



# The Scottish Parliament

## **Subordinate Legislation Committee**

### **26th Report, 2009 (Session 3)**

## **Flood Risk Management (Scotland) Bill as amended at Stage 2**

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### **26th Report, 2009 (Session 3)**

## **Flood Risk Management (Scotland) Bill as amended at Stage 2**

**Published by the Scottish Parliament on 11 May 2009**





# The Scottish Parliament

## Subordinate Legislation Committee

### Remit and membership

#### Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

#### Membership:

Jackson Carlaw  
Malcolm Chisholm  
Bob Doris  
Helen Eadie  
Tom McCabe  
Ian McKee (Deputy Convener)  
Jamie Stone (Convener)

**Committee Clerking Team:**

**Clerk to the Committee**

Shelagh McKinlay

**Assistant Clerk**

Jake Thomas



# The Scottish Parliament

## Subordinate Legislation Committee

### 26th Report, 2009 (Session 3)

#### Flood Risk Management (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 5 May the Subordinate Legislation Committee considered the delegated powers provisions in the Flood Risk Management (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill<sup>1</sup>.

#### Delegated Powers Provisions

3. The Committee considered all of the powers as set out in the supplementary DPM and is content with sections: 2(1), 5, 9(2), 15A(1)(c), 15A(2) to (9), 15B(2), 15C(1)(c), 15C(2)(c), 18(4), (5) and (6), 29(6), 44(1), 52(4), 53C(1), 56(1B)(b), 77 and 77A.

#### Section 82(1) – Ancillary provision

4. In its Stage 1 Report, the Committee recommended that the Scottish Government should give further consideration to agreeing that any modification of primary legislation however effected should be subject to affirmative procedure.

5. Section 82(1) confers a power on the Scottish Ministers to make incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, the Bill or any provision of the Bill. Section 82(2) provides that an Order under subsection (1) may modify any enactment, instrument or document.

6. Section 83 provides that this power is exercisable by negative resolution procedure, unless it contains provisions which add to, replace or omit any part of the text of an Act in which case it is subject to affirmative procedure.

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<sup>1</sup> [Supplementary Delegated Powers Memorandum](#)

7. During its Stage 1 consideration of the Bill, the Committee recognised that this is a wide power to make orders to “modify any enactment, instrument or document” and, as such, it could be used to amend or repeal primary legislation (including the Bill once enacted). However, the Committee recognised that the power could only do so in order to make incidental, supplemental, consequential, transitional, transitory or savings provisions. In addition, Ministers would also require to be satisfied that the provisions were necessary or expedient to deliver the purpose of, or in consequence of, or to give full effect to the Bill.

8. The Committee recognised that it is possible to modify the effect of an Act using such powers, without making textual amendments to it which would add, replace or omit any part of its text. Whilst this form of modification may be appropriate in limited circumstances such as a transitory provision that would apply only for a short period when moving over to a new statutory regime, there may be concerns as to transparency, and the proper role of Parliament as guardian of primary legislation, were the power to be used in this way for more significant amendments.

9. The Committee therefore asked at Stage 1 whether the Scottish Government was prepared to agree that any modification of primary legislation should be subject to affirmative procedure and, if not, whether it would give an undertaking that any significant or permanent modifications made to enactments using this power will be effected through textual amendment and so subject to affirmative procedure.

10. The Minister confirmed in the Stage 1 response to the Committee that non-textual modification is normally confined to modifying particular pieces of text for certain limited circumstances, application or adaptation and that negative procedure is usually appropriate in relation to such modification, and agreed to give further consideration to this issue.

11. The ancillary provision was not amended at Stage 2, so the committee assumes that on consideration the Scottish Government have determined that no amendment on this issue is required.

12. The Committee was satisfied that the Minister had given some additional comfort in his explanation in the Stage 1 response, that non-textual modification using such ancillary powers is usually confined to modifying particular pieces of text for certain limited circumstances, application or adaptation, when the Government considers that negative procedure is usually more appropriate than affirmative procedure.

**13. The Committee will always consider powers in the context of the particular Bill. The Committee finds that in the instance of this particular Bill, the ancillary provisions in section 82 are acceptable.**

**14. The Committee reiterates its views on this matter, as expressed in paragraph 79 of its Stage 1 Report. In its view the modification of enactments (without textual amendment) using such ancillary powers may be appropriate by negative procedure in limited circumstances, such as a transitory provision applying only for a short period. However, the**

**Committee considers that any significant or permanent modification of enactments using such powers should be effected through textual amendment, and subject to affirmative procedure.**



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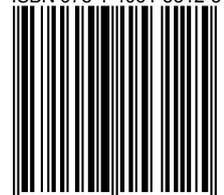
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