Passage of the

Water Services etc. (Scotland) Bill 2004

SPPB 76
Passage of the

Water Services etc. (Scotland) Bill 2004

SP Bill 23 (Session 2), subsequently 2005 asp 3

SPPB 76
# Contents

**Foreword**

*Introduction of the Bill*

- Bill (As Introduced) (SP Bill 23) | 1
- Explanatory Notes (and other accompanying documents) (SP Bill 23-EN) | 51
- Policy Memorandum (SP Bill 23-PM) | 97

**Stage 1**

- Stage 1 Report, Environment and Rural Development Committee | 119
- Extract from the Minutes, Finance Committee, 9 September 2004 | 461
- Official Report, Finance Committee, 9 September 2004 | 462
- Extract from the Minutes, Finance Committee, 14 September 2004 | 474
- Official Report, Finance Committee, 14 September 2004 | 475
- Extract from the Minutes of the Parliament, 17 November 2004 | 482
- Official Report, Meeting of the Parliament, 17 November 2004 | 483
- Scottish Executive Response to Stage 1 Report on the Water Services etc. (Scotland) Bill | 513

**Before Stage 2**

- Extract from the Minutes, Environment and Rural Development Committee, 24 November 2004 | 527
- Official Report, Environment and Rural Development Committee, 24 November 2004 | 528

**Stage 2**

- 1st Marshalled List of Amendments for Stage 2 (SP Bill 23-ML1) | 542
- Groupings of Amendments for Stage 2, Day 1 (SP Bill 23-G1) | 551
- Extract from the Minutes, Environment and Rural Development Committee, 8 December 2004 | 552
- Official Report, Environment and Rural Development Committee, 8 December 2004 | 553

- 2nd Marshalled List of Amendments for Stage 2 (SP Bill 23-ML2) | 560
- Groupings of Amendments for Stage 2, Day 2 (SP Bill 23-G2) | 573
- Extract from the Minutes, Environment and Rural Development Committee, 15 December 2004 | 574
- Official Report, Environment and Rural Development Committee, 15 December 2004 | 575

- Bill (As Amended at Stage 2) (SP Bill 23A) | 583
- Revised Explanatory Notes (SP Bill 23A-EN) | 643
### Supplementary Financial Memorandum (SP Bill 23A-FM)

**After Stage 2**

<table>
<thead>
<tr>
<th>Document</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extract from the Minutes, Subordinate Legislation Committee, 1 February 2005</td>
<td>691</td>
</tr>
<tr>
<td>Official Report, Subordinate Legislation Committee, 1 February 2005</td>
<td>692</td>
</tr>
<tr>
<td>Report on Water Services etc. (Scotland) Bill at Stage 2, Subordinate Legislation Committee</td>
<td>695</td>
</tr>
<tr>
<td>Extract from the Minutes, Finance Committee, 8 February 2005</td>
<td>706</td>
</tr>
<tr>
<td>Official Report, Finance Committee, 8 February 2005</td>
<td>707</td>
</tr>
<tr>
<td>Correspondence from the Minister for Environment and Rural Development to the Convener of the Environment and Rural Development Committee, January 2005</td>
<td>711</td>
</tr>
<tr>
<td>Correspondence from the Minister for Environment and Rural Development to the Convener of the Finance Committee, 25 October 2004</td>
<td>713</td>
</tr>
</tbody>
</table>

**Stage 3**

<table>
<thead>
<tr>
<th>Document</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marshalled List of Amendments selected for Stage 3 (SP Bill 23A-ML)</td>
<td>715</td>
</tr>
<tr>
<td>Supplement to Marshalled List of Amendments selected for Stage 3 (SP Bill 23A-ML (Supp.))</td>
<td>719</td>
</tr>
<tr>
<td>Groupings of Amendments for Stage 3 (SP Bill 23A-G)</td>
<td>720</td>
</tr>
<tr>
<td>Extract from the Minutes of the Parliament, 9 February 2005</td>
<td>721</td>
</tr>
<tr>
<td>Official Report, Meeting of the Parliament, 9 February 2005</td>
<td>722</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Document</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill (As Passed) (SP Bill 23B)</td>
<td>739</td>
</tr>
</tbody>
</table>
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. Extracts from the Official Report are re-printed as corrected for the archive version of the Official Report.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament's Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.
After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Clerking and Reporting Directorate. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Finance Committee reported to the Environment and Rural Development Committee on the Bill at Stage 1. Its report is included in Annex A of the Stage 1 Report. However, the oral evidence taken by this committee was not included in that report and it is therefore included in this volume after the Stage 1 Report.

The Minister for Environment and Rural Development advised the Environment and Rural Development Committee during Stage 1 that amendments relating to Water Customer Consultation Panels would be brought forward at Stage 2. The Committee decided to take additional oral and written evidence on this issue. The additional written evidence was received in time to be included in the Stage 1 Report but oral evidence was not taken until after Stage 1: the official report and minute from the Committee’s meeting of 24 November 2004 is therefore included in this volume in the “Before Stage 2” section.

Forthcoming titles

The next titles in this series will be:

- SPPB 77: Budget (Scotland) (No.2) Bill 2005
- SPPB 78: Fire (Scotland) Bill 2004
- SPPB 79: Further and Higher Education (Scotland) Bill 2004
- SPPB 80: Gaelic Language (Scotland) Bill 2004
CONTENTS

Section

**PART 1**

**WATER INDUSTRY COMMISSION FOR SCOTLAND**

1 Water Industry Commission for Scotland
2 Water Industry Commissioner for Scotland
3 Determinations relating to provision of certain services

**PART 2**

**PROVISION OF WATER AND SEWERAGE SERVICES**

*Offences*

4 Public water supply system: offences
5 Public sewerage system: offences

*Licensing of services provided to eligible premises*

6 Licence authorisation
7 Granting of licence
8 Compliance with licences
9 Commission’s power to obtain information and charge fees
10 Participation of water and sewerage services providers
11 Licences and compliance: further provision

*Scottish Water: water and sewerage services subsidiary*

12 Water and sewerage services subsidiary
13 Transfer of staff etc. to the subsidiary

*Scottish Water: provision of certain services*

14 Scottish Water to provide certain services
15 Continuation of provision of services
16 Discontinuation of supply of water
17 Disconnections code

*Scottish Water: charges and functions*

18 Scottish Water’s charges for water and sewerage services
19 Scottish Water’s functions: powers of the Scottish Ministers

*Definitions for Part*

20 Meaning of “eligible premises”
21 Meaning of “public water supply system”
22 Meaning of “public sewerage system”

PART 3
COAL MINE WATER POLLUTION

23 Control of water from coal mines

PART 4
MISCELLANEOUS AND GENERAL

Miscellaneous
24 Offences by bodies corporate and partnerships
25 Amendments to enactments
26 Ancillary provision

General
27 Orders and regulations
28 Interpretation
29 Crown application
30 Short title and commencement

Schedule 1—Water Industry Commission for Scotland
Schedule 2—Licences and compliance: further provision
Schedule 3—Certain pre-existing agreements as to charges
Schedule 4—Powers of entry under the Coal Industry Act 1994
Schedule 5—Amendments to enactments
An Act of the Scottish Parliament to establish the Water Industry Commission for Scotland; to create offences in relation to the unauthorised use of the public water and sewerage systems; to provide for licensing the provision of certain water and sewerage services; to amend the system for fixing charges for services provided by Scottish Water; to make provision as to Scottish Water’s functions; to make provision in relation to coal mine water pollution; and for connected purposes.

PART 1

WATER INDUSTRY COMMISSION FOR SCOTLAND

1 Water Industry Commission for Scotland

(1) For section 1 (Water Industry Commissioner for Scotland) of the 2002 Act there is substituted—

“1 Water Industry Commission for Scotland

(1) There is established a body to be known as the Water Industry Commission for Scotland (referred to in this Act as “the Commission”).

(2) The Commission has the general function of promoting the interests of persons (taken as a whole) whose premises—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both, or

(b) might reasonably become connected to either or both of those systems, relating to the provision to them of water and sewerage services.

(3) The Scottish Ministers may, after consulting the Commission, give the Commission directions of a general or specific character as to the financial management or administration of the Commission; and the Commission must comply with any such directions.

(4) Schedule A1 makes further provision about the Commission.”.
In section 4 (power of the Commissioner to require information) of that Act, for subsection (2) there is substituted—

“(2) Subsection (1) does not authorise the Commission to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

(3) Where Scottish Water considers that it is entitled to withhold information from the Commission—

(a) because it is not reasonably sought, or

(b) by virtue of subsection (2),

it must intimate that fact to the Commission in writing.”.

In section 5 (annual reports by the Commissioner etc.) of that Act, at the end there is added—

“(4) The Scottish Ministers must lay before the Parliament a copy of each report submitted to them under subsection (1)(a).”.

Schedule 1 inserts schedule A1 into that Act.

The office of Water Industry Commissioner for Scotland is dissolved on such date as the Scottish Ministers may by order appoint.

In section 1 (duty of Scottish Water to provide for sewerage) of the 1968 Act—

(a) in subsection (4)—

(i) for the words “Secretary of State” there is substituted “Water Industry Commission for Scotland”; and

(ii) for the word “his” there is substituted “its”;

(b) after that subsection there is inserted—

“(4A) The Commission—

(a) shall prepare a statement which specifies the procedure to be followed for the purposes of its determining questions under subsection (4) above, and

(b) may from time to time revise the statement.

(4B) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(4C) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”;

(c) subsection (5) is repealed; and

(d) in subsection (6), for the words “subsections (3C) and (5)” there is substituted “subsection (3C)”.

In section 6 (duty of Scottish Water to provide water supply) of the 1980 Act—
(a) in subsection (3)—
   (i) for the words “Secretary of State” there is substituted “Water Industry Commission for Scotland”; and
   (ii) for the word “his” there is substituted “its”; and

(b) after that subsection there is inserted—

“(3A) The Commission—
   (a) shall prepare a statement which specifies the procedure to be followed for the purposes of its determining questions under subsection (3), and
   (b) may from time to time revise the statement.

(3B) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(3C) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”.

PART 2

PROVISION OF WATER AND SEWERAGE SERVICES

Offences

4 Public water supply system: offences

(1) Any person who introduces water into the public water supply system is guilty of an offence.

(2) Any person 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 who makes arrangements for or in relation to the supply of water to the premises of another person through the public water supply system is guilty of an offence.

(4) Subsections (1) to (3) do not apply to—
   (a) Scottish Water; or
   (b) another person if (and to the extent that) the person is acting on behalf of Scottish Water or under its authority.

(5) Subsections (2) and (3) do not apply to a person if (and to the extent that) the person is supplying water with the help of services provided by Scottish Water as described in section 30 of the 2002 Act.

(6) Subsection (3) does not apply to a water services provider where the provider is acting as authorised by the water services licence held by the provider.

(7) The Scottish Ministers may by regulations—
   (a) specify other 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 such other person or to such category of person; and
(ii) to such extent and subject to such conditions,
as may be specified in the regulations.

(8) The Scottish Ministers are to consult—
   (a) Scottish Water;
   (b) the Commission; and
   (c) such other persons as they consider appropriate,
on any regulations they propose to make under subsection (7).

(9) 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.

(10) 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.

(11) Any contract or other agreement which involves a contravention of subsection (1), (2) or
(3) is unenforceable.

5 Public sewerage system: offences

(1) Any person who draws sewage from the public sewerage system is guilty of an offence.

(2) Any person who uses the public sewerage system for the disposal of sewage from the
premises of another person is guilty of an offence.

(3) Any person 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 is guilty of an offence.

(4) Subsections (1) to (3) do not apply to—
   (a) Scottish Water; or
   (b) another person if (and to the extent that) the person is acting on behalf of Scottish
Water or under its authority.

(5) Subsections (2) and (3) do not apply to a person if (and to the extent that) the person is
providing sewerage, or disposing of sewage, with the help of services provided by
Scottish Water as described in section 30 of the 2002 Act.

(6) Subsection (3) does not apply to a sewerage services provider where the provider is
acting as authorised by the sewerage services licence held by the provider.

(7) The Scottish Ministers may by regulations—
   (a) specify other 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 such other person or to such category of person; and
      (ii) to such extent and subject to such conditions,
as may be specified in the regulations.
(8) The Scottish Ministers are to consult—
   (a) Scottish Water;
   (b) the Commission; and
   (c) such other persons as they consider appropriate,
on any regulations they propose to make under subsection (7).

(9) 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.

(10) 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.

(11) Any contract or other agreement which involves a contravention of subsection (1), (2) or
     (3) is unenforceable.

(12) In this Part, “sewage” is to be construed in accordance with section 59(1)
     (interpretation) of the 1968 Act.

### Licensing of services provided to eligible premises

6 **Licence authorisation**

(1) The Commission may, subject to section 7 and paragraphs 1 and 2 of schedule 2, grant a
licence authorising a person—

   (a) to—

   (i) make arrangements with the occupier of any eligible premises for or in
       relation to the supply of water to the premises through the public water
       supply system; and

   (ii) fix, demand and recover charges for or in relation to the supply of water to
        any premises in respect of which the person has made such arrangements;
        and

   (b) 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
       paragraph (a).

(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 Commission may, subject to section 7 and paragraphs 1 and 2 of schedule 2, grant a
licence authorising a person—

   (a) to—

   (i) make arrangements with the occupier of any eligible premises for or in
       relation to 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 or in relation to the provision of sewerage to, and disposal of sewage from, any premises in respect of which the person has made such arrangements; and

(b) 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 paragraph (a).

(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”.

7 Granting of licence

(1) The Commission 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 Commission 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 Commission may issue guidance (either generally or in a particular case or category 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 Commission 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 Commission 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 Commission is to—

(a) monitor compliance with the terms and conditions of water services licences and sewerage services licences; and

(b) take such steps as it considers are necessary for the purposes of ensuring that the terms and conditions of such licences are complied with.
(2) The Commission 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 Commission may issue guidance (either generally or in a particular case or category 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 Commission 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 Commission’s power to obtain information and charge fees

(1) Water services providers and sewerage services providers must provide the Commission with such information (including information in the form of a document) as it reasonably requires in the exercise of its functions.

(2) Subsection (1) does not authorise the Commission 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 Commission 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 Commission 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 Participation of water and sewerage services providers

(1) The Commission is (so far as is consistent with the exercise of its function under section 1(2) of the 2002 Act) to exercise its functions relating to water services and sewerage services licences for the purposes of securing the participation—

(a) in an orderly manner; and

(b) in a manner that is not detrimental to the exercise of Scottish Water’s core functions, of water services and sewerage services providers in the provision of water and sewerage services.

(2) The Commission may give directions of a specific or general character to—

(a) Scottish Water; or

(b) any—

(i) water services or sewerage services provider; or

(ii) person in whose favour it intends to grant a water services or sewerage services licence,
Part 2—Provision of water and sewerage services

(3) Directions under subsection (2) may, in particular, relate to the provision or exchange of information about customers of water services or sewerage service providers.

(4) Before giving directions under subsection (2), the Commission must consult any person to whom the directions are to be given.

(5) Any person to whom directions are given under subsection (2) must comply with the directions.

11 Licences and compliance: further provision

Schedule 2 makes further provision regarding licences and compliance with licences.

Scottish Water: water and sewerage services subsidiary

12 Water and sewerage services subsidiary

(1) The Scottish Ministers may require Scottish Water to secure (within such time as they may in the requirement specify), the establishment of a subsidiary business entity (in this section and section 13 referred to as “the subsidiary”) for the purposes of this section.

(2) The functions of the subsidiary are—
   (a) to become a water services provider and a sewerage services provider; and
   (b) thereafter, to perform the activities authorised by the water services and sewerage services licences held by it.

(3) Accordingly, the subsidiary must (as soon as reasonably practicable after it is established) apply for a water services licence and a sewerage services licence.

(4) The subsidiary may engage in any activity which it considers is not inconsistent with the performance of the activities authorised by the water services and sewerage services licences held by it.

(5) When the subsidiary is established, Scottish Water must not treat it any more or less favourably than it treats—
   (a) in relation to services as respects the supply of water, other water services providers; and
   (b) in relation to services as respects the provision of sewerage and the disposal of sewage, other sewerage services providers.

(6) Any reference in any enactment to Scottish Water is to be construed as not including the subsidiary.

13 Transfer of staff etc. to the subsidiary

(1) The Scottish Ministers may require Scottish Water to transfer such of its staff to the employment of the subsidiary as are necessary for the purposes of or in connection with the matters mentioned in subsection (7).

(2) The contract of employment of a person transferred by virtue of subsection (1)—
   (a) is not terminated by the transfer; and
(b) has effect from the date of transfer as if originally made between the person and the subsidiary.

(3) Without prejudice to subsection (2), where a person is transferred to the employment of the subsidiary by virtue of subsection (1)—

(a) all the rights, powers, duties and liabilities of Scottish Water under or in connection with the person’s contract of employment are transferred to the subsidiary on the date of transfer; and

(b) anything done before that date by or in relation to Scottish Water in respect of the person or that contract is to be treated from that date as having been done by or in relation to the subsidiary.

(4) Subsections (1) to (3) do not affect any right of any person to terminate the person’s contract of employment if the terms and conditions of employment are changed substantially to the detriment of the person; but such a change is not to be taken to have occurred by reason only that the identity of the person’s employer changes by virtue of those subsections.

(5) The Scottish Ministers may require Scottish Water to transfer such of its property (including rights) and liabilities to the subsidiary as are necessary for the purposes of or in connection with the matters mentioned in subsection (7).

(6) A transfer by virtue of subsection (5)—

(a) has effect in relation to any property and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or prohibit the transfer of the property or liabilities; and

(b) has the effect of vesting in the subsidiary any property or liabilities to which it applies.

(7) For the purpose of subsections (1) and (5), those matters are—

(a) applications by the subsidiary for water services and sewerage services licences; and

(b) the performance by the subsidiary of its activities.

Scottish Water: provision of certain services

14 Scottish Water to provide certain services

(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, so far as is consistent with the exercise of its core functions as respects the supply of water, 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 15(1)); or
(ii) the supply is discontinued under section 16; 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, so far as is consistent with the exercise of its core functions as respects the provision of sewerage and disposal of sewage, 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 Commission, 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.

15 Continuation of provision of services

(1) Where—

(a) water is supplied to premises by Scottish Water under subsection (2) of section 14; and

(b) the arrangements for the supply of water made between the occupier of the premises and the water services provider who made the related request under subsection (1) of that section in respect of the premises have come to an end—

(i) by reason of 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 16(5)),

the duty of Scottish Water under subsection (2) of section 14 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 14; 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 14, 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 related 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 14 of the Water Services etc. (Scotland) Act 2004 (asp 00) but—

(a) the arrangements for the supply made between the occupier of the premises and the water services provider who made the related 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 16(5) 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 Commission for Scotland to review that decision.

(2C) In a review under subsection (2B), the Commission may, having regard to any representations made to it 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 Commission in the review shall be final.”.

16 Discontinuation of supply of water

(1) A water services provider may request Scottish Water to discontinue a supply of water to premises made under subsection (2) of section 14.

(2) At least 14 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 Commission.

(3) The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.
An occupier of premises who has been served with a notice under subsection (2) may, within 10 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.

Where a request is made under subsection (1), Scottish Water is to discontinue the supply of water made under section 14(2) to the premises provided that the conditions mentioned in subsection (6) are satisfied.

The conditions are that—

(a) the provisions of the code made under section 17 are complied with; and

(b) any supply of water to—

(i) the premises for domestic purposes; or

(ii) any supply of water to any other premises,

is not adversely affected.

In subsection (6)(b)(i), 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.

Any reasonable costs incurred by Scottish Water in effecting a discontinuation under this section are to be met by the water services provider who made the request under subsection (1) for the discontinuation.

If there is a dispute between a water services provider and Scottish Water as to reasonable costs incurred in effecting a discontinuation under this section, Scottish Water is to refer the matter to the Commission for determination; and the determination of the Commission in the matter is final.

**Disconnections code**

For the purposes of subsection (6)(a) of section 16, the Commission must make a code (a “disconnections code”) which contains further provision about discontinuations of supplies of water to premises under that section.

In particular, a disconnections code may specify—

(a) circumstances in which requests under subsection (1) of section 16 may (or may not) be made; and

(b) conditions (in addition to the condition mentioned in subsection (6)(b) of that section) which are to be satisfied before Scottish Water is required under subsection (5) of that section to discontinue a supply of water to premises.

A disconnections code may—

(a) make different provision for different cases or types of case;

(b) revoke or amend a previous code.

In making a disconnections code, the Commission must consult—

(a) Scottish Water;

(b) every water services provider and sewerage services provider;

(c) the Convener of the Water Customer Consultation Panels; and

(d) such other persons as the Commission considers appropriate.
(5) When a disconnections code is made, the Commission must—
   (a) make arrangements for allowing any person to obtain a copy of the code on payment of such reasonable fee (if any) as the Commission may determine; and
   (b) publicise those arrangements and publish the code.

Scottish Water: charges and functions

18 Scottish Water’s charges for water and sewerage services

(1) For section 29 (charges for goods and services) of the 2002 Act there is substituted—

   “29 Charges for goods and services

   (1) Scottish Water may—
   
   (a) demand and recover charges for any services provided by it in the exercise of its core functions, and
   
   (b) fix, demand and recover charges for any goods supplied or services provided in exercise of its other functions.

   (2) Scottish Water is to exercise the power conferred by subsection (1)(a) in accordance with—
   
   (a) a charges scheme, or
   
   (b) a departure from a charges scheme approved under section 29E.

   (3) The power conferred by subsection (1)(b) is exercisable by or in accordance with an agreement with the person to be charged.

   (4) Subsections (1) to (3) are subject to sections 9A and 47 of the 1980 Act (which provide for no charge for water in certain circumstances).

29A Charges schemes

(1) Scottish Water must make a scheme (referred to in this Act as a “charges scheme”) which fixes the charges to be paid for services provided by Scottish Water in the exercise of its core functions.

(2) A charges scheme must be made by reference to a determination made under section 29B.

(3) In particular, the scheme must not fix in any case a charge exceeding any maximum charge applying to the case by virtue of the determination.

(4) A charges scheme may make provision with respect to the times and methods of payment of the charges fixed by the scheme.

(5) The Scottish Ministers and the Commission must provide Scottish Water with such information as it reasonably requires for the purposes of making a charges scheme.

(6) Scottish Water must send a charges scheme to the Commission for approval by such date as the Scottish Ministers may direct.

(7) The Commission may approve a charges scheme with or without modifications.

(8) If the Commission approves a charges scheme with modifications, it must give its reasons for doing so.
(9) When a charges scheme is approved by the Commission, Scottish Water must—

(a) make arrangements for allowing any person to—

(i) inspect the scheme at any reasonable time,

(ii) obtain a copy of the scheme or part of it on payment of such reasonable fee (if any) as Scottish Water may determine, and

(b) publicise those arrangements and publish a summary of the scheme.

(10) Following approval of a charges scheme by the Commission, the scheme comes into effect on such date as is specified in the scheme.

29B Determination of maximum charges

(1) The Commission must—

(a) determine in writing maximum amounts of charges by reference to which a charges scheme is to be made, and

(b) send the determination to Scottish Water by such time as the Scottish Ministers may specify.

(2) Maximum amounts determined under subsection (1)(a) apply in relation to such period as the Scottish Ministers may specify.

(3) A determination made under subsection (1)(a) may make different provision for different cases or categories of case.

(4) Before making a determination under subsection (1)(a), the Commission—

(a) must send a draft determination to the Scottish Ministers and Scottish Water,

(b) must—

(i) publish the draft determination, and

(ii) invite (by way of advertisement or otherwise) representations as regards the draft determination by such time as the Commission may specify, and

(c) must have regard to any representations made to the Commission by virtue of paragraph (a) or (b).

(5) The Scottish Ministers and Scottish Water must provide the Commission with such information as it reasonably requires for the purposes of making a determination under subsection (1)(a).

29C Exercise of functions regarding charges

(1) Scottish Water must exercise its functions under sections 29A and 29F for the purposes of ensuring that subsections (3) and (4) are complied with.

(2) The Commission must—

(a) exercise its functions under sections 29A, 29B and 29F for the purposes of ensuring that subsections (3) and (4) are complied with,

(b) exercise its functions under section 29E for the purposes of ensuring that subsection (4) is complied with, and

(c) in exercising its functions under those sections, have regard to—
(i) any guidance issued to Scottish Water by the Scottish Ministers, and

(ii) any directions issued to Scottish Water under section 44 or 56, so far as relevant in relation to charges schemes.

(3) This subsection is complied with if (so far as is consistent with compliance with subsection (4)) a charges scheme gives effect to any statement issued under section 29D.

(4) This subsection is complied with if (so far as is consistent with compliance with section 41(1)) Scottish Water’s receipts from the aggregate of—

(a) its income from charges for services provided in the exercise of its core functions, and

(b) the amount of—

(i) any grants paid to it under subsection (1) of section 42,

(ii) money it may borrow under subsection (3) of that section, and

(iii) any other resources available to it,

for the purposes of the exercise of those functions, is not less than sufficient to meet the expenditure required for the effective exercise of those functions.

29D Statements regarding charges

(1) The Scottish Ministers must—

(a) in respect of a period specified under section 29B(2), and

(b) by reference to such economic or other factors as they consider relevant,

issue to Scottish Water and the Commission a statement of policy regarding charges under a charges scheme.

(2) A statement under subsection (1) is to include provision with respect to harmonisation of charges (that is to say, provision with a view to ensuring that a charges scheme does not fix different charges for similar services provided to persons of a similar category).

(3) A statement under subsection (1) may (so far as is consistent with the provision described in subsection (2)) include provision with respect to—

(a) the funding of particular services by charges for services as a whole,

(b) the proportion of the amount of income requiring to be raised by charges fixed by a charges scheme to be contributed by each category of person to whom Scottish Water provides services,

(c) the fixing of levels of charges by reference to—

(i) different categories of person to whom Scottish Water provides services, or

(ii) liability for council tax under Part II (Council tax: Scotland) of the Local Government Finance Act 1992 (c.14), and

(d) such other matters as the Scottish Ministers think fit.
29E Departure from certain charges

(1) Scottish Water may, in any particular case, apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid for services provided to a water services or sewerage services provider.

(2) The Commission may consent to a departure from a charges scheme only if satisfied that—

(a) a customer of the provider has taken action which reduces the costs incurred by Scottish Water in providing the services to the provider, and

(b) the departure is otherwise justified in the circumstances of the case.

(3) Where the Commission consents to a departure, it may do so subject to such reasonable conditions as it considers are appropriate in the case.

(4) Where the Commission withholds its consent to a departure, it must give its reasons for doing so.

(5) The Commission is to make provision in writing which specifies—

(a) the procedure to be followed for the purposes of determining applications made under subsection (1), and

(b) any matters to be taken into account and the criteria to be applied in—

(i) determining whether a departure from a charges scheme is justified, and

(ii) the fixing, by Scottish Water, of lower charges to be paid for the services in question where it is determined that a departure is justified.

(6) The Commission may from time to time revise the provision.

(7) In preparing or revising the provision, the Commission must consult—

(a) the Scottish Ministers and Scottish Water, and

(b) such other persons as it thinks fit,

as to the procedure to be followed in considering applications made under subsection (1).

(8) The Commission must send a copy of the provision to—

(a) the Scottish Ministers,

(b) Scottish Water, and

(c) every water services and sewerage services provider.

(9) Scottish Water must publish details of every departure from a charges scheme.

29F Review of determinations and charges

(1) This subsection applies where, since the making of a determination under section 29B(1)(a), there has been or is likely to be material change to—

(a) Scottish Water’s income from charges for services provided in the exercise of its core functions,
(b) the amount of—
   (i) any grants paid to it under subsection (1) of section 42,
   (ii) money it may borrow under subsection (3) of that section, or
   (iii) any other resources available to it,

for the purposes of the exercise of those functions, or

(c) the expenditure required for the effective exercise of those functions.

(2) Where subsection (1) applies, Scottish Water—
   (a) may of its own accord,
   (b) must, if the Commission requests it to do so,

send to the Commission proposals for revising the maximum amounts of
charges determined under section 29B(1)(a).

(3) The Commission—
   (a) must, after receipt of the proposals, review those amounts, and
   (b) may revise those amounts to such extent as it thinks fit.

(4) In reviewing those amounts, the Commission must take into account all matters
affecting the resources available to Scottish Water for the purposes of the
exercise of its core functions.

(5) Before revising those amounts, the Commission must—
   (a) intimate to the Scottish Ministers that revision of those amounts is under
      consideration,
   (b) invite (by way of advertisement or otherwise) representations as regards
      revision of those amounts by such time as the Commission may specify, and
   (c) have regard to any representations made to the Commission by virtue of
      paragraph (a) or (b).

(6) The Commission must give its reasons for deciding whether or not to revise
those amounts.

(7) Where the Commission revises those amounts, it must send to Scottish Water
written notice which specifies the revised amounts.

(8) Scottish Water—
   (a) may, after receipt of the notice, revise any charges fixed by the charges
      scheme by reference to the revised amounts specified in the notice, and
   (b) if it does so, must send written notice of the revised charges to the
      Commission for approval.

(9) The Commission may approve any revised charges with or without
modifications.

(10) If the Commission approves any revised charges with modifications, it must
give its reasons for doing so.

(11) When revised charges are approved by the Commission, Scottish Water must
publish a summary of the revised charges and the date from which they have
effect.
(12) The date from which the revised charges have effect is to be determined by the Commission.

29G Effective exercise of core functions

For the purposes of sections 29C(4) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if (in discharging its statutory duties and contractual obligations relating to the exercise of those functions) it makes such use of its resources that, year on year, it—

(a) achieves the objectives contained in any directions given by reference to section 56A, and

(b) does so at the lowest reasonable overall cost.”.

(2) In section 30 (maximum charges for services provided with help of Scottish Water) of that Act—

(a) in subsection (1), for the words “The Scottish Ministers may by order” there is substituted “A charges scheme must also”;

(b) in subsection (3), for the words “An order under this section” there is substituted “In relation to maximum charges fixed by virtue of subsection (1), the charges scheme”; and

(c) in subsection (4)—

(i) for the words “an order under this section” there is substituted “, by virtue of subsection (1), a charges scheme”; and

(ii) for the word “order” in the second place where it appears there is substituted “scheme”.

(3) Sections 31 to 34 of that Act (which make provision for and in connection with the making of charges schemes by Scottish Water) are repealed.

(4) In section 35 (liability of occupiers etc. for charges) of that Act, after subsection (9) there is added—

“(10) This section does not apply to or in relation to any services provided by Scottish Water under section 14 of the Water Services etc. (Scotland) Act 2004 (asp 00) except where the provision of the service is continued under section 15(1) or (4) of that Act.”.

(5) After that section of that Act there is inserted—

“35A Charges for services arranged by licensed providers

(1) Supplies of water provided to any premises by Scottish Water under subsection (2) of section 14 of the Water Services etc. (Scotland) Act 2004 (asp 00) are to be treated, for the purposes of sections 29 to 29F, as services provided solely to the water services provider who made the related 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 to 29F, as services provided solely to the sewerage services provider who made the related request under subsection (4) of that section in respect of the premises.

(3) But—
(a) where the supplies of water provided to the premises are continued under subsection (1) of section 15 of that Act, subsection (1) does not apply,

(b) where 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.”.

(6) Schedule 3 makes provision in relation to certain pre-existing agreements as to charges.

19 Scottish Water’s functions: powers of the Scottish Ministers
After section 56 (directions) of the 2002 Act there is inserted—

“56A Directions may set objectives

(1) In particular, directions under section 56 may in respect of a period specified under section 29B(2) set objectives as to—

(a) the standard of the services to be provided in the exercise of Scottish Water’s core functions, and

(b) the time by which—

(i) a particular standard of any of those services is to be attained,

(ii) any particular work required for or in connection with the provision of those services is (in part or whole) to be commenced or completed.

(2) Different objectives may be set for different cases or categories of case.

56B Supplementary functions

(1) The Scottish Ministers may by order confer on Scottish Water such additional or supplementary functions relating to the provision of water and sewerage services by Scottish Water as the Scottish Ministers consider appropriate so to confer.

(2) The Scottish Ministers are to consult Scottish Water and the Commission on any order they propose to make under subsection (1).”.

Definitions for Part

20 Meaning of “eligible premises”

(1) In this Part, “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) except the residential part of part residential subjects within the meaning of that Part of that Act.

(3) The Scottish Ministers may by order modify subsection (2) so as to vary the meaning of “dwelling”.

19
5
115
20
129
25
20
30
35
35
21
21 Meaning of “public water supply system”

(1) In this Part, 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 a person acting on its behalf or under its authority) in connection with 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.

22 Meaning of “public sewerage system”

(1) In this Part, 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 a person acting on its behalf or under its authority) in connection with 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 3

COAL MINE WATER POLLUTION

23 Control of water from coal mines

(1) After section 4C of the Coal Industry Act 1994 (c.21) there is inserted—

“4D Power of the Authority with respect to coal mine water discharge: Scotland

(1) The Authority may take such action as it considers appropriate (if any) for the purpose of preventing, or mitigating the effect of, the discharge of water from a coal mine into or on to any land or into the water environment.

(2) In this section and sections 4E and 4F below—

(a) “water environment” has the meaning given by section 3 of the Water Environment and Water Services (Scotland) Act 2003 (asp 3); and

(b) references to coal mines are to coal mines vested in the Authority.
4E Coal mine water discharge: powers of entry in Scotland

(1) If the Authority is of the opinion that a discharge of water from a coal mine into or on to any land or into the water environment has caused, is causing or is likely to cause—

(a) serious pollution of the environment; or

(b) danger to life or health,

the Authority may, for any purpose specified in subsection (2) below, in writing authorise a person to exercise (in accordance with the terms of the authorisation) any of the powers specified in subsection (3) below.

(2) The purposes are—

(a) to determine the extent of the pollution or of the danger, or the likelihood of serious pollution or such danger;

(b) to determine whether (and if so how) the Authority should exercise its power under section 4D above;

(c) to take action under that section.

(3) The powers are—

(a) to enter—

(i) in an emergency, at any time (and, if need be, using reasonable force); or

(ii) in any other case, at any reasonable time,

any premises which the authorised person has reason to believe it is necessary for him to enter;

(b) to use a vehicle or boat to do so;

(c) to make such examination and investigation as may in any circumstances be necessary;

(d) to take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under paragraph (c) above;

(e) to take samples, or cause samples to be taken, of any articles or substances found in or on any premises which he has power to enter, and of the air or water or land in, on, or in the vicinity of, the premises;

(f) to require any person to give him such facilities and assistance with respect to any matters or things within that person’s control or in relation to which that person has responsibilities as are necessary to enable the authorised person to exercise any of the powers conferred on him by virtue of this section.

(4) The powers which are conferred in relation to any land by this section include power, for the purposes mentioned in subsection (2) above—

(a) to carry out experimental borings or other works on those premises; and

(b) to install, keep or maintain monitoring and other apparatus there.

(5) Where subsection (6) below applies, any entry to premises by virtue of this section shall (except in an emergency) be effected only—
(a) after the expiry of at least seven days’ notice of the proposed entry given to a person who appears to the authorised person to be in occupation of the premises in question; and

(b) either—

5 (i) with the consent of a person who is in occupation of those premises; or

(ii) under the authority of a warrant granted under paragraph 2 of Schedule 1C to this Act.

(6) This subsection applies where it is proposed to—

(a) enter any premises used for residential purposes; or

(b) take heavy equipment on to any premises which are to be entered.

(7) Where an authorised person proposes to enter any premises and—

(a) entry has been refused and he reasonably believes that the use of force may be necessary to effect entry; or

(b) he reasonably believes that entry is likely to be refused and that the use of force may be necessary to effect entry,

any entry to those premises by virtue of this section shall (except in an emergency) be effected only under the authority of a warrant granted under paragraph 2 of Schedule 1C to this Act.

(8) In this section—

“premises” includes any land, vehicle or vessel, and any plant which is designed to move or be moved (whether or not on roads);

“emergency” means a case in which it appears to the authorised person in question—

(a) that there is an immediate risk of serious pollution of the environment; or

(b) that circumstances exist which are an immediate danger to life or health,

and that immediate entry to any premises is necessary to verify the existence of that risk or those circumstances or to ascertain the cause of that risk or those circumstances or to effect a remedy.

(9) Schedule 1C to this Act makes further provision regarding powers of entry.

4F Coal mine discharge: compulsory acquisition of land in Scotland

(1) The Authority may, with the authorisation of the Scottish Ministers, acquire any land anywhere in Scotland compulsorily if the Authority is of the opinion that—

(a) the acquisition is for the purpose of preventing, or mitigating the effect of, a discharge of water from a coal mine; and

(b) the discharge has caused, is causing or is likely to cause—

(i) serious pollution of the water environment; or

(ii) danger to life or health.
(2) The power to acquire land under subsection (1) above includes power to acquire a servitude or other right in or over land by the creation of a new right.

(3) The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) applies in relation to an acquisition under subsection (1) above as if—

(a) this section were contained in an Act in force immediately before the commencement of that Act; and

(b) references in that Act to a local authority were references to the Authority.”.

(2) In section 66 (Crown application) of that Act, after subsection (5) there is added—

“(6) The references in subsection (5) above to a Government department shall, for the purposes of the application of this section to sections 4D to 4F of, and Schedule 1C to, this Act, be treated as including the holder of an office in the Scottish Administration which is not a ministerial office.”.

(3) In section 68 (extent, etc.) of that Act, after subsection (7) there is inserted—

“(7A) Sections 4D to 4F of, and Schedule 1C to, this Act extend to Scotland only.”.

(4) Schedule 4 inserts Schedule 1C into that Act.

