

# **WATER SERVICES ETC. (SCOTLAND) ACT 2005**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. The main provisions of the Act are as follows:
  - Part 1 – replaces the Water Industry Commissioner (the Commissioner) with a body corporate, the Water Industry Commission (the Commission), with a view to improving the transparency, accountability and consistency of regulation in the water industry. It also amends the functions of the Water Customer Consultation Panels and the Convener of those Panels to strengthen customer representation in the water industry.
  - Part 2 – makes a series of provisions regarding water and sewerage services:
    - prohibits common carriage (where Scottish Water would use its water mains to carry water treated by a competitor and its sewers to carry wastewater from a competitor's customers to that competitor's treatment works) in the water or sewerage systems, and prohibits retail competition for households (sections 4 and 5);
    - establishes a licensing regime for retail competition for non-household premises only, managed by the Water Industry Commission (sections 6 to 12);
    - enables Ministers to require Scottish Water to establish an undertaking for the purposes of applying for a licence under the Act (sections 13 to 15);
    - provides for arrangements between Scottish Water and a licensed water or sewerage services provider to supply water or sewerage services, or, as the case may be, to discontinue a water supply or trade effluent services, and the procedure to be followed in the latter cases (sections 16 to 20);
    - provides new arrangements for determining Scottish Water's charges, under which the Water Industry Commission will determine charge limits based on objectives set by Ministers, and Scottish Water will propose charges schemes within these limits (sections 21 to 24);
    - enables Ministers to issue Codes of Practice on sewerage nuisance and introduces monitoring and enforcement provisions to ensure compliance with such Codes (sections 25 and 26); and

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sets out definitions of “eligible premises” for the purposes of retail competition, and of “public water supply system” and “public sewerage system” (sections 27 to 29).

- Part 3 – makes provision for coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution (section 30).
- Part 4 – makes miscellaneous and general provision, including in relation to the offences created under the Act and the procedure for exercising the order and regulation making powers provided under the Act (sections 31 to 37).

## **COMMENTARY ON SECTIONS**

### **Part 1: Water Industry Commission and Customer Panels**

#### ***Section 1: Water Industry Commission for Scotland***

4. **Section 1** establishes a corporate body, the Water Industry Commission for Scotland, to take on the functions of the Water Industry Commissioner.
5. Subsection (1) of section 1 replaces section 1 of the Water Industry (Scotland) Act 2002 (“the 2002 Act”) with a new section 1 establishing the Water Industry Commission for Scotland. Subsection (2) of the new section 1 of the 2002 Act gives the Commission the general function of promoting the interests of persons whose premises are connected or might reasonably become connected to the public water supply and/or sewerage system (as defined in sections 28 and 29 of the Act respectively). This ensures that the Commission will promote the interests of both Scottish Water’s direct customers, and the customers of licensed providers of retail services. It is a duty to promote the interest of customers as a whole which might be relevant, for example, where the interests of different categories of customers conflicted.
6. Subsection (3) of the new section 1 of the 2002 Act gives Scottish Ministers power to direct the Commission with regard to the financial management or administration of the Commission, having first consulted it. This ensures that the Commission is accountable to Ministers for these matters, while at the same time functioning independently with regard to its technical functions of calculating Scottish Water’s required revenue, and charge determination and the other substantive functions conferred on it by or under the Act. Subsection (4) introduces schedule A1 which makes detailed provision as to the appointment of the Commission and as to the Commission’s staff, status and accounts and its procedures for carrying out its functions. This schedule is inserted into the 2002 Act by schedule 1 to the Act.
7. Subsection (2) of section 1 replaces section 4(2) of the 2002 Act (power of the Commissioner to require information), with the effect that the Commission may not require Scottish Water to disclose anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session. This enables Scottish Water to treat as confidential legally privileged information. Subsection (2) also adds a new subsection (3) to section 4 of the 2002 Act, which requires Scottish Water to inform the Commission in writing if it considers that it is entitled to withhold information which the Commission has requested. This removes Ministers from having a role in resolving conflicts between the Commission and Scottish Water as to whether the information requested by the Commission is reasonable.
8. Subsection (3) of section 1 adds a new subsection (4) to section 5 of the 2002 Act (annual reports by, and information from, the Commissioner), requiring Scottish Ministers to lay before Parliament a copy of the Commission’s annual report, detailing the Commission’s functions during that financial year.

## ***Section 2: Dissolution of office of Commissioner***

9. **Section 2** provides for Scottish Ministers to specify an appointed day to dissolve the office of the Water Industry Commissioner for Scotland, given that it is replaced by the Water Industry Commission for Scotland, as described above.

## ***Section 3: Customer Panels***

10. **Section 3** amends provision in Part 1 of the Water Industry (Scotland) Act 2002 relating to the Water Customer Consultation Panels, customer representation and investigating customer complaints. The Water Customer Consultation Panels (“Customer Panels”) and the Convener of those Panels are appointed by virtue of section 2 of, and Part 1 of schedule 1 to, the 2002 Act.
11. Subsection (1) replaces sections 2(3) to (5) of the 2002 Act, which made provision in relation to the functions of a Customer Panel, including its duty to publish reports, and in relation to the duty of the Water Industry Commissioner to have regard to representations, recommendations or reports made by a Customer Panel, with new subsections (3) to (5D).
12. New subsection 2(3) of the 2002 Act provides that the general function of the Customer Panels is to represent the views and interests of those whose premises are connected to the public water supply and sewerage systems, or might reasonably become connected to those systems.
13. New subsection 2(4) to the 2002 Act places a duty on Customer Panels to publish reports on matters relevant to the interests of the persons they represent, and gives them the power to make recommendations to the Water Industry Commission, the Scottish Ministers, the Drinking Water Quality Regulator, the Scottish Environment Protection Agency and Scottish Water:
  - (a) Recommendations to the Water Industry Commission can be made as to the promotion of the interests of those represented by the Customer Panels, whether generally or specifically;
  - (b) Recommendations to the Scottish Ministers, the Drinking Water Quality Regulator or the Scottish Environment Protection Agency can be made on any matters considered relevant to those interests, in connection with such functions of those bodies as are exercisable in relation to Scottish Water’s exercise of core functions (as defined in section 70(2) of the 2002 Act to mean its statutory functions as the public water supplier and provider of sewerage); and
  - (c) Recommendations to Scottish Water can be made on any matter considered relevant to those interests in relation to Scottish Water’s exercise of core functions.
14. New subsection (5) provides that Scottish Water must have regard to any representations or recommendations made to it by a Customer Panel. New subsection (5A) makes equivalent provision as regards other persons to whom a Customer Panel makes representations or recommendations.
15. New subsection (5B) requires the Customer Panel to publish a summary of any representations and recommendations made by it, as referred to in subsections (4) to (5A). This may be complied with through including such a summary in a report.
16. New subsection (5C) provides that any person who receives recommendations under new subsection (4) must respond to the recommendations within 6 months, and publish a summary of their responses.
17. New subsection (5D) enables Customer Panels to jointly exercise their functions in publishing reports and making recommendations or representations.

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18. **Section 3(2)** of the Act repeals section 3(1) to (5) of the 2002 Act (the Water Industry Commissioner's complaints investigation function) in consequence of the amendments made in section 3(3) (paragraph 20 below).
19. **Section 3(3)** of the Act inserts new sections 6A to 6C into the 2002 Act to confer on the Convener of the Customer Panels ("the Convener") duties to: investigate complaints about Scottish Water's exercise of its core functions; publish an annual report; and, with the Water Industry Commission, produce a memorandum of understanding.
20. New section 6A(1) of the 2002 Act places a duty on the Convener to investigate complaints in respect of Scottish Water's exercise of its core functions from any person whose premises are connected to, or have been, or might reasonably become, connected to the public water or sewerage systems (as defined in sections 28 and 29 of the Act). Section 6A(2) provides that if such a complaint is received by a Customer Panel or the Water Industry Commission, they must refer it to the Convener. Section 6A(3) provides that the Convener need not investigate a complaint which has not already been pursued with Scottish Water, or which the Convener considers vexatious or frivolous. Section 6A(4) enables the Convener to make representations about complaints to Scottish Water. Sections 6A(5) and (6) require the Convener to report to the Water Industry Commission or a Customer Panel about the outcome of any investigations made about a complaint referred under subsection (2), or give reasons for any decision not to investigate such a complaint. Section 6A(7) requires Scottish Water to respond to reasonable requests for information from the Convener in connection with the Convener's complaints investigation function. If Scottish Water and the Convener disagree on whether a request for information is reasonable, section 6A(8) provides that the disagreement may be referred to Scottish Ministers to decide the matter, and the latter's decision is final.
21. New section 6B of the 2002 Act requires the Convener to submit to the Scottish Ministers and to publish an annual report, on the exercise of functions by both the Customer Panels and the Convener (under section 6A), as soon as practicable after the end of each financial year. The Convener is also required to provide the Scottish Ministers with any information they require as regards the exercise of those functions. The Scottish Ministers are required to lay a copy of the annual report before Parliament.
22. New section 6C of the 2002 Act requires the Water Industry Commission and the Convener of the Customer Panels to make arrangements for co-operation and the exchange information between the Commission and the Panels and between the Commission and the Convener; and for the consistent treatment of matters which affect both the Commission and the Panels, or both the Commission and the Convener. These arrangements are to be set out in a memorandum, which they are to send to the Scottish Ministers. The memorandum is to be kept under review, and any revised memorandum must also be sent to Ministers.

## **Part 2: Provision of Water and Sewerage Services**

### **Offences**

#### **Section 4: Public water supply system: offences**

23. **Section 4** prohibits any person from introducing water into the public water supply system (as defined by section 28 of the Act) or using the public water supply system to carry water to the premises of another person. It also prohibits making arrangements for or in relation to the supply of water to the premises of another person, except as authorised by a licence. To achieve this, subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).
24. Subsections (1) and (2) prohibit common carriage by making it an offence for anyone to introduce water into the public water supply system or to use that system for the purpose of supplying water to premises connected to the system.

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25. Subsection (3) prohibits the making of any arrangements for or in relation to the supply of water through the public water supply system to the premises of customers connected to that system.
26. Subsection (4) exempts Scottish Water or someone acting on its behalf or under its authority from the offences introduced in the preceding subsections, allowing them to introduce water to the public water supply system, use the system for the purpose of supplying water and make arrangements in connection with supplying water.
27. Subsection (5), by way of an exemption from the offences at subsections (2) and (3), allows a person supplying water with the help of services provided by Scottish Water as described at section 30 of the 2002 Act, to use the public water supply system to supply water to premises connected to the system and to make arrangements to supply water to the premises of another person.
28. Subsection (6) provides that licensed providers of water or sewerage services are not caught by the prohibition at subsection (3). (Section 6 of the Act establishes a system for licensing "water services providers" and "sewerage services providers".)
29. Subsections (7) and (8) allow Ministers to specify in regulations other circumstances where the prohibitions in subsections (1), (2) and (3) will not apply. These give Ministers powers, which could be used if, for example, it emerged in practice that the prohibitions were catching activities which Ministers did not intend to prohibit. Ministers are required to consult on any regulations that they propose to make under subsection (7), and section 34 provides for these regulations to be subject to affirmative procedure in the Parliament. Subsection (9) qualifies the power to make regulations under subsection (7) by providing that it can only be exercised where the effect of any such regulations is not prejudicial to the exercise of Scottish Water's core functions regarding the supply of water.
30. Subsections (10) and (11) set out the penalties for anyone committing an offence under this section, setting greater penalties for offences under subsection (1), which prohibits introducing water into the public water supply system: up to two years in prison, an unlimited fine, or both (subsection (10)). Subsection (11) specifies penalties for anyone guilty of the offences at subsections (2) and (3) of using the public water supply system to supply customers, or arranging for a supply to be made, of up to an unlimited fine. In both cases there is provision for treating offences in two ways, summary conviction (i.e. where convicted by a Sheriff sitting without a jury), where lesser maximum penalties apply, or conviction on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court). The statutory maximum fine referred to in subsection (11)(a) is currently £5,000. Subsection (12) provides that any agreement in breach of the prohibitions is unenforceable.

**Section 5: Public sewerage system: offences**

31. **Section 5** makes provisions prohibiting common carriage and other activities for or in relation to the public sewerage system that parallel those at section 4 in relation to the public water supply system. Subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).
32. Subsections (1) to (3) prohibit common carriage on the public sewerage system (as defined by section 29 of the Act). They also prohibit the making of arrangements for or in relation to the provision of sewerage to, or the disposal of sewage from the premises of another person, except as authorised by a licence.
33. Subsections (4) to (6) set out the circumstances in which the prohibitions in subsections (1) to (3) do not apply. Subsections (7) and (8) provide for Ministers to make regulations specifying other circumstances in which the prohibitions will not apply. Section 34 provides for these regulations to be subject to affirmative procedure in the Parliament. Subsection (9) qualifies the power to make regulations by providing that

it can only be exercised where the effect of any such regulations is not prejudicial to the exercise of Scottish Water's core functions regarding the provision of sewerage and disposal of sewage. Subsections (10) and (11) provide for the same range of penalties in respect of the prohibitions concerning the provision of sewerage services as are available at section 4(10) and (11) in respect of water supply services. Subsection (12) provides that any agreement in breach of the prohibitions is unenforceable.

## **Licensing of services provided to eligible premises**

### ***Section 6: Licence authorisation***

34. **Section 6** provides for the Commission to grant licences which authorise licence holders to provide services to the occupiers of eligible premises (as defined in section 27). The Commission's powers to grant licences are subject to the provisions at section 7, as regards the Commission granting licences, and at paragraphs 1 and 2 of schedule 2 to the Act, which makes detailed provision for applications for licences and licence conditions.
35. Subsections (1) and (2) and subsections (3) and (4) respectively empower the Commission to grant a "water services licence" and a "sewerage services licence". These licences will authorise their holders (the "water services providers" and "sewerage services providers") to arrange for the supply of water, or the provision of sewerage services, as the case may be, to the occupiers of eligible premises. Subsection (5) provides that where premises are unoccupied, references to occupiers in this section are to be read as referring to the owner of the premises. Eligible premises are defined in section 27 as premises other than domestic dwellings. These subsections also set out that providers can fix, demand and recover charges for the water or sewerage services they provide.

