed to write to the Cabinet Secretary for Justice asking him to respond to these concerns raised by the FBU. The Cabinet Secretary's response is attached at Annexe B and is summarised in the following paragraphs.
20. The Cabinet Secretary states that, at present, the Defence Risk Management Organisation (the organisation responsible for the management of MoD facilities) does not employ contractors in any of their five operational fire stations across Scotland. The MoD is reviewing the outsourcing arrangements for the DFRMO's capabilities but a decision on this has yet to be made. However, the Cabinet Secretary goes on to clarify that all DFRMO fire stations work under the same operational protocol and policies, as dictated by DFRMO headquarters.
21. He goes on to state that SFRS has adopted the same policy as the DFRMO and therefore follows the same procedures—
-  Using common language and components of the ICS (Incident Command System) allows for effective joint working and operability between DFRMO and SFRS, for example when providing handover/takeover briefs. Additionally, DFRMO Fire Station Managers are encouraged to engage and liaise locally with their respective SFRS 'neighbours' allowing them to effectively work and train together.<sup>4</sup>
22. The Cabinet Secretary also advises that—
- with regards to the arrangements in place to inform SFRS personnel that MoD firefighters are attending an incident, the DFRMO fire station would notify the SFRS control room by making a 999 call; and
  - where there is dual SFRS and DFRMO attendance at an incident, DFRMO personnel would be aware that a full handover is to be undertaken and that command of an incident is to be transferred, with the SFRS assuming primary control.
23. Finally, the Cabinet Secretary explains that MoD colleagues have offered to meet with members of the SFRS to discuss the implications of the proposed changes, should they find this helpful.
24. During its consideration of the LCM on 9 February 2016 the Committee agreed to write again to the FBU seeking its views on the response provided by the Cabinet Secretary.
25. In its response of 17 February (Annexe C), the FBU indicated that its earlier concerns have been adequately addressed in the Cabinet Secretary's response. It

also confirmed that no meeting had taken place between it, the SFRS and the MoD, but said it does not believe a meeting with the MoD is now necessary.

## Recommendations

26. The Committee notes the additional information provided by the Cabinet Secretary for Justice which addresses specific points raised by the Fire Brigades Union, and further notes that the FBU is content with the response provided. The Committee is therefore broadly content with the provisions in the Armed Forces Bill that relate to devolved matters in Scotland. However, we ask the Chief Fire Officer to monitor the effectiveness of the provisions following enactment and, as appropriate, to comment on them in his annual reports.
27. The Committee is surprised that the MoD and the Scottish Fire and Rescue Service do not appear to have met to discuss the how the measures might work in practice. We therefore encourage them to do so before the provisions come into force, to ensure that adequate arrangements are in place to deal with particular situations specified in the LCM.
28. The Committee recommends that the Parliament approves the Legislative Consent Motion on the Armed Forces Bill, to be lodged by the Scottish Government.<sup>5</sup>

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<sup>1</sup> [Armed Forces Bill 2015-16](#)

<sup>2</sup> [Armed Forces Bill, explanatory notes, paragraph 2](#)

<sup>3</sup> [Armed Forces LCM](#)

<sup>4</sup> Letter from Cabinet Secretary to be placed on website

<sup>5</sup> [Armed Forces LCM](#)



## Annexe A

### **Response from Fire Brigades Union of 13 January 2016 to the Justice Committee's request for its views on the LCM on the Armed Forces Bill**

Thank you for extending the invitation to provide comments and evidence to the Scottish Parliament Justice Committee on the aforementioned Bill, specifically the measures outlined in the LCM. For your information, the FBU provided a submission to the Armed Forces Bill Select Committee at Westminster on the 18 November 2015 and I have enclosed a copy for your convenience.

In relation to those specific aspects of the Bill considered to change the law on devolved matters, I have a number of concerns and observations.

It has been stated that the extension of specific powers to MOD firefighters, broadly similar to those of the Scottish Fire and Rescue Service (SFRS), will not impact on the duties or responsibilities of the SFRS, that they are of a minor and technical nature and that they will help to ensure public safety.

While we can accept the principle of more resources being better than less and that any additional resilience within an emergency service response to the communities of Scotland is to be welcomed within the current climate, we nonetheless have some concerns. It is the assertion of the Scottish Government that the new provisions are of a minor and technical nature. However, whilst they may explain the broad effect, we do not believe they explain the full purpose and possible consequences.

We are also concerned about the definition of a "firefighter" under the employ of the MoD and the consequence of this on a shared incident ground and mutual attendance with SFRS firefighters.

