



FLOOD RISK MANAGEMENT BILL 2013

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Mr J R Houghton MHK.

GENERAL NOTE

1. This Bill initially promoted by the Department of Transport and from 1st April 2010 by the Isle of Man Water & Sewerage Authority ("the Authority") is intended to replace the existing Land Drainage Legislation on the Island. This Bill will cover both inland and coastal flooding. The Bill was originally introduced during the 2010/11 Session of Tynwald but was withdrawn by the then Chairman of the Authority at its Consideration of Clauses Reading in the House of Keys in March 2011; this was to enable discussions to take place with the Manx National Farmers Union in relation to specific concerns that they had with the Bill at that stage. Those discussions have taken place and the Bill has been revised accordingly; the main concerns expressed by the Manx National Farmers Union have been largely addressed in the Bill that is now re-lodged in Tynwald.

Part 1 (Clauses 1 -10): Opening Provisions

Clauses 1 & 2

These clauses give the Bill its "short title" and set out its commencement provisions; the substantive provisions will come into operation on a day or days to be appointed by Order.

Clauses 3 – 10 (& the Schedule)

These clauses contain definitions of the various terms that are used in the Bill. In particular –

- "**flood**". The Bill is intended to cover all forms of flooding irrespective of its cause or source. This means that it encompasses, for example, flooding from groundwater as well as from highway drains (however, responsibility for highway drains/ drainage will remain with the Department of Infrastructure).

- **“risk”**. The potential harmful implications to be considered in assessing risk under the Bill, include the consequences for people, property, infrastructure and the environment.
- **“flood risk management”** (abbreviated in the Bill as **“FRM”**). This describes a range of measures to reduce the likelihood and/or impact of flooding and includes land drainage, the provision of flood defences (whether inland or coastal) and flood warning systems.
- **“serious flood risk”**. This covers situations where one of the consequences referred to above under “risk” arises (e.g. potential flooding of property) and as a result the Authority considers that it needs to take appropriate action under the Bill in respect of **non**-designated FRM works or watercourses (see further under Clauses 16 & 24).
- **“FRM works”**. This is a wide term and encompasses (inter alia) new or improved flood defences, sluice gates and flood storage areas.
- **“watercourse”**. Again this is a wide term and basically encompasses all channels (including ditches) through which water flows. In the Bill, unless otherwise stated, all references to “watercourses” are to **both** designated and non-designated watercourses.

Part 2 (Clauses 11 - 13): Authority’s FRM Functions.

Clause 11

The Authority will be the flood risk management authority for the Island. In that capacity, the Authority will be required to exercise a general supervision over all aspects of FRM. Basically, it will do so via a combination of measures involving surveys to identify those areas that are at a particular risk of flooding; the publishing of strategies and plans for the carrying out of appropriate flood protection works; the provision of flood warning arrangements.

Clauses 12 - 13

Except where it would be unreasonable for it to have to do so, the Authority will be required to take into consideration –

- The likely costs and benefits involved, before it decides to carry out capital projects under Clause 24 of the Bill.
- The effects (if any) on archaeological sites and wildlife etc, before it decides to exercise any of its functions under the Bill.

Part 3 (Clauses 14 - 22): General Provisions About FRM Works & About Watercourses

Clause 14

This enables the Authority by Order to designate FRM works or watercourses that it considers to be of major importance in terms of FRM. Before making an Order the Authority will be required to consult with those affected (including landowners). Moreover, such Orders are to be subject to annulment by Tynwald (Clause 73 refers). Such designated works/ watercourses will be the sole responsibility of the Authority so far as their efficacy for FRM purposes is concerned. However, ordinarily the land in question will remain in the ownership of the landowners concerned who will continue to be able to use it in the normal way (e.g. for grazing of animals); but following designation the land will be subject to certain restrictions (see further under Clause 18).

Clause 15

The Authority will be required to keep proper records or maps of all designated FRM works/ watercourses; these will be required to be made available for inspection by members of the public free of charge and also deposited at the Central Tynwald Reference Library. The Authority will be required to register such records/ maps against the title to the land involved, which will give prospective purchasers due notice of the existence of the designation and of the restrictions that will apply (see further under Clause 18).

Clause 16

The main implication of designation (under Clause 14) is that in effect the Authority takes over responsibility for those works/ watercourses on the Island that have been identified as being of major importance in the context of FRM. In contrast, responsibility for the more minor **non**-designated works/ watercourses will remain with the landowners concerned; nevertheless, the Authority will be able to intervene in cases where a serious flood risk arises or in order to mitigate a flooding situation.