### ***Section 7: Granting of licence***

36. Section 7 specifies the grounds on which the Commission can grant a water services or sewerage services licence and the procedure to be followed.
37. Subsection (1) requires the Commission to be satisfied that an applicant has the ability to perform adequately the activities authorised by a licence, before granting the licence. Subsection (2) requires the Commission, in assessing an applicant's ability to perform those activities, to have particular regard to an applicant's knowledge, experience, expertise, financial acumen and business viability, and to any other factors specified by the Scottish Ministers in an order. Section 34 provides for orders under subsection (2) to be subject to negative procedure in the Parliament. In the interests of transparency, subsection (3) empowers the Commission to issue guidance setting out the factors it will consider when assessing an applicant's ability under subsection (2).
38. Subsection (4) requires a licence to be in writing. It provides for it to be in force as set out in the licence unless it has been revoked or suspended. Subsection (5) requires the Commission to notify the applicant and Scottish Water of a decision to refuse a licence application. And where the Commission has granted a licence application, subsection (6) provides for the Commission to send a copy of the licence to the applicant and Scottish Water.

### ***Section 8: Compliance with licences***

39. Section 8 places a duty on the Commission to monitor compliance with the terms and conditions of licences and to take any action necessary to ensure compliance. To carry out this duty, the section confers two powers on the Commission: subsection (2) enables the Commission to give directions to service providers which providers are obliged to comply with; and subsection (3) empowers the Commission to issue guidance in relation to compliance with the terms and conditions of a licence. In addition,

subsection (4) requires Scottish Water to inform the Commission if it appears a licence condition is being or has been breached.

### ***Section 9: Fees relating to licences***

40. **Section 9** provides for the Commission to make a fees scheme specifying matters relating to water services and sewerage services licences in respect of which fees are payable, and the amounts of fees payable (and as appropriate, the persons by whom they are payable) in respect of each of those matters. Subsection (2) states that the purpose of the scheme is to ensure that such fees are sufficient to meet the costs incurred by the Commission in exercising its functions in relation to water and sewerage services licences.
41. Subsections (3), (4) and (5) respectively provide that a fees scheme: may impose on licence-holders fees by way of annual levies and specify fees by reference to maximum amounts; may make provision for the times and methods of payment of fees; and may make different provision for different cases or types of case, and may revoke or amend a previous scheme.
42. Subsection (6) requires the Commission to send any fees scheme to the Scottish Ministers for approval, and publish a summary of the scheme. Subsection (7) requires Ministers to have regard to any representations made about a fees scheme within four weeks of the publication of the summary, and allows them to approve a scheme with or without modifications. Subsection (8) provides that if Ministers approve the scheme with modifications, they must give their reasons for doing so.
43. Subsection (9) provides that when a fees scheme has been approved, the Commission must make arrangements for any person to obtain a copy of the scheme, and publicise those arrangements and publish the scheme; and that the Commission may charge and recover fees in accordance with the scheme.

### ***Section 10: Licensed providers to give information***

44. **Section 10** gives the Commission further powers in respect of its monitoring and compliance functions at section 8 by requiring water and sewerage service providers to provide the Commission with information.
45. Subsection (1) places a duty on service providers to comply with requests for information by the Commission, provided the request is reasonable for the Commission to make in the exercise of its functions. Subsection (2) provides that service providers need not provide the Commission with information that they would not be required to disclose on grounds of confidentiality in proceedings in the Court of Session (such as legally privileged information).
46. Subsection (3) provides that it is an offence for a service provider to fail to provide information required by the Commission without a reasonable excuse. Subsection (4) specifies that the penalties for this offence, depending on the type of conviction, are a fine not exceeding the statutory maximum, currently set at £5,000, on summary conviction (i.e. where convicted by a Sheriff sitting without a jury), or an unlimited fine if convicted on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court).

### ***Section 11: Participation of licensed providers***

47. **Section 11** gives the Commission powers to take such steps as it considers necessary to ensure that the opening up of the market for licensed water and sewerage services under Part 2 of the Act happens in an orderly manner, and with minimum disruption to Scottish Water and its customers.
48. Subsection (1) gives the Commission a duty to exercise its functions in such a way as to secure that water and sewerage services providers participate in the provision

of services pursuant to a licence in an orderly manner and in a way that is not detrimental to the exercise of Scottish Water's core functions. To enable it to do this, the Commission is given powers under subsection (2) to direct Scottish Water or a licensed water or sewerage services provider, including a potential licensed provider, to take such steps as are required to ensure their participation achieves the aims in subsection (1). Subsection (4) requires proposed directions to be consulted upon with the intended recipient(s). Subsection (5) requires that the recipient(s) of directions under subsection (2) must comply with these.

49. In particular, it is envisaged that the Commission may use its power under this section to require licensed providers to use a central mechanism (one which the Commission would have identified as optimum) to facilitate the exchange of information required when a customer switches to another licensed provider. Subsection (3) specifically provides for directions to relate to this matter and to any costs associated with the participation of licensed providers in the market, which could, for example, include the costs of developing such a mechanism.

### ***Section 12: Licences and compliance: further provision***

50. Section 12 introduces schedule 2 which makes more detailed provisions on licences and compliance with them.

### **Scottish Water: water and sewerage services undertaking**

#### ***Section 13: Water and sewerage services undertaking***

51. Section 13 enables the Scottish Ministers to require Scottish Water to separate its retail functions from its wholesale functions, by creating a separate business undertaking. In this way it will be possible for this retail arm to be treated in the same way as any other service provider, under the licensing regime and by Scottish Water.
52. Subsection (1) provides that Scottish Water must comply with a requirement made on it to secure the establishment of a business undertaking. Subsection (2) provides that the Scottish Ministers may require Scottish Water to take such steps as Ministers specify for the purposes of, or in connection with, the establishment and development of, or Scottish Water's interest in, the undertaking; and to take these steps, or any particular steps, by such date as Ministers specify. Subsection (3) provides that it is for Scottish Water to determine, subject to Scottish Ministers' approval, whether the undertaking will be a subsidiary, company, or partnership, or be established through such other arrangements as it considers appropriate.
53. Subsection (4) provides that the functions of the undertaking established under subsection (1) are to become a water services provider and a sewerage services provider, and thereafter to carry out the functions authorised by those licences. Subsection (5) requires the undertaking to apply to become a water services and sewerage services provider as soon as reasonably practicable after it is established.
54. Subsection (6) confers an order-making power on the Scottish Ministers to prescribe that paragraphs 1 and 2 of schedule 2 to the Act, which make provision for licence applications and licence conditions, have effect subject to such modifications as are specified in the order, in relation to the first application for a licence made by the undertaking established under section 13. Section 34 of the Act provides that an order under this subsection is subject to negative procedure in the Parliament.
55. Subsection (7) allows the new undertaking to engage in any activity which it considers is not inconsistent with its activities as a water and sewerage services provider. The intention here is to ensure that the undertaking has the same freedom as any other licensed provider to offer its customers services in addition to those provided pursuant to its licence.



56. Subsection (8) requires Scottish Water to treat the new undertaking in the same way as it treats any other licensed water or sewerage services provider.
57. Subsection (9) confirms that references to Scottish Water in any enactment will henceforth be understood not to include the new undertaking established by this section, to ensure that responsibility for all Scottish Water's statutory functions apply to Scottish Water as the public (wholesale) water supplier and sewerage provider in exercise of its core functions.

#### ***Section 14: Financing, borrowing and guarantees***

58. Section 14 makes provision in relation to the funding of the undertaking established under section 13, and confers order-making powers on the Scottish Ministers to prescribe circumstances in which grants may be made to the undertaking, sums may be lent to it, financial obligations may be guaranteed in respect of it and in which equity may be provided to it. Section 34 of the Act provides that the order-making powers in subsections (1), (2), (6) and (9) of section 14 are subject to negative procedure in the Parliament.
59. Subsections (1) and (2) make provision for the Scottish Ministers to make grants to the undertaking, and for the undertaking to borrow from the Scottish Ministers and not (subject to the exception in subsection (4)(b)) from any other person, except Scottish Water. In each case, the circumstances in which this may occur and the amounts of any grant or loan will be specified in an order, and will be subject to the consent of Scottish Water.
60. Subsection (3) provides that in any financial year, the net amount (as defined in subsection (4)) of sums borrowed from the Scottish Ministers by the undertaking must not exceed the amount specified for that year in a Budget Act.
61. Subsection (5) provides that any loans made by the Scottish Ministers under subsection (2)(a) to the undertaking are to be repaid at such times and by such methods, as Ministers may from time to time specify; and Ministers can also specify the times and rates at which interest on such loans is to be paid.
62. Subsection (6) provides for an order-making power for Scottish Ministers to specify the circumstances in which they may guarantee a financial obligation entered into by the undertaking under subsection (4)(b), such as an overdraft or similar temporary borrowing arrangement. Subsection (7) provides that, immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before Parliament. Subsection (8) provides that where any sums are paid out in fulfilment of a guarantee, the undertaking must repay to Ministers such amounts (with interest), as Ministers may specify.
63. Subsection (9) provides another order-making power for Scottish Ministers to specify circumstances in which they may, with the consent of Scottish Water, subscribe for share or loan capital of the undertaking.
64. Subsection (10) provides that any grants or loans made, or guarantees or subscriptions for share or loan capital given to the undertaking under section 14 are to be subject to such conditions as Scottish Ministers consider it appropriate to impose.

#### ***Section 15: Transfer of staff etc. to the undertaking***

65. Section 15 provides for the transfer of staff, property and liabilities from Scottish Water to the new undertaking established under section 13 for the purposes that the undertaking is established to perform. It makes provision for the protection of the terms and conditions of employment of staff who are transferred to the undertaking.
66. Subsection (1) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer staff to the new undertaking for the purposes of it applying for

water services and sewerage services licences and enabling the undertaking to carry out its activities as a licensed provider (these purposes are specified in subsection (8)).

67. Subsection (2) provides that the contract of employment of any staff transferred under subsection (1) will not be terminated by the transfer, but will continue as if originally made between the person and the undertaking.
68. Subsection (3) provides that when staff are transferred to the undertaking, the undertaking will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer will continue to have effect after the transfer.
69. Subsection (4) states that the transfer under these provisions does not affect any person's right to terminate their contract of employment if their terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that the identity of the person's employer has changed does not in itself constitute such a change.
70. Subsection (5) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer such property (including rights) and liabilities to the undertaking as necessary for the purposes specified in subsection (8). Subsection (6) provides that such a transfer may be to such extent and subject to such conditions as Scottish Water, with the consent of Scottish Ministers, may determine. Subsection (7) provides for the transfer of property and liabilities to have effect despite any provision which might otherwise prevent the transfer, and that the property and liabilities which are transferred are vested in the undertaking.

## **Scottish Water: services via licensed providers**

### ***Section 16: Scottish Water to provide services***

71. The Act provides for water and sewerage services providers to assume responsibility for providing services to customers in the following way. Firstly, the provider applies for a licence from the Commission. Secondly, and assuming that a licence is granted, the provider makes arrangements with the occupier of eligible premises to provide them with licensed services. Thirdly, the provider agrees specific terms and conditions by which Scottish Water will provide a wholesale supply of water or, as the case may be, sewerage services in respect of the premises provided with such services. Section 16 makes provision for this third step.
72. Subsection (1) enables a water services provider, once it has made arrangements with the occupier of eligible premises (as defined in section 27 of the Act) for the supply of water to those premises, to request Scottish Water to supply water to the premises through the public water supply system (as defined in section 28 of the Act). Subsection (2) places a duty on Scottish Water to comply with this request subject to agreeing terms and conditions with the provider, and subject to the carrying out of the request being consistent with the exercise of Scottish Water's core functions (as defined in section 70(2) of the Water Industry (Scotland) Act 2002). This is to ensure that these new duties on Scottish Water are subject to its wider statutory responsibilities as the public supplier of water.
73. Subsection (3)(a) provides for Scottish Water's duty to supply water under subsection (2) to cease if the arrangements between a provider and the occupier of eligible premises have come to an end. However, this is subject to section 17(1) of the Act which provides that Scottish Water must continue to serve the premises for two months after the arrangements have come to an end, unless it has come to an end under the disconnection provisions in section 18(5). However, subsection (3)(b) provides that Scottish Water's duty to supply water under subsection (2) may be superseded by a new duty, such as, for example, when another licensed provider assumes responsibility for the provision of water services to the premises.

74. Subsections (4) to (6) make equivalent provision to subsections (1) to (3) as respects Scottish Water's duty to provide sewerage services to premises as agreed by the sewerage services provider. However, unlike Scottish Water's duties under subsections (1) to (3) in relation to the water supply, there is no general provision for sewerage services to be disconnected: a duty to provide sewerage services can only be superseded by a new duty, under subsection (5). Trade effluent services may, however, be discontinued by virtue of section 20 of the Act (see paragraphs 89 to 98 below).
75. Where Scottish Water and a water or sewerage services provider cannot come to an agreement under subsections (2) or (5), on the terms and conditions whereby Scottish Water provides the water supply or sewerage services, subsection (7) provides for the Commission to determine the terms and conditions of the supply that Scottish Water is to make to the provider and for these to have effect as if they had been agreed between those parties.

