

## **ANNEX B: DRAFT GUIDANCE FOR FIRE AND RESCUE AUTHORITIES ON CHARGING UNDER SECTION 19 OF THE FIRE AND RESCUE SERVICES ACT 2004**

### Introduction

1. The Fire and Rescue Services Act 2004 ("the 2004 Act") received Royal Assent on 22 July 2004. Its' first provisions, including section 19, were commenced on 7<sup>th</sup> September. Section 19 provides that the Secretary of State may, by Order, authorise a Fire and Rescue Authority (FRA) to charge a person of a specified description for any action of a specified description taken by the authority. The first such Order<sup>1</sup> ("the 2004 Order") came into effect on 1<sup>st</sup> October and is available on the HMSO website at: <http://www.opsi.gov.uk/si/si2004/20042305.htm>
2. While the intention in drafting the Order was to replicate the charging regime operated under section 3(1)(e) of Fire Services Act 1947, section 19 is sufficiently broad to extend beyond the provision of discretionary services. Any such extension of the charging regime would only take place after appropriate consultation.

### Background

3. FRAs have had a power under section 3(1)(e) of the Fire Services Act 1947 to charge for the provision of services other than fire-fighting services provided under section 1. In 2003, section 3 was amended by the Marine Safety Act 2003, to allow fire authorities to recover the costs of fire-fighting at sea.
4. Section 93 of the Local Government Act 2003 ("the 2003 Act") introduced a general power for best value authorities to charge for the provision of discretionary services, subject to certain limitations. It should be noted that section 93 has no application to charging by FRAs as it is exercisable only where no other power to charge exists and where there is no prohibition on charging.
5. In autumn 2003 the ODPM canvassed FRAs on the scope of their charging activity to inform policy development during the drafting of the Fire and Rescue Services Bill. A public consultation document issued in February 2004 listed the services provided against a charge by any FRA in England.

### The 2004 Act power

6. Section 19 includes a prohibition on charging for:
  - extinguishing fires<sup>2</sup>
  - protecting life and property in the event of a fire<sup>2</sup>
  - providing emergency medical assistance
7. The power is wider than that contained in section 93 of the Local Government Act 2003, which deals with charging for the provision of discretionary services by best value authorities. That power is strictly limited to services that an authority is under no obligation to provide and also requires that the person

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<sup>1</sup> SI 2004/2035

<sup>2</sup> Other than fires at or under the sea

receiving the service gives express prior consent to its provision if a charge is to be levied.

8. The Department recognised that in preparing the charging provision it may not be possible or desirable to wait for consent to be given in some of the situations with which Fire and Rescue Services currently deal and this is reflected in section 19 of the 2004 Act. This approach also takes account of the fact that certain services for which FRAs have a power to charge under section 3 of the 1947 Act have become statutory duties under the 2004 Act. For that reason the power to charge is not confined to discretionary services.
9. Unlike section 93, the section 19 power allows for third parties to be charged for a service provided to others. The latter may, for example, be used to recover the cost of effecting a lift release from a building management company rather than from those who had been trapped in the stalled lift.
10. In one regard section 19 is more restrictive than the section 93 power. While the latter allows a best value authority to charge for the provision of *any* discretionary service at its' own instigation the section 19 power can be exercised only after the Secretary of State has specified the relevant service, whether statutory or discretionary, in an Order.
11. While an authority may not have charged under the 1947 power for the provision of a service since specified in the 2004 Order they are at liberty to start doing so without further consent from the Secretary of State.
12. Charges made under section 19 are limited to cost recovery.

#### Limitation to cost recovery

13. By providing a power to charge (under section 19 of the 2004 Act) the Government's aim was to encourage authorities to provide those sorts of services they would otherwise decide not to provide (or improve) at all because they cannot justify or afford to provide them for free or to improve them. The aim is not to provide a new source of income for authorities, but to allow them to cover their costs.
14. Authorities are not required to charge for the services listed in the Order. They may provide them for free if they so decide. Section 19(6) provides that for each service for which a charge is made, FRAs are under a duty to secure that, taking one year with another, the income from charges for that service does not exceed the costs of provision.
15. The requirement to take one year with another recognises the practical difficulties FRAs will face in estimating the charges. It establishes the idea of balancing the books over a period of time (which may be a number of years – see paragraphs 19, 20 & 21) without having to have detailed prescription either on the face of the Act or in secondary legislation. Any over or under recovery that resulted in a surplus or deficit of income in relation to costs in one period should be addressed by an authority when setting its charges for future periods so that over time income equated to costs (see also paragraph 24).

#### Calculating the costs of provision and the charge

16. Each authority making use of the power to charge will need to establish a robust methodology for assessing the costs to the authority of providing each discretionary service. Authorities are free to decide what methodology they wish to adopt. They may however find it helpful to draw on existing and familiar principles as set out in the CIPFA Best Value Accounting Code of Practice (the Code). One option would be to use the Code's definition of Total Cost. As an alternative, authorities may wish to consider adding to Total Cost an appropriate contribution for Corporate and Democratic Core (CDC) and Non-Distributed Costs (NDC), as those terms are defined in the Code, as a part of the costs of provision.
17. The Code offers guidance on the practice authorities might adopt and is amended from time to time to take account of changes in requirements.
18. Any capital and investment costs necessary to establish a new service or to improve or extend an existing service are legitimate costs of providing the service. Consistent with standard local government accounting practice, to the extent that these costs are charged to revenue, they can be set against income in calculating whether the cost ceiling rule has been met.
19. Section 19(6) of the 2004 Act places authorities under a duty to secure that, taking one financial year with another, the income from charges does not exceed the costs of provision. The Government recognises that when establishing a new service, authorities may have limited information initially upon which to base their assessment of the costs they expect to incur and thus the charge that should be made for a particular service. This provision is intended to allow an authority flexibility in the setting of the charge for each kind of service so that over a period of time the charges made for that particular service do not exceed the costs incurred by an authority in providing that service.
20. Authorities will wish to establish a period over which it would be appropriate to gather information or make estimates to calculate the cost of providing a particular kind of service and therefore the charge that should be levied. This period may also be the period over which an authority would expect to compare income with costs for the purposes of complying with the duty at section 19(6). The period adopted may differ between authorities. The 2004 Act does not specify a period over which charges should be calculated; this is left to authorities' discretion.
21. Initially authorities may find it useful to consider assessing the cost of providing a service, the projected take-up of that service and thus the charge that should be made, over a period of not less than 1 year and no more than 3 years. For services that require capital investment it may be appropriate to specify a longer period.

