

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **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.
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.

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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

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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



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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

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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 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

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

- 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 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.
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.
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 as a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of statutory public sewerage services.