### ***Section 17: Continuation of water services***

76. Section 17 makes provision in relation to Scottish Water's duty to provide water services, when the arrangements between a licensed water services provider and the occupier of eligible premises have come to an end.
77. Subsection (1) provides that where the arrangements between the occupier of an eligible premises (as defined in section 27 of the Act) and a water services provider have come to an end, such as, for example, on revocation of a licence, Scottish Water has a continuing duty to supply water to the premises for the period specified in subsection (2). The only exception to this is where the supply is discontinued at the request of a provider under section 18 of the Act where alternative arrangements apply. This is to enable the customers of licensed providers to have a continued supply of water while they seek to secure services from an alternative licensed provider if their arrangement with their existing provider comes to an end for any other reason than those provided in the disconnection code under section 19. In most cases it is anticipated that a customer will be able to make arrangements with a new provider prior to the arrangements with their previous provider having come to an end.
78. Subsection (2) specifies the period for which Scottish Water must continue to supply water, after arrangements between the occupier of premises and a provider have come to an end, as two months or such longer period as Scottish Water agrees to.
79. Subsection (3) provides that the continuing duty to supply under subsection (1), that is to say, in the absence of an agreement between the occupier and a provider, ceases where a new arrangement has been made between a licensed provider and the occupier of eligible premises, which would lead to a new duty under section 16(2) of the Act, or where the occupier of those premises notifies Scottish Water that a supply of water is no longer required.
80. Subsection (4) amends section 9 of the Water (Scotland) Act 1980, by inserting new subsections (2A) to (2C). Section 9(1) of the 1980 Act requires Scottish Water to supply water on reasonable terms and conditions where requested for non-domestic purposes. The new section 9(2A) qualifies the section 9(1) duty so that Scottish Water is not required to make such a supply where arrangements between a licensed provider and the occupier of eligible premises under section 16(2) of the Act have come to an end, where it believes there is no reasonable prospect of recovering charges from a customer. The requirement to supply water for non-domestic purposes can only come to an end if the arrangements between a licensed provider and a customer have ended because of non-payment of charges (section 9(2A)(a) of the 1980 Act), or the supply of water to a premises has been discontinued at the request of the provider (under section 18(5) of the Act) because of non-payment of charges (section 9(2A)(b) of the 1980 Act). The intention of this provision is to ensure that, where a customer is unable to find a water service provider, for example, because of a track record of not paying bills, that Scottish Water should not be required to provide a supply of water to that customer. The new

section 9(2B) of the 1980 Act provides that where Scottish Water refuses to provide such a supply, the occupier of the premises has a right to have this reviewed by the Water Industry Commission which, in terms of the new section 9(2C) of the 1980 Act, can either confirm the decision to refuse or direct Scottish Water to give a supply, and its decision is final.

### ***Section 18: Discontinuation of water services***

81. Section 18 enables water services providers to request (under subsection (1)) that Scottish Water discontinue the supply of water to a premises provided by Scottish Water under an agreement with the provider as established by section 16(2) of the Act. This provision will allow a water services provider, subject to compliance with the provisions of the disconnection code provided for under section 19, to request the disconnection of a customer, for example, when the customer has not complied with their contract to the provider by not paying their charges.
82. Subsection (2) requires a provider to serve a notice on: the occupier of the premises, Scottish Water, and the Commission, at least 14 days before requesting disconnection intimating its intention to seek disconnection. Subsection (3) gives Ministers the power to specify by order the form the notice will take and its content, and under section 34 an order under this subsection is subject to negative procedure in the Parliament.
83. Subsection (4) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.
84. Subsection (5) requires Scottish Water to discontinue a supply of water as requested if the conditions set out in subsection (6) are satisfied. Accordingly, the disconnections code provided under section 19 of the Act must have been complied with, and the disconnection requested must not adversely affect any supply of water to the premises for domestic purposes, or the supply of water, to any other premises for any purpose. Subsection (7) provides that a supply of water for domestic purposes is defined in accordance with section 7 of the Water (Scotland) Act 1980 (which includes a supply for drinking, washing, cooking, central heating and sanitary purposes).
85. Subsection (8) provides that the water services provider who requested the disconnection should pay any reasonable costs incurred by Scottish Water in carrying out the disconnection. Subsection (9) provides that in the case of any dispute as to reasonable costs in this regard the Commission will determine this and its decision is final.

### ***Section 19: Disconnections code***

86. This section makes provision for a disconnections code to be drawn up by the Commission in relation to discontinuations of supplies of water.
87. Subsection (2) provides that a disconnection code may specify circumstances in which requests to Scottish Water to disconnect a premises under section 18 of the Act may or may not be made; and any other conditions which must be satisfied before the disconnection actually takes place (over and above those mentioned in section 18(6)(b) of the Act). The intention behind the code is to ensure that disconnection is only carried out where the circumstances genuinely demand it, and where it will not adversely affect any customers other than the one in respect of whom the disconnection is to be carried out. The code may make different provision for different cases and can be amended or revoked (subsection (3)).
88. Subsection (4) ensures that the Commission, in devising the code, will consult: Scottish Water, all water and sewerage services providers, the Convener of the Water Customer Consultation Panels (on behalf of the Panels), the Drinking Water Quality Regulator for Scotland (appointed by virtue of section 7 of the 2002 Act), and such others as it

thinks appropriate. Subsection (5) provides that the Commission must publish the code and publicise arrangements for making a copy of it available to any person who wishes to obtain it.

***Section 20: Continuation and discontinuation of sewerage services***

89. **Section 20** makes provision in relation to Scottish Water's duty to provide sewerage or dispose of sewage when the arrangements between a licensed sewerage services provider and occupier of eligible premises have come to an end. Specific provision is made in relation to "trade effluent services" (as defined in subsection (15)), to permit such services to be discontinued under particular circumstances.
90. Subsection (1) places a duty on Scottish Water to continue providing sewerage, or disposing of sewage from eligible premises (as defined in section 27 of the Act), even if the arrangements between the occupier of the premises and the sewerage services provider have come to an end. However, in contrast to the duty in section 17 as regards the continuing provision of a water supply, no time limit is put on this duty. However, by virtue of subsection (2), the duty does not apply to trade effluent services.
91. Subsection (3) provides that where arrangements between a sewerage services provider and the customer have come to an end, such as, for example, on revocation or suspension of a sewerage provider's licence, Scottish Water has a continuing duty to provide trade effluent services for the period specified in subsection (4) (namely, for 2 months or such shorter period as Scottish Water, with the Water Industry Commission's consent, determines).
92. However, subsection (5) provides that Scottish Water's duty under subsection (3) ceases where a new arrangement has been made between a sewerage services provider and the occupier of eligible premises under section 16(5) of the Act, or if the occupier of the premises notifies Scottish Water that trade effluent services are no longer required.
93. Subsection (6) enables a sewerage services provider to request that Scottish Water discontinue any trade effluent services provided to premises under section 16(5) of the Act. The procedures for this are set out in subsections (7) to (13). Under subsection (7), at least 14 days before making such a request, the provider must serve a notice of its intention to do so on: the occupier of the premises, Scottish Water, and the Commission. Subsection (8) gives Ministers the power to specify by order the form and content of such a notice, and under section 34 of the Act, such an order is subject to negative procedure in the Parliament.
94. Subsection (9) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.
95. Under subsection (10), if the request proceeds, Scottish Water must discontinue the trade effluent services, provided that the conditions set out in subsection (11) are satisfied, namely, that other arrangements for the provision of sewerage or the disposal of sewage in respect of those or other premises is not adversely affected by the discontinuation, and there is no likely risk to public health as a result of the discontinuation.
96. Subsection (12) provides that the sewerage services provider who requested the discontinuation should pay any reasonable costs incurred by Scottish Water in carrying out the discontinuation (which, in the event of a dispute, must be determined by the Commission - see subsection (13)).
97. Subsection (14) provides that section 20 is expressly without prejudice to the existing statutory provisions governing the provision of trade effluent services, as set out in Part II of the Sewerage (Scotland) Act 1968. Part II of that Act makes provision generally for the granting or continuation of consents by Scottish Water in respect of discharges of trade effluent from premises, or for agreements in relation to such discharges. Those

consents or agreements can be subject to appropriate conditions, which may include provision as regards their discontinuance in certain circumstances.

98. Subsection (15) defines trade effluent services for the purpose of section 20, in accordance with section 59(1) of the 1968 Act, which provides that ““trade effluent” means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises, including trade waste waters or waters heated in the course of any trade or industry and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises”.

## **Scottish Water: charges and functions**

### ***Section 21: Scottish Water’s charges for water and sewerage services***

99. Section 21 alters the basis for determining Scottish Water’s charges as provided in the Water Industry (Scotland) Act 2002 (“the 2002 Act”). Under the new provisions, Ministers will set objectives for charges, and the Commission will determine charge limits and approve charges schemes. This section substitutes a new section 29, and inserts new sections 29A to 29G into the 2002 Act; amends section 30 thereof; and repeals sections 31 to 34 thereof. It also amends section 35 of the 2002 Act and inserts a new section 35A into it.

### **Subsection (1): the new section 29 of the 2002 Act: Charges for goods and services**

100. Subsection (1) inserts new sections 29 to 29G into the 2002 Act. The new section 29 provides for Scottish Water to charge for goods and services. In contrast to the broad general power in the existing section 29(1) of the 2002 Act, the new section 29(1) makes a distinction between the power to demand and recover charges for services which are part of Scottish Water’s core functions as defined in section 70(2) of the 2002 Act (new subsection 29(1)(a)), and goods or services provided in pursuit of Scottish Water’s other functions (new subsection 29(1)(b)).
101. The new section 29(2) of the 2002 Act provides that Scottish Water is to demand and recover charges for services it provides as part of its core functions either according to a charges scheme made under the new section 29A of the 2002 Act or under an approved departure from a charges scheme under the new section 29E of the 2002 Act.
102. The new section 29(3) of the 2002 Act provides that fixing, demanding and recovering charges for non-core functions is exercisable by or in accordance with an agreement with the person to be charged.
103. The new section 29(4) of the 2002 Act makes exemptions from the general charging powers in sections 29(1) to (3) in respect of water supplied under the circumstances set out in:
- section 9A of the Water (Scotland) Act 1980, which ensures that no charge can be made for supplies of water for certain fire-fighting purposes; and
  - section 47 of that Act, which continues any arrangements in force before 16th May 1949 under which no charge was made for supplies of water.

### **Subsection (1): the new section 29A of the 2002 Act: Charges schemes**

104. The new section 29A to the 2002 Act, also inserted by subsection (1) of section 21 of the Act, sets out the procedure for making, approving and publishing charges schemes. Subsection (1) of the new section 29A provides for Scottish Water to make a scheme, defined as a charges scheme, setting out what it proposes to charge for each of the services it provides as part of its core functions. Subsections (2) and (3) of the new section 29A provide that a charges scheme must comply with a charge determination

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made by the Water Industry Commission under the new section 29B to the 2002 Act, and in particular that no charge within the scheme may exceed the relevant maximum charge set out in the determination.

105. Subsection (4) of the new section 29A provides that a charges scheme can specify times and methods of payment for charges.
106. Subsection (5) of the new section 29A provides that where Scottish Water reasonably requests information from Scottish Ministers and the Commission for the purposes of making a charges scheme they must provide that information.
107. Subsection (6) of the new section 29A gives the Scottish Ministers the power to direct when Scottish Water should send the charges scheme they have drawn up to the Commission for its approval. This is connected to Ministers' power to set the charge determination period under the new subsection 29B(2) of the 2002 Act. The charge determination period will be divided into one or more periods for a charges scheme to apply to and this provision will allow Ministers to set a date sufficiently in advance of the intended start of a new charges scheme period for the scheme to be approved by the Commission and published by Scottish Water.
108. Subsections (7) and (8) of the new section 29A provide that the Commission may approve a charges scheme as submitted by Scottish Water with or without modifications. Where the Commission modifies the charges scheme, it is to set out its reasons for doing so.
109. Subsection (9) of the new section 29A provides for Scottish Water to publish a summary of the charges scheme approved by the Commission. It must also make arrangements for anyone to inspect or obtain a copy of the full charges scheme, and publicise these arrangements.

#### **Subsection (1): the new section 29B of the 2002 Act: Determination of maximum charges**

110. The new section 29B of the 2002 Act, which is also inserted by subsection (1) of section 21 of the Act, requires the Commission to determine maximum amounts of charges within which Scottish Water will make a charges schemes for approval under the new section 29A of the 2002 Act. It also provides for the period of a determination to be set by Ministers and for the Commission to consult on a draft determination.
111. Subsection (1) of the new section 29B provides that the Commission must determine maximum charge limits which will be the basis for a charges scheme made by Scottish Water under the new section 29A(1), and for Ministers to specify the date by which the determination must be sent to Scottish Water.
112. Subsection (2) of the new section 29B provides for Scottish Ministers to set the period that a charge determination by the Commission will apply for. This might cover the period of one or several charges schemes.
113. Subsection (3) of the new section 29B provides that a charge determination by the Commission can set different maximum charges for different cases or categories of case. This will allow the Commission to provide different charge limits for different types of customers of Scottish Water, including customers in particular circumstances and for different services. The Commission will do this to reflect the different services Scottish Water provides to its customers, and in accordance with Scottish Ministers' statement under the new section 29D of the 2002 Act.
114. Subsection (4) of the new section 29B sets out the procedure for the Commission to consult on the basis of a draft determination. In advance of making a determination under this section, the Commission is required to send a draft determination to Scottish Ministers, Scottish Water and the Convener of the Water Customer Consultation

Panels (representing the Panels as a whole) and to publish it with a view to receiving representations about it, which the Commission must have regard to.

115. Subsection (5) of the new section 29B provides that Scottish Ministers and Scottish Water are required to comply with reasonable requests for information made by the Commission in exercise of its determination function under this section.

**Subsection (1): the new section 29C of the 2002 Act: Exercise of functions regarding charges**

116. The new section 29C of the 2002 Act, which is also inserted by subsection (1) of section 21 of the Act, sets out what should be taken into account by:

- Scottish Water, in making a charges scheme under section 29A or revising any charges fixed by the scheme under section 29F; and
- the Commission, in approving charges schemes under section 29A, determining maximum charges under section 29B, authorising departures from those schemes under section 29E and reviewing its determinations under section 29F.

117. Subsection (1) of the new section 29C provides that Scottish Water, in proposing a charges scheme under section 29A or any revision under section 29F, must comply with subsections (4) and (5) of this section. These provide that Scottish Water must comply with the statement of policy regarding charges as issued by Ministers under the new section 29D, and ensure that its income (whether from charges or other available resources) is not less than sufficient to match the expenditure required to enable the effective exercise of its core functions (the latter as defined in section 29G).

