



# **Draft Water Services (Scotland) Bill**

Consultation on Proposed Provisions

October 2003  
Paper 2003/26

Scottish Executive Environment Group

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**OCTOBER 2003**

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## **PREFACE**

On 3 February 2003, Ross Finnie MSP, Minister for Environment and Rural Development, outlined the Scottish Executive's policy for addressing the possibility of competition on Scotland's public water and sewerage networks. He said that the Executive would amend the present regulatory framework for public water and sewerage services by introducing legislation that would:

Protect public health and the environment by prohibiting common carriage on the public water and sewerage networks.

Safeguard the Executive's social objectives by prohibiting anyone other than Scottish Water from serving household customers.

Establish a licensing regime to regulate the provision of retail services to non-household customers.

The First Minister, in his statement to the Scottish Parliament on 28 May 2003 about the Executive's legislative programme, confirmed that the Executive would consult publicly and then bring forward legislation on these matters. Accordingly, the Executive has prepared a draft Water Services (Scotland) Bill. This paper invites comments on the draft Bill. It comprises the following sections:

- A A description of the Executive's policy.
- B The draft Bill.
- C A commentary on the draft Bill.
- D A series of questions about the draft Bill and the policy underpinning it on which responses from the public and interested parties are sought.
- E A Partial Regulatory Impact Assessment of the provisions contained in the draft Bill.
- F Proposals that the Bill should include provisions relating to the Coal Authority.

## HOW TO RESPOND TO THIS CONSULTATION EXERCISE

### *Closing date for comments*

Comments on the issues raised in this paper and on the provisions proposed for the Water Services Bill should reach the Scottish Executive by **09 January 2004**.

### *Mail, fax and e-mail contacts*

Comments may be made by mail or fax to:

Scottish Executive  
Environment and Rural Affairs Department  
Water Services Unit  
Area 1-H  
Victoria Quay  
Edinburgh  
EH6 6QQ

Tel. 0131 244 0275

Fax 0131 244 0259

Comments by e-mail may be made to: [waterbill@scotland.gsi.gov.uk](mailto:waterbill@scotland.gsi.gov.uk)

### *Confidentiality of responses*

The Executive might wish to publish responses to this consultation document, or deposit them in the Scottish Parliament Information Centre. Unless the respondent states otherwise, the Executive will assume that there is no objection to their comments being made public in this way. Respondents who would prefer their comments not to be made public should make this clear in their response, in which case their wishes will be respected.

### *How to obtain further copies of this paper*

Further copies of this paper may be obtained from the Executive at the above address. Copies are also available in the Stationery Bookshop and on the Executive website at <http://www.scotland.gov.uk>.

## SECTION A

### The Water Services (Scotland) Bill: The Executive's Policy

#### Introduction

A1. Scottish Water is responsible for providing all services on the public water and sewerage networks across Scotland. It was established as a public corporation by the Water Industry (Scotland) Act 2002 and is accountable to the Scottish Ministers, and through them to the Scottish Parliament, for the provision of these services.

A2. Ministers appoint the chairman and non-executive members of the Scottish Water board and approve the appointment of its executive members. They set the policy framework within which Scottish Water performs its statutory functions and determine the level of financial resources available to it by setting annual limits on its borrowing and on the total amount of income available to it from customers as a whole.

A3. The Programme for a Better Scotland, published on 15 May 2003 confirmed Ministers’ commitment to retaining Scottish Water in the public sector. Ministers have set Scottish Water the task of achieving significant improvements in efficiency, so as to ease pressure on customer charges. They also require Scottish Water to continue contributing towards their public health, environment protection and social policy objectives by ensuring an uninterrupted supply of wholesome drinking water, the safe disposal of wastewater and the continuation of current charging arrangements for household customers.

A4. Scottish Water operates within a regulatory framework designed to safeguard public health and the environment and to promote the interests of customers. The framework’s main elements are:

- The Drinking Water Quality Regulator (established by the Water Industry (Scotland) Act 2002) - whose functions include ensuring that Scottish Water complies with drinking water quality duties set by Ministers under the provisions of the Water (Scotland) Act 1980.
- The Scottish Environment Protection Agency (established by the Environment Act 1995) - whose functions include regulating the impact that Scottish Water has on the environment, principally by granting consent to discharges into the aquatic environment from Scottish Water's wastewater treatment works.
- The Water Industry Commissioner for Scotland (first established by the Water Industry Act 1999 and re-established by the Water Industry (Scotland) Act 2002) – who has the function of promoting the interests of Scottish Water's customers. The Commissioner's particular functions are to investigate and report on customer complaints, advise Ministers on the level of income needed by Scottish Water to perform its functions and, in light of Ministers' decisions on that point, to approve annual water charges schemes proposed by Scottish Water.
- The Water Customer Consultation Panels (established by the Water Industry (Scotland) Act 2002) - whose function is to represent the views and interests of Scottish Water's customers in their respective areas.

A5. The framework does not include any provisions for any form of competition on the public networks. The possibility of such competition has increased since 2000, when the Competition Act 1998 came into force. The draft Bill, at section B of this paper, contains provisions to update the framework to ensure that Minister’s public health, environment protection and social policy objectives can continue to be met if competition develops.

## **Background**

### ***Scottish Water's Customers***

A6. Scottish Water supplies water services to over 95% of household properties and sewerage services to over 90% of such properties. The remainder is served by private water supplies and sewerage systems, which are the responsibility of their owners, not Scottish Water. Scottish Water also provides water and sewerage services to some 160,000 other premises, including shops, offices, hospitals, schools, hotels and factories and other industrial plant. Others in these categories either provide some or all of their water and sewerage services for themselves or contract with third parties to provide the services for them. A distinction can be drawn between those services provided by Scottish Water on the public networks and all other services provided by other parties either for themselves or for third parties not on the public networks (“off-network” services). The latter are subject to separate provisions within the regulatory framework and are not affected by the proposals outlined in this paper.

### ***The Competition Act 1998***

A7. The Competition Act 1998 introduced a clearer framework for competition in the United Kingdom than had been provided by earlier competition legislation. It brought into domestic law provisions (which parallel those under European law) and introduced new sanctions for anti-competitive behaviour. It applies to the provision of all types of goods and services and is enforced by the Office of Fair Trading (the OFT). In the case of the privatised utilities, the OFT and the relevant sector regulator have concurrent jurisdiction. The 1998 Act applies to Scottish Water, but in Scottish Water's case it is applied and enforced by the OFT alone as the Water Industry Commissioner does not have the same concurrent powers as the Office of Water Services (OFWAT) has in respect of the privatised water industry in England and Wales.

A8. The Competition Act includes two prohibitions:

- A prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which have the object or effect of preventing, restricting or distorting competition in the United Kingdom (or a part thereof) and which may affect trade within the United Kingdom (the "Chapter I prohibition"); and
- A prohibition of conduct by one or more undertakings which amounts to the abuse of a dominant position in a market in the United Kingdom (or part thereof), which may affect trade within the United Kingdom (the "Chapter II prohibition").

A9. These prohibitions, breaches of which carry penalties of up to 10% of annual turnover, affect Scottish Water in a number of ways. For example, they preclude it from seeking to retain particular customers within a customer group by offering them charges and

tariffs not available to other customers in the same group and in the same circumstances. Also, the basic principle of competition legislation relating to “essential facilities” carries significant implications for Scottish Water. Where certain assets (i.e. “essential facilities”) are uneconomic to duplicate, but access to, or use of, them is essential in order to compete effectively in a market, the owner of the assets may be required to provide competitors with access to them on an equitable basis. It can be argued that some Scottish Water assets, notably the water and sewerage pipe networks, constitute essential facilities. In such cases, and where safety, public health and other practical considerations make it feasible, Scottish Water might be required to make access to these facilities available to competitors. Failure to do so could leave it open to the charge of abusing a dominant position were it to be demonstrated that such a position existed in a particular case. This state of affairs could result in prospective new entrants to the market gaining access to, or otherwise benefiting from, the infrastructure vested in Scottish Water, with Scottish Water having to open parts of its networks to competitors in two possible ways that can be summarised as follows:

**Common carriage** – where Scottish Water would use its system of water mains to carry water treated by a competitor to the competitor’s customers, or where it would use its sewers to carry wastewater from a competitor’s customers to the competitor’s treatment works.

**Retail Competition** – where Scottish Water would have sole responsibility for treatment and distribution on the public networks. It would treat water or wastewater for a competitor and would distribute it to or from the competitor’s customers using the public networks. In such cases the role of Scottish Water would differ from its present role of supplier in that while it would continue physically to supply water and sewerage services, it would do so on behalf of the competitor and it would be the competitor rather than Scottish Water who would have the direct commercial relationship with the ultimate consumer of the service.

## **Executive policy**

### ***Risks and benefits of competition***

A10. Competition can bring benefits to customers. In general, it provides choice and encourages efficiency, keener prices, greater customer responsiveness, innovation and improved standards. In the water industry, common carriage could encourage competition in the provision of water and wastewater treatment services by enabling third parties to develop new treatment facilities that relied on the public networks to supply and serve their customers. There would also be scope to use retail competition as a means of providing customers with more choice in how they pay for water and sewerage services. However, these options also pose a range of risks.

### ***Prohibiting common carriage on the public networks***

A11. In the case of common carriage the risks would be to public health and the environment. Allowing third parties to add to the public networks drinking water that they had treated, or to draw from the public sewers sewage for treatment, would mean them becoming involved in the processes by which Scottish Water manages the infrastructure as a whole to ensure continuing compliance with drinking water and wastewater treatment regulations. This involvement would necessarily complicate the process and introduce

additional risks to it. In the case of drinking water, there would be the primary risk to public health from the insertion of treated water. Also common carriage would probably mean tapping new sources of water and this could impact on effective water resource management. These risks could be managed by placing strict operating conditions on the third party, but they could not be eliminated. Consequently, there would be a greater likelihood of failure within the process.

A12. Were such risks to be realised, the consequences could include contamination of the public water supply, interruption to the supply and damage to the public infrastructure - all of which would threaten public health. Similarly, on the wastewater side, there could be pollution, including sewage flooding, interruption to the supply and again damage to the public infrastructure - threatening public health and the environment.

A13. The Executive has concluded that these risks to public health and the environment outweigh any foreseeable benefits that might arise from competition in treatment services. It has decided therefore, in the interests of safeguarding public health and the environment, that the regulatory framework should be revised to preclude the possibility of anyone other than Scottish Water using the public networks to carry out the physical supply of water or sewerage services. To this end the draft Bill contains provisions prohibiting common carriage on the public water and sewerage networks.

#### ***Prohibiting retail competition for households***

A14. Retail competition poses risks for households. These risks arise from the nature, and impact on customers, of the current arrangements by which households pay for water and sewerage charges. A crucial feature of the current arrangements for charging domestic customers is the link between charges and the Council Tax band of the property served. Thus households occupying properties in Council Tax Band A pay two thirds of the charge paid by those in Band D and one third of the charge paid by those in Band H. In addition the discounts on Council Tax available to particular households are applied to water and sewerage charges too. These include a discount of 25% for all single adult households. Taken as a whole these arrangements provide that charges reflect broadly ability to pay, with those living in higher banded properties, who tend to be better off, paying more for their water and sewerage services than those in lower banded properties. However, these arrangements are dependent not only on the current link to Council Tax bands, but also on the practice of the local authorities collecting the charges along with Council Tax payments. Discounts in particular, which are dependent on the local authority applying its detailed information of an individual household’s circumstances, could not be maintained were another arrangement put in place, as any such arrangement could not be given access to the local authorities’ household information.

A15. Careful regulation would enable the effect of the link between Council Tax bands and water charges to be retained. However, there is no feasible means by which the range of discounts could be retained. Consequently, there is a serious risk that retail competition for households could mean new entrants to the market “cherry picking” high-banded properties, leaving low-banded properties and those attracting discounts to be served by Scottish Water. This would reduce Scottish Water’s revenues, leaving it little option but to increase charges to those customers who remained with it.

A16. In light of these very particular arrangements for charging, it is unlikely that competition would develop in a manner that would benefit all customers. Indeed, the expectation would be that low income and vulnerable households, such as single parents and single pensioners, would end up being worse off as the benefit to them of receiving a discount would be lost. Accordingly, the Executive has decided that the regulatory framework should also preclude the possibility of there being retail competition in the household sector. Therefore, the draft Bill contains provisions prohibiting this form of competition.

### ***Licensing non-household retail competition***

A17. This leaves open the possibility of retail competition for Scottish Water's 160,000 non-household premises. Such competition would mean Scottish Water continuing as the sole supplier of water and sewerage services on the public network, but with the possibility of new entrants to the market providing non-household customers with services such as meter reading and billing and collection of charges. In effect Scottish Water would become the wholesaler of water and sewerage services to the new entrant, with the new entrant becoming the retailer of these services to the end user. This would encourage Scottish Water to improve the efficiency with which it provides retail services at present and also the nature of these services. In itself that would offer a modest benefit to non-household customers. Additional benefits might include billing arrangements better suited to the needs of particular customers. This could include providing the operator of many sites with a single invoice in respect of all the sites at a frequency that suited the operator, or combining retail water and sewerage services with other utility services.

A18. Customers generally could benefit through the impact that providing wholesale services to retailers would have on Scottish Water. Providing wholesale services would require Scottish Water to improve the transparency and accuracy with which it accounts for the different costs of its business. This would make it easier for the Commissioner and retailers to check Scottish Water's progress in delivering efficiency and for Scottish Water itself to identify the scope for greater cost effectiveness. Thus the development of competition in one part of the business could be expected to provide an additional spur to efficiency beyond that provided by the current regulatory regime.

A19. A key consideration for the Executive is that the pressure on wholesale charges from retailers should not result in Scottish Water offering the retailers better charges at the expense of other customers. Keener charge levels must be based on improved efficiency within Scottish Water and its benefits must be available to all customers – household as well as non-household. There is an issue therefore of ensuring that those taking advantage of competition do not do so at the expense of other customers. It is important that the regime of economic regulation is capable of ensuring that retailers and their customers contribute fairly and proportionately to the costs of the public networks on which they would still rely for the service. Accordingly, the draft Bill contains provisions to establish a regime to license the providers of retail services that deliver that outcome.

### ***Licensing regime***

A20. The Executive proposes two types of licence:

- A Water Services Retail licence - whose purpose is to establish a legal right for the holder of such a licence to enter into contractual agreements with non-

domestic customers on the public networks, for the provision of water services.

- A Sewerage Services Retail licence - whose purpose is to establish a legal right for the holder of such a licence to enter into contractual agreements with non-domestic customers on the public networks, for the provision of sewerage services. This licence will apply to trade effluent services, though it will not affect Scottish Water's responsibility for monitoring compliance with trade effluent consents and agreements.

A21. Each will entitle the holder to become a wholesale customer of Scottish Water for those respective services. Only licence holders will be entitled to become wholesale customers and to offer retail services to customers on the public networks. It will be possible for a retailer to hold one or other or both licences depending on the services that they wish to offer to their customers.

### *The role of the Water Industry Commissioner in the licensing regime*

A22. The purpose of the licensing regime is to ensure equality of treatment for all customers served by the public networks. This is a task that falls within the broad functions of the Water Industry Commissioner, as the economic and customer service regulator of Scottish Water. It is proposed that the Bill should amend the detail of the Commissioner’s remit and functions to reflect the possibility of others than Scottish Water providing retail services to customers on the public networks.

