

*These notes relate to the Pow of Inchaffray Drainage Commission (Scotland) Act 2019 (asp 2) which received Royal Assent on 17 January 2019*

# **POW OF INCHAFFRAY DRAINAGE COMMISSION (SCOTLAND) ACT 2019**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1 – The Commission**

##### **Constitution**

##### ***Section 1 – The Pow of Inchaffray Drainage Commission***

11. **Section 1** incorporates the Commission as a body corporate called the Pow of Inchaffray Drainage Commission and provides, in accordance with schedule 1, for the Commission’s functions, powers etc.

##### ***Section 2 – The Commissioners***

12. **Section 2** provides that the Commission is to consist of nine Commissioners representing the different sections of land benefited by the Pow (“benefited land”). The number of Commissioners for a section of the benefited land can be amended by a resolution of heritors passed in compliance with section 9.

##### **The Pow and benefited land**

##### ***Section 3 – Extent of the Pow and benefited land***

13. **Section 3** defines the Pow as the Pow of Inchaffray shown on the land plans deposited with the Scottish Parliament and the “associated works”. The associated works comprise ditches shown on the plans, further ditches within the benefited land included by agreement or by a resolution of heritors passed in compliance with section 9, and banks and other structures associated with the Pow. Ditches within the Pow may be excluded by a resolution passed in compliance with section 9.
14. **Section 3(4)** divides the Pow into four sections for the purpose of appointing Commissioners. The boundaries between each section may be altered by a resolution of heritors passed in compliance with section 9.

##### **Appointment of Commissioners etc.**

##### ***Section 4 – Appointment of Commissioners etc.***

15. **Section 4** provides for the appointment of Commissioners in accordance with schedule 2.

##### ***Section 5 – First appointments of Commissioners***

16. **Section 5** sets out the provisions for the transition from the existing serving Commissioners appointed under the 1846 Act to nine Commissioners under section 2.

Prior to section 2 coming into force, the serving Commissioners must choose three serving Commissioners as the Commissioners for the lower, middle and upper sections. These three Commissioners are to continue in office for 24 months and the others will cease to be Commissioners. Six further Commissioners must then be appointed under schedule 2, one for each of the lower, middle and upper sections and three for the Balgowan section. These Commissioners are to be appointed at a heritors' meeting within two months of the Act coming into force. This is to allow the additional Commissioners to be appointed by the time section 2 comes into force (three months after the rest of the Act) as, in accordance with paragraph 3(c) of schedule 2, a Commissioner is to be appointed one month before that Commissioner's appointment takes effect.

### ***Section 6 – Commission meetings***

17. **Section 6** provides for meetings of the Commission in accordance with schedule 3.

### **Heritors' meetings etc.**

### ***Section 7 - Heritors' meetings convened by the Commission***

18. **Section 7** sets out when the Commission must call a meeting of heritors, and when it may do so. The Commission must call a heritors' meeting when necessary to appoint a Commissioner; before each general business meeting of the Commission (held twice a year); and (where requested to do so by three or more heritors) to consider a resolution to: change the number of Commissioners for each section of the benefited land; alter the boundaries of each section; to include or exclude a ditch from the Pow; or terminate the appointment of a Commissioner. The Commission may call a heritors' meeting for any other purpose at any other time. Before the Commission convenes a heritors' meeting it must give not less than 10 days' notice to heritors and provide them with the details of the meeting, including the agenda. The quorum for such a meeting is three heritors.

### ***Section 8 – Heritor's representative***

19. **Section 8** provides that a heritor may, by giving notice to the Clerk, appoint a person to represent the heritor for the purposes of the Act. For example, a heritor who does not live in the Pow area can appoint a local representative to attend meetings and vote for a resolution on the heritor's behalf.

### ***Section 9 – Alterations by heritors***

20. **Section 9** provides that where the Act requires a resolution to comply with this section it must be voted for by heritors representing at least 75% of the sum of the chargeable values of all heritors' land.

## **Part 2 – Annual Assessments etc**

### ***Section 10 – Annual budget and assessments***

21. **Section 10** introduces schedule 4, which provides for the preparation and confirmation of the budget for each assessment year and for heritors' rights to make representation on, and require a review of, the draft budget. The provisions of this schedule are explained below.
22. The section also provides for the calculation of the annual assessment payable by each heritor. Each heritor is to pay a share of the annual budget based on the "chargeable value" – that is, the assumed value of the benefit to the heritor's land of the work carried out under the Pow Acts (this Act, the 1846 Act and the 1696 Act). The chargeable value is calculated in accordance with schedule 5. The amount that each heritor must pay is the chargeable value multiplied by the "rate poundage" for the assessment year – namely the total amount of the year's budget divided by the sum of all the chargeable values.