PART 4

MISCELLANEOUS AND GENERAL

Miscellaneous

24 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.

25 Amendments to enactments

Schedule 5 amends enactments for the purposes of and in consequence of this Act.

26 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.
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 2, 7(2), 9(5), 16(3) or 20(3);
   (b) subject to subsection (4)(a), section 26; or
   (c) paragraph 1(1), (4) or (7) or 11(1) or (2)(g) of schedule 2,
   is subject to annulment in pursuance of a resolution of the Parliament.

(4) A statutory instrument containing—
   (a) an order under section 26 which amends an Act; or
   (b) regulations under section 4(7) or 5(7),
   is not made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

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 Commission” means the Water Industry Commission 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.

Crown application

This Act binds the Crown.

Short title and commencement

(1) This Act may be cited as the Water Services etc. (Scotland) Act 2004.

(2) The provisions of this Act, except sections 26 to 29 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 1
(introduced by section 1)

WATER INDUSTRY COMMISSION FOR SCOTLAND

Before schedule 1 (the Commissioner and Customer Panels) to the 2002 Act there is inserted—

“SCHEDULE A1
(introduced by section 1(4))

WATER INDUSTRY COMMISSION FOR SCOTLAND

Status

1 (1) The Commission is a body corporate.

(2) The Commission—
   (a) is not a servant or agent of the Crown,
   (b) has no status, immunity or privilege of the Crown,

and its property is not to be regarded as property of, or held on behalf of, the Crown.

Membership

2 The Commission is to consist of the following members—
   (a) not fewer than 3, nor more than 5, ordinary members, and
   (b) the person holding the post of chief executive.

Tenure and removal from office

3 (1) Each ordinary member—
   (a) is to be appointed by the Scottish Ministers for such period as is specified in the appointment,
   (b) may, by written notice to the Scottish Ministers, resign as a member,
   (c) in other respects, holds and vacates office on such terms and conditions as the Scottish Ministers may determine, and
   (d) after ceasing to hold office is eligible for reappointment as a member.

(2) The Scottish Ministers may remove an ordinary member from office and the Commission may, with the approval of the Scottish Ministers, remove the member who is the chief executive from office if satisfied that—
   (a) the member’s estate has been sequestrated or the member has been adjudged bankrupt, has made an arrangement with creditors or has granted a trust deed for creditors or a composition contract, or
   (b) the member—
      (i) is incapacitated by physical or mental illness,
(ii) has been absent from meetings of the Commission for a period longer than 3 consecutive months without the permission of the Commission, or

(iii) is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member.

Disqualification

4 A person is disqualified from appointment, and from holding office, as a member of the Commission if that person is a member of—

(a) the House of Lords,

(b) the House of Commons,

(c) the Scottish Parliament, or

(d) the European Parliament.

Chairing

5 (1) The Scottish Ministers—

(a) must appoint one of the ordinary members to chair meetings of the Commission, and

(b) may, after consulting that member, appoint another ordinary member to act as deputy to that member.

(2) The member appointed to chair the meetings and any member appointed to act as deputy to that member hold and vacate office as such in accordance with the terms of their appointments.

(3) A member so appointed may, by written notice to the Scottish Ministers, resign from office as such.

(4) A member so appointed vacates office on ceasing to be a member of the Commission.

(5) Where a member—

(a) is appointed to chair meetings or to act as deputy to the member so appointed, or

(b) ceases to hold office as such,

the Scottish Ministers may vary the terms of the member’s appointment so as to alter the date on which office as a member is to be vacated.

Remuneration, allowances and pensions

6 (1) The Commission must pay to each ordinary member such remuneration as the Scottish Ministers may determine.

(2) The Commission must pay to each ordinary member and the chief executive such allowances as the Scottish Ministers may determine in respect of expenses properly incurred in the performance of their duties as a member.
(3) Where a person ceases to be an ordinary member otherwise than on the expiry of that person’s term of appointment, the Scottish Ministers may, if they think there are special circumstances, direct the Commission to pay to the person such amount of compensation as they may determine.

(4) The Scottish Ministers may direct the Commission to pay—

(a) such pension, allowance or gratuity to, or in respect of, any person who is or has been an ordinary member,

(b) such contribution or other payment towards provision for such pension, allowance or gratuity,

as they consider appropriate.

Chief executive

7 (1) The Commission is to employ a chief executive.

(2) The Scottish Ministers are to appoint the first chief executive of the Commission on such terms and conditions as the Scottish Ministers may determine.

(3) Before making the appointment of the first chief executive the Scottish Ministers must consult the member of the Commission appointed, or to be appointed, to chair the meetings of the Commission (if there is a person holding, or as the case may be designated to hold, that office).

(4) The Commission may, with the approval of the Scottish Ministers, make subsequent appointments to the post of chief executive on such terms and conditions as it may with the approval of the Scottish Ministers determine.

(5) The chief executive is to be appointed from amongst persons who appear—

(a) as regards the first appointment, to the Scottish Ministers, and

(b) thereafter, to the Commission,

to have knowledge, skills or experience relevant to the functions of the Commission.

(6) The Commission may, with the approval of the Scottish Ministers—

(a) vary any terms and conditions of a person’s appointment to the post of chief executive, or

(b) terminate a person’s appointment to the post of chief executive if the Commission is satisfied that the person is not adequately discharging the functions of that post.

Staff

8 (1) All staff employed (immediately before the coming into force of this sub-paragraph) by the Water Industry Commissioner for Scotland are transferred to the employment of the Commission.

(2) The contract of employment of a person transferred by virtue of sub-paragraph (1)—

(a) is not terminated by the transfer,
(b) has effect from the date of transfer as if originally made between the person and the Commission.

(3) Without prejudice to sub-paragraph (2), where a person becomes a member of staff of the Commission under sub-paragraph (1)—

(a) all the rights, powers, duties and liabilities of the Water Industry Commissioner for Scotland under or in connection with that person’s contract of employment are by virtue of this sub-paragraph transferred to the Commission on the date of transfer, and

(b) anything done before that date by or in relation to the Water Industry Commissioner for Scotland in respect of that contract of employment or that person is to be treated from that date as having been done by, or in relation to, the Commission.

(4) Sub-paragraphs (1) to (3) do not prejudice the right of any person to terminate that person’s contract of employment if the terms and conditions of employment are changed substantially to the detriment of the person; but such a change is not to be taken to have occurred by reason only that the identity of that person’s employer changes by virtue of those sub-paragraphs.

(5) The Commission may, with the consent of the Scottish Ministers as to numbers, terms and conditions, appoint such other employees as it considers appropriate.

(6) The Commission must, as regards such of its employees as it may with the approval of the Scottish Ministers determine, make such arrangements as it considers appropriate for providing, to or in respect of those employees, pensions, allowances or gratuities.

(7) Such arrangements—

(a) may include the establishment and administration, by the Commission or otherwise, of one or more pension schemes, and

(b) must, in any case, be approved by the Scottish Ministers.

(8) The reference in sub-paragraph (6) to the provision of pensions, allowances or gratuities includes a reference to their provision by way of compensation for loss of office or employment or loss or diminution of emoluments.

Transfer of property and liabilities

9 (1) All property (including rights) and liabilities, subsisting immediately before the coming into force of this paragraph, of the Water Industry Commissioner for Scotland are transferred to the Commission.

(2) Sub-paragraph (1) has effect in relation to any property and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or prohibit the transfer of the property or liabilities.

Committees

10 (1) The Commission may establish committees for or in connection with the exercise of such of its functions as it may determine.

(2) Any committee established under this paragraph must be chaired by a person who is an ordinary member of the Commission.
(3) Employees of the Commission who are not members of the Commission may be appointed to be members of any committee established by it.

Delegation of powers

11 (1) Anything authorised or required under any enactment to be done by the Commission may be done by any of its committees which, or by any of its members or employees who, are authorised (whether generally or specifically) by it for the purpose.

(2) Nothing in sub-paragraph (1) prevents the Commission from doing anything that a committee, member or employee has been authorised or required to do.

Proceedings

12 (1) The Commission may regulate its own procedure (including any quorum) and that of any of its committees.

(2) The validity of any proceedings or actings of the Commission is not affected by—

(a) any vacancy among its members, or
(b) any defect in the appointment of a member.

General powers

13 (1) The Commission may do anything which appears necessary or expedient for the purpose of, or in connection with, the exercise of its functions including, in particular—

(a) entering into contracts; and
(b) acquiring and disposing of property.

(2) But the Commission may not acquire or dispose of land without the consent of the Scottish Ministers.

Accounts

14 The Commission must—

(a) prepare, for each financial year, in accordance with directions given by the Scottish Ministers, an account of the Commission’s income and expenditure, and

(a) send the account, by such time as the Scottish Ministers may direct, to the Auditor General for Scotland for auditing.”.
SCHEDULE 2
(introduced by section 11)

LICENCES AND COMPLIANCE: FURTHER PROVISION

Application for licence

1 1 (1) An application for a water services licence or a sewerage services licence is to be made to the Commission 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 (2) The applicant must provide the Commission with such further information (including information in the form of a document) as it reasonably requires in order to determine the application.

3 (3) Sub-paragraph (2) does not authorise the Commission 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 (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 Commission with respect to the application; and
   (b) contain such other particulars, as the Scottish Ministers may so prescribe.

5 (5) Where the Commission proposes to refuse an application, the Commission is to give the applicant notice—
   (a) of that fact (together with its reasons for proposing to refuse the application); and
   (b) specifying the date by which the applicant may make representations to the Commission with respect to the proposed refusal.

6 (6) The Commission 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 (7) The Scottish Ministers may by order specify circumstances in which sub-paragraphs (4) to (6) do not apply.

8 (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 (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 Commission’s decision to refuse the application or (as the case may be) grant the licence; 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 Commission to be necessary or expedient for the purposes of or in connection with the activities authorised by the licence.

(2) The Commission 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 standard conditions may, in particular—

(a) include standard conditions that are to apply to—

(i) all licences; and

(ii) a particular type of licence; and

(b) make provision for—

(i) the standard conditions (or any of them) not to apply to a particular licence or type of licence in such circumstances; and

(ii) the coming into effect and suspension of the standard conditions (or any of them) in such manner and in such circumstances,

as may be specified in the standard conditions.

(4) The Commission is to—

(a) consult the Scottish Ministers on proposals for standard conditions; and

(b) publish the standard conditions.

(5) The Commission—

(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 it considers is necessary or expedient as a consequence of any modification of the standard conditions.

(6) Before making any modification under sub-paragraph (5)(b), the Commission is to—

5 (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 Commission.

(8) The Commission is to have regard to any representations made by virtue of sub-paragraph (7)(b).

(9) Where the Commission modifies the standard conditions, the Commission is to publish them as modified.

(10) The Commission may, in granting a particular licence, exclude or modify any of the standard conditions to such extent as it 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 Commission considers appropriate.

(13) The Commission may modify any condition of a particular licence if it considers that the modification is necessary or expedient 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 Commission consents to the transfer.

(3) The Commission 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 Commission 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 Commission 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 Commission 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 Commission.
(7) The Commission is to have regard to any representations made by virtue of sub-paragraph (6)(d).

(8) The Commission 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 it considers it appropriate to make.

(9) As soon as practicable after deciding whether to consent to a transfer, the Commission is to intimate its decision to—

(a) the transferor and the transferee; and

(b) Scottish Water.

(10) Where the Commission withholding 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 Commission’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 Commission and any person authorised by the Commission 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 or in relation to the supply of water or 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 Commission 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 Commission (or a person authorised by the Commission) 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 Commission (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 Commission 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.

Powers of entry etc.: further provision

(1) 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.

(2) 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.

(3) Where a person exercises the power mentioned in paragraph 4(2)(a), the Commission 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 sub-paragraph (2), except in so far as the loss or damage is attributable to the fault of the person who sustained it.

(4) 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.

(5) Any person who—
   (a) intentionally obstructs a person acting in the exercise of any power conferred by paragraph 4(1) and (2); or
   (b) refuses or fails, without reasonable excuse, to comply with a requirement made under paragraph 4(5),
   is guilty of an offence.

(6) A person who is guilty of an offence under sub-paragraph (4) or (5) is liable—
(a) on summary conviction, to a fine not exceeding the statutory maximum; or
(b) on conviction on indictment, to a fine.

Warrants

6 (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 Commission (and any person
authorised by the Commission 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.

Enforcement notices

7 (1) If it appears to the Commission (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 Commission may serve on the provider a notice (in this paragraph and paragraphs 8, 9 and 11 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 Commission’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 Commission requires the provider 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 Commission must consult—
   (a) Scottish Water; and

   (b) such other persons as the Commission considers appropriate.

(6) Before serving an enforcement notice on a provider under sub-paragraph (1), the
     Commission is to—

       (a) serve a copy of the proposed notice on the provider; and

       (b) specify a period (which is to be 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 Commission about the proposed notice.

(7) The Commission—

       (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 Commission 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 Commission 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 Commission’s power to issue a further such notice.

Enforcement notices: offences

8 (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 7; 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 7—

(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

9 (1) A water services licence or sewerage services licence may be revoked in accordance with this paragraph.

(2) If it appears to the Commission 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 7; 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 7—
   (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 Commission may revoke the licence held by the provider by serving on the provider a notice of revocation.

(3) If—
   (a) it appears to the Commission 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 Commission considers that the provider would fail to comply with the terms of an enforcement notice pertaining to that contravention,
the Commission 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 Commission 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 Commission 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 Commission may, following a request made to the Commission 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 Commission 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 Commission considers to be relevant.

(7) A notice of revocation must specify—
   (a) the reasons why it is served; and
   (b) the date (which must be no earlier 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 Commission 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

10 (1) Where it appears to the Commission that a water services provider or a sewerage services provider has contravened a term or condition of the licence held by the provider, the Commission may impose on the provider a financial penalty of such amount as it considers reasonable in the circumstances of the case.

10 (2) The Commission—
(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;
(c) in preparing the statement (and any revised statement), is to consult such persons as it considers appropriate; and
(d) is to publish the statement (and any revised statement) in such manner as it considers appropriate.

10 (3) Before imposing a penalty under sub-paragraph (1), the Commission is to serve on the provider a notice of its intention to impose the penalty; and the notice must specify the date by which the provider may make representations to the Commission with respect to the penalty.

10 (4) In imposing a penalty under sub-paragraph (1), the Commission 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).

10 (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.

10 (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.

10 (7) Any penalty imposed under sub-paragraph (1) is recoverable, from the person on whom it was imposed, by the Commission—
(a) by civil diligence; and
(b) whether or not that person continues to hold the licence in relation to which the penalty was imposed.

10 (8) Any sums received by the Commission by virtue of this paragraph must be paid into the Scottish Consolidated Fund.
Register of licences

11 (1) The Commission 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 each water services provider and sewerage services provider;

(b) record the terms and conditions of each water services licence and sewerage services 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 7;

(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 9—

(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 10—

(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.

SCHEDULE 3
(introduced by section 18(6))

CERTAIN PRE-EXISTING AGREEMENTS AS TO CHARGES

1 (1) In this schedule, a “relevant agreement” is an agreement—

(a) made between Scottish Water and another person (a “relevant customer”) in respect of eligible premises (within the meaning of Part 2)—

(i) by virtue of any of the provisions referred to in sub-paragraph (2) or otherwise; and

(ii) which makes provision as to the charges to be paid (other than under a charges scheme) by the relevant customer for services provided by Scottish Water in the exercise of its core functions; and
 Schedule 3—Certain pre-existing agreements as to charges

(2) For the purposes of sub-paragraph (1)(a)(i), the provisions are—

(a) sections 29(2)(b) and (4) and 31(6) of the 2002 Act (as they had effect immediately before their repeal by this Act);

(b) section 29(3)(j) of the 1968 Act (as it had effect immediately before its repeal by this Act).

2 (1) Scottish Water must, within one month of the coming into force of this schedule, send to the Commission written details of every relevant agreement.

(2) The Commission must, following receipt of those details, in each case—

(a) assess the charges payable under the relevant agreement (the “relevant charges”) during any period to which a charges scheme applies; and

(b) having regard to—

(i) any costs which reasonably require to be met from the charges fixed in accordance with sub-paragraph (6)(b); and

(ii) such other matters as the Commission considers appropriate,

determine, for the purposes of sub-paragraph (6)(a), an amount less than the relevant charges.

(3) The Commission must, in each case—

(a) give the relevant customer written notice of the assessment and determination under sub-paragraph (2); and

(b) send a copy of the notice to—

(i) Scottish Water; and

(ii) every water services and sewerage services provider,

by such date as the Scottish Ministers may direct.

(4) The Commission must publish details of every determination under sub-paragraph (2)(b).

(5) This sub-paragraph applies in any case where a water or sewerage services provider makes arrangements for the provision of any services to which relevant charges apply and is accordingly entitled to demand and recover charges from a relevant customer for that provision.

(6) Where sub-paragraph (5) applies—

(a) Scottish Water may, in relation to that provision, demand and recover from the provider charges which must not exceed the amount determined under sub-paragraph (2)(b); and

(b) the charges which the provider may, in relation to that provision, demand and recover from the relevant customer concerned must not exceed the amount of the relevant charges.

(7) Any financial disadvantage to Scottish Water arising as a consequence of differences between—

(a) the amounts determined under sub-paragraph (2)(b); and
(b) the charges which would be recoverable by Scottish Water under a charges scheme in relation to the services to which the determinations apply, is to be borne by Scottish Water.

(8) Scottish Water is—

(a) in any case where sub-paragraph (5) does not for the time being apply; or

(b) in any case where that sub-paragraph ceases to apply,

to demand and recover relevant charges from the relevant customer for services provided by it to the customer.

3 (1) A charges scheme does not apply in relation to any services to which relevant charges apply except where the relevant agreement concerned expires or is terminated.

(2) For the purposes of sub-paragraph (1), the making of arrangements by a water services or sewerage services provider for the provision of any services to which relevant charges apply does not of itself cause the relevant agreement concerned to expire or terminate.

(3) A relevant agreement may not be renewed on its expiry or termination, nor may its term be extended at any time.

SCHEDULE 4
(introduced by section 23(4))

POWERS OF ENTRY UNDER THE COAL INDUSTRY ACT 1994

After Schedule 1B to the Coal Industry Act 1994 (c.21) there is inserted—

“SCHEDULE 1C

SUPPLEMENTAL PROVISIONS WITH RESPECT TO POWERS OF ENTRY: SCOTLAND

Exercise of powers of entry etc.

1 (1) A person entitled to enter premises by virtue of the power mentioned in section 4E(3)(a) of this Act—

(a) may take on to the premises such other persons (including, if the person reasonably believes he is likely to be obstructed, a constable) and such equipment or materials 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.

(2) A person who enters premises in the exercise of a power conferred by virtue of section 4E of this Act must leave the premises as effectually secured against trespassers as the person found them.

(3) Where a person exercises a power conferred by virtue of section 4E(3)(a) or (4) of this Act, the Authority 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 sub-
paragraph (2) above,
except in so far as the loss or damage is attributable to the fault of the person
who sustained it.

(4) Any dispute as to a person’s entitlement to compensation under sub-paragraph
(3) above, or as to the amount of any such compensation, shall be referred to
the arbitration of a single arbiter, appointed—

(a) by agreement between the Authority and the person who claims to have
sustained the loss or damage; or

(b) in default of agreement, by the Scottish Ministers.

(5) 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 a power conferred by virtue
of section 4E of this Act is guilty of an offence.

(6) A person who is guilty of an offence under sub-paragraph (5) above is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment, to a fine.

(7) In this schedule, “premises” has the meaning given by section 4E(8) of this
Act.

Warrants

2 (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 section 4E(3) or (4) of this Act; and

(b) at least one of the conditions mentioned in sub-paragraph (2) below is
fulfilled in relation to the premises,

the sheriff or justice may grant a warrant authorising the Authority (and any
person authorised by the Authority 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 and the case is
one of urgency.

(3) In a case where subsections (5) and (6) of section 4E of this Act apply, a sheriff
or justice shall 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)
above is fulfilled unless the sheriff or justice is also satisfied that notice
required by subsection (5)(a) of that section has been given and that the period
of that notice has expired.
(4) A warrant granted under this paragraph continues in force until the purposes for which the warrant is issued have been fulfilled.”.

SCHEDULE 5
(introduced by section 25)

AMENDMENTS TO ENACTMENTS

Sewerage (Scotland) Act 1968 (c.47)

1 In section 29 (which makes provision relating to consent to discharge of trade effluent) of the 1968 Act, paragraph (j) of subsection (3) is repealed.

House of Commons Disqualification Act 1975 (c.24)

2 In the House of Commons Disqualification Act 1975, in Part III of Schedule 1 (disqualifying offices), the entry relating to the Water Industry Commissioner for Scotland is repealed.

Race Relations Act 1976 (c.74)

3 In the Race Relations Act 1976, in Part II of Schedule 1A (bodies and other persons subject to general statutory duty), the entry relating to the Water Industry Commissioner for Scotland is repealed.

Water (Fluoridation) Act 1985 (c.63)

4 In the Water (Fluoridation) Act 1985, in subsections (2)(b)(i) and (3) of section 4 (publicity and consultation), for the word “Commissioner” in each place where it occurs there is substituted “Commission”.

Public Finance and Accountability (Scotland) Act 2000 (asp 1)

5 In the Public Finance and Accountability (Scotland) Act 2000, in subsection (7) of section 23 (economy, efficiency and effectiveness examinations), for the word “Commissioner” there is substituted “Commission”.

Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

6 In the Ethical Standards in Public Life etc. (Scotland) Act 2000—
   (a) in section 19 (action on finding of contravention)—
      (i) in subsection (4), the words from “and” in the second place where it occurs to the end are repealed; and
      (ii) in subsection (5), paragraph (c) and the word “; or” immediately preceding it are repealed;
   (b) sections 25 and 26 (which make special provision for the Water Industry Commissioner for Scotland) are repealed;
   (c) in section 30 (modification of enactments etc.), the words “or the Water Industry Commissioner for Scotland” are repealed;
(d) in schedule 1 (the Standards Commission for Scotland), in paragraph 3, the words “or the Water Industry Commissioner for Scotland” are repealed; and

(e) in schedule 3 (devolved public bodies), after the entry relating to the State Hospitals Board for Scotland, there is inserted—

“The Water Industry Commission for Scotland”.

Water Industry (Scotland) Act 2002 (asp 3)

7 (1) In each of the following provisions of the 2002 Act, for the words “Commissioner” and “Commissioner’s” wherever occurring there is substituted “Commission” and “Commission’s” respectively—

section 2(4)(b) and (5);

section 3;

section 4(1);

section 5(1) to (3);

section 6;

section 11(1)(a);

section 26(1) to (4) and (7);

section 27;

section 57(6)(a); and

in schedule 1, paragraphs 6(4), 7 and 8.

(2) In section 2 (Water Customer Consultation Panels) of that Act, after subsection (5) there is inserted—

“(5A) Subsections (1) to (5) do not apply in relation to services provided to water services providers or sewerage services providers (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or customers of such providers.”.

(3) In section 3 (functions of the Commissioner) of that Act, after subsection (6) there is inserted—

“(6A) Subsections (1) to (6) do not apply in relation to services provided to water services providers or sewerage services providers (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or customers of such providers.”.

(4) In section 26 (customer standards codes) of that Act—

(a) subsection (2) is repealed; and

(b) after subsection (7) there is added—

“(8) This section does not apply in relation to services provided to water services providers or sewerage services providers (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or customers of such providers.”.

(5) Section 40 (reduced charges) of that Act is repealed.
(6) In section 49 (interests of customers) of that Act, for the words “who is a customer or potential customer of Scottish Water” there is substituted “whose premises are connected to, or might reasonably become connected to, the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both;”.

(7) In section 68 (orders and regulations) of that Act—
   (a) in subsection (4) after the words “41(5)” there is inserted “, 56B”; and
   (b) in subsection (6), after the words “41(5)” there is inserted “or 56B”.

(8) In section 70 (interpretation) of that Act, in subsection (1)—
   (a) in the definition of “charges scheme”, for the words “31(1)” there is substituted “29A(1)”; and
   (b) for the definition of “the Commissioner” there is substituted—
       “the Commission” means the Water Industry Commission for Scotland established under section 1(1) of this Act,”.

(9) Part 1 (the Commissioner) of schedule 1 to that Act is repealed.

**Scottish Public Services Ombudsman Act 2002 (asp 11)**

8 In the Scottish Public Services Ombudsman Act 2002, in paragraph 55 of schedule 2 (listed authorities), for the word “Commissioner” there is substituted “Commission”.

**Freedom of Information (Scotland) Act 2002 (asp 13)**

9 In the Freedom of Information (Scotland) Act 2002, in paragraph 106 of schedule 1 (Scottish public authorities), for the word “Commissioner” there is substituted “Commission”.

**Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)**

10 In the Public Appointments and Public Bodies etc. (Scotland) Act 2003, in schedule 2 (specified authorities)—
   (a) the entry relating to the Water Industry Commissioner for Scotland is repealed; and
   (b) after the entry relating to the Scottish Tourist Board there is inserted—
       “Water Industry Commission for Scotland”.
Water Services etc. (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to establish the Water Industry Commission for Scotland; to create offences in relation to the unauthorised use of the public water and sewerage systems; to provide for licensing the provision of certain water and sewerage services; to amend the system for fixing charges for services provided by Scottish Water; to make provision as to Scottish Water’s functions; to make provision in relation to coal mine water pollution; and for connected purposes.

Introduced by:  Ross Finnie
On:          11 June 2004
Supported by: Allan Wilson
Bill type:  Executive Bill
WATER SERVICES ETC. (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Water Services etc. (Scotland) Bill introduced in the Scottish Parliament on 11 June 2004:
   - Explanatory Notes;
   - a Financial Memorandum;
   - an Executive Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 23–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The main provisions of the Bill are as follows:

   • Part 1 – replaces the Water Industry Commissioner (the Commissioner) with a body corporate, the Water Industry Commission (the Commission), with a view to improving the transparency, accountability and consistency of regulation in the water industry.

   • Part 2 – makes a series of provisions regarding water and sewerage services:

     ➢ prohibits common carriage (where Scottish Water would use its water mains to carry water treated by a competitor and its sewers to carry wastewater from a competitor’s customers to that competitor’s treatment works) in the water or sewerage systems, and prohibits retail competition for households (sections 4 and 5);

     ➢ establishes a licensing regime for retail competition for non-household premises only, managed by the Water Industry Commission (sections 6 to 11);

     ➢ enables Ministers to require Scottish Water to establish a subsidiary for the purposes of applying for a licence under the Bill (sections 12 and 13);

     ➢ provides for arrangements between Scottish Water and a licensed water or sewerage services provider to supply water or sewerage services, or, as the case may be, to discontinue a water supply, and the procedure to be followed in the latter case (sections 14 to 17);

     ➢ provides new arrangements for determining Scottish Water’s charges, under which the Water Industry Commission will determine charge limits based on objectives set by Ministers, and Scottish Water will propose charges schemes within these limits (sections 18 and 19); and

     ➢ sets out definitions of “eligible premises” for the purposes of retail competition, and of “public water supply system” and “public sewerage system” (sections 20 to 22).

   • Part 3 – makes provision for coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution (section 23).
• Part 4 – makes miscellaneous and general provision, including in relation to the
offences created under the Bill and the procedure for exercising the order and
regulation making powers provided under the Bill (sections 24 to 30).

COMMENTARY ON SECTIONS

PART 1: WATER INDUSTRY COMMISSION FOR SCOTLAND

Section 1: Water Industry Commission for Scotland

5. Section 1 establishes a corporate body, the Water Industry Commission for Scotland, to
take on the functions of the Water Industry Commissioner.

6. Subsection (1) of section 1 replaces section 1 of the Water Industry (Scotland) Act 2002
(“the 2002 Act”) with a new section 1 establishing the Water Industry Commission for Scotland.
Subsection (2) of the new section 1 of the 2002 Act gives the Commission the general function
of promoting the interests of persons whose premises are connected or might reasonably become
connected to the public water supply and/or sewerage system (as defined in sections 21 and 22 of
the Bill respectively). This ensures that the Commission will promote the interests of both
Scottish Water’s direct customers, and the customers of licensed providers of retail services. It is
a duty to promote the interest of customers as a whole which might be relevant, for example,
where the interests of different categories of customers conflicted.

7. Subsection (3) of the new section 1 of the 2002 Act gives Scottish Ministers power to
direct the Commission with regard to the financial management or administration of the
Commission, having first consulted it. This ensures that the Commission is accountable to
Ministers for these matters, while at the same time functioning independently with regard to its
technical functions of calculating Scottish Water’s required revenue, and charge determination
and the other substantive functions conferred on it by or under the Bill. Subsection (4)
introduces Schedule A1 which makes detailed provision as to the appointment of the
Commission and as to the Commission’s staff, status and accounts and its procedures for carrying
out its functions. This Schedule is inserted into the 2002 Act by Schedule 1 to the Bill.

8. Subsection (2) of section 1 replaces section 4(2) of the 2002 Act (power of the
Commissioner to require information), with the effect that the Commission may not require
Scottish Water to disclose anything which a person would be entitled to refuse to disclose on
grounds of confidentiality in proceedings in the Court of Session. This enables Scottish Water to
treat as confidential legally privileged information. Subsection (2) also adds a new subsection
(3) to section 4 of the 2002 Act, which requires Scottish Water to inform the Commission in
writing if it considers that it is entitled to withhold information which the Commission has
requested. This removes Ministers from having a role in resolving conflicts between the
Commission and Scottish Water as to whether the information requested by the Commission is
reasonable.

9. Subsection (3) of section 1 adds a new subsection (4) to section 5 of the 2002 Act (annual
reports by, and information from, the Commissioner), requiring Scottish Ministers to lay before
Parliament a copy of the Commission’s annual report, detailing the Commission’s functions
during that financial year.
These documents relate to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

Section 2: Water Industry Commissioner for Scotland

10. Section 2 provides for Scottish Ministers to specify an appointed day to dissolve the office of the Water Industry Commissioner for Scotland, given that it is replaced by the Water Industry Commission for Scotland, as described above.

Section 3: Determinations relating to provision of certain services

11. Section 3 relates to regulations to be made under the Sewerage (Scotland) Act 1968 (“the 1968 Act”) and the Water (Scotland) Act 1980 (“the 1980 Act”) as amended by the Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”). These allow the Scottish Ministers to make regulations dealing with the issue of reasonable cost, the cost which Scottish Water is required to bear in making a new connection to the public water supply or sewerage system. The regulations will define how the balance of costs between Scottish Water and developers will be calculated. In effect, these amendments mean that the Commission is to be responsible for deciding any disputes about reasonable costs rather than Ministers.

12. Subsection (1)(a) amends subsection (4) of section 1 of the 1968 Act to give the Commission, rather than Ministers, powers to determine disputes arising over the determination of reasonable cost of a sewerage connection as defined in regulations. Subsection (1)(b) inserts provisions into the 1968 Act to require the Commission to define its procedures for determining disputes, and to consult Scottish Water and others as it considers appropriate on these procedures.

13. Subsection (2) makes equivalent provision in relation to connection to the public water networks through amendments to the 1980 Act.

PART 2: PROVISION OF WATER AND SEWERAGE SERVICES

Offences

Section 4: Public water supply system: offences

14. Section 4 prohibits any person from introducing water into the public water supply system (as defined by section 21 of the Bill) or using the public water supply system to carry water to the premises of another person. It also prohibits making arrangements for or in relation to the supply of water to the premises of another person, except as authorised by a licence. To achieve this, subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).

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

16. Subsection (3) prohibits the making of any arrangements for or in relation to the supply of water through the public water supply system to the premises of customers connected to that system.

17. Subsection (4) exempts Scottish Water or someone acting on its behalf or under its authority from the offences introduced in the preceding subsections, allowing them to introduce
water to the public water supply system, use the system for the purpose of supplying water and make arrangements in connection with supplying water.

18. Subsection (5), by way of an exemption from the offences at subsections (2) and (3), allows a person supplying water with the help of services provided by Scottish Water as described at section 30 of the 2002 Act, to use the public water supply system to supply water to premises connected to the system and to make arrangements to supply water to the premises of another person.

19. Subsection (6) provides that licensed providers of water or sewerage services are not caught by the prohibition at subsection (3). (Section 6 of the Bill establishes a system for licensing "water services providers" and "sewerage services providers").

20. Subsections (7) and (8) allow Ministers to specify in regulations other circumstances where the prohibitions in subsections (1), (2) and (3) will not apply. These give Ministers powers, which could be used if, for example, it emerged in practice that the prohibitions were catching activities which Ministers did not intend to prohibit. Ministers are required to consult on any regulations that they propose to make under subsection (7), and section 27 provides for these regulations to be subject to affirmative procedure in the Parliament.

21. Subsections (9) and (10) set out the penalties for anyone committing an offence under this section, setting greater penalties for offences under subsection (1), which prohibits introducing water into the public water supply system: up to two years in prison, an unlimited fine, or both (subsection (9)). Subsection (10) specifies penalties for anyone guilty of the offences at subsections (2) and (3) of using the public water supply system to supply customers, or arranging for a supply to be made, of up to an unlimited fine. In both cases there is provision for treating offences in two ways, summary conviction (i.e. where convicted by a Sheriff sitting without a jury), where lesser maximum penalties apply, or conviction on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court). The statutory maximum fine referred to in subsection (10)(a) is currently £5,000. Subsection (11) provides that any agreement in breach of the prohibitions is unenforceable.

Section 5: Public sewerage system: offences

22. Section 5 makes provisions prohibiting common carriage and other activities for or in relation to the public sewerage system that parallel those at section 4 in relation to the public water supply system. Subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).

23. Subsections (1) to (3) prohibit common carriage on the public sewerage system (as defined by section 22 of the Bill). They also prohibit the making of arrangements for or in relation to the provision of sewerage to, or the disposal of sewage from the premises of another person, except as authorised by a licence.

24. Subsections (4) to (6) set out the circumstances in which the prohibitions in subsections (1) to (3) do not apply. Subsections (7) and (8) provide for Ministers to make regulations specifying other circumstances in which the prohibitions will not apply. Section 27 provides for these regulations to be subject to affirmative procedure in the Parliament.
Subsections (9) and (10) provide for the same range of penalties in respect of the prohibitions concerning the provision of sewerage services as are available at section 4(9) and (10) in respect of water supply services. Subsection (11) provides that any agreement in breach of the prohibitions is unenforceable.

**Licensing of services provided to eligible premises**

*Section 6: Licence authorisation*

25. Section 6 provides for the Commission to grant licences which authorise licence holders to provide services to the occupiers of eligible premises (as defined in section 20). The Commission's powers to grant licences are subject to the provisions at section 7, as regards the Commission granting licences, and at paragraphs 1 and 2 of schedule 2 to the Bill, which makes detailed provision for applications for licences and licence conditions.

26. Subsections (1) and (2) and subsections (3) and (4) respectively empower the Commission to grant a “water services licence” and a "sewerage services licence". These licences will authorise their holders (the "water services providers" and "sewerage services providers") to arrange for the supply of water, or the provision of sewerage services, as the case may be, to the occupiers of eligible premises. Eligible premises are defined in section 20 as premises other than domestic dwellings. These subsections also set out that providers can fix, demand and recover charges for the water or sewerage services they provide.

*Section 7: Granting of licence*

27. Section 7 specifies the grounds on which the Commission can grant a water services or sewerage services licence and the procedure to be followed.

28. Subsection (1) requires the Commission to be satisfied that an applicant has the ability to perform adequately the activities authorised by a licence, before granting the licence. Subsection (2) requires the Commission, in assessing an applicant’s ability to perform those activities, to have particular regard to an applicant's knowledge, experience, expertise, financial acumen and business viability, and to any other factors specified by the Scottish Ministers in an order. Section 27 provides for orders under subsection (2) to be subject to negative procedure in the Parliament. In the interests of transparency, subsection (3) empowers the Commission to issue guidance setting out the factors it will consider when assessing an applicant’s ability under subsection (2).

29. Subsection (4) requires a licence to be in writing. It provides for it to be in force as set out in the licence unless it has been revoked or suspended. Subsection (5) requires the Commission to notify the applicant and Scottish Water of a decision to refuse a licence application. And where the Commission has granted a licence application, subsection (6) provides for the Commission to send a copy of the licence to the applicant and Scottish Water.

*Section 8: Compliance with licences*

30. Section 8 places a duty on the Commission to monitor compliance with the terms and conditions of licences and to take any action necessary to ensure compliance. To carry out this duty, the section confers two powers on the Commission: subsection (2) enables the Commission to give directions to service providers which providers are obliged to comply with; and
subsection (3) empowers the Commission to issue guidance in relation to compliance with the terms and conditions of a licence. In addition, subsection (4) requires Scottish Water to inform the Commission if it appears a licence condition is being or has been breached.

Section 9: Commission’s power to obtain information and charge fees

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

32. Subsection (1) places a duty on service providers to comply with requests for information by the Commission, provided the request is reasonable for the Commission to make in the exercise of its functions. Subsection (2) provides that service providers need not provide the Commission with information that they would not be required to disclose on grounds of confidentiality in proceedings in the Court of Session (such as legally privileged information).

33. Subsection (3) provides that it is an offence for a service provider to fail to provide information required by the Commission without a reasonable excuse. Subsection (4) specifies that the penalties for this offence, depending on the type of conviction, are a fine not exceeding the statutory maximum, currently set at £5,000, on summary conviction (i.e. where convicted by a Sheriff sitting without a jury), or an unlimited fine if convicted on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court).

34. Subsection (5) gives the Commission the general power to charge fees in relation to licences, for example, in relation to applications for a licence. It gives Ministers the power to set out in an order the detailed basis on which, and the matters in respect of which, the Commission is to charge fees, and section 27 provides for these regulations to be subject to negative procedure in the Parliament.