A23. At present the Commissioner acts on behalf of all classes of Scottish Water’s customers. He has no duties in respect of the customers of other service providers. To ensure that the Commissioner acts in the interests of all customers served by the public networks, it is proposed that his general function of promoting the interests of Scottish Water’s customers should be extended to those of retailers’ customers. This duty will not extend to the Commissioner being involved in regulating the charges set by new entrants for their customers. That is a matter to be settled between supplier and customer in a competitive market. However, it will extend to matters in connection with the levels of service provided by new entrants insofar as these might be specified in licences. An important part of the Commissioner's new role will be to ensure that new entrants are capable of providing the level of service that they propose in their application for a licence and that subsequently they do provide that service consistently.

A24. It is proposed that the Commissioner will administer the licensing regime on the basis of regulations made by Ministers. The regulations will be the subject of consultation before being given effect in secondary legislation. Their purpose will be to ensure that there is a transparent, fair and proportionate process by which the Commissioner considers licence applications, grants licences and subsequently monitors and enforces compliance with licence conditions.

A25. It will be open to any legal person to apply for a licence. Conditions will be attached to licences only insofar as they are necessary to enable Scottish Water, the Commissioner and retailers to perform their respective functions. The conditions will ensure that retailers meet their obligations to contribute towards the costs of maintaining the public networks. They

will also provide a clear basis for the transactions and exchanges of information between Scottish Water, the Commissioner and retailers that will be necessary.

A26. In granting licences the Commissioner will be required to consider whether the applicant has the financial strength and the operational and managerial capacity to satisfy their licence conditions as a retail supplier. It is envisaged that a licence once granted will remain valid for as long as its conditions continue to be observed. Licences will be transferable only where the Commissioner is satisfied that the person receiving the licence is capable of meeting its conditions.

### ***Charging for the provision of wholesale services***

A27. A principal part of the Commissioner’s new functions will be the power to regulate the wholesale charge to licensed providers by Scottish Water for its provision of water treatment and distribution services and wastewater collection and treatment services. At present the Commissioner has the function of approving Scottish Water’s schemes of charges. These schemes are prepared annually by Scottish Water and set out the charges to be paid by different groups of customers so that taken as a whole they provide Scottish Water with the income that it needs in total to provide its services. In approving a scheme, the Commissioner, exercising his general function of promoting the interests of customers, considers whether it strikes a fair balance in apportioning costs to the different groups of customers. In broad terms he looks for the scheme to provide for each group of customers collectively to cover the costs to Scottish Water of the service that it provides to them.

A28. It is proposed that Scottish Water’s charges to retailers, in effect Scottish Water’s wholesale charges, should be included in the charges scheme. The draft Bill provides for this and provides the basis on which these charges should be set. Within the framework created by these provisions, the Commissioner will be responsible for establishing the detailed principles to be used in setting wholesale charges. The intention is that these charges should enable Scottish Water to recover from retailers a fair and proportionate share of the total network costs that can be attributed to their customers. This will offer the retailer the reassurance that they are paying no more than is justified economically for the services that they are buying from Scottish Water. It will also reassure other customers that they are not paying more for the wholesale element of the services than are those opting to be served by retailers. Scottish Water will agree with the Commissioner wholesale charges for water and sewerage service providers, including wholesale trade effluent charges, as part of charges schemes generally. However Scottish Water, in its capacity as a retailer, will be free to set the retail charges for those non-household customers that it serves without reference to the Commissioner.

A29. It is proposed that the Bill will provide for the Commissioner to charge licence applicants for the cost of processing their applications. It will also provide more generally for him to recover through levies on new entrants, the costs to him arising from regulating them, including the costs of monitoring compliance with their licence conditions. This is in the interests of fairness and also of consistency with the present arrangement, where Scottish Water, and ultimately its customers, meet the Commissioner’s costs in regulating it.

### ***Thresholds***

A30. Where competition has been introduced in other utility sectors, it has been on the basis of the market being opened gradually to ensure orderly access to it. Typically this has meant beginning by issuing licences to serve the relatively small number of large customers and then progressively extending the scope of the market to other customers. This approach of applying transitional thresholds has particular merit where forms of common carriage and new sources of production are involved. These require careful physical management of assets and maintenance of constant production standards, which can be controlled more effectively if the initial volume of extra activity is limited. It is less clear that this is necessary where only new retail services are being introduced. Retail services pose no threat to the integrity of the public networks and the only issue is whether the licence holder is competent to provide a reasonable level of retail service to customers without placing an unreasonable administrative burden on Scottish Water. That is a matter for the Commissioner to consider in granting a licence and if there were any doubt on that score, he would be expected to withhold the licence.

A31. On balance therefore the Executive takes the view that a system of transitional thresholds is unnecessary in this market. Accordingly, the draft Bill makes no provision for them.

### ***Exchanging customer information***

A32. The prohibition on competition in the household sector effectively limits the retail market in water and sewerage services to all non-household customers served by the public networks. This amounts to some 160,000 premises, ranging from very large industrial premises, through commercial and public sector premises to small businesses. At present Scottish Water bills all of these customers and it will continue to do so unless they opt to use the services of another retailer. However, customers will only be able to choose another retailer if efficient and cost-effective arrangements are in place to enable information about customers to be transferred between retailers.

A33. The provision of such arrangements is a specialised business in its own right that has developed to meet the needs of those competing in other utility markets. The expectation therefore is that several firms will seek to sell their expertise to those wishing to enter the market. As the specification of these arrangements is primarily a matter for prospective retailers, the Executive would not expect to become involved in the detail of such developments. However, the Executive recognises that there might be a need at the outset for measures to facilitate agreement among retailers on issues such as common standards, and compatibility of systems. Insofar as such a need emerges, the Executive proposes that the Commissioner should play an informal role in assisting the different parties reach agreement. It is envisaged that this will be a non-statutory role. It will be distinct from the Commissioner's new statutory function of granting licences, which will require him to satisfy himself, among other things, that a retailer has systems in place to enable information about customers to be transferred effectively before granting a licence to the retailer.

### ***Relationship between Scottish Water and retailers***

A34. A licence will grant the retailer rights, principally the right to receive a wholesale service from Scottish Water. It will also impose duties on the retailer, including duties to provide the Commissioner and Scottish Water with whatever information they might

reasonably require for the discharge of their respective functions and the duty to pay Scottish Water for any costs that they impose upon it. The rights granted to retailers by their licences will impose concomitant duties on Scottish Water in terms of satisfying these rights. These duties will be binding on Scottish Water.

### ***Relationship between Scottish Water and the licensing regime***

A35. Scottish Water will be able to compete with retail providers. This raises the question of whether it should be covered by the licensing regime. The Executive has concluded that it should not, in so far as it discharges its core functions as the physical provider of water and sewerage services. In that context, Scottish Water is bound by statute to perform a range of unique functions, usually to standards prescribed in statute or regulations. It would make no sense for its performance of these functions to be subject additionally to licence conditions, particularly where the range of functions to be covered in licences covers only a small part of those that Scottish Water performs.

A36. It is important, however, where Scottish Water is in direct competition with retailers, that it should not use, or be thought to be using, its position as the sole provider of wholesale activities to place its competitors at a disadvantage to it. To that end, it is proposed that Scottish Water will place its retail activities into a separate retail subsidiary with a view to the subsidiary being treated as a retailer for the purposes of the licensing regime. In this way, Scottish Water’s wholesale and retail activities will be separated and accounted for separately. The retail arm will be subject to the same regulation as other retailers and will be treated by the wholesale arm in the same way as the other retailers.

A37. The draft Bill does not make specific provision for this arrangement. Instead, it is envisaged that Ministers will direct Scottish Water to undertake the separation using existing powers at section 56 of the Water Industry (Scotland) Act 2002.

### ***Appeal mechanisms***

A38. The Bill will provide that decisions taken by the Commissioner in exercise of the functions in respect of administering the licensing regime can be appealed to the Court of Session or the Sheriff Court as appropriate. In addition to these specific appeal mechanisms, decisions taken by the Commissioner that have a bearing on aspects of competition law can be raised with the UK competition authorities (the Office of Fair Trading and the Competition Commission). As many of the Commissioner’s decisions are likely in practice to fall into this category, there could be merit, in terms of providing certainty and transparency, in making specific provision for appeals to be considered by the competition authorities in appropriate cases. As this is a matter that is reserved under the Scotland Act 1998, it would not be possible to include such provisions in the Bill. However, they could be given effect through an order made by the UK Government under the Scotland Act and the Executive will pursue this possibility with the UK Government.

### ***Timetable for implementation***

A39. Subject to the Water Services (Scotland) Bill being enacted, the Executive and the Commissioner will work towards the introduction of a regime to license retailers. The Executive will draft and consult on the regulations governing the licensing regime to be made under the Bill. The Commissioner will develop procedures on issuing licences and will

consult on these. It is expected that these steps will have been completed by 1 April 2006, thereby enabling applications for licences to be submitted to the Commissioner from that date.

# Water Services (Scotland) Bill

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## CONSULTATION DRAFT

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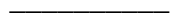
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**CONSULTATION DRAFT**

# Water Services (Scotland) Bill

An Act of the Scottish Parliament to create offences in relation to the unauthorised use of the public water and sewerage systems; to allow the Water Industry Commissioner for Scotland to grant licences authorising the provision of certain water and sewerage services by persons other than Scottish Water; and for connected purposes.

**PART 1****PUBLIC WATER SUPPLY AND SEWERAGE SYSTEMS: OFFENCES AND MAIN DEFINITIONS****1 Public water supply system: offences**

- (1) Any person (other than Scottish Water or a person acting on its behalf) who introduces water into the public water supply system is guilty of an offence.
- (2) Any person (other than Scottish Water or a person acting on its behalf) who uses the public water supply system for the purposes of supplying water to the premises of another person is guilty of an offence.
- (3) Any person (other than Scottish Water or a person acting on its behalf) who makes arrangements for or in relation to the supply of water to the premises of another person through the public water supply system otherwise than authorised by a water services licence held by the person is guilty of an offence.
- (4) The Scottish Ministers may by regulations—
  - (a) specify circumstances in which subsection (1), (2) or (3) does not apply; or
  - (b) specify that subsection (1), (2) or (3) does not apply—
    - (i) to any person or category of person; and
    - (ii) to such extent and subject to such conditions, as may be specified in the regulations.
- (5) The Scottish Ministers are to consult—
  - (a) Scottish Water;
  - (b) the Commissioner; and
  - (c) such other persons as they consider appropriate,on any regulations they propose to make under subsection (4).

- (6) A person who is guilty of an offence under subsection (1) is liable—
  - (a) on summary conviction, to a fine not exceeding £20,000; or
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both.
- (7) A person who is guilty of an offence under subsection (2) or (3) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on conviction on indictment, to a fine.
- (8) Any contract or other agreement which involves a contravention of subsection (1), (2) or (3) is unenforceable.

## **2 Meaning of “public water supply system”**

- (1) In this Act, the “public water supply system” means any and all of the mains and other pipes, water treatment works and other similar infrastructure which are (either or both)—
  - (a) vested in Scottish Water; or
  - (b) used (by Scottish Water or on its behalf) in the exercise of Scottish Water’s core functions as respects the supply of water.
- (2) In subsection (1), “mains” is to be construed in accordance with section 109(1) (interpretation) of the 1980 Act.

## **3 Public sewerage system: offences**

- (1) Any person (other than Scottish Water or a person acting on its behalf) who draws sewage from the public sewerage system is guilty of an offence.
- (2) Any person (other than Scottish Water or a person acting on its behalf) who uses the public sewerage system for the provision of sewerage to, or disposal of sewage from, the premises of another person is guilty of an offence.
- (3) Any person (other than Scottish Water or a person acting on its behalf) who makes arrangements for or in relation to the provision of sewerage to, or disposal of sewage from, the premises of another person through the public sewerage system otherwise than authorised by a sewerage services licence held by the person is guilty of an offence.
- (4) The Scottish Ministers may by regulations—
  - (a) specify circumstances in which subsection (1), (2) or (3) does not apply; or
  - (b) specify that subsection (1), (2) or (3) does not apply—
    - (i) to any person or category of person; and
    - (ii) to such extent and subject to such conditions, as may be specified in the regulations.
- (5) The Scottish Ministers are to consult—
  - (a) Scottish Water;
  - (b) the Commissioner; and
  - (c) such other persons as they consider appropriate,

on any regulations they propose to make under subsection (4).

- (6) A person who is guilty of an offence under subsection (1) is liable—
  - (a) on summary conviction, to a fine not exceeding £20,000; or
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both.
- (7) A person who is guilty of an offence under subsection (2) or (3) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on conviction on indictment, to a fine.
- (8) Any contract or other agreement which involves a contravention of subsection (1), (2) or (3) is unenforceable.
- (9) In this Act, “sewage” is to be construed in accordance with section 59(1) (interpretation) of the 1968 Act.

#### **4 Meaning of “public sewerage system”**

- (1) In this Act, the “public sewerage system” means any and all of the sewers (and junctions therewith), drains, SUD systems, sewage treatment works and other similar infrastructure which are (either or both)—
  - (a) vested in Scottish Water; or
  - (b) used (by Scottish Water or on its behalf) in the exercise of Scottish Water’s core functions as respects the provision of sewerage or disposal of sewage.
- (2) In subsection (1)—

“sewers”, “SUD systems” and “sewage treatment works” are to be construed in accordance with section 59(1) (interpretation) of the 1968 Act; and

“junctions” is to be construed in accordance with section 16 (vesting of sewers and other works) of that Act.

### **PART 2**

#### **PROVISION OF WATER AND SEWERAGE SERVICES TO ELIGIBLE PREMISES**

##### *Water services and sewerage services licences*

#### **5 Licence authorisation**

- (1) The Commissioner may, subject to section 7 and paragraphs 1 and 2 of the schedule, grant a licence authorising a person—
  - (a) to—
    - (i) make arrangements with the occupier of any eligible premises for the supply of water to the premises through the public water supply system; and
    - (ii) fix, demand and recover charges for the supply of water to any premises in respect of which the person has made such arrangements;
  - (b) to provide goods and services ancillary to the things mentioned in paragraph (a) and fix, demand and recover charges for providing them; and

- (c) to make such arrangements with Scottish Water and such other persons as are necessary for the purposes of or in connection with the things mentioned in paragraphs (a) and (b).
- (2) A licence granted under subsection (1) is in this Act referred to as a “water services licence”; and a person who holds a water services licence is in this Act referred to as a “water services provider”.
- (3) The Commissioner may, subject to section 7 and paragraphs 1 and 2 of the schedule, grant a licence authorising a person—
  - (a) to—
    - (i) make arrangements with the occupier of any eligible premises for the provision of sewerage to, or the disposal of sewage from, the premises through the public sewerage system; and
    - (ii) fix, demand and recover charges for the provision of sewerage to, and disposal of sewage from, any premises in respect of which the person has made such arrangements;
  - (b) to provide services ancillary to the things mentioned in paragraph (a) and fix, demand and recover charges for providing them; and
  - (c) to make such arrangements with Scottish Water and such other persons as are necessary for the purposes of or in connection with the things mentioned in paragraphs (a) and (b).
- (4) A licence granted under subsection (3) is in this Act referred to as a “sewerage services licence”; and a person who holds a sewerage services licence is in this Act referred to as a “sewerage services provider”.

## **6 Meaning of “eligible premises”**

- (1) In this Act, “eligible premises” means—
  - (a) in relation to the supply of water, premises which are connected to the public water supply system; and
  - (b) in relation to the provision of sewerage or the disposal of sewage, premises which are connected to the public sewerage system,but not any dwelling.
- (2) In subsection (1), “dwelling” means any dwelling within the meaning of Part II (Council Tax: Scotland) of the Local Government Finance Act 1992 (c.14).
- (3) The Scottish Ministers may by order modify subsection (2) so as to vary the meaning of “dwelling”.