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23. Heritors are notified by the Commission of the amount each must pay by way of an assessment notice. The assessment is payable within 28 days of receipt of the assessment notice or, if later, by the first day of the assessment year.
24. The Commission must notify each heritor of the chargeable value of the heritor's land, and how it has been calculated, within 2 months of the day after the Act receives Royal Assent.

### ***Section 11 – Revaluation of assumed values and base value***

25. **Section 11** provides that the Commission must have the assumed value and base value per acre, used to calculate chargeable values (and initially fixed in schedule 5) revalued every 10 years. The revaluation is to be carried out by a surveyor appointed by the Commission.
26. Before finalising a revaluation, the surveyor must notify each heritor of the proposed revaluation. Heritors then have 28 days to make representations to the surveyor on the proposed revaluation, and the surveyor must have regard to any such representations in making the revaluation.
27. The Bill provides for revaluations to take effect from the commencement of the first assessment year following completion of the revaluation. The intention is that in practice this will be every 10th anniversary of the commencement of the first assessment year, but this provision ensures that, if there are delays, any resulting changes in chargeable values will not be retrospective.

### ***Section 12 – Amendments to land categories to meet changed circumstances***

28. **Section 12** sets out the circumstances in which the Commission may appoint a surveyor to amend the land categories in schedule 5 and the procedure for doing so.
29. Before making an amendment, the surveyor must notify each heritor of the proposed amendment. Heritors then have 28 days to make representations to the surveyor on the proposed amendment, and the surveyor must have regard to any such representations in making the revaluation.
30. Amendments are to take effect from the commencement of the first assessment year following the making of the amendment.

### ***Section 13 – Surveyor's professional requirements***

31. **Section 13** requires a surveyor appointed by the Commission for the purposes of sections 11 and 12 to be a member of the Royal Institution of Chartered Surveyors in Scotland or any successor body.

### ***Section 14 – Commission may act as surveyor's agent***

32. Where the Commission has appointed a surveyor under section 11 or 12, the Commission may act as the surveyor's agent for the purpose of communicating between the surveyor and the heritors.

### ***Section 15 - Land Plans***

33. **Section 15** requires the Commission to make the land plans available for inspection, free of charge, at the Clerk's offices during ordinary office hours, and must also be made available electronically (for example, on a website). The Commission is to amend the land plans where a change is made following a resolution by heritors to include ditches or exclude ditches from the Pow or alter the boundaries of the sections of the benefited land.

### ***Section 16 – Register of Heritors***

34. The Commission must maintain a register with particulars of the heritors and plans showing the benefited land owned by each heritor. Heritors or persons ceasing to be heritors must notify the Commission of changes. The Commission is to make the register available for inspection, free of charge, at the Clerk's offices during ordinary office hours, and must also make it available electronically (e.g. on a website).

## **Part 3 – Miscellaneous and General**

### ***Section 17 – Access to the Pow***

35. **Section 17** gives the Commission a statutory right of access to the benefited land and affected land for any purpose connected with the Commission's functions, rights and obligations. Affected land, as defined in section 27, is land within six metres of the top of a bank of any part of the Pow. Unless it is an emergency, the Commission is to give not less than seven days' notice to the owner of the land over which access is required. The Commission can take access to a building only with the consent of the owner or occupier. The Commission must make good, or compensate for, any damage caused.

### ***Section 18 – Notice of planning applications***

36. **Section 18** provides that the Commission will be treated as an owner of the benefited land and affected land for (and only for) the purposes of section 35(1) of the Town and Country Planning (Scotland) Act 1997. Accordingly, the Commission will be entitled to receive notice of any planning application that relates to the benefited land or the affected land.

### ***Section 19 – Consent for activities affecting the Pow and adjacent land etc.***

37. **Section 19** requires any person, other than a local authority, to obtain the consent of the Commission before doing any thing that may obstruct the Pow or limit or restrict the Commission's access under section 17; or before discharging anything into the Pow or abstracting water from it. A local authority must give notice, but does not require the Commission's consent.
38. The procedure for seeking consent is set out in schedule 6.
39. If a person carries out such an activity without the consent of the Commission, the Commission can require the person by way of notice to remedy the contravention or reimburse the Commission for costs incurred as a consequence. If a person fails to comply with such a notice the Commission may remedy the contravention and by a further notice require the person to reimburse the Commission for the costs of doing so.