Clauses 17 - 19

These clauses impose appropriate restrictions that are primarily aimed at controlling certain activities that may otherwise cause or contribute to an additional risk of flooding. In summary, except in cases of emergency, such activities require **the consent of the Authority** (see further under Clause 20), namely -

- (1) In relation to **designated** FRM works/ watercourses –
 - Development within a 9.1 metre corridor. This equates to the 30 foot corridor that currently applies in respect of “main river” under the Land Drainage Act 1934.
 - Obstructions that affect the maintenance of or access to designated works/ watercourses.

(2) In relation to **all** watercourses (whether designated or not) -

- The construction of a dam/ weir; the construction of a culvert etc that may affect the flow of a watercourse.
- Any other works that may significantly affect the flow of a watercourse (however, consent is not needed for necessary works that are carried out in order to maintain the condition of a watercourse).

Undertaking the activities outlined above without the consent of the Authority is made a criminal offence (subject to the emergency defence provided for in Clause 22). Furthermore, the Authority will have the necessary power to require the persons concerned to remove the offending works (see further under Clause 30).

Clauses 20 - 22

These clauses deal with applications to the Authority for its consent under Clauses 18 & 19. The Authority will not be permitted to withhold its consent unreasonably. However, in the event of the Authority refusing to grant consent or imposing conditions with which the applicant is dissatisfied, then there will be a right of appeal to the FRM Tribunal (see further under Part 7). Breach of the conditions of a consent is to be made a criminal offence; the penalty will however be a fine only since custody is not considered to be apposite.

The Authority will be able to charge an administrative fee for dealing with applications for its consent; but fees will need to be fixed by Order, which will be subject to annulment by Tynwald under Clause 73.

Part 4 (Clauses 23 - 37): Authority's Powers For FRM Works And For Watercourses

Clauses 23 - 25

These clauses empower the Authority to maintain or improve existing FRM works/ watercourses or to construct new ones where it considers that to be necessary. However, this will normally only apply to **designated** FRM works/ watercourses; in contrast its works powers in relation to **non-** designated works/ watercourses are more limited (see further under Clause 16). Moreover, the Authority will be permitted to deposit any material that it removes when carrying out such works on the banks of the watercourse concerned, (which is done at present under the existing 1934 Land Drainage Act).

Compensation will be payable in appropriate cases (see further under Clause 29).

Clause 26

This clause provides the Authority with the necessary ancillary powers of entry on to land that it will require in order to carry out its functions under the Bill (e.g. to survey land before deciding whether or not to construct new FRM works on it).

Again compensation will be payable in appropriate cases (see further under Clause 29).

Clause 27

This clause will enable the Authority to deal with any emergency flooding event that may arise on the Island from time to time (e.g. by carrying out temporary works in order to divert flood waters away from residential properties).

The Authority will be able to enter into prior arrangements with other public bodies (including the Emergency Services) for the discharge by them of some of the Authority's functions under this clause (e.g. to enter a house in order to evacuate the occupier who is considered to be at a serious risk during a flood event). Such arrangements will need to be set out in agreements to be concluded between the Authority and the other bodies involved; it is envisaged that those agreements will be in place by the time that the Bill, if enacted, comes into force.

Finally, the Authority will be able to require the assistance of the other public bodies concerned (who have entered into such agreements) where it considers that to be necessary in order to deal with a particular emergency flooding event.

Clause 28

The Authority will be required to give 21 days' prior notice to all landowners concerned of its intention to carry out works etc. However, this requirement will not apply in cases of emergency nor in order to merely inspect land or carry out maintenance works (that do not involve the use of heavy equipment).

Clause 29

The Authority will be required, in appropriate cases, to pay compensation to the landowners concerned who suffer damage as a consequence of the exercise of the Authority's various powers under Clauses 24 - 26. Such compensation will fall to be determined in accordance with the Acquisition of Land Act 1984 (which includes arbitration provisions in the event of a dispute). Claims for compensation will need to be made within 3 years.

Clauses 30 - 37

These clauses will enable the Authority to take appropriate enforcement action under the Bill (e.g. against a landowner who has failed to properly maintain a watercourse and as a consequence a significant increased flood risk has arisen or necessary land drainage improvements are being impeded). A "remedial action notice" served under these provisions will bind both the current and subsequent landowners in cases of non-compliance. Failure to comply with the Authority's requirements is to be made a criminal offence (subject to the defence provided for in Clause 36 in favour of a successor in title to the land concerned). In addition, the Authority will be able to undertake the required works itself and to recover the costs involved from the person responsible. However, there will be a right of appeal against a remedial action notice to the FRM Tribunal under Part 7.