118. Subsection (2) of the new section 29C specifies how the Commission must exercise its functions under the new sections 29A, 29B, 29E and 29F. In relation to sections 29A, 29B and 29F, the Commission must, like Scottish Water, comply with subsections (4) and (5) of this section (as discussed in the previous paragraph). In approving departures from charges schemes under section 29E, the Commission should ensure that Scottish Water's income is sufficient to match the expenditure required to enable the effective exercise of its core functions (again as defined in section 29G). The Commission must also have regard to any relevant Ministerial guidance issued to Scottish Water or directions given to it, either under the general direction-making power in section 56 of the 2002 Act, or in relation to payment and investment under section 44 of that Act. This is facilitated by subsection (3) which requires Scottish Ministers to send to the Commission copies of the relevant guidance or directions, as well as such other information as it may require. This will ensure that the Commission takes account of all relevant obligations or duties or instructions which have a bearing on how Scottish Water discharges its core functions (as defined in section 70(2) of the 2002 Act), in calculating the income or expenditure charge determinations or schemes should provide for.

119. Subsection (5) of the new section 29C provides a formula for balancing Scottish Water's income and expenditure (from various resources) which charge determinations and revisions thereof (under section 29F) and charges schemes must take account of. This must be read in light of the duty on Scottish Water under section 41(1) of the 2002 Act to ensure that, taking one year with another, its income is not less than sufficient to meet its expenditure. It defines Scottish Water's income as the sum of its income from its charges for services and the amount of financial resources reasonably available to it such as, for example, grants paid to it by Ministers under section 42(1) of the 2002 Act and borrowing authorised by Ministers under section 42(3) of that Act. In effect, it requires that Scottish Water's income in respect of its core functions should not be less than sufficient to meet the expenditure, in both capital and operating costs, required to enable it to effectively perform those functions.



**Subsection (1): the new section 29D of the 2002 Act: Statements regarding charges**

120. The new section 29D of the 2002 Act, which is also inserted by subsection (1) of section 21 of the Act, provides for Ministers to issue a statement of policy regarding charges, which must be taken into account by the Commission in its determination of maximum charges under the new section 29B and by Scottish Water and the Commission respectively in making and approving charges schemes under the new section 29A.
121. Subsection (1) provides that for each charge determination specified under section 29B(2), the Scottish Ministers must provide Scottish Water and the Commission with a statement of policy on charges for a given period (as determined under section 29B(2)). This statement is to be prepared with reference to economic as well as other relevant factors.
122. Subsection (2) provides that Ministers' statement on charges policy should include provision regarding charge harmonisation, and defines that as provision that seeks to ensure that charges under a charges scheme are the same for similar services provided to people in similar categories.
123. Subsection (3) specifies other provisions that Scottish Ministers may include in their statement on charges policy, which must be consistent with the overriding principle of harmonisation as set out in subsection (2). This includes provision regarding: particular services that should be funded through a charge for combined services (subsection (3)(a)); the proportion of Scottish Water's charge income which different categories of customer should contribute (subsection (3)(b)); fixing the level of charge for specific categories of customer, or by reference to a customer's liability for council tax (subsection (3)(c)); and for it to cover such other matters as Ministers think fit (subsection (3)(d)). This latter provision will allow Ministers to require continuation of the current link for household customers between their council tax band and their water and sewerage charges. It also provides a mechanism for prescribing reduced charges for certain groups of customers, which will replace the current provision under section 40 of the 2002 Act for Ministers to make regulations reducing charges for customers meeting specific conditions, for example, those in receipt of council tax benefit.
124. Subsection (4) provides that in preparing a statement under this section, Scottish Ministers must have regard to Scottish Water's duty under section 51(1) of the 2002 Act, when exercising its functions, to act in the way best calculated to contribute to the achievement of sustainable development.
125. Subsection (5) states that Scottish Ministers must consult the Commission, the Convener of the Customer Consultation Panels (representing the Panels as a whole) and Scottish Water before issuing a policy statement on charges under this section.

**Subsection (1): the new section 29E of the 2002 Act: Departure from certain charges**

126. The new section 29E of the 2002 Act, which is also inserted by subsection (1) of section 21 of the Act, provides for departures from a charges scheme to be made in respect of charges paid by a water services or sewerage services provider. The section also specifies the narrow circumstances in which these departures from the set charges scheme may be permitted.
127. Subsection (1) of the new section 29E allows Scottish Water to apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid by a water services or sewerage services provider.
128. Subsection (2) of the new section 29E provides that the Commission may consent to such a departure only where satisfied that a customer of the provider in respect of which Scottish Water has made the request has taken specific action, or has agreed

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to something, which demonstrably reduces or increases the costs incurred by Scottish Water in providing services to the provider. The subsection also provides that the departure must be otherwise justified in the circumstances of the case.

129. Subsection (3) of the new section 29E provides that where the Commission agrees to a departure, it may do so subject to such reasonable conditions as it considers appropriate.
130. Subsection (4) of the new section 29E stipulates that where the Commission does not agree to a departure it must give its reasons for doing so.
131. Subsection (5) of the new section 29E provides that the Commission must specify in writing the procedure it will follow in deciding whether to agree to requests for departures made under subsection (1). In addition it must specify matters which will be taken into account and criteria which will be used in determining whether a departure from a charges scheme is justified; and, where the Commission determines that a departure is justified, matters to be taken into account and criteria to be used by Scottish Water in the setting of lower, or as the case may be, higher, charges. Subsection (6) provides that the Commission may revise this provision.
132. Subsection (7) of the new section 29E provides that, in preparing or revising the provision under subsection (5) for the procedure to be followed in determining requests for departures, the Commission must consult Scottish Ministers, Scottish Water and such other persons as it thinks fit.
133. Subsection (8) provides that the Commission must send a copy of the provision made under subsection (5) to Scottish Ministers, Scottish Water and every water services and sewerage services provider. Subsection (9) also requires Scottish Water to publish details of every departure from a charges scheme.

**Subsection (1): the new section 29F of the 2002 Act: Review of determinations and charges**

134. The new section 29F of the 2002 Act, which is also inserted by subsection (1) of section 21 of the Act, provides for the Commission's determination of charges made under section 29B to be reviewed and amended prior to the date set (under section 29B(2)) for the next determination to be made. Subsection (1) of the new section 29F provides that a review of a determination under section 29B(1)(a) is only to be sought where there has been or is likely to be a material change to Scottish Water's income from charges, grants, borrowing, or the other resources reasonably available to it; or to the expenditure required by Scottish Water for the effective exercise of its core functions (as defined in section 29G).
135. Subsection (2) of the new section 29F provides that, where subsection (1) applies, Scottish Water may, or must if the Commission requests it to, send the Commission proposals for revising the maximum amounts determined for charges under section 29B(1)(a).
136. Subsection (3) of the new section 29F provides that the Commission, on receipt of such a proposal, must review the maximum amounts in force, and may revise them to such extent as it thinks fit.
137. Subsection (4) of the new section 29F provides that in reviewing the amounts, the Commission must take into account all matters affecting the resources available to Scottish Water and the expenditure required to carry out its core functions.
138. Subsection (5) of the new section 29F provides that the Commission, before revising the amounts, must inform Scottish Ministers that review of these is under consideration; invite representations regarding the revision of the amounts; and have regard to any representations made to it.

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139. Subsection (6) of the new section 29F provides that the Commission must give reasons for its decision as to whether or not to revise the amounts.
140. Subsection (7) of the new section 29F requires the Commission to send Scottish Water a written notice of any revised amounts set.
141. Subsection (8) of the new section 29F provides that Scottish Water may revise any charges fixed by the charges scheme in accordance with the revised amounts and that where it does so it must send written notice of the revised charges to the Commission for approval. Subsection (9) provides that the Commission may approve any revised charges with or without modifications. Subsection (10) provides that if the Commission approves any revised charges with modifications, it must give its reasons for doing so.
142. Subsection (11) provides that once revised charges have been approved by the Commission, Scottish Water must publish a summary of the revised charges and the date from which the revised charges have effect. Subsection (12) provides that the date for this purpose will be determined by the Commission.

**Subsection (1): the new section 29G of the 2002 Act: Effective exercise of core functions**

143. The new section 29G of the 2002 Act, which is also inserted by subsection (1) of section 21 of the Act, provides that, for the purposes of sections 29C(5) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if it makes such use of its resources that, year on year, it achieves its objectives, as set out in Ministerial directions under sections 56 and 56A of the 2002 Act at the lowest reasonable overall cost. Section 29C(5) provides that Scottish Water's income should not be less than sufficient to allow it to carry out its core functions. A definition of the effective exercise of Scottish Water's core functions is needed in relation to section 29F(1) because the expenditure required in relation to this is one factor where a material change may trigger a section 29F review of the Commission's determination and charges.

**Subsection (2): Scottish Water's charges for water and sewerage services**

144. Subsection (2) of section 21 makes amendments to section 30 of the 2002 Act which gives the Scottish Ministers the power by order to set maximum charges that may be recovered by a person other than Scottish Water for supplying water or providing sewerage services with the help of Scottish Water to others who are not the direct customers of Scottish Water. For example, the owner of a caravan site may be the direct customer of Scottish Water, and might in turn charge individual caravan owners for Scottish Water's services subject to any relevant maxima. The amendments provide that in future the maximum charges for these services, or the method of calculating them, will be set out in Scottish Water's charges scheme under the new section 29A of the 2002 Act (see above) and consequently will be subject to approval by the Commission.

**Subsection (3): Repeal of sections 31 to 34 of the 2002 Act**

145. Subsection (3) of section 21 repeals sections 31 to 34 of the 2002 Act, which make provision for the Water Industry Commissioner to provide advice on charges and for charges schemes to be proposed, approved and published. These arrangements are all superseded by new sections 29 to 29G of the 2002 Act, as inserted by subsection (1) of section 21.

**Subsections (4) and (5): Liability of occupiers etc. for charges**

146. Subsection (4) of section 21 amends section 35 of the 2002 Act which sets out the liability of the occupiers of premises to pay Scottish Water for water or sewerage services. The amendment disapplies the section in respect of services provided under section 16(2) and (5) of the Act, i.e. services to persons eligible to be served by a water or

sewerage services provider; unless their supply has been continued under section 17(1) or section 20(1) or (3). This provides that only occupiers of eligible premises whose service is continued by Scottish Water under the supplier of last resort provisions in sections 17 and 20 are liable to Scottish Water directly for their water charges. For all other occupiers of eligible premises whose services are arranged by a licensed provider, the latter will instead be liable to Scottish Water for charges under the new section 35A.

147. Subsection (5) of section 21 inserts a new section 35A into the 2002 Act. This new section provides that water and sewerage services provided by Scottish Water to eligible premises by a licensed provider, as provided in section 16 of the Act, are to be considered as services provided solely by Scottish Water to the licensed provider for the purposes of charge schemes and determinations under the new sections 29 to 29F of the 2002 Act (as inserted by section 21(1) of the Act) (see, in particular, section 35A(1) and (2) which make provision for water and sewerage services respectively). Section 35A(3), however, disapplies section 35A(1) and (2) where water or sewerage services continue to be provided directly to the occupiers of those premises under section 17(1) or 20(1) or (3) of the Act. In that case, occupiers will be directly liable to Scottish Water for charges as set out in a charges scheme under the new section 29A of the 2002 Act.

### ***Section 22: Scottish Water's functions: powers of the Scottish Ministers***

148. Section 22 inserts sections 56A and 56B into the 2002 Act. Section 56 of the 2002 Act gives the Scottish Ministers powers to direct Scottish Water as regards the exercise of their functions. Subsection (1) of the new section 56A enables any directions issued under section 56 to, in particular, set objectives regarding the standard of services to be provided by Scottish Water in the exercise of its functions; or the timescales within which Scottish Water is to achieve a particular standard of service in exercising its functions, or to commence or complete a particular piece of work. The directions will apply by reference to the period of a charge determination specified under the new section 29B(2) of the 2002 Act. Subsection (2) states that different objectives may be set for different cases or categories of case.
149. Subsection (3) of the new section 56A requires Scottish Ministers, in formulating objectives of a type referred to in subsection (1), to have regard to Scottish Water's duty under section 51(1) of the 2002 Act, in exercising its functions, to act in the way best calculated to contribute to the achievement of sustainable development.
150. Subsection (4) of the new section 56A of the 2002 Act requires Scottish Ministers, before giving directions under section 56 which set objectives of a type referred to in subsection (1), to consult the Convener of the Customer Consultation Panels on the objectives. The Convener, in being consulted under this section, represents the Panels as a whole.
151. The new section 56B of the 2002 Act gives Ministers powers, after consulting the Commission and Scottish Water, to make orders conferring additional or supplementary functions on Scottish Water as regards the provision of water and sewerage services. Paragraph 7(8) of schedule 5 to the Act amends section 68 of the 2002 Act to provide that regulations under new section 56B will be subject to affirmative procedure in the Parliament.

### ***Section 23: Determinations relating to provision of services***

152. **Section 23** relates to regulations to be made under the Sewerage (Scotland) Act 1968 ("the 1968 Act") and the Water (Scotland) Act 1980 ("the 1980 Act") as amended by the Water Environment and Water Services (Scotland) Act 2003 ("the 2003 Act"). These allow the Scottish Ministers to make regulations dealing with the issue of reasonable cost, the cost which Scottish Water is required to bear in making a new connection to the public water supply or sewerage system. The regulations will define how the balance of costs between Scottish Water and developers will be calculated. In effect,

these amendments mean that the Commission is to be responsible for deciding any disputes about reasonable costs, rather than Ministers.

153. Subsection (1)(a) amends subsection (4) of section 1 of the 1968 Act to give the Commission, rather than Ministers, powers to determine disputes arising over the determination of reasonable cost of a sewerage connection as defined in regulations. Subsection (1)(b) inserts provisions into the 1968 Act to require the Commission to define its procedures for determining disputes, and to consult Scottish Water and others as it considers appropriate on these procedures.
154. Subsection (2) makes equivalent provision in relation to connection to the public water networks through amendments to section 6 of the 1980 Act.

#### ***Section 24: Qualification of duty to provide services***

155. **Section 24** qualifies Scottish Water's duties to provide public sewers and a supply of wholesome water for domestic purposes, and to allow connections to the public water and sewerage systems, where practicable at a reasonable cost, as set out respectively in section 1 of the 1968 Act and section 6 of the 1980 Act.
156. Subsection (1) inserts a new subsection (7) into section 1 of the 1968 Act to provide that the duties imposed by sections 1(1) and (2) of that Act shall not require Scottish Water to do anything which is prejudicial to its compliance with (a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 so far as setting objectives of a type referred to in section 56A of that Act (inserted by section 22 of the Act); or (b) a statement of policy issued under section 29D of the 2002 Act (inserted by section 21 of the Act).
157. Subsection (2) of section 24 makes equivalent qualifications in respect of Scottish Water's duties under sections 6(1), (2) and (4) of the 1980 Act.

