

WATER SERVICES ETC. (SCOTLAND) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Provision of Water and Sewerage Services

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 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 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.