## **7 Granting of licence**

- (1) The Commissioner may grant a water services licence or a sewerage services licence only if satisfied that the applicant has the ability to perform adequately the activities authorised by the licence.
- (2) In assessing an applicant’s ability so to perform those activities, the Commissioner is to have special regard to the following factors (in so far as relevant in relation to the performance of those activities)—
  - (a) knowledge, expertise and experience; and

- (b) financial acumen and business viability,  
and such other matters as the Scottish Ministers may by order specify.
- (3) The Commissioner may issue guidance (either generally or in a particular case or class of case) in relation to the things mentioned in subsection (2).
- (4) A water services licence and a sewerage service licence—
  - (a) must be in writing; and
  - (b) unless revoked or suspended, continues in force for such period as may be specified in or determined by or under the licence.
- (5) As soon as practicable after refusing an application for a water services licence or a sewerage services licence, the Commissioner is to intimate the refusal to—
  - (a) the applicant; and
  - (b) Scottish Water.
- (6) As soon as practicable after granting a water services licence or a sewerage services licence, the Commissioner is to send a copy of the licence to—
  - (a) the person to whom it is granted; and
  - (b) Scottish Water.

## **8 Compliance with licences**

- (1) The Commissioner is to—
  - (a) monitor compliance with the terms and conditions of water services licences and sewerage services licences; and
  - (b) take such steps as the Commissioner considers are necessary for the purposes of ensuring that the terms and conditions of such licences are complied with.
- (2) The Commissioner may give directions to any water services provider or sewerage services provider for the purpose of ensuring that the provider complies with the terms and conditions of the provider's licence; and the provider must comply with any such directions.
- (3) The Commissioner may issue guidance (either generally or in a particular case or class of case) in relation to compliance with the terms and conditions of water services licences and sewerage services licences.
- (4) Scottish Water must report to the Commissioner any contravention of a term or condition of a water services licence or a sewerage services licence which appears to it to have occurred or be occurring.

## **9 Commissioner's power to obtain information and charge fees**

- (1) Water services providers and sewerage services providers must provide the Commissioner with such information (including information in the form of a document) as the Commissioner reasonably requires in the exercise of the Commissioner's functions.
- (2) Subsection (1) does not authorise the Commissioner to require the disclosure of anything that a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

- (3) Any person who fails, without reasonable excuse, to provide information required by the Commissioner under subsection (1) is guilty of an offence.
- (4) A person who is guilty of an offence under subsection (3) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on indictment, to a fine.
- (5) The Commissioner may charge such fees, for such matters in relation to water services licences and sewerage services licences, as the Scottish Ministers may by order prescribe.

## **10 Licences and compliance: further provision**

The schedule makes further provision regarding licences and compliance with licences.

### *Provision of and charging for services by Scottish Water*

## **11 Provision of services by Scottish Water**

- (1) Where a water services provider has made arrangements with the occupier of eligible premises for the supply of water to the premises, the provider may request Scottish Water to supply (or continue to supply) water through the public water supply system to the premises.
- (2) Scottish Water must supply water as so requested subject to agreement between Scottish Water and the provider as to the terms and conditions that are to apply in relation to that supply.
- (3) A duty to supply water under subsection (2)—
  - (a) ceases if—
    - (i) the arrangements mentioned in subsection (1) have come to an end (unless the duty is continued under section 12(1)); or
    - (ii) the supply is discontinued under section 13(6); and
  - (b) may be superseded by a new duty under subsection (2).
- (4) Where a sewerage services provider has made arrangements with the occupier of eligible premises for the provision of sewerage to, or disposal of sewage from, the premises, the provider may request Scottish Water to provide (or continue to provide) sewerage to, or dispose of (or continue to dispose of) sewage from, the premises through the public sewerage system.
- (5) Scottish Water must provide sewerage and dispose of sewage as so requested subject to agreement between Scottish Water and the provider as to the terms and conditions that are to apply in relation to that provision or disposal.
- (6) A duty to provide sewerage or dispose of sewage under subsection (5) may be superseded by a new duty under that subsection.
- (7) Where no agreement as is mentioned in subsection (2) or (5) is reached, the Commissioner, on the application of the provider in question, may determine the terms and conditions that are to apply in relation to the supply or, as the case may be, provision or disposal; and those terms and conditions have effect as if agreed between the provider and Scottish Water.

**12 Continuation of provision of services**

- (1) Where—
- (a) water is supplied to premises by Scottish Water under subsection (2) of section 11; and
  - (b) the arrangements for the supply of water made between the occupier of the premises and the water services provider who made the request under subsection (1) of that section in respect of the premises have come to an end—
    - (i) due to the revocation or suspension of the licence held by the provider; or
    - (ii) for any other reason (except where the supply is discontinued under section 13(6)),

the duty of Scottish Water under subsection (2) of section 11 to supply water to the premises continues for the period mentioned in subsection (2).

- (2) The period is 2 months (or such longer period as Scottish Water agrees to) from the date on which the arrangements mentioned in subsection (1)(b) came to an end.
- (3) But that continuation of that duty ceases if—
- (a) it is superseded by a new duty under subsection (2) of section 11; or
  - (b) the occupier of the premises notifies Scottish Water that the supply of water is not required.
- (4) Where sewerage is provided to, or sewage is disposed of from, premises by Scottish water under subsection (5) of section 11, Scottish Water is to continue providing sewerage or (as the case may be) disposing of sewage from the premises even if the arrangements for that provision or disposal made between the occupier of the premises and the sewerage services provider who made the request under subsection (4) of that section in respect of the premises have come to an end.
- (5) In section 9 (supply of water for non-domestic purposes) of the 1980 Act, after subsection (2), there is inserted—

“(2A) Where a supply of water has been made to premises under subsection (2) of section 11 of the Water Services (Scotland) Act 2003 (asp 00) but—

- (a) the arrangements for the supply made between the occupier of the premises and the water services provider who made the request under subsection (1) of that section in respect of the premises are at an end (or are to come to an end) in consequence of non-payment of charges owed to the provider in relation to the water supplied; or
- (b) the supply is discontinued (or is to be discontinued) under section 13(6) of that Act,

Scottish Water shall not be required to give a supply of water to the premises in accordance with subsection (1) if it is of the opinion that there is no reasonable prospect of recovering the charges (or any significant proportion of the charges) which it would be entitled to recover in relation to that supply of water were it given.

- (2B) Where Scottish Water decides, by virtue of subsection (2A), not to give a supply of water to premises, the occupier of the premises may by notice require the Water Industry Commissioner for Scotland to review that decision.

- (2C) In a review under subsection (2B), the Commissioner may, having regard to any representations made to him by the parties—
- (a) confirm the decision of Scottish Water; or
  - (b) direct Scottish Water to give a supply of water to the premises in accordance with subsection (1),
- and the determination of the Commissioner in the review shall be final.”.

### **13 Discontinuation of supply of water**

- (1) Where—
- (a) a water services provider has obtained a court decree in respect of charges owed to the provider in relation to water supplied to premises under subsection (2) of section 11; and
  - (b) the decree has not been complied with,
- the water services provider may request Scottish Water to discontinue the supply of water under that subsection to the premises.
- (2) At least 7 days before making a request under subsection (1) the provider must serve a notice of the provider’s intention to make such a request on—
- (a) the occupier of the premises;
  - (b) Scottish Water; and
  - (c) the Commissioner.
- (3) The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.
- (4) Where a notice is served in accordance with subsection (2) the provider must at the same time provide a certified copy of the decree mentioned in subsection (1).
- (5) An occupier of premises who has been served with a notice under subsection (2) may, within 5 days of the date of service of the notice, make representations to the provider about the notice; and the provider must have regard to any representations so made.
- (6) Where a request is made under subsection (1), Scottish Water is to discontinue the supply of water made under section 11(2) to the premises provided that—
- (a) any supply of water to the premises for domestic purposes; or
  - (b) any supply of water to any other premises,
- is not adversely affected.
- (7) In subsection (6)(a), what is a supply of water for domestic purposes is to be construed in accordance with section 7 (supply of water for domestic purposes) of the 1980 Act.

### **14 Scottish Water’s charges schemes**

- (1) After section 29 (charges for goods and services) of the 2002 Act, there is inserted—

**“29A Charges for services arranged by licensed providers**

- (1) Supplies of water provided to any premises by Scottish Water under subsection (2) of section 11 of the Water Services (Scotland) Act 2003 (asp 00) are to be treated, for the purposes of sections 29 and 31, as services provided to the water services provider who made the request under subsection (1) of that section in respect of the premises.
  - (2) The provision of sewerage to, and disposal of sewage from, any premises by Scottish Water under subsection (5) of that section of that Act are to be treated, for the purposes of sections 29 and 31, as services provided to the sewerage services provider who made the request under subsection (4) of that section in respect of the premises.
  - (3) But where—
    - (a) the supplies of water provided to the premises are continued under subsection (1) of section 12 of that Act, subsection (1) does not apply;
    - (b) the provision of sewerage to, or disposal of sewerage from, the premises is continued under subsection (4) of that section, subsection (2) does not apply.”.
- (2) In section 31 (charges schemes) of that Act, after subsection (3) there is inserted—
- “(3A) Without prejudice to subsection (3)(a), a charges scheme may make special provision for and in relation to charges to be paid for services provided by Scottish Water to water services providers and sewerage services providers (within the meaning of the Water Services (Scotland) Act 2003 (asp 00)).
- (3B) In particular, any such special provision may specify reasonable additional charges to be paid by—
- (a) water services providers as contributions towards the costs incurred by Scottish Water in the exercise of its core functions as respects the supply of water as a whole; and
  - (b) sewerage services providers as contributions towards the costs incurred by Scottish Water in the exercise of its core functions as respects the provision of sewerage and disposal of sewage as a whole.”.

(3) After section 33 (Commissioner’s advice on charges) of that Act there is inserted—

**“33A Exercise of functions under sections 31 to 33**

Scottish Water is to exercise its functions under section 31, and the Commissioner is to exercise the Commissioner’s functions under sections 32 and 33—

- (a) with a view to ensuring that—
  - (i) the costs incurred by Scottish Water in supplying water to any premises under subsection (2) of section 11 of the Water Services (Scotland) Act 2003 (asp 00) are met from charges recovered by it from the water services provider who made the request under subsection (1) of that section in respect of the premises; and

- (ii) the costs incurred by Scottish Water in providing sewerage to, or disposing of sewage from, any premises under subsection (5) of that section of that Act are met from charges recovered by it from the sewerage services provider who made the request under subsection (4) of that section in respect of the premises; and
- (b) with regard to the desirability of—
  - (i) the costs incurred by Scottish Water in exercising its core functions as respects the supply of water as a whole being met from charges recovered by it from its customers (including water services providers within the meaning of the Water Services (Scotland) Act 2003 (asp 00)) in respect of the provision of services to them in the exercise of those functions; and
  - (ii) the costs incurred by Scottish Water in exercising its core functions as respects the provision of sewerage and disposal of sewage as a whole being met from charges recovered by it from its customers (including sewerage services providers within the meaning of that Act) in respect of the provision of services to them in the exercise of those functions.”.
- (4) In section 35 (liability of occupiers etc. for charges) of that Act, after subsection (9) there is inserted—
  - “(10) This section does not apply to or in relation to any service provided by Scottish Water under section 11 of the Water Services (Scotland) Act 2003 (asp 00) except where the provision of the service is continued under section 12(1) or (4) of that Act.”.

*The Water Industry Commissioner for Scotland*

**15 The Commissioner’s general function**

In section 1 (Water Industry Commissioner for Scotland) of the 2002 Act, in subsection (2), for the words from “promoting” to the end there is substituted “promoting—

- (a) the interests of customers (excluding water services providers and sewerage services providers within the meaning of the Water Services (Scotland) Act 2003 (asp 00)) of Scottish Water in relation to the provision of services by it in the exercise of its core functions; and
- (b) the interests of customers of water services providers and sewerage services providers (within the meaning of that Act) in relation to the provision of services by—
  - (i) such providers; and
  - (ii) Scottish Water in the exercise of its core functions,by virtue of that Act.”.

**PART 3**

## MISCELLANEOUS AND GENERAL

*Miscellaneous***16 Offences by bodies corporate and partnerships**

- (1) Where an offence under this Act has been committed by a body corporate and has been committed with the consent or connivance of, or is attributable to the neglect of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, that person as well as the body corporate is guilty of the offence.
- (2) Where an offence under this Act has been committed by a Scottish partnership and has been committed with the consent or connivance of, or is attributable to the neglect of, a partner, that partner as well as the partnership is guilty of the offence.

*General***17 Orders and regulations**

- (1) Any power of the Scottish Ministers to make orders or regulations under this Act is exercisable by statutory instrument.
- (2) Any such power includes power to make—
  - (a) such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient; and
  - (b) different provision for different purposes.
- (3) A statutory instrument containing an order under—
  - (a) section 6(3), 7(2), 9(5) or 13(3);
  - (b) subject to subsection (4)(a), section 18; or
  - (c) paragraph 1(1), (4) or (7) or 10(1) or (2)(g) of the schedule,is subject to annulment in pursuance of a resolution of the Parliament.
- (4) A statutory instrument containing—
  - (a) an order under section 18 which amends an Act; or
  - (b) regulations under section 1(4) or 3(4),is not made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

**18 Ancillary provision**

The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in consequence of this Act.

**19 Interpretation**

- (1) In this Act, unless the context otherwise requires—
  - “the 1968 Act” means the Sewerage (Scotland) Act 1968 (c. 47);
  - “the 1980 Act” means the Water (Scotland) Act 1980 (c. 45);

“the 2002 Act” means the Water Industry (Scotland) Act 2002 (asp 3);

“the Commissioner” means the Water Industry Commissioner for Scotland;

“the Parliament” means the Scottish Parliament.

- (2) Any reference in this Act to the core functions of Scottish Water is to be construed by reference to section 70(2) of the 2002 Act.

## **20 Short title and commencement**

- (1) This Act may be cited as the Water Services (Scotland) Act 2003.
- (2) The provisions of this Act, except sections 17 to 19 and this section, come into force on such day as the Scottish Ministers may by order appoint.
- (3) Different days may be so appointed for different provisions and for different purposes.

SCHEDULE  
*(introduced by section 10)*

LICENCES AND COMPLIANCE: FURTHER PROVISION

*Application for licence*

- 1 (1) An application for a water services licence or a sewerage services licence is to be made to the Commissioner and is—
  - (a) to be in such form and made in such manner; and
  - (b) to contain such information (including information in the form of a document),as the Scottish Ministers may by order prescribe.
- (2) The applicant must provide the Commissioner with such further information (including information in the form of a document) as the Commissioner reasonably requires in order to determine the application.
- (3) Sub-paragraph (2) does not authorise the Commissioner to require the disclosure of anything that a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.
- (4) The applicant must, in such manner and within such time from the making of the application as the Scottish Ministers may by order prescribe, publish a notice of the application; and the notice must—
  - (a) specify such procedure for making representations to the Commissioner with respect to the application; and
  - (b) contain such other particulars,as the Scottish Ministers may so prescribe.
- (5) Where the Commissioner proposes to refuse an application, the Commissioner is to give the applicant notice—
  - (a) of that fact (together with the Commissioner’s reasons for proposing to refuse the application); and
  - (b) specifying the date by which the applicant may make representations to the Commissioner with respect to the proposed refusal.
- (6) The Commissioner is, in determining the application, to have regard to any representations made by virtue of—
  - (a) sub-paragraph (4)(a); and
  - (b) sub-paragraph (5)(b).
- (7) The Scottish Ministers may by order specify circumstances in which sub-paragraphs (4) to (6) do not apply.
- (8) Any applicant for a water services licence or a sewerage services licence who knowingly or recklessly makes a statement, in connection with the application for the licence, that is false or misleading in a material particular is guilty of an offence.
- (9) A person who is guilty of an offence under sub-paragraph (8) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on indictment, to a fine.

