SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

WATER SERVICES ETC. (SCOTLAND) BILL

Purpose

1. This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.7.9 of the Parliament’s Standing Orders, of the Water Services etc. (Scotland) Bill. This memorandum refers to the Bill as amended at Stage 2. It describes the purpose of those provisions conferring power to make subordinate legislation which were amended or added at Stage 2, explains why the matter is to be left to subordinate legislation, and explains why the stated parliamentary procedure applying to each power has been chosen as the most appropriate option in each case. The memorandum should be read in conjunction with the Executive’s memorandum to the Subordinate Legislation Committee, which was submitted with the Bill when it was introduced.

Subordinate Legislation Powers following Stage 2

2. During Stage 2, one paragraph of Schedule 2 to the Bill which conferred a power to make an order was removed (paragraph 1(7) of schedule 2), 2 sections which conferred powers to make regulations were amended and 6 new powers to make orders were added. This memorandum examines each of these. Section 27 of the Bill sets out the procedures for orders and regulations to be made under the Bill.

Section 4(7), Exceptions to offences regarding the public water supply system

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3. New subsection (8A) has been added to section 4 of the Bill. This new subsection qualifies the regulation-making power provided for at section 4(7) of the Bill, and provides that the power under section 4(7) may be exercised only where the effect of the regulations would not be prejudicial to the exercise of Scottish Water’s core functions as respects the supply of water. Thus, the scope of regulations made under section 4(7) is restricted to specifying the circumstances and categories of person in respect of which the prohibitions as regards the public water supply system (as set out in section 4(1) to (3) of the Bill) do not apply.

Reason for taking this power

4. In its Stage 1 Report (see in particular paragraphs 8-23), the Committee was concerned about the width of the section 4(7) regulation-making power and that it could, for example, lead to privatisation of Scottish Water by the back-door. The amendment, however, ensures that the power cannot be used in a way which would be prejudicial to the exercise of Scottish Water’s core functions regarding the supply of water. It reinforces the Executive’s intention
that the power be exercised to provide for a flexible response to the unforeseen application of the prohibitions provided for in sections 4(1) to (3) of the Bill.

Section 5(7), Exceptions to offences regarding the public sewerage system

Powers conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution procedure

5. New subsection (8A) has been added to section 5 of the Bill, which makes provision equivalent to that described at paragraph 3 above in relation to section 4(7) of the Bill in respect of Scottish Water’s core functions regarding the provision of sewerage services. The provision similarly qualifies the scope of the regulation-making power in section 5(7) of the Bill to ensure that it cannot be used in such a way as to prejudice the exercise of Scottish Water’s core functions as respects the provision of sewerage and disposal of sewage.

Section 12(3A), Water and sewerage services undertaking

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

6. Section 12(1) of the Bill enables the Scottish Ministers to require Scottish Water to secure the establishment of a business undertaking to obtain a licence to become a water or sewerage services provider (see subsections (2) and (3)).

7. Provision regarding applications for water and sewerage services licences is made in paragraphs 1 and 2 of Schedule 2 to the Bill. Section 12(3A) of the Bill confers an order-making power on Scottish Ministers to enable modification of the licence application procedure provided for in paragraphs 1 and 2 of Schedule 2 in respect of the initial licence application to be made by the undertaking and the granting of such a licence.

Reason for taking this power

8. The Executive considers that it is important to have some degree of flexibility as regards the initial application for a licence by the undertaking, given the Executive’s intention (as indicated in its letter to the Committee of 3 October 2004 during Stage 1) that before the provisions are commenced more generally, the undertaking will require in the first instance to apply for a licence under Part 2 of the Bill to provide water and sewerage services. During this period, it was considered that there may be a case for a simplified applications procedure to be in place. It is considered that negative parliamentary procedure provides for sufficient Parliamentary scrutiny for this power, which is to be used in narrow circumstances concerning the first application for a water and sewerage services licence by the undertaking. In consequence, paragraph 1(7) of Schedule 2 to the Bill (as introduced), which conferred a more general order-making power on the Scottish Ministers as regards amending the licence application procedure provided for under that Schedule, and which was itself subject to negative resolution procedure, has been removed. In its Stage 1 Report, the Committee was concerned about the width of such a power (see paragraphs 47-50).
Section 12A(1), (2) and (6), Financing, borrowing and guarantees

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

9. Subsections (1), (2) and (6) of new section 12A of the Bill (financing, borrowing and guarantees) confer upon the Scottish Ministers order-making powers to specify the circumstances in which the undertaking established under section 12(1) of the Bill is to be financed, whether by grant, loan or guarantee.