Section 10: Participation of water and sewerage services providers

35. Section 10 gives the Commission powers to take such steps as it considers necessary to ensure that the opening up of the market for licensed water and sewerage services under Part 2 of the Bill happens in an orderly manner, and with minimum disruption to Scottish Water and its customers.

36. Subsection (1) gives the Commission a duty to exercise its functions in such a way as to secure that water and sewerage services providers participate in the provision of services pursuant to a licence in an orderly manner and in a way that is not detrimental to the exercise of Scottish Water’s core functions. To enable it to do this, the Commission is given powers under subsection (2) to direct Scottish Water or a licensed water or sewerage services provider, including a potential licensed provider, to take such steps as are required to ensure their participation achieves the aims in subsection (1). Subsection (4) requires proposed directions to be consulted upon with the intended recipient(s). Subsection (5) requires that the recipient(s) of directions under subsection (2) must comply with these.

37. In particular, it is envisaged that the Commission may use its power under this section to require licensed providers to use a central mechanism (one which the Commission would have
identified as optimum) to facilitate the exchange of information required when a customer switches to another licensed provider. Subsection (3) specifically provides for directions to relate to this matter.

Section 11: Licences and compliance: further provision

38. Section 11 introduces schedule 2 which makes more detailed provisions on licences and compliance.

Scottish Water: water and sewerage services subsidiary

Section 12: Water and sewerage services subsidiary

39. Section 12 enables the Scottish Ministers to require Scottish Water to separate its retail functions from its wholesale functions, by creating a subsidiary business entity. In this way it will be possible for the retail arm to be treated in the same way as any other service provider, by the licensing regime and by Scottish Water.

40. Subsection (1) confers on Ministers powers to require Scottish Water to establish a separate business entity, in order for this entity to apply for a water services licence and a sewerage services licence, and to become a water services and sewerage services provider (as indicated in subsection (2)) as soon as reasonably practicable (subsection (3)).

41. Subsection (4) allows the new entity to engage in any activity which it considers is not inconsistent with its activities as a water and sewerage services provider. The intention here is to ensure that the entity has the same freedom as any other licensed provider to offer its customers services in addition to those provided pursuant to its licence.

42. Subsection (5) requires Scottish Water to treat the new entity in the same way as it treats any other licensed water or sewerage services provider.

43. Subsection (6) confirms that references to Scottish Water in any enactment will henceforth be understood not to include the new entity established by this section, to ensure that responsibility for all Scottish Water’s statutory functions apply to Scottish Water as the public (wholesale) water supplier and sewerage provider in exercise of its core functions.

Section 13: Transfer of staff etc. to the subsidiary

44. Section 13 provides for the transfer of staff from Scottish Water to the new subsidiary established under section 12. It makes provision for the protection of the terms and conditions of employment of staff who are transferred to the subsidiary, and for the transfer of property, including rights, and liabilities from Scottish Water to the subsidiary for the purposes that the subsidiary is established to perform.

45. Subsection (1) allows the Scottish Ministers to require Scottish Water to transfer staff to the new subsidiary for the purposes of it applying for water services and sewerage services licences and enabling the entity to carry out its activities as a licensed provider (these purposes are specified in subsection (7)).
46. Subsection (2) provides that the contract of employment of any staff transferred under subsection (1) will not be terminated by the transfer, but will continue as if originally made between the person and the subsidiary.

47. Subsection (3) provides that when staff are transferred to the subsidiary, the subsidiary will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer will continue to have effect after the transfer.

48. Subsection (4) states that the transfer under these provisions does not affect any person’s right to terminate their contract of employment if their terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that the identity of the person’s employer has changed does not in itself constitute such a change.

49. Subsection (5) allows Scottish Ministers to require Scottish Water to transfer property (including rights) and liabilities to the subsidiary as necessary for the purposes specified in subsection (7). Subsection (6) provides for the transfer of property and liabilities to have effect despite any provision which might otherwise prevent the transfer, and that the property and liabilities which are transferred are vested in the subsidiary.

Scottish Water: provision of certain services

Section 14: Scottish Water to provide certain services

50. The Bill provides for water and sewerage services providers to assume responsibility for providing services to customers in the following way. Firstly, the provider applies for a licence from the Commission. Secondly, and assuming that a licence is granted, the provider makes arrangements with the occupier of eligible premises to provide them with licensed services. Thirdly, the provider agrees specific terms and conditions by which Scottish Water will provide a wholesale supply of water in respect of the premises provided with such services. Section 14 makes provision for this third step.

51. Subsection (1) enables a water services provider, once it has made arrangements with the occupier of eligible premises (as defined in section 20 of the Bill) for the supply of water to those premises, to request Scottish Water to supply water to the premises through the public water supply system (as defined in section 21 of the Bill). Subsection (2) places a duty on Scottish Water to comply with this request subject to agreeing terms and conditions with the provider, and subject to the carrying out of the request being consistent with the exercise of Scottish Water’s core functions (as defined in section 70(2) of the Water Industry (Scotland) Act 2002). This is to ensure that these new duties on Scottish Water are subject to its wider statutory responsibilities as the public supplier of water.

52. Subsection (3)(a) provides for Scottish Water’s duty to supply water under subsection (2) to cease if the arrangements between a provider and the occupier of eligible premises have come to an end. However, this is subject to section 15(1) of the Bill which provides that Scottish Water must continue to serve the premises for two months after the arrangement has come to an end, unless it has come to an end under the disconnection provisions in section 16(5). However, subsection (3)(b) provides that Scottish Water’s duty to supply water under subsection (2) may
be superseded by a new duty, such as, for example, when another licensed provider assumes responsibility for the provision of water services to the premises.

53. Subsections (4) to (6) make equivalent provision to subsections (1) to (3) as respects Scottish Water’s duty to provide sewerage services to a premises as agreed by the sewerage services provider, excepting that there is no provision for this duty to cease. Existing legislation is not altered since, unlike in relation to the water supply, there is no provision for sewerage services to be disconnected.

54. Where Scottish Water and a water or sewerage services provider cannot come to an agreement under subsections (2) or (5), on the terms and conditions whereby Scottish Water provides the water supply or sewerage services, subsection (7) provides for the Commission to determine the terms and conditions of the supply that Scottish Water is to make to the provider and for these to have effect as if they had been agreed between those parties.

Section 15: Continuation of provision of services

55. Section 15 makes provision in relation to Scottish Water’s duty to provide water and sewerage services, when the arrangements between a particular provider and the occupier of eligible premises have come to an end.

56. Subsection (1) provides that where the arrangements between the occupier of an eligible premises (as defined in section 20 of the Bill) and a water services provider have come to an end, such as, for example, on revocation of a licence, Scottish Water has a continuing duty to supply water to the premises for the period specified in subsection (2). The only exception to this is where the supply is discontinued at the request of a provider under section 16(5) of the Bill where alternative arrangements apply. This is to enable the customers of licensed providers to have a continued supply of water while they seek to secure services from an alternative licensed provider if their arrangement with their existing provider comes to an end for any other reason than those provided in the disconnection code under section 16. In most cases it is anticipated that a customer will be able to make arrangements with a new provider prior to the arrangements with their previous provider having come to an end.

57. Subsection (2) specifies the period for which Scottish Water must continue to supply water, after arrangements between the occupier of premises and a provider have come to an end, as two months or such longer period as Scottish Water agrees to.

58. Subsection (3) provides that the continuing duty to supply under subsection (1), that is to say, in the absence of an agreement between the occupier and a provider, ceases where a new arrangement has been made between a licensed provider and the occupier of eligible premises under section 14(2) of the Bill, or where the occupier of those premises notifies Scottish Water that a supply of water is no longer required.

59. Subsection (4) places a duty on Scottish Water to continue providing sewerage, or disposing of sewage from eligible premises, even if the arrangements between the occupier of the premises and the provider have come to an end. In contrast to the situation regarding water supply, no time limit is put on this duty. This reflects the practical difficulties of disconnecting sewerage services.
60. Subsection (5) amends section 9 of the Water (Scotland) Act 1980, by inserting new subsections (2A) to (2C). Section 9(1) of the 1980 Act requires Scottish Water to supply water on reasonable terms and conditions where requested for non-domestic purposes. The new section 9(2A) qualifies the section 9(1) duty so that Scottish Water is not required to make such a supply where arrangements between a licensed provider and the occupier of eligible premises under section 14(2) of the Bill have come to an end, where it believes there is no reasonable prospect of recovering charges from a customer. The requirement to supply water for non-domestic purposes can only come to an end if the arrangements between a licensed provider and a customer have ended because of non-payment of charges (section 9(2A)(a) of the 1980 Act), or the supply of water to a premises has been discontinued at the request of the provider (under section 16(5) of the Bill) because of non-payment of charges (section 9(2A)(b) of the 1980 Act). The intention of this provision is to ensure that, where a customer is unable to find a water service provider, for example, because of a track record of not paying bills, that Scottish Water should not be required to provide a supply of water to that customer. The new section 9(2B) of the 1980 Act provides that where Scottish Water refuses to provide such a supply, the occupier of the premises has a right to have this reviewed by the Water Industry Commission which, in terms of the new section 9(2C) of the 1980 Act, can either confirm the decision to refuse or direct Scottish Water to give a supply, and its decision is final.

Section 16: Discontinuation of supply of water

61. Section 16 enables water services providers to request (under subsection (1)) that Scottish Water discontinue the supply of water to a premises provided by Scottish Water under an agreement with the provider as established by section 14(2) of the Bill. This provision will allow a water services provider, subject to compliance with the provisions of the disconnection code provided for under section 17, to request the disconnection of a customer, for example, when the customer has not complied with their contract to the provider by not paying their charges.

62. Subsection (2) requires a provider to serve a notice on: the occupier of the premises, Scottish Water, and the Commission, at least 14 days before requesting disconnection intimating its intention to seek disconnection. Subsection (3) gives Ministers the power to specify by order the form the notice will take and its content, and under section 27 an order under this subsection is subject to negative procedure in the Parliament.

63. Subsection (4) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.

64. Subsection (5) requires Scottish Water to discontinue a supply of water as requested if the conditions set out in subsection (6) are satisfied. Accordingly, the disconnection code, provided under section 17 of the Bill must have been complied with, and the disconnection requested must not adversely affect any supply of water for domestic purposes to the premises in question, 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 (which includes a supply for drinking, washing, cooking, central heating and sanitary purposes).

65. Subsection (8) provides that the water services provider who requested the disconnection should pay any reasonable costs incurred by Scottish Water in carrying out the disconnection.
Subsection (9) provides that in the case of any dispute as to reasonable costs in this regard the Commission will determine this and its decision is final.

**Section 17: Disconnections code**

66. This section makes provision for a disconnection code to be drawn up by the Commission.

67. Subsection (2) provides that a disconnection code may specify circumstances in which requests to Scottish Water to disconnect a premises under section 16 of the Bill may or may not be made; and any other conditions which must be satisfied before the disconnection actually takes place (over and above those mentioned in section 16(6)(b) of the Bill). The intention behind the code is to ensure that disconnection is only carried out where the circumstances genuinely demand it, and where it will not adversely affect any customers other than the one in respect of whom the disconnection is to be carried out. The code may make different provision for different cases and can be amended or revoked (subsection (3)).

68. Subsection (4) ensures that the Commission, in devising the code, will consult: Scottish Water, all water and sewerage services providers, the Convener of the Water Customer Consultation Panels (appointed by virtue of section 2 of, and Schedule 1, Part 1 to, the Water Industry (Scotland) Act 2002), and such others as it thinks appropriate. Subsection (5) provides that the Commission must publish the code and publicise arrangements for making a copy of it available to any person who wishes to obtain it.

**Scottish Water: charges and functions**

**Section 18: Scottish Water’s charges for water and sewerage services**

69. Section 18 alters the basis for determining Scottish Water’s charges as provided in the Water Industry (Scotland) Act 2002 (“the 2002 Act”). Under the new provisions, Ministers will set objectives for charges, and the Commission will determine charge limits and approve charges schemes. This section substitutes a new section 29, and inserts new sections 29A to 29G into the 2002 Act; amends section 30 thereof; and repeals sections 31 to 34 thereof. It also amends section 35 of the 2002 Act and inserts a new section 35A into it.

**Subsection (1): the new section 29 of the 2002 Act: Charges for goods and services**

70. Subsection (1) inserts new sections 29 to 29G into the 2002 Act. The new section 29 provides for Scottish Water to charge for goods and services. In contrast to the broad general power in the existing section 29(1) of the 2002 Act, the new section 29(1) makes a distinction between the power to demand and recover charges for services which are part of Scottish Water’s core functions as defined in section 70(2) of the 2002 Act (new subsection 29(1)(a)), and goods or services provided in pursuit of Scottish Water’s other functions (new subsection 29(1)(b)).

71. The new section 29(2) of the 2002 Act provides that Scottish Water is to demand and recover charges for services it provides as part of its core functions either according to a charges scheme made under the new section 29A of the 2002 Act or under an approved departure from a charges scheme under the new section 29E of the 2002 Act.
72. The new section 29(3) of the 2002 Act provides that fixing, demanding and recovering charges for non-core functions is exercisable by or in accordance with an agreement with the person to be charged.

73. The new section 29(4) of the 2002 Act makes exemptions from the general charging powers in sections 29(1) to (3) in respect of water supplied under the circumstances set out in:

- section 9A of the Water (Scotland) Act 1980, which ensures that no charge can be made for supplies of water for certain fire-fighting purposes; and
- section 47 of that Act, which continues any arrangements in force before 16th May 1949 under which no charge was made for supplies of water.

Subsection (1): the new section 29A of the 2002 Act: Charges schemes

74. The new section 29A to the 2002 Act, also inserted by subsection (1) of section 18 of the Bill, sets out the procedure for making, approving and publishing charges schemes. Subsection (1) of the new section 29A provides for Scottish Water to make a scheme, defined as a charges scheme, setting out what it proposes to charge for each of the services it provides as part of its core functions. Subsections (2) and (3) of the new section 29A provide that a charges scheme must comply with a charge determination made by the Water Industry Commission under the new section 29B to the 2002 Act, and in particular that no charge within the scheme may exceed the relevant maximum charge set out in the determination.

75. Subsection (4) of the new section 29A provides that a charges scheme can specify times and methods of payment for charges.

76. Subsection (5) of the new section 29A provides that where Scottish Water reasonably requests information from Scottish Ministers and the Commission for the purposes of making a charges scheme they must provide that information.

77. Subsection (6) of the new section 29A gives the Scottish Ministers the power to direct when Scottish Water should send the charges scheme they have drawn up to the Commission for its approval. This is connected to Ministers’ power to set the charge determination period under the new subsection 29B(2) of the 2002 Act. The charge determination period will be divided into one or more periods for a charges scheme to apply to and this provision will allow Ministers to set a date sufficiently in advance of the intended start of a new charges scheme period for the scheme to be approved by the Commission and published by Scottish Water.

78. Subsections (7) and (8) of the new section 29A provide that the Commission may approve a charges scheme as submitted by Scottish Water with or with modifications. Where the Commission modifies the charges scheme, it is to set out its reasons for doing so.

79. Subsection (9) of the new section 29A provides for Scottish Water to publish a summary of the charges scheme approved by the Commission. It must also make arrangements for anyone to inspect or obtain a copy of the full charges scheme, and publicise these arrangements.
Subsection (1): the new section 29B of the 2002 Act: Determination of maximum charges

80. The new section 29B of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, requires the Commission to determine maximum charges within which Scottish Water will make a charges schemes for approval under the new section 29A of the 2002 Act. It also provides for the period of a determination to be set by Ministers and for the Commission to consult on a draft determination.

81. Subsection (1) of the new section 29B provides that the Commission must determine maximum charge limits which will be the basis for a charges scheme made by Scottish Water under the new section 29A(1), and for Ministers to specify the date by which the determination must be sent to Scottish Water.

82. Subsection (2) of the new section 29B provides for Scottish Ministers to set the period that a charge determination by the Commission will apply for. This might cover the period of one or several charges schemes.

83. Subsection (3) of the new section 29B provides that a charge determination by the Commission can set different maximum charges for different cases or categories of case. This will allow the Commission to provide different charge limits for different types of customers of Scottish Water, including customers in particular circumstances and for different services. The Commission will do this to reflect the different services Scottish Water provides to its customers, and in accordance with Scottish Ministers’ statement under the new section 29D of the 2002 Act.

84. Subsection (4) of the new section 29B sets out the procedure for the Commission to consult on the basis of a draft determination. In advance of making a determination under this section, the Commission is required to send a draft determination to Scottish Ministers and Scottish Water, and to publish it with a view to receiving representations about it, which the Commission must have regard to.

85. Subsection (5) of the new section 29B provides that Scottish Ministers and Scottish Water are required to comply with reasonable requests for information made by the Commission in exercise of its determination function under this section.

Subsection (1): the new section 29C of the 2002 Act: Exercise of functions regarding charges

86. The new section 29C of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, sets out what should be taken into account by:

- Scottish Water, in making a charges scheme under section 29A or revising any charges fixed by the scheme under section 29F; and
- the Commission, in approving charges schemes under section 29A, determining maximum charges under section 29B, authorising departures from those schemes under section 29E and reviewing its determinations under section 29F.

87. Subsection (1) of the new section 29C provides that Scottish Water, in proposing a charges scheme under section 29A or any revision under section 29F, must comply with subsections (3) and (4) of this section. These provide that Scottish Water must comply with the statement of policy regarding charges as issued by Ministers under the new section 29D, and
ensure that its income (whether from charges or other available resources) is not less than sufficient to match the expenditure required to enable the effective exercise of its core functions (the latter as defined in section 29G).

88. Subsection (2) of the new section 29C specifies how the Commission must exercise its functions under the new sections 29A, 29B, 29E and 29F. In relation to sections 29A, 29B and 29F, the Commission must, like Scottish Water, comply with sections 29C(3) and 29C(4) (as discussed in the previous paragraph). In approving departures from charges schemes under section 29E, the Commission should ensure that Scottish Water’s income is sufficient to match the expenditure required to enable the effective exercise of its core functions (again as defined in section 29G). The Commission must also have regard to any relevant Ministerial guidance issued to Scottish Water or directions issued to it, either under the general direction-making power in section 56 of the 2002 Act, or in relation to payment and investment under section 44 of that Act. This will ensure that the Commission takes account of all relevant obligations or duties or instructions which have a bearing on how Scottish Water discharges its core functions (as defined in section 70(2) of the 2002 Act), in calculating the income or expenditure charge determinations or schemes should provide for.

89. Subsection (4) of the new section 29C provides a formula for balancing Scottish Water’s income and expenditure (from various resources) which charge determinations and revisions thereof (under section 29F) and charges schemes must take account of. This must be read in light of the duty on Scottish Water under section 41(1) of the 2002 Act to ensure that, taking one year with another, its income is not less than sufficient to meet its expenditure. It defines Scottish Water’s income as the sum of its income from its charges for services and the amount of financial resources available to it such as, for example, grants paid to it by Ministers under section 42(1) of the 2002 Act and borrowing authorised by Ministers under section 42(3) of that Act. In effect, it requires that Scottish Water’s income in respect of its core functions should not be less than sufficient to meet the expenditure, in both capital and operating costs, required to enable it to effectively perform those functions.

Subsection (1): the new section 29D of the 2002 Act: Statements regarding charges

90. The new section 29D of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for Ministers to issue a statement of policy regarding charges, which must be taken into account by the Commission in its determination of maximum charges under the new section 29B and by Scottish Water and the Commission respectively in making and approving charges schemes under the new section 29A.

91. Subsection (1) provides that for each charge determination provided under section 29B(2), the Scottish Ministers must provide Scottish Water and the Commission with a statement of policy on charges for a given period (as determined under section 29B(2)). This statement is to be prepared with reference to economic as well as other relevant factors.

92. Subsection (2) provides that Ministers’ statement on charges policy should include provision regarding charge harmonisation, and defines that as provision that seeks to ensure that charges under a charges scheme are the same for similar services provided to people in similar categories.
93. Subsection (3) specifies other provisions that Scottish Ministers may include in their statement on charges policy, which must be consistent with the overriding principle of harmonisation as set out in subsection (2). This includes provision regarding: particular services that should be funded through a charge for combined services (subsection (3)(a)); the proportion of Scottish Water’s charge income which different categories of customer should contribute (subsection (3)(b)); fixing the level of charge for specific categories of customer, or by reference to a customer’s liability for council tax (subsection (3)(c)); and for it to cover such other matters as Ministers think fit (subsection (3)(d)). This will allow Ministers to require continuation of the current link for household customers between their council tax band and their water and sewerage charges. It also provides a mechanism for prescribing reduced charges for certain groups of customers, which will replace the current provision under section 40 of the 2002 Act for Ministers to make regulations reducing charges for customers meeting specific conditions, for example, those in receipt of council tax benefit.

94. Subsection (4) states that Scottish Ministers must consult the Commission and Scottish Water before issuing a policy statement on charges under this section.

**Subsection (1): the new section 29E of the 2002 Act: Departure from certain charges**

95. The new section 29E of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for departures from a charges scheme to be made in respect of charges paid by a water services or sewerage services provider. The section also specifies the narrow circumstances in which these departures from the set charges scheme may be permitted.

96. Subsection (1) of the new section 29E allows Scottish Water to apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid by a water services or sewerage services provider.

97. Subsection (2) of the new section 29E provides that the Commission may consent to such a departure only where satisfied that a customer of the provider in respect of which Scottish Water has made the request has taken specific action which demonstrably reduces the costs incurred by Scottish Water in providing services to the provider. The subsection also provides that the departure must be otherwise justified in the circumstances of the case.

98. Subsection (3) to new section 29E provides that where the Commission agrees to a departure, it may do so subject to such reasonable conditions as it considers appropriate.

99. Subsection (4) to new section 29E stipulates that where the Commission does not agree to a departure it must give its reasons for doing so.

100. Subsection (5) to new section 29E provides that the Commission must specify in writing the procedure it will follow in deciding whether to agree to requests for departures made under subsection (1). In addition it must specify matters which will be taken into account and criteria which will be used in determining whether a departure from a charges scheme is justified; and, where the Commission determines that a departure is justified, matters to be taken into account and criteria to be used by Scottish Water in the setting of lower charges. Subsection (6) provides that the Commission may revise this provision.
101. Subsection (7) to new section 29E provides that, in making provision under subsection (5) for the procedure to be followed in determining requests for departures, the Commission must consult Scottish Ministers, Scottish Water and such other persons as it thinks fit.

102. Subsection (8) provides that the Commission must send a copy of the provision made under subsection (5) to Scottish Ministers, Scottish Water and every water services and sewerage services provider. And subsection (9) requires Scottish Water to publish details of every departure from a charges scheme.

Subsection (1): the new section 29F of the 2002 Act: Review of determinations and charges

103. The new section 29F of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for the Commission’s determination of charges made under section 29B to be reviewed and amended prior to the date set (under section 29B(2)) for the next determination to be made. Subsection (1) of the new section 29F provides that a review of a determination under section 29B(1)(a) is only to be sought where there has been or is likely to be a material change to Scottish Water’s income from charges, grants, borrowing, or the other resources available to it; or to the expenditure required by Scottish Water for the effective exercise of its core functions (as defined in section 29G).

104. Subsection (2) of the new section 29F provides that, where subsection (1) applies, Scottish Water may, or must if the Commission requests it to, send the Commission proposals for revising the maximum amounts determined for charges under section 29B(1)(a).

105. Subsection (3) of the new section 29F provides that the Commission, on receipt of such a proposal, must review the maximum amounts in force, and may revise them to such extent as it thinks fit.

106. Subsection (4) of the new section 29F provides that in reviewing the amounts, the Commission must take into account all matters affecting the resources available to Scottish Water and the expenditure required to carry out its core functions.

107. Subsection (5) of the new section 29F provides that the Commission, before revising the amounts, must inform Scottish Ministers that review of these is under consideration; invite representations regarding the revision of the amounts; and have regard to any representations made to it.

108. Subsection (6) of the new section 29F provides that the Commission must give reasons for its decision as to whether or not to revise the amounts.

109. Subsection (7) of the new section 29F requires the Commission to send Scottish Water a written notice of any revised amounts set.

110. Subsection (8) of the new section 29F provides that Scottish Water may revise any charges fixed by the charges scheme in accordance with the revised amounts and that where it does so it must send written notice of the revised charges to the Commission for approval. Subsection (9) provides that the Commission may approve any revised charges with or without
modifications. Subsection (10) provides that if the Commission approves any revised charges with modifications, it must give its reasons for doing so.

111. Subsection (11) provides that once revised charges have been approved by the Commission, Scottish Water must publish a summary of the revised charges and the date from which the revised charges have effect. Subsection (12) provides that the date for this purpose will be determined by the Commission.

**Subsection (1): the new section 29G of the 2002 Act: Effective exercise of core functions**

112. The new section 29G of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides that, for the purposes of sections 29C(4) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if it makes such use of its resources that, year on year, it achieves its objectives, as set out in Ministerial directions under sections 56 and 56A at the lowest reasonable overall cost. Section 29C(4) provides that Scottish Water’s income should not be less than sufficient to allow it to carry out its core functions. A definition of the effective exercise of Scottish Water’s core functions is needed in relation to section 29F(1) because the expenditure required in relation to this is one factor where a material change may trigger a section 29F review of the Commission’s determination and charges.

**Section 18(2): Scottish Water’s charges for water and sewerage services**

113. Subsection (2) of section 18 makes amendments to section 30 of the 2002 Act which currently gives the Scottish Ministers the power by order to set maximum charges that may be recovered by a person other than Scottish Water for supplying water or providing sewerage services with the help of Scottish Water to others who are not the direct customers of Scottish Water. For example, the owner of a caravan site may be the direct customer of Scottish Water, and might in turn charge individual caravan owners for Scottish Water’s services subject to any relevant maxima. The amendments provide that in future the maximum charges for these services, or the method of calculating them, will be set out in Scottish Water’s charges scheme under the new section 29A of the 2002 Act (see above) and consequently will be subject to approval by the Commission.

**Section 18(3): Repeal of sections 31 to 34 of the 2002 Act**

114. Subsection (3) of section 18 repeals sections 31 to 34 of the 2002 Act, which make provision for the Water Industry Commissioner to provide advice on charges and for charges schemes to be proposed, approved and published. These arrangements are all superseded by new sections 29 to 29G of the 2002 Act, as inserted by subsection (1) of section 18.

**Sections 18(4) and 18(5): Liability of occupiers etc. for charges**

115. Subsection (4) of section 18 amends section 35 of the 2002 Act which sets out the liability of the occupiers of premises to pay Scottish Water for water or sewerage services. The amendment disappplies the section in respect of services provided under section 14(2) of the Bill, i.e. services to persons eligible to be served by a water or sewerage services provider; unless their supply has been continued under section 15(1) or (4). This provides that only occupiers of eligible premises whose service is continued by Scottish Water under the supplier of last resort provisions in section 15 are liable to Scottish Water directly for their water charges. For all other occupiers of eligible premises whose services are arranged by a licensed provider, the latter will instead be liable to Scottish Water for charges under the new section 35A.
These documents relate to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

116. Subsection (5) of section 18 inserts a new section 35A into the 2002 Act. This new section provides that water and sewerage services provided by Scottish Water to eligible premises by a licensed provider, as provided in section 14 of the Bill, are to be considered as services provided solely by Scottish Water to the licensed provider for the purposes of charges schemes and determinations under the new sections 29 to 29G of the 2002 Act (as inserted by section 18(1) of the Bill) (see, in particular, section 35A(1) and (2) which make provision for water and sewerage services respectively). Section 35A(3), however, disapplies section 35A(1) and (2) where water or sewerage services continue to be provided directly to the occupiers of those premises under section 15 of the Bill. In that case, occupiers will be directly liable to Scottish Water for charges as set out in a charges scheme under the new section 29A of the 2002 Act.

Section 19: Scottish Water’s functions: powers of Scottish Ministers

117. Section 19 inserts sections 56A and 56B into the 2002 Act. Section 56 of the 2002 Act gives the Scottish Ministers powers to direct Scottish Water as regards the exercise of their functions. The new section 56A enables any directions issued under that provision to, in particular, set objectives regarding the standard of services to be provided by Scottish Water in the exercise of its functions; or the timescales within which Scottish Water is to achieve a particular standard of service in exercising its functions, or to commence or complete a particular piece of work. The directions will apply by reference to the period of a charge determination specified under the new section 29B(2) of the 2002 Act.

118. The new section 56B gives Ministers powers, after consulting the Commission and Scottish Water, to make orders conferring additional functions on Scottish Water as regards the provision of water and sewerage services. Paragraph 7(7) of schedule 5 to the Bill amends section 68 of the 2002 Act to provide that regulations under new section 56B will be subject to affirmative procedure in the Parliament.

Definitions for Part

Section 20: Meaning of “eligible premises”

119. Section 20 defines “eligible premises” for the purposes of Part 2 of the Bill. This is required to define which customers licensed providers may make arrangements to supply water or sewerage services to. Where a customer meets this definition a licensed provider can supply services to them without contravening the general prohibitions in sections 4(3) and 5(3) of the Bill.

120. 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.

121. Subsection (2) defines “dwelling” by reference to the definition given to it for council tax purposes under the Local Government Finance Act 1992 (i.e. premises in respect of which council tax is payable). The main purpose of this provision is to ensure that licensed providers cannot make arrangements to provide services to households. However, certain places which are dwellings under the 1992 Act, are not to be classed as a dwelling for the purposes of this Bill, namely “the residential part of part residential subjects within the meaning of that Part of that Act”. This means that premises which are technically residential but which form part of a building whose main purpose is to function as a business, e.g. a care home, are not caught by the
These documents relate to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

Definition of “dwelling”; they will therefore fall within the definition of “eligible premises” and be able to receive water and sewerage services from a licensed provider notwithstanding that, for council tax purposes, certain parts of those subjects may be classed as a dwelling.

122. Subsection (3) gives Ministers the power by order to amend the definition of a “dwelling” for the purposes of the Bill. This power could be used, for example, in the event of any changes made for council tax purposes to the definition of dwelling, to ensure that premises used primarily as dwellings are always excluded from the category of "eligible" premises. Section 27 provides for these regulations to be subject to negative procedure in the Parliament.

Section 21: Meaning of “public water supply system”

123. A water services licence will authorise a provider to arrange for a supply of water to be made to any eligible premises through the public water supply system. Section 21 defines what constitutes the public water supply system for the purposes of Part 2 of the Bill.

124. 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 (or a person acting on its behalf or under its authority, such as a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of the public water supply. (Scottish Water’s core functions are defined at section 70(2) of the Water Industry (Scotland) Act 2002 and for all practical purposes the definition includes all activities involved in providing statutory public water and sewerage services.)

Section 22: Meaning of “public sewerage system”

125. 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 through the public sewerage system. Section 22 provides a definition of the public sewerage system for the purposes of Part 2 of the Bill.

126. Subsection (1) defines the public sewerage system as all sewers, drains, sustainable urban drainage systems (SUDS), sewage treatment works or other similar infrastructure vested in Scottish Water or used by Scottish Water (or a person acting on its behalf or under its authority, such a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of statutory public sewerage services.

PART 3: COAL MINE WATER POLLUTION

Section 23: Control of water from coal mines

127. Subsection (1) of section 23 of the Bill inserts new sections 4D to 4F and a new Schedule 1C into the Coal Industry Act 1994 (“the 1994 Act”). These new sections provide the terms and conditions of powers allowing the Coal Authority (“the Authority”) to act to prevent or mitigate pollution, and to gain access and, if need be, to compulsorily acquire land in order to deal with coal mine water pollution in Scotland. The new provision is set out as a power, rather than a duty in any particular case, in order to enable the Authority to decide what action, if any, would be appropriate, depending on the circumstances.
128. The new section 4D of the 1994 Act makes provision for the Authority to take action to prevent or mitigate pollution of the water environment caused by discharges of water from coal mines which are vested in the Authority. This provides a statutory basis for the Authority’s remediation work beyond its existing powers and general duties in Part 1 of the 1994 Act.

129. The new section 4E of the 1994 Act defines the powers that are given to the Authority to enter premises (within the meaning of section 4E(8), which includes land) for the purpose of investigating or dealing with water discharging from coal mines. The new Schedule 1C to the 1994 Act (as set out in Schedule 4 to the Bill) sets out additional provisions on the administrative and operational procedures concerning these powers of entry. Before invoking these powers, the Authority would usually seek to reach agreement with the relevant owners of the land. These provisions therefore only concern situations where the Authority is unable to gain entry by agreement.

130. Subsections (1) and (2) of new section 4E set out the reasons why the Authority would need to have access to premises (in exercise of its powers under subsection (3)). These are to carry out work to determine the extent, or the likelihood, of any pollution or danger, and to take any remedial action required under section 4D, where coal mine water has caused, or is causing, or is likely to cause either serious pollution of the environment or a danger to life or health. While actual ownership of the mine remains with the Authority, Part II of the 1994 Act provides for the leasing of coalmining operations; this new provision therefore makes provision to enable another person, such as a licencee or a specialist, to undertake the required investigative works on behalf of the Authority.

131. Subsections (3) and (4) of new section 4E set out the extent of the powers of entry and the purposes for which they might be used in order to allow a broad spectrum of investigative and remedial work, including the power to carry out experimental borings. As read with paragraph 1 of Schedule 1C, the powers enable the Authority to take others onto the premises, for example, engineering experts, and any necessary equipment, for use in tracing the source of leaks.

132. In an emergency (as defined in new section 4E(8) to cover cases where there is an immediate risk of serious pollution of the environment or immediate danger to life or health), the provisions of new section 4E(3) permit the Authority to enter premises at any time and, if need be, by force.

133. Subsections (5), (6) and (7) of new section 4E require the Authority either to give at least seven days’ notice before entering a premises (in cases other than an emergency), or to obtain a warrant granted under the terms of paragraph 2 of Schedule 1C (where the occupier of the premises does not consent to the entry). Whilst the immediacy of the threat to the water environment may not be such that it could be described as an “emergency”, there may still nevertheless be a need to exercise the powers of entry under the authority of a warrant to deal with potentially significant pollution of the water environment. For example, where the Authority had identified the need for a new monitoring point but could not gain the agreement of the landowner to install the monitoring equipment or subsequently to take measurements. In order to establish clearly the evidential basis which underpins the issue of a warrant, the new Schedule 1C sets out the required evidence which must be adduced in writing before a warrant may be issued. These include circumstances where the Authority requires access urgently and
the occupier is absent. However, this would rarely be necessary, for example, where the Authority needed to work quickly and the occupier was uncontactable for an extended period.

134. The new section 4F of the 1994 Act enables the Authority to compulsorily acquire land in Scotland. This new provision is in addition to section 5(2) of the 1994 Act which enables the Authority to acquire land by agreement for the purposes of carrying out its general functions under that Act.

135. Subsections (1) and (2) of new section 4F enable the Authority, if authorised by the Scottish Ministers, to acquire land compulsorily for the purpose of preventing or mitigating the effects of a mine water discharge which has caused, is causing or is likely to cause serious pollution of the water environment or danger to life or health. The Authority is also able, where necessary, to acquire a right of servitude in or over land to ensure access to the land for the purpose of carrying out its works.

136. Subsection (3) of new section 4F applies the requirements of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to compulsory acquisitions under new section 4F. Wherever the 1947 Act refers to ‘a local authority’, it will apply as if it were a reference to the Coal Authority. The provisions of the 1947 Act enable Scottish Ministers to confirm an Order with or without modifications in the absence of any outstanding objections, failing which a public local inquiry must be held. Additionally, following confirmation of an Order, the Authority is required to notify it in the prescribed form. These new powers will not affect the requirements, in section 5(7) of the 1994 Act, for the Authority to obtain the agreement of Treasury and the Secretary of State for Trade and Industry before acquiring any land.

137. Subsection (2) of section 23 of the Bill inserts a new subsection (6) into section 66 of the 1994 Act, so that the provisions apply to land held by non-ministerial office holders in the Scottish Administration as well as other government departments.

138. Subsection (3) of section 23 of the Bill amends the 1994 Act to provide that the provisions inserted by the Bill apply to Scotland only.

PART 4: MISCELLANEOUS AND GENERAL

Miscellaneous

Section 24: Offences by bodies corporate and partnerships

139. Section 24 provides that officers of companies and other corporations and members of partnerships can be held personally liable, in certain circumstances, for offences under the Bill that their companies or partnerships commit.

Section 25: Amendments to enactments

140. Section 25 introduces schedule 5, which makes consequential amendments to enactments as a result of this Bill.
Section 26: Ancillary provision

141. Section 26 enables Ministers to make orders for incidental, supplemental, consequential, transitional, transitory or saving provisions where they consider that these are necessary or expedient for the purposes of or in consequence of the Bill. The parliamentary procedure for making these orders is defined under section 27: where an order is used to amend primary legislation, affirmative procedure is prescribed; otherwise an order would be subject to negative procedure.

General

Section 27: Orders and regulations

142. Section 27(1) provides that the powers to make orders and regulations that the Bill confers on the Scottish Ministers are exercisable by statutory instrument. Subsection (2) provides that in exercising such powers, Ministers can make such incidental, consequential, transitional or saving provisions as considered necessary or expedient and can make different provision for different circumstances.

143. Subsections (3) and (4) set out the parliamentary procedure which the various statutory instruments that are capable of being made under the powers in the Bill are subject to.

144. Subsection (3) provides that some statutory instruments are subject to negative procedure or annulment. Subsection (4), however, specifies affirmative procedure for some statutory instruments, whereby 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.