Part 5 (Clauses 38 - 45): Other Powers

Clause 38

This clause will enable the Authority, in appropriate cases, to seek a JP's Warrant where, for example, it is being refused entry onto land for the purposes of performing its function under the Bill (see further under Clause 26).

Clause 39

This clause empowers the Authority to acquire land for the purposes of the Bill, either by agreement with the landowners concerned or by compulsory purchase. As previously explained ordinarily the land upon which FRM works/ watercourses are situated will remain in the ownership of the landowners concerned (see further under Clause 14). However there may be some instances where the Authority will need to acquire the relevant land and hence this clause (e.g. in order to construct a new flood defence pumping station or to create a flood storage area).

Clause 40

Under this clause the Authority will be able to carry out flood defence works on behalf of private landowners on a rechargeable basis (e.g. to protect a group of houses from the risk of flooding).

Clause 41

This clause will enable the Authority to take over responsibility for private FRM works where the Authority considers that such works should come under its direct control. However, before agreeing to do so, it will be able to require those concerned to pay to the Authority an appropriate commuted sum to reflect the anticipated future maintenance costs involved.

Clause 42

If necessary the Authority will be able to apply to the High Court for an Injunction to ensure compliance with the requirements of the Bill (e.g. against a persistent offender). Moreover, a private individual will likewise be able to apply for an Injunction against another person who is, for example, failing to comply with his FRM obligations (such as failing to adequately maintain a private flood protection wall).

Clause 43

Under this clause the Authority will be able to approve the various forms that are to be used under the Bill (e.g. when applying for its consent under Clause 20).

Clause 44

Under this clause the Authority will be able to appoint "authorised persons" in order to carry out its various functions under the Bill. Such persons can be (inter alia) employees of the Authority, a Government Department or another Statutory Board.

Clause 45

Under this clause the Authority will be able to make Bye-Laws in order to deal with certain detailed matters under the Bill (e.g. to control the use of vehicles on sea walls or flood bunds). Such Bye-laws will require the approval of Tynwald under Clause 73. The power to make Bye-Laws reflects the current position under the Land Drainage Act 1934; however, to date no such Bye-laws have been made.

Part 6 (Clauses 46 - 56) - Landowners: Drainage On Other Land

Clauses 46 – 50

In essence, these provisions reflect the current position under the Land Drainage Act 1934.

These clauses will enable a Landowner ("L") to lay drains through the land(s) of another Landowner ("neighbour"), in order to, for example, develop L's land. L will require the agreement of the neighbour and may be required to pay compensation to him (and his tenants, if any). However, in the event of the neighbour refusing to agree to the proposed arrangements, then L will have direct recourse to the FRM Tribunal under Part 7, who will adjudicate on the matter.

Clauses 51 – 55

Under these clauses L (or his successors in title) will be responsible for subsequently maintaining the drain laid through his neighbour's land (see further under Clauses 46 – 50). However, if L fails to do so, then the neighbour concerned will have the requisite powers to maintain the drain and to recover the costs involved from L.

Clause 56

It is made an offence to (inter alia) obstruct the laying of a drain or its subsequent maintenance under Part 6 of the Bill.

Part 7 (Clauses 57 – 61): Appeals

Clauses 57 - 61

These clauses establish a new tribunal, to be known as the Flood Risk Management Tribunal, which will operate in accordance with the Tribunals Act 2006. As previously mentioned, the Bill provides for rights of appeal in certain circumstances, namely the refusal of consents, the imposition of consent conditions, the issuing of Remedial Action Notices and the refusal of a landowner to permit a drain to be laid through his land (see further under Clauses 20, 31 & Part 6)

Decisions of the Tribunal will be binding on the parties subject only to any further appeal to the High Court on a point of law.

Part 8 (Clauses 62 – 65): General Offences

Clauses 62- 65

Firstly, these clauses create certain criminal offences under the Bill. For example, obstructing the carrying out of works by the Authority, interfering with apparatus, making false statements to the Authority when applying for its consent and offences by companies/ firms.

Secondly, appropriate penalties are imposed on those who commit such offences. The more serious offences (e.g. wilfully interfering with apparatus installed by the Authority) will be subject to possible custody of up to 2 years, whilst the less serious offences will be subject to a fine only. .