- (10) A person whose application for a water services licence or sewerage services licence has been refused may, within 14 days of the date on which the refusal was intimated to the person under section 7(5)(a), appeal to the Court of Session against the refusal.
- (11) Where a water services licence or sewerage services licence has been granted, Scottish Water may, within 14 days of the date on which a copy of the licence was sent to Scottish Water under section 7(6)(b), appeal to the Court of Session against the granting of the licence; and the licence is suspended until the appeal is withdrawn or finally determined.
- (12) In an appeal under sub-paragraph (10) or (11), the Court may quash or confirm the Commissioner's decision to refuse or (as the case may be) grant the application; and the decision of the Court in the appeal is final.

### *Conditions of licence*

- 2 (1) Each water services licence and sewerage services licence—
  - (a) is, subject to sub-paragraph (10), to have incorporated in it by reference to the standard conditions such of those conditions as are applicable to it; and
  - (b) may include such ordinary conditions as appear to the Commissioner to be necessary or expedient for the purposes of or in connection with the activities authorised by the licence.
- (2) The Commissioner is, within 9 months of the coming into force of this sub-paragraph, to determine standard conditions that are to apply to water services licences and sewerage services licences.
- (3) The standard conditions are to relate to the obligations of water services providers and sewerage services providers to their customers and to Scottish Water; and the conditions may, in particular—
  - (a) include such conditions that are to apply to—
    - (i) all licences; and
    - (ii) a particular class of licence; and
  - (b) make provision for—
    - (i) the conditions (or any of them) not to apply to a particular licence or class of licence in such circumstances; and
    - (ii) the coming into effect and suspension of the conditions (or any of them) in such manner and in such circumstances,as may be specified in the conditions.
- (4) The Commissioner is to—
  - (a) consult the Scottish Ministers on proposals for standard conditions; and
  - (b) publish the standard conditions.
- (5) The Commissioner—
  - (a) is from time to time to review the standard conditions; and
  - (b) may—
    - (i) modify the standard conditions; and

- (ii) make such modification to the conditions of any licence as the Commissioner considers necessary or expedient as a consequence of any modification of the standard conditions.
- (6) Before making any modification under sub-paragraph (5)(b), the Commissioner is to—
  - (a) send a notice of the proposed modification to—
    - (i) every water services provider and sewerage services provider whose licence would be affected by the modification;
    - (ii) the Scottish Ministers; and
    - (iii) Scottish Water; and
  - (b) publish the notice.
- (7) The notice must—
  - (a) state the reasons why the modification is proposed; and
  - (b) specify the period (which is to be not less than 28 days from the date of publication of the notice) within which representations with respect to the proposed modification may be made to the Commissioner.
- (8) The Commissioner is to have regard to any representations made by virtue of sub-paragraph (7)(b).
- (9) Where the Commissioner modifies the standard conditions, the Commissioner is to publish them as modified.
- (10) The Commissioner may, in granting a particular licence, exclude or modify any of the standard conditions to such extent as the Commissioner considers appropriate in the circumstances of the case.
- (11) Sub-paragraphs (6) to (8) apply to exclusions and modifications under sub-paragraph (10) as they apply to modifications under sub-paragraph (5)(b) (but as if, in the case of an exclusion, the references in sub-paragraphs (6) and (7) to modification were references to exclusion).
- (12) Any ordinary condition of a licence may provide for the condition to—
  - (a) have effect or cease to have effect; or
  - (b) be modified,at such time, in such manner, and in such circumstances, as the Commissioner considers appropriate.
- (13) The Commissioner may modify any condition of a particular licence if the Commissioner considers that the modification is necessary in the circumstances of the case.
- (14) Sub-paragraphs (6) to (8) apply to modifications under sub-paragraph (13) as they apply to modifications under sub-paragraph (5)(b).
- (15) Any water services provider or sewerage services provider who is aggrieved by the inclusion of a condition in the licence held by the provider may, within 14 days of the date on which the licence was granted, appeal to the Court of Session against the inclusion of the condition on the grounds that the condition is unreasonable in the circumstances of the case.

- (16) Any water services provider or sewerage services provider who is aggrieved by a modification of a condition included in the licence held by the provider may, within 14 days of the date on which the modification has effect, appeal to the Court of Session against the making of the modification on the grounds that the condition as modified is unreasonable in the circumstances of the case.
- (17) In an appeal under sub-paragraph (15) or (16), the Court may quash, confirm or vary the condition; and the decision of the Court in the appeal is final.

### *Transfer of licence*

- 3 (1) Any water services licence or sewerage services licence may, subject to sub-paragraph (2), be transferred to another person by the provider who holds it (“the transferor”), either in respect of—
  - (a) all the activities; or
  - (b) any particular activity or activities,authorised by the licence.
- (2) A transfer of a licence is not valid unless—
  - (a) the transfer complies with any condition of the licence as to transfer; and
  - (b) the Commissioner consents to the transfer.
- (3) The Commissioner may consent to a transfer only if satisfied that—
  - (a) in a case where the proposed transfer is in respect of all the activities authorised by the licence, the person to whom the transferor proposes to transfer the licence (“the transferee”) has the ability to perform adequately those activities; or
  - (b) in a case where the proposed transfer is in respect of any particular activity or activities authorised by the licence, the transferee has the ability to perform adequately that activity or (as the case may be) those activities.
- (4) In assessing the transferee’s ability so to perform that activity or those activities, the Commissioner is to have special regard to—
  - (a) the factors mentioned in paragraphs (a) and (b) of subsection (2) of section 7; and
  - (b) any other matters specified under that subsection.
- (5) Before consenting to a transfer, the Commissioner is to—
  - (a) send a notice of the proposed transfer to Scottish Water; and
  - (b) publish the notice.
- (6) The notice must—
  - (a) give the particulars of the transferor and transferee;
  - (b) state the reasons why the transfer is proposed;
  - (c) specify any modification or condition that the Commissioner proposes to make under sub-paragraph (8) and state the reasons why it is proposed; and
  - (d) specify the period (which is to be not less than 28 days from the date of publication of the notice) within which representations with respect to the proposed transfer (including any such modification or condition) may be made to the Commissioner.

- (7) The Commissioner is to have regard to any representations made by virtue of sub-paragraph (6)(d).
- (8) The Commissioner may consent to a transfer subject to such—
  - (a) modification to any condition of the licence; and
  - (b) conditions apart from the conditions of the licence,as the Commissioner considers it appropriate to make.
- (9) As soon as practicable after deciding whether to consent to a transfer, the Commissioner is to intimate the Commissioner’s decision to—
  - (a) the transferor and the transferee; and
  - (b) Scottish Water.
- (10) Where the Commissioner withholds consent to the transfer, the transferee may, within 14 days of the date on which the withholding of consent was intimated to the transferee under sub-paragraph (9)(a), appeal to the Court of Session against the withholding of consent.
- (11) In an appeal under sub-paragraph (10), the Court may quash or confirm the Commissioner’s decision to withhold consent to the transfer; and the decision of the Court in the appeal is final.
- (12) In this paragraph, “transfer” includes any form of assignation.

*Powers of entry etc.*

- 4 (1) For the purposes of monitoring and ensuring compliance with the terms and conditions of licences under section 8(1), the powers mentioned in sub-paragraph (2) are exercisable by the Commissioner and any person authorised by the Commissioner for the purpose of the exercise of those powers.
- (2) The powers are—
  - (a) power to enter any premises—
    - (i) of any water services provider or sewerage services provider;
    - (ii) in respect of which such a provider has made arrangements for the supply of water or for the provision of sewerage or disposal of sewage;
    - (iii) of any other person,for the purpose of exercising a power mentioned in heads (b) and (c);
  - (b) power to carry out such inspection of any document or article found on the premises as the Commissioner considers necessary; and
  - (c) for the purpose of inspecting any such document or article, power to take the document away from the premises.
- (3) The power mentioned in head (a) of sub-paragraph (2) entitles the Commissioner (or a person authorised by the Commissioner) to demand, as of right, entry—
  - (a) to premises referred to in sub-head (i) of that head, at any reasonable time (and without notice); and
  - (b) to premises referred to in sub-head (ii) or (iii) of that head, at any reasonable time provided that the Commissioner (or the person) gives 24 hours’ notice of the exercise of the power to the occupier of the premises.

- (4) The powers mentioned in sub-paragraph (2) must not be exercised in relation to premises referred to in sub-head (iii) of head (a) of that sub-paragraph unless the Commissioner is satisfied that the exercise of those powers in relation to the premises referred to in sub-heads (i) and (ii) of that head would be insufficient for the purposes referred to in sub-paragraph (1).
- (5) The owner and occupier of any premises in respect of which a power mentioned in sub-paragraph (2) is being exercised, and any person on the premises when the power is being exercised, must—
  - (a) give the person exercising the power such assistance; and
  - (b) provide that person with such information,as that person reasonably requires.
- (6) Any person who—
  - (a) intentionally obstructs a person acting in the exercise of any power conferred by sub-paragraphs (1) and (2); or
  - (b) refuses or fails, without reasonable excuse, to comply with a requirement made under sub-paragraph (5),is guilty of an offence.
- (7) A person who is guilty of an offence under sub-paragraph (6) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on conviction on indictment, to a fine.

*Powers of entry etc.: further provision*

- 5 (1) If a sheriff or justice of the peace is satisfied, by evidence on oath, that—
- (a) there are reasonable grounds for the exercise in relation to any premises of a power mentioned in paragraph 4(2); and
  - (b) at least one of the conditions mentioned in sub-paragraph (2) is fulfilled in relation to the premises,
- the sheriff or justice may grant a warrant authorising the Commissioner (and any person authorised by the Commissioner for the purpose) to exercise the power in relation to the premises in accordance with the terms of the warrant and, if need be, by force.
- (2) The conditions are—
    - (a) that the exercise of the power in relation to the premises has been refused;
    - (b) that such a refusal may reasonably be expected;
    - (c) that the premises are unoccupied;
    - (d) that the occupier is temporarily absent from the premises;
    - (e) that the case is one of urgency;
    - (f) that an attempt to gain entry to the premises without the authority of a warrant would defeat the object of the proposed entry.
  - (3) A sheriff or justice must not issue a warrant under this paragraph by virtue of being satisfied that a condition mentioned in head (a) or (b) of sub-paragraph (2) is fulfilled unless the sheriff or justice is also satisfied—

- (a) that notice of the intention to apply for the warrant has been given to the occupier of the premises; or
  - (b) that the giving of such notice would defeat the object of the proposed entry.
- (4) A warrant granted under this paragraph continues in force until the purposes for which the warrant is issued have been fulfilled.
- (5) A person entitled to enter premises by virtue of the power mentioned in paragraph 4(2)(a)—
  - (a) may take on to the premises such other persons and such equipment as may be necessary; but this is, where that power is exercisable under a warrant, subject to the terms of the warrant; and
  - (b) must, if required to do so, produce written evidence of that entitlement.
- (6) A person who enters premises in the exercise of the power mentioned in paragraph 4(2)(a) must leave the premises as effectually secured against trespassers as the person found them.
- (7) Where a person exercises the power mentioned in paragraph 4(2)(a), the Commissioner is to make full compensation to any person who has sustained loss or damage by reason of—
  - (a) the exercise that power; or
  - (b) the carrying out of, or failure to carry out, the duty imposed by paragraph (6),except in so far as the loss or damage is attributable to the fault of the person who sustained it.
- (8) Any person who makes use of or discloses any trade secret of which the person has gained knowledge as a result of the exercise of any power conferred by paragraph 4(1) and (2) is guilty of an offence.
- (9) A person who is guilty of an offence under sub-paragraph (8) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on conviction on indictment, to a fine.

#### *Enforcement notices*

- 6 (1) If it appears to the Commissioner (whether or not following the exercise of powers under paragraph 4)—
- (a) that—
    - (i) a water services provider or a sewerage services provider has contravened a term or condition of the licence held by the provider and the contravention is likely to recur; or
    - (ii) such a provider is contravening a term or condition of the licence held by the provider and the contravention is likely to continue or to recur or both; and
  - (b) that the provider is not taking appropriate steps for the purpose of rectifying the contravention or (as the case may be) preventing its recurrence,
- the Commissioner may serve on the provider a notice (in this paragraph and paragraphs 7, 8 and 10 referred to as an “enforcement notice”) in respect of the contravention.

- (2) An enforcement notice must specify—
  - (a) the contravention to which it relates;
  - (b) the Commissioner’s reasons for believing (as the case may be) that the contravention—
    - (i) has occurred and is likely to recur; or
    - (ii) is occurring and is likely to continue or to recur or both;
  - (c) the date by which the provider is required to rectify the contravention or (as the case may be) take steps to prevent its recurrence;
  - (d) any particular steps which the Commissioner requires the licence holder to take for that purpose; and
  - (e) the date on which the notice is to take effect.
- (3) An enforcement notice may specify different dates by which different steps specified under sub-paragraph (2)(d) must be completed.
- (4) The date referred to in sub-paragraph (2)(e) must be no earlier than the day following the last day on which an appeal may be made under sub-paragraph (9).
- (5) In considering whether to serve an enforcement notice, the Commissioner must consult—
  - (a) Scottish Water; and
  - (b) such other persons as the Commissioner considers appropriate.
- (6) Before serving an enforcement notice on a provider under sub-paragraph (1), the Commissioner is to—
  - (a) serve a copy of the proposed notice on the provider; and
  - (b) specify a period (which must expire not less than 7 days and no more than 28 days from the date of service of the notice) within which the provider may make representations to the Commissioner about the proposed notice.
- (7) The Commissioner—
  - (a) is to have regard to any representations made by virtue of sub-paragraph (6)(b); and
  - (b) may adjust the notice in light of the representations.
- (8) The Commissioner must send a copy of an enforcement notice to—
  - (a) the Scottish Ministers; and
  - (b) Scottish Water.
- (9) A provider on whom an enforcement notice has been served may, by summary application made within 14 days of the date of service of the notice, appeal to the sheriff against the notice; and the enforcement notice is of no effect until the appeal is withdrawn or finally determined.
- (10) In an appeal under sub-paragraph (9), the sheriff may make such order as the sheriff thinks fit; and the decision of the sheriff in the appeal is final.
- (11) The Commissioner may—
  - (a) withdraw an enforcement notice; or

- (b) waive or relax any requirement of an enforcement notice, including substituting a later date for a date specified under sub-paragraph (2)(c) or (3),  
and may do so whether or not the notice has taken effect.
- (12) The withdrawal of an enforcement notice does not affect the Commissioner’s power to issue a further such notice.

*Enforcement notices: offences*

- 7 (1) Any water services provider or sewerage services provider, on whom an enforcement notice has been served, who—
- (a) fails to rectify, or (as the case may be) fails to take steps to prevent the recurrence of, a contravention specified in the notice—
    - (i) by the date specified in relation to the contravention under sub-paragraph (2)(c) of paragraph 6; or
    - (ii) where a later date has been substituted for that date under sub-paragraph (11)(b) of that paragraph, by that later date; or
  - (b) fails to complete a step specified under sub-paragraph (2)(d) of paragraph 6—
    - (i) by the date specified in relation to that step under sub-paragraph (3) of that paragraph; or
    - (ii) where a later date has been substituted for that date under sub-paragraph (11)(b) of that paragraph, by that later date,
- is guilty of an offence.
- (2) An offence under sub-paragraph (1) may be charged by reference to any day or longer period of time; and a provider may be convicted of a second or subsequent offence under that sub-paragraph by reference to any period of time following conviction for such an offence.
- (3) A person who is guilty of an offence under sub-paragraph (1) is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on indictment, to a fine.