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

- **Section 2:** an order to dissolve the Water Industry Commissioner for Scotland.
- **Section 7(2):** an order to specify any other factors beyond those at sections 7(2)(a) and 7(2)(b) that the Commission 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 Commission, under the powers conferred by section 9, may charge applicants for a licence.
- **Section 16(3):** an order prescribing the form and content of the notice that a provider must issue under section 16(3), prior to requesting that Scottish Water discontinue the supply of water to a premises.
- **Section 20(3):** an order to vary the meaning of “dwelling” for the purposes of the Bill’s definition of “eligible premises” at section 20.
- **Section 26:** an order to make further provision for the purposes of the Bill (where this does not amend primary legislation).
These documents relate to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

- **Paragraph 1(1) of Schedule 2**: an order prescribing the form and content of an application for a water services or sewerage services licence.
- **Paragraph 1(4) of Schedule 2**: an order prescribing the timescales and content of the notice that an applicant for a licence must publish.
- **Paragraph 1(7) of Schedule 2**: an order specifying the circumstances in which the procedural requirements in paragraphs 1(4) to 1(6), for licences being applied for and assessed, do not apply.
- **Paragraph 11(1) of Schedule 2**: an order specifying the manner in which the Commission must maintain a register of water and sewerage services licences.
- **Paragraph 11(2)(g) of Schedule 2**: an order specifying any additional information, beyond that at sections 10(2)(a) to 10(2)(f), to be included in the Commission’s register of water and sewerage services licences.

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

- **Section 26**: an order to make further provision for the purposes of the Bill (where this amends primary legislation).
- **Section 4(7)**: regulations which specify circumstances in which the prohibition on common carriage on the public water networks at section 4(1); on using the public water networks to supply services at section 4(2); or on providing services on the public water networks without a licence at section 4(3), do not apply.
- **Section 5(7)**: regulations which specify the circumstances in which the prohibition: on common carriage on the public sewerage networks at 5(1); on using the public sewerage networks to supply services at section 5(2); or on providing services on the public sewerage networks without a licence at section 5(3), do not apply.

*Section 28: Interpretation*

147. Section 28(1) specifies the meaning to be placed upon the abbreviated references to legislation in the Bill. Subsection (2) provides that the definition of Scottish Water’s core functions given at section 70(2) of the 2002 Act is to apply for the purpose of the Bill.

*Section 29: Crown application*

148. Section 29 provides that the provisions in the Bill bind the Crown.

*Section 30: Short title and commencement*

149. Section 30 (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.

**SCHEDULE 1: WATER INDUSTRY COMMISSION FOR SCOTLAND**

150. Schedule 1 is introduced by section 1(4) of the Bill and inserts a new schedule A1 into the 2002 Act.
Schedule A1: Water Industry Commission for Scotland

Paragraph 1: Status
151. Paragraph 1 provides that the Commission is a body corporate. Sub-paragraph (2) provides that the Commission does not form part of the Crown.

Paragraph 2: Membership
152. Paragraph 2 provides that the Commission is to be made up of 3-5 ordinary members and a chief executive. This means that the majority of the membership of the Commission will be non-executive. Paragraph 5 provides that a person is to be appointed to chair the Commission from amongst the ordinary members.

Paragraph 3: Tenure and removal from office
153. Paragraph 3 provides for the appointment and vacation of office for Commission members. Members are to be appointed by the Scottish Ministers, who will also determine their terms and conditions. Sub-paragraph (2) provides that Ministers may remove ordinary members from office; and that the Commission may remove the chief executive from office with the approval of Ministers. Removal from office under this paragraph of members or the chief executive may only happen under certain circumstances, specified as bankruptcy, incapacity by physical or mental illness, prolonged absence from Commission meetings without permission, or otherwise being unable, or unfit to discharge the functions of a member or unsuitable to continue as a member.

Paragraph 4: Disqualification
154. Paragraph 4 disqualifies members of the House of Lords, the House of Commons, the Scottish Parliament or the European Parliament from being appointed as members of the Commission.

Paragraph 5: Chairing
155. This paragraph requires the Scottish Ministers to appoint a person to chair the Commission from among its ordinary members. Sub-paragraph (3) provides that this person may resign by giving written notice to Ministers. Sub-paragraph (4) states that they cease to chair the Commission on ceasing to be a member of the Commission.

Paragraph 6: Remuneration, allowances and pensions
156. Sub-paragraph (1) provides for Scottish Ministers to determine the remuneration to be paid to ordinary members of the Commission, and sub-paragraph (2) provides further for them to determine allowances in respect of expenses to be paid to ordinary members and to the chief executive.

157. Sub-paragraph (3) provides that Scottish Ministers may, under special circumstances, direct the Commission to pay compensation to an ordinary member who has ceased to hold the office otherwise than on the expiry of the terms of their appointment. Sub-paragraph (4) provides that Scottish Ministers may direct the Commission to pay pensions, allowances or gratuities, or contributions to these, to ordinary members as Ministers consider appropriate.
Paragraph 7: Chief executive

158. Paragraph 7 requires the Commission to employ a chief executive and makes provision regarding their appointment and employment.

159. Sub-paragraph (2) provides that Scottish Ministers will appoint the first chief executive of the Commission and determine the appointee’s terms and conditions. Sub-paragraph (3) ensures that before they do this, Scottish Ministers will consult the chairman or prospective chairman of the Commission, if that person has been identified.

160. Sub-paragraph (4) provides that the Commission will appoint subsequent chief executives on such terms and conditions as they determine, subject to the approval of Ministers.

161. Sub-paragraph (5) requires that the chief executive has knowledge, skills or experience relevant to the functions of the Commission.

162. Sub-paragraph (6) enables the Commission, with the approval of Ministers, to vary the terms and conditions of the chief executive or to terminate such an appointment where satisfied that the chief executive is not adequately discharging the functions of that post.

Paragraph 8: Staff

163. Sub-paragraph (1) provides that all the staff of the Water Industry Commissioner for Scotland will transfer to the Commission once it is established.

164. Sub-paragraph (2) provides for the contract of employment of any staff transferred under sub-paragraph (1) not to be terminated by the transfer, but to continue as if originally made between the member of staff and the Commission.

165. Sub-paragraph (3) provides that when staff are transferred to the Commission, the Commission will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer continues to have effect after the transfer.

166. Sub-paragraph (4) states that the transfer under these provisions does not affect any person’s right to terminate their contract of employment if the terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that that the identity of the person’s employer has changed is not in itself to constitute such a change.

167. Sub-paragraphs (5), (6) and (7) provide that the Commission may employ other staff, and determine their terms and conditions and the arrangements for pensions, allowances or gratuities. Ministers must approve all such recruitment and arrangements. Sub-paragraph (8) provides that reference to provision of pensions includes provision by way of compensation for loss of office or employment.
Paragraph 9: Transfer of property and liabilities

168. Paragraph 9(1) provides that all property (including rights) and liabilities of the Water Industry Commissioner will transfer to the Commission. Sub-paragraph (2) provides that sub-paragraph (1) will have effect despite any provision which might otherwise prevent the transfer of such property and liabilities.

Paragraph 10: Committees

169. Paragraph 10 provides for the Commission to establish committees for or in connection with any of its functions. These must be chaired by an ordinary member of the Commission (sub-paragraph (2)), and may include employees of the Commission who are not members of the Commission (sub-paragraph (3)), as well as the chief executive.

Paragraph 11: Delegation of powers

170. Paragraph 11 enables any function of the Commission to be delegated to any of its authorised committees; but that this authorisation does not prevent the Commission itself from doing anything it has authorised a committee to do.

Paragraph 12: Proceedings

171. Paragraph 12 states that the Commission may determine its own procedures, and that any vacancy among its members or defect in the appointment of a member does not affect the validity of its proceedings.

Paragraph 13: General powers

172. Paragraph 13(1) provides that the Commission may enter into contracts and acquire or dispose of property, if this is necessary or expedient in the exercise of its functions; but the Scottish Ministers’ consent is required where land is acquired or disposed of (sub-paragraph (2)).

Paragraph 14: Accounts

173. Paragraph 14 provides that the Commission will prepare accounts for each financial year, and send these to the Auditor General, in accordance with directions from Scottish Ministers. By virtue of this provision the Commission is also subject to provision under the Public Finance and Accountability (Scotland) Act 2000 giving the Auditor General powers to audit and examine any part of the Commission’s expenditure.

SCHEDULE 2: LICENCES AND COMPLIANCE: FURTHER PROVISION

174. Schedule 2 is introduced by section 11.

Paragraph 1: Application for licence

175. Paragraph 1 provides an order-making power for the Scottish Ministers to make provision in respect of applications for a water or sewerage services licence under the Bill. The paragraph sets out detailed provisions about the Commission’s functions in considering applications from those seeking licences, and about the requirements to be placed on applicants.
176. Sub-paragraph (1) requires the form for applications to the Commission under this paragraph to be prescribed by Ministers. Sub-paragraph (2) requires applicants to provide the Commission with any other information reasonably required to enable consideration of the application unless that is legally privileged information (sub-paragraph (3)).

177. 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 Commission about the application. The timing of this notice and the procedures on representation contained in it are to comply with requirements prescribed by Ministers in an order.

178. Sub-paragraph (5) requires the Commission 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 Commission is required to have regard to any representations made by 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 should not be subject to the general procedures established at sub-paragraphs (4) to (6).

179. 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 up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or where convicted by a jury, an unlimited fine.

180. 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

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

182. 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 Commission judges to be necessary. Sub-paragraph (2) requires the Commission to specify what the standard conditions are to be within 9 months of the sub-paragraph coming into force. For example, this will allow the Commission to use part of the 9 month period to consult publicly on draft conditions.

183. Sub-paragraph (3) provides for the matters to be covered by the standard conditions. It is anticipated 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 Commission 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.

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

185. Sub-paragraphs (5) to (11) provide for the Commission 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 Commission is not required to obtain the agreement of each licence holder to whatever change is being made.

186. Sub-paragraph (5) places a duty on the Commission to review the standard conditions from time to time and gives it the power to modify them and also, in consequence of so doing, to make any other modifications to licence conditions which it considers necessary or expedient. The frequency with which this type of review is required will depend on experience gained of the system in operation. Sub-paragraph (6) requires that the Commission, before making any modification to a standard condition or a consequential amendment to a licence condition, should notify the licence holders affected by any proposed modification, Scottish Water and Ministers; and should publish this notification. Sub-paragraph (7) requires that the notice explains the Commission’s reasons for proposing modifications and specifies the timescale within which representations about them can be made to it. Sub-paragraph (8) requires the Commission to have regard to any representations made about the proposed modification. Sub-paragraph (9) requires the Commission to publish any modifications that are made to the standard conditions.

187. Sub-paragraph (10) empowers the Commission 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 Commission is minded to grant a licence on this basis, that the Commission should follow the procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6) to (8).

188. In the interests of flexibility, sub-paragraph (12) gives the Commission 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 it considers appropriate.

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

190. Sub-paragraphs (15) and (16) empower a water or sewerage services provider to appeal to the Court of Session against the inclusion or modification respectively 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 licence**

191. Paragraph 3 establishes the basis on which a water or sewerage services provider can transfer a licence to another person.

192. 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 Commission.

193. Sub-paragraphs (3) and (4) empower the Commission to consent to a transfer, but only where 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 Commission 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 Commission to notify Scottish Water of any transfer to which it 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 Commission to have regard to any representations made in response to this notice.

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

195. 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.**

196. Paragraph 4 provides for the Commission to have powers of entry to premises so as to enable it to discharge its duty, under section 8 of the Bill, to monitor and ensure compliance with licence conditions. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, to exercise the powers specified in sub-paragraph (2).

197. Sub-paragraph (2)(a) enables the Commission and its 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 Commission considers necessary to give effect to its monitoring and compliance duties. The exercise of the powers of entry are qualified by sub-paragraph (3). Thus whereas the Commission, or anyone authorised by the Commission, 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 Commission is satisfied that gaining access to premises in the first and second categories only would not be sufficient to enable it to discharge its monitoring and compliance duties. In practice, this would mean that the Commission could seek entry to premises in the third category only where it had grounds for believing that it 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 Commission’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.

198. Sub-paragraph (5) requires that the Commission 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.

Paragraph 5: Powers of entry etc.: further provision

199. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, 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 paragraph 6. 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 (2) requires those entering premises to leave them in a condition no less secure than that in which they found them.

200. Sub-paragraphs (3) to (5) provide protection for those whose premises are entered under paragraph 4(2). Sub-paragraph (3) places a duty on the Commission 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 (4) makes it an offence for anyone to disclose any commercially sensitive information obtained as a result of exercising the power of entry. Sub-paragraph (5) provides that anyone obstructing the Commission, or failing to provide assistance to the Commission, in the exercise of the powers at this paragraph is guilty of an offence. The penalties for these offences are set out in sub-paragraph (6) and are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

Paragraph 6: Warrants

201. Paragraph 6 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.

202. 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 Commission, or those authorised by it, 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 Commission 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.

203. 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.

Paragraph 7: Enforcement notices

204. Paragraph 7 gives the Commission power to issue enforcement notices and describes the process to be followed in issuing these notices.

205. Sub-paragraph (1) gives the Commission 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 Commission can do so only where it appears to it that the provider is not taking appropriate steps to remedy the contravention or prevent it from recurring. Any enforcement notice that the Commission 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).

206. Sub-paragraphs (5) and (6) specify the steps that the Commission must take before issuing an enforcement notice, including 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 Commission to have regard to any representations made to it by the provider about an enforcement notice. Sub-paragraph (8) requires copies of enforcement notices to be sent to Ministers and Scottish Water.

207. 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 as considered necessary and provides that the sheriff’s decision is final in such cases.

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

Paragraph 8: Enforcement notices: offences

209. Paragraph 8 sets out the sanctions for a water or sewerage services provider, who having been served with an enforcement notice, fail 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 up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.
Paragraph 9: Revocation of licences

210. Paragraph 9 gives the Commission the power to revoke a water or sewerage services licence under certain circumstances.

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

212. Sub-paragraph (4) allows the Commission to revoke a licence if it 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 Commission must have regard to the factors mentioned in section 7(2) of the Bill and to other matters specified under that subsection. Finally, sub-paragraph (5) allows the Commission to revoke a licence if requested to do so by a provider.

213. Sub-paragraph (6) provides that before revoking a licence the Commission 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.

214. 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 provides that the decision of the sheriff is final.

215. Sub-paragraph (10) requires the Commission 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 10: Penalties for contravention of licence

216. Paragraph 10 gives the Commission the power to impose financial penalties on water or sewerage services providers if they contravene the terms and conditions of their licence. The Commission is required to prepare and publish a policy with respect to the imposition of penalties.

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

218. Sub-paragraph (3) requires the Commission to notify a provider of its intention to impose a penalty. Sub-paragraph (4) requires the Commission 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 Commission 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 is considered necessary and provides that the sheriff’s decision in such cases is final.

219. Sub-paragraph (7) ensures that the Commission will be able to recover any penalties that it 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 11: Register of licences

220. Paragraph 11 requires the Commission 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.

221. Sub-paragraph (1) empowers the Scottish Ministers to prescribe, by order, the manner of the register, which the Commission 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.

SCHEDULE 3: CERTAIN PRE-EXISTING AGREEMENTS AS TO CHARGES

222. Schedule 3, introduced by section 18(6) of the Bill, makes provision to preserve the charging arrangements which apply where, before the coming into force of this schedule, Scottish Water have used existing statutory powers to enter into “relevant agreements” with non-household customers for charging (other than through a charges scheme) for services provided under those agreements. Once the Bill is enacted, Scottish Water will no longer have the power to enter into such agreements for charging for services provided to customers in exercise of core functions, and any charges will be determined instead according to a charges scheme (under the new section 29A of the 2002 Act) or an authorised departure from a charges scheme (under the new section 29E of the 2002 Act).

Paragraph 1

223. Paragraph 1 defines a “relevant agreement” and a “relevant customer” for the purpose of schedule 3. These are agreements between Scottish Water and another person in respect of “eligible premises” (as defined in section 20 of the Bill) which have been entered into before the coming into force of this schedule by virtue of the statutory powers set out in sub-paragraph (2) or otherwise and which make provision for the relevant customer to pay charges for services provided under those agreements other than by reference to a charges scheme.

Paragraph 2

224. Paragraph 2 sets out the arrangements for relevant agreements to be identified and considered by the Commission, in order to assess the relevant charges to be paid by customers under those agreements and to determine the charges which any licensed provider, in respect of such customers, should pay to Scottish Water for services provided under those agreements.
225. Sub-paragraph (1) requires Scottish Water to send details of relevant agreements to the Commission within one month of the schedule coming into force. Sub-paragraph (2) provides for the Commission to assess, in respect of each agreement sent, the relevant charges which the relevant customer is still entitled to pay under the agreement, and based on this and the costs which any water and sewerage services provider will incur where it provides services to that customer under the agreement and any other matter the Commission considers appropriate, to determine the charges which a provider should pay to Scottish Water (as read with sub-paragraph (6)(a)).

226. Sub-paragraph (3) requires the Commission to give each relevant customer written notice of its assessment of the relevant charges payable under the agreement and the amount which Scottish Water will be able to recover from a provider in respect of the customer. This notice is also to be sent to Scottish Water and every water and sewerage services provider, by such date as the Scottish Ministers may direct.

227. Sub-paragraph (5) sets out the circumstances in which the charging arrangements at sub-paragraph (6) apply. In the case where a relevant customer is served by a water and sewerage services provider, Scottish Water can recover any charges determined under sub-paragraph (2)(b) from the provider and the provider in turn can charge the relevant customer no more than the amount set out in the relevant agreement.

228. Sub-paragraph (7) provides that Scottish Water should bear the cost of any shortfall between the charges determined under sub-paragraph (2)(b) and any charges determined under a charges scheme.

229. Sub-paragraph (8) provides that where a relevant customer is not or has ceased to be served by a water and sewerage services provider for any reason, Scottish Water should demand and recover directly from the relevant customer no more than the relevant charge as set out in the relevant agreement as assessed under sub-paragraph (2)(a).

**Paragraph 3**

230. Paragraph 3 makes provision in relation to the status of relevant agreements under this schedule and the application of charges schemes to them. Sub-paragraph (1) disapplies a charges scheme in relation to any services covered by relevant charges determined under this schedule unless the agreement concerned has expired or has been terminated. Sub-paragraph (2) clarifies that a relevant agreement is not to expire or terminate simply as a result of the change of a water and sewerage services provider in respect of a relevant customer.

231. Sub-paragraph (3) provides that a relevant agreement cannot be renewed on its expiry or termination or extended at any time.

**SCHEDULE 4: POWERS OF ENTRY UNDER THE COAL INDUSTRY ACT 1994**

232. Schedule 4 is introduced by section 23(4) and inserts Schedule 1C to the Coal Industry Act 1994. Commentary on the provisions of Schedule 1C is to be found within the commentary on the provisions of section 23 of the Bill. The Schedule makes further provision in relation to these amendments.
SCHEDULE 5: AMENDMENTS TO ENACTMENTS

233. Schedule 5 is introduced by section 25 of the Bill. The Schedule makes amendments to other enactments which are required in consequence of provisions made under this Bill.

Paragraph 1: Sewerage (Scotland) Act 1968 (c.47)
234. Paragraph 1 repeals section 29(3)(j) of the Sewerage (Scotland) Act 1968 – that provisions allows Scottish Water to set charges in relation to the disposal of trade effluent into sewers. Under the new arrangements introduced by the Bill, all such charges will be set by reference to the charges scheme made under section 29A.

Paragraph 2: House of Commons Disqualification Act 1975 (c.24)
235. Paragraph 2 repeals the section of Part III of Schedule 1 of the House of Commons Disqualification Act 1975 which relates to the Water Industry Commissioner. This specifies offices the holders of which are disqualified from being a member of the House of Commons. Since the Water Industry Commissioner is replaced by the Water Industry Commission under the Bill, the reference to the Water Industry Commissioner needs to be removed.

Paragraph 3: Race Relations Act 1976 (c.74)
236. Paragraph 3 repeals the section of Part II of Schedule 1A of the Race Relations Act 1976 which relates to the Water Industry Commissioner. This Part specifies offices the holders of which are subject to the general statutory duty to eliminate unlawful racial discrimination and promote equality of opportunity in the carrying out of their functions. As above, the reference to the Water Industry Commissioner needs to be removed.

Paragraph 4: Water (Fluoridation) Act 1985 (c.63)
237. Paragraph 4 replaces references in the Water (Fluoridation) Act 1985 to the Commissioner with references to the Commission.

Paragraph 5: Public Finance and Accountability (Scotland) Act 2000 (asp 1)
238. Paragraph 5 replaces references in the Public Finance and Accountability (Scotland) Act 2000 to the Commissioner, with references to the Commission.

Paragraph 6: Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)
239. Paragraph 6(a) to (d) repeals all references to the Water Industry Commissioner in the Ethical Standards in Public Life etc. (Scotland) Act 2000. Sub-paragraph (e) replaces these references by adding the Water Industry Commission established by the Bill to the list of devolved public bodies. This provides that the Commission and its members will be subject to that Act and required to draw up and comply with a code of conduct under the Act.

Paragraph 7: Water Industry (Scotland) Act 2002 (asp 3)
240. Paragraph 7 amends the Water Industry (Scotland) Act 2002 in consequence of the provisions of the Bill. Sub-paragraph (1) replaces references to the Commissioner with references to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.
241. Sub-paragraph (2) inserts subsection (5A) into section 2 of the Act (Water Customer Consultation Panels). Subsection (5A) provides that subsections (1) to (5) do not apply in relation to services provided to water services and sewerage services providers, or to their customers. This has the effect of ensuring that the Water Customer Consultation Panels represent only the direct customers of Scottish Water i.e. domestic customers.

242. Sub-paragraph (3) inserts subsection (6A) into section 3 of the Act (Functions of the Commissioner). Subsection (6A) provides that subsections (1) to (6) do not apply in relation to services provided to water services and sewerage services providers, or to their customers. This has the effect of ensuring that the Commission, in carrying out its functions relating to investigating customer complaints and advising Ministers on Scottish Water’s customer service, has regard only the direct customers of Scottish Water i.e. domestic customers.

243. Sub-paragraph (4) repeals subsection (2) of section 26 of the Act (Customer standards code), which provided that a customer standards code had to be submitted to the Commissioner no later than the date on which Scottish Water first sent a charges scheme to the Commissioner. Sub-paragraph (4) also inserts subsection (8) into section 26 of the Act. Subsection (8) provides that the section does not apply in relation to services provided to water services and sewerage services providers, or to their customers. This has the effect of ensuring that Scottish Water’s code of practice, or customer standards code, relates only to the direct customers of Scottish Water i.e. domestic customers.

244. Sub-paragraph (5) repeals section 40 of the Act (Reduced charges), which allowed Ministers to provide by regulations that certain people should pay Scottish Water reduced charges. In future provision for reduced charges will be given effect through Ministers’ statement under the new section 29D which Scottish Water will take account of in making charges schemes under the new section 29A.

245. Sub-paragraph (6) replaces wording in section 49 of the 2002 Act to ensure that the Scottish Ministers and Scottish Water are obliged to carry out their functions with regard to the interests of all end users of the public water and sewerage systems. The intention of this amendment is to exclude licensed retailers from the scope of this customer interest duty. Although the licensed retailers will be customers of Scottish Water and will receive wholesale services from them, the high level customer interest duty placed on Ministers and Scottish Water is to be exercised with regard to direct (i.e. domestic) customers of Scottish Water, and customers of the licensed providers, but not the licensed providers themselves.

246. Sub-paragraph (7) adds the new section 56B to the orders and regulations which are excluded from those orders and regulations to be subject to negative procedure in the Scottish Parliament; and includes section 56B with the sections under which orders and regulations may be made subject to affirmative procedure.

247. Sub-paragraph (8) amends section 70 of the Act (Interpretation) to the effect that “charges scheme” has the meaning given to it under the new section 29A(1) and substitutes a definition of the Water Industry Commission for that of the Water Industry Commissioner.

248. Sub-paragraph (9) repeals Part I of Schedule 1 (The Commissioner) of the Act, since the Water Industry Commissioner is replaced by the Water Industry Commission under the Bill.
Paragraph 8: Scottish Public Services Ombudsman Act 2002 (asp 11)

249. Paragraph 8 replaces the reference in the Scottish Public Services Ombudsman Act to the Commissioner with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.


250. Paragraph 9 replaces the reference in the Freedom of Information Act to the Commissioner with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.

Paragraph 10: Public Appointments and Public Bodies etc.(Scotland) Act 2003 (asp 4)

251. Paragraph 10 repeals the entry relating to the Commissioner in Schedule 2 of the Act, and replaces it with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.

FINANCIAL MEMORANDUM

INTRODUCTION

252. The provisions in the Water Services etc. (Scotland) Bill introduce a range of measures to define, limit and facilitate the orderly operation of the contestable water market. They also alter the regulatory framework that supports the Scottish water industry and makes provision in relation to the coal authority.

253. The Bill will establish the Water Industry Commission to replace the present Commissioner. There will be modest additional costs associated with restructuring into the Commission and the new charge determination role it will exercise. The Commission will have three statutory funding mechanisms: direct grant in aid from the Scottish Executive, levies on Scottish Water, and charges raised from licence holders to meet the costs of operating the licensing regime. Ministers’ policy is that the costs of regulation should be borne by those who benefit from it, and this principle has been used to determine how different costs falling to the Commission should be funded. For example household customers, who will be prohibited from retail competition, will not share the costs of regulating this activity.

254. The Bill also provides measures which prohibit common carriage, prohibit retail competition for household customers and establish a licensing regime to regulate the provision of retail services to non-household customers. These are necessary in view of the possibility, introduced by the Competition Act 1998, of competition on Scotland’s public water and sewerage networks. The provisions are, however, precautionary and it is difficult to predict when the retail market will develop. But by providing a regime to manage this, certainty is provided for the industry and customers, and Scottish Ministers’ public health, environmental and social policy objectives are secured. This is an opportunity that would be lost if development of the market were left to chance or the outcome of court decisions. The costs of providing this certainty are not great, and it is proposed that these should be met directly by the
These documents relate to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

Executive. Ongoing costs arising from operating the licensing regime will be met by licence holders.

**PART 1 – WATER INDUSTRY COMMISSION FOR SCOTLAND (SECTIONS 1 TO 3)**

**Costs on the Scottish Administration**

255. There will be initial costs involved in the recruitment and appointment of members of the Water Industry Commission, and ongoing costs when re-appointments are required. These appointment processes will be carried out by the Water Services Division in the Executive and their costs will be borne directly by the Executive. We estimate these costs to be less than £25,000 for the initial appointments (during 2005), followed by similar amounts when further appointments are required. The greatest expense is incurred in advertising, for example, it cost nearly £17,000 to advertise a position as a board member to Scottish Water in early 2003.

**Costs on local authorities**

256. There are no cost implications for local authorities.

**Costs on other bodies, individuals and businesses**

257. There will be modest additional operating costs associated with restructuring into a body corporate with a Board, and we estimate that these costs will not exceed £150,000 per annum, commencing in 2005-06. These are described below.

258. In line with Ministers’ policy that the Commission should be a small body of experts, the Bill makes provision for the Board to comprise a non-executive chairman, two to four further non-executive members, and the senior executive officer of the Commission. It is expected that in the first instance three ordinary members in addition to the chairman will be appointed. Board members will receive remuneration and travel and subsistence expenses in line with Scottish Executive policy on NDPB members’ pay. Given the expertise in economic regulation that will be required of candidates and the responsibility they will undertake, these posts are expected to be in Band 2 of the pay scales for NDPB members (pay rates of up to £260 per day for board members, and up to £370 per day for the chairman). The posts will be structured to ensure that Board members have sufficient time to take a full part in the Commission’s decision-making and this time commitment will determine their salary costs. In estimating the total costs we have included modest additional administration costs arising from supporting a Board, including, if required, employing an officer to support the Board.

259. These changes will benefit all customers, by improving the robustness, accountability and consistency of the regulatory regime. The costs will therefore be met by an increase in the levy on Scottish Water, and taken into account by the Commission in determining charges, including wholesale charges. This will ensure they are shared by all customers, including those not served directly by Scottish Water, given that they also benefit from the regulation of Scottish Water.
PART 2 – ESTABLISHING A LICENSING REGIME (SECTIONS 4 TO 17)

Costs on the Scottish Administration

260. The Bill provides for the Water Industry Commission to facilitate the orderly opening of the market for retail competition for non-household customers. This will bring to an end the current uncertainty over the application of the Competition Act 1998, and the risk that competition will develop on the back of court decisions to the detriment of Ministers’ public health, environmental policy and social objectives. However, the price of this certainty is investing in the establishment of a regulatory regime for the orderly management of the limited contestable market.

261. The Scottish Executive has commissioned advice from the Water Industry Commissioner on the work required to achieve this. He has estimated that there are significant preparation costs, and has divided these into general administrative work (including consultation), legal advice, accounting projects, other advisory work and market research, and his initial work suggests that a total budget of £5 million for these one-off projects will be required. A breakdown of these costs is given in the table below. However, there will remain some uncertainty with these costs until the respective projects have started, and they will be subject to careful scrutiny as part of the Commissioner’s, and subsequently the Commission’s, budget approval before they are committed to. Although it is difficult to make direct comparisons with different markets, these are broadly comparable to the costs incurred by other regulators in other industries. The costs will be incurred over 2005 to 2008.

<table>
<thead>
<tr>
<th>Item</th>
<th>Estimated costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>General administrative work (including staff salaries and consultation exercises)</td>
<td>£2.5 million</td>
</tr>
<tr>
<td>Legal advice</td>
<td>£1.5 million</td>
</tr>
<tr>
<td>Accounting projects</td>
<td>£0.5 million</td>
</tr>
<tr>
<td>Other advisory work</td>
<td>£0.4 million</td>
</tr>
<tr>
<td>Market research</td>
<td>£0.1 million</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£5 million</strong></td>
</tr>
</tbody>
</table>

Table 1: Costs of Water Industry Commission establishing the licensing regime

262. These costs will be met directly by the Scottish Administration, through grant in aid from the budget for the water industry. This means that the costs of implementing this legislation will be borne by the generality of taxpayers. It ensures, in response to a concern raised in consultation, that the cost does not fall on charge-payers – neither household customers, who will not benefit directly from competition, nor on non-household customers, in advance of the development of the market from which they may benefit.

263. Two new offences are created under sections 4 and 5 of the Bill. Prosecutions under these offences are expected to be very rare and associated costs to be absorbed by the relevant budgets. The costs of drawing up the disconnections code under section 17 will be met by the Commissioner through the funding described above.
Costs on local authorities

264. There are no cost implications for local authorities.

Costs on other bodies, individuals and businesses

Initial costs

265. As described above, it is intended that the start up costs for the Commission in establishing a licensing regime should be borne by the Scottish Administration. There will also be activity for Scottish Water to undertake to prepare for competition, including separation of their retail functions based on the customers served. The costs of separation itself, which will be required by the Bill will comprise modest legal and accounting costs, and Scottish Water have estimated these at £100,000, and these are expected to arise in 2005-06. This is the cost of “removing” the retail part of Scottish Water to form a separate retail subsidiary. Whether Scottish Water’s retail subsidiary elects to serve the competitive market only as the market opens, or seeks to compete in the longer term with new entrants, it will also incur modest initial costs in preparing to enter the market. Scottish Water is undertaking further scoping work on the establishment of a retail subsidiary and associated costs.

266. The more substantial costs will be those that Scottish Water will have to meet in preparing for and responding to the new situation. The Water Industry Commissioner has estimated, based on comparisons with other industries, that these costs might amount to £5 million, falling in 2005-08, but could be significantly lower in net terms due to potential savings from the separation of the businesses (see below), or other efficiencies. Particular activity required here is likely to include investment in new IT systems and external advice, altering billing systems and establishing transaction arrangements to the new retail providers. The costs incurred by Scottish Water in preparing to be a wholesale supplier to the contested market and to continue to serve domestic customers directly will be borne by Scottish Water and in turn all charge payers. These exclude switching costs which will be borne by the retail providers.

267. This separation activity is a step that Scottish Water might have chosen to take in any case, to improve transparency and understanding of their costs, and is consistent with good practice and the recommendation of the Water Industry Commissioner in his Strategic Review of Charges 2002-2006. The improved understanding and consequent pressure on costs this will provide can be expected to help Scottish Water make cost savings independent of the development of the limited competitive market, assisting Scottish Water in closing the efficiency gap between their performance and benchmark efficiency in the water industry in England and Wales. As one of many factors affecting Scottish Water’s performance, however, these savings will be difficult to quantify.

268. It is important to note that the subsidiary will be formed from part of the current Scottish Water, and as such will take with it those functions which are required to serve non-household customers, for example, its billing system. The Commission will protect customers from unreasonable costs being placed on them through its licence conditions to the subsidiary. In

---

effect the Commission will continue to regulate charges for contestable customers until the market has developed sufficiently to operate competitively.

Operating costs

269. There will be ongoing costs arising from the licensing regime and these will be met by licence holders, with the expectation that they will pass these on to their customers. These can be divided into three specific costs as follows:

(a) Licence applications: the Bill provides for prospective licence holders to apply to the Water Industry Commission for a licence, and for the Commission to charge an application fee to cover the costs of considering applications. These costs will include assessing the applicant’s plans and their financial viability, and will reflect the work required to do this. The Commissioner has estimated that the cost of full consideration of a licence application is likely to be of the order of £50,000 and these costs will be met in full through the application fee;

(b) Licensing costs: the Water Industry Commission will levy licence holders for the ongoing costs of operating the licensing regime. This will cover increased costs arising in the Commission’s office, which the Commissioner has indicated will include general administrative and economic work, as well as legal advice required to issue and amend licences, or to respond to challenges to wholesale pricing decisions, and work monitoring the market and its entrants. He estimates these costs at £1 million per annum, and these will be charged to licence holders through their licences; and

(c) Switching costs: in the utility industries, an IT system known as a switch engine is normally used to efficiently and responsibly transfer customer data when customers choose to switch retailer, and such a system will be required for the purposes of this market. A switch engine continues to be used on an ongoing basis after initial market opening to facilitate all customer movement. Promoting the development of such a system will be part of the function of the Water Industry Commission, under its duty in section 10 of the Bill. If necessary, the Commission might require prospective licence holders to co-operate in the purchase and operation of a switch engine. It is good practice to develop a switch engine with the capacity to cover the whole competitive market from the outset, to avoid it quickly becoming obsolete. The Commissioner has estimated that the initial cost of a switch engine for this market would be no more than £2.5 million. Since it is essentially a complex IT system, current industry practice suggests the system would require replacing every 5 years, giving rise to an average annual cost of £500,000. There will also be ongoing costs of maintaining the data used by the switch engine, known as the customer supplier register, and this is likely to be around £500,000 per annum, so the total resulting costs will be £1 million per annum and are likely to arise from 2007-08. (The cost can be expected to be comparable to that in other industries, where customers’ switching costs may be £30 to £50 per customer switching, depending upon economies of scale in the industry. The Commissioner estimates turnover in the region of 10,000 customers per annum given the size of the market, which is small in industry terms.) The costs of such a system, whether jointly owned by licence holders or owned by a third party will be borne by licence holders.

270. There are several checks to ensure that business customers’ interests are protected under the licensing regime. Firstly, through regulation: in the case that the market has not yet developed and, for example, a subsidiary of Scottish Water is the sole retailer, prices will
continue to be regulated by the Commission and ongoing costs to the Commission will be lower than estimated. Secondly, market pressures: for licence holders to successfully enter the market, customers will have to perceive a benefit in using them, and they can be expected to be highly price sensitive, providing a strong efficiency pressure on licence holders. And thirdly, in the case that licence holders act anti-competitively, or the charges set by the Commission for administering the regime are considered unreasonable, these can be subject to legal challenge before the UK competition authorities.

271. Scottish Water will be able to charge providers for costs associated with disconnecting water supplies for providers under sections 14 to 17.

272. This section has focused on the costs and potential costs of establishing the regime and these costs are summarised in the table below. However, these costs should be seen in the context of the expected benefits, which are set out in the Regulatory Impact Assessment (RIA) on these measures which the Scottish Executive has prepared in relation to the Bill. The RIA will be published on the Scottish Executive’s Improving Regulation website, at www.scotland.gov.uk/about/ELLD/EI/00015242/Introduction.aspx.

PART 2 – CHARGE DETERMINATION (SECTIONS 18 AND 19)

Costs on the Scottish Administration

273. There are no cost implications for the Scottish Administration.

Costs on local authorities

274. There are no cost implications for local authorities.

Costs on other bodies, individuals and businesses

275. The Commission’s charge determination role will give rise to some additional regulatory costs. These will arise from ensuring that the process previously used to provide advice to Ministers on charges is sufficiently robust to support charge determination and the additional scrutiny that can be expected. This will require investment in expert advice to support and audit parts of the work, market research, the ongoing costs of maintaining regulatory accounts, and ensuring all its procedures are robust and transparent. The Commissioner is already taking steps to ensure the process for the Strategic Review of Water Charges 2006-2010, commencing in 2004, is carried out to these standards, and his budget for the Review is slightly less than £1 million. Costs of a similar order can be expected in each charge determination year, expected to be at four yearly intervals. These will be funded through increases to the levy on Scottish Water. The costs will be allowed for in determining charges, including the wholesale price of water, and will be shared by all customers.

276. New powers for the Scottish Ministers to direct Scottish Water as regards the exercise of its functions are provided by section 19 of the Bill and these could require it to incur greater costs in relation to its functions. The costs of complying with such a direction would be taken into account by the Commission in making its charge determination and therefore borne by charge payers. It is not possible to predict what costs might arise in this way, but Ministers are
required to consult Scottish Water and the Commission in advance of making a direction. For example, a direction might be used to require Scottish Water to meet additional environmental requirements. If this power were used it would be likely to be in advance of the Commission making a charge determination, to ensure that the cost of an otherwise optional function was taken into account.

