



# The Scottish Parliament

## **Subordinate Legislation Committee**

### **Marine (Scotland) Bill**

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Parliament

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## Subordinate Legislation Committee

### Marine (Scotland) Bill

The Committee reports to the lead committee as follows—

#### Introduction

1. At its meetings on 23 June<sup>1</sup>, and 1 September<sup>2</sup> 2009 the Subordinate Legislation Committee considered the delegated powers provisions in the Marine (Scotland) Bill at Stage 1. The Committee submits this report to the Rural Affairs and Environment Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.<sup>3</sup>
3. The Committee's correspondence with the Scottish Government is reproduced in the Annexe.

#### Delegated powers provisions

4. The Committee considered each of the delegated powers provisions in the Bill.
5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 3(4), 18(1)(b), 20(4)(a), 20(7), 21(2), 25(1), 27(1), 37(1), 39(1), 42(1), 45(2), 45(3), 68(2), 74(1), 77(6), 79(2), 93, 102(1) and 148(1).

#### **Section 17(3) - Powers to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities**

6. This power allows the Scottish Ministers, by order to add or remove any licensable marine activity from the list in section 17(1). The Delegated Powers Memorandum ("DPM") explains this power is needed in order to respond to changing developmental needs which are likely to change over time. While

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<sup>1</sup> [Official Report 23 June](#)

<sup>2</sup> [Official Report 1 September](#)

<sup>3</sup> [Delegated Powers Memorandum](#) ('DPM')

flexibility is thought important, the DPM does not explain why the power is open to permit any additions to or deletions from the list or why no criteria are specified for before such changes can be made. The Scottish Government was asked to explain why the power was open and what criteria would be applied.

7. The Scottish Government response advises that because there may be any number of reasons for making changes it would not be useful to specify criteria for the exercise of the power.

8. The Bill does not expressly set out the objectives of the licensing regime, but these may be inferred from matters to which the Scottish Ministers must have regard in determining an application for a marine licence. These are set out at section 20(1): the need to protect the environment, to protect human health and to prevent interference with legitimate uses of the sea and such other matters as the Scottish Ministers consider relevant. However, the Committee notes that there is no link between the power to alter the scope of the regime and its objectives as described in the matters specified in section 20(1).

9. The Committee accepts that circumstances will change over time and it may be necessary to make changes to the activities of the marine licensing regime. Nevertheless the exercise of the power in section 17(3) is of significance as the inclusion of an activity on the list of licensable marine activities will result in that that activity being brought into the marine licensing regime. Inclusion in the regime will have a significant effect on the people involved in that activity.

10. The Committee also acknowledges that affirmative procedure affords a high level of scrutiny over the exercise of the power. However, the provision of flexibility is not inconsistent with the provision of a limitation (by reference to objectives, criteria or otherwise) on how a power may be exercised.

**11. The Committee therefore draws to the attention of the lead committee that the power is unqualified and does not specify any criteria on the basis of which the Scottish Government may determine that a particular activity should be added to or removed from the list.**

### **Section 24(1) - Power to specify activities which will not need a marine licence**

12. A marine licence is required for the activities specified in section 17(1). Section 24(1) provides that the Scottish Ministers may by order specify activities which do not require a marine licence or don't require a licence if specified conditions in the order are satisfied. The Scottish Ministers are required to consult such persons as they consider appropriate in advance of making any order.

13. This would allow for exemptions within the classes of licensable activity and for such exemptions to be permitted subject to compliance with set conditions. The Committee's comments in relation to section 17(1) apply equally here.

14. While the Committee understands the need for the power and agrees with the power in principle, it notes that it is not qualified in any way and no criteria are specified on the basis of which the Scottish Ministers may determine that an

activity should be specified under section 24(1). Also, as with the power under section 17(3), there is no link between the power and the apparent objectives of the regime.

15. Whether or not an activity is to require a licence and thereby come within or be excluded from the marine licensing regime is a matter of considerable significance for those involved in the activity.