#### **Sewerage nuisance: Code of Practice**

##### ***Section 25: Sewerage nuisance: code of practice***

158. **Section 25** gives the Scottish Ministers powers to issue a code of practice on the assessment, control and minimisation of sewerage nuisance.
159. Subsection (1) gives the Scottish Ministers the power to make an order containing a code of practice on the assessment, control or minimisation of sewerage nuisance. This is referred to as a "sewerage code".
160. Subsection (2) defines "sewerage nuisance" as any smells and discharges, insects or any other thing emanating from any part of the public sewerage system so as to be prejudicial to health or a nuisance. "Public sewerage system" is defined in section 29 of the Act.
161. Subsection (3) provides that a sewerage code may include guidance on the best practicable means of assessing, controlling and minimising sewerage nuisance, and may set out the circumstances in which a person to whom a sewerage code applies could be regarded as complying or not complying with that code.
162. Subsection (4) contains provisions concerning the interpretation of "best practicable means" for the purposes of subsection (3)(a).
163. Subsection (5) provides that a sewerage code will apply to Scottish Water in respect of its core functions relating to the provision of sewerage and the disposal of sewage and to any other person acting on Scottish Water's behalf or under its authority in respect of those functions.
164. Subsection (6) requires Scottish Water and any other person to whom the code applies, to comply with that code.

*These notes relate to the Water Services etc. (Scotland) Act 2005 (asp 3)  
which received Royal Assent on 17 March 2005*

165. Subsection (7) requires the Scottish Ministers and local authorities to publicise a sewerage code.
166. Subsection (8) requires the Scottish Ministers, in advance of making an order containing a sewerage code, to consult Scottish Water, local authorities and any other appropriate persons, on the proposed sewerage code.
167. Subsection (9) exempts from the requirements of sections 25 and 26, those parts of the public sewerage system which are regulated by a permit granted by the Scottish Environment Protection Agency (SEPA) by virtue of regulations made under section 2 of the Pollution Prevention and Control Act 1999. For example, certain sewage treatment works are regulated by permits granted under the Pollution Prevention and Control (Scotland) Regulations 2000. However, subsection (10) reserves the powers of Ministers under other legislation, to make a direction concerning the application of a sewerage code to any part of the public sewerage system. This would, for example, enable Ministers to give directions to SEPA to have regard to the requirements of any sewerage code when granting permits under the 2000 Regulations.

### **Section 26: Monitoring and enforcement**

168. **Section 19C** contains monitoring and enforcement provisions relating to sewerage codes.
169. Subsection (1) requires a local authority to monitor compliance with a sewerage code, and to investigate complaints of sewerage nuisance made by persons living in its area.
170. Subsection (2) requires a local authority to serve a notice (referred to as an “enforcement notice”) on Scottish Water or any other person to whom a sewerage code applies, where it is satisfied that there is or is likely to be material non-compliance with a sewerage code.
171. Subsection (3) provides that the enforcement notice may set out the works or steps required to comply with a sewerage code and must specify the date by which these requirements are to be fulfilled.
172. Subsection (4) provides for a right of appeal to the sheriff court against an enforcement notice served by a local authority under subsection (2), as the contravention of an enforcement notice is an offence. The appeal must be made by summary application to the sheriff within 21 days of the date of service of the notice. It further provides that the enforcement notice will have no effect until the appeal is withdrawn or finally determined. This provision is similar to that available to Scottish Water or responsible person under Part III of the Environmental Protection Act 1990.
173. Subsection (5) provides that the sheriff in an appeal under subsection (4) may make such order as the sheriff thinks fit and the decision of the sheriff in the appeal is final.
174. Subsection (6) provides that it is an offence without reasonable excuse to contravene an enforcement notice, and provides for a fine of up to £40,000 on summary conviction.
175. Subsection (7) provides that a local authority may, in the event that an enforcement notice is contravened, take proceedings in the sheriff court to ensure that the requirements of the notice are fulfilled. This is irrespective of whether proceedings have been taken for an offence under subsection (6).
176. Subsections (8) and (9) enables a local authority itself, in the event of non-compliance with an enforcement notice, to undertake works to secure compliance with that notice, and to recover the costs of so doing from the person upon whom the notice was served.
177. Subsection (10) disapplies the statutory nuisance functions of a local authority under sections 79 to 81 of the Environmental Protection Act 1990, so that only this Act’s provisions apply as regards sewerage nuisance (and not the monitoring and enforcement functions under those sections of the 1990 Act so far as relevant in relation to sewerage

nuisance). However, the operation of section 82 of the 1990 Act is expressly preserved by subsection (11) so that the abatement procedure under that section, by which individuals may bring summary proceedings regarding a statutory nuisance, continues to apply so far as relevant in relation to sewerage nuisance.

## **Definitions for Part**

### ***Section 27: Meaning of “eligible premises”***

178. Section 27 defines “eligible premises” for the purposes of Part 2 of the Act. This is required to define which customers water and sewerage services providers may make arrangements to supply water or sewerage services to. Where a customer meets this definition a licensed provider can supply services to them without contravening the general prohibitions in sections 4(3) and 5(3) of the Act.
179. Subsection (1) defines eligible premises as those that are connected, or are to be connected to the public water supply system or, as the case may be, the public sewerage system, and are not a dwelling.
180. Subsection (2) defines “dwelling” by reference to the definition given to it for council tax purposes under Part II of the Local Government Finance Act 1992 (i.e. premises in respect of which council tax is payable). The main purpose of this provision is to ensure that water and sewerage services providers cannot make arrangements to provide services to households. However, certain places which are dwellings under the 1992 Act, are not to be classed as a dwelling for the purposes of this Act, namely the residential part of part residential subjects within the meaning of Part II of the 1992 Act. This means that premises which are technically residential but which form part of a building whose main purpose is to function as a business, e.g. a care home, are not caught by the definition of “dwelling”; they will therefore fall within the definition of “eligible premises” and be able to receive water and sewerage services from a licensed provider notwithstanding that, for council tax purposes, certain parts of those subjects may be classed as a dwelling.
181. Subsection (3) gives Ministers the power by order to amend the definition of a “dwelling” for the purposes of the Act. This power could be used, for example, in the event of any changes made under the 1992 Act for council tax purposes to the definition of dwelling, to ensure that premises used primarily as dwellings are always excluded from the category of “eligible” premises. Section 34 provides for these regulations to be subject to negative procedure in the Parliament.

### ***Section 28: Meaning of “public water supply system”***

182. A water services licence will authorise a provider to arrange for a supply of water to be made to any eligible premises through the public water supply system. Section 28 defines what constitutes the public water supply system for the purposes of Part 2 of the Act.
183. Subsection (1) defines the public water supply system as all mains, pipes, water treatment works and other similar infrastructure vested in Scottish Water (i.e. infrastructure for which Scottish Water is responsible), or used by Scottish Water (or a person acting on its behalf or under its authority, such as a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of the public water supply. (Scottish Water’s core functions are defined at section 70(2) of the Water Industry (Scotland) Act 2002 and for all practical purposes the definition includes all activities involved in providing statutory public water and sewerage services.)

### ***Section 29: Meaning of “public sewerage system”***

184. In parallel to the water services licence, a sewerage services licence authorises a provider to arrange for a supply of sewerage to, or disposal of sewage from, eligible

premises through the public sewerage system. Section 29 provides a definition of the public sewerage system for the purposes of Part 2 of the Act.

185. Subsection (1) defines the public sewerage system as all sewers, drains, sustainable urban drainage systems (SUDS), sewage treatment works or other similar infrastructure vested in Scottish Water or used by Scottish Water (or a person acting on its behalf or under its authority, such a PFI contractor) in connection with the exercise of Scottish Water's core functions in respect of statutory public sewerage services.

### **Part 3: Coal Mine Water Pollution**

#### ***Section 30: Control of water from coal mines***

186. Subsection (1) of section 30 of the Act inserts new sections 4D to 4F and a new schedule 1C into the Coal Industry Act 1994 ("the 1994 Act"). These new sections provide the terms and conditions of powers allowing the Coal Authority ("the Authority") to act to prevent or mitigate pollution, and to gain access and, if need be, to compulsorily acquire land in order to deal with coal mine water pollution in Scotland. The new provision is set out as a power, rather than a duty in any particular case, in order to enable the Authority to decide what action, if any, would be appropriate, depending on the circumstances.
187. The new section 4D of the 1994 Act makes provision for the Authority to take action to prevent or mitigate pollution of the water environment caused by discharges of water from coal mines which are vested in the Authority. This provides a statutory basis for the Authority's remediation work beyond its existing powers and general duties in Part I of the 1994 Act.
188. The new section 4E of the 1994 Act defines the powers that are given to the Authority to enter premises (within the meaning of section 4E(8), which includes land) for the purpose of investigating or dealing with water discharging from coal mines. The new schedule 1C to the 1994 Act (as set out in schedule 4 to the Act) sets out additional provisions on the administrative and operational procedures concerning these powers of entry. Before invoking these powers, the Authority would usually seek to reach agreement with the relevant owners of the land. These provisions therefore only concern situations where the Authority is unable to gain entry by agreement.
189. Subsections (1) and (2) of new section 4E sets out the reasons why the Authority would need to have access to premises (in exercise of its powers under subsection (3)). These are to carry out work to determine the extent, or the likelihood, of any pollution or danger, and to take any remedial action required under section 4D, where coal mine water has caused, or is causing, or is likely to cause either serious pollution of the environment or a danger to life or health. While actual ownership of the mine remains with the Authority, Part II of the 1994 Act provides for the licensing of coalmining operations; this new provision therefore makes provision to enable another person, such as a licensee or a specialist, to undertake the required investigative works on behalf of the Authority.
190. Subsections (3) and (4) of new section 4E set out the extent of the powers of entry and the purposes for which they might be used in order to allow a broad spectrum of investigative and remedial work, including the power to carry out experimental borings. As read with paragraph 1 of schedule 1C, the powers enable the Authority to take others onto the premises, for example, engineering experts, and any necessary equipment, for use in tracing the source of leaks.
191. In an emergency (as defined in new section 4E(8) to cover cases where there is an immediate risk of serious pollution of the environment or immediate danger to life or health), the provisions of new section 4E(3) permit the Authority to enter premises at any time and, if need be, by force.



192. Subsections (5), (6) and (7) of new section 4E require the Authority either to give at least seven days' notice before entering a premises (in cases other than an emergency), or to obtain a warrant granted under the terms of paragraph 2 of schedule 1C (where the occupier of the premises does not consent to the entry). Whilst the immediacy of the threat to the water environment may not be such that it could be described as an "emergency", there may still nevertheless be a need to exercise the powers of entry under the authority of a warrant to deal with potentially significant pollution of the water environment. For example, where the Authority had identified the need for a new monitoring point but could not gain the agreement of the landowner to install the monitoring equipment or subsequently to take measurements. In order to establish clearly the evidential basis which underpins the issue of a warrant, the new schedule 1C sets out the required evidence which must be adduced in writing before a warrant may be issued. These include circumstances where the Authority requires access urgently and the occupier is absent. However, this would rarely be necessary, for example, where the Authority needed to work quickly and the occupier was uncontactable for an extended period.
193. The new section 4F of the 1994 Act enables the Authority to compulsorily acquire land in Scotland. This new provision is in addition to section 5(2) of the 1994 Act which enables the Authority to acquire land by agreement for the purposes of carrying out its general functions under that Act.
194. Subsections (1) and (2) of new section 4F enable the Authority, if authorised by the Scottish Ministers, to acquire land compulsorily for the purpose of preventing or mitigating the effects of a mine water discharge which has caused, is causing or is likely to cause serious pollution of the water environment or danger to life or health. The Authority is also able, where necessary, to acquire a right of servitude in or over land to ensure access to the land for the purpose of carrying out its works.
195. Subsection (3) of new section 4F applies the requirements of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to compulsory acquisitions under new section 4F. Wherever the 1947 Act refers to 'a local authority', it will apply as if it were a reference to the Coal Authority. The provisions of the 1947 Act enable Scottish Ministers to confirm an Order with or without modifications in the absence of any outstanding objections, failing which a public local inquiry must be held. Additionally, following confirmation of an Order, the Authority is required to notify it in the prescribed form. These new powers will not affect the requirements, in section 5(7) and (8) of the 1994 Act, for the Authority to obtain the agreement of Treasury and the Secretary of State for Trade and Industry before acquiring any land.
196. Subsection (2) of section 30 of the Act inserts a new subsection (6) into section 66 of the 1994 Act, so that the provisions apply to land held by non-ministerial office holders in the Scottish Administration as well as other government departments.
197. Subsection (3) of section 30 of the Act amends section 68 of the 1994 Act to provide that the provisions inserted by the Act apply to Scotland only.

## **Part 4: Miscellaneous and General**

### **Miscellaneous**

#### ***Section 31: Offences by bodies corporate and partnerships***

198. Section 31 provides that officers of companies and other corporations and members of partnerships can be held personally liable, in certain circumstances, for offences under the Act that their companies or partnerships commit.

### **Section 32: Amendments to enactments**

199. Section 32 introduces schedule 5, which makes consequential amendments to enactments as a result of this Act.

### **Section 33: Ancillary provision**

200. Section 33 enables Ministers to make orders for incidental, supplemental, consequential, transitional, transitory or saving provisions where they consider that these are necessary or expedient for the purposes of or in consequence of the Act. The parliamentary procedure for making these orders is defined in section 34: where an order is used to amend primary legislation, affirmative procedure is prescribed; otherwise an order would be subject to negative procedure.