*Revocation of licences*

- 8 (1) A water services licence or sewerage services licence may be revoked in accordance with this paragraph.
- (2) If it appears to the Commissioner that a water services provider or sewerage services provider, on whom an enforcement notice has been served, has—
- (a) failed to rectify, or (as the case may be) failed to take steps to prevent the recurrence of, a contravention specified in the notice—
    - (i) by the date specified in relation to the contravention under sub-paragraph (2)(c) of paragraph 6; or
    - (ii) where a later date has been substituted for that date under sub-paragraph (11)(b) of that paragraph, by that later date; or
  - (b) failed to complete a step specified under sub-paragraph (2)(d) of paragraph 6—

- (i) by the date specified in relation to that step under sub-paragraph (3) of that paragraph; or
- (ii) where a later date has been substituted for that date under sub-paragraph (11)(b) of that paragraph, by that later date,

the Commissioner may revoke the licence held by the provider by serving on the provider a notice of revocation.

(3) If—

- (a) it appears to the Commissioner that a water services provider or a sewerage services provider has contravened a term or condition of the licence held by the provider; and
- (b) the Commissioner considers that the provider would fail to comply with the terms of an enforcement notice pertaining to that contravention,

the Commissioner may revoke the licence by serving on the provider a notice of revocation.

- (4) If, having special regard to the factors mentioned in paragraphs (a) and (b) of subsection (2) of section 7 and to any other matters specified under that subsection, the Commissioner considers that a water services provider or sewerage services provider no longer has the ability to perform adequately the activities authorised by the licence held by the provider, the Commissioner may (whether or not the provider has contravened a term or condition of the licence held by the provider) revoke the licence by serving on the provider a notice of revocation.
- (5) The Commissioner may, following a request made to the Commissioner by a water services provider or a sewerage services provider for the licence held by the provider to be revoked, revoke the licence by serving on the provider a notice of revocation.
- (6) The Commissioner must not revoke a licence under this paragraph unless satisfied that revocation is reasonable having regard to—
  - (a) the terms and conditions of the licence;
  - (b) the provider's responsibilities to the provider's customers; and
  - (c) any other matters the Commissioner considers to be relevant.
- (7) A notice of revocation must specify—
  - (a) the reasons why it is served; and
  - (b) the date (which must not be sooner than the day after the last day on which an appeal against the notice may be made under sub-paragraph (8)) from which the revocation is to have effect.
- (8) A provider on whom a notice of revocation has been served under sub-paragraph (2), (3) or (4) may, by summary application made within 14 days of the date of the notice, appeal to the sheriff against the notice; and the revocation is of no effect until the appeal is withdrawn or finally determined.
- (9) In an appeal under sub-paragraph (8), the sheriff may make such order as the sheriff thinks fit; and the decision of the sheriff in the appeal is final.
- (10) As soon as practicable after a revocation under this paragraph has effect, the Commissioner must—
  - (a) send a copy of the notice of revocation to—

- (i) Scottish Water; and
  - (ii) the Scottish Ministers; and
- (b) publish the notice.

*Penalties for contravention of licence*

- 9 (1) Where it appears to the Commissioner that a water services provider or a sewerage services provider has contravened a term or condition of the provider's licence, the Commissioner may impose on the provider a financial penalty of such amount as the Commissioner considers reasonable in the circumstances of the case.
- (2) The Commissioner—
- (a) is to prepare a statement of policy with respect to the imposition of penalties under sub-paragraph (1) and the determination of their amount;
  - (b) is to keep the statement under review and may revise the statement; and
  - (c) in preparing the statement (and any revised statement), is to consult such persons as the Commissioner considers appropriate; and
  - (d) is to publish the statement (and any revised statement) in such manner as the Commissioner considers appropriate.
- (3) Before imposing a penalty under sub-paragraph (1), the Commissioner is to serve on the provider a notice of the Commissioner's intention to impose the penalty; and the notice must specify the date by which the provider may make representations to the Commissioner with respect to the penalty.
- (4) In imposing a penalty under sub-paragraph (1), the Commissioner is to have regard to—
- (a) the statement of policy under sub-paragraph (2) as published at the time of the contravention to which the penalty relates; and
  - (b) any representations made by virtue of sub-paragraph (3).
- (5) A provider on whom a penalty is imposed under sub-paragraph (1) may, by summary application made within 14 days of the date on which the penalty was imposed, appeal to the sheriff against the imposition of the penalty or the amount of the penalty; and the penalty is not recoverable until the appeal is withdrawn or finally determined.
- (6) In an appeal under sub-paragraph (5), the sheriff may make such order as the sheriff thinks fit; and the decision of the sheriff in the appeal is final.
- (7) Any penalty imposed under sub-paragraph (1) is recoverable, from the person on whom it was imposed, by the Commissioner—
- (a) by civil diligence; and
  - (b) whether or not that person continues to hold the licence in relation to which the penalty was imposed.
- (8) Any sums received by the Commissioner by virtue this paragraph must be paid into the Scottish Consolidated Fund.

*Register of licences*

- 10 (1) The Commissioner must keep a register of water services licences and sewerage services licences in such manner as the Scottish Ministers may by order prescribe.

- (2) The register must—
  - (a) record the particulars of the holder of each licence;
  - (b) record the terms and conditions of each licence;
  - (c) record, in relation to any enforcement notice—
    - (i) the particulars of the provider on whom the notice was served;
    - (ii) the date of service of the notice;
    - (iii) the matters specified under sub-paragraph (2) of paragraph 6;
    - (iv) any date specified under sub-paragraph (3) of that paragraph; and
    - (v) anything done under sub-paragraph (11) of that paragraph;
  - (d) record, in relation to any notice of revocation served under paragraph 8—
    - (i) the particulars of the provider on whom the notice was served;
    - (ii) the date of service of the notice;
    - (iii) the reasons why it was served; and
    - (iv) the date specified under sub-paragraph (7)(b) of that paragraph;
  - (e) record, in relation to any penalty imposed under paragraph 9—
    - (i) the particulars of the provider on whom it was imposed;
    - (ii) the amount; and
    - (iii) the date on which it was imposed;
  - (f) record the outcome of any appeal provided for in this schedule; and
  - (g) contain such other information as the Scottish Ministers may by order prescribe.
- (3) The register must be available for inspection by any person at any reasonable time.

## SECTION C

### COMMENTARY ON DRAFT WATER SERVICES (SCOTLAND) BILL

#### Introduction

This commentary describes the provisions contained in the draft Water Services (Scotland) Bill at section B of this paper and how the Executive expects them to be applied in practice.

#### **Overview of Draft Bill**

The draft Bill is intended to ensure that those providing water and sewerage services to customers served by the public water and sewerage networks do so in a manner that is consistent with the Scottish Executive's public health, environment protection and social policy objectives.

**Part 1** provides that common carriage on the public networks is prohibited; that only Scottish Water can provide water and sewerage services to households; and that anyone providing water and sewerage services to non-household customers on the public networks can do so only if licensed for that purpose.

**Part 2** provides for the Water Industry Commissioner to grant licences to those wishing to serve non-household customers; confers powers on the Commissioner to monitor and enforce compliance with the conditions attached to licences; and amends the Commissioner's general function to take account of these new functions. It provides that licences granted by the Commissioner empower the licence holder to buy from Scottish Water wholesale water and sewerage services, which the licence holder can sell to those occupying premises defined as eligible. It defines eligible premises as any premises that are connected to the public system and are not used as dwellings. It provides that licence holders, in respect of the charges that they pay Scottish Water for each of the customers that they serve, shall make a proportionate contribution to the total costs of providing water and sewerage services on the public infrastructure. It provides that the charges paid by licence holders are covered by the arrangements that exist at present for agreeing water and sewerage charges between Scottish Water and the Water Industry Commissioner.

**Part 3** contains a number of miscellaneous and general provisions. These include the procedures for making subordinate legislation under the Bill, how references in the Bill are to be interpreted and a general power for Ministers to make regulations and to amend other legislation as a consequence of the provisions contained in the Bill.

**The schedule** makes more detailed provisions about licences and compliance.

The Bill includes a number of reserve powers for Ministers. These will be available to Ministers should it prove necessary, in light of how the Bill's provisions operate in practice, for them to make exceptions or modifications to the provisions. Any modifications will be consistent with the broad policy intentions of the Bill.

# WATER SERVICES (SCOTLAND) BILL

## [CONSULTATION DRAFT]

### Part 1

#### PUBLIC WATER SUPPLY AND PUBLIC SEWERAGE SYSTEMS: OFFENCES AND MAIN DEFINITIONS

##### **Section 1: Public water supply system – offences**

C1. Section 1 provides for common carriage on the public water networks for which Scottish Water is responsible to be prohibited and for anyone other than Scottish Water not licensed for the purpose to be prohibited from retailing water services to customers on the public networks.

C2. Subsections (1) and (2) prohibit common carriage by making it an offence for anyone other than Scottish Water to introduce water into the public water supply system or to use the public system for the purpose of supplying water to premises connected to the system.

C3. Subsection (3) prohibits any arrangements for using the public water supply system to supply the premises of customers except under the authority of a licence. (Part 2 of the Bill establishes a system for licensing "water service providers" and "sewerage service providers".)

C4. Subsections (4) and (5) allow Ministers to specify in regulations 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 other than those described above. Ministers will consult on any regulations that they propose to make under subsection (4). (The procedure by which the Parliament will approve such regulations is specified at section 17 and described at paragraph C51 of this commentary.)

C5. Subsections (6) and (7) set out the penalties for anyone committing an offence under this section. The penalties are intended to provide the Procurators Fiscal and the courts with flexibility in responding to the gravity of particular offences. They recognise that the offence at subsection (1), of adding water to the public networks, with its direct threat to public health and the environment, is by its nature more grave than the other offences.

C6. Subsection (6) provides that adding water to the public networks can be treated in two ways depending on the gravity of the particular offence. Subsection (6)(a), which would apply in lesser cases, provides that anyone guilty of an offence can be liable to fine of up to £20,000 on summary conviction (i.e. where convicted by a Sheriff sitting without a jury). Subsection (6)(b) specifies more severe penalties for conviction of an offence on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court). Anyone convicted on those terms is liable to an unlimited fine, imprisonment for up to 2 years, or both of these depending on the circumstances of the offence.

C7. Subsection (7) specifies penalties for anyone guilty of the offences at subsections (2) and (3) of using the public water supply to supply customers, or arranging for a supply to be made without being licensed for that purpose. These offences, which do not involve the

physical addition of water to the public networks, are less grave. Accordingly, at subsection (7)(a) the maximum fine available on summary conviction is the statutory maximum, which at present is £5,000. At subsection (7)(b) the maximum penalty for conviction on indictment is an unlimited fine.

C8. Subsection (8) provides that any agreement found to contravene the prohibitions in this section (i.e. an agreement between a person purporting to supply water services and a customer on the public networks) is void.

## **Section 2: Meaning of “public water supply system**

C9. The Executive's intention is that a water services licence will authorise a provider to arrange for a supply of water to be made to any eligible premises on the public water supply system. Section 2 defines what constitutes the public water supply system for the purposes of the Bill.

C10. Subsection (1) defines the public water supply system as all mains, pipes, water treatments works and other similar infrastructure “vested” in Scottish Water (i.e. infrastructure for which Scottish Water is responsible), or used by Scottish Water in exercise of its 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. For all practical purposes they comprise all activities involved in providing statutory public water and sewerage services).

## **Section 3: Public Sewerage System – offences**

C11. Section 3 makes provisions prohibiting common carriage and other activities on the public sewerage system that parallel those at section 1 in relation to the public water supply system.

C12. Subsections (1), (2) and (3) provide for common carriage on the public sewerage system for which Scottish Water is responsible to be prohibited and for anyone other than Scottish Water not licensed for the purpose to be prohibited from retailing sewerage services to customers on the public systems. Subsections (4) and (5) provide for Ministers to make regulations specifying circumstances in which the prohibitions will not apply. Subsections (6) and (7) provide for the same range of penalties in respect of offences on sewerage services as are available at section 1(6) and (7) in respect of water services.

## **Section 4: Meaning of “public sewerage system”**

C13. 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, an eligible customer on the public sewerage system. Section 4 provides a definition of the public sewerage system for the purposes of the Bill.

C14. Subsection (1) defines the public sewerage system as all sewers, drains, sustainable urban drainage (SUD) systems, sewerage treatment works or other similar infrastructure “vested” in Scottish Water or used by Scottish Water in exercise of its core functions in respect of statutory public sewerage services.

## Part 2

### PROVISION OF WATER AND SEWERAGE SERVICES TO ELIGIBLE PREMISES

#### *Water services and sewerage services licences*

#### **Section 5: Licence authorisation**

C15. Section 5 provides for the Water Industry Commissioner for Scotland to grant licences which authorise licence holders ("the providers") to provide services to the occupiers of eligible premises (as defined in section 6). The Commissioner's powers to grant licences are subject to the provisions at section 7 and at paragraphs 1 and 2 of the schedule to the Bill.

C16. Subsections (1) and (2) and subsections (3) and (4) respectively empower the Commissioner 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 sewerage services to the occupiers of eligible premises. In effect, the provider will provide retail services to customers on the public networks, such as meter reading or billing, although the actual physical service will always be provided by Scottish Water. These subsections also allow providers to charge for the supply of their services and to provide and charge for ancillary services, such as consultancy services. They allow for the provider to make arrangements with Scottish Water, so that in effect Scottish Water, in continuing to provide the physical service, supplies the provider with a wholesale service, which the provider retails to the end user (see section 11 of the Bill, discussed at paragraphs C29 to C32 below).

#### **Section 6: Meaning of "eligible premises"**

C17. Section 5 of the Bill provides that a licensed provider may make arrangements with customers in eligible premises in relation to the supply of water and sewerage to their premises and, where he does so, he will not be subject to the general prohibitions in sections 1(3) and 3(3). Section 6 provides the definition of "eligible premises" in this context.

C18. Subsection (1) defines eligible premises as those that are connected to the public water supply system or as the case may be the public sewerage system and are not a dwelling.

C19. Subsection (2) provides that a "dwelling" has the meaning given to it under the Local Government Finance Act 1992 (i.e. premises on which Council Tax is payable). The main purpose of this provision is to ensure that licensed providers cannot make arrangements to provide services to households.

C20. Subsection (3) gives Ministers the power to make orders amending the definition of a "dwelling" for the purposes of the Bill. This is a reserve power, which could be used, for example, in the event of any changes being made to the definition of dwelling for council tax purposes, to ensure that premises used primarily as dwellings are always excluded from the category of "eligible" premises. (The procedure by which the Parliament will scrutinise and approve such orders is specified at section 17 and described at paragraph C51 of this commentary.)

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

C21. Section 7 specifies the grounds on which the Commissioner can grant a water services or sewerage services licence.

C22. Subsection (1) requires the Commissioner 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 Commissioner, 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, which Ministers are empowered to specify in an order. (The procedure by which the Parliament will approve such an order is specified at section 17 and described at paragraph C51 of this commentary.) In the interests of transparency, subsection (3) empowers the Commissioner to issue guidance setting out the factors he will consider when assessing an applicant's ability.

C23. Subsection (4) requires a licence to be in writing. It provides for it to continue in existence with or without a specified time limit, although the expectation in general is that licences will be granted on the latter basis. Subsections (5) and (6) respectively require the Commissioner to notify the applicant and also Scottish Water, of a decision to refuse or grant an application.

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

C24. Section 8(1) places a duty on the Commissioner to monitor compliance with the terms and conditions of licences and to take any action necessary to ensure compliance. To these ends it confers the following powers on the Commissioner. Subsection (2) enables the Commissioner to give directions to service providers which providers are obliged to comply with. Subsection (3) empowers the Commissioner 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 Commissioner if they believe a licence condition has been breached.