16. This power is broadly the same as the power under section 7(1) of the Food and Environment Protection Act 1985, although an order under section 7(1) was subject to negative procedure. There is, however, a significant difference between the two powers with respect to consultation. Section 7 requires a licensing authority to consult the Food Standards Agency as to any proposed order under section 7(1). Section 24(4) provides only a general requirement that the Scottish Ministers must consult such persons as they consider appropriate.

17. The Food Standards Agency therefore no longer has a specified or compulsory role in the order-making process. The consultation requirement has been watered down and there is no explanation of or justification for this significant change. However, the Committee does acknowledge that affirmative procedure provides a greater level of scrutiny than before.

**18. The Committee draws to the attention of the lead committee the Government's control as to consultation prior to the exercise of the power and that the power does not specify any criteria on the basis of which the Scottish Government may determine that a particular activity should be specified as not requiring a licence or not requiring a licence if specified conditions are satisfied.**

**Section 29(1) - Power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22**

**Section 52(1) - Power to make provision for any person to whom a notice listed in subsection (2) is issued to appeal against that notice**

19. These powers are very similar and the underlying issue is the same in each case, as are the questions asked of the Scottish Government and the Scottish Government responses.

20. Part 3 establishes a regime for the licensing of the marine activities specified in section 17. Section 22 provides that when an application is made to the Scottish Ministers for a marine licence, the Scottish Ministers must grant the licence unconditionally, grant the licence subject to conditions as they consider appropriate, or refuse the application.

21. Section 29(1) provides that the Scottish Ministers must by regulations make provision for any person who applies for a marine licence to appeal against a decision under section 22.

22. There are various enforcement notices which the Scottish Ministers can issue under various provisions in Part 3, which are listed in section 52(2). Section 52

provides that the Scottish Ministers must by regulations make provision for any person to whom a notice listed in section 52(2) is issued, to appeal against that notice.

23. No details of the appeal mechanisms are given on the face of the Bill. The justification provided in the DPM for using subordinate legislation for the purpose of establishing an appeals mechanism is extremely brief.

24. The Committee accepts that it is not unusual to have the details of appeal procedures left to subordinate legislation provided that the core elements or outline of any appeal mechanism are established on the face of the Bill. It is understandable that details of appeals procedures may require to be adjusted over time in the light of experience. However, on the face of the Bill there is no substantive provision with respect to appeals, only a requirement for an appeals mechanism to be put in place by regulations. This, in the Committee's view, is neither sufficient nor appropriate.

25. While detailed rules of procedure need not be set out in primary legislation, the Committee would normally expect the appeal body to be specified on the face of the Bill. Provision should also be on the face of the Bill for matters such as the grounds of appeal, the legal consequences of an appeal being initiated and the powers of the appellate body. The Committee gives by way of example the extensive and comprehensive provisions for appeals in sections 131 and 132 of the Licensing (Scotland) Act 2005.

**26. The Committee informs the lead committee that, notwithstanding the powers to make provision for appeals under sections 29(1) and 52(1) of the Bill, no substantive provision with respect to appeals is made on the face of the Bill and that the Committee expects the fundamental elements of an appeal procedure should appear on the face of the Bill.**

#### **Section 54(3)(1) - Power to provide for marine fish farming not to constitute 'development'**

27. 'Marine fish farming' is development for the purposes of the Town and Country Planning (Scotland) Act 1997 ('the 1997 Act') and accordingly requires planning consent from the local planning authority. Section 54 of the Bill inserts a new provision (section 26AB) in the 1997 Act. This gives the Scottish Ministers power to provide by order that the establishment of a fish farm in the waters specified in the order does not constitute 'development' in terms of the 1997 Act. In that event the fish farm would not require planning permission, but would fall to be regulated by and require to be licensed under the marine licensing regime established by the Bill (because it would fall within the list of licensable activities).

28. The reason for a power to transfer marine fish farming between the planning regime and the marine licensing regime and the reason for doing so on an area by area basis was not explained. The change from one regime to another on an area by area basis could result in a lack of uniformity across the country and could give rise to considerable confusion as different criteria for development could apply from one area to another with different procedural rules and different rights of

appeal. The Committee therefore sought clarification from the Scottish Government.