In this context, it is important to note that the new powers do not appear to be confined to firefighters employed and trained by the MoD. The definition of MoD firefighters include reference to Government contractors:

*"Ministry of Defence firefighter" means... an employee or servant of the Crown, or... an employee of a Government contractor...*

*"Government contractor" means a person who provides services to the Secretary of State with responsibility for defence under contract (and includes a subcontractor)*

Under this definition, an employee of a private company is regarded as a MoD firefighter and given the new powers, provided:

- 1. Their duties include firefighting on defence property and RTA rescues on defence property; and*
- 2. They are an employee of a company who provide services to the MoD of any kind either directly or as a sub-contractor.*

I assume that arrangements across Scotland within MoD Crown property are broadly in line with the rest of the UK

Of significant concern to the FBU in Scotland is the potential for 'unintended consequences' as a result of the extension of powers to MoD firefighters.

The successful intervention and resolution of an emergency incident relies upon a number of factors, including the speed of response. We can accept, in some instances, the availability of an MoD Fire Service response may reduce the attendance time of initial appliances, personnel and equipment and may be 'deployed' prior to the arrival of the SFRS pre-determined attendance.

However, critical to achieving a successful outcome is the early adoption and application of tactical and operational plans, safe systems of work and an overarching, clearly defined Incident Command structure.

Presently, interoperability between SFRS and other Local Authority Fire and Rescue services (with which mutual assistance arrangements exist) is guaranteed by the adherence to and the adoption of National Operational Guidance (NOG) across the whole of the UK. Additionally, all Local Authority and National Fire and Rescue Service firefighters and Incident Commanders are trained to a recognised set of National Occupational Standards (NOS).

This ensures a high level of consistency in approach to hazards and risks, skills/qualifications attained and overall professionalism of firefighters.

The FBU in Scotland are therefore naturally concerned over the prospect of SFRS firefighters potentially working alongside MoD firefighters within a time and risk critical environment, which will often be under stressful conditions.

In this context, do the Scottish Government and Justice Committee have confidence that:

- Present arrangements, if any, are suitable and sufficient to overcome potential obstacles to full interoperability between two different services, employers and employees.
- A potentially conflicting approach in the application and compatibility of 'Standard Operational Procedures' (SOPs) will not compromise the safety of members of the public, firefighters or other partner agencies on the incident ground.
- Arrangements are in place, or can be provided, to inform oncoming SFRS personnel responding as normal to an incident, of the additional response and/or presence of MoD firefighters at the scene of the incident.
- It is clear as to who will assume primacy, command and control over **any** incident where there is a dual attendance.

*In conclusion*

It is the opinion of the FBU that there is presently suitable and sufficient scope for SFRS and the Scottish Government to recruit, retain and deliver a robust and resilient Fire and Rescue service to the communities of Scotland, within the provision of the Fire (Scotland) Act 2005.

While these new powers may appear to be of a minor and technical nature, there are still a range of potential consequences which require early due consideration and attention, some of which we have outlined in this submission. Once again, can I thank you for consulting with the FBU on the LCM and hope the submission is of some assistance in your own Committee's considerations. If there is any aspect of the submission which requires clarification, please do not hesitate to contact me.

Chris McGlone  
EC Member Scotland

## Annexe B

### **Response from the Cabinet Secretary for Justice of 4 February 2016 in relation to the Fire Brigades Union's concerns regarding the LCM on the Armed Forces Bill**

Thank you for your letter of 28 January 2016, in which you request a response to the points raised by the Fire Brigades Union (FBU) concerning the Legislative Consent Memorandum (LCM) on the Armed Forces Bill.

I have sought clarification from colleagues in the Ministry of Defence (MoD) as well as the views of the Scottish Fire and Rescue Service (SFRS) and shall address each of the points you raise in turn.

#### *1. The definition of "firefighter" under the employ of the MoD (which appears to include the use of private contractors) and the consequences of this on a shared incident.*

The Defence Fire Risk Management Organisation (DFRMO) currently employs contractors on several of its fire stations within England, Wales and overseas. At present none of the five DFRMO operational fire stations within Scotland employs contractors as its firefighters.

Although the MoD is reviewing the potential to outsource some or all of DFRMO's capabilities, decisions on this have not yet been taken and all DFRMO fire stations, regardless of their provision (civilian MoD, civilian contractor or service personnel) work under the same operation protocols and policies, as dictated by HQ DFRMO.