## **General**

### **Section 34: Orders and regulations**

201. Section 34(1) provides that the powers to make orders and regulations that the Act confers on the Scottish Ministers are exercisable by statutory instrument. Subsection (2) provides that in exercising such powers, Ministers can make such incidental, consequential, transitional or saving provisions as considered necessary or expedient and can make different provision for different circumstances.
202. Subsections (3) and (4) set out the parliamentary procedure which the various statutory instruments that are capable of being made under the powers in the Act are subject to.
203. Subsection (3) provides that some statutory instruments are subject to negative procedure or annulment. Subsection (4), however, specifies affirmative procedure for some statutory instruments, whereby Ministers cannot make and bring into force a statutory instrument until the instrument has been laid in draft before the Parliament and the Parliament has by resolution approved it. This procedure requires closer Parliamentary scrutiny and is applied to the few provisions in the Act that enable primary legislation to be amended, or enable provisions in the Act to be modified in a significant way.
204. Subsection (3) applies negative procedure to statutory instruments in respect of the following provisions:
- Section 2: an order to dissolve the Water Industry Commissioner for Scotland.
    - Section 7(2): an order to specify any other factors beyond those at sections 7(2)(a) and 7(2)(b) that the Commission is to take into account in assessing the ability of an applicant for a licence to discharge the licence's terms and conditions.
    - Section 13(6): an order to modify paragraphs 1 and 2 of schedule 2, which govern procedures for the application for a water or sewerage services licence and the conditions of the licence, in relation to the first application for such a licence by the undertaking established by Scottish Water under section 13.
    - Section 14(1): an order to specify circumstances in which Scottish Ministers may make grants to the undertaking established under section 13.
    - Section 14(2): an order to specify circumstances in which the undertaking established under section 13 may borrow from Scottish Ministers and the circumstances in which it may not borrow money from any other person except Scottish Water.
    - Section 14(6): an order to specify circumstances in which Scottish Ministers may guarantee the discharge of any financial obligation in connection with sums borrowed by the undertaking under section 14(4)(b).

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- Section 14(9): an order specifying circumstances in which Scottish Ministers may subscribe for share or loan capital of the undertaking.
  - Section 18(3): an order prescribing the form and content of the notice that a water services provider must issue, prior to requesting that Scottish Water discontinue the supply of water to premises.
  - Section 20(8): an order prescribing the form and content of a notice that a sewerage services provider must issue, prior to requesting that Scottish Water discontinue provision of trade effluent services to premises.
  - Section 25(1): an order containing a code of practice for the purposes of assessing, controlling and minimising sewerage nuisance.
  - Section 27(3): an order to vary the meaning of “dwelling” for the purposes of the Act’s definition of “eligible premises” at section 27.
  - Section 33: an order to make further provision for the purposes of the Act (where this does not amend primary legislation).
  - Paragraph 1(1) of schedule 2: an order prescribing the form and content of an application for a water services or sewerage services licence.
  - Paragraph 1(4) of schedule 2: an order prescribing the timescales and content of the notice that an applicant for a licence must publish.
  - Paragraph 12(1) of schedule 2: an order specifying the manner in which the Commission must maintain a register of water and sewerage services licences.
  - Paragraph 12(2)(g) of schedule 2: an order specifying any additional information, beyond that at subparagraph (2)(a) to (f), to be included in the Commission’s register of water and sewerage services licences.
205. Subsection (4) applies affirmative procedure to statutory instruments in respect of the following provisions:
- Section 33: an order to make further provision for the purposes of the Act (where this amends primary legislation).
  - Section 4(7): regulations which specify circumstances in which the prohibitions: on common carriage on the public water networks at section 4(1); on using the public water networks to supply services at section 4(2); or on providing services on the public water networks without a licence at section 4(3), do not apply.
  - Section 5(7): regulations which specify the circumstances in which the prohibitions: on common carriage on the public sewerage networks at 5(1); on using the public sewerage networks to supply services at section 5(2); or on providing services on the public sewerage networks without a licence at section 5(3), do not apply.

### ***Section 35: Interpretation***

206. Section 35(1) specifies the meaning to be placed upon the abbreviated references to legislation in the Act. Subsection (2) provides that the definition of Scottish Water's core functions given at section 70(2) of the 2002 Act is to apply for the purpose of the Act.

### ***Section 36: Crown application***

207. Section 36 provides that the provisions in the Act bind the Crown.

***Section 37: Short title and commencement***

208. Section 37(1) specifies the title by which the Act should be cited. Subsections (2) and (3) empower Ministers to bring different provisions in the Act into force at different times following Royal Assent. This section, as well as sections 33 to 36, however, come into force on Royal Assent.

***Schedule 1: Water Industry Commission for Scotland***

209. Schedule 1 is introduced by section 1(4) of the Act and inserts a new schedule A1 into the 2002 Act.

***Schedule A1: Water Industry Commission for Scotland***

***Paragraph 1: Status***

210. Paragraph 1 provides that the Commission is a body corporate. Sub-paragraph (2) provides that the Commission does not form part of the Crown.

***Paragraph 2: Membership***

211. Paragraph 2 provides that the Commission is to be made up of 3-5 ordinary members and a chief executive. This means that the majority of the membership of the Commission will be non-executive. Paragraph 5 provides that a person is to be appointed to chair the Commission from amongst the ordinary members.

***Paragraph 3: Tenure and removal from office***

212. Paragraph 3 provides for the appointment and vacation of office for Commission members. Members are to be appointed by the Scottish Ministers, who will also determine their terms and conditions. Sub-paragraph (2) provides that Ministers may remove ordinary members from office; and that the Commission may remove the chief executive from office with the approval of Ministers. Removal from office under this paragraph of members or the chief executive may only happen under certain specified circumstances, such as bankruptcy, incapacity by physical or mental illness, prolonged absence from Commission meetings without permission, or otherwise being unable, or unfit to discharge the functions of a member or unsuitable to continue as a member.

***Paragraph 4: Disqualification***

213. Paragraph 4 disqualifies members of the House of Lords, the House of Commons, the Scottish Parliament or the European Parliament from being appointed as members of the Commission.

***Paragraph 5: Chairing***

214. This paragraph requires the Scottish Ministers to appoint a person to chair the Commission from among its ordinary members. Sub-paragraph (3) provides that this person may resign by giving written notice to Ministers. Sub-paragraph (4) states that they cease to chair the Commission on ceasing to be a member of the Commission.

***Paragraph 6: Remuneration, allowances and pensions***

215. Sub-paragraph (1) provides for Scottish Ministers to determine the remuneration to be paid to ordinary members of the Commission, and sub-paragraph (2) provides further for them to determine allowances in respect of expenses to be paid to ordinary members and to the chief executive.
216. Sub-paragraph (3) provides that Scottish Ministers may, under special circumstances, direct the Commission to pay compensation to an ordinary member who has ceased to hold the office otherwise than on the expiry of the terms of their appointment.

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Sub-paragraph (4) provides that Scottish Ministers may direct the Commission to pay pensions, allowances or gratuities, or contributions to these, to ordinary members as Ministers consider appropriate.

### ***Paragraph 7: Chief executive***

217. **Paragraph 7** requires the Commission to employ a chief executive and makes provision regarding their appointment and employment.
218. Sub-paragraph (2) provides that Scottish Ministers will appoint the first chief executive of the Commission and determine the appointee's terms and conditions. Sub-paragraph (3) ensures that before they do this, Scottish Ministers will consult the chairman or prospective chairman of the Commission, if that person has been identified.
219. Sub-paragraph (4) provides that the Commission will appoint subsequent chief executives on such terms and conditions as they determine, subject to the approval of Ministers.
220. Sub-paragraph (5) requires that the chief executive has knowledge, skills or experience relevant to the functions of the Commission.
221. Sub-paragraph (6) enables the Commission, with the approval of Ministers, to vary the terms and conditions of the chief executive or to terminate such an appointment where satisfied that the chief executive is not adequately discharging the functions of that post.

### ***Paragraph 8: Staff***

222. Sub-paragraph (1) provides that all the staff of the Water Industry Commissioner for Scotland will transfer to the Commission once it is established.
223. Sub-paragraph (2) provides for the contract of employment of any staff transferred under sub-paragraph (1) not to be terminated by the transfer, but to continue as if originally made between the member of staff and the Commission.
224. Sub-paragraph (3) provides that when staff are transferred to the Commission, the Commission will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer continues to have effect after the transfer.
225. Sub-paragraph (4) states that the transfer under these provisions does not affect any person's right to terminate their contract of employment if the terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that the identity of the person's employer has changed is not in itself sufficient to constitute such a change.
226. Sub-paragraphs (5), (6) and (7) provide that the Commission may employ other staff, and determine their terms and conditions and the arrangements for pensions, allowances or gratuities. Ministers must approve all such recruitment and arrangements. Sub-paragraph (8) provides that reference to provision of pensions, allowances or gratuities, includes provision by way of compensation for loss of office or employment.

### ***Paragraph 9: Transfer of property and liabilities***

227. **Paragraph 9(1)** provides that all property (including rights) and liabilities of the Water Industry Commissioner for Scotland will transfer to the Commission. Sub-paragraph (2) provides that sub-paragraph (1) will have effect despite any provision which might otherwise prevent, penalise or prohibit the transfer of such property and liabilities.

### ***Paragraph 10: Committees***

228. **Paragraph 10** provides for the Commission to establish committees for or in connection with any of its functions. These must be chaired by an ordinary member of the

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Commission (sub-paragraph (2)), and may include employees of the Commission who are not members of the Commission (sub-paragraph (3)), as well as the chief executive.

***Paragraph 11: Delegation of powers***

229. Paragraph 11 enables any function of the Commission to be delegated to any of its authorised committees; but that this authorisation does not prevent the Commission itself from doing anything it has authorised a committee to do.

***Paragraph 12: Proceedings***

230. Paragraph 12 states that the Commission may determine its own procedures, and that any vacancy among its members or defect in the appointment of a member does not affect the validity of its proceedings.

***Paragraph 13: General powers***

231. Paragraph 13(1) provides that the Commission may enter into contracts and acquire or dispose of property, if this is necessary or expedient in the exercise of its functions; but the Scottish Ministers' consent is required where land is acquired or disposed of (sub-paragraph (2)).

***Paragraph 14: Accounts***

232. Paragraph 14 provides that the Commission will prepare accounts for each financial year, and send these to the Auditor General for auditing, in accordance with directions from Scottish Ministers. By virtue of this provision the Commission is also subject to provision under the Public Finance and Accountability (Scotland) Act 2000 giving the Auditor General powers to audit and examine any part of the Commission's expenditure.

***Schedule 2: Licences and Compliance: Further Provision***

233. Schedule 2 is introduced by section 12.

***Paragraph 1: Application for licence***

234. Paragraph 1 provides an order-making power for the Scottish Ministers to make provision in respect of applications for a water or sewerage services licence under the Act. The paragraph sets out detailed provisions about the Commission's functions in considering applications from those seeking licences, and about the requirements to be placed on applicants.
235. Sub-paragraph (1) requires the form for applications to the Commission under this paragraph to be prescribed by Ministers. Sub-paragraph (2) requires applicants to provide the Commission with any other information reasonably required to enable consideration of the application unless that is legally privileged information (sub-paragraph (3)).
236. Sub-paragraph (4) requires applicants to publish a notice of their application and to explain in this notice the procedures by which anyone can make representations to the Commission about the application. The timing of this notice and the procedures on representation contained in it are to comply with requirements prescribed by Ministers in an order.
237. Sub-paragraph (5) requires the Commission to give notice to applicants of any proposed refusal of an application, explaining the reasons for it and specifying a time within which representations about it may be made. Sub-paragraph (6) provides that in making a final decision about whether to grant or refuse an application, the Commission is required to have regard to any representations made by the applicant and other interested parties.

238. Sub-paragraph (7) makes it an offence for an applicant to provide false or misleading information in an application for a licence. Sub-paragraph (8) specifies that the penalties for anyone guilty of this offence are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or where convicted by a jury, an unlimited fine.
239. Sub-paragraph (9) gives applicants who are refused a licence the right to appeal against that refusal to the Court of Session, on a question of law. Sub-paragraph (10) gives Scottish Water a right of appeal on a question of law, to the Court of Session against a licence being granted. Sub-paragraph (11) establishes the decisions which the Court of Session can make in these cases, and provides that these are final.

### ***Paragraph 2: Conditions of licence***

240. **Paragraph 2** makes provisions about the conditions that are to attach to water services licences and sewerage services licences.
241. Sub-paragraph (1) provides for each licence to contain within it certain standard conditions, and any other "ordinary" conditions particular to individual licences, which the Commission judges to be necessary or expedient. Sub-paragraph (2) requires the Commission to specify what the standard conditions are to be within 9 months of the sub-paragraph coming into force. For example, this will allow the Commission to use part of the 9 month period to consult publicly on draft conditions.
242. Sub-paragraph (3) provides for the matters to be covered by the standard conditions. It is anticipated that these will include requirements that service providers avoid undue discrimination between customers, meet their financial obligations to Scottish Water at all times, and comply with standard procedures in transferring or surrendering licences. In the interests of allowing the Commission to operate flexibly and to take into account different circumstances, the sub-paragraph enables conditions to apply only to specified classes of licence and to come into effect or be suspended in particular circumstances.
243. Sub-paragraph (4) requires the Commission to consult Ministers on its proposals for standard conditions and to publish the conditions once determined. The intention is that the Commission should consult Ministers about these proposals having had regard to the outcome of a public consultation on the draft conditions.
244. Sub-paragraphs (5) to (11) provide for the Commission to review and modify the standard conditions and to modify other conditions of any licence if necessary as a consequence of modifying a standard condition. This is the mechanism for changing the standard conditions for all licences that contain them. The Commission is not required to obtain the agreement of each licence holder to whatever change is being made.
245. Sub-paragraph (5) places a duty on the Commission to review the standard conditions from time to time and gives it the power to modify them and also, in consequence of so doing, to make any other modifications to licence conditions which it considers necessary or expedient. The frequency with which this type of review is required will depend on experience gained of the system in operation. Sub-paragraph (6) requires that the Commission, before making any modification to a standard condition or a consequential amendment to a licence condition, should notify the licence holders affected by any proposed modification, Scottish Water and Ministers; and should publish this notification. Sub-paragraph (7) requires that the notice explains the Commission's reasons for proposing modifications and specifies the timescale within which representations about them can be made to it. Sub-paragraph (8) requires the Commission to have regard to any representations made about the proposed modification. Sub-paragraph (9) requires the Commission to publish any modifications that are made to the standard conditions.
246. Sub-paragraph (10) empowers the Commission to grant a licence that does not contain the standard conditions in their normal form, again in the interests of flexibility to

reflect the particular circumstances of the case. Sub-paragraph (11) requires, where the Commission is minded to grant a licence on this basis, that the Commission should follow the procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6) to (8).