29. It appears from the response that the Scottish Ministers are uncertain whether aquaculture developments should fall under the terrestrial planning or the marine licensing regime. The policy objective appears to allow for marine fish farming to be removed from the terrestrial planning regime and to fall within the marine licensing regime on an area basis if the relevant local planning authority wishes that to be done. The need for this power is therefore understandable if that policy objective is to be achieved. However, the potential for confusion and inconsistency in the statutory control of this activity remain. The Committee notes that the affirmative procedure provides a significant degree of Parliamentary scrutiny of any proposal for change.

**30. The Committee draws to the attention of the lead committee that the effect of the power is to permit local authorities to determine whether, in respect of their particular area, marine fish farming is to be in the terrestrial planning regime or in the marine licensing regime. The Committee also draws to the attention of the lead committee that the exercise of the power on an area by area basis could result in a lack of uniformity across the country which may give rise to considerable confusion as different criteria for development could apply from one area to another with different procedural rules and different rights of appeal.**

**Section 58(1) – Power to designate any area of the Scottish marine protection area as a nature conservation marine protected area, a demonstration and research marine protected area or a historic marine protected area.**

**Section 64 – Power to amend or revoke a designation order under section 58**

31. Section 58(1) provides that the Scottish Ministers may by order designate any area of the Scottish marine protection area as of one of three types of marine protected area ('MPA') namely, a Nature Conservation MPA, a Demonstration and Research MPA or an Historic MPA. Section 64 provides that a designation order made under section 58(1) may be amended or revoked by a further such order (under section 58(1)).

32. Section 145(3) provides that an order under section 58(1) is not made by statutory instrument.

33. The designation of MPAs is one of the key elements of the Bill. However, as 'designation' is not exercised by legislative provision, the power is not listed or discussed in the DPM. Having regard to the number and nature of the considerations which may arise with respect to any decision on designation and to the fact that a number of areas may be designated, the Committee considered it appropriate to consider whether that 'designation' should be exercised by legislative provision.

**34. The Scottish Government's response has been helpful in explaining the approach adopted. Having regard to the context and background and the**

**extent to which other elements of the MPA regimes and procedures are set out in the Bill, the committee does not consider that it is necessary for the power to designate a marine protected area under section 58(1) or the power to amend or revoke a designation to be exercised by statutory instrument.**

#### **Section 77(1) - Power to make an urgent marine conservation order**

35. Section 77(1) provides that, where Scottish Ministers consider that there is an urgent need to protect an area in respect of which an MCO may be made through an MCO, then an MCO may be made without the need to follow the procedures otherwise required by section 76.

36. An urgent MCO remains in force for the period specified in the order, which must not exceed 12 months. The Scottish Ministers are required to publish notice of the making of the urgent MCO. Representations can be made about an urgent MCO (after it has been made) and the Scottish Ministers have power to revoke an urgent MCO.

37. The DPM does not comment on the power to make an urgent MCO, although it does comment on the power under section 77(6) to continue an urgent MCO.

38. The Committee appreciates the need for a power to take urgent action as well as the need for urgent MCOs to be time limited. It was not clear as to the intended effect of section 77(2)(a) which provides that an urgent MCO comes into effect on such date as is specified in it, as it is accepted that every SSI comes into force on the day specified in it for this purpose.

39. The Scottish Government appears to accept that there is no need for the provision in section 77(2), which it states is designed to make an order under section 77 more 'user friendly' than might otherwise be the case. The Committee does not agree with this approach and considers that it is not appropriate or advisable to make provision for something which is unnecessary, not least as a question may arise with respect to the effect if a similar provision is omitted elsewhere.

40. The Committee appreciates the need for this power and agrees with the power in principle. As far as procedure is concerned, the Committee considers that negative procedure is appropriate, and that there should be consistency of approach in the procedure proposed in respect of orders under section 74(1), urgent orders under section 77(1) and urgent continuation orders under section 77(6).

**41. The Committee considers that the proposed power is acceptable in principle and that negative procedure is appropriate. However, the Committee considers section 77(2)(a) to be unnecessary.**

#### **Section 144(1) - Ancillary provision**

42. Section 144(1) provides that the Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of,

or for giving full effect to, the Act or any provision of it. Section 144(2) provides that an order under this section may modify any enactment, instrument or document.