#### *2. The potential for conflicting operational procedures used by the Scottish Fire and Rescue Service (SFRS) and MoD firefighters when attending an incident.*

DFRMO's Incident Command System (ICS) Policy and Procedures are aligned to the National Operational Guidance Programme (NOGP) Operational Guidance to Incident Command and the NOGP Foundation for Incident Command. SFRS has also adopted the same policy and therefore follows the same procedures. Using common language and components of the ICS allows for effective joint working and operability between DFRMO and SFRS, for example when providing handover/takeover briefs. Additionally, DFRMO Fire Station Managers are encouraged to engage and liaise locally with their respective SFRS 'neighbours' allowing them to effectively work and train together.

The use of NOGP ICS principles, together with jointly agreed Standard Operating Procedures (SOP) and Tactical Operational Guidance (TOG) will remove the risk of any "conflicting approach" to the management of an incident. DFRMO has historically, and will continue to liaise closely with SFRS to ensure commonality of working practices and adoption of wider guidance principles. For example, DFRMO currently has a Group Manager based at HMNB Clyde who is tasked as a Liaison Officer to work alongside SFRS in the development of SOPs and TOGs, with particular reference to incidents involving nuclear risks, and DFRMO also provides specialist assistance to fire and rescue services when developing their SOPs and TOGs for incidents involving military aircraft.



It is commonly acknowledged by fire and rescue services throughout the UK that DFRMO FRS personnel have a wider understanding of the approach to be taken at certain risks, for example military aircraft crashes (where ejection and armament systems may be involved) or nuclear risks on submarines, and this specialist knowledge is shared on the incident ground. In these cases, the local fire service Incident Commander will retain overall command but work closely and harmoniously with the senior DFRMO firefighter in attendance.

*3. The arrangements in place to inform SFRS personnel that MoD firefighters are attending an incident.*

If a DFRMO fire station were to respond to a life threatening situation outside its MoD site, for example where a road traffic collision or fire were witnessed in the vicinity and the DFRMO fire station was notified, an immediate 999 call would be made by the DFRMO fire station to notify the SFRS control room of its attendance. Similarly, should a military aircraft crash shortly after take-off, MOD policy dictates that DFRMO Airfield Rescue and Fire Fighting (ARFF) Services will respond 'up to' a 1000 metre radius from the runway. In this case DFRMO would be deployed by Air Traffic Control as a part of their 'Emergency State 1' procedures, which also include an immediate call to the local fire and rescue service with all details passed.

*4. Clarification as to who will assume primary command and control over any incident where there is dual attendance.*

All members of DFRMO operational fire stations are clear that, immediately upon the attendance of a local fire and rescue service at an incident either on or off the MOD estate, a full handover is to be undertaken (in accordance with ICS principles) and command of the incident is transferred. This means that for all incidents in Scotland, SFRS would assume primary command and control over any incident where there is dual attendance.

There may be occasions when a local fire service requires the expert knowledge of the senior DFRMO firefighter present, at which time the DFRMO firefighter will assume the role of Tactical Adviser to the local fire service Incident Commander. This policy is dictated within DFRMO's Chief Fire Officer Instructions directing the use of DFRMO Incident Command policies and procedures.

In addition, MOD colleagues have offered to meet with SFRS colleagues to discuss the implications of the proposed changes, should they find this helpful.

I trust that the above information provides the Committee with appropriate reassurance on the points raised by the FBU, but I would be happy to provide further information should it be required.

Michael Matheson MSP  
Cabinet Secretary for Justice  
4 February 2016

## Annexe C

### **Further response from the Fire Brigades Union of 17 February 2016 to the additional information provided by the Cabinet Secretary for Justice on the LCM on the Armed Forces Bill**

Thank you for the reply to the FBU concerns over certain aspects of the the Bill, which were raised in my previous letter to the Committee. Thank you also for the attached letter from Cabinet Secretary for Justice which I welcome and found both helpful and informative.

It is my view that the response to the FBU concerns, detailed within the letter from Michael Matheson, adequately addresses those concerns. Furthermore, the information provided and dialogue between the Cabinet Secretary and MOD, gives reassurance that the implications from the proposed changes to The Bill, should have no detrimental effect or impact on the Scottish Fire and Rescue Service.

I can confirm that there has been no dialogue to date between the FBU and MOD nor discussions with SFRS. Given the positive response to the FBU concerns, I do not believe a meeting with the MOD is now necessary, prior to the reforms coming into force. I will however raise the subject with SFRS in the normal course of our regular business meetings and I am happy to proceed in that manner.

Once again, on behalf of the FBU in Scotland, thank you for seeking our views on this important matter and hope our input has been of some assistance to the Committee in their deliberations.

Chris McGlone  
EC Member Scotland  
17 February 2016