PART 3 – COAL AUTHORITY (SECTION 23)

Costs on the Scottish Administration

277. The Bill provides the Coal Authority with powers of access and compulsory purchase where necessary to carry out its functions. On the rare occasion of the Coal Authority having to use these powers, the costs, for a sheriff or Justice of the Peace to grant a warrant for access or, in the case of an appeal against compulsory purchase, for a public local inquiry to be held, will be met from existing budgets for court administration and public local inquiries.

Costs on local authorities

278. The Coal Authority already undertake remediation work on abandoned coal mines and where necessary work in conjunction with local authorities (mainly in respect of their duties on flood prevention, coastal protection and land drainage). There are no additional cost implications for local authorities.

Costs on other bodies, individuals and businesses

279. There are not expected to be any additional costs to the Coal Authority as a result of the Bill. This is because the Authority is already funded by the Department of Trade and Industry to carry out a long term prevention and clean-up programme. The Bill puts activities carried out as part of that programme on a statutory basis.

280. The powers provided in the Bill will eliminate the problem that currently occurs occasionally where the Coal Authority needs to purchase land for its remediation works but the landowner is unwilling to sell it at the market value. Having powers of compulsory purchase in these circumstances will therefore enable work to be progressed and at reasonable cost. Provision is made in the Bill and in existing legislation in terms of compensation to individuals affected by the Coal Authority’s use of the proposed powers of access and compulsory purchase
## SUMMARY OF COSTS UNDER THE BILL

<table>
<thead>
<tr>
<th>Description</th>
<th>Estimated costs</th>
<th>To be met by:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(in most cases these are upper limits)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Part 1 – Water Industry Commission for Scotland</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointing initial Commission members</td>
<td>£25,000</td>
<td>Scottish Administration</td>
</tr>
<tr>
<td>Ongoing costs of the Commission</td>
<td>£150,000 per annum</td>
<td>Scottish Water</td>
</tr>
<tr>
<td><strong>Part 2 – Establishing a licensing regime</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preparation by the Commission</td>
<td>£5 million</td>
<td>Scottish Administration</td>
</tr>
<tr>
<td>Preparation by Scottish Water</td>
<td>£5 million</td>
<td>Scottish Water</td>
</tr>
<tr>
<td>Ongoing costs of licensing regime and switching engine</td>
<td>£2 million per annum</td>
<td>Licence holders</td>
</tr>
<tr>
<td>Licence applications (per application)</td>
<td>£50,000</td>
<td>Licence applicants</td>
</tr>
<tr>
<td>Establishing Scottish Water retail subsidiary</td>
<td>£100,000</td>
<td>Retail customers through charges</td>
</tr>
<tr>
<td><strong>Part 2 – Charge determination</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carrying out a charge determination (expected to be 4 yearly)</td>
<td>£1 million per determination</td>
<td>Scottish Water</td>
</tr>
<tr>
<td><strong>Part 3 – Coal Authority</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No additional costs anticipated</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Table 2: Summary of all anticipated costs under the Bill*

## EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

281. On 11 June 2004, the Minister for Environment and Rural Development (Ross Finnie) made the following statement:

“In my view, the provisions of the Water Services etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

282. On 10 June 2004, the Presiding Officer (George Reid) made the following statement:

“In my view, the provisions of the Water Services etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Water Services etc. (Scotland) Bill introduced in the Scottish Parliament on 11 June 2004. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 23–EN.

POLICY OBJECTIVES OF THE BILL

2. The objective of this Bill is to strengthen the regulatory framework for the water industry, ensuring that there is a robust transparent regime that operates in the interests of all customers. The Bill includes measures to improve the accountability and transparency of the regulator, including replacing the current individual Water Industry Commissioner with a body corporate, the Water Industry Commission for Scotland. The Bill then goes on to give the Water Industry Commission powers of determination over Scottish Water’s charges, and powers to establish a licensing regime to regulate retail competition for non-household customers. The Bill also provides certainty for the water industry and secures Ministers’ public health, environmental protection and social policy objectives by prohibiting common carriage on the public water and sewerage networks, and prohibiting retail competition for household customers.

- **Part 1** of the Bill replaces the Water Industry Commissioner (the Commissioner) with a body corporate, the Water Industry Commission (the Commission), to improve the transparency, accountability and consistency of regulation in the water industry.
- **Part 2** of the Bill makes a series of provisions regarding water and sewerage services:
  - it prohibits common carriage in the water or sewerage systems (sections 4 and 5);
  - establishes a licensing regime for retail competition for non-household premises only, managed by the Water Industry Commission (sections 6 to 11);
  - requires Scottish Water to establish a subsidiary for the purposes of applying for a licence under the Bill (sections 12 and 13);
  - provides for arrangements between Scottish Water and a licensed water or sewerage services provider to supply services to eligible customers, request
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

the disconnection of a water supply and the procedure to be followed in the latter case (sections 14 to 17);

- provides new arrangements for determining Scottish Water’s charges, under which the Water Industry Commission will determine charge limits based on objectives set by Ministers, and Scottish Water will propose charges schemes within these limits (sections 18 and 19); and

- sets out definitions of “eligible premises”, for the purposes of retail competition, and of “public water supply system” and “public sewerage system” (sections 20 to 22).

- **Part 3** of the Bill makes provision regarding coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution (section 23).

- **Part 4** of the Bill makes miscellaneous and general provision, including in relation to the offences created under the Bill and the procedure for exercising the order and regulation making powers provided under the Bill (sections 24 to 29).

3. The provisions in the Bill will provide a strong and highly transparent regulatory framework for the water industry in Scotland, improving understanding of charges and costs at all levels and securing the Scottish Water’s effective function at the lowest reasonable cost. This is in the interests of all customers. The new regulation arrangements will be made more accountable through an order under the Scotland Act which will work with the provisions in the Bill to provide a right for Scottish Water to appeal the decisions by the Water Industry Commission to the UK competition authorities, who have the expertise to rigorously examine the economic decisions made by the Commission.

4. The Executive consulted on the draft Water Services Bill between October 2003 and January 2004. In total 47 consultation responses were received, and a summary of these was placed in the Scottish Parliamentary Information Centre on 29 January 2004. The responses themselves may be viewed by the public in the Scottish Executive library.

5. Subsequently, the Finance Committee has completed its inquiry into the water industry and it published its Report on Scottish Water on 22 April 2004. Some of the Committee’s key findings, including calling for more transparency and accountability in the regulation of the industry, are addressed by the provisions of the Bill. In particular, the Committee’s Report recommended that an improved structure for the office of the Water Industry Commissioner was required, including non-executive membership, which could provide greater accountability and continuity for the industry, and that consideration should be given to the regulator taking certain decisions on the basis of advice from Ministers rather than the reverse. These changes are delivered in the Bill.

**Background**

_Scottish Water_

6. 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
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

(Scotland) Act 2002 and is accountable to the Scottish Ministers and through them to the Scottish Parliament for the provision of these services. Scottish Water supplies water services to over 95% of households and sewerage services to over 90% of households. The remainder are 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 that are not households.

Commitments

7. Scottish Ministers are committed to retaining Scottish Water in the public sector, a commitment confirmed in A Partnership for a Better Scotland in May 2003. Ministers have charged Scottish Water with the objective of achieving significant improvements in efficiency, to ease pressure on customer charges for the benefit of all water customers. They also require Scottish Water to continue contributing towards their public health and environmental protection objectives by ensuring an uninterrupted supply of wholesome drinking water, and the safe disposal of wastewater. Ministers are also committed to ensuring that water charging is on an equitable basis, securing social policy objectives. The forthcoming Principles of Charging consultation will consider how this should be achieved.

Regulatory framework

8. 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;
- the Scottish Environment Protection Agency;
- the Water Industry Commissioner for Scotland; and
- the Water Customer Consultation Panels.

Competition Act 1998

9. The possibility of competition on the public networks has increased since 2000, when the Competition Act 1998 came into force. The Competition Act includes prohibitions on agreements between businesses which have the object or effect of preventing, restricting or distorting competition; and on conduct by one or more businesses which amounts to the abuse of a dominant position.

10. These prohibitions affect Scottish Water in a number of ways. For example, the basic principle of competition legislation relating to “essential facilities” carries significant implications for Scottish Water. Where certain assets (such as water and sewerage pipe networks) are uneconomic to duplicate, but 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. If it were demonstrated that such a position existed in a particular case, failure to allow such access could leave the owner open to the charge of abusing a dominant position. This opens up the possibility of being required to permit two types of competition in the water industry:
• **Common carriage** – where Scottish Water would use its system of water mains to carry water treated by a competitor’s customers, or use its sewers to carry wastewater from a competitor’s customers to the competitor’s treatment works, or both; and

• **Retail competition** – where Scottish Water would continue to have sole responsibility for physical treatment and distribution on the public networks. However, it would undertake these activities on behalf of the competitor, and the competitor rather than Scottish Water would have a direct commercial relationship with the ultimate consumer of the service.

11. Without express provision, the Competition Act 1998 might allow potential competitors to seek to enter the market in either of these ways, and if their challenges were successful, this would result in these types of competition irrespective of Ministers’ objectives and without effective regulation or a licensing system to manage the presence of competitors in the market. The Bill therefore makes provisions in relation to each potential type of competition, prohibiting common carriage for any customer, and prohibiting retail competition for household customers.

The Bill then provides a licensing regime under which retail competition for business customers can develop, balanced with provisions to protect the interests of the generality of customers served by Scottish Water.

**DETAILED POLICY OBJECTIVES OF THE BILL**

**PART 1: WATER INDUSTRY COMMISSION FOR SCOTLAND**

*Policy*

12. The Bill provides for the office of the Water Industry Commissioner to be re-structured as a body corporate, the Water Industry Commission for Scotland. This is a change made in response to consultation on the draft Bill, and growing best practice on the structure of regulatory authorities. It is also in line with a recommendation in the Finance Committee’s recent Report on Scottish Water. The new provisions recognise the benefits in terms of accountability, transparency and continuity of moving from an individual regulator to a board structure with collective responsibility for decision-making. The Bill provides that all the functions currently vested in the Commissioner will be conferred on a small body of experts.

13. The Commission will comprise a Chairman, two to four other members, and a Chief Executive. Members will be experts who bring relevant specialist skills to the post, rather than representatives of stakeholder or customer groups. This is in recognition of the fact that the work of the Commission will be of a highly technical nature. A small, well-qualified Commission will be in the best position to make robust regulatory decisions which are in the interests of all customers. And the new provisions on charge determination make a clear separation between policy decisions, which are for Ministers, and technical economic decisions which the Commission should be best placed to take.

14. The new body corporate will operate as a non-departmental public body, in line with guidance on the establishment of public bodies, and regulated by the Commissioner for Public Appointments. The independence that this model provides will ensure that the Commission is able to carry out its technical, statutory functions at arm’s length from Ministers, as is appropriate for a regulatory body. At the same time the model maintains appropriate
accountability to Ministers and Parliament, in particular in respect of its financial management and administration.

15. A major new function for the Commission is charge determination, including determining maximum charge levels and approving Scottish Water’s charges schemes. This role is described in detail in paragraphs 59 to 71, and will place responsibility for these key decisions on the regulator, in the context of policy advice from Ministers. The provisions in the Bill will ensure that the appropriate economic expertise is brought to bear on charges, and also that the process is much more transparent and consultative. And to ensure that the Commission’s decisions in turn are subject to appropriate expert scrutiny, the Commission will be made accountable to the Competition Commission for its decisions on charging, which will be achieved through an order under the Scotland Act in the UK Parliament. These combined checks will ensure appropriate accountability for all regulatory decisions and a stronger process that is in the interests of all customers.

16. The creation of a Commission to take collective responsibility for the Commissioner’s functions is in line with the findings of a report by the Better Regulation Taskforce, an independent body which advises Government on regulation and its enforcement, which found that boards improved continuity and consistency of regulation, and provided greater experience and expertise to be brought to bear in regulatory decisions. The report goes on to recommend that all independent regulators should have boards, including both executive and non-executive members. It is also consistent with the restructuring, due to take place shortly, of the water regulator in England and Wales, Ofwat, into the Water Services Regulation Authority as provided for in the Water Act 2003.

Alternative approaches

17. It would have been possible, as consulted on, to continue the Commissioner’s role as an individual regulator. However, the Bill significantly increases the regulator’s role, in giving the regulator responsibility both to administer the licensing regime, and now, since consultation, to determine Scottish Water’s charges. Concerns at vesting too much responsibility in one individual were raised through consultation, and a similar recommendation in favour of non-executive members was raised in the Finance Committee’s Report. Given the powers the regulator will now exercise, and the best practice referred to earlier, the Executive is persuaded that it is important that the regulator is a body corporate.

18. Alternatives to the approach chosen in the Bill would have been to establish the Commission as another type of body, or to give its functions to an existing body.

19. Potential structures could have included an agency of the Scottish Executive, or a non-ministerial department. However, Ministers concluded that a non-departmental public body offered the desired balance of Ministerial accountability and regulatory independence which would be essential to the successful carrying out of the Commission’s functions.

20. For an existing body to take on the Commission’s functions it would have to have had expertise in economic regulation, and the function would have to sit well with its other functions. The forthcoming Water Services Regulation Authority in England and Wales offers the closest possible match. However, even this would not really be an appropriate body to take on the
functions of the current Commissioner, given the different structure of the water industry in England and Wales and their approach to competition in the industry. This means that the common features and potential for shared regulation are limited and the option of transferring the functions of the current Commissioner to another existing body has therefore not been pursued.

Consultation

21. In response to the proposal that the Commissioner be given authority to administer the licensing regime, a significant number of consultation respondents expressed concern over the large amount of power being vested in one individual. Some specifically suggested that the post be re-structured as a board, while others favoured some limitation on the powers of the individual, which the Commission will now provide. Some respondents also cited the recommendations of the Better Regulation Taskforce.

22. It is likely that the further extension of the Commissioner’s powers to determine Scottish Water’s charges would have added weight to the concerns of these respondents. The Executive has therefore responded directly to these views by re-structuring the office as a Commission.

PART 2: PROVISION OF WATER AND SEWERAGE SERVICES

Prohibition on common carriage

Policy

23. Competition in the form of common carriage (defined in paragraph 10) has the potential to bring benefits to customers through extending competition throughout water and sewerage service provision in Scotland. However, it also poses serious risks to public health and the environment.

24. Allowing third parties to add drinking water that they had treated to the public networks, or to draw wastewater from the public sewers for treatment, would involve them in the processes by which Scottish Water manages the infrastructure as a whole to ensure compliance with stringent drinking water and wastewater treatment regulations. This involvement would necessarily complicate these processes and introduce additional and ongoing risks. In the case of drinking water, there would be the primary risk to public health from the insertion of inadequately treated water. In addition common carriage would probably mean new suppliers 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.

25. 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.
26. The Executive has concluded that these risks to public health and the environment outweigh any foreseeable benefits that might arise from competition in treatment and carriage services. Therefore, in the interests of safeguarding public health and the environment, the Bill revises the regulatory framework to prohibit anyone other than Scottish Water from using the public networks to carry out the physical supply of water or sewerage services.

Alternative approaches

27. The alternative to prohibiting common carriage would be to allow Scottish Water’s competitors to add to the public networks drinking water they had treated, or to draw sewage for treatment from the public sewers. This would entail the risks described above and the Executive is not willing to potentially endanger public health and the environment in this manner. Because of the nature of common carriage even introducing limited common carriage, for example, for large business customers only, would give rise to the same public health and environmental risks given the use of the public networks to serve them.

Consultation

28. Consultation respondents were generally very supportive of the prohibition on common carriage on the grounds of protecting public health and the environment. Some respondents from the business sector considered that the prohibition should be re-assessed once the effects of limited retail competition had been analysed.

Prohibition on retail competition for households

Policy

29. Retail competition (defined in paragraph 10) for all customers would render unworkable the current arrangements whereby the local authorities bill the great majority of domestic customers for their water and sewerage charges alongside their council tax bills. This system contributes towards the achievement of Ministers’ social policy objectives. Crucially, the current arrangements link water and sewerage charges to the council tax band of a householder’s property. This link means that 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 council tax discounts available to particular households are applied to water and sewerage charges too: single adult households, and households including students, people with a disability or severe mental impairment, or carers, all qualify for discounts. Taken as a whole these arrangements provide that charges broadly reflect 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.

30. 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.

31. Careful regulation of charge setting could enable the link between council tax bands and water charges to be retained, were parties other than the local authorities to bill households. However, we have concluded that there is no feasible means by which the range of discounts could be retained without local authority billing and collection. Consequently, there is a serious
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 11 June 2004

risk that retail competition for households could mean new entrants to the market “cherry picking” high-banded properties, which pay relatively more for their water, 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.

32. 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 they would lose the discounts they currently receive. Accordingly, the Executive has decided that the regulatory framework should prohibit retail competition in the household sector.

Alternative approaches

33. The alternative to prohibiting retail competition in the domestic sector, would be to allow other companies to carry out billing and collection functions for households. This would mean losing the linkages between the council tax billing system and water charges, with the results as described above. The Executive’s social policy objectives would thus be jeopardised, and on this basis it has been decided that domestic retail competition is not acceptable.

Consultation

34. Respondents were generally very supportive of the policy of prohibiting retail competition for the domestic sector, on the basis of protecting the current system of cross subsidies and discounts, which helps fulfil the Executive’s social policy objectives. The Executive will shortly consult on the principles of charging including affordability for different customer groups.

Licensed retail competition for the non-domestic sector

Policy

35. In securing Ministers’ public health, environmental protection and social policy objectives, the Bill provides two prohibitions, against common carriage, and against retail competition for household customers. However, on balance Ministers have concluded that these grounds do not provide justification for prohibiting retail competition for non-household customers. The 160,000 non-household premises served by Scottish Water are directly billed by Scottish Water, and if competition did develop in this sector, it could be to the benefit on these customers. Such competition would mean Scottish Water would become the wholesaler of water and sewerage services to new entrants to the market, who would retail these services to the end user, providing services such as meter reading, billing and collecting charges.

36. Providing wholesale services will require Scottish Water to improve the transparency and accuracy with which it accounts for the different costs of its business. This will make it easier for the Water Industry Commission and retailers to measure Scottish Water's progress in delivering efficiencies 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 arrangements. This
would benefit all customers. Additional benefits might include billing arrangements better suited to the needs of particular non-household customers.

37. However, it is important to ensure that those who gain most from competition do not do so at the expense of other customers. Accordingly, the Bill contains provisions to establish a regime to license the providers of retail services to deliver that outcome. In particular the Bill and the licensing regime will ensure that customers requiring similar services anywhere in Scotland should pay similar charges. This geographic harmonisation will remove any incentive for providers to cherry-pick customers who are technically cheaper for Scottish Water to serve due to their location.

38. 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 cover trade effluent services, though it will not affect Scottish Water’s responsibility for monitoring compliance with trade effluent consents and agreements.

39. 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.

40. The licensing regime is a key element in providing certainty in the industry. Through careful regulation, new entrants to the market will be required to contribute fairly to Scottish Water’s costs, so that Scottish Water’s finances are safeguarded. The Commission will have a duty to facilitate the orderly development of the market, including, for example, ensuring effective arrangements are established to ensure that transfer of data when customers switch supplier is handled efficiently and responsibly.

Alternative approaches

41. Given the scope of the Competition Act 1998, the alternative to providing a regime to support retail competition among non-household customers would either be to seek a specific prohibition of retail competition, or to let new entrants into the market without being regulated or subject to any licence conditions. Competition policy is reserved to Westminster, and Ministers have concluded, as set out above, that there are not public health, environmental protection or social policy objectives to justify a prohibition on other grounds. That leaves the alternative of unlicensed competition. This would offer no system to ensure retailers paid fair charges, and would risk them negotiating charges that disadvantaged other customers. For example, a retailer might decide to serve only customers whose premises were situated close to treatment works, and who were therefore technically cheaper to serve. The retailer could then try to use this to justify paying a lower wholesale price to Scottish Water. The licensing regime is therefore needed to protect geographic harmonisation of charges. The Executive recognises the desire for
keener charge levels, but believes that these should be based on improved efficiency within Scottish Water and that these benefits should be available to all customers, household as well as non-household. Establishing a licensing regime will ensure that retailers and their customers contribute fairly and proportionately to the costs of maintaining the whole of the public networks on which they will still rely for the service. This is a key aim of the licensing regime.

Consultation

42. The proposal to introduce licensed retail competition met with a more mixed reaction from consultation respondents than the two prohibitions. Opinion was divided as to whether any competition at all should be allowed in the water industry, and among those who were in favour of competition, there was a wide range of views as to whether the proposed regime was too restrictive or not restrictive enough.

Establishing a licensing regime

Policy

43. The purpose of the licensing regime is to ensure equality of treatment for all customers served by the public networks i.e. to ensure that, with the introduction of competition, retailers pay a fair wholesale price which neither disadvantages businesses or domestic customers. The licensing regime will be established and operated by the Water Industry Commission as the economic and customer service regulator of Scottish Water. The Bill gives the Commission duties to administer the licensing regime, granting licences and monitoring compliance with licence conditions, and confers on it powers to obtain information and charge fees and to facilitate the orderly opening of the market.

44. At present the Commissioner acts on behalf of all categories of Scottish Water’s customers. To ensure that the Commission acts in the interests of all end users of the public networks, it is proposed that its general function of promoting the interests of Scottish Water’s customers should be extended to include the interests of retailers’ customers. This duty will not extend to the Commission being involved in regulating the charges set by new entrants for their customers, which is a matter to be settled between supplier and customer in a competitive market. However, it will cover levels of service provided by new entrants insofar as these might be specified in licences. An important part of the Commission’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 in accordance with their licence.

45. The Bill places a duty on the Commission to monitor compliance with the terms and conditions of licences and to take any action necessary to ensure compliance. Licence conditions will ensure that retailers meet their obligations to contribute towards the costs of maintaining the public networks. In granting licences the Commission will be required to satisfy itself that the applicant has the financial strength and the operational and managerial capacity to meet their licence conditions as a retail supplier.

46. It is proposed that the Commission 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 Commission considers licence applications, grants licences and subsequently monitors compliance with licence conditions.

Alternative approaches

47. As the economic and customer service regulator for Scottish Water, the Commission is the obvious choice of authority to administer the regulation of new entrants to the market. Placing this responsibility elsewhere would have increased the risk that customers who take advantage of retail competition would receive less protection than those who remain with Scottish Water, or than household customers. And not establishing a licensing regime would fail to provide the certainty required to meet the Executive’s public health and social policy objectives.

Consultation

48. Most respondents who accepted that there should be some form of competition in the industry were content for the Commissioner to administer the licensing regime. However, a significant number felt that too much power was being vested in a single person, and emphasised the importance of making the Commissioner’s decision making transparent and accountable. These concerns have been addressed by re-structuring the Water Industry Commissioner as a body corporate, as explained above.

Orderly opening of the market

Policy

49. The Bill confers a duty on the Commission to exercise its licensing functions in such a way as to ensure that the interests of all customers served by the public networks continue to be safeguarded. In particular it provides a duty on the Commission to ensure that the new regime operates in a way that is not to the detriment of water customers as a whole. This will be done by protecting Scottish Water since, if Scottish Water suffers financial losses as a result of the retail market, any shortfall in its income will need to be made up through higher customer charges. Therefore it is in the interests of all charge payers that the regime develops smoothly leaving Scottish Water in a secure financial position. This will mean, for example, setting licence conditions to protect Scottish Water from any risks to its finances arising from competition, by stipulating strict payment conditions for new entrants, and avoiding any unforeseen and potentially destabilising effects on Scottish Water and the industry as a whole.

50. It also provides a duty for the Commission to exercise its licensing functions to secure the participation of retailers in an orderly manner. To enable it to discharge this duty, the Commission will be able to direct Scottish Water or retailers (actual or prospective) to carry out such steps as are necessary to secure such participation. This may include requiring the provision or exchange of information so that there are, for example, suitable means of handling customer data. This is to address specific concerns, due in part to the experience of the energy sector, about the way in which this data is transferred when a customer switches between retailers. The Commission is authorised to take the initiative in this area if it becomes necessary. It will also ensure appropriate use of customer data, addressing concerns over privacy raised by consultation respondents. Careful regulation in this area is an important part of minimising the uncertainty surrounding limited competition.
Alternative approaches

51. An alternative way of ensuring the orderly opening of the market would have been to phase the introduction of competition through the use of thresholds, similar to those which have been imposed in England and Wales, where only premises using over 50 megalitres of water a year are eligible for competition. However, use of thresholds is primarily intended to ease the transition to common carriage, which raises practical issues for the incumbent water provider about how it manages the impact of new entrants gaining access to its infrastructure. Common carriage can also lead to the problem of “stranded assets”, that is, treatment works which the incumbent no longer requires because new entrants have displaced a significant part of its treatment activity in a short space of time. Neither of these issues arise in Scotland since the Bill prohibits common carriage, and therefore the use of thresholds was not considered to be a necessary or appropriate means of phasing the introduction of competition. Instead the Commission has the power to take action required to ensure orderly opening of the market, as set out above.

Consultation

52. A majority of respondents who expressed a clear view on this issue were in favour of some form of transitional thresholds. This view was generally based on concerns about the unknown impact of competition on Scottish Water, and about potential destabilisation. The duties of the Commission described above have been introduced into the Bill in order to address these concerns.

53. Those respondents who argued against the use of transitional thresholds did so on the basis that they would stifle the market before it had had the chance to develop, and would make it less attractive to new entrants, to the detriment of customers accessing the benefits of competition.

54. The provisions in the Bill use strong powers to set licence conditions to balance the security gained by prohibiting common carriage with the remaining risks to businesses from retail competition for business customers; and give the Commission all necessary powers to ensure that the market does open in an orderly manner, but without limiting the sections of the market open for new entrants to serve.

Separation of Scottish Water

Policy

55. The Bill confers on Scottish Ministers powers to direct Scottish Water to establish a subsidiary, with a view to ensuring the separation of its statutory and licensed activities. The Executive does not consider that Scottish Water should be subject to the licensing regime in so far as it discharges its core functions as the physical provider of water and sewerage services. Scottish Water is bound by statute to perform these functions, usually to prescribed standards, and it is not desirable for these to be additionally subject to licence conditions. On the other hand, Scottish Water’s retail activities must not be placed in an advantageous or disadvantageous position in relation to other retailers. In terms of the provision of retail services, Scottish Water will be in direct competition with other retailers, and must not use or be thought to be using, its position as sole provider of wholesale services, to put its competitors at a disadvantage.
56. To achieve these aims, Ministers are being given powers to require Scottish Water to establish a separate, wholly owned, retail subsidiary to be responsible for all retail activities. Scottish Water’s wholesale and retail activities will be accounted for separately, and the subsidiary will be treated in the same way as other retailers for the purposes of the licensing regime. The retail arm will be subject to the same regulation as other retailers, and treated by Scottish Water’s wholesale business in the same way as other retailers.

Alternative approaches

57. If Scottish Water were to enter the retail market without separating its retail and wholesale activities, it is likely that other retailers would feel unfairly disadvantaged by Scottish Water’s dual position as retailer and wholesale provider to other retailers. An alternative would have been to restrict Scottish Water from competing in the retail market for business customers. However, without being able to predict how the market will develop or how quickly, this option seems to carry unacceptable risk and uncertainty.

Consultation

58. Most respondents expressing a clear view on this subject were in favour of the separation of Scottish Water into wholesale and retail arms. They were generally very concerned that a genuine separation should take place, including separation of accounts. Some felt that even with these provisions, Scottish Water retail would still retain an advantage over other retailers, and in response to these concerns more explicit provision to ensure the full legal separation of Scottish Water’s retail subsidiary has been made in the Bill. Some respondents felt that this separation was not desirable, because of the disruption to Scottish Water’s core business and uncertainty for staff. However provisions have been included in the Bill to ensure that the terms and conditions of all employees transferring are explicitly preserved; as well as ensuring that the appropriate provision for rights (including contractual arrangements with customers) and liabilities to transfer to the subsidiary. This is intended to make any transfer as straightforward as possible.

Charge determination

Policy

59. The Bill establishes new arrangements with regard to the way in which Scottish Water’s charges are set. These give the Commission new authority to set charges which, as described in more detail below, will made be subject to a right of appeal by Scottish Water to the Competition Commission. In discharging these new charge setting functions, the Commission will be required to operate within a policy framework set by Scottish Ministers.

60. Under the new arrangements, Scottish Ministers will retain full policy control over Scottish Water’s functions. They will determine the level to which Scottish Water is to be required to perform its statutory duties where this is a matter of discretion. Ministers will also be able to stipulate additional functions or objectives for Scottish Water, which are non-statutory, to achieve wider policy objectives. For example, Ministers will decide on the principles of charging to which the Commission will be required to adhere when determining charges. This gives Ministers the power, for example, to provide for reduced charges for particular groups of customers, or to stipulate the proportion of charges that should be based on volumetric or fixed...
elements of costs. This role will enable Ministers to give effect to the outcomes of the forthcoming consultation on the Principles of Charging, and any other future policy decisions.

61. Within this policy framework the Commission is first required to assess the total revenue that Scottish Water needs, based on the principle that the revenue raised by the scheme of charges, when taken with the borrowing and grants available to Scottish Water from Ministers, should never be less than sufficient for the purpose of enabling Scottish Water to perform its core functions effectively, and fulfil any other objectives set by Ministers. In calculating this, the Commission must take account of all circumstances which might have a bearing, either positive or negative, on Scottish Water’s ability to meet its obligations.

62. Having had regard to these factors, the Commission will determine maximum charge limits for Scottish Water’s charges for its core functions. These charge limits will be based on the objectives set by Ministers, including the principle that customers are to be considered, and charged, as users of a national as opposed to a local service. This means charges will reflect the cost to Scottish Water of maintaining its whole infrastructure across the country, irrespective of the actual cost of serving individual customers which will vary, for example, with distance from treatment works.

63. The Bill requires the Commission to firstly consult on the process by which it carries out charge determination. The Commission is then to make and publish a draft determination and to take into account the representations received. Following this consultation the Commission will make a final determination of charge limits. Similarly to the current set up, it is expected that a charge determination will be made for a medium term period, for example, the first one is expected to cover charges in 2006-2010. However the Bill also provides for determinations to be reviewed in advance of the date set for the next determination, if there is a substantial change in circumstances meaning that the amount of revenue Scottish Water requires to carry out its core functions increases or decreases significantly. Once the determination has set maximum limits for Scottish Water’s charges, Scottish Water is required to propose a detailed charges scheme, which must adhere to the maximum charges set out in the Commission’s determination. It is expected that Scottish Water will be asked to propose charges schemes on an annual basis.

64. An important feature of the new arrangements for charge setting is that Scottish Water will no longer have discretion to make agreements with specific customers about the charges levied on them. Instead, all charges must be made by reference to a charges scheme except for departures from the charges schemes which will require to be specifically authorised by the Commission on the basis that the charge-payer has taken action which reduces the cost to Scottish Water of serving them. The Bill makes specific provision for existing agreements to be continued until they expire, and provision that they may not be renewed or extended.

65. As mentioned earlier, an important component of the new charging regime is to balance the Commission’s charge determination powers with a right of appeal to the Competition Commission. Under the current set up, the Commissioner advises Ministers on charge setting, and when the Commissioner’s advice conflicts with Scottish Water’s view, Ministers have to decide charges. This is not ideal given that Ministers and the Executive do not have, nor would it make sense for them to have, the technical economic expertise to make a robust and objective assessment of the Commissioner’s advice and determine whether to follow it or modify it. And
as Scottish Water’s owner, Ministers also have a potential conflict of interest. There is therefore a clear case for excluding Ministers from this process, and providing more effective accountability for the Water Industry Commission in its decision-making.

66. The Competition Commission is a UK body with the technical, economic and legal expertise to adjudicate in disputes between Scottish Water and the Commission. Their involvement will ensure that the charge setting process, carried out in the knowledge of a possible referral to the Competition Commission, is robust and transparent, and if a case is referred to them, their decision will be binding.

67. This role for the Competition Commission has been agreed with the Commission and the Secretary of State for Trade and Industry. Because matters relating to the Competition Commission are reserved under the Scotland Act, Scottish Water’s right of appeal to the Competition Commission will be established by way of an Order being made under section 104 of the Scotland Act 1998. This will be put in place as soon as possible after enactment of the Bill.

Alternative approaches

68. The new arrangements for the setting of water charges are fundamentally different to the current situation, where the Commissioner does not have the power to actually set charges, but simply advises Scottish Ministers on charges, albeit that his advice is detailed and based on an assessment of how efficiently Scottish Water can perform its functions. Currently Ministers make a formal response to the Commissioner’s advice on charges, and in the light of that response, Scottish Water draws up a charges scheme. The Commissioner must approve this scheme, but if he and Scottish Water cannot agree the terms of the scheme, it falls to Ministers to determine details of the charges scheme. This leaves Ministers in the position of either having to duplicate the expertise and experience that the Commissioner and his staff possess, or being unable to place his advice under expert or independent scrutiny.

69. The alternative to Scottish Water losing its right to make agreements would be to continue to allow them to do so; however this would not be consistent with the principle of harmonisation of charges. For example, if customers who cost least to serve ask for and are granted a lower price for services, it undermines the wholesale price being offered to other customers whose charges must rise in consequence. Permitting special agreements is contrary to the principle of harmonisation which the Bill is intended to enshrine. Therefore the Bill provides that current special agreements will not be renewed or extended. Instead it provides for new departures from charges schemes to be permitted by the Water Industry Commission where the customer in question has taken action to reduce the cost to Scottish Water of serving them.

Consultation

70. The provisions of the Bill establishing the new charging regime have been added since the formal consultation, but respond to concerns about transparency and accountability, including those raised in the Finance Committee’s report into the water industry. The Bill aims to provide the independent regulation and transparency which the Finance Committee recommended. In strengthening the mechanism governing the regulation of charges the Bill responds to concerns raised in the consultation about affordability of water charges and
efficiencies to be achieved by Scottish Water. The issue of affordability has been raised by various parties in different settings, and will be further addressed by the Executive’s forthcoming consultation on the principles of charging.

71. These provisions have also been discussed with Scottish Water and the Commissioner; and with the Department for Trade and Industry and Ofwat, with regard to the right of appeal to the Competition Commission for Scottish Water.

PART 3: COAL AUTHORITY

Policy

72. Coal mining activities in Scotland extend throughout the central belt, and are shown in the map below. There are currently over thirty discharges from abandoned coal mines in Scotland affecting the water environment. There is also the threat of rising mine water in some of the more recently closed collieries where discharges have not yet occurred but may do so unless preventative action is taken. The Coal Authority has an ongoing remediation programme to clear up or prevent pollution of the water environment from these coal mine discharges. The programme has been run on a non-statutory basis and receives funding from the Department of Trade and Industry. The high priority that the UK Government places on this work reflects, amongst other things, commitments made by the UK to the European Commission in the course of negotiations to end infraction proceedings brought against the UK for non-application of the Dangerous Substances Directive. In carrying out the work, the Coal Authority has developed important relationships with the Scottish Environment Protection Agency (SEPA) through a formal Memorandum of Understanding, given the latter’s existing powers under environmental legislation.

![Map of Coal Mining areas in Scotland](image)

Figure 1: Map of Coal Mining areas in Scotland (shown in darker shade)

73. Notwithstanding the Memorandum of Understanding, there has for some time been a concern at UK level that the Authority's mine water programme did not have specific statutory basis, particularly where the Authority 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. To date the Authority's work in Scotland has been taken forward based on the "Strathclyde
Commitment", given during the passage of the Coal Industry Act 1994, that the Authority would "go beyond the minimum standards of environmental responsibility ... set by its legal duties in these areas and ... seek the best environmental result which can be secured from the use of the resources available to it for these purposes". However, the Coal Authority's mine water programme is now long running and incurring increasing expenditure, and is likely to require to be transferred to a successor body in due course. The Water Act 2003 therefore placed it on a more secure statutory basis in England and Wales, and to gain these benefits and for consistency and coherence, similar provision is proposed for Scotland in this Bill.

**Alternative approaches**

74. The proposals in the Bill were developed through negotiations between the Department of Trade and Industry and the Coal Authority. They take account of SEPA’s views, and reflect provisions that have already been made in the Water Act 2003 for England and Wales.

75. Three alternative options have been considered: for the Coal Authority's remediation work in Scotland to continue as at present; to enact legislation for Great Britain in a Westminster Bill; and for SEPA to use its powers of entry and compulsory purchase on behalf of the Coal Authority. The Executive rejects these approaches.

76. For the Coal Authority's programme of remediation work in Scotland to remain without legislative certainty, when primary legislation has been enacted for its operations in England and Wales, would create incoherence and inconsistency of approach in its functions. There are cases in Scotland where the Authority has been unable to gain access to land to carry out investigative work or where it cannot acquire land by agreement for its remediation work. In these cases, without powers of entry and compulsory purchase, it, at worst, runs the risk of being unable to prevent water pollution incidents; for it to be unable to meet EC legislative obligations e.g. under the Dangerous Substances Directive; and for the DTI funding to be reallocated to other works, not necessarily in Scotland, in the remediation programme.

77. Given that the purpose of the powers proposed in the Water Services etc. Bill concern the control of pollution, which, being an environmental issue, is devolved, it is considered more appropriate to enact the proposed powers through this Bill rather than through a Westminster Bill. The DTI has indicated its agreement in principle to the conferral of pollution control powers on the Authority in Scotland through this Bill.