### **Section 9: Commissioner's power to obtain information and charge fees**

C25. Section 9 gives the Commissioner further powers in respect of his monitoring and compliance functions at section 8 by requiring water and sewerage service providers to provide the Commissioner with information. It also empowers the Commissioner to charge service providers fees.

C26. Subsection (1) places a duty on service providers to comply with any reasonable request for information that the Commissioner might make. Subsection (2) provides that service providers need not provide the Commissioner with information that they would not be required to disclose in proceedings in the Court of Session. This enables the provider to treat as confidential legally privileged information, such as any advice received from its lawyers. Subsection (3) provides that it is an offence for a service provider, without a reasonable excuse, not to provide information required by the Commissioner. Subsection (4) specifies that the penalties for this offence are the statutory maximum (currently £5,000) where convicted by a sheriff sitting without a jury; and an unlimited fine where convicted by a jury.

C27. The Executive's policy is that the Commissioner should be able to recover from service providers all the costs of administering the licence system. Subsection (5) provides for this by giving the Commissioner the general ability to charge fees in relation to licences. It gives Ministers the power to set out in an order the detailed basis on which the Commissioner is to charge. The intention is that Ministers will consult on this order prior to it being brought into force. (The procedure by which the Parliament will approve such an order is specified at section 17 and described at paragraph C51 of this commentary.)

### **Section 10: Licences and compliance: further provision**

C28. Section 10 provides for the more detailed provisions on licences and compliance, which are set out in the schedule, to have effect.

#### *Provision of and charging for services by Scottish Water*

### **Section 11: Provision of services by Scottish Water**

C29. The Executive intends that water and sewerage providers should assume responsibility for providing services to customers in the following way. First, the provider should apply for and be granted a licence from the Commissioner. Secondly, they should make arrangements with the occupier of eligible premises to provide them with retail services. Thirdly, they should agree specific terms and conditions by which Scottish Water will provide a wholesale supply to the provider.

C30. Section 11(1) provides for this by giving a water service provider the power, once it has made arrangements with the occupier of an eligible premises, to request Scottish Water to supply water to the premises through the public networks. Subsection (2) places a duty on Scottish Water to comply with this request subject to agreeing terms and conditions with the provider. 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 premises come to an end. The exception to this is where Scottish Water has a continued duty to supply the premises under section 12(1) of the Bill (see paragraph C34 of this commentary). Scottish Water's duty to supply water also ceases if the supply to premises is discontinued at the request of the provider under section 13(6). (See paragraph C42 of this commentary). Subsection (3)(b) provides that a 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 retail services to the premises.

C31. Subsection (4) gives a sewerage service provider the power, once it has made arrangements with the occupier of an eligible premises, to request Scottish Water to supply sewerage to, or dispose of sewage from, the premises through the public networks. Subsection (5) places a duty on Scottish Water to comply with this request subject to agreeing terms and conditions with the provider. Subsection (6) provides that a duty to supply sewerage or dispose of sewage under subsection (5) may be superseded by a further new duty under subsection (5). There are no express provisions for Scottish Water's duty to supply sewerage, or dispose of sewage, to cease, as is the case in subsection (3) with regards to water. (See section 12(4), which is explained in paragraph C37, for further related provisions.) This reflects the practical difficulties of disconnecting sewerage services.

C32. Where Scottish Water and a water or sewerage service provider cannot come to an agreement under subsections (2) or (5), subsection (7) provides for the Commissioner to determine the terms and conditions of the supply that Scottish Water is to make to the provider.

## **Section 12: Continuation of provision of services**

C33. Section 12 sets out what happens to Scottish Water's duty to provide water and sewerage, when the arrangements between a particular provider and the occupier of premises come to an end.

C34. Subsection (1) provides that where the arrangements between the occupier of premises and a water service provider have come to an end, such as, for example, on revocation of a licence, Scottish Water has a continued duty to supply water to the premises for the period specified in subsection (2). The exception to this is where the supply is discontinued at the request of a provider under subsection 13(6). The intention of these provisions is to provide customers with a continued supply of water while they find a new retail provider, should the arrangements with their previous provider come to an end. In most cases we would expect a customer to have made arrangements with a new provider prior to the arrangements with their previous provider coming to an end.

C35. 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 2 months.

C36. Subsection (3) provides that the duty ceases if a new arrangement is made between a provider and the occupier of premises under section 11(2), or if the occupier tells Scottish Water that a supply of water is no longer required.

C37. Subsection (4) places a duty on Scottish Water to continue providing sewerage, or disposing of sewage from premises, even if the arrangements between the occupier of the premises and the provider have come to an end. This reflects the practical difficulties of disconnecting sewerage services. (See also section 11(5), which is explained in paragraph C31, for further related provisions.)

C38. Subsection (5) amends section 9 of the Water (Scotland) Act 1980. The new section 9(2A) provides that Scottish Water is not required to supply water for non-domestic purposes 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 provider and a customer have ended because of non-payment of charges (9(2A)(a)), or the supply of water to a premises has been discontinued at the request of the provider (under section 13(6)) because of non-payment of charges (9(2A)(b)). The intention of this provision is to ensure, 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 forced to provide them with a supply of water. The new section 9(2B) provides, where Scottish Water refuses to supply a customer on this basis, that the customer has a right to have this reviewed by the Water Industry Commissioner who, in terms of the new section 9(2C), can either confirm the decision to refuse or direct Scottish Water to give a supply.

### **Section 13: Discontinuation of supply of water**

C39. Section 13 enables water service providers to request that Scottish Water discontinue the supply of water to premises where charges have not been paid.

C40. Subsection (1) provides that before a water service provider can request that Scottish Water discontinue a supply of water, they must obtain a court decree in respect of charges owed and that there has been failure to comply with the decree. Subsections (2) to (4) require a provider to serve a notice, and a copy of the decree, on the occupier of the premises, Scottish Water and the Commissioner before requesting the Scottish Water discontinue the supply. Subsection (3) gives Ministers the power to specify by order the form the notice will take and what it will include. (The procedure by which the Parliament will approve such an order is specified at section 17 and described at paragraph C51 of this commentary.)

C41. Subsection (5) gives the occupier of premises, on whom a notice has been served, the right to make representations to their provider within 5 days of the notice being served. The provider must have regard to these representations.

C42. Subsection (6) requires Scottish Water to discontinue the supply of water, on the request of the water services provider, providing that Scottish Water can make the disconnection without affecting any supply of water to the premises for domestic purposes, or any supply of water to any other premises. Subsection (7) provides that a supply of water for domestic purposes is defined in accordance with section 7 of the Water (Scotland) Act 1980.

### **Section 14: Scottish Water's charges schemes**

C43. Section 14 sets out the principles by which Scottish Water should charge for the services it provides to water and sewerage service providers. The Executive's intention is that Scottish Water should charge water and sewerage service providers what in effect is a wholesale charge as the means by which it recovers from the service providers the cost to it of continuing to deliver network services to the provider's customers. The principle underpinning the wholesale charge is that it should reflect the costs incurred by Scottish Water in the exercise of its core functions as a whole. Section 14 achieves this by amending and supplementing the provisions relating to Scottish Water's charging functions contained in sections 29, 31, 32 and 33 of the Water Industry (Scotland) Act 2002.

C44. Subsection (1) inserts a new section 29A into the 2002 Act to treat service providers as the customers of Scottish Water. So that the charges to be paid to Scottish Water by service providers can be included in the charges scheme that Scottish Water is required to agree with the Water Industry Commissioner under sections 31 and 32 of the 2002 Act. Customers of providers will not count as customers of Scottish Water for the purposes of the charges schemes and will be charged directly by their providers under the authority of their licences. Subsection (2) adds two new subsections to section 31 of the 2002 Act. The new section 31(3A) makes it clear that the charges scheme can include charges for services provided by Scottish Water to service providers. The new section 31(3B) provides that the scheme can specify reasonable additional charges to be paid by service providers as contributions towards the costs incurred by Scottish Water in the exercise of its core functions.

C45. Subsection (3) adds a new section (section 33A) to the 2002 Act. This carries the principles on cost recovery described above into the process by which Scottish Water and the

Commissioner agree the contents of a charges scheme. The new section requires Scottish Water and the Commissioner, in agreeing any charges scheme, to ensure that the costs Scottish Water incurs in delivering network services to the premises of a service provider's customers are met by the charges recovered from that provider. The charges scheme is also to ensure that the costs Scottish Water incurs in exercising its core functions as a whole are shared across all customers on the public networks (whether being served directly by Scottish Water or a water or sewerage service provider).

C46. Subsection (4), which amends section 35 of the 2002 Act, provides that the occupier of a premises is not liable for charges where the provision of services is via a provider (except where water continues to be supplied by Scottish Water under section 12(1)). Instead it is the provider who is liable to Scottish Water for charges by virtue of the new section 29A of the 2002 Act.

### *The Water Industry Commissioner for Scotland*

#### **Section 15: The Commissioner's general function**

C47. Section 15 amends the general functions of the Commissioner under the Water Industry (Scotland) Act 2002 to reflect the change in functions conferred on him by the Bill. Section 1 of the 2002 Act is amended to give the Commissioner a duty to promote not only the interests of Scottish Water's customers but also the interests of service providers' customers. In effect, therefore the Commissioner is being required to promote the interests of all customers served by the public water and sewerage networks, regardless of whether they are customers of Scottish Water or a service provider. Service providers are excluded from this revised duty, as the intention here is that the Commissioner's duty should only be towards the ultimate consumers i.e. the providers' customers rather than the providers themselves.

### **Part 3**

#### MISCELLANEOUS AND GENERAL

#### **Section 16: Offences by bodies corporate and partnerships**

C48. Section 16 ensures that officers of companies and other corporations and members of partnerships can be held personally liable, in certain circumstances, for any offences under the Bill that their companies or partnerships commit.

#### **Section 17: Orders and regulations**

C49. Section 17(1) provides that the powers to make orders and regulations that the Bill confers on Ministers are exercisable by statutory instrument. In terms of subsection (2), in exercising such powers, Ministers can make such incidental, consequential, transitional or savings provisions as considered necessary and different provision for different circumstances.

C50. Subsections (3) and (4) set out the parliamentary procedure by which the Parliament scrutinises the various statutory instruments that are capable of being made under the powers in the Bill.

C51. Subsection (3) empowers Ministers to make and bring a statutory instrument into force, subject to the instrument being laid before the Parliament. The instrument continues to have effect unless the Parliament passes a resolution objecting to it within 40 days of it having been laid. This procedure is applied to instruments whose purpose is to give detailed effect to the Bill's provisions, where any closer scrutiny is considered unnecessary. Subsection (4), however, specifies that Ministers cannot make and bring into force a statutory instrument until the instrument has been laid in draft before the Parliament and the Parliament has by resolution approved it. This procedure requires closer Parliamentary scrutiny and is applied to the few provisions in the Bill that enable primary legislation to be amended, or enable provisions in the Bill to be modified in a significant way.

C52. Subsection (3) applies to statutory instruments in respect of the following provisions:

- **Section 6(3):** An order to vary the meaning of "dwelling" for the purposes of the Bill's definition of "eligible premises" at section 6.
- **Section 7(2):** An order to specify any other factors beyond those at 7(2)(a) and 7(2)(b) that the Commissioner is to take into account in assessing the ability of an applicant for a licence to discharge the licence's terms and conditions.
- **Section 9(5):** An order specifying the matters for which the Commissioner, under the powers conferred by section 9, may charge applicants for a licence.
- **Section 13(3):** An order prescribing the form and content of the notice that a provider must issue under section 13(2), prior to requesting that Scottish Water discontinue the supply of water to premises.
- **Section 18:** An order to make further provision for the purposes of the Bill (where this does not amend primary legislation.)
- **Paragraph 1(1) of the schedule:** An order prescribing the form and content of an application for a licence required under this provision.
- **Paragraph 1(4) of the schedule:** An order prescribing the timescales and content of the notice that an applicant for a licence must publish under this provision.
- **Paragraph 1(7) of the schedule:** An order specifying the circumstances in which the procedural requirements in paragraph 1(4) to 1(6), for licences being applied for and assessed, do not apply.
- **Paragraph 10(1) of the schedule:** An order specifying the manner in which the Commissioner must maintain a register of water and sewerage services licences.
- **Paragraph 10(2)(g) of the schedule:** An order specifying any additional information, beyond that at sections 10(2)(a) to 10(2)(f), to be included in the Commissioner's register of water and sewerage services licences.

C53. Subsection (4) applies to statutory instruments in respect of the following provisions:

- **Section 18:** An order to make further provision for the purposes of the Bill (where this amends primary legislation.)
- **Section 1(4):** Regulations which specify the circumstances in which the prohibition on common carriage on the public water networks at section 1(1), on using the public water networks to supply services at section 1(2), and on providing services on the public water networks without a licence at section 1(3) do not apply.

- **Section 3(4):** Regulations which specify the circumstances in which the prohibition on common carriage on the public sewerage networks at section 3(1), on using the public sewerage networks to supply services at section 3(2), and on providing services on the public sewerage networks without a licence at section 3(3) do not apply.

### **Section 18: Ancillary provision**

C54. Section 18 enables Ministers to make orders by statutory instrument where they consider that these are necessary to give proper effect to the Bill's provisions. The parliamentary procedure for making these order will depend on whether the order is used to amend primary legislation or not and is described at paragraph C51 above.

### **Section 19: Interpretation**

C55. Section 19(1) specifies the meaning to be placed upon the abbreviated references to legislation in the Bill. Subsection (2) provides that the usual definition of Scottish Water's core functions (i.e. that given at subsection 70(2) of the Water Industry (Scotland) Act 2002) is to apply in the context of the Bill.

### **Section 20: Short title and commencement**

C56. Subsection 20(1) specifies the title by which the Bill should be cited once it has been enacted. Subsections (2) and (3) empower Ministers to bring different provisions in the Bill into force at different times following Royal Assent.

C57. Subject to the Parliament passing the Bill and to it receiving Royal Assent, the Executive expects to bring the provisions at Part 1 relating to common carriage and use of the public networks into force 2 months after Royal Assent. The remaining provisions, at Part 1 and all of those at Part 2, relating to the licensing regime, will be brought into force after public consultation on the regulations associated with them. This is expected to happen by April 2006.

## **SCHEDULE**

(introduced by section 10)

### **LICENCES AND COMPLIANCE: FURTHER PROVISION**

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

C58. Paragraph 1 empowers Ministers to make an order in respect of applications for a water or sewerage licence under the Bill. It makes detailed provisions about the Commissioner's functions in considering applications from those seeking licences, and about the requirements to be placed on applicants.

C59. Sub-paragraph (1) requires applications to the Commissioner to be made in whatever form Ministers determine in an order. Sub-paragraph (2) requires applicants to provide the Commissioner with any information over and above that specified in the order, for which he has a reasonable requirement in considering their application. This requirement is qualified

by sub-paragraph (3), which allows applicants to withhold information, such as advice to the applicant from their legal advisers, that would be treated as confidential in proceedings in the Court of Session.

C60. Sub-paragraph (4) requires applicants to publish a notice of their application and to explain in this notice the procedures by which anyone can make representations to the Commissioner about the application. The timing of this notice and the procedures on representation contained in it are to comply with whatever requirements Ministers prescribe for them in an order.

C61. Sub-paragraph (5) requires the Commissioner to give notice to applicants of any proposed refusal of an application, explaining the reasons for it and specifying a time within which representations about it may be made. Sub-paragraph (6) provides that in making a final decision about whether to grant or refuse an application, the Commissioner is required to have regard to any representations that he receives from the applicant and other interested parties. Sub-paragraph (7) provides that Ministers have the power to make an order specifying the circumstances in which sub-paragraphs (4) to (6) do not apply. This is a reserve power, which could be used were Ministers to consider in light of experience that certain classes of application did not need to be subject to the general procedures established at sub-paragraphs (4) to (6).