43. This is an example of the widest formula adopted in relation to ancillary powers. The Committee has previously expressed concern that non-textual modification of legislation may provide for significant legal effects and that accordingly textual amendment may not be the appropriate test to determine the appropriate level of Parliamentary scrutiny. The Committee has expressed the view that those ancillary powers which make permanent provision may be considered likely to have more significant effects. There should be a full consideration given by the Scottish Government to the procedure appropriate to ancillary powers in each Bill on a case by case basis. There is no significant assessment in the DPM explaining how the Scottish Government has reached its view here.

44. The Scottish Government's response to the questions posed by the Committee is very brief and does not address the question or add to what the Committee knows already. There is no explanation as to the Scottish Government's approach to the procedure proposed with respect to ancillary powers having regard to the provisions in this Bill.

45. The Committee is disappointed by the apparent unwillingness on the part of the Scottish Government to give much thought to the use of ancillary powers or to address the use of the individual elements within the powers, either in the DPM or in their response to the Committee's question.

46. There are six elements to the ancillary powers set out in section 144. The Scottish Government appears to treat the ancillary powers equally and to suggest that the use of all these ancillary powers is 'standard' in all Bills. The Committee does not agree with this approach. The appropriateness or otherwise of each of the different elements of an ancillary powers provision has to be considered separately in the context of a particular Bill. While the Committee accept that there may be thought to be nothing out of the ordinary in this Bill, it does not absolve the Scottish Government from its obligation to consider the provision of ancillary powers and to provide adequate justification for each element of the powers.

**47. The Committee finds the powers acceptable but reports that, in its view, the different elements of ancillary powers provision should be justified on a case by case basis by the Scottish Government in the context of each Bill.**

## Response from Scottish Government

### Marine (Scotland) Bill at Stage 1

#### **Section 17(3) - Powers to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities**

##### **The Committee asked the Scottish Government:**

- what is the justification for the power being completely open, in that it does not contain any limitation on the nature, scope or extent of any modification which may be made to the list of licensable marine activities?
- by reference to what criteria, if any, will the Scottish Government determine that a particular activity should be added to or removed from the list of licensable marine activities and could these be specified in the Bill?

##### **Scottish Government response:**

It is envisaged that activities will be added to the list of licensable marine activities if the Scottish Ministers consider that it would be appropriate for those activities to be subject to marine licensing. Activities would be deleted from the list if it is no longer appropriate for them to be subject to that system.

There could be any number of reasons (e.g. a change in other regulatory regimes, technological change and the development of new industries) for making a section 17(3) order and therefore determining criteria could not be usefully specified in the Bill.

#### **Section 20(7) – Power to make further provision as to the procedure to be followed in connection with applications for and the grant of licences**

##### **The Committee asked the Scottish Government:**

As the power in section 20(7) does not appear to be addressed in the DPM, the Scottish Government is asked for the justification for this power in accordance with rule 9.4A of Standing Orders.

##### **Scottish Government response:**

We apologise for the oversight that led to section 20(7) not being addressed in the DPM. The paragraphs set out in Annex A should have appeared in place of paragraphs 21 to 26 in the DPM.

## **Section 24(1) - Power to specify activities which will not need a marine licence**

### **The Committee asked the Scottish Government:**

- what is the justification for the power being completely open, in respect that it does not contain any limitation on the nature, scope or extent of activities which may be specified as not needing a licence or not needing a licence if conditions specified in the order are satisfied?
- by reference to what criteria, if any, will the Scottish Government determine that a particular activity should be specified in an order under section 24(1) and could this be set out in the Bill?

### **Scottish Government response:**

Any order under section 24(1) will specify activities which the Scottish Ministers consider should not require to be licensed. There could be any number of reasons for making a section 24(1) order and therefore determining criteria could not be usefully specified in the Bill. There are existing long established exemptions with regards to licenses under the Food and Environment Protection Act 1985 and consents under the Coast Protection Act 1949 and it is likely that similar exemptions will be continued under the new licensing system after a full consultation process. There are existing exemptions for activities such as the deposit of fishing gear other than for the purpose of disposal and the deposit of cable and associated equipment (other than for the purpose of disposal) in the course of cable laying or cable maintenance.