78. SEPA has powers to deal with the pollution of controlled waters which include remedial powers to deal with contaminated land, including from abandoned mines, result in the pollution of controlled waters. These include powers of access and compulsory purchase. It would, however, be inappropriate for SEPA to use these powers on behalf of the Coal Authority to achieve the latter's mine water remediation work. The use of the access and the ownership of the land would in these circumstances be SEPA's responsibility, and if the Coal Authority's operations were to lead to a pollution incident, it would compromise SEPA's responsibilities to consent and prevent discharges.

79. The Memorandum of Understanding, will continue to provide a mechanism for co-operation between the two organisations to tackle coal mining discharges and for ensuring that SEPA is kept fully informed of the Coal Authority’s activities. However, the Coal Authority
will continue to be unable to progress remediation work in Scotland where it is not able to gain access to land, or to acquire land, by agreement. While SEPA has powers of access and compulsory purchase for environmental purposes, it would be inappropriate for it to use these powers on behalf of the Coal Authority for the reasons given above.

Consultation

80. Respondents broadly accepted the proposal to introduce powers for the Coal Authority to enter and compulsorily acquire land in order to take action to prevent environmental damage from abandoned coal mines.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

81. The Bill’s provisions are not discriminatory on the basis of gender, race, age, disability, marital status, religion or sexual orientation. The possible impact of the Bill on people with particular needs, including those with a disability, has been considered, and this contributed to the conclusion that retail competition should be prohibited in the domestic sector to achieve the Executive’s social policy objectives (see paragraphs 29 to 34).

82. The Bill should not be considered in isolation from existing statutory obligations in relation to equal opportunities. Public authorities have relevant statutory obligations under the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995. All three Acts make discrimination in service provision unlawful. The Race Relations Act also places a general duty on public authorities to work towards the elimination of unlawful discrimination and promote equality of opportunity and good relations between people of different racial groups. The Commission for Racial Equality produces codes of practice to provide practical guidance to public authorities on how to fulfil that duty. The Water Industry Commission will be required to carry out all its functions in accordance with this legislation.

83. Equality issues could arise in relation to the way in which the Commission carries out its duties to publicly consult on its draft charge determinations. It will need to ensure that these consultations are open to all equality groups.

Human rights

84. The Executive is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). Particular attention has been paid both at policy development and drafting stages to the necessity of ensuring ECHR compliance.

85. In particular, the Bill respects the principle of peaceful enjoyment of property under Article 1 of Protocol 1 ECHR so far as consistent with the wider public interest in the regulation of public water and sewerage services (Parts 1 and 2), and the protection of the environment (Part 3 of the Bill). Controls over the use of property are no more than is necessary to protect those public interests. Enforcement powers in relation to the licensing of water and sewerage
service providers are proportionate to the need to safeguard the public interest in relation to the new licensing system (sections 6 to 11 of the Bill) and to protect the environment (Part 3 of the Bill). They are also compatible with Article 8 (right to a family life). The retail licensing and enforcement provisions the Bill, which are underpinned by appeal provisions, also respect the right to a fair hearing in Article 6 ECHR in so far as they give rise to any determination of civil rights and obligations.

Island communities

86. The Bill is designed to safeguard public health and the environment across the whole of Scotland, and will not have any disproportionate effect on island communities. The new regime for setting water services charges for all customers will ensure that all customers within a certain group will pay harmonised charges, and all customers will contribute to the cost of maintaining the infrastructure across the whole country. This is irrespective of the actual cost of serving any particular customer. If the cost of serving individual customers were to be taken into account then more rural areas would incur higher costs than urban ones and specific provision against this is made new section 29D of the Water Industry (Scotland) Act 2002 as inserted by section 18 of the Bill. By virtue of that Act, Scottish Water is already under a duty in exercising its functions to have regard to the interests of all its customers, especially those in rural or remote areas.

87. The provisions in the Bill only relate to customers served by the public water and sewerage networks. In that island communities are less likely to be on the public networks, they are less likely to be affected by, including sharing in any benefits from, these provisions.

Local government

88. The Bill will not affect the current arrangements whereby local authorities will continue to carry out domestic billing functions on behalf of Scottish Water, in order to safeguard the Executive’s social policy objectives. In their position as water customers, local authorities will be affected in the same way as all other non-household customers and will enjoy the benefits of retail competition if the market develops.

Sustainable development

89. In exercising all its functions, including those conferred on it by virtue of this Bill, Scottish Water is under a duty to act in the way best calculated to contribute to the achievement of sustainable development. Sustainable development can be understood in terms of economic, environmental and social impacts and these are considered separately below.

Economic

90. The Bill provides for competition in retail services, for the non-domestic sector. Establishing a licensing regime will promote the orderly development of the market, providing choice for customers, and encouraging efficiency, keener prices, greater customer responsiveness, innovation and improved standards in retail providers, all of which should result in economic benefits to businesses across Scotland.
91. The licensing of competition will ensure that this partial opening of the market does not have a detrimental effect on the finances of Scottish Water, which could have resulted in higher charges than necessary for domestic customers; an economic impact which the Executive was keen to avoid.

92. The new regime of charge determination will benefit both retailers and customers generally by ensuring that charges are set in a transparent manner by an expert board, and are kept to the minimum necessary to ensure Scottish Water is able to carry out its functions effectively.

Environmental

93. The prohibition on common carriage introduced by the Bill is intended to protect the environment by avoiding situations where anyone other than Scottish Water introduces water into, or draws sewage from, the public networks. Involving others in the process of managing the infrastructure would increase the risk of accidents occurring, and of non-compliance with drinking water and wastewater treatment regulations. Errors in the use of the water and sewerage networks could potentially result in damage to the environment through pollution and flooding, as well as contamination of the public water supply on the public health side, and damage to the infrastructure. The Executive considers that these environmental and public health risks require the prohibition on common carriage provided through the Bill.

94. In terms of resource management, a key element of sustainable development, common carriage would probably mean tapping new sources of water, which could have a negative impact on effective water resource management. The water and sewerage networks are also a valuable resource, albeit of a different kind than the water itself. Scottish Water’s extensive current investment programme is focussed on maintaining these resources in a sustainable manner. The licensing regime will ensure that Scottish Water continues to be sufficiently funded to meet its statutory obligations and Ministers’ wider policy objectives.

95. The coal mine water pollution provisions in Part 3 of the Bill will put the Coal Authority’s remediation programme on a secure statutory footing and reduce and prevent harmful pollution.

Social

96. The provisions in the Bill prohibiting retail competition in the domestic sector are intended to protect the Executive’s social policy objectives. Currently local authorities carry out billing functions on behalf of Scottish Water. Allowing anyone else to perform this role, would necessarily mean losing the linkage between water charges and council tax, including the taking into account of the discounts which form part of the council tax billing system (as explained more fully in paragraphs 29 to 34 above). This would be at odds with the Executive’s social policy, as the expectation would be that low income and vulnerable households such as single parents and single pensioners, would end up being worse off as they would lose the discounts available to them under the current system. Furthermore, there is a risk that new entrants to the market would “cherry pick” high banded properties, leaving the less profitable low banded properties to be served by Scottish Water. This would not benefit customers generally, as Scottish Water’s revenues would be reduced, leaving it little option but to increase charges to
those customers who remained with it. The Bill therefore aims to avoid socially unacceptable consequences, by prohibiting competition in the domestic sector.

97. As part of the new charging regime, the Bill provides for charge determinations to be on the basis of objectives set by Ministers. Ministers are given wide powers to set these objectives, which will allow them to specify the proportions of charges different categories of charge payers should fund, the ability to link charges to council tax liability, and to make separate provision for different categories of person. This would allow Ministers to make to maintain particular cross subsidies between groups of customers, or provide reduced charges to some customers in order to meet specific social policy objectives.
Environment and Rural Development Committee

13th Report 2004

Stage 1 Report on the Water Services etc (Scotland) Bill

Published by the Scottish Parliament on 9 November 2004
CONTENTS

REPORT

Introduction
Background and consultation
Evidence taken by the Committee
Part 1 – Water Industry Commission
Part 2 – Provision of water and sewerage services
Consultations on the ‘Quality and Standards III process – Investment priorities for 2006-14’ and ‘Paying for Water Services 2006-10’
Part 3 – Coal mine water pollution
Subordinate legislation
Policy Memorandum
Financial Memorandum
Conclusion

ANNEX A: REPORTS FROM OTHER COMMITTEES

Report from the Finance Committee
Report from the Subordinate Legislation Committee

ANNEX B: EXTRACTS FROM THE MINUTES

16 June (16th Meeting, Session 2 (2004))
30 June (18th Meeting, Session 2 (2004))
9 September (19th Meeting, Session 2 (2004))
15 September (20th Meeting, Session 2 (2004))
22 September (21st Meeting, Session 2 (2004))
29 September (22nd Meeting, Session 2 (2004))
5 October (23rd Meeting, Session 2 (2004))
27 October (24th Meeting, Session 2 (2004))
3 November (25th Meeting, Session 2 (2004))
4 November (26th Meeting, Session 2 (2004))
ANNEX C: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

9 September (19th Meeting, Session 2 (2004))

Written Evidence
Dr John Sawkins
Ian Jones
Chartered Institution of Water and Environmental Management (CIWEM)
Scottish Council for Development and Industry (SCDI)
Federation of Small Businesses in Scotland (FSB)
Forum of Private Business, Scotland (FPB)
Diageo
BP Grangemouth
Ciba Speciality Chemicals

Oral Evidence
Dr John Sawkins, Heriot-Watt University
Ian Jones, Quayle Munro Holdings plc
Alan Thomson, CIWEM
Ian Duff, SCDI
John Downie, FSB
Bill Anderson, FPB
Alan Barclay, Diageo
Dr Ray Mountford, BP Grangemouth
David Calder, Ciba Speciality Chemicals

15 September (20th Meeting, Session 2 (2004))

Written Evidence
STUC
Gemserv
Water UK
Scottish Water

Oral Evidence
Dave Watson, STUC
Nigel Bromley, Gemserv
Ceri Jones, Water UK
Professor Alan Alexander, Scottish Water
Dr Jon Hargreaves, Scottish Water
Douglas Millican, Scottish Water

Supplementary Evidence
Scottish Water (1)

22 September (21st Meeting, Session 2 (2004))

Written Evidence
Scottish Council for Voluntary Organisations (SCVO)
Oral Evidence

Jim Lugton, SCVO
Trisha McAuley, Scottish Consumer Council
Ian Smith, Water Customer Consultation Panels
Len Scoullar, Water Customer Consultation Panels
Councillor Alison Hay, COSLA
Councillor Alan Kenney, COSLA
James Thomson, COSLA

29 September (22nd Meeting, Session 2 (2004))

Written Evidence

Water Industry Commissioner for Scotland
Office of Water Services (Ofwat)
Competition Commission
The Coal Authority

Oral Evidence

Alan Sutherland, Water Industry Commissioner for Scotland
Dr John Simpson, Office of the Water Industry Commissioner for Scotland
Tony Smith, Ofwat
John Banfield, Competition Commission
Stuart Rolley, The Coal Authority
Stephen Hill, The Coal Authority

5 October (23rd Meeting, Session 2 (2004))

Written Evidence

Letters from Ross Finnie MSP, Minister for Environment and Rural Development, relating to—
- Equal Opportunities
- Water Customer Consultation Panels

Oral Evidence

Ross Finnie MSP, Minister for Environment and Rural Development

Supplementary Evidence

Letter from Ross Finnie MSP, Minister for Environment and Rural Development, relating to Cost Estimates
Supplementary Evidence on the Minister’s proposals for the Water Customer Consultation Panels

- Water Industry Commissioner for Scotland
- Water Customer Consultation Panels
- Scottish Water (2)
- Scottish Consumer Council
- Federation of Small Businesses in Scotland
- Forum of Private Business, Scotland

ANNEX D – OTHER WRITTEN EVIDENCE

- Aquavita
- Citizens Advice Scotland
- City of Edinburgh Council
- Sarah Hendry
- Highland Council
- Office of Fair Trading
- Phil Olson
- Orkney Housing Association
- Scottish Enterprise Network
- Scottish Environment Protection Agency
- Tillicoultry Community Council
Remit:  

To consider and report on matters relating to rural development, environment and natural heritage, agriculture and fisheries and such other matters as fall within the responsibility of the Minister for Environment and Rural Development.

Membership:

Sarah Boyack (Convener)  
Rob Gibson  
Karen Gillon  
Alex Johnstone  
Richard Lochhead  
Maureen Macmillan  
Mr Alasdair Morrison  
Nora Radcliffe  
Mr Mark Ruskell (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee  
Mark Brough  

Assistant Clerks  
Chris Berry  
Catherine Johnstone
INTRODUCTION

1. The Water Services etc (Scotland) Bill (SP Bill 23, Session 2) was introduced in the Parliament on 11 June 2004 by Ross Finnie MSP, the Minister for Environment and Rural Development. The Bill is accompanied by Explanatory Notes (SP Bill 23-EN), a Financial Memorandum, and a Policy Memorandum (SP Bill 23-PM) as required by Standing Orders. The Parliamentary Bureau subsequently referred the Bill to the Environment and Rural Development Committee as lead committee. Under Rule 9.6 of Standing Orders it is for the lead committee to report to the Parliament on the general principles of the Bill.

2. The provisions of the Bill that confer powers to make subordinate legislation were referred to the Subordinate Legislation Committee under Rule 9.6.2. In addition, the Finance Committee took evidence on matters relating to the Financial Memorandum accompanying the Bill. The reports of these Committees are attached as Annex A to this report.

BACKGROUND AND CONSULTATION

3. The Bill is the third piece of primary legislation on the water industry to be considered by the Parliament. The Water Industry (Scotland) Act 2002 (‘the 2002 Act’) created Scottish Water and set out the roles and functions of the Water Industry Commissioner, the Water Customer Consultation Panels and the Drinking Water Quality Regulator. The Water Environment and Water Services (Scotland) Act 2003 dealt mainly with the natural water environment and implemented the European Water Framework Directive.

4. The Bill implements policy proposals which have been developed since the Executive first consulted in June 2000 on the implications of the Competition Act 1998 for the water industry in Scotland. In February 2003 the Minister for
Environment and Rural Development announced in a written answer that the Executive intended to legislate to prohibit common carriage\(^1\).

5. In October 2003 the Scottish Executive published a draft Bill, which contained draft legislative text on what is now Part 2 of the Bill – regulating competition. The draft Bill also contained a policy statement in relation to preventing environmental damage from abandoned coal mines. Proposals on this now form Part 3 of the Bill.

6. The Scottish Executive received 47 responses to its consultation on the draft Bill. The Committee had the benefit of receiving a copy of these submissions along with a summary.

7. The Parliament’s Finance Committee conducted an inquiry into the water industry subsequent to the publication of the draft Bill, and published its Report on Scottish Water on 22 April 2004\(^2\). The Bill’s Policy Memorandum states that some of that Committee’s key findings are addressed by the provisions of the Bill. In particular, the Committee recommended an improved structure for the office of the Water Industry Commissioner in order to provide greater accountability and continuity in the regulation of the industry. It also recommended that consideration should be given to the regulator taking certain decisions on the basis of advice from Ministers rather than the reverse. Proposals to address these recommendations now form Part 1 of the Bill, along with the charge determination procedure set out in section 18.

8. The Committee received a private briefing from Executive officials at the time of the Bill’s introduction. Following introduction, the Committee issued an open call for written evidence, inviting respondents to concentrate their comments particularly on the changes made to the proposals between the draft Bill and the Bill as introduced.

\section*{EVIDENCE TAKEN BY THE COMMITTEE}

9. The Committee took oral evidence over the course of five meetings. On 9 September the Committee took evidence from a panel of independent analysts – Ian Jones of Quayle Munro Holdings (adviser to the former Transport and the Environment Committee on its 2001 inquiry into the water industry), Dr John Sawkins, a senior lecturer in economics at Heriot-Watt University, and Alan Thomson of the Chartered Institution of Water and Environmental Management (CIWEM). On that date it also took evidence from the Scottish Council for Development and Industry, the Federation of Small Businesses in Scotland, the Forum of Private Business Scotland, Diageo, BP Grangemouth and Ciba Speciality Chemicals. On 15 September the Committee took evidence from the STUC, Gemserv, Water UK and Scottish Water. On 22 September the Committee took evidence from the Scottish Council for Voluntary Organisations, the Scottish Consumer Council, the Water Customer Consultation Panels and COSLA. On 29 September the Committee took evidence from the Water

\(^1\) S1W-33630, answered on 3 February 2003. ‘Common carriage’ refers to a system where various water and sewerage providers are permitted to use the public networks.

\(^2\) Finance Committee, 2nd Report, 2004 (Session 2), \textit{Report on Scottish Water}, SP Paper 125
Industry Commissioner for Scotland, the Office for Water Services (Ofwat), the Competition Commission and the Coal Authority. On 5 October the Committee heard evidence from Ross Finnie MSP, Minister for Environment and Rural Development.

10. Many of these witnesses also provided written submissions and supplementary material. In total, evidence was received from 33 organisations or individuals. The Committee would like to record its thanks to all those who provided written or oral evidence.

PART 1 – WATER INDUSTRY COMMISSION

Introduction

11. Part 1 of the Bill provides for the dissolution of the office of the Water Industry Commissioner for Scotland (‘the WIC’), to be replaced by the formation of a Water Industry Commission (‘the Commission’). Section 1 (and the associated Schedule 1) provides for the Commission to be a body corporate, with a chief executive and 3 to 5 ordinary members (one of whom will be appointed as chairperson). In considering the provisions for the structure and general function of the Commission outlined in this Part, they should be read in conjunction with the provisions in Part 2 of the Bill. Part 2 clarifies the Commission’s function as the economic regulator of the water industry, with responsibility for regulating competition through a licensing regime and for calculating the resources that Scottish Water requires in order to achieve the objectives for the industry set by Ministers.

Structure and role of the proposed Commission

12. Most witnesses accepted the Executive’s argument that the proposal to move to a board structure for the regulator is in accordance with best practice and is likely to improve the transparency and consistency of regulatory practice. The proposal reflects the Finance Committee’s call for an improved structure and support for the WIC to ensure independent regulation and transparency across the industry. This structure is consistent with the impending replacement in England and Wales of the Director General of Water Services with the Water Services Regulation Authority.

13. The current Water Industry Commissioner for Scotland supported the move, stating that he had advocated such a structure for some time. Dr John Sawkins suggested that a board structure would help to discourage any tendency to personalise the inevitable tension that can arise between regulator and regulated industry. Ian Jones emphasised the need for members of the Commission to be expert and very robust, and suggested that a committee structure can in some ways act against regulation being strongly focused.

14. Although not specified in the Bill, the Executive has made it clear in the Policy Memorandum that the members of the Commission would be chosen to create

---

3 Finance Committee, 2nd Report, 2004 (Session 2), Report on Scottish Water, SP Paper 125, paragraph 88
4 Written submission
5 Written submission
6 Written submission
a body with expert and specialist technical skills, rather than a body representative of stakeholder or customer groups. The Chartered Institution of Water and Environmental Management (CIWEM) suggested that the Commission’s numbers should be increased. Their representative, Alan Thomson, stated “It should be representative of stakeholders and having between three and five members is inadequate for that purpose.”

15. However, a substantial majority of witnesses agreed that the Commission should be focused on the core technical role of economic regulation, and should be of a relatively small and expert nature, focused on costing the implementation of Executive direction for the industry. Dr John Sawkins summarised this view when he stated “It should be a panel of experts who conduct this narrow job.”. While expressing a number of concerns about stakeholder representation (which are elaborated on below), most witnesses agreed that to make the Commission a more representative body would risk undermining its economic competence and focus.

16. The Committee is content with the proposed replacement of the WIC by a Commission. The Committee acknowledges that this is in line with best practice for regulatory authorities, and considers that it is correct for the Commission to be a specialist expert body rather than representative of various stakeholder interests. The Committee considers that it would be more appropriate for the Commission to have 5 ordinary members than 3, as 3 remains potentially too close to a ‘personalised’ relationship between regulator and regulated.

Representation of customer interests
17. While accepting that the Commission, as economic regulator of the industry, is not regarded as the correct focus for representing stakeholders, many witnesses raised concerns about how effectively this is achieved in the governance of the industry. Scottish Water summed this up clearly-

“...there is a lack of clarity because we have an economic regulator who is also by statute the customer champion, and we also have water customer consultation panels, which are intended to canvass customers' collective, rather than individual, views. If we move towards a commission rather than a commissioner—which the bill proposes and which, as our submission says, we support—the question arises of where customer issues should go in that structure. We must be absolutely sure and clear about who is responsible for what.”

18. In regulating the industry, the proposed new Commission is to have the role of promoting the interests of all customers as a whole. However, many witnesses suggested that the Bill provides an opportunity to clarify and strengthen the role of the Water Customer Consultation Panels (‘the Panels’) in providing a customer representative function. Scottish Water outlined the
system in England and Wales, where WaterVoice has been created as a customer representative body independent of Ofwat.\textsuperscript{12}

19. The 2002 Act gives the Panels the role of representing the views and interests of customers of Scottish Water. The Bill as introduced does not address and amend the role of the Panels directly. However, the competition elements in Part 2 of the Bill provide for non-domestic customers to be served by licensed retail providers rather than by Scottish Water – effectively leaving the Panels with no role to represent the interests of that sector. The Bill makes it clear that the Panels’ functions do not extend to the services provided to licensed retailers and their customers.\textsuperscript{13}

20. Very late in the Stage 1 evidence programme, the Minister wrote to the Committee outlining changes to the role of the Panels which he proposed to make at Stage 2. In oral evidence he suggested that the Panels could be made more effective and indicated his intention to “firm up” the Panels while stating that “The democratic control of Scottish Water rests with the Parliament.”.\textsuperscript{14} He suggested that the Panels should have a clear route to contribute to Ministers’ consideration of objectives for the industry. They should also have the power to direct reports to Ministers, any of the regulators, and to Scottish Water itself, with a power to require a response within a reasonable period.

21. One of his proposals is that the Panels should be able to represent all end-users of the public water supply, rather than just those served by Scottish Water. The Minister suggested that non-domestic customers would still have an interest in Scottish Water’s services and its monopoly responsibility for overall distribution and supply, and he conceded that the distinction in access to the Panels which the Bill established would be unnatural.\textsuperscript{15} He therefore signalled his intention to revisit the function of the Panels at Stage 2.

22. The Committee has not had the opportunity to take oral evidence from other parties on the Minister’s late proposals. The Committee therefore wrote to a number of bodies seeking their views on the proposed changes. All those who responded welcomed an enhanced role for the Panels. The Panels themselves suggested that, “The Minister’s proposals to involve us at the policy development stage, and to give us the power to recommend across the industry thereafter, create many valuable opportunities to advocate the customer interest.”.\textsuperscript{16} Others agreed that the proposals would enhance consumer representation and help to clarify the purpose both of the Panels and of the Commission. The WIC emphasised that representing customer interests in the policy development phase would not be consistent with its regulatory role.\textsuperscript{17}

23. The Scottish Consumer Council (SCC) did not support the proposal that the Panels should represent non-domestic as well as domestic customers. It suggested that non-domestic customers will have a choice of supplier and the
protection of the licensing regime, as well as already having the resources to secure effective strategic representation\textsuperscript{18}. Several respondents also sounded a general caveat that the enhanced role for the Panels would need to be adequately resourced. The SCC supported the Panels’ view that it would require the ability to conduct policy research or employ specialists if it was to make informed and in-depth recommendations. In particular, it suggested that care should be taken to ensure that the Panels’ policy input is adequately resourced, so that the representation of customer interests is more than simply the sum of data from individual complaints.

24. The WIC also suggested that some customer service information would be important for both the Commission and the Panels to access. In a similar vein, the SCC proposed a statutory obligation for the two bodies to establish a formal Memorandum of Understanding to secure co-operation, exchange of information and consistent treatment of matters which affect both.

25. The Committee welcomes the Minister’s proposals to enhance the customer representation role of the Water Customer Consultation Panels. In particular, the Committee welcomes the proposal to involve the Panels at the policy development stage and the proposed enhanced powers to direct reports at various bodies. The Committee considers that the structure of the Panels must enable the full range of regional stakeholder interests to be taken into account, as well as both domestic and non-domestic customer perspectives. The Committee requests the Minister’s comments on the proposal by the Scottish Consumer Council for a statutory Memorandum of Understanding to secure appropriate co-operation between the Commission and the Panels.

Complaints process

26. At present, the WIC is responsible for dealing with individual customer complaints, once they have been pursued initially with Scottish Water. As the Bill stands, this function would therefore pass to the Commission. This function includes the power to make representations to Scottish Water on any matter relating to the complaint, but does not include a power to make a formal recommendation\textsuperscript{19}. At present each Customer Panel has the role of representing the views and interests of Scottish Water customers in its area, but the Panels do not have a role in considering individual complaints\textsuperscript{20}.

27. In considering the representation of consumer interests in the governance of the industry, several witnesses expressed concerns at the way individual complaints are handled. For example, the Convener of the Panels stated that the present system does not meet “the customer expectation of complaint resolution” and that increased customer confidence “could be achieved only by separating customer complaints from the Commission’s economic regulation function”\textsuperscript{21}. The Bill does not address this.

\textsuperscript{18} Supplementary written submission
\textsuperscript{19} Section 3 of the 2002 Act
\textsuperscript{20} Sections 2(3) and 3(2) of the 2002 Act
\textsuperscript{21} Official Report, 22 September 2004, Column 1205
28. Some saw a role for the Panels in resolving individual complaints, but the Panels indicated that they did not want their consultation role to be bogged down. In his letter referred to at paragraph 20 above, the Minister indicated that he proposed at Stage 2 to amend the Bill in order to transfer this function (and the small complaints team) from the WIC’s office to the office of the Convener of the Panels. The Minister suggested that this would add to clarity on the respective roles of the Panels and the new Commission. It was not immediately clear to the Committee what impact this additional responsibility would have on the operation or resources of the Panels, and no evidence was presented to indicate whether the Panels were content with this addition.

29. As noted at paragraph 22 above, the Committee therefore wrote to a number of bodies seeking their views on the suggested revisions to the complaints process. The WIC helpfully provided information on the numbers and various types of complaints which are received, and the processes involved in resolving these, including clarification of when the ‘second tier’ in the complaints process comes into play. The Panels categorised complaints as generally being either practical or policy-related. They suggested that policy-related complaints sit well with the Panels themselves, and would be appropriately served by the proposed enhanced power of recommendation. The practical complaints would be dealt with by the Office of the Convener.

30. All respondents agreed in principle that it was appropriate to transfer the complaints process from the WIC to the Panels, ensuring that both policy and practical issues would be dealt with by the customer representative organisation. The WIC emphasised that it would clarify the roles of both the Commission and the Panels. He suggested that it was appropriate to separate the complaints-handling process from the price-setting regulatory function, as had happened in other regulated utility markets.

31. Again, respondents argued that the proposal to move complaints to the Panels had to be adequately resourced. The WIC noted the increasing number of complaints and the resource-intensive nature of dealing with them. The SCC again emphasised that the balance between complaints and policy work must be maintained so that the Panels’ output was an appropriate representation of the overall customer experience. In this context, the SCC expressed concern about the Panels dealing with complaints from non-domestic customers, and suggested that this should only be done after adequate analysis of data about the complexity and level of workload involved in complaints from each sector. It suggested that dealing with non-domestic complaints could, in fact, muddy the role of the Commission in overseeing the competitive retail market for that sector. The Panels, however, stated that there should be no distinction in complaints from the two sectors.

---

22 Official Report, 22 September 2004, Column 1206
23 Section 3(3)(a) of the 2002 Act provides that the complaint need not be investigated by the WIC if the complainer has not pursued the complaint with Scottish Water.
24 Supplementary written submission
25 Supplementary written submission
32. The Panels suggested that an appropriate framework had to be established between themselves and Scottish Water to ensure the best possible outcome to complaints. Scottish Water described the current complaints protocol and emphasised that the transfer of the complaints function to the Panels need not impact on the established processes. However, the SCC argued that, rather than the current reliance on persuasion, formal powers of intervention were required if real customer benefits were to be achieved. In connection with the process, the SCC also suggested that the role of the Scottish Public Services Ombudsman in relation to the water industry required to be clarified.

33. The Committee acknowledges the desire to separate the second-tier complaints-handling function from the economic regulation role of the proposed Commission. However, the Committee remains concerned that handling individual complaints has the potential to swamp the representative role of the Panels. The Committee has not received sufficient evidence from the Minister to assure it that the Panels will be robust enough and resourced to a level that will minimize this risk. In this context, the Committee recommends that consideration be given to producing clear guidance for customers which will allow different types of complaints to be appropriately directed.

34. The Committee considers that the priority for the Panels should be to pick up trends arising from complaints, in order to inform its overall customer representation role. The Committee therefore requests that the Minister provides clarification on whether Scottish Water will have a duty to report data on all complaints it receives, and its decisions on them, to the Panels. The Committee also requests clarification of the potential role of the Scottish Public Services Ombudsman in relation to the water industry.

35. The Minister’s proposals were received so late in the process that it was difficult for the Committee to consider them fully in its Stage 1 evidence programme. The Committee does not currently have sufficient evidence on which to come to a conclusion. The Committee therefore agreed to take further oral evidence on this issue before considering the Minister’s proposed amendments at Stage 2.

Reporting

36. In connection with the functions of the Panels, their Convener indicated that the Panels would welcome the opportunity to report formally on their activity to the Parliament on an annual basis. This was suggested as part of a need for the Panels to be able to present a broad view of the customer experience of the Scottish water industry. Again, in his letter referred to at paragraph 20 above, the Minister indicated that he intended to introduce Stage 2 amendments to strengthen the Panels’ power to publish reports. He suggested that reports may be directed to a variety of bodies and the recipient might be required to respond within a set period. The Minister also indicated that he would lodge an amendment to provide for the Panels’ annual report to be laid before the

---

26 Official Report, 22 September 2004, Column 1203
Parliament. Respondents to the Committee’s request for supplementary evidence all welcomed these enhanced reporting powers.

37. **The Committee welcomes the proposed enhancement of the Panels’ reporting powers. In particular, the Committee welcomes the increased transparency and potential for scrutiny which will result from the Panels’ annual report being formally laid before the Parliament.**

*Duty to promote sustainable development*

38. The Committee noted that the Water Act 2003 has imposed an obligation on the Water Services Regulation Authority (which will replace OFWAT in England and Wales) to “carry out its duties in the manner which it considers is best calculated, amongst other things, to contribute to the achievement of sustainable development”27. Scottish Water currently has an obligation to “act in the way best calculated to contribute to the achievement of sustainable development”28.

39. The Committee heard differing views on whether the Water Industry Commission for Scotland should be given a similar statutory responsibility in the current Bill. Some witnesses felt that imposing this duty on the Commission, and asking it to use the same framework as Scottish Water, would help to produce effective pressure to ensure that these principles are followed throughout the industry. Scottish Water itself stated that “… it would be useful to us, and therefore to Scotland, for that to be mirrored by the regulator”29. Similarly, as an example of a sustainable development perspective, SEPA noted that in England and Wales the Environment Agency and Ofwat both have responsibilities to promote efficient water use. It suggested that the difference in Scotland “will result in an inconsistent approach to water conservation and sustainable development”30. Some concern was expressed that the Commission will work to a policy of simply lowering consumer costs, and that a purely economic pressure could be regarded as contradictory to a wider environmental and social justice policy framework implied by a duty to promote sustainable development.

40. Some witnesses felt that this Bill is not the right vehicle for further statutory obligations of this kind – which may dilute the focus of the Commission. The FSB argued against including this kind of obligation, as did the SCDI which stated “it is difficult for us to get a handle on how sustainability could be sensibly enshrined in the legislation”31. Dr John Sawkins argued that the Commission should remain tightly focused and not get into detailed operational targets and indicators, but that it should still have a duty to conduct itself in line with the principles of sustainable development32.

41. The Minister explained his decision not to give the new Commission this type of responsibility by distinguishing the Scottish water industry context from that in

---

27 Section 39
28 Section 51 of the 2002 Act
29 *Official Report*, 15 September 2004, Column 1163
30 Written submission
31 *Official Report*, 9 September 2004, Column 1103
32 *Official Report*, 9 September 2004, Column 1094
Environment and Rural Development Committee, 13th Report, 2004 (Session 2)

England and Wales. The Minister suggested that, in England and Wales, imposing this duty on the regulator is a method by which a policy framework can be imposed on the industry where this cannot be done directly on the various private water providers. In Scotland, by contrast, where there is a public water provider the statutory means already exist to impose public policy priorities on the industry. It is not entirely clear, however, how such obligations could be imposed on new retail entrants in the future unless the Commission had a duty to do so in the licensing regime.

42. In that context, the Minister suggested that responsibility for contributing to the achievement of sustainable development is a matter for operational delivery by Scottish Water, not a matter for a regulator. Not imposing it on the Commission does not relieve Scottish Water of the obligation. The Commission cannot disregard Scottish Water’s obligations, and the financial parameters imposed by the Commission must allow Scottish Water to deliver all its statutory obligations and formal policy objectives. Questions about whether the operational performance was adequately delivering the sustainable development function should be a matter for Scottish Water as part of its business planning.

43. The Committee acknowledges that it has heard contradictory evidence on whether the Commission should have a statutory duty to promote the achievement of sustainable development. The Committee considers that, ultimately, the Minister must remain accountable to the Parliament for policy objectives of this nature. Nonetheless, the Committee considers that sustainable development must be pursued consistently at all levels in the industry – operational, regulatory and political.

44. The Committee understands that the different structure of the water industry in England and Wales may lead to a different method for imposing statutory policy frameworks on the industry. However, Scottish Water’s suggestion that its obligation could usefully be reflected by a similar one on the regulator is persuasive. In particular, the Committee considers that potential new entrants to the non-domestic retail market must be required to pursue sustainable development in a manner consistent and equal to the obligation on Scottish Water. The Committee, therefore, recommends that the Minister gives further consideration to how sustainable development can be promoted throughout the industry – whether by imposing a statutory duty on the Commission, or by imposing sustainable development obligations on water and sewerage service providers through the licensing regime.

PART 2 – PROVISION OF WATER AND SEWERAGE SERVICES

Introduction – Outline of proposals

45. Part 2 of the Bill proposes to regulate the extent to which competition could be introduced to the Scottish water industry by prohibiting anyone other than Scottish Water from introducing water to, or drawing sewage from, the public networks. This prohibition on ‘common carriage’ is supplemented by the

33 Official Report, 5 October 2004, Column 1311
proposal to regulate competition in the retailing of water and sewerage services. This regulation is to be achieved through a licensing regime operated by the proposed Water Industry Commission, which will authorise competition in the provision of retail services to non-domestic customers only.

46. Section 6 of the Bill provides for retailers to be licensed for the provision of water and sewerage services to 'eligible premises'. Section 20 defines 'eligible premises' so that it excludes dwellings. The Executive has stated that retail competition for all customers would make the continuation of domestic billing alongside council tax impossible. It is suggested that this billing method is essential in order for charges broadly to reflect ability to pay, for discounts to be targeted appropriately, and for maintenance of the broad cross-subsidies from customers in higher Council Tax band properties to those in lower bands. Section 18 explicitly allows Ministers, as part of their policy statement on the principles of charging, to require continuation of this link between council tax banding and water and sewerage charges. It also allows Ministers to make regulations reducing charges for customers meeting specific conditions.

47. The licensing regime will be administered by the Commission. Section 10 requires the Commission to do so in a way which ensures that the market opens in a way which is orderly and not detrimental to the exercise of Scottish Water’s core functions. The Executive states that establishing a licensing regime will ensure that retailers and their customers contribute fairly and proportionately to the costs of maintaining the whole of the public networks on which they will still rely for the service. The Executive envisages that the conditions which the Commission will attach to a licence will play a central role in avoiding destabilising Scottish Water. The WIC outlined to the Committee the consultation process he expects to follow before finalising these standard conditions.

48. Sections 12 and 13 give Ministers the power to require Scottish Water to separate its retail and wholesale functions and to transfer staff to a new retail subsidiary. Only the wholesale function would remain known as Scottish Water. The retail body would be able to apply for a licence to become a provider, and to seek wholesale services from Scottish Water, on the same basis as any other retail provider.

49. Section 18 proposes changes to the process (set out in the 2002 Act) for determining Scottish Water’s charges. The new process requires Ministers to set the objectives and functions (including investment priorities) which should be funded by charges, and the broad principles which should be adopted in any charges scheme. The Commission will then be responsible for determining the charge limits within which this policy framework can be efficiently delivered. Scottish Water will then produce a detailed charges scheme within these limits. This removes Ministers from a final role in determining charges.

34 Section 18 inserts a new section 29D(3) into the 2002 Act
35 Policy Memorandum, paragraph 41
36 Official Report, 29 September 2004, Column 1255
50. Section 18 also sets out the basis on which Scottish Water may be able to depart from the usual charges scheme in fairly restricted cases where a customer has taken steps to reduce the costs of supplying them. Each proposed departure must be approved by the Commission, and details published. Alongside this, Schedule 3 provides that any existing special deals between Scottish Water and individual non-domestic customers can continue until they expire, but may not be extended or renewed.

51. The Executive has explained that it intends to establish a right of appeal to the Competition Commission on certain matters relating to licensing and charge determination. Legislation on the Competition Commission is a reserved matter and these proposed rights are therefore not set out in the Bill. In discussion with the UK Government, it is intended to establish this right by means of an Order under the Scotland Act 1998 as soon as possible after enactment of this Bill.