C62. Sub-paragraph (8) makes it an offence for an applicant to provide false or misleading information in an application for a licence. Sub-paragraph (9) specifies that the penalties for anyone guilty of this offence are the statutory maximum (currently £5,000), where convicted by a Sheriff sitting without a jury, and an unlimited fine, where convicted by a jury.

C63. Sub-paragraph (10) gives applicants who are refused a licence the right to appeal against that refusal to the Court of Session. Sub-paragraph (11) gives Scottish Water a right of appeal to the Court of Session against a licence being granted. Sub-paragraph (12) establishes that decisions by the Court of Session in these cases are final.

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

C64. Paragraph 2 makes provisions about the conditions that are to attach to water services licences and sewerage services licences.

C65. Sub-paragraph (1) provides for each licence to contain within it certain standard conditions, and any other "ordinary" conditions particular to individual licences, which the Commissioner judges to be necessary. Sub-paragraph (2) requires the Commissioner to specify what the standard conditions are to be within 9 months of the sub-paragraph coming into force. The intention is that the Commissioner will use part of the 9-month period to consult publicly on draft conditions prior to them being determined.

C66. Sub-paragraph (3) provides for the matters to be covered by the standard conditions. The Executive expects that these will include requirements that service providers avoid undue discrimination between customers, meet their financial obligations to Scottish Water at all times, and comply with standard procedures in transferring or surrendering licences. In the interests of allowing the Commissioner to operate flexibly and to take into account different circumstances, the sub-paragraph enables conditions to apply only to specified classes of licence and to come into effect or be suspended in particular circumstances.

C67. Sub-paragraph (4) requires the Commissioner to consult Ministers on his proposals for standard conditions and to publish the conditions once determined. The intention is that the Commissioner should consult Ministers about these proposals having had regard to the outcome of the public consultation exercise on the draft conditions.

C68. Sub-paragraphs (5) to (11) provide for the Commissioner to review and modify the standard conditions and to modify other conditions of any licence if necessary as a consequence of modifying a standard condition. This is the mechanism for changing the standard conditions for all licences that contain them. The Commissioner is not required to obtain the agreement of each licence holder to whatever change is being made.

C69. Sub-paragraph (5) places a duty on the Commissioner to review the standard conditions from time to time and gives him the power to modify them and also, in consequence of so doing, the ordinary conditions of the licence. The Executive expects that the frequency with which this is done will depend on the number of licences issued, the rate at which they are issued, and the experience gained of their operation in practice. Sub-paragraph (6) requires that the Commissioner, before making any modification to a standard condition or a consequential amendment to an ordinary condition, should notify the licence holders affected by any proposed modification, Scottish Water and Ministers; and that he should publish this notification. Sub-paragraph (7) requires that the notice explains the Commissioner's reasons for proposing modifications and specifies the timescale within which representations about them can be made to the Commissioner. Sub-paragraph (8) requires the Commissioner to have regard to any representations made about the proposed modification. Sub-paragraph (9) requires the Commissioner to publish any modifications that are made to the standard conditions.

C70. Sub-paragraph (10) empowers the Commissioner to grant a licence that does not contain the standard conditions in their normal form, again in the interests of flexibility to reflect the particular circumstances of the case. Sub-paragraph (11) requires, where the Commissioner is minded to grant a licence on this basis, that the Commissioner should follow the procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6)-(8).

C71. In the interests of flexibility, sub-paragraph (12) gives the Commissioner discretion to provide in an ordinary condition of a licence, for that condition to have effect or cease to have effect or be modified at such time, in such manner and in such circumstances as the Commissioner considers appropriate.

C72. Sub-paragraph (13) empowers the Commissioner to modify any conditions within a particular licence, if the Commissioner considers that the modification is necessary in the circumstances of the case. Sub-paragraph (14) requires, where the Commissioner is minded to modify a condition on this basis, that the Commissioner should follow procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6)-(8).

C73. Sub-paragraphs (15) and (16) empower a water or sewerage services provider to appeal to the Court of Session against the inclusion or modification of a condition in a licence, on the grounds that the condition, or the condition as modified, is unreasonable in the circumstances of the case. Sub-paragraph (17) provides that the decision of the Court in the appeal is final.

**Paragraph 3: Transfer of a licence**

C74. Paragraph 3 establishes the basis on which a service provider can transfer a licence to another person.

C75. Sub-paragraph (1) allows in principle for a licence to be transferred from a service provider, who holds a licence, to another person. A transfer can be in respect of all, or part of, the activities covered by a licence. Sub-paragraph (2) requires any transfer to comply with any conditions (whether standard or ordinary) relating to transfers and to be subject to the consent of the Commissioner.

C76. Sub-paragraphs (3) and (4) empower the Commissioner to consent to a transfer, but only where he is satisfied that the person the licence is being transferred to is able to carry out adequately the activities in respect of which the transfer is being proposed. In deciding whether someone is able to conduct these activities adequately the Commissioner must take into account the factors that would normally be considered when granting the licence under section 7 of the Bill. Sub-paragraph (5) requires the Commissioner to notify Scottish Water of any transfer to which he is minded to consent and to publish this notification. Sub-paragraph (6) specifies the matters to be contained in this notice, including the reasons for the proposed transfer. Sub-paragraph (7) requires the Commissioner to have regard to any representations made in response to this notice.

C77. Sub-paragraph (8) empowers the Commissioner to make his consent to a transfer subject to any conditions in respect of the licence or more generally as he considers appropriate. Sub-paragraph (9) requires the Commissioner to notify, as soon as is practicable after his decision about a transfer, those parties with an interest in that transfer and Scottish Water.

C78. Sub-paragraph (10) permits prospective transferees to appeal to the Court of Session against a decision by the Commissioner to withhold consent to a transfer. Sub-paragraph (11) provides that the decision of the Court of Session in such cases shall be final. Sub-paragraph (12) ensures that any attempt to assign a licence is caught by the provisions of this paragraph.

**Paragraph 4: Powers of entry etc.**

C79. Paragraph 4 provides for the Commissioner to have powers of entry to premises so as to enable him to discharge the duty, placed on him at section 8, to monitor and ensure compliance with licence conditions. Sub-paragraph (1) empowers the Commissioner, or anyone authorised by him, to exercise the powers specified in sub-paragraph (2).

C80. Sub-paragraph (2)(a) enables the Commissioner and his officials to enter (i) the premises of any water or sewerage services provider (“the first category”), (ii) the premises of anyone that a provider has arranged to provide with services (“the second category”), or (iii) the premises of any other person (“the third category”). Sub-paragraphs (2)(b) and (c) respectively make provision for powers to inspect such documentation and articles, and to remove them from the premises, as the Commissioner considers necessary to give effect to his monitoring and compliance duties. The exercise of the powers of entry are qualified by sub-paragraph (3). Thus whereas the Commissioner, or anyone authorised by the Commissioner, can enter the premises of a licensed provider in terms of the first category at

any reasonable time without notice, they can only enter premises falling within the second and third categories on giving 24 hours' notice. Moreover, sub-paragraph (4) specifies that premises in the third category can be entered only where the Commissioner is satisfied that gaining access to premises in the first and second categories only would not be sufficient to enable him to discharge his monitoring and compliance duties. In practice, this would mean that the Commissioner could seek entry to premises in the third category only where he had grounds for believing that he might obtain there information relevant to monitoring and compliance that could not be obtained in any of the premises in the preceding two categories. The effect of these qualifications is to direct the Commissioner's powers of entry, first to the premises of service providers, then to the premises of customers of service providers, and only in the last resort to premises in general.

C81. Sub-paragraph (5) requires that the Commissioner be given reasonable assistance by the owners and occupiers of premises that are subject to the exercise of the Commissioner's powers of entry. This duty extends to those who are present on the premises when the powers are being exercised.

C82. Sub-paragraph (6) provides that anyone obstructing the Commissioner, or failing to provide assistance to the Commissioner, in the exercise of the powers at this paragraph is guilty of an offence. Sub-paragraph (7) specifies that the penalties for anyone guilty of this offence are the statutory maximum (currently £5,000), where convicted by a Sheriff sitting without a jury, and an unlimited fine, where convicted by a jury.

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

C83. Paragraph 5 provides for a sheriff or justice of the peace to grant warrants where this is necessary to give effect to the powers of entry conferred at paragraph 4.

C84. Sub-paragraph (1) establishes, that a sheriff or justice, where satisfied that evidence provided to them on oath meets at least one of the conditions specified at sub-paragraph (2), can issue a warrant authorising the Commissioner, or those authorised by him, to enter premises as provided for at paragraph 4(2). As a warrant authorises the use of force if necessary, the power to issue a warrant is qualified to ensure that it is exercised only after there has been proper consideration of the circumstances. Sub-paragraph (2) specifies the conditions at least one of which must be satisfied before a sheriff or justice issues a warrant. In essence these ensure that a warrant will be issued only in circumstances where entry cannot be gained without one, or where entry is required urgently. Sub-paragraph (3) further qualifies the power to issue a warrant in cases where the conditions in sub-paragraphs (2)(a) and (b) are satisfied, by requiring the Commissioner to have given notice of the intention to apply for a warrant, save where to have done so would defeat the purpose of gaining entry to premises.

C85. Sub-paragraph (4) provides that a warrant remains in force until the purposes for which the warrant was issued have been fulfilled, for example when entry to the premises cited in the warrant has been gained.

C86. Sub-paragraph (5) empowers the Commissioner, or anyone authorised by him, and subject to the terms of any warrant, to be accompanied by others on, and to take equipment on to, the premises so as to be able to conduct monitoring and enforcement activity effectively. Where appropriate, this must be done in a manner consistent with the terms of

any warrant granted under sub-paragraphs (1) to (3). The sub-paragraph also requires anyone exercising a power of entry and if required to do so, to provide written evidence of their authority to do so. Sub-paragraph (6) requires those entering premises to leave them in a condition no less secure than that in which they found them.

C87. Sub-paragraphs (7) to (9) provide protection for those whose premises are entered under paragraph 4(2). Sub-paragraph (7) places a duty on the Commissioner to pay compensation to anyone who suffers damage or loss as a result of the powers of entry being exercised except where such loss or damage is attributable to the fault of the person who sustained it. Sub-paragraph (8) makes it an offence for anyone to disclose any commercially sensitive information obtained as a result of exercising the power of entry and sub-paragraph (9) specifies that the penalties for anyone guilty of this offence are the statutory maximum (currently £5,000), where convicted by a Sheriff sitting without a jury, and an unlimited fine, where convicted by a jury.

### **Paragraph 6: Enforcement notices**

C88. Paragraph 6 gives the Commissioner power to issue enforcement notices and describes the process to be followed in issuing these notices.

C89. Sub-paragraph (1) gives the Commissioner power to issue enforcement notices if a water or sewerage services provider has contravened or is contravening a licence condition and the contravention is likely to recur. The Commissioner can do so only where it appears to him that the provider is not taking appropriate steps to remedy the contravention or prevent it from recurring. Any enforcement notice that the Commissioner issues must contain information about the contravention and the steps required by the provider to remedy it and about the timescales for doing so, as specified at sub-paragraphs (2) to (4).

C90. Sub-paragraphs (5) and (6) specify the steps that the Commissioner must take before issuing an enforcement notice, such as consultation with Scottish Water and other appropriate persons and allowing the provider to whom the notice will relate to make representations. Sub-paragraph (7) requires the Commissioner to have regard to any representations made to him by the provider about an enforcement notice. Sub-paragraph (8) requires copies of enforcement notices to be sent to Ministers and Scottish Water.

C91. Sub-paragraph (9) gives those on whom a notice has been served a right to appeal to the sheriff against the notice within 14 days. Sub-paragraph (10) empowers the sheriff to make any order in respect of an appealed notice that he considers necessary and provides that the sheriff's decision is final in such cases.

C92. Sub-paragraphs (11) and (12) empower the Commissioner to withdraw, waive or relax any requirement of an enforcement notice, without in any way restricting his power to issue subsequently a further notice in respect of the same contravention.

### **Paragraph 7: Enforcement notices: offences**

C93. Paragraph 7 sets out the sanctions for a water or sewerage service provider, who having been served with an enforcement notice, fails to satisfy the requirements of the notice. Sub-paragraphs (1) and (2) specify that such a failure is an offence and that where a failure recurs subsequently, that too is an offence. Sub-paragraph (3) specifies that the penalties for

anyone guilty of these offences are the statutory maximum (currently £5,000), where convicted by a Sheriff sitting without a jury, and an unlimited fine, where convicted by a jury.

### **Paragraph 8: Revocation of licences**

C94. Paragraph 8 gives the Commissioner the power to revoke a water or sewerage services licence under certain circumstances.

C95. Sub-paragraph (1) provides that a licence may in principle be revoked. Sub-paragraph (2) empowers the Commissioner to revoke a licence where there has been a failure to comply with the terms of an enforcement notice. Sub-paragraph (3) empowers the Commissioner to revoke a licence where there has been a failure to comply with a term or condition of a licence and where he considers that the provider would fail to comply with an enforcement notice relating to the contravention.

C96. Sub-paragraph (4) allows the Commissioner to revoke a licence if he considers that a water or sewerage services provider no longer has the ability to perform adequately the activities in their licence. In making this decision the Commissioner must have regard to the factors mentioned in section 7(2) and to other matters specified under that subsection. Finally, sub-paragraph (5) allows the Commissioner to revoke a licence if requested to do so by a provider.

C97. Sub-paragraph (6) provides that before revoking a licence the Commissioner must consider the terms and condition of the licence, the providers' responsibilities to their customers and any other relevant matters. Sub-paragraph (7) provides that a notice of revocation must specify the reasons for the revocation and the date from which it will have effect.

C98. Sub-paragraph (8) allows a provider on whom a notice of revocation is served to appeal to the sheriff against the notice within 14 days. Subsection (9) empowers the sheriff to make any order in respect of such an appeal and the decision of the sheriff is final.

C99. Sub-paragraph (10) requires the Commissioner to send a copy of the notice of revocation to Scottish Water and the Scottish Ministers and to publish the notice, once it comes into effect.

### **Paragraph 9: Penalties for contravention of licence**

C100. Paragraph 9 gives the Commissioner the power to impose financial penalties on water or sewerage service providers if they contravene the terms and conditions of their licence. The Commissioner is required to prepare and publish a policy with respect to the imposition of penalties.

C101. Sub-paragraph (1) empowers the Commissioner to impose penalties for contravention of licence terms and conditions. In the interests of transparency, sub-paragraph (2) requires the Commissioner to develop and to publish, and to keep under review and revise, a statement of his policy for imposing penalties on providers who contravene the terms and conditions of their licences. The Executive expects the Commissioner to consult publicly on the basis of a draft policy statement prior to a final statement being published.

C102. Sub-paragraph (3) requires the Commissioner to notify a provider of his intention to impose a penalty. Sub-paragraph (4) requires the Commissioner to have regard to any policy statement and any representations from a provider in respect of a notice before determining the penalty to be imposed on the provider. Sub-paragraph (5) enables a provider to appeal to the sheriff within 14 days against any penalty imposed by the Commissioner and the penalty is not recoverable until the appeal is withdrawn or finally determined. Sub-paragraph (6) empowers the sheriff to make any order in respect of such an appeal that he considers necessary and provides that the sheriff's decision in such cases is final.

C103. Sub-paragraph (7) ensures that the Commissioner will be able to recover any penalties that he imposes by using general debt recovery procedures and remedies. It ensures too that a former provider can be pursued for any penalty, even where it no longer holds a licence. In terms of sub-paragraph (8), the proceeds of penalties recovered must be paid into the Scottish Consolidated Fund.