### ***Section 20 – Liability of persons exercising functions***

40. **Section 20** clarifies that that a person appointed as a Commissioner will not be held personally liable in any civil or criminal proceedings for anything done in the exercise of a function of the Commission if acting in good faith.

### ***Section 21 – Court proceedings***

41. **Section 21** provides that the Commission may raise court proceedings to recover payments due.

### ***Section 22 – Interest on sums due***

42. Any debts due to the Commission carry interest at the judicial rate or a lower rate determined by the Commission.

### **Section 23 – Certification of land plans**

43. **Section 23** provides that the Clerk to the Commission may certify copies of the land plans as true copies.

### **Section 24 – Service of notices**

44. **Section 24** introduces schedule 7 which contains the provisions for the service of notices.

### **Part 4 – Final Provisions**

45. **Section 25** provides for the Clerk appointed under the 1846 Act to continue until replaced by the Commission. It also provides that if the Commission needs to give notice to a heritor before the Register of Heritors has been prepared, it must give notice to the person it believes, after reasonable enquiry, to be the heritor.
46. **Section 26** repeals the 1846 Act.
47. **Section 27** provides definitions for certain terms used in the Act.
48. **Section 28** provides that the Act is to come into force the day after Royal Assent, except for section 2 (which provides for nine Commissioners), which comes into force three months after Royal Assent.
49. **Section 29** provides that the short title is the Pow of Inchaffray Drainage Commission (Scotland) Act 2019.

### **The Schedules**

50. **Schedule 1** sets out the functions and powers of the Commission:
- Paragraph 1 sets out the functions of the Commission. Broadly, these are to maintain, renew and improve the Pow insofar as the Commission considers necessary or desirable to maintain effective drainage of the benefited land;
  - Paragraph 2 sets out the Commission’s general powers including the power to borrow money;
  - Paragraph 3 provides for appointment of a Clerk;
  - Paragraph 4 provides for the Commission to delegate functions to a committee of Commissioners;
  - Paragraphs 5 and 6 provides for the Commission to employ advisers;
  - Paragraph 7 provides for the Commission to regulate its own procedures except where these are set out in the Act;
  - Paragraph 8 provides that an act of the Commission is not invalid by virtue of there being a defect in the appointment of a Commissioner or a vacancy in the office of Commissioner;
  - Paragraphs 9, 10 and 11 make provision for finances, account and audit. Heritors are entitled to copies of audited accounts for which the Commission may charge a reasonable fee;
  - Paragraph 12 provides how documents are to be executed by the Commission.
51. **Schedule 2** sets out the procedure for appointing Commissioners for each section of the Pow and the grounds for early termination of appointment as a Commissioner.
52. A Commissioner must be either a heritor in that section or such a heritor’s representative. Commissioners for a section are appointed at a heritors’ meeting by the

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heritors who own land within that section. Except in specific circumstances, heritors must appoint a new Commissioner not later than one month before the appointment is to take effect. If no Commissioner is appointed at a meeting (for example if no-one is prepared to stand) the Commission may fill the vacancy by appointing a Commissioner for up to 12 months.

53. Except where the Act provides otherwise, a Commissioner is appointed for a 10 year term. Commissioners may be reappointed on any number of occasions. However, a person may not be reappointed as a Commissioner where that person's appointment as a Commissioner has been terminated under paragraph 13(2), unless the Commission is satisfied that the grounds for that person's previous termination as a Commissioner no longer apply.
54. The Commission must terminate a Commissioner's appointment if the Commissioner ceases to be a heritor. The Commission may terminate a Commissioner's appointment if the Commissioner is absent from two or more consecutive meetings without permission or, if in the Commission's view, is unable to continue or is otherwise unsuitable. A Commissioner's appointment may also be terminated by a majority vote of heritors owning land within the relevant section.
55. **Schedule 3** sets out provisions governing the meetings of the Commission.
56. The Commission must hold at least two general business meetings per year and may hold additional meetings if required. If a Commissioner cannot attend a meeting, the Commissioner can authorise another person to attend and vote on that Commissioner's behalf provided prior notification is given to the Clerk. The quorum for a meeting is five Commissioners and a decision of the Commission is to be made by a resolution passed unanimously by, or by a majority of, the Commissioners in attendance at the meeting. Where necessary, the Chair of the meeting is to have the casting vote. The Clerk must prepare a record of resolutions passed by the Commission and provide a copy to a heritor if requested.
57. **Paragraphs 6, 7 and 8** provide that Commissioners have duties to: avoid conflicts of interest; decline to accept benefits from third parties; and declare any interest in a proposed transaction or arrangement with the Commission. The duty of a Commissioner to avoid a conflict of interest is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or if the matter has been authorised by the Commission. If a Commissioner is aware of, or ought reasonably to be aware of, such an interest, the nature and extent of that interest must be declared unless such interest cannot reasonably be regarded as likely to give rise to a conflict of interest.
58. In a situation which could reasonably be regarded as giving rise to a conflict of interest, the duty of the Commissioner is not infringed if the matter giving rise to the situation has been authorised by the Commission. Commissioners need only declare an interest or refuse a benefit if the interest or acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
59. **Schedule 4** sets out how annual budgets are to be prepared and how heritors may require a review of the draft budget.
60. **Paragraphs 1 to 6** set out the process for the preparation of the draft budget and the issuing of provisional assessment notices. Prior to the commencement of each assessment year the Commission is to prepare a draft budget of anticipated expenditure for that assessment year. The budget is adjusted to take account of any anticipated surplus or shortfall from the current year and may also include provision for a reserve fund to cover extraordinary expenditure.
61. The fees and expenses incurred by the Commission in promoting the Bill (so far as not recovered in assessments made under the 1846 Act) may be recovered through the first three annual assessments.