The proposed model for regulation of competition

General

52. The Policy Memorandum sets out the Executive’s view that the Competition Act 1998 has increased the possibility of competition developing on the public networks. That Act seeks to prevent the restriction or distortion of competition and the abuse of dominant market position. The Minister stated that he had to address the fact that Scottish Water “falls broadly within the mischief of the Competition Act”\(^37\). He suggested that, “…the Water Industry (Scotland) Act 2002 does not indicate that we are compliant with some of the requirements of the Competition Act 1998”.

53. There was no real consensus among other witnesses on the implications of the Competition Act for the industry. The Convener of the Panels suggested that the Executive needed to explain the requirement for a limited competition framework much more fully to consumers\(^38\). Some witnesses argued that the Act presented particular threats to the maintenance of essential public services. From this perspective, it was suggested that, rather than bring forward a Bill to regulate competition, Ministers should be prepared simply to defend Scottish Water against any legal challenge to its monopoly status. For example, the STUC suggested that exclusion provisions in schedule 3 of the Competition Act would allow Ministers to argue that water is a public service and not open to competition. It suggested that the Bill ran the risk of destabilising the industry and represented ‘the thin end of the wedge’ - opening up the industry to the possibility of further privatisation\(^39\). The STUC did concede that its suggested position had not been tested and the outcome of any legal challenge could not be certain.

54. The Minister indicated that he did not consider this potential defence to be satisfactory. In the absence of statutory provision to address competition in the industry, he believed that Scottish Water’s functions and its position as monopoly controller of the public networks would potentially be vulnerable to

\(^{37}\) Official Report, 5 October 2004, Column 1316
\(^{38}\) Official Report, 22 September 2004, Column 1208
\(^{39}\) Official Report, 15 September 2004, Column 1142
challenge. He argued that this created the possibility of considerable instability, and the threat of uncontrolled impact on Ministers’ public policy objectives for the water industry. The Minister explained that his political preference was for no competition in the industry, and that the Bill was seeking to interpret the Competition Act in such a way as to minimise potential competition to Scottish Water. In this context, some witnesses expressed concern that the policy framework is not about developing a coherent and beneficial model of competition. Others seemed to believe that the purpose of the Bill was to increase competition rather than limit it.

The Minister made it clear that he wished to retain an efficiently-managed public water industry, delivering a high quality service at an efficient price. In that context, he regarded the Bill’s purpose as providing the minimum statutory regulation of competition in order to comply with the Competition Act. He preferred to set out the precise way in which competition would be allowed to develop, and not simply await any potential legal challenge to determine the development of the market. He suggested that the statutory limitations on competition, coupled with more robust independent regulation of Scottish Water, would make any potential challenge to Scottish Water’s position extremely difficult, if not impossible, and would therefore give it appropriate stability. Significant support for this position appears to be given by legal advice provided to the Finance Committee by the WIC, and by the Office of Fair Trading.

The Committee accepts that a statutory framework for competition is required in order to provide appropriate stability to the industry in the light of the Competition Act.

Common carriage

Other witnesses raised questions as to whether the Bill would be sufficient to avoid legal challenges by potential competitors. Water UK suggested that all parties share the Executive’s wish that the competition regime should be determined by Act of Parliament rather than through the courts. However, it noted that common carriage is to be allowed in England and Wales under the Water Act 2003, and questioned whether two quite different approaches could co-exist in the long term. Gemserv suggested that there is usually a move towards harmonisation as markets mature.

In its Policy Memorandum the Executive suggested that a prohibition on common carriage was justified on the grounds that permitting it would pose serious risks to public health and the environment. It stated that common carriage would involve third parties in the processes by which Scottish Water...
manages the infrastructure, which would complicate these processes and introduce significant on-going additional risks of non-compliance with stringent standards. The Executive concluded that the potential risks outweigh any potential benefits which would arise from the increased opportunities for competition that common carriage would allow.

59. While a number of witnesses agreed with prohibiting common carriage on environmental and public health grounds, others questioned the evidence on which the Executive’s assessment of the risks of common carriage is based. Water UK noted that the Drinking Water Inspectorate in England and Wales concluded in 2000 that the public health and water quality risks associated with common carriage were not significant provided its guidelines were followed. It acknowledged that it was legitimate for a different approach to be taken in Scotland, but suggested that the inconsistency may lead potential new entrants to be more inclined to challenge the policy. CIWEM suggested that the risks could be managed by appropriate licensing conditions. In this context, the Convener of the Panels suggested that the Executive’s reasoning for prohibition needed to be strengthened.

60. The Committee accepts the arguments presented by the Scottish Executive for the prohibition of common carriage.

Prohibiting competition for domestic customers
61. The Executive suggested that domestic competition would prevent discounts being applied. Additionally, it argued that competition would be likely to develop in a way which picked off high value customers, and would not therefore benefit all customers. Any such ‘cherry-picking’ would risk leaving Scottish Water to serve lower-banded properties and those receiving discounts – with consequent impact on its revenue base and implication that charges would have to rise significantly for its remaining customers.

62. The Committee received little direct evidence to suggest that competition should be extended to domestic customers. The Scottish Consumer Council agreed that many domestic groups, such as those living in more remote or rural areas, may not benefit from competition. It did, however, emphasise that the way in which competition in the industry developed as a whole was likely to have significant potential effects on the domestic sector – particularly noting the potential for changes to revenues and cross-subsidies, which is discussed in more detail at paragraphs 125-8 below.

63. The Committee accepts that retail competition in water and sewerage services should be restricted to the non-domestic sector.

49 Written submission
50 Official Report, 15 September 2004, Column 1151
51 Written submission
52 The Committee divided at its meeting on 3 November 2004. See Annex B, Extracts from the Minutes – Record of Divisions in Private.
53 The Committee divided at its meeting on 3 November 2004. See Annex B, Extracts from the Minutes – Record of Divisions in Private.
The effect of competition on the industry

64. A significant amount of evidence heard by the Committee related to the impact which competition could be expected to have on the water industry.

65. The prohibitions on common carriage and domestic retail competition limit the potential scope and, arguably, impact of competition. It is estimated that there are approximately 160,000 non-domestic customers in Scotland. Provision of retail services to these users was regarded by some witnesses as too small a market to attract entrants, and the potential margins too small to make any significant impact on charges.\(^54\)

66. However, many witnesses did expect to see new entrants – even if the market was likely to develop only gradually.\(^55\) Development is unpredictable, but it was expected that competition (or even credible threat of competition) would cause providers to improve efficiency. The Executive suggests that providing wholesale services will require Scottish Water to improve the transparency and accuracy with which it accounts for the different costs of its business.\(^56\) This will make it easier for the Water Industry Commission and retailers to measure Scottish Water's progress in delivering efficiencies and for Scottish Water itself to identify the scope for greater cost effectiveness. The regulatory regime is designed to add pressure for efficiencies in the way that a competitive environment might. The Executive suggests that 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 arrangements.\(^57\) Ofwat stated that it expected competition to deliver cheaper water.\(^58\) Similarly, the WIC noted that “…retailers typically up their game when they are in competition with one another.”\(^59\) The STUC, however, highlighted research which it suggested indicated that most of the early price reductions in the energy market after introducing competition were due to factors other than competition.\(^60\)

67. The Panels indicated that 2010 (rather than the planned 2008) might be a more realistic period, and suggested that the pace of introducing competition would be disruptive to Scottish Water.\(^61\) Aquavitae, however, stated that slow progress towards liberalisation had discouraged it from investing to compete, to the detriment of customers in Scotland.\(^62\)

\(^{54}\) For example, see written submission by BP Grangemouth
\(^{55}\) For example, Water UK, Official Report, 15 September 2004, Column 1159
\(^{56}\) Policy Memorandum, paragraph 36
\(^{57}\) Policy Memorandum, paragraph 36
\(^{58}\) Official Report, 29 September 2004, Column 1262
\(^{59}\) Official Report, 29 September 2004, Column 1259
\(^{60}\) Official Report, 15 September 2004, Column 1136
\(^{61}\) Official Report, 22 September 2004, Column 1208
\(^{62}\) Written submission
The effect of competition on Scottish Water

68. A number of witnesses argued that it was appropriate for Scottish Water to be required to establish a demonstrably distinct and transparent retail subsidiary. This was regarded as an essential factor in promoting fair competition – although enforced separation of incumbent companies is not part of the competition regime in England and Wales.

69. Some concern was expressed at the pace of change at a time when Scottish Water was stabilising and facing huge challenges in investment programmes. Witnesses again argued that separation was a distraction for the company, and risked losing recent economies of scale and incurring extra costs in re-branding etc., potentially placing at risk the efficiency gains which had resulted from merging the previous water companies. The STUC opposed the diversion of essential investment resources into the management information systems that are an integral part of a regulated market. The accuracy of predicted start-up costs is discussed at paragraphs 171-3 below.

70. The implications of separation for Scottish Water staff are unclear. Evidence suggests that up to 200 staff may be involved, and section 13 of the Bill may require the transfer of all necessary staff (with protected contract conditions) to the new entity.

71. A number of witnesses emphasised the importance of the basis of the wholesale price which Scottish Water will be permitted to charge its retail subsidiary and other retail water and sewerage service providers. From a number of perspectives, this price was regarded as crucial both to the operation of competition and to the stability of the industry.

72. The STUC stated that, if the split goes ahead, the best opportunity for it not to affect staff negatively is if the split is correct in terms of costs and revenues being apportioned to each part. From a different perspective, Water UK argued that the wholesale price is the critical factor rather than the split in itself. Scottish Water similarly suggested that it would set up and run such an entity only if it could be viable.

73. Water UK stated that the Bill proposes that all retail providers will be charged an averaged wholesale price, and that the success of the approach proposed in the Bill depends crucially on the correct setting of that price. Scottish Water explained this in some detail:

“If the wholesale price does not fully cover the cost of carrying out all the wholesale activities that are being bought by new retailers, either there will be a risk that Scottish Water will be unable to fulfil all its obligations or, more probably, there will be a risk that the generality of customers, and in

---

63 For example, CIWEM, Official Report, 9 September 2004, Column 1096
64 Written submission
65 Official Report, 15 September 2004, Column 1145
66 Official Report, 15 September 2004, Column 1148
67 Official Report, 15 September 2004, Column 1179
68 Written submission and Official Report, 15 September 2004, Column 1148
particular domestic customers, will pick up part of the financial burden that should properly be the domain of the business customers. That risk also goes in the other direction. If the wholesale price is set too high and more than covers the costs of the wholesale activities, household customers could receive a benefit at the expense of business customers.”

74. In evidence, the WIC indicated the basis upon which he would calculate the initial wholesale price. However, crucially for this debate, considerable dispute has grown up around the retail margin which is assumed to be included in tariffs. The Regulatory Impact Assessment (RIA) on the Bill says that the WIC estimates the “retail gross margin for an average business customer is in the region of 15-20% of their total bill”. This estimate has been disputed by witnesses before the Committee. Water UK stated that it relied on some major erroneous assumptions. It cited work by OFWAT which put the average margin for English and Welsh water companies at 9.6% - ranging downwards if applied only to non-domestic customers, to as low as 4% for large industrial users.

75. The Executive’s clearly stated policy intention is that the Bill should introduce retail competition for non-domestic customers. Section 6(1)(a) sets out what a licence may authorise a retailer to do. However, it has been suggested that the Bill does not define clearly what is meant by ‘retail’. Water UK suggested that retail ‘customer facing’ functions reach deep into operational functions. It suggested that the split could not be clear. Scottish Water suggested that the Bill creates new risks, stating that “There will inevitably be an ambiguity around precisely what is wholesale and what is retail”. It suggested that the scope of the licence could be anything that is not prohibited under the Bill.

76. In order to allocate costs appropriately, a clear definition is needed of which functions rest with the wholesale part of Scottish Water’s business, and which with the retail part. Scottish Water indicated that, if clarity was provided on this split, it would have sufficient data to be able to make the separation by the intended date of 2008 for opening the market. The Minister defended the fact that the RIA contains only estimates. He conceded that “No one has done detailed work on that”. He acknowledged that considerable work was required to get it right and that getting it wrong would undermine Scottish Water. He indicated that the WIC has engaged consultants to gather the appropriate regulatory information.

77. The Minister emphasised that recourse against an incorrect price would be for Scottish Water to appeal to the Competition Commission, rather than to recoup necessary extra revenue from domestic customers. (The issue of cross-subsidy and ‘cherry-picking’ is discussed further at paragraphs 125-8 below.) The WIC stated that material new information about the retail-wholesale split could lead

---

69 Official Report, 15 September 2004, Column 1178
70 Official Report, 29 September 2004, Columns 1255-6
71 Regulatory Impact Assessment on the Water Services etc (Scotland) Bill, June 2004, paragraph 14
72 Written submission
73 Official Report, 15 September 2004, Column 1178
74 Official Report, 15 September 2004, Column 1149
75 Official Report, 5 October 2004, Column 1320
to a review of the wholesale price in an interim determination\textsuperscript{76}. The Committee welcomes this clarification.

78. However, given the centrality of this provision, there is considerable importance in getting it right first time. When the figures in the RIA are acknowledged to be estimates which are subject to such widely different challenges, it is extremely difficult for the Committee to be confident that it can appropriately scrutinise the potential impact of the Bill.

79. The Committee accepts the rationale for requiring Scottish Water to separate its retail and wholesale functions. The Committee is, however, concerned at the potential for disruption to Scottish Water’s on-going delivery of challenging investment priorities and efficiency improvements.

80. The Committee believes that competition in the industry must be managed in such a way as to enable Scottish Water to remain a stable and efficient public provider. The Committee is, therefore, seriously concerned at evidence which indicates a high level of uncertainty about the gross retail margin and the consequent potential difficulties in setting an appropriate wholesale price. The Committee remains unconvinced that this has been addressed adequately. It therefore recommends that the Minister provides, as a matter of urgency, further explanation of how the distinction between retail and wholesale functions will be defined for the purposes of the Bill, and how the costs will be accurately apportioned.

Licensing

81. No significant concerns were expressed about the procedures for licensing new entrants (including elements such as the terms of licences, the application and appeal processes, transfer and revocation of licences, and a register of licences). Similarly, no concerns were expressed about proposals to govern disconnections. However, the FSB particularly argued that the provision that Scottish Water’s retail subsidiary should no longer being required to be a ‘provider of last resort’ should be tempered to some extent. It was concerned that a legitimate start-up businesses would potentially find itself unable to secure a water and sewerage supply because of past trading problems – perhaps unintentionally preventing someone with a bad credit rating from starting up a business or someone who has been declared bankrupt from going back into business \textsuperscript{77}. Water UK implied that this might be the case when it suggested that the issue of new entrants ‘cherry-picking’ customers was more likely to apply to customer characteristics than geography\textsuperscript{78}.

82. Section 10(3) gives the Commission the power to issue directions to regulate the flow of customer information between providers. This is not specific about the process by which companies should exchange information about their customers to allow switching to take place. Some witnesses suggested to the

\textsuperscript{76} Under the proposed new section 29F of the 2002 Act, inserted by section 18(1) of the Bill. See written submission from the WIC.

\textsuperscript{77} \textit{Official Report}, 9 September 2004, Column 1109

\textsuperscript{78} \textit{Official Report}, 15 September 2004, Columns 1149-50
Committee that the Bill should be more explicit, and that the Commission should have a duty to ensure that companies put in place switching arrangements, and that those arrangements should mirror those being developed in England and Wales. For example, Gemserv argued that a clear structure for governing switching should be in the control of all providers (as in the energy market), to avoid undue incumbent influence.

83. **The Committee accepts the procedures set out in the Bill for licensing water and sewerage service providers.** However, in the light of the evidence outlined above, the Committee recommends that the Minister should consider further whether his proposals for ensuring supply to non-domestic customers are sufficiently robust. The Committee recommends that the Minister should consider further whether his proposals for switching arrangements are consistent with those operating in England and Wales. The Committee has also recommended at paragraph 44 above that the Minister consider whether the licensing regime can be used to impose consistent sustainable development obligations on water and sewerage service providers.

**Charge determination process**

*General*

84. The Minister emphasised to the Committee that the Bill marks out a distinction between his policy-making role, and the Commission’s duty to calculate the resources that those policies require. Most witnesses welcomed this approach and the change in the role of the WIC from advising the Minister to economic regulation.

85. The FSB highlighted how the proposed charge determination procedure should improve transparency:

“The clear issue over the past two years is about roles, responsibilities and accountability. We talked to Scottish Water, the Executive and the water industry commissioner, and everybody passed the buck. The bill clarifies the issue.”

86. A number of witnesses emphasised that nothing should be done to compromise this clarity. The Forum of Private Business, however, did suggest that Ministers should retain a final political ‘over-ride’ in the process of setting the charges scheme. Others suggested that this concern would be dealt with if appropriate routes were established for all stakeholder perspectives to be fully understood in the process. These ‘governance’ issues are discussed more fully at paragraphs 17-25 above.

87. In connection with this, it was suggested that some stages of the charge determination process should be open to wider consultation than allowed for in

---

79 *Official Report*, 15 September 2004, Column 1152
80 *Official Report*, 5 October 2004, Column 1309
81 *Official Report*, 9 September 2004, Column 1112
82 Written submission and *Official Report*, 9 September 2004, Column 1112
the Bill. For example, before issuing their statement on principles of charging, the Bill requires Ministers to consult only Scottish Water and the Commission. The Convener of the Panels suggested that this could be extended to require Ministers to consult the public through the Panels. In his letter referred to at paragraph 20 above, the Minister indicated that he proposed to lodge an amendment at Stage 2 to make this change. The Scottish Consumer Council suggested that the Panels should also be included as statutory consultees when the Commission produces its draft determination of charges, and under section 19 of the Bill before Ministers exercise their power to confer any additional or supplementary powers on Scottish Water.

88. The Committee considers that the proposed charge determination procedure is appropriate. The Committee welcomes the Minister’s further proposal to include the Panels as statutory consultees before a Ministerial statement on the principles of charging is made (under the proposed new section 29D(4) of the 2002 Act). The Committee recommends, however, that the Panels should also be included as statutory consultees in the proposed new sections 29B(4)(a) and 56B of the 2002 Act, as suggested by the Scottish Consumer Council.

Right of appeal to the Competition Commission

89. The Committee heard evidence that the body arbitrating in disputes between Scottish Water and the Water Industry Commission should have detailed knowledge of the policy objectives for the industry, rather than simply economic expertise. The STUC presented a strong criticism of the proposed route of appeal to the Competition Commission. It suggested that it was-

“...simply not qualified to play that role in relation to a public service such as Scottish Water, which has clear political direction in relation to public policy. A political question arises as to whether it is right for the judgments in relation to the balance between economic efficiency and public policy considerations to be arbitrated by a body of economists sitting in London.”

It suggested that the right of appeal should be to Ministers, as any dispute would have its origin in political directions.

90. From a different perspective, Diageo suggested that a UK body may not have appropriate knowledge of all relevant factors in the Scottish water industry or the unique factors in the whisky industry. Others were clear that any appeal would be complex and would require an expert economic body. Scottish Water supported the right to appeal to a professional, independent body.

---

83 For example, section 18(1), inserting section 29D(4) into the 2002 Act
84 Official Report, 22 September 2004, Column 1204
85 Section 18(1) of the Bill, inserting section 29B(4)(a) into the 2002 Act
86 Section 19 of the Bill, inserting section 56B into the 2002 Act, currently requires that Ministers must consult only Scottish Water and the Commission on any such proposals. See written submission by the Scottish Consumer Council.
87 Official Report, 15 September 2004, Columns 1139-40
88 Written submission
89 Supplementary written submission
91. The Competition Commission indicated that it would be alert to Scottish factors and that regulatory inquiries generally had common threads, on which it had the relevant expertise.\(^90\)

92. The Committee accepts, on balance, the proposed rights of appeal being to the Competition Commission. The Committee recommends, however, that the operation of this right be kept under review to assess whether it is operating in the best interests of the Scottish water industry.

**Departures from the charges scheme**

93. The Bill would end Scottish Water’s freedom to negotiate individual agreements with customers. Large users suggested that current special deals were good business for them and for Scottish Water. BP Grangemouth stated that it had pursued the option of contracting with a third party to supply it from a private source. Scottish Water’s reaction to this was, BP suggested, an appropriately competitive business response.\(^91\) BP, and other large business users, stated that they will seek alternative (off network) provision if the Bill unduly restricts them from making appropriate deals. Diageo gave examples of cases where appropriate partnerships with water authorities had led to revenue stability and cost savings on both customer and supplier sides. Some concern was expressed that continuing current special deals until they lapse will create uneven situations, with some being near their end and others being long-term. However, no information on the number and length of such deals was available to the Committee.

94. While the intention in ending special deals is clear, the implications of this change for the competitiveness of Scottish businesses are not. The Scottish Enterprise Network expressed particular concern on this point.\(^93\) Some large customers appear likely to seek off-network solutions if they lose this freedom to negotiate. This will clearly have implications for Scottish Water’s revenues, and potentially for other Scottish Water customers. Special deals can also be argued to have these implications. Evidence to the Committee did not give a clear indication of which would have the greater impact.

95. The Committee is concerned that the proposed limited departures from the charges scheme may not strike the correct balance for businesses and for the revenue base of Scottish Water. The Committee recommends that the Minister gives further consideration to this.

---

**EXECUTIVE CONSULTATIONS ON THE QUALITY AND STANDARDS III PROCESS – INVESTMENT PRIORITIES FOR 2006-14 AND PAYING FOR WATER SERVICES 2006-2010**

96. The Bill does not deal directly with investment priorities for Scottish Water or how Scottish Water’s core activities and objectives should be funded. However, a statement by Scottish Ministers on the objectives to be pursued by Scottish

---

\(^{90}\) *Official Report*, 29 September 2004, Column 1268

\(^{91}\) *Official Report*, 9 September 2004, Column 1121

\(^{92}\) *Official Report*, 9 September 2004, Column 1127 and written submission

\(^{93}\) Written submission
Water (and the principles to be followed in a charges scheme to fund these objectives) is required by the Bill\(^{94}\) as the foundation for the proposed new charge determination process.

97. Two consultations are being conducted in parallel to Stage 1 of the Bill. The first is on the investment priorities for the period 2006-2014 (known as the Quality and Standards III period – ‘Q&SIII’). The second is on the principles to be followed in a charges scheme. They are intricately linked.

98. Ministers’ policy statement to the WIC, which will reflect decisions on these investment priorities and charging principles, is expected in January 2005. Evidence has clearly suggested that it is difficult in practice to separate the content of a statement on what should be funded and the principles of charging entirely from the process of determining charges (and from the development of competition and arguments about how this might affect the customer and revenue base for the industry). The Committee therefore agreed to take evidence directly from the Minister on the consultations, alongside evidence on the Bill. A significant number of other witnesses also raised issues relating to investment priorities and charging with the Committee. The issues which emerged are covered briefly below.

Consultation on the Quality and Standards III process – investment priorities for 2006-14

99. Two main issues emerged in evidence: development constraints and the control of odour nuisance from waste water treatment works.

Development constraints

100. A number of witnesses focused on the development constraints created by limits on investment in new water and sewerage infrastructure. The Minister acknowledged that this issue received very low priority in the Q&SII process, and so Scottish Water has had limited funds to address it in the current 2002-2006 programme\(^{95}\). Local authorities, including Highland Council, emphasised the stifling effect this had on economic development and regeneration\(^{96}\).

101. The priority to be given to development constraints is intricately linked to the principle of how this work should be funded, which was the more significant element of this issue raised in evidence before the Committee. The extent to which infrastructure development is funded by current or future water charge-payers is addressed at paragraphs 133-7 below.

102. The Committee acknowledges that there will always be a need for prioritisation between possible developments. The issues are clearly different depending on whether developments are, for example, large commercial ones or small social housing projects. Similarly, there are different issues in rural areas where one or two extra housing or business units can have a significant local impact, but can also have very substantial costs to connect to the water

---

\(^{94}\) Section 18(1), inserting a new section 29D(1) into the 2002 Act

\(^{95}\) Official Report, 5 October 2004, Column 1291

\(^{96}\) Written submission
network. Flexibility to cooperate is required. Scottish Water noted the complexities of addressing this and stated-

“However, we know from our discussions with the Executive that it is acutely aware of the fact that multi-differences are involved and that development cannot be tackled with a single blunt instrument.”

103. Scottish Water argued strongly that it should not be, and was not equipped to be, in the position where its limited funding forced it effectively to act like a planning authority by determining which developments could go ahead.

104. Witnesses suggested that better coordination with the local authority planning system would allow consistent prioritisation. If possible, structure planning processes should be better aligned with the water investment decisions. The Committee welcomed the Minister's assurance that better information was coming from local authorities in this consultation process, and his assurance that he was working closely with the Minister for Communities.

105. Some concerns were, however, raised that appropriate modelling to plan whether connection to the public supply was possible was not being done because no-one was willing to take funding responsibility for the modelling. Without this information now it could be difficult to plan effectively in Q&SIII for future investment decisions by both the public and private sectors. The Committee welcomed the Minister's clarification that he was encouraging Scottish Water to build the need for modelling exercises into its costings.

106. The Committee welcomes the increased consideration being given to investment in new infrastructure in this consultation process. The Committee regards this as a fundamental priority for the environment and for sustainable economic development in Scotland.

107. However, the Committee recognises that this is an extremely complex issue. The scale of the issue demands very careful co-ordination. The wide range of potential development which must be addressed – including affordable and social housing, housing in rural areas, and commercial developments – involves complex decisions and potentially competing perspectives. In order to achieve the required balance between different priorities, the Committee considers that a consistent and robust system must be established for prioritising investment in new infrastructure. This must effectively integrate different perspectives within government – including housing and planning alongside the water industry.

108. The Committee considers that the prioritising of infrastructure investment must be explicitly integrated with the structure and local planning processes. Achieving equitable decisions may, however, be complicated by the different stages of development in local and structure

97 Official Report, 15 September 2004, Column 1169
98 Official Report, 15 September 2004, Column 1168
99 Official Report, 5 October 2004, Columns 1291 and 1299
100 Official Report, 5 October 2004, Column 1292
101 Official Report, 5 October 2004, Column 1296
plans. The Committee recommends that the Minister considers as a matter of urgency how robust prioritisation can be achieved. The Committee also requests the Minister's comments on the position of local authorities which grant planning permission to developments when it is known that there is insufficient network water and drainage capacity.

Control of odour nuisance from waste water treatment works
109. The Committee has been referred two public petitions (PE517 and PE645) which call for action to address odour nuisance problems arising from waste water treatment works. The Committee has considered the petitions in some detail since first considering petition PE517 at its meeting on 10 September 2003, including taking evidence from Ministers. In the course of this consideration, the Committee has examined the regulatory framework for the enforcement of controls on odours and the practical steps being pursued by various authorities.

110. Evidence to the Committee indicates that major stakeholders believe in general that the regulatory framework governing odour nuisance is adequate and competent to deal with problems. However, a significant (and increasing) number of complaints continue to arise. Local authorities tend to favour informal approaches to resolution of complaints, but formal powers, where used, are effective in the long term.

111. However, evidence suggests that consistency of implementation and enforcement of the regulatory regime requires to be improved as a matter of urgency. There is strong support for the Executive’s current development of a code of practice for local authority enforcement of statutory nuisance powers, as a tool to facilitate investigations and promote solutions. A statutory basis for the code is regarded as having many advantages, and the Committee has previously welcomed the Deputy Minister for Environment and Rural Development’s commitment to this.

112. The Executive has stated that it is seeking to identify a suitable legislative vehicle to make statutory provision for the proposed code. (The Executive had previously indicated that it did not consider either the proposed Water Services or Planning bills to be appropriate for legislating about odour nuisance.)

113. Difficulties remain in defining and measuring odour objectively, and monitoring can be resource intensive. Different facilities can be subject to different, or no, odour standards and different authorities have different means of measuring them. Odour problems also have a number of different causes.

114. The Committee’s welcomes the Executive’s acceptance of its request for the need for higher standards of odour control to be considered in consultations on Q&SIII. However, the consultation document gives no projected costs for addressing these issues. Scottish Water has indicated that it is unlikely that the capital costs to address all known odour issues can be accommodated within the Q&SIII exercise. Scottish Water is, however, undertaking a range of

---

Further background explanation and evidence was made public in the agenda papers for the Committee’s meeting on 5 October 2004, and is available on the Parliament’s web-site.
technical measures to improve odour control across a range of sites. The Committee welcomes the Minister’s indication that costings would be available to him before the final decisions on investment priorities were made.\(^\text{103}\)

115. The Committee welcomes the increased consideration being given to addressing issues of odour nuisance in this consultation process, and recommends that this issue is addressed in the Q&SII period. The Committee is concerned that the consultation document does not contain any cost estimates for this, but welcomes the fact that these will be available to the Minister before final decisions are made.

116. The Committee remains strongly committed to seeing statutory underpinning for the proposed code of practice on odour nuisance. The Committee strongly recommends that the Minister should consider again whether the Water Services etc (Scotland) Bill could be used to give statutory basis to the code.

117. It was clear to the Committee, and acknowledged by the Minister,\(^\text{104}\), that a number of issues were not adequately raised or analysed at the time of preparation for the Q&SII investment period (2002-06). The Committee welcomes all the indications that there appears to be a significantly more comprehensive gathering of information in the Q&SIII process. It welcomes the fact that all parties appear to have grasped the importance of the process, and that issues such as development constraint are being given much fuller attention. The Minister has also acknowledged the need for cooperation with different policy areas, particularly planning and housing.\(^\text{105}\)

118. The Committee acknowledges the evidence that, once priorities and a charging scheme have been set, it is difficult to identify a basis for intervention in the middle of an investment period. Given the huge sums of money involved, and the fact that decisions are being made for an 8-year timeframe, the Committee therefore believes that it is essential that the decisions made now are as robust and accurate as possible.

119. The Committee considers that there are a number of general issues which must be addressed about the investment programme. Firstly, in the context of an 8-year plan with finite investment funds and finite civil engineering capacity, the Committee considers that the process by which investment projects are identified and implemented must be subject to continuous monitoring and periodic review. This monitoring and review must involve both Scottish Water and local authorities.

120. Secondly, the Committee considers that progress should be benchmarked and made as transparent as possible through the establishment and publication of a robust set of indicators. This will assist in enabling decisions about the priority order of projects to be clear and equitable. Alongside this, the Committee considers that any new...

\(^{103}\) Official Report, 5 October 2004, Column 1298
\(^{104}\) Official Report, 5 October 2004, Column 1288
\(^{105}\) Official Report, 5 October 2004, Column 1299
processes should not be allowed to jeopardise the progress Scottish Water has made in its business management and the improving efficiency in its investment programme.

121. Thirdly, the Committee considers it unacceptable that Scottish Water may be unable to respond to any unforeseen need which arises during an investment period. The Committee recommends that sufficient flexibility and contingency funding should be available within the investment programme to allow Scottish Water the scope to respond appropriately to unforeseen investment needs.

Consultation on paying for water services 2006-2010

122. The Committee notes the evidence of the WIC that the current (Q&SII) level of investment is extremely challenging for Scottish Water to achieve, and that, in many respects, it is unprecedented\textsuperscript{106}. The Q&SIII consultation raises the prospect of huge further increases in this investment level, highlighting the possibility of increased charge levels. The Committee therefore also agreed to consider the ‘principles of charging’ consultation document.

123. Scottish Water aptly summarised a large amount of evidence that was received by the Committee-

“....over the past two or three years....we saw huge frustration among our customers and an inability to have a debate around the issues of cross-subsidy, standing charges and all the rest of it.”\textsuperscript{107}

124. The Committee recognises this frustration, and welcomes the opportunity that this consultation offers for these issues to be considered comprehensively and transparently. The discussion of the Q&SIII process above has highlighted that there is likely to be substantial pressure on charges in the coming years. In this context, it is extremely important to get the principles of charging correct. As the FSB stated to the Committee, “If we can get the principles of charging right...we will take away many of the problems you are referring to [concerns about complaint processes and stakeholder representation]”\textsuperscript{108}. The Committee believes that it is important that decisions should be based on, and applied through, appropriate cross-departmental working and that they should command public confidence.

Cross-subsidies

125. A number of witnesses stated that the Executive needs to be clear about distinctions between the provision of water and sewerage as a basic social provision and the provision of services as a commercial commodity\textsuperscript{109}. This should lead to clarity about which should be funded by public spending in some form and which should be purchased through charges. A complete separation between social and commercial elements is, however, extremely difficult.

\textsuperscript{106} Official Report, 29 September 2004, Column 1250
\textsuperscript{107} Official Report, 15 September 2004, Column 1165
\textsuperscript{108} Official Report, 9 September 2004, Column 1115
\textsuperscript{109} For example, Dr John Sawkins, Official Report, 9 September 2004, Columns 1087-8
126. The Executive has explicitly stated that social policy objectives underpin the Bill, and some of these are factors which have to be included in the Ministers’ statement on charges\textsuperscript{110}. BP argued that, while it is legitimate to have these social objectives for the industry, social policy decisions should not be implemented via charging (which effectively uses the charging scheme as a form of redistributive taxation)\textsuperscript{111}. Ian Jones suggested that Scottish Water is not the correct agency to be charged with practising social security, as its primary responsibility was to be efficient\textsuperscript{112}. Dr John Sawkins suggested that what was required was a clear decision from Ministers. From this could flow any decisions about whether cross-subsidies within the system between different groups of customers were appropriate\textsuperscript{113}. The Scottish Consumer Council stated that, “…help for those who cannot afford to pay must be seen as an issue of social policy, rather than service provision. It should be addressed outwith the parameters of the charging system and funded by society as a whole and not cross-subsidised by other water customers.”\textsuperscript{114}

127. Cross-subsidy, and the means to deal with it, was a recurring theme in evidence on the Bill. The Bill sets out to protect some elements of cross-subsidy, such as national harmonisation of charges. However, the Executive stated (see paragraph 77 above) that the Bill addresses the implications of competition for the whole revenue base of Scottish Water, so that domestic customers do not face higher charges. Despite the confidence of the Executive, some witnesses expressed some concern on this point. Both Ian Jones and the SCDI stated that competition would increase the need for cross-subsidies\textsuperscript{115}, particularly as large users may be ‘cherry-picked’ by providers other than Scottish Water – or may opt for ‘off network’ solutions if they can no longer negotiate appropriate special deals with Scottish Water.

128. A number of witnesses suggested that the business sector in Scotland subsidises the non-domestic sector, with consequent implications for Scottish business competitiveness. The FSB suggested that the key requirement is simply for clarity about where cross-subsidies between and within groups of customers exist, their purpose and their effects. The charge determination process allows for these to be specified by Ministers – and therefore for appropriate transparency and public debate. The Committee welcomes the Minister’s assurances that research currently being conducted by the Executive to identify cross-subsidies will be available before the Ministerial statement is made in January 2005.

129. Related to the issue of cross-subsidy is that of the affordability of water charges. A number of witnesses suggested that a definition of water poverty would have been useful in assessing this and in designing the principles of the charges scheme\textsuperscript{116}. The Minister indicated that he intended to re-target the approximately £75m subsidy which is currently used on single adult and second

\textsuperscript{110} Section 18(1), inserting section 29D(2) and (3) into the 2002 Act
\textsuperscript{111} Official Report, 9 September 2004, Column 1118
\textsuperscript{112} Official Report, 9 September 2004, Column 1089
\textsuperscript{113} Official Report, 9 September 2004, Column 1089
\textsuperscript{114} Written submission
\textsuperscript{115} Official Report, 9 September 2004, Columns 1096 and 1106 respectively
\textsuperscript{116} For example, see written submission from Citizens Advice Scotland
home discounts. He proposes to use this to provide more support to fewer customers in the future.\footnote{117}{Official Report, 5 October 2004, Column 1305}

130. SCVO argued that the current arrangements for charge concessions for voluntary and charity sector organisations were inflexible and over-complex.\footnote{118}{Official Report, 22 September 2004, Column 1199} The Executive has indicated that this scheme will remain in place until at least 2010. However, SCVO suggested that the number of organisations benefiting was significantly lower than had been anticipated, and that it may particularly affect the decisions of organisations to move to more suitable premises. The Minister noted that any change in the scheme would simply have to be paid for by cross-subsidies from other sectors.\footnote{119}{Official Report, 5 October 2004, Column 1304} However, some witnesses suggested that the funding for charities to meet these charges was one example where ‘social policy’ objectives should be funded from elsewhere in public expenditure rather than from other water charge-payers.\footnote{120}{For example, SCVO, Official Report, 22 September 2004, Column 1200}

131. The Committee considers that the issue of pricing is central to the economic, social justice and environmental objectives associated with the provision of water and sewerage services. The Committee acknowledges that cross-subsidy currently has an assumed, but unquantified, role in achieving these objectives. It also notes that the trend is for cross-subsidies gradually to be removed from the pricing structure. The Committee requests that the Minister provides the Committee with the research on cross-subsidies and a comprehensive analysis of the winners and losers in the any proposed changes being considered by the Executive.

132. The Committee also requires further clarification on the eligibility for, and operation of, the charges exemption scheme for charitable organisations. The Committee requests the Minister to provide a comprehensive written briefing to the Committee, including information on the numbers of organisations qualifying, problems which may be encountered by organisations moving premises, and the options for addressing this issue which may exist through other Executive departments or through forthcoming charity reform legislation.

Development constraints

133. As noted in paragraphs 100-108 above, the Committee heard substantial evidence on the priority to be given to funds for connection of new and existing properties to the public networks. Scottish Water and other witnesses suggested that what was required was a clear mechanism for determining the apportionment of costs between public funds, Scottish Water and developers.

134. Section 3 of the Bill addresses the power of Ministers to make regulations dealing with the issue of ‘reasonable cost’ – how that part of the cost of connecting to the public water and sewerage system which Scottish Water must bear will be calculated. It also proposes that the new Commission, rather than
Ministers, will have the right to determine any disputes which arise about reasonable costs. It is anticipated that the Executive will consult in 2005 on regulations. Scottish Water suggested that “...it is the subsequent regulations that will really bite in this sector”\(^\text{121}\).