### Setting the Charge

22. Section 19(5) allows authorities to set the level of the charge for each service as they think fit within the restriction that the income from charges for each kind of service must not exceed the costs of its provision as described at paragraphs 14-19 above. By virtue of section 19(6), authorities are to secure that for each kind of service the income from charges does not exceed the costs of provision. This provision allows authorities to compare the charges for and income from similar or related services together and so offers some

flexibility to group services together when assessing compliance with the duty imposed by section 19(6).

23. Should they so wish authorities may continue to provide a service for free. Equally they may decide not to make a charge at all for a new service or to charge different amounts to different groups of recipients. The charging power recognises that in certain circumstances authorities may wish to offer certain services at a reduced charge or for free, for example to the disabled, the unemployed or those in receipt of benefit, while making a charge based on the cost of providing the service to other recipients. Differential charging for local authorities' discretionary services is already well established, through, for example, discount cards for leisure services.

#### Use of estimates and later adjustments

24. Authorities should use the best available information about the expected cost for each service over the period (see paragraphs 19-21) adopted for assessing the cost of that particular service. There may, however, be circumstances where an authority inadvertently recovers more than its costs and thus generates a surplus. Where surpluses or deficits of income in relation to costs result from the use (particularly initially) of estimated income and expenditure information or from unexpectedly high or low uptake for a service, such surpluses or deficits should be taken into account when setting charges in the following period (see paragraph 15) so that taking one year with another income does not exceed costs and the authority complies with the duty.

#### Preparing to Charge

25. When offering any new services at a charge or introducing a charge for existing services, authorities are advised to make appropriate administrative arrangements.
26. Each FRA should produce a plan to provide clarity in respect of any charges to be imposed and provide details on how such a list of charges could be accessed.
27. Providing discretionary services and in particular advisory services may take authorities and their officers outside the coverage of their existing professional liability insurance. Authorities are therefore advised to review the cover provided by their professional liability insurers in connection with their duties on behalf of the authority and to ensure that they are properly insured in this respect for any new services they propose to offer. A proportion of any such insurance costs would be a legitimate element of the costs of the service in question.
28. When considering the introduction of charges for advisory services authorities will wish to take a view as to whether the charges will improve overall levels of regulatory compliance. Consultation with local businesses and other interested parties may inform their consideration.

#### The Competition Acts and effect on local businesses

29. Authorities need to ensure that when using the charging power conferred by section 19 in relation to services for which there are alternative providers they

fully comply with other complementary legislation such as the Competition Acts. Otherwise they risk being investigated and taken to court for non-compliance and may incur significant associated costs. When considering whether to charge for services using the charging power, authorities are advised to consider the likely impact on local businesses and may wish to consult with them and other interested parties.

#### Removal of the power to charge

30. It is only in exceptional circumstances that the DCLG would expect to use its' power to amend the charging Order so as to remove the power to charge for services from particular authorities or in respect of particular services. However this means that the DCLG could take action for example in the event of unfair competition.
31. The Secretary of State could remove the power to charge in circumstances where an authority was found to be making a commercial return on charges levied under section 19 or where the authority otherwise had no power to trade on a commercial basis (i.e. the power in section 95 of the 2003 Act had not been extended to the authority in question). The power might be dis-applied in respect of a particular service, where it might be deemed not in the public interest to charge for that service.

#### Use of powers to amend existing legislation

32. Once authorities begin to use the new power to charge, it may become clear that there is certain legislation in place that in some way restricts an FRA's ability to charge for the provision of a discretionary service with the consent of the service user. The provisions at sections 97 and 98 of the 2003 Act may allow modification of any such enactment following rigorous scrutiny in both Houses of Parliament.

#### Flooding

33. During the passage of the Fire and Rescue Services Bill through the House of Lords concern was expressed about householders who were effectively unable to obtain flood risk insurance. The Government agreed to consider how it might mitigate the additional burden for pumping out that householders might face following an incident of severe flooding.
34. The measure chosen is the same as that used by the Association of British Insurers when determining whether premises are considered to be "high risk", a classification covering some 200,000 premises. The ABI test is whether the premises are considered to have an annual probability of flooding greater than 1 in 75, as determined by Environment Agency flood risk models.
35. FRAs are advised to consider waiving any charge for pumping out following coastal, fluvial or tidal flooding for premises that fall into the high risk category defined. It should be noted that this recommendation does not extend to other causes of flooding, such as burst pipes or tanks.

#### Trading

36. Charges beyond full cost recovery are deemed to be trading. This is covered in the Schedule to the Local Government (Best Value Authorities) (Power to

Trade) (England) Order 2004<sup>3</sup> (the Trading Order).It specifies the authority and the service which that authority can provide

37. Guidance on the Trading Order is covered in a separate draft document [Link to be established once finalised].

**Q3. Do you require any changes, additions or deletions to this guidance?  
Please clarify.**

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<sup>3</sup> S.I. 2004/1705.2307 & S.I. 2004/2573