## **Section 25(1) - Power to allow licensable marine activities which fall below a specified threshold of environmental impact to be registered rather than licensed**

### **The Committee asked the Scottish Government:**

Given that regulations made under section 25(1) will specify the threshold of environmental impact for the purpose of determining whether a particular licensable marine activity will not need a licence but will instead be registered, can the Scottish Government explain the need for the regulations to define or elaborate the meaning of 'specified threshold of environmental impact' and also 'fall below' and 'registered', as provided for in section 25(2) and how it is envisaged that this power may be exercised?

### **Scottish Government response:**

It is felt that taking the power to be able to define or elaborate the meaning of the phrases in question in the regulations is a sensible approach and will help to avoid any confusion.

There are a large number of FEPA licences issued at present for small uncontroversial projects each year (e.g. the placing of single sewage outfall pipes

for discharge of treated sewage from septic tanks serving single dwellings). These sort of projects (although falling within being a licensable activity under section 17 of the Bill) may merit being registered in future rather than licensed.

The Scottish Ministers will define on the basis of research the 'specified threshold of environmental impact' where registration is appropriate. They will be able to use the experience gained through the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (SSI 2005/348) which includes a similar registration system. But the concept of a "specified threshold of environmental impact" is not a straightforward one and the exact meaning of the phrase may need elaborated in the regulations.

**Section 29(1) - Power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22**

**The Committee asked the Scottish Government:**

Given the importance of providing a Convention compliant appeals regime, to explain why it is considered necessary to use sub-leg for this purpose in this particular case.

**Scottish Government response:**

It is considered unexceptional to have the details of appeal procedures left to subordinate legislation, so as amongst other things to allow those details to be adjusted over time in the light of experience.

**Section 37(1) - Power to make provision about the imposition of fixed monetary penalties in relation to offences under Part 3; and**

**Section 39(1) - Power to make provision about the imposition of variable monetary penalties in relation to offences under Part 3**

**The Committee asked the Scottish Government:**

- what is the justification for 2 civil sanction regimes (fixed penalty and variable penalty)?
- on what basis or with regard to what criteria will the Scottish Ministers determine which regime to apply in a particular case?
- why is the maximum variable monetary penalty not specified on the face of the Bill?

**Scottish Government response:**

Fixed monetary penalties will be for low level, primarily technical offences which are not causing harm to the environment or human health or interfering with other legitimate uses of the sea. This could include failure to notify when works are to

commence or a failure to forward a return form to the licensing authority detailing the work that has taken place over the licensing period.

Variable monetary penalties will be for more serious breaches of licence conditions where it is not proportionate to prosecute. The breach may cause harm to the environment or human health or interfere with other legitimate uses of the sea. As the range of operations can vary from small to large-scale operations it is important that penalties can be varied to provide a proportionate response. They could be used to remove financial benefit resulting from the offence or to apply an additional deterrent element.

The penalty levels will be subject to consultation. The levels of fixed monetary penalty will be set down in regulations and any fixed penalty is not to exceed the fine for summary conviction for the offence in question.

A maximum variable monetary penalty is not specified on the face of the Bill as a maximum for the more serious offences would not be appropriate. The Scottish Ministers must be able to capture any financial benefit gained from non-compliance.

**Section 52(1) - Power to make provision for any person to whom a notice listed in subsection (2) is issued to appeal against that notice**

**The Committee asked the Scottish Government:**

Given the importance of providing a Convention compliant appeals regime, to explain why it is considered necessary to use sub-leg for this purpose in this particular case.

**Scottish Government response:**

Reference is made to the answer in paragraph 11 above.

**Section 54(3) - insertion of section 26AB into the Town and Country Planning (Scotland) Act 1997 - Power to provide for marine fish farming not to constitute 'development'**

**The Committee asked the Scottish Government:**

- what is the justification for the power i.e. what is the justification for moving aquaculture developments out of the normal planning system and into the marine licensing regime where different mechanisms and criteria will apply?
- what is the justification for moving aquaculture developments out of the normal planning system and into the marine licensing regime on a case by case (i.e. area by area) basis rather than by doing this all at once by an appropriate amendment to the relevant primary legislation, without the requirement for a power?