### **Paragraph 10: Register of licences**

C104. Paragraph 10 requires the Commissioner to keep a register of water and sewerage services licences and sets out a list of the information which must be included in the register.

C105. Sub-paragraph (1) empowers the Scottish Ministers to prescribe, by order, the manner of the register, which the Commissioner must keep. Sub-paragraph (2) specifies certain information, which must be included in the register and gives Ministers the power to prescribe by order any additional information which must be contained in the register. Sub-paragraph (3) provides that the register must be available for inspection by any person at any reasonable time.

**SECTION D****WATER SERVICES (SCOTLAND) BILL - QUESTIONS****1:     *Prohibition on common carriage***

Executive Policy:     The Executive's policy is to safeguard public health and the environment by prohibiting common carriage on the public networks.

**Question:     Do the provisions at sections 1 to 4 of the draft Water Services (Scotland) Bill achieve the objective of prohibiting common carriage?**

**2:     *Prohibition on retail competition for households***

Executive Policy:     The Executive's policy is to safeguard social policy objectives by prohibiting competition in the provision of retail water and sewerage services to households.

**Question:     Do the provisions at sections 1(3), 3(3), 5 and 6 of the draft Water Services (Scotland) Bill achieve the objective of prohibiting retail competition for households?**

**3:     *Licensing the provision of retail water and sewerage services***

Executive Policy:     The Executive's policy is that the provision of retail water and sewerage services to non-household customers should be confined to retailers licensed by the Water Industry Commissioner for Scotland.

**Question:     Do the provisions at sections 5, 7-13, 15 and the schedule of the draft Water Services (Scotland) Bill provide a reasonable basis for establishing and administering the proposed licensing regime?**

**4:     *Setting wholesale charges***

Executive Policy:     The Executive's policy is for the wholesale charges paid to Scottish Water by licensed retailers, including Scottish Water's retail arm, to meet Scottish Water's costs in providing the wholesale service on a consistent and proportionate basis.

**Question:     Do the provisions at section 14 of the draft Water Services (Scotland) Bill achieve the objective of ensuring that retailers contribute towards Scottish Water's wholesale costs on a consistent and proportionate basis?**

**5:     *Thresholds***

Executive Policy:     Transitional thresholds could play a useful role in managing the orderly development of a market in treatment services based on the use of common carriage. Given the Bill's prohibition on common carriage, the Executive does not propose making any provisions for a system of transitional thresholds as part of the licensing regime.

**Question:     Should the Bill include provisions for transitional thresholds, and if so how should they be set?**

**6:     *Arrangements for transferring information about retail customers***

Executive Policy:     The Executive expects a number of specialist firms to offer their services in the development of arrangements to enable information about customers to be transferred between retailers. The Executive considers these to be matters for retailers to agree among themselves and not a matter for legislation. However, the Commissioner, while having no statutory role in this respect, might be required to perform an informal role in assisting the development of satisfactory arrangements.

**Question:     Is it satisfactory to rely on non-statutory arrangements for transferring information about retail customers?**

**7:     *Licensing Scottish Water's retail activities***

Executive Policy:     The Executive wishes to ensure that Scottish Water's retail activities are not placed in an advantageous or disadvantageous position in relation to other retailers. It proposes therefore that Scottish Water should be required to establish a wholly owned retail subsidiary that will be subject to the licensing regime in the same manner as all other retailers.

**Question.     Will the requirement on Scottish Water to establish a retail subsidiary meet the objective that all retailers, including Scottish Water's retail arm, are treated equally for the purposes of the licensing regime?**

## SECTION E

### PARTIAL REGULATORY IMPACT ASSESSMENT

E1. This partial regulatory impact assessment (RIA) assesses the likely impact of the provisions contained in the draft Water Services (Scotland) Bill

#### Issue

E2. *Is the current regulatory framework for the provision of public water and sewerage services adequate to protect the Executive's objectives given the possibility that competition on the public networks might develop?*

E3. The current regulatory regime applies only to Scottish Water as the sole provider of water and sewerage services on the public networks. It makes no clear provision for the regulation of services provided by third parties using the public networks. Until recently, this was an acceptable state of affairs. However, the Competition Act 1998, which came into force in March 2000, opens up the possibility of other parties seeking various forms of access to the public networks. The Executive proposes therefore that the Water Services (Scotland) Bill should revise the legislative framework to ensure that its public health, environment protection and social policy objectives continue to be met as competition develops.

E4. Scottish Water is regulated by several different regulators (WIC, SEPA, DWQU, and HSE – see paragraph A4 of this consultation paper for further details). Due to the complex nature of this regulatory regime and the difficulty in predicting how a competitive market will develop and behave, the assessment of costs, benefits and risks included in this partial RIA is mainly qualitative.

E5. In RIAs it is good practice to distinguish between policy and implementation costs. Policy costs refer to the costs that can be directly attributed to the policy goal whereas implementation costs are those that can be attributed to the 'red-tape' burden of regulation. The situation under consideration here is what form of competition, if any, should be allowed. Therefore it is about opening up a market rather than imposing additional burdens. In general therefore there will be benefits to businesses rather than additional costs. Hence the analysis below does not mention costs, except in specific instances where they are thought to be significant for particular businesses.

#### Objectives

E6. The Executive has business and public policy objectives for Scottish Water. The public policy objectives are for it to contribute to:

- *Public health* - by providing a constant public supply of drinking water, which satisfies drinking water quality standards and by the safe and effective removal of wastewater.
- *Environment protection* - by providing for the treatment and disposal of wastewater that meets environment protection standards.

- *Social policy* - by maintaining the link between domestic water and sewerage charges and the Council Tax system, which results in domestic charges that reflect broadly customers' ability to pay for the services that they receive.

E7. The Executive wishes to ensure that the revised regulatory framework continues to support Scottish Water's contribution to the delivery of these objectives.

### **Risk Assessment**

E8. The Competition Act 1998 came into force in 2000. It opened up the prospect of competition on the public water and sewerage networks developing on the back of challenges brought under the Act by third parties wishing to enter the market and compete with Scottish Water through the shared use of parts of the networks. This competition could take two main forms:

- **Common Carriage** - where a new entrant to the market competes with Scottish Water, to provide water and sewerage services on the public networks. This is on the basis of the new entrant adding water that they have treated to the public networks for distribution to their customers on the networks, or drawing wastewater from the public sewers for treatment in their own wastewater treatment works. In both cases the new entrant is providing a treatment service, which they can only deliver through the public networks that the incumbent owns and operates.
- **Retail** - where the incumbent continues to provide all the treatment and distribution functions and the new entrant's role is confined to offering billing and other customer services in competition with the incumbent.

E9. As matters stand, either form of competition would mean new entrants to the market operating beyond the scope of the regulatory framework that is applied to Scottish Water. This could pose risks to the Executive's stated objectives on public health, environment protection and social policy.

### **Preferred Option**

E10. In February 2003, Ross Finnie MSP, Minister for Environment and Rural Development outlined the Scottish Executive's policy for addressing the possibility of competition on Scotland's public water and sewerage networks. He said that the Executive would amend the present framework of water and sewerage regulation by legislating to:

- Protect public health and the environment by prohibiting common carriage on the public networks.
- Safeguard the Executive's social objectives by prohibiting anyone other than Scottish Water from serving household customers.
- Establish a licensing regime to regulate the provision of retail services to non-household customers.

E11. The Executive believes that this option strikes the right balance between the need to safeguard its public policy objectives and the desirability of capturing the benefits that can be expected to flow from competition. In terms of the former, the restriction of competition to the non-domestic sector will ensure that the link between the Council Tax system and

domestic charges is retained. In terms of the latter, it will clarify the legal framework, which will assist prospective new entrants to the market by providing them with certainty as to the application of the Competition Act. It will ensure that wholesale charges are published, so that there is a level playing field for new entrants to compete with Scottish Water in the supply of retail services. By assisting businesses that wish to enter the retail market to compete with Scottish Water, the Bill will benefit businesses generally by encouraging the development of choice for the 160,000 premises in the sector. This can be expected to stimulate keener charges and better services.

E12. A licensing regime for retail competition in the non-domestic market will impose some costs on the companies that currently supply retail services to non-domestic customers. The Executive is only aware of a very few such companies and it is expected that the cost to obtain a license under the new proposals will be relatively minor. The cost of running the license regime will be recovered by the WIC from all license holders.

### **Alternative Options Considered**

E13. The following alternative options were considered:

*Alternative Option 1: No change to the existing legislative framework*

*Alternative Option 2: Prohibit all forms of competition on the public networks*

*Alternative Option 3: Allow retail competition for all customers*

*Alternative Option 4: Allow common carriage*

E14. The section below considers the costs, benefits and risks of each of these options.

### **Costs, Benefits & Risks of each Option**

#### Alternative Option 1: No change to the existing legislative framework

E15. If the present legislative framework is not revised, there is a risk that competition will develop on an ad-hoc basis. This would pose risks to Ministers' public health, environment protection and social policy objectives. (See below on the options for retail competition and common carriage.)

E16. As well as posing risks, ad-hoc development of competition, probably as the result of legal challenges against Scottish Water, would be an inefficient and ineffective way forward. It would mean considerable uncertainty existing for many years both for water users and for those firms wanting to compete with Scottish Water.

#### Alternative Option 2: Prohibit all forms of competition on the public networks

E17. The Executive considers that for legislation in this area to fall within the competence of the Scottish Parliament, it should not go beyond the minimum necessary to safeguard its stated policy objectives. It has concluded that prohibiting all forms of competition would go beyond what is required. Further, such a prohibition would prevent potential suppliers

unnecessarily from entering the market and would prevent non-domestic customers from obtaining the benefits that competition could bring them.

#### Alternative Option 3: Allow retail competition for all customers

E18. In the Strategic Review of Charges 2001, the Water Industry Commissioner estimated that the size of the retail segment of Scottish Water's business as a whole was around £75m in 2000-01.

E19. By 2006, when competition would be introduced, Scottish Water is expected to have cut its operating costs by approximately a third. If it achieves this then the potential net benefit from retail competition is estimated to be around £5m a year. These net benefits would accrue to customers in the form of keener prices and to new entrants in the form of profits.

E20. The above estimate of the potential benefit from retail competition does not capture any dynamic efficiency gains that might result from increased competition, although these are thought to be small. Nor do they capture any benefits that may result to businesses having a choice of supplier, such as improved service levels. The cost of the regulatory regime that would be required to administer the competitive regime and the data transfer system would reduce these benefits.

E21. Against these benefits have to be set the risks posed by retail competition to Ministers' social policy objectives. These objectives are delivered through the current charging arrangements for domestic customers. First, charges are averaged across the country so that customers resident in expensive to serve areas pay for their services on the basis of the same tariff structure as those in relatively cheap to serve areas. Secondly, local authority billing and collection of domestic charges is conducted on the back of the Council Tax billing and collection system. Thus domestic customers across the country pay for water and sewerage by reference to the Council Tax band of their homes and where they receive a discount on their council tax, they also receive the same discount on their water and sewerage charges.

E22. It does not appear possible to retain the current charging arrangements and introduce retail competition in the domestic sector, as the arrangements are dependent on the local authorities applying their detailed information of individual household's circumstances, which could not be made available to other parties. The Executive judges that the potential net benefits that may result from retail competition in the domestic sector are not sufficient to offset the higher charges that would result for many of the most vulnerable (such as single parents, single pensioners and the disabled) if the current charging arrangements were undermined.

#### Alternative Option 4: Allow common carriage

E23. Allowing common carriage would create a larger contestable market compared to the retail competition only options. Taken at face value, this could imply there is greater scope for efficiency savings in the industry, which would feed through into benefits for businesses and domestic customers.

E24. The critical issue here is that in the Executive’s view common carriage poses an unacceptable risk to public health and the environment. Anyone wishing to add water or draw water from the public networks would be committing themselves to running a continuing process, relying on the performance of managerial and operational functions to a constant and demanding standard. Such processes would inevitably carry with them the risk of standards not being met at all times. Were such risks to be realised, the consequences could include contamination of the public water supply, interruption to supply and damage to the public infrastructure - all of which would threaten public health. Similarly, on the wastewater side, there could be pollution, including sewage flooding, interruption to the supply and again damage to the public infrastructure - threatening public health and the environment.

### **Consultation with Small Business: ‘The Litmus Test’**

E25. The proposed reforms should not involve any additional costs to small businesses – rather they should benefit water users by providing them with a choice of retailer. They should also benefit potential small retailers by providing clarity on the legal framework.

E26. Small businesses and their representatives are specifically invited to respond to the consultation questions.

### **Compliance & Enforcement**

E27. The Executive proposes that the Water Industry Commissioner should be responsible for administering the licensing regime: considering licence applications, issuing licences and monitoring compliance with the terms of the licences. It proposes that the Commissioner's actions in this respect should be subject to appeal to the Courts and, in respect of competition matters, to the Competition Commission.

### **Results of consultation**

E28. This RIA is part of the Executive’s consultation on the draft Water Services (Scotland) Bill and the results of the consultation exercise overall will help inform the full RIA.

**SECTION F****PREVENTION OF ENVIRONMENTAL DAMAGE FROM ABANDONED COAL MINES**

F1. Once underground coal mines are closed and the pumps are switched off, surface and ground water will flood the mine. As the water level rebounds to its natural state, minerals in the coal workings that have oxidised in air may dissolve in solution. The water that results often becomes rich in iron – the telltale orange colour that has blighted many a river in Scotland’s industrial belt. If left unchecked this water is likely to flow into watercourses and pollute them, but if treated may be used for potable, irrigation or industrial supply. There are currently over thirty discharges from abandoned coal mines in Scotland. There is also a threat from recovering water levels in some of our more recently closed collieries where discharges have not yet occurred but may do so unless preventative action is taken.

F2. Funded by the Department of Trade and Industry, the Coal Authority is tasked with carrying out work on such mines and, in consultation with the Scottish Environment Protection Agency (SEPA), agrees a priority list of works based on environmental impact. Where appropriate, the Coal Authority needs to set up remediation equipment and other apparatus on land near the mine. However, it is hampered in achieving this in cases where it is unable to gain access to land in order to carry out investigative work, or where it cannot acquire land by agreement for its remediation works.

F3. At present SEPA has powers of access and compulsory purchase where necessary to carry out its functions, whereas the Coal Authority does not have any for its programmed abandoned mine operations that are to prevent pollution to the environment. The Water Bill for England and Wales includes provisions for the Coal Authority's operations to be given similar access and entry powers to those of the Environment Agency. In order that the Coal Authority's works in Scotland are not disadvantaged, we therefore propose to introduce similar statutory powers to:-

- Prevent or deal with water emanating from any coal mine onto or into any land or into the water environment,
- Enter land to drill boreholes and install monitoring or other equipment, in order to investigate and deal with discharges of water from coal mines that cause or are likely to cause serious pollution of the water environment or a danger to life or health; and
- Compulsorily purchase land in Scotland to prevent or mitigate the effect of a discharge of water from a coal mine into the water environment in cases where the discharge has, is or is likely to cause serious pollution of the water environment or serious harm to human health.

F4. Sections will be added to the Bill to give effect to the above before it is introduced in the Scottish Parliament.

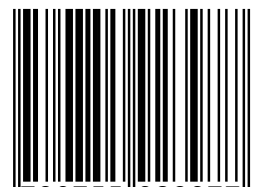


Small changes in the way we perform everyday tasks can have huge impacts on Scotland's environment.

Walking short distances rather than using the car, or being careful not to overfill the kettle are just two positive steps we can all take.

This butterfly represents the beauty and fragility of Scotland's environment. The motif will be utilised extensively by the Scottish Executive and its partners in their efforts to persuade people they can do a little to change a lot.

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