Part 9 (Clauses 66 – 73): Other Provisions

Clauses 66 & 67

These clauses will require the Authority to obtain the prior consent of Statutory Undertakers (or the Department of Infrastructure in relation to harbours) to the carrying out of any works by the Authority under the Bill that may affect the operations of such bodies. However, consent is not to be unreasonably withheld and in any event will not be required in cases of emergency. The clauses incorporate appropriate arbitration provisions in order to resolve any disputes that may arise between the parties.

Clause 68

This clause imposes a requirement on the Department of Infrastructure, when it considers applications for planning permission, to consider (inter alia) the extent to which the development may create a significant risk of flooding. If so, it will be open to the Department to either refuse planning permission for the development or to impose appropriate conditions, for example, requiring the developer to construct suitable flood protection works before the project can proceed.

Clause 69

This clause makes it a requirement that before exercising its functions under the Minerals Act 1986, the Department of Economic Development is to have regard to the extent to which the exercise of those functions may create an additional risk of flooding; in those circumstances, the Department will be under an obligation to consult with the Authority.

Clause 70

This clause will have the effect of abolishing in relation to all **designated** FRM works/ watercourses, any private flood related obligations that may still exist under the current Land Drainage Act 1934 (e.g. an obligation to repair a flood protection wall).

Clauses 71 - 73

Firstly, these clauses deal with certain technical matters relating to penalties in respect of offences under the Bill. Secondly, they deal with the making of Subordinate Legislation; basically, Orders will normally need to be laid before Tynwald (and may be subject to annulment) but Bye-Laws will require the formal approval of Tynwald (see further under Clause 45).

Part 10 (Clauses 74 – 79): Savings & Transitional

Clauses 74 – 78

These clauses will have the effect of (inter alia) -

- Making consents and permissions issued under the Land Drainage Act 1934 valid for the purposes of the Bill thereby avoiding the necessity to have to re-apply for the same.
- Likewise, "Main River" designations under the 1934 Act will automatically become "designated watercourses" for the purposes of the Bill.

Clause 79

This clause deals with the question of the Appeal Rules that are to apply for the purposes of Part 7 of the Bill. Until such time as appropriate Rules are made under the Tribunals Act, the Draft Model Rules are to be used as the interim rules.

Part 11 (Clauses 80 – 96); Repeals & Amendments

Clause 80

This Clause repeals the current Land Drainage Legislation on the Island.

Clauses 81- 96

These clauses amend certain associated Legislation, in particular –

- **Clause 83** amends the **Rating and Valuation Act 1953** to enable the Authority to obtain details of land ownership in circumstances where it proposes to, for example, enter on to land in order to carry out experimental borings prior to deciding whether or not to undertake FRM works on that land (under Clauses 24 & 26 of the Bill).
- **Clause 89** amends the **Wildlife Act 1990** to the effect that, except in cases of emergency, the Authority will require the prior consent of the Department of Environment, Food and Agriculture before the Authority exercises its functions under the Bill in circumstances that may have implications for wildlife (including wild birds and plants). This requirement is to be in addition to the general conservation duties imposed on the Authority under Clause 13 of the Bill. Where the consent of the Department is needed such consent is not however to be unreasonably withheld. Appropriate arbitration arrangements are included in the event of a dispute arising between the parties.

- **Clause 92** amends the **Tree Preservation Act 1993** so as to enable the Authority to apply to the Department of Environment, Food and Agriculture for either a licence under the Act or for its consent under the Bill. For example, where the Authority needs to cut down a protected tree that is obstructing the flow of a designated watercourse. However, such licence/ consent will not be required in cases of emergency. The main reason for this Amendment is to enable the Authority to remove such trees in connection with the construction of flood defence works where the landowner concerned has refused permission for it to do so, or is unwilling to seek a licence on the Authority's behalf.

- **Clause 93** amends the **Sewerage Act 1999** in two important respects, namely –
 - (1) To permit the Sewerage Authority to refuse its consent to the making of a connection between a private drain and a public sewer, where the Authority considers that the capacity of the sewerage system is insufficient thereby posing an additional risk of flooding. This is in addition to its existing right for the Authority to refuse consent to such a connection where it considers that the mode of construction of the drain is unsatisfactory. However, the Authority will not be able to refuse consent where the connection with the public sewerage system is necessary in order to facilitate a development in respect of which planning permission has been granted by the Department of Infrastructure (but see further under Clause 68).

 - (2) To enable the Sewerage Authority to introduce sewerage charges, when it considers that to be appropriate. However, in order to introduce sewerage charges, the Authority will need to make an Order(s), which will require the formal approval of Tynwald.