10. Section 12A(1) enables Ministers to specify in an order, the circumstances under which they may, with the consent of Scottish Water, make grants to the undertaking. Section 12A(2) makes similar provision in respect of loans to the undertaking and in respect of the circumstances in which the undertaking may not borrow from any other person (except as described in subsection (4)(b), where the undertaking may borrow by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure). Finally, section 12A(6) enables Ministers to make an order specifying circumstances in which Ministers may guarantee the discharge of any financial obligation in connection with sums borrowed in terms of section 12A(4)(b).

Reason for taking this power

11. Just as section 12 of the Bill is intended to afford to Scottish Water some degree of flexibility as regards the form of undertaking to be established, section 12A provides for equivalent flexibility as regards the funding arrangements for that undertaking, subject to the financial controls the Scottish Ministers are able to exercise as a result of the order-making powers provided for in section 12A(1), (2) and (6). That flexibility will allow Ministers to decide in an Order, which is subject to Parliamentary scrutiny, which funding mechanisms are the most appropriate in the light of their approval of the exact form that the undertaking established under section 12 will take. It is considered that negative Parliamentary procedure provides sufficient Parliamentary scrutiny for this power. As an additional safeguard, subsection (3) provides that any borrowing by the undertaking must not exceed the amount specified in the relevant Budget Act as approved by Parliament. Moreover, in terms of subsection (7), Ministers must lay a statement before the Parliament immediately after any guarantees made under subsection (6).

Section 17A(8), Continuation and discontinuation of sewerage services

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

12. New section 17A of the Bill provides for the circumstances in which trade effluent services may be continued or discontinued by Scottish Water. In general, sewerage services cannot be discontinued, due to the public health risks involved, however, trade effluent is treated differently under the Bill, due to the specialised technical agreements which govern its disposal. Under section 17A(6), a sewerage services provider may request Scottish Water to discontinue trade effluent services to a customer. Scottish Water must carry out this request provided that the conditions in subsection (11) are met. Before doing so, section 17A(7)
provides that a sewerage services provider, at least 14 days before making such a request, must serve a notice on the occupier of the premises in question, and on Scottish Water and the Commission, informing them of the intention to make the request to disconnect. Section 17A(8) enables the Scottish Ministers to make an order prescribing the form and content of such notices.

Reason for taking this power.

13. Just as with the similar power in section 16(3) of the Bill, as regards the prescription of notice for discontinuance of water services, it is not considered necessary to define in detail the form and content of the notice on the face of the Bill, and that this is more appropriate for subordinate legislation. This affords sufficient flexibility to make amendments to these details if required in light of the operation of the new licensing regime. It is considered that negative Parliamentary procedure provides sufficient Parliamentary scrutiny for this power.

Section 19B(1), Sewerage nuisance: code of practice

Powers conferred on: The Scottish Ministers  
Power exercisable by: Order made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

14. New section 19B(1) gives the Scottish Ministers the power to make an Order containing a code of practice on the assessment, control and minimisation of sewerage nuisance. This is referred to as “a sewerage code”. Section 19B(2) defines “sewerage nuisance” as smells and discharges, insects or any other thing emanating from any part of the public sewerage system so as to be prejudicial to health or a nuisance. Section 19B(3) provides that a sewerage code may include guidance on the best practicable means of assessing, controlling and minimising sewerage nuisance, and the circumstances in which a person to whom a sewerage code applies could be regarded as complying or not complying with that code.

15. Section 19B(8) requires Scottish Ministers, in advance of making an order containing a sewerage code, to consult Scottish Water, local authorities and any other appropriate persons, on the proposed sewerage code. Once an Order containing a sewerage code has been made, Ministers and every local authority, must, in accordance with section 19B(7), publicise the sewerage code.

Reason for taking this power

16. Given the detailed technical provisions which are likely to be contained in a sewerage code, it is considered appropriate that it is brought into effect by way of secondary legislation. The power is also sufficiently wide so as to enable different sewerage codes on different aspects of sewerage nuisance to be introduced. Any such Order is also to be subject to prior consultation and will be publicised. In the circumstances, it is considered that this provides a sufficient level of scrutiny.

SCOTTISH EXECUTIVE