247. In the interests of flexibility, sub-paragraph (12) gives the Commission discretion to provide in an ordinary condition of a licence, for that condition to have effect or cease to have effect or be modified at such time, in such manner and in such circumstances as it considers appropriate.
248. Sub-paragraph (13) empowers the Commission to modify any conditions within a particular licence, if it considers that this is necessary in the circumstances of the case. Sub-paragraph (14) requires, where the Commission is minded to modify a condition on this basis, that it should follow procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6) to (8).
249. Sub-paragraphs (15) and (16) empower a water or sewerage services provider to appeal to the Court of Session against the inclusion or modification respectively of a condition in a licence, on a question of law. Sub-paragraph (17) provides that the decision of the Court in the appeal is final.

### ***Paragraph 3: Conditions: sustainable development***

250. Sub-paragraph (1) of paragraph 3 provides that Scottish Ministers may issue guidance to the Water Industry Commission on how licensed water and sewerage services providers might, in performing the activities authorised by their licences, reasonably contribute to the achievement of sustainable development. Sub-paragraph (2) requires the Commission to have regard to such guidance when setting licence conditions for providers under paragraph 2 of schedule 2 to the Act. Such conditions will, in line with all other licence conditions, be binding on providers.

### ***Paragraph 4: Transfer of licence***

251. **Paragraph 4** establishes the basis on which a water or sewerage services provider can transfer a licence to another person.
252. Sub-paragraph (1) allows in principle for a licence to be transferred from a provider, who holds a licence, to another person. A transfer can be in respect of all, or part of, the activities covered by a licence. Sub-paragraph (2) requires any transfer to comply with any conditions (whether standard or ordinary) relating to transfers and to be subject to the consent of the Commission.
253. Sub-paragraphs (3) and (4) empower the Commission to consent to a transfer, but only where satisfied that the person the licence is being transferred to is able to carry out adequately the activities in respect of which the transfer is being proposed. In deciding whether someone is able to conduct these activities adequately the Commission must take into account the factors that would normally be considered when granting the licence under section 7 of the Act.
254. Sub-paragraph (5) requires a transferee to submit an application to the Commission for consent to the transfer and provides for a similar application procedure for the transfer of a water or sewerage services licence to that which applies to licence applications under paragraph 1(1) to (6) of schedule 2 to the Act.
255. Sub-paragraph (6) makes it an offence to knowingly or recklessly make a false statement in connection with a transfer application (similar to paragraph 1(7) of schedule 2) whilst sub-paragraph (7) prescribes the penalties for such an offence (similar to paragraph 1(8) of that schedule).
256. Sub-paragraph (8) empowers the Commission to make its consent to a transfer subject to any conditions in respect of the licence or more generally as it considers appropriate.



Sub-paragraph (9) requires the Commission to notify, as soon as is practicable after its decision about a transfer, those parties with an interest in that transfer and Scottish Water.

257. Sub-paragraph (10) permits prospective transferees to appeal to the Court of Session on a question of law against a decision by the Commission to withhold consent to a transfer.
258. Sub-paragraph (11) permits Scottish Water to appeal to the Court of Session, on a question of law, against the granting of consent to transfer a water or sewerage services licence, in the same way that Scottish Water may appeal against the granting of the original licence under paragraph 1(10) of schedule 2.
259. Sub-paragraph (12) provides that the decision of the Court of Session in an appeal under sub-paragraphs (10) or (11) shall be final.
260. Sub-paragraph (13) ensures that any attempt to assign a water or sewerage services licence will be a transfer for the purposes of paragraph 4 of schedule 2 to the Act.

#### ***Paragraph 5: Powers of entry etc.***

261. **Paragraph 5** provides for the Commission to have powers of entry to premises so as to enable it to discharge its duty, under section 8(1) of the Act, to monitor and ensure compliance with licence conditions. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, to exercise the powers specified in sub-paragraph (2).
262. Sub-paragraph (2)(a) enables the Commission and its officials to enter (i) the premises of any water or sewerage services provider (“the first category”), (ii) the premises of anyone that a provider has arranged to provide with services (“the second category”), or (iii) the premises of any other person (“the third category”). Sub-paragraphs (2) (b) and (c) respectively make provision for powers to inspect such documentation and articles, and to remove them from the premises, as the Commission considers necessary to give effect to its monitoring and compliance duties. The exercise of the powers of entry is qualified by sub-paragraph (3). Thus whereas the Commission, or anyone authorised by the Commission, can enter the premises of a licensed provider in terms of the first category at any reasonable time without notice, they can only enter premises falling within the second and third categories on giving 24 hours' notice. Moreover, sub-paragraph (4) specifies that premises in the third category can be entered only where the Commission is satisfied that gaining access to premises in the first and second categories only would not be sufficient to enable it to discharge its monitoring and compliance duties. In practice, this would mean that the Commission could seek entry to premises in the third category only where it had grounds for believing that it might obtain there information relevant to monitoring and compliance that could not be obtained in any of the premises in the preceding two categories. The effect of these qualifications is to direct the Commission's powers of entry, first to the premises of service providers, then to the premises of customers of service providers, and only in the last resort to premises in general.
263. Sub-paragraph (5) requires that the Commission be given reasonable assistance by the owners and occupiers of premises that are subject to the exercise of the Commissioner's powers of entry. This duty extends to those who are present on the premises when the powers are being exercised.

#### ***Paragraph 6: Powers of entry etc.: further provision***

264. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, and subject to the terms of any warrant, to be accompanied by others on, and to take equipment on to, the premises so as to be able to conduct monitoring and enforcement activity effectively. Where appropriate, this must be done in a manner consistent with the terms of any warrant granted under paragraph 7. The sub-paragraph also requires anyone exercising

a power of entry and if required to do so, to provide written evidence of their authority to do so. Sub-paragraph (2) requires those entering premises to leave them in a condition no less secure than that in which they found them.

265. Sub-paragraphs (3) to (4) provide protection for those whose premises are entered under paragraph 5(2)(a). Sub-paragraph (3) places a duty on the Commission to pay compensation to anyone who suffers damage or loss as a result of the powers of entry being exercised except where such loss or damage is attributable to the fault of the person who sustained it. Sub-paragraph (4) makes it an offence for anyone to disclose any commercially sensitive information obtained as a result of exercising the power of entry. Sub-paragraph (5) provides that anyone obstructing the Commission, or failing without reasonable excuse to provide assistance to the Commission, in the exercise of the powers at this paragraph is guilty of an offence. The penalties for these offences are set out in sub-paragraph (6) and are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

### ***Paragraph 7: Warrants***

266. **Paragraph 7** provides for a sheriff or justice of the peace to grant warrants where this is necessary to give effect to the powers of entry conferred at paragraph 5.
267. Sub-paragraph (1) establishes, that a sheriff or justice, where satisfied that evidence provided to them on oath meets at least one of the conditions specified at sub-paragraph (2), can issue a warrant authorising the Commission, or those authorised by it, to enter premises as provided for at paragraph 5(2). As a warrant authorises the use of force if necessary, the power to issue a warrant is qualified to ensure that it is exercised only after there has been proper consideration of the circumstances. Sub-paragraph (2) specifies the conditions at least one of which must be satisfied before a sheriff or justice issues a warrant. In essence these ensure that a warrant will be issued only in circumstances where entry cannot be gained without one, or where entry is required urgently. Sub-paragraph (3) further qualifies the power to issue a warrant in cases where the conditions in sub-paragraphs (2)(a) and (b) are satisfied, by requiring the Commission to have given notice of the intention to apply for a warrant, save where to have done so would defeat the purpose of gaining entry to premises.
268. Sub-paragraph (4) provides that a warrant remains in force until the purposes for which the warrant was issued have been fulfilled, for example when entry to the premises cited in the warrant has been gained.

### ***Paragraph 8: Enforcement notices***

269. **Paragraph 8** gives the Commission power to issue enforcement notices and describes the process to be followed in issuing these notices.
270. Sub-paragraph (1) gives the Commission power to issue enforcement notices if a water or sewerage services provider has contravened or is contravening a licence condition and the contravention is likely to recur. The Commission can do so only where it appears to it that the provider is not taking appropriate steps to remedy the contravention or prevent it from recurring. Any enforcement notice that the Commission issues must contain information about the contravention and the steps required by the provider to remedy it and about the timescales for doing so, as specified at sub-paragraphs (2) to (4).
271. Sub-paragraphs (5) and (6) specify the steps that the Commission must take before issuing an enforcement notice, including consultation with Scottish Water and other appropriate persons and allowing the provider to whom the notice will relate to make representations. Sub-paragraph (7) requires the Commission to have regard to any representations made to it by the provider about an enforcement notice. Sub-paragraph (8) requires copies of enforcement notices to be sent to Ministers and Scottish Water.

272. Sub-paragraph (9) gives those on whom a notice has been served a right to appeal to the sheriff against the notice within 14 days. Sub-paragraph (10) empowers the sheriff to make any order in respect of an appealed notice as considered necessary and provides that the sheriff's decision is final in such cases.
273. Sub-paragraphs (11) and (12) empower the Commission to withdraw, waive or relax any requirement of an enforcement notice, without in any way restricting its power to issue subsequently a further notice in respect of the same contravention.

***Paragraph 9: Enforcement notices: offences***

274. Paragraph 9 sets out the sanctions for a water or sewerage services provider, who having been served with an enforcement notice, fails to satisfy the requirements of the notice. Sub-paragraphs (1) and (2) specify that such a failure is an offence and that where a failure recurs subsequently, that too is an offence. Sub-paragraph (3) specifies that the penalties for anyone guilty of these offences are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

***Paragraph 10: Revocation of licences***

275. Paragraph 10 gives the Commission the power to revoke a water or sewerage services licence under certain circumstances.
276. Sub-paragraph (1) provides that a licence may in principle be revoked. Sub-paragraph (2) empowers the Commission to revoke a licence where there has been a failure to comply with the terms of an enforcement notice. Sub-paragraph (3) empowers the Commission to revoke a licence where there has been a failure to comply with a term or condition of a licence and where it considers that the provider would fail to comply with an enforcement notice relating to the contravention.
277. Sub-paragraph (4) allows the Commission to revoke a licence if it considers that a water or sewerage services provider no longer has the ability to perform adequately the activities in their licence. In making this decision the Commission must have regard to the factors mentioned in section 7(2) of the Act and to other matters specified under that subsection. Finally, sub-paragraph (5) allows the Commission to revoke a licence if requested to do so by a provider.
278. Sub-paragraph (6) provides that before revoking a licence the Commission must consider the terms and condition of the licence, the provider's responsibilities to its customers and any other relevant matters. Sub-paragraph (7) provides that a notice of revocation must specify the reasons for the revocation and the date from which it will have effect.
279. Sub-paragraph (8) allows a provider on whom a notice of revocation is served to appeal to the sheriff against the notice within 14 days. Sub-paragraph (9) empowers the sheriff to make any order in respect of such an appeal and provides that the decision of the sheriff is final.
280. Sub-paragraph (10) requires the Commission to send a copy of the notice of revocation to Scottish Water and the Scottish Ministers and to publish the notice, once it comes into effect.

***Paragraph 11: Penalties for contravention of licence***

281. Paragraph 11 gives the Commission the power to impose financial penalties on water or sewerage services providers if they contravene the terms and conditions of their licence. The Commission is required to prepare and publish a policy with respect to the imposition of penalties.

282. Sub-paragraph (1) empowers the Commission to impose penalties for contravention of licence terms and conditions. In the interests of transparency, sub-paragraph (2) requires the Commission to develop and to publish, and to keep under review and revise, a statement of its policy for imposing penalties on providers who contravene the terms and conditions of their licences. The Executive expects the Commission to consult publicly on the basis of a draft policy statement prior to a final statement being published.
283. Sub-paragraph (3) requires the Commission to notify a provider of its intention to impose a penalty. Sub-paragraph (4) requires the Commission to have regard to any policy statement under sub-paragraph (2) and any representations from a provider in respect of a notice before determining the penalty to be imposed on the provider. Sub-paragraph (5) enables a provider to appeal to the sheriff within 14 days against any penalty imposed by the Commission and the penalty is not recoverable until the appeal is withdrawn or finally determined. Sub-paragraph (6) empowers the sheriff to make any order in respect of such an appeal that is considered necessary and provides that the sheriff's decision in such cases is final.
284. Sub-paragraph (7) ensures that the Commission will be able to recover any penalties that it imposes by using general debt recovery procedures and remedies. It ensures too that a former provider can be pursued for any penalty, even where it no longer holds a licence. In terms of sub-paragraph (8), the proceeds of penalties recovered must be paid into the Scottish Consolidated Fund.

#### ***Paragraph 12: Register of licences***

285. **Paragraph 12** requires the Commission to keep a register of water and sewerage services licences and sets out a list of the information which must be included in the register.
286. Sub-paragraph (1) empowers the Scottish Ministers to prescribe, by order, the manner of the register, which the Commission must keep. Sub-paragraph (2) specifies certain information, which must be included in the register and gives Ministers the power to prescribe by order any additional information which must be contained in the register. Sub-paragraph (3) provides that the register must be available for inspection by any person at any reasonable time.

#### ***Schedule 3: Certain Pre-Existing Agreements as to Charges***

287. **Schedule 3**, introduced by section 21(6) of the Act, makes provision to preserve the charging arrangements which apply where, before the coming into force of this schedule, Scottish Water have used existing statutory powers to enter into “relevant agreements” with non-household customers for charging (other than through a charges scheme) for services provided under those agreements. Once the relevant provisions of the Act are commenced, Scottish Water will no longer have the power to enter into such agreements for charging for services provided to customers in exercise of core functions, and any charges will be determined instead according to a charges scheme (under the new section 29A of the 2002 Act) or an authorised departure from a charges scheme (under the new section 29E of the 2002 Act).