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62. After the draft budget is prepared, the Commission must issue a provisional assessment notice to each heritor setting out the amount payable in accordance with the draft budget. Provisional assessment notices must include: a copy of the draft budget; the rate poundage and an explanation of how it is calculated; an explanation of how the amount of the assessment has been calculated; and details of how heritors can make representations on the draft budget.
63. [Paragraphs 7 to 12](#) set out the right of heritors to make representations on, and to require a review of, the draft budget. Heritors can make written representation to the Commission on the draft budget no later than 21 days following the date of the provisional assessment notice. The Commission must consider and respond to any such representations made, decide whether to amend the draft budget, and notify all heritors of its decisions, and the reasons for them.
64. [Paragraphs 13 to 15](#) set out heritors' rights to require an independent review of the draft budget and the procedures involved. If the amount of the confirmed draft budget exceeds the "budget review threshold", then a single heritor has the right to require a review, but if the budget is below the threshold, a minimum of 10 heritors is required. The budget review threshold is £60,000 in the first assessment year, and is then adjusted in line with the retail price index in subsequent years. Where the Commission is required to review the draft budget, it must refer the budget to an independent expert within 14 days for a decision. The independent expert must be appointed by the Association of Drainage Authorities (or any successor body) or, where that is not possible, by the Royal Institute of Chartered Surveyors in Scotland (or any successor body).
65. The confirmed budget (for the purposes of section 10) is: the original (un-amended) budget; the budget as amended after representation; or the budget determined by an independent expert following review (this will include the costs of the review process).
66. [Schedule 5](#) sets out how the chargeable value of each heritor's land is to be calculated for the purposes of calculating annual assessments under section 10.
67. The chargeable value of a heritor's land is the "enhanced acreage value" multiplied by the acreage of the heritor's land. The enhanced acreage value is the "assumed value per acre" for the relevant land category less the "base value per acre" (£500). The land categories and assumed values per acre are set out in the table in paragraph 3.
68. Provision is made for land falling into more than one land category and for residential properties that are split into two or more units (e.g. flats).
69. If the category of a heritor's land changes during an assessment year (other than as consequence of building works), the change applies from the commencement of the next assessment year. If the change occurs as a consequence of building works, the change applies from the date the building works are completed.
70. [Paragraph 8](#) sets out the valuation assumptions that are to be used for the purpose of a revaluation under section 11.
71. [Schedule 6](#) sets out the procedure for applying for the consent of the Commission in terms of section 19. Under section 19, a person must obtain the consent of the Commission if the person wishes to obstruct the Pow, limit or restrict access to the Pow by the Commission or discharge any thing into, or abstract water from the Pow. The person wishing to carry out such an activity must first make an application to the Commission in writing, providing details of the proposal. The Commission may charge a reasonable fee for considering the application and may require the person to provide more information in support of the application. Following consideration of the proposal, the Commission may either grant consent on such terms (if any) as the Commission thinks fit or refuse consent. Where the Commission has not made a decision on an application within three months of receipt of the application or further information, the Commission is deemed to have granted consent.

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72. **Schedule 7** sets out the procedure for serving notices. Notice will be valid if in writing and sent by personal delivery, post or electronically. If a name or address cannot be ascertained after reasonable enquiry, a notice may be delivered to the person who appears to be resident or employed on the relevant land or affixed to a building or object on the land, for example, conspicuously attached to a door or a gate.