**Scottish Government response:**

During the consultation process leading up to the Bill, there was a mixed response as to who should be responsible for consents for aquaculture developments (that is, whether responsibility should be left with local authorities under the Town and Country Planning (Scotland) Act 1997 or whether the developments should constitute licensable activities under the Bill). The Scottish Ministers decided in light of this that the Bill should include a mechanism whereby any particular local authority could decide to give up its role under the 1997 Act in respect of aquaculture developments, with the result that in the area in question those developments would become licensable under the Bill. It is considered that the use of statutory instruments is the best and clearest way to effect the change in relation to any area where an authority chooses in due course to give up its 1997 Act role.

**Section 58(1) – Power to designate any area of the Scottish marine protection area as a nature conservation marine protected area, a demonstration and research marine protected area or a historic marine protected area.****The Committee asked the Scottish Government:**

Given the significance of designation as a Nature Conservation MPA, Demonstration and Research MPA or a Historic MPA and of the consequences and obligations which follow thereon, why does the Scottish Government consider that it is not necessary for the power to designate a marine protected area under section 58(1) to be exercised by statutory instrument?

**Scottish Government response:**

The use of an administrative rather than legislative process to establish MPAs is well paralleled in other legislation dealing with protected areas. For instance, “European sites” as defined in regulation 10 of the Conservation (Natural Habitats, &c.) Regulations 1994 (S.I. 1994/2716) are not set down in statutory instruments. Nor are sites of special scientific interest under Part 2 of the Nature Conservation (Scotland) Act 2004. For historic assets, the scheduling of monuments (Ancient Monuments and Archaeological Areas Act 1979) is also not effected by statutory instrument.

Under the Marine and Coastal Access Bill (currently before the Westminster Parliament), Scottish Ministers will also have responsibility for designating MPAs in the Scottish offshore region and this too will not fall to be done by statutory instrument. An administrative process for establishing MPAs in the inshore region will allow Scottish Ministers to follow through a similar designation process in the inshore and offshore regions.

Part 4 of the Bill contains a process for selecting MPAs and qualifies the grounds on which MPAs may be selected. It is thought appropriate that the Scottish Parliament be asked to agree to a circumscribed selection process rather than to approve each and every MPA designation.

## **Section 74(1) - Powers to make marine conservation orders ('MCOs')**

### **The Committee asked the Scottish Government:**

To explain fully why negative procedure is considered sufficient scrutiny.

### **Scottish Government response:**

It is considered that negative procedure is the appropriate procedure for an MCO. A parallel may be drawn with orders made under the Inshore Fishing (Scotland) Act 1984, which are also subject to annulment. While we have no intention of unnecessarily restricting marine activities, should we need to protect an MPA from fisheries related activities then that will be done by an order under the Inshore Fishing Act rather than by an MCO. From a practical point of view we consider it expedient that both sorts of orders should be subject to the same sort of instrument. This will especially be the case where the Parliament is asked to consider fisheries related and non-fisheries related restrictions simultaneously.

## **Section 77(1) - Power to make an urgent marine conservation order**

### **The Committee asked the Scottish Government:**

What the intended effect of section 77(2)(a) is given that it is not necessary to specify this for negative SSIs?

### **Scottish Government response:**

Section 77(2) provides clarity as to the period during which an urgent MCO is to remain in force. Whilst it is not necessary to provide that the order comes into force on such date as is specified in it, the terms of paragraph (a) help the reader to understand the reference in paragraph (b) to the period for which the order may remain in force.

## **Section 144(1) - Ancillary provision**

### **The Committee asked the Scottish Government:**

To explain its approach to the procedure applicable to ancillary powers in more detail given that these are significant powers which should be tailored to the individual circumstances of the Bill in question.

### **Scottish Government response:**

Section 144 is in fairly standard terms and provides the sort of general powers seen in most Scottish Parliament Bills. As far as procedure is concerned, a section 144 order will be subject to negative procedure unless it contains "provisions which add to, replace or omit any part of the text of an Act", in which case affirmative procedure will apply (section 145(5)(e)). We see no reason to extend affirmative procedure to any other category of order under section 144.