#### ***Paragraph 1***

288. **Paragraph 1** defines a “relevant agreement” and a “relevant customer” for the purpose of schedule 3. These are agreements between Scottish Water and another person in respect of “eligible premises” (as defined in section 27 of the Act) which have been entered into before the coming into force of this schedule by virtue of the statutory powers set out in sub-paragraph (3) or otherwise and which make provision for the relevant customer to pay charges for services provided under those agreements other than by reference to a charges scheme.

289. Sub-paragraph (2) further specifies that, for the purposes of sub-paragraph (1), an agreement between Scottish Water and another person includes an agreement to which Scottish Water has become party in consequence of a transfer of obligations, by virtue of any enactment or contractual arrangements, which includes, for example, obligations which have been entered into by Scottish Water's statutory predecessors and which have subsequently transferred to Scottish Water. However, it will not include those agreements to which section 47 of the Water (Scotland) Act 1980 applies. Section 47 of the 1980 Act makes provision to preserve certain agreements made between Scottish Water's statutory predecessors prior to 1949 and their customers, regarding the provision of water supplies free of charge or on other favourable terms, in return for the granting of, for example, way leaves to lay infrastructure.

### **Paragraph 2**

290. **Paragraph 2** sets out the arrangements for relevant agreements to be identified and considered by the Commission, in order to assess the relevant charges to be paid by customers under those agreements and to determine the charges which any licensed provider, in respect of such customers, should pay to Scottish Water for services provided under those agreements.
291. Sub-paragraph (1) requires Scottish Water to send details of relevant agreements to the Commission within one month of the schedule coming into force. Sub-paragraph (2) provides for the Commission to assess, in respect of each agreement sent, the relevant charges which the relevant customer is still entitled to pay under the agreement, and based on this and the costs which any water and sewerage services provider will incur where it provides services to that customer under the agreement and any other matter the Commission considers appropriate, to determine the charges which a provider should pay to Scottish Water (as read with sub-paragraph (6)(a)).
292. Sub-paragraph (3) requires the Commission to give each relevant customer written notice of its assessment of the relevant charges payable under the agreement and the amount which Scottish Water will be able to recover from a provider in respect of the customer. This notice is also to be sent to Scottish Water and every water and sewerage services provider, by such date as the Scottish Ministers may direct.
293. Sub-paragraph (5) sets out the circumstances in which the charging arrangements at sub-paragraph (6) apply. In the case where a relevant customer is served by a water and sewerage services provider, Scottish Water can recover any charges determined under sub-paragraph (2)(b) from the provider and the provider in turn can charge the relevant customer no more than the amount set out in the relevant agreement.
294. Sub-paragraph (7) provides that Scottish Water should bear the cost of any shortfall between the charges determined under sub-paragraph (2)(b) and any charges determined under a charges scheme.
295. Sub-paragraph (8) provides that where a relevant customer is not or has ceased to be served by a water and sewerage services provider for any reason, Scottish Water should demand and recover directly from the relevant customer no more than the relevant charge as set out in the relevant agreement as assessed under sub-paragraph (2)(a).

### **Paragraph 3**

296. **Paragraph 3** makes provision in relation to the status of relevant agreements under this schedule and the application of charges schemes to them. Sub-paragraph (1) disapplies a charges scheme in relation to any services covered by relevant charges determined under this schedule unless the agreement concerned has expired or has been terminated. Sub-paragraph (2) clarifies that a relevant agreement is not to expire or terminate simply as a result of the change of a water and sewerage services provider in respect of a relevant customer.

*These notes relate to the Water Services etc. (Scotland) Act 2005 (asp 3)  
which received Royal Assent on 17 March 2005*

297. Sub-paragraph (3) provides that a relevant agreement cannot be renewed on its expiry or termination or extended at any time.

#### ***Schedule 4: Powers of Entry under the Coal Industry Act 1994***

298. [Schedule 4](#) is introduced by section 30(4) and inserts schedule 1C into the Coal Industry Act 1994. Commentary on the provisions of schedule 1C is to be found within the commentary on the provisions of section 30 of the Act. The schedule makes further provision in relation to these amendments.

#### ***Schedule 5: Amendments to Enactments***

299. [Schedule 5](#) is introduced by section 32 of the Act. The schedule makes amendments to other enactments which are required in consequence of provisions made under this Act.

#### ***Paragraph 1: Sewerage (Scotland) Act 1968 (c.47)***

300. [Paragraph 1](#) repeals section 29(3)(j) of the Sewerage (Scotland) Act 1968. That provision allows Scottish Water to set charges in relation to the disposal of trade effluent into sewers. Under the new arrangements introduced by the Act, all such charges will be set by reference to the charges scheme made under new section 29A of the Water Industry (Scotland) Act 2002.

#### ***Paragraph 2: House of Commons Disqualification Act 1975 (c.24)***

301. [Paragraph 2](#) repeals the section of Part III of schedule 1 to the House of Commons Disqualification Act 1975 which relates to the Water Industry Commissioner. This specifies offices the holders of which are disqualified from being a member of the House of Commons. Since the Water Industry Commissioner is replaced by the Water Industry Commission under the Act, the reference to the Water Industry Commissioner needs to be removed.

#### ***Paragraph 3: Race Relations Act 1976 (c.74)***

302. [Paragraph 3](#) repeals the section of Part II of schedule 1A to the Race Relations Act 1976 which relates to the Water Industry Commissioner. This Part specifies offices the holders of which are subject to the general statutory duty to eliminate unlawful racial discrimination and promote equality of opportunity in the carrying out of their functions. As above, the reference to the Water Industry Commissioner needs to be removed.

#### ***Paragraph 4: Water (Fluoridation) Act 1985 (c.63)***

303. [Paragraph 4](#) replaces references in the Water (Fluoridation) Act 1985 to the Commissioner with references to the Commission.

#### ***Paragraph 5: Public Finance and Accountability (Scotland) Act 2000 (asp 1)***

304. [Paragraph 5](#) replaces references in the Public Finance and Accountability (Scotland) Act 2000 to the Commissioner, with references to the Commission.

#### ***Paragraph 6: Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)***

305. [Paragraph 6\(a\) to \(d\)](#) repeals all references to the Water Industry Commissioner in the Ethical Standards in Public Life etc. (Scotland) Act 2000. Sub-paragraph (e) replaces these references by adding the Water Industry Commission established by the Act to the list of devolved public bodies. This provides that the Commission and its members will be subject to that Act and required to draw up and comply with a code of conduct under that Act.

**Paragraph 7: Water Industry (Scotland) Act 2002 (asp 3)**

306. Paragraph 7 amends the Water Industry (Scotland) Act 2002 in consequence of the provisions of the Act. Sub-paragraph (1) replaces references to the Commissioner with references to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part I of the Act.
307. Sub-paragraph (2) amends section 3(6) of the 2002 Act (functions of the Commissioner) and replaces references to customers there with references to persons whose premises are connected to, or might reasonably become connected to, the public water supply or sewerage systems. This ensures that, in its duty to advise Ministers on the standard of service Scottish Water provides and the manner in which it conducts relations with “customers”, the Water Industry Commission will represent those persons.
308. Sub-paragraph (3) amends section 5 (annual reports by, and information from, the Commissioner) of the 2002 Act in relation the content of the Commission’s annual report, to require the report to contain a summary of any action taken by the Commission in response to representations and recommendations made by the Customer Panels under the amended section 2 of the 2002 Act (as introduced by section 3(1) of the Act).
309. Sub-paragraph (4) replaces references to Scottish Water’s “customers” in section 26 (customer standards code) of the 2002 Act, with reference to persons whose premises are connected to, or might reasonably become connected to, the public water supply or sewerage systems. This ensures that Scottish Water’s customer standards code will apply in relation to services provided to such persons. It also repeals subsection (2) of section 26 of that Act, which provided that a customer standards code had to be submitted to the Commissioner no later than the date on which Scottish Water first sent a charges scheme to the Commissioner. This is in consequence of the repeal of section 32 of the 2002 Act by section 21(3) of the Act (and its replacement with new provisions as regards the determination of Scottish Water’s charges).
310. Sub-paragraph (5) repeals section 40 of the Act (reduced charges), which allowed Ministers to provide by regulations that certain people should pay Scottish Water reduced charges. In future provision for reduced charges will be given effect through Ministers’ statement under the new section 29D which Scottish Water will take account of in making charges schemes under the new section 29A.
311. Sub-paragraph (6) replaces wording in section 49 of the 2002 Act to ensure that the Scottish Ministers and Scottish Water are obliged to carry out their functions with regard to the interests of all end users of the public water and sewerage systems. The intention of this amendment is to exclude licensed water and sewerage services providers from the scope of this customer interest duty. Although those providers will be customers of Scottish Water in its wholesale capacity and will receive water and sewerage services from them, the high level customer interest duty placed on Ministers and Scottish Water is to be exercised with regard to direct (i.e. domestic) customers of Scottish Water, and customers of the licensed providers, but not the providers themselves.
312. Sub-paragraph (7) amends section 57(7) of the 2002 Act (information and reports) to require Scottish Water to include in its annual report, information on the extent to which it has complied with requirements made under sections 13(2), 15(1) or (5) of the Act.
313. Sub-paragraph (8) adds the new section 56B to the orders and regulations which are excluded from those orders and regulations to be subject to negative procedure in the Scottish Parliament; and includes section 56B with the sections under which orders and regulations may be made subject to affirmative procedure.
314. Sub-paragraph (9) amends section 70 of the Act (interpretation) to the effect that “charges scheme” has the meaning given to it under the new section 29A(1) of the 2002 Act, and substitutes a definition of the Water Industry Commission for that of the Water Industry Commissioner.

*These notes relate to the Water Services etc. (Scotland) Act 2005 (asp 3)  
which received Royal Assent on 17 March 2005*

315. Sub-paragraph (10) repeals Part I of schedule 1 (the Commissioner) to the Act, since the Water Industry Commissioner is replaced by the Water Industry Commission under Part I of the Act.

***Paragraph 8: Scottish Public Services Ombudsman Act 2002 (asp 11)***

316. Paragraph 8 inserts the Convener of the Water Customer Consultation Panels into schedule 2 (listed authorities) to the Scottish Public Services Ombudsman Act 2002, to ensure that the Convener’s activities come under the scrutiny of the Ombudsman. It also replaces the reference in that Act to the Commissioner with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part 1 of the Act.

***Paragraph 9: Freedom of Information (Scotland) Act 2002 (asp 13)***

317. Paragraph 9 inserts the Convener of the Water Customer Consultation Panels into schedule 1 (Scottish public authorities) to the Freedom of Information (Scotland) Act 2002, to ensure that the Convener is subject to the requirements of that Act. It also replaces the reference in that Act to the Commissioner with a reference to the Commission, again since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part 1 of the Act.

***Paragraph 10: Public Appointments and Public Bodies etc.(Scotland) Act 2003 (asp 4)***

318. Paragraph 10 repeals the entry relating to the Commissioner in schedule 2 to the Act, and replaces it with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part I of the Act.

**Parliamentary History**

319. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports and other papers.

<b><i>Proceedings and Reports</i></b>	<b><i>References</i></b>
<b>Introduction</b>	
11 June 2004	Bill as introduced (SP Bill 23)
<b>Stage 1</b>	
<b><i>a) Environment and Rural Development Committee</i></b>	
19 <sup>th</sup> Meeting, 9 September 2004	cols 1087 - 1128
20 <sup>th</sup> Meeting, 15 September 2004	cols 1134 - 1181
21 <sup>st</sup> Meeting, 22 September 2004	cols 1214 - 1224
22 <sup>nd</sup> Meeting, 29 September 2004	cols 1248 - 1275
23 <sup>rd</sup> Meeting, 5 October 2004	cols 1308 - 1327
13 <sup>th</sup> Report, 2004 (Session 2)	Stage 1 Report on the Water Services etc. (Scotland) Bill (SP PAPER 233)
<b><i>b) Finance Committee</i></b>	
21 <sup>st</sup> Meeting, 9 September 2004	cols 1612 - 1634



*These notes relate to the Water Services etc. (Scotland) Act 2005 (asp 3)  
which received Royal Assent on 17 March 2005*

<b><i>Proceedings and Reports</i></b>	<b><i>References</i></b>
22 <sup>nd</sup> Meeting, 14 September 2004	cols 1654 - 1665
Report to ERD Committee, 29 September 2004	Report on Water Services etc. (Scotland) Bill
<b><i>c) Subordinate Legislation Committee</i></b>	
26 <sup>th</sup> Meeting, 28 September 2004	cols 582 - 584
27 <sup>th</sup> Meeting, 5 October 2004	cols 594 - 596
Report to ERD Committee included in ERD Committee Stage 1 Report	Stage 1 Report on the Water Services etc. (Scotland) Bill (SP PAPER 233)
<b><i>d) Consideration by the Parliament</i></b>	
Stage 1 debate, 17 November 2004	17 November 2004 cols 11897 - 11949 and 11961 - 11965
<b>Stage 2</b>	
<b><i>a) Environment and Rural Development Committee</i></b>	
Pre-Stage 2, 28 <sup>th</sup> Meeting, 24 November 2004	cols 1369 - 1396
29 <sup>th</sup> Meeting, 8 December 2004	cols 1408 - 1420
30 <sup>th</sup> Meeting, 15 December 2004	cols 1437 - 1450
Bill as amended at Stage 2	Bill as amended (SP Bill 23A)
<b><i>b) Finance Committee</i></b>	
5 <sup>th</sup> Meeting, 8 February 2005	cols 2348 - 2353
<b><i>c) Subordinate Legislation Committee</i></b>	
4 <sup>th</sup> Meeting, 1 February 2005	cols 784 - 786
4 <sup>th</sup> Report, 8 February 2005	Report on the Water Services etc. (Scotland) Bill at Stage 2 (SP 288)
<b>Stage 3</b>	
<b><i>Consideration by the Parliament</i></b>	
Stage 3 debate, 9 February 2005	9 February, cols 14358 - 14384 and 14416 - 14417
Bill passed, 9 February 2005	Bill as passed (SP Bill 23B)
<b>Royal Assent</b>	
17 March 2005	Water Services etc. (Scotland) Act 2005