135. The apportionment of these connection costs is particularly relevant to the issue of development constraints. Any decision about apportioning costs will have a significant bearing on the funding required to meet investment priorities. In that context it is not clear what the impact will be of detailed regulations on this point being consulted on and produced separately from, and after, decisions about investment for 2006-14 are finalised.

136. The Committee welcomes the Minister’s suggestion that, “with infrastructure that is just for a development, we should move from a position whereby all such infrastructure is provided by Scottish Water”\(^\text{122}\).

137. The Committee remains concerned about the issue of accountability, given that Scottish Ministers will make regulations and investment disputes will in future revert to the proposed Water Industry Commission rather than to the political level. The Committee also requests further explanation from the Minister in advance of Stage 2 on how the regulation-making power in section 3 of the Water Services etc (Scotland) Bill will interact with the decisions on investment and charging – particularly given that the regulation–making power will not be used until after the investment levels and priorities for Q&SIII have been set.

Rateable value as a basis for non-domestic charges
138. A number of witnesses suggested that changing the basis of some non-domestic charges from rateable value to a banding system was welcome. The Forum of Private Business said, “The assessment that is based on rateable value is grossly unfair.”\(^\text{123}\), and provided a number of case studies which it regarded as particularly problematic. The FSB echoed this point and argued for a more significant usage basis for charges. Some concern was expressed that proposals to move to a banding system from 2010 would leave considerable instability in the meantime, and lead to a repeat of many of the complaints of recent years.

Resource use incentives
139. A number of witnesses discussed the possibility of changes to the proportion of charges which are based on fixed or volumetric elements. The Minister explained that the significant majority of the industry’s costs are in fixed elements rather than in volume-related elements, and so it was appropriate for the regulator to use this as the basis for charging\(^\text{124}\). However, this decision has an inevitable impact on cross-subsidy within the system. Large business users

\(^{121}\) Official Report, 15 September 2004, Column 1169
\(^{122}\) Official Report, 5 October 2004, Column 1302
\(^{123}\) Official Report, 9 September 2004, Column 1102
\(^{124}\) Official Report, 5 October 2004, Column 1306
who have a metered element indicated that they were very volume conscious, and were strongly in favour of a higher volumetric element to charges\textsuperscript{125}.

140. One business user argued that there was a basic conflict between a high infrastructure cost and the issue of sustainability\textsuperscript{126}. Ian Jones reflected this, suggesting that there were contradictory impulses for Scottish Water. It was unlikely to benefit from a water conservation policy, given the costs it would impose\textsuperscript{127}. Ofwat noted that, in England and Wales, the Water Act 2003 gave the Secretary of State a formal role to achieve and report on water conservation\textsuperscript{128}.

141. The Committee notes evidence that both the initial capital and on-going maintenance costs of widespread water metering would be very substantial. However, the Article 9 of the European Water Framework Directive requires that water charges should provide an incentive for users to use water resources efficiently. The issue seems to have been given low priority in Scotland. The principles of charging consultation does not mention this and so it was not at all clear how this requirement will be implemented in Scotland. A number of witnesses confirmed that the Bill did not address the issue of water resource use, and Scottish Water suggested that it was not the appropriate vehicle for wider issues of this nature. Despite the considerable amount of evidence received by the Committee on this point it was, therefore, not at all clear where this debate should take place.

142. \textbf{The Committee remains concerned that there does not appear to be any current consideration of issues of efficient water resource use and measures for water conservation – particularly given the requirements of the Water Framework Directive. The Committee acknowledges that this is an extremely complex issue, overlapping considerably with other issues of infrastructure, pricing system and cross-subsidy.}

143. \textbf{The Committee recommends that the Minister gives serious consideration to measures and incentives for efficient use of water resources. In particular, the Committee recommends that the Minister should commission research to investigate this issue and identify potential strategies. The Committee also considers that there is a strong argument for non-domestic customers to move towards metering as a long-term goal.}

\textbf{PART 3 - COAL MINE WATER POLLUTION}

\textit{Introduction}

144. Part 3 of the Bill proposes powers to enable the Coal Authority (‘the Authority’) to tackle and prevent coal mine water pollution in Scotland. The Authority currently works closely with SEPA through a formal Memorandum of Understanding to take action in preventing damage to the environment caused\textsuperscript{125} For example, BP Grangemouth and Diageo, see \textit{Official Report}, 9 September 2004, Columns 1124-6 \textsuperscript{126} Ciba Speciality Chemicals, see \textit{Official Report}, 9 September 2004, Column 1126 \textsuperscript{127} \textit{Official Report}, 9 September 2004, Column 1091 \textsuperscript{128} \textit{Official Report}, 29 September 2004, Column 1267.
by discharges from abandoned coal mines. Evidence to the Committee was
generally supportive of the provisions in the Bill, which were seen as
strengthening the Authority’s powers, and reflecting provisions that have
already been made for England and Wales in the Water Act 2003. However, a
number of issues were raised in evidence.

Compulsory purchase
145. As part of its role in preventing the polluting effect of discharges, the
Authority monitors disused shafts and boreholes to assess the extent of rising
mine waters. While it owns abandoned mine-workings, it may have to negotiate
with other landowners to gain access and secure land for monitoring boreholes
and pursuing other remedial works. SEPA has powers of access and
compulsory purchase for environmental purposes, but the Authority does not
have similar statutory powers. The Authority indicated that there have been
occasions in Scotland when its work has been compromised or could not be
carried out because it was unable to gain access to the affected land, or to
acquire land by agreement. The Authority cited examples where it has been
delayed in dealing with two of the most polluting discharges on SEPA’s priority
list. The Bill seeks to address this issue. The Committee noted that both
SEPA and the Authority welcome the compulsory purchase provisions in the Bill
as a means of resolving such problems in the last resort.

146. No evidence was presented to the Committee to suggest that the compulsory
purchase powers are not appropriate or necessary. The powers were described
as adequate and a useful last resort in a range of options. In oral evidence the
Authority confirmed that it has never had to resort to using the compulsory
purchase option established for use in England or Wales, but that its existence
was a very powerful tool. SEPA welcomed the proposals.

Relationship between SEPA and the Authority
147. A significant number of pollution incidents need to be dealt with under a
priority list which is drawn up by SEPA and reviewed annually. The Committee
notes that the Authority has a rolling programme to deal with these incidents
within a timeframe which will comply with the Water Framework Directive.

148. Witnesses suggested that the Bill provides sufficient clarity to reinforce the
existing good practice which has developed between the Authority and SEPA.
However, given that the Authority does not have a base in Scotland and in view
of the need for urgent action to be taken when incidents are reported, COSLA
questioned whether the Bill should contain further guidance on the allocation of
responsibility for cleaning up discharges.

Pollution from other types of mining
149. Some concerns were raised about pollution from other types of mineral
extraction works. The Committee heard that the processes and technical
knowledge required are similar to that for dealing with coal mine water pollution.

129 Official Report, 29 September 2004, Column 1270
130 SEPA and The Coal Authority, written evidence
131 Official Report, 29 September 2004, Column 1271
132 Written submission
133 Official Report, 22 September 2004, Column 1215
Although the Authority has neither the responsibility nor resources to deal with discharges from other types of mining, it indicated that it would be willing to use its expertise in other mining industries if required\(^\text{134}\). In oral evidence the Minister confirmed that SEPA has powers under the Water Environment and Water Services (Scotland) Act 2003 to deal with water pollution from disused mines\(^\text{135}\), but it is not clear to the Committee how this might operate in practice.

**Report to the Parliament**

150. The Committee acknowledged that the work of the Authority has not been well known to it in the past. It has been suggested that a duty might be imposed on SEPA to report formally to the Parliament at regular intervals on progress being made on mine water pollution. The Authority indicated that it would welcome any suggestions on enhancing reporting of this activity\(^\text{136}\).

151. **The Committee is broadly content with the provisions contained in Part 3 of the Bill.** In particular, the Committee accepts that the proposed compulsory purchase powers are appropriate. The Committee recommends, however, that the Minister gives further consideration to how the work of the Authority in addressing mine water pollution is reported. The Committee also requests the Minister to consider further whether additional powers are required to address water pollution from other types of mineral workings and landfill sites in Scotland.

**SUBORDINATE LEGISLATION**

152. The Bill contains a number of powers to make subordinate legislation. Section 27 outlines the Parliamentary procedure to which instruments under the Bill will be subject. The Subordinate Legislation Committee examined these provisions in detail at its meetings on 29 September and 5 October and discussed a number of issues with the Scottish Executive. That Committee’s report is reproduced in full at Annex A. A number of significant points arise.

**Sections 4(7) and 5(7) – Exceptions to the prohibitions**

153. Sections 4(7) and 5(7) of the Bill specify exceptions to the offences relating to the prohibition of common carriage. The Subordinate Legislation Committee has raised concerns that these powers are extremely wide. In that Committee’s view (and as the Executive recognises) these powers could have a fundamental effect on the way in which the prohibitions operate and thereby on the core provisions of the Bill. That Committee expressed very serious concerns about the Executive’s position on this. In order to protect the policy intention, it would appear that it may be better to draw the powers more narrowly, or that such powers might more properly appear on the face of the Bill rather than in delegated powers.

154. The Subordinate Legislation Committee has reported its very serious concern that the proposed affirmative procedure does not provide sufficient safeguards

\(^{134}\) *Official Report*, 29 September 2004, Column 1274

\(^{135}\) *Official Report*, 5 October 2004, Column 1327

given the width of the powers. It recommends that these powers should be subject at the very least to affirmative procedure combined with a requirement of prior public consultation. Given the use to which they might be put, they may in fact be more suited to a super-affirmative procedure\textsuperscript{137}. This procedure can be handled within Standing Orders and has previously been used by the Executive\textsuperscript{138}.

155. The Committee shares the concerns of the Subordinate Legislation Committee, and recommends that the exercise of these powers should be subject to a degree of scrutiny beyond that provided by the usual affirmative procedure.

Section 19 – Directions regarding Scottish Water’s functions

156. Section 19 of the Bill gives Ministers powers to include in directions to Scottish Water objectives regarding the standards and timescales to which services should be delivered. It also inserts a new section 56B into the 2002 Act to give Ministers a broad power to confer additional or supplementary functions on Scottish Water – a power which would be subject to affirmative procedure. It is not immediately clear what these powers might be used for, or what their limits may be.

157. The Minister sought to clarify their purpose. He indicated that section 19 would be used to direct Scottish Water to adopt and meet objectives agreed for investment priorities and the principles of charging. Section 19 is therefore intricately linked with section 18 (which sets out the charge determination procedure). This ensures that all the objectives that are set for the industry through the quality and standards process are functions that will have to be taken account of by the Water Industry Commission in determining the amounts to be funded through charges.

158. While it noted that the powers in the proposed new section 56B remain very broad, the Subordinate Legislation Committee approved the affirmative procedure chosen. However, the Committee remains unclear on what the powers might be used for. As noted in paragraph 87 above, the Scottish Consumer Council suggested that the Panels should be included as statutory consultees before Ministers exercise this power\textsuperscript{139}.

159. The Committee requests that the Minister provides further detailed explanation on how he intends to use the powers set out in section 19.

\textsuperscript{137} A super-affirmative procedure requires that a Minister wishing to make an order must lay a proposed draft of the order before the Parliament, inviting observations within 60 days. In subsequently laying a draft of the order, the Minister must provide a statement indicating what changes have been made and giving reasons. The order then proceeds as a draft affirmative instrument. The procedure provides a degree of scrutiny that falls between that of affirmative procedure and a Bill.

\textsuperscript{138} For example in Part 6 of the Convention Rights (Compliance) (Scotland) Act 2001. It also appears in section 6 of the National Parks (Scotland) Act 2001 as the procedure which must be followed in producing park designation orders.

\textsuperscript{139} The Bill currently requires that Ministers must consult only Scottish Water and the Commission on any such proposals. See written submission by the Scottish Consumer Council.
Section 20(3) - Meaning of ‘dwelling’ in relation to eligible premises

160. The Subordinate Legislation Committee also expressed concern about the Parliamentary procedure to be used in respect of this delegated power to vary the meaning of ‘dwelling’. The Executive states that the power would be used in only a limited fashion for the purposes outlined in the Explanatory Notes. However, the Subordinate Legislation Committee observed that the power in the Bill is drafted very widely and could be used to amend the definition of ‘dwelling’ in almost any way - for example, by breaking the link with the council tax regime entirely. That Committee also noted that the power allows Ministers to modify primary legislation. It concluded, therefore, that exercise of this power should be subject to affirmative procedure rather than the negative proposed. **The Committee endorses this recommendation.**

Paragraph 1(7) of schedule 2 - Consideration of licence applications

161. This paragraph gives Ministers the power to specify circumstances in which the normal licence procedures should not apply. The Subordinate Legislation Committee noted that it was not entirely clear how this power would operate or in what circumstances it is proposed that it be used. It observed that it is not unknown to confer order-making powers that authorise exemptions from certain statutory provisions. However, the proposed power seems to go wider than this and in particular seems to allow the provisions of the Bill to be modified. That Committee is unsure whether, in so far as the power would allow the substantive obligations imposed by sub-paragraphs (4) to (6) to be disapplied, negative procedure would provide sufficient Parliamentary control. It welcomed the Executive’s commitment to look at that again following its comments.

162. **The Committee is also unconvinced that negative procedure provides the appropriate level of Parliamentary scrutiny for the exercise of this power, and recommends that the Minister should consider subjecting it to affirmative procedure.**

POLICY MEMORANDUM

163. Under Rule 9.6.3 the Committee is required at Stage 1 to consider and report to the Parliament on the Policy Memorandum.

164. While there has been a draft Bill consultation stage prior to introduction, some of the provisions of this Bill have been included since the draft. In particular, Part 1 of the Bill and section 18 (on the charge determination process) were not included in the draft. However, these provisions have been generally welcomed by all witnesses, and it should be acknowledged that they respond in part to recommendations by the Parliament’s Finance Committee.

165. However, as already noted (for example, at paragraph 53 above) there are a number of areas where witnesses have suggested that the Executive’s justification and explanation for its decisions on regulating competition need to be strengthened. In particular, the Executive’s proposals on regulating competition have changed since first outlined in 2000. Further explanation of the reasons for this, and the implications of the proposed model, would have

---

140 Explanatory Notes, paragraph 122
been welcomed by many witnesses. The Panels, in particular, suggested that the necessary level of information and assessment of the proposed changes had not been given.\textsuperscript{141}

166. Nonetheless, the Policy Memorandum does provide information which effectively supplements the information on the face of the Bill. In particular, information about the rights of appeal to the Competition Commission (which, as explained in paragraph 51 above, is not in the Bill) was helpful.

167. The Policy Memorandum is also required to set out an assessment of the effects of the Bill on (among other things) equal opportunities. The Memorandum notes general statutory duties to provide services in a non-discriminatory way, and focuses on the need for consultation processes to be widely accessible. The Committee wrote to the Minister seeking a detailed assessment of how the policy of the Bill relates to six questions (recommended by the Parliament’s Equal Opportunities Committee). The Minister’s reply emphasises that the Bill’s provisions on setting charge limits and licensing ensure geographical harmonisation and protection against discrimination. The Executive does not generally consider that the Bill will affect people differentially on the basis of any of the personal attributes identified by the Equal Opportunities Committee.

168. The Policy Memorandum is also required to set out an assessment of the effects of the Bill on sustainable development. Whether the Commission should have a statutory duty to promote sustainable development, and whether the principles of charging should include firmer incentives for water resource conservation, have been discussed in detail at paragraphs 38-44 and 139-143 respectively above.

169. \textbf{Overall, the Committee considers that the information provided in the Policy Memorandum is adequate.}

\section*{FINANCIAL MEMORANDUM}

170. Under Rule 9.6.3 the Committee is also required at Stage 1 to consider and report to the Parliament on the Financial Memorandum. The Finance Committee sought written evidence from interested parties and then took oral evidence from Scottish Water, the Water Industry Commissioner and Executive officials and produced a report on the Financial Memorandum. This report is reproduced in full at Annex A. Two points of particular significance arise from that report.

\textit{Establishing a licensing regime}

171. In evidence to both the Finance Committee and the Environment and Rural Development Committee, Scottish Water challenged the assumptions set out in the Financial Memorandum for the one-off costs of establishing the licensing regime. Independent research commissioned by Scottish Water indicates that the cost estimates in the Financial Memorandum (which are based on advice from the WIC) are in many cases too low, and some potential costs are not

\textsuperscript{141} Written submission
included. The research concludes that one-off costs are likely to be £10-18m above the £12.6m estimated in the Memorandum, and that on-going operational costs are likely to be £4.7-6.9m per annum above the £1.9m estimate in the Memorandum.

172. While expressing concern at the gap between the estimates, the Minister stated that he felt that these costs in the water industry should not be comparable to those in other utility markets\textsuperscript{142}. However, in oral evidence he stated that he had not yet seen the detail of the research report, and therefore felt unable to comment. The Minister subsequently wrote to the Committee, indicating that he had now considered the research. He suggested that some of the assumptions underlying it were at odds with the structure of the market which would be established under the Bill, and stood by his estimates.

173. This issue remains a matter of some concern, as these disputed costs are the majority of the direct costs expected to arise from the Bill. In the context of the public water provider disputing these estimates, it is difficult for the Committee to be confident that the information given in the Memorandum is accurate. The Committee notes the Minister’s commitment to continue to examine the issue with a view to narrowing the range associated with the possible costs of the licensing regime. In particular, it notes that the Executive has funded a detailed scoping study on the activity required to establish the regime and the costs of this, and that this is due to be published shortly.

\textit{Competition and efficiency}

174. The Finance Committee also expressed concerns at disagreement between the WIC and Scottish Water on the calculation and assumptions underlying Scottish Water’s level of efficiency compared to other providers. While this is not specifically referred to in the Financial Memorandum, the Finance Committee recommended that its concerns should be pursued with the Minister by the lead committee.

175. This is related directly to the debate about the correct apportioning of costs between retail and wholesale functions (which is discussed in detail at paragraphs 71-80 above). Paragraph 14 of the Regulatory Impact Assessment highlights the WIC’s estimate of the efficiency gap, which informs the cost savings that a relatively efficient competitor could potentially pass on to customers. Both Scottish Water and Water UK dispute these estimates, arguing that they are out of date at present and that the efficiency gap will have been largely eliminated by the time the competition regime is expected to be established.

176. The Minister did not appear to consider this difference to be a fundamental problem, regarding it as part of the inevitable tension between regulator and regulated\textsuperscript{143}. However, Water UK suggested that continued differences on this point could lead to too low a wholesale price being set. Given the fundamental importance of this issue to the stability and impact of competition, it is a matter

\textsuperscript{142} \textit{Official Report, 5 October 2004, Columns 1319-20}
\textsuperscript{143} \textit{Official Report, 5 October 2004, Column 1323}
of some concern that the Committee cannot have full confidence that it has accurate information on which to judge the potential impacts of the Bill.

177. The Committee remains seriously concerned about the lack of clarity on both of these issues raised by the Finance Committee. The Committee cannot have full confidence that the core costs associated with the Bill have been accurately presented, or that it has been provided with sufficient information to enable it to assess the likely impact of the Bill on the industry. The Committee recommends that the Executive’s further work on establishing the costs of the licensing regime should be concluded as a matter of urgency. If possible, this should be presented to the Parliament before it considers the Financial Resolution for the Bill.

178. The Committee further recommends that an updated Financial Memorandum should be provided to the Parliament prior to Stage 3. The Committee notes that the Parliament’s Standing Orders do not currently require a Financial Memorandum which is considered to provide insufficient information to be updated. The Committee recommends that the Procedures Committee consider whether the Standing Orders should be amended to establish such a requirement.

CONCLUSION

179. The Committee shares the desire of the Minister to strengthen the Scottish water industry, to improve its regulation and the representation of customer interests. In the preceding sections the Committee has drawn attention to some of the main areas in which the Bill could be improved in the interests of the water industry as a whole. Additionally, a number of issues have been identified on which the Committee requests further information from the Minister. The Committee urges the Minister to respond to it in writing on all these requests for further information or recommendations for further consideration. The Committee urges him to do so as soon as possible, and in good time before the start of Stage 2 proceedings.

180. Taking account of these issues requiring further consideration, the Committee recommends that the general principles of the Bill should be agreed to.

---

144 The Committee divided at its meeting on 3 November 2004. See Annex B, Extracts from the Minutes – Record of Divisions in Private.
Report on the Financial Memorandum of the Water Services (Scotland) Bill

The Committee reports to the Environment and Rural Development Committee as follows—

Introduction

1. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee in relation to the Financial Memorandum of the Water Services etc. (Scotland) Bill, for which the Environment and Rural Development Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

Background

3. At its meeting on 9 September 2004, the Committee took evidence from Alan Sutherland, the Water Industry Commissioner (WIC) and from Dr John Simpson the Commissioner’s Director of Cost and Performance. The Committee also took evidence from Scottish Water which was represented by: Dr Jon Hargreaves, Chief Executive, Douglas Millican, Finance Director and Ian McMillan, Non-executive Board Member.

4. The Committee took evidence at its meeting on 14 September 2004 from Scottish Executive officials; Andrew Scott, Head of the Water Services Division, Clare Morley, the Bill team leader and Tom Harvie-Clark, Economist with the Analytical Services Division.

5. In addition, the Committee received written evidence from Scottish Water, Water UK, the Water Customer Consultation Panels and Scottish Enterprise. These submissions are reproduced at Appendix A. The Committee would like to thank all those organisations who took the time to send their views on the Financial Memorandum to the Committee.

Financial Memorandum

6. The main provisions of the Bill are:

   o to replace the Water Industry Commissioner with a body corporate, the Scottish Water Commission;

   o to prohibit common carriage in the water or sewerage systems. This means that only Scottish Water can use the public water and sewerage pipe network in Scotland;
o to establish a licensing regime for retail competition for non-
household premises only ie, the new entrant to the market will offer
billing and other customer services in competition with the
incumbent. This regime will be managed by the Water Industry
Commission;

o To require Scottish Water to set up a separate retail subsidiary for
the purpose of applying for a license under the Bill;

o To provide new arrangements for determining Scottish Water’s
charges;

o To provide further statutory powers for the Coal Authority in Scotland

7. The costs of the Bill, as set out in the Financial Memorandum are
summarised in the following paragraphs.

8. It will cost £25,000 to recruit and appoint members of the Water Industry
Commission. There will be similar ongoing costs where re-appointments are
required. This cost will be met by the Scottish Executive.

9. Board members will receive remuneration in line with Scottish Executive
policy on NDPB members’ pay – which will be up to £260 per day for board
members and £370 per day for the chair). It is estimated there will only be
“modest” additional administration costs from supporting a Board and therefore,
the total additional operating costs associated with restructuring into a body
corporate will not exceed £150,000 per annum. These costs will be met by
increasing the levy on Scottish Water.

10. It is estimated that preparatory work for establishing a licensing regime will
cost the Water Industry Commissioner £5m. This will cover general administrative
work, legal advice, accounting projects, other advisory work and market research.
These costs will be met by the Scottish Executive through grant in aid from the
budget for the water industry.

11. It is estimated that it will cost £100,000 for Scottish Water to set up a
separate retail function – due to legal and accounting costs. However, the main
bulk of the costs will be in preparing for and responding to the new regime. The
WIC has estimated that this could amount to £5m. The Financial Memorandum
states that some of these costs could be offset by potential savings arising for the
separation of the businesses.

12. It is likely to cost £50,000 for a licence applications and this will be charged to
licence holders.

13. Switching costs (ie, costs involved in transferring customer data) are
estimated to be: £2.5m for the initial cost of a switch engine with an average
ongoing annual cost of £500,000. Additionally it is estimated to that around
£500,000 per annum will be required to maintain the data used by the switch engine. These costs will be borne by licence holders.

14. It is anticipated that it will cost £1m for each charge determination (this is likely to happen once every four years). This will be funded through increases to the levy on Scottish Water.

Coal authority
15. The Financial Memorandum does not anticipate any additional costs to the Coal Authority as a result of the Bill.

Summary of Evidence

General issues
16. The Committee questioned whether the need for the Bill, and the financial implications of not introducing it, outweighed the costs of the provisions in the Bill. The WIC, Scottish Water and the Executive all stated that legal advice to them had indicated that the Water industry in Scotland could be open to challenge under the Competition Act 1998 and the Bill was seen a necessary, precautionary step. The WIC subsequently provided the Committee with a copy of his legal advice and this is attached at Appendix A.

17. This was further amplified by Executive officials who stated that the financial risks of not introducing this Bill could arise from an imposition of common carriage which the Executive assessed could have a detrimental impact on public health and could lead to an inability to maintain discounts for less affluent customers. In addition, the Executive stated that if the market were to become entirely contested, then terms on which loan funds are granted to Scottish Water might be challenged. The Executive estimated that the difference between the interest rates which are currently charged on such loans and interest rates on the open market could be £40m over Scottish Water’s entire loan stock.  

18. It was noted that the Bill will set a national harmonised water charge which “will be segmented according to the circumstances of different users, such as large and small users”. The principle behind this is to have a controlled market which could militate against larger users opting out of using Scottish Water which could lead to other, smaller users having to pay more to make up for the loss of income from larger users.

19. The Committee questioned the Executive further on this to find out whether there will be careful consideration of the issue of cross-subsidy to take into account the needs of different parts of Scotland and of different users of the system. The Executive confirmed that subsidies will be examined and decisions will be taken in December 2004 or January 2005 as to what any future subsidies should be. The Committee recognises that these issues and those such as environmental compliance and development constraints are not directly associated with this Bill but are issues which will need to be looked at carefully in the context of the next Strategic Review of Charges.

---

145 Scott, Official Report, 14 September 2004, Cols 1655 and 1656
146 Scott, Official Report, 14 September 2004, Col 1656
Setting up a Water Industry Commission
20. Both the WIC and Scottish Water indicated that they were satisfied that the stated costs of setting up the Commission were adequate. The Committee has no reason to believe that this is not the case.

Establishing a Licensing Regime
21. The Committee noted, and was concerned, that there was a difference of opinion between the WIC and Scottish Water as to the costs of establishing a licensing regime.

22. The costs as set out in the Financial Memorandum were based on advice from the WIC whose estimates had been informed by previous research. However, Scottish Water commissioned its own, independent research from IBM Consulting. This research concluded that the one-off costs of setting up the new regime would be in the range of £22.7m - £30.3 million (as opposed to £12.6m) and that ongoing operational costs would be in the range of £6.6m - £8.8m per annum (as opposed to £1.9m per annum). A breakdown of this analysis is provided in Scottish Water’s written submission at Appendix A.

23. When questioned over the figures, the WIC responded that he had not seen the research carried out for Scottish Water and that:

“among the critical issues is to hear what the regulated company says its costs will be, to challenge those costs, and to understand what scope for efficiency the company believes will arise that would offset the costs in some way.”147

24. When Executive officials were questioned over this, they responded by saying that they felt the figures in the Financial Memorandum were “reasonably robust”148 and that the proposed competition market would be much simpler than the electricity and gas markets.

25. However, the Committee remains concerned that the figures produced for Scottish Water show one-off costs £10-£18m higher than in the Financial Memorandum and ongoing costs which are approximately £5-£8m higher. As the setting up of this regime accounts for the majority of the costs arising from the Bill, the Committee believes it is imperative that agreement is reached about the accuracy of the figures. It is noted that the WIC is continuing to work on costs and the Executive stated that he will publish a scoping study in the next couple of months.149 However, this means that the Committee is not able to assess the accuracy of this part of the Financial Memorandum and finds the situation highly unsatisfactory. The Committee believes it is imperative that a reconciliation is reached so that there can be more certainty over costs and recommends that Environment and Rural Development Committee raises this issue with the Minister as a matter of urgency.

147 Sutherland, Official Report, 9 September 2004, Col 1615
148 Scott, Official Report, 14 September 2004, Col 1657
149 Morley, Official Report, 14 September 2004, Col 1655
26. Additionally when the Committee took evidence from the Minister on broader water issues, it questioned whether the setting up of the new subsidiary company would create upheaval and uncertainty for staff and whether staff and their union representatives had been consulted regarding the new regime. The Committee commented that such uncertainty had been a major problem during the setting up of Scottish Water. In addition, the Committee asked questions regarding the number of staff who will be transferred and whether their existing terms and conditions will be transferred. The Minister responded that while there may be some disruption it would not be on the scale of that which happened when Scottish Water was set up. He agreed to write to Scottish Water about the specific issues as regards staffing and then to respond in writing to the Committee.

27. A question was also raised about the financial implications for Scottish Water if billing arrangements were changed. The Bill leaves the billing of domestic households with Scottish Water as it prohibits competition for those households. The Committee recognises this is therefore not an issue for Scottish Water at the moment but noted the Executive’s estimate that it costs Scottish Water between £4 and £6 to issue a domestic bill. However, in England and Wales where companies do not issue bills through local authorities, it can cost around £15 to £20.150

**Competition and Efficiency**

28. In setting up the licensing regime, Scottish Water will charge its retail subsidiary an averaged wholesale price. The Regulatory Impact Assessment (RIA) sets out the WIC’s estimate of the financial benefits for business customers as a result of this. This assessment is that the retail gross margin for an average business customer is in the region of 15% to 20% of their total bill. The WIC also estimates that there is an efficiency gap of 42% between Scottish Water and “the most comparable water companies in England and Wales. If it is assumed that Scottish Water’s billing and collection activities are broadly of the same level of relative efficiency to their other activities, it is reasonable to assume that an efficient new entrant would be prepared to reduce the bill for a standard connection by at least £30.”151

29. Both Scottish Water and Water UK have questioned these estimates. In its written submission to the Committee, Water UK set out a detailed argument against the assumptions used by the WIC and concluded that “By the time the market opens in 2008 it appears likely that Scottish Water will have largely eliminated the efficiency gap. In this case, an overstatement of the retail gross margin – namely a wholesale price that is too low – will have a negative impact on domestic customers.”152

30. When the WIC was questioned on this, his Director of Cost and Performance gave the following explanation:

“On the basis of the gap that we published, it would cost Scottish Water £1.86 to deliver a service equivalent to that which the leading company can

---

150 Scott, Official Report, 14 September 2004, Col 1664
151 Regulatory Impact Assessment on the Water Services etc. (Scotland) Bill 2004
152 Submission from Water UK
delivered for 87p....The latest comparisons that we have are for 2002-03; Ofwat has not yet published any information for 2003-04. I would regard the efficiency gap, as stated in the impact assessment, as of the right order...Scottish Water has made substantial and welcome improvements over the past financial year and that is continuing today. On the basis of the figures that Scottish Water has provided to us, my £1.86 figure becomes £1.76...Scottish Water says that it expects to improve by a further 10 per cent in this financial year; that takes us to £1.51. Another 10 per cent improvement in the following year would take us to £1.36....If we ask where the leading company will be by 2008, we can only speculate but, if we assume that the leading company improves by 2 per cent per year..then the figure of 87p becomes 77p.\footnote{153}

31. Scottish Water countered this by saying that "there is a wide range between the most efficient company and the least efficient company."\footnote{154} The WIC responded that "the average company in 2002-03 would have delivered the equivalent service for £1."\footnote{155} However, Scottish Water went on to say that "the relevant aspect is not what the gap might be against the leading company, because that leading company might have no interest in competing in the Scottish market. The relevant issue is the cost base of Scottish Water's retail activities compared to the cost base of new retail companies that want to come in to the market."\footnote{156}

32. \textit{Again, the Committee is concerned at the disagreement between Scottish Water and the WIC and would recommend that the Environment and Rural Development Committee explore this issue with the Minister.}

\textbf{Charge Determination}

33. The Bill gives new powers for Scottish Ministers to direct Scottish Water in regard to its functions and the costs of complying with any direction would be taken into account by the new Water Industry Commission in making its charge determination. The Financial Memorandum states it is not possible to predict what costs might arise in this way.

34. When questioned about this, Executive officials explained that this will occur as part of the Strategic Review process at which time, the services Ministers believe Scottish Water should deliver will need to be balanced with the investment required, and consequently the size of water bills. The position was summed up as:

\begin{quote}
There is no point in raising water charges to such a point that people cannot afford them and there is no point in specifying a capital programme that cannot be delivered – or that cannot be delivered efficiently.\footnote{157}
\end{quote}
Conclusions

35. As stated in paragraph 21, the Committee is content with the estimated cost of setting up the Water Industry Commissioner for Scotland. However, it is not entirely convinced by the stated costs of establishing a licensing regime, given the disagreement between Scottish Water and the WIC. As stated in paragraph 25, the Committee recommends that this issue be pursued with the Minister.

36. The Committee also notes the disagreement between the WIC and Scottish Water on the calculation and assumptions underlying Scottish Water’s comparative level of efficiency. Given the importance of this issue, the Committee recommends that this be pursued with the Minister.

37. The Committee recognises that there are other issues such as investment and cross-subsidy which are associated with Bill, although not directly related to it. As was stated in the Committee’s report on Scottish Water (SP Paper 125) the Committee believes it is imperative that there is widespread consultation on investment needs and the principles of charging and that there must be much greater transparency in this and the decision-making process. The Committee took further evidence from the Minister for Environment and Rural Development on broader water issues, following its earlier inquiry into Scottish Water and raised such issues with the Minister.
SUBMISSION FROM SCOTTISH ENTERPRISE

Thank you for your letter of 28 June 2004, inviting Scottish Enterprise (SE) to present its views on financial aspects of the Water Services Etc (Scotland) Bill with reference to the cost implications associated with the new regulatory framework, new licensing regime and the new charge determination. Since SE has no specific involvement in this area we have limited our comments to SE as an economic development agency and as a user of water as follows:

• the proposed Water Industry Commission for Scotland should also take into account the importance of economic development and work towards the achievement of ‘A Smart Successful Scotland’, by addressing issues as continued affordability and overcoming development constraints;

• in international comparisons, Scotland is uncompetitive in terms of water charges, being the fifth most expensive in a recent NUS Consulting survey and with countries such as Belgium, Italy and Spain having a comparative advantage in terms of pricing. Key sectors such as paper processing, pharmaceuticals as well as the chemical industry are especially price sensitive, given their large water usage. SE would welcome and approach by Scottish Water to invest and structure prices to ensure a sufficiently competitive environment in which all businesses in Scotland can succeed and

• the harmonisation of prices across Scotland, although to be welcomed in terms of increased price transparency, will have negative effects on certain industries which have located in specific regions of Scotland. For example under West of Scotland Water, companies had the ability to negotiate individual deals, but this facility is being withdrawn and so companies which were specifically enticed to the west coast on the proviso of competitively priced water are going to face increased water charges. SE welcomes harmonisation of charges and the interim pricing measure, but believes that there should be a mechanism in place for favourable pricing interventions which are deemed to be strategically important to the economy.

In conclusion, SE welcomes this opportunity to highlight certain concerns over the proposed Water Services Etc. (Scotland) Bill to the Finance Committee and the information contained herein is expanded upon in the submission to the Environment and Rural Affairs Committee and is attached for reference.

1.0 Introduction

Scottish Enterprise (SE), alongside HIE, is the main economic development agency for Scotland covering 93% of the population from Grampian to the Borders. The Scottish Enterprise Network consists of SE and 12 Local Enterprise
Companies. Working in partnership with the private and public sectors (including Scottish Water), the Network aims to build more and better businesses, to develop the skills and knowledge of Scottish people, and to encourage innovation to make Scottish business internationally competitive. SE’s activities focus on the three priority areas laid out in ‘A Smart, Successful Scotland’: Growing Businesses; Global Connections and Skills and Learning.

SE recognises the aspirations behind the proposed changes to the Water Services (Scotland) Bill and has consequently made the following comments to the consultation process. The first two points,(paragraphs 2 and 3) are general comments on the Water Industry, the latter reflect changes proposed by the Bill.

2.0 International Competitiveness

It is important that Scotland can compete effectively with its international competitors. However, Scotland is presently internationally uncompetitive in terms of water charges, ranking fifth most expensive in a recent survey conducted by NUS consulting. Key sectors such as paper processing, pharmaceuticals as well as the chemical industry are especially price sensitive, given their large water usage. It is our opinion that the principal responsibility should remain with Scottish Water to invest and structure prices to ensure a sufficiently competitive environment in which all businesses in Scotland can succeed.

3.0 Development Constraints

The Committee should note the significant constraints to development which SE and its client companies are facing in their achievement of the ambitions of ‘A Smart, Successful Scotland’ and would call upon the new Water Commission to recognise that the principle responsibility for overcoming these problems should not be left to the development agencies but resolved by an adequately resourced Scottish Water. SE is currently working with Scottish Water to evaluate the impact of development constraints on the achievement of SE’s Five Year Investment Plan.

4.0 Restructure of the office of the Water Industry Commissioner

SE welcomes the development of the Water Industry Commission for Scotland, but is concerned that there is no mention of its role in supporting economic development, one of the principal aspirations of the Scottish Executive.

SE recommends that the Water Commission is required to consider the impact of any action on the Scottish economy and that its own actions and those of the water industry as a whole, should contribute to the achievement of the ambitions highlighted in ‘A Smart, Successful Scotland’. This should be central to the future objectives of both the Water Commission and Scottish Water.

158 Countries more expensive than Scotland are Germany, Denmark, Netherlands and France. However water standards in Germany, Netherlands and Denmark exceed the maximum requested in the UK and may contribute to the higher costs
However, the proposed stance for the Water Commission is more concerned with ensuring that qualitative standards are met and that issues of continued serviceability are maintained. In short, it highlights the preservation of the status quo and does not promote a development agenda, which is again contrary to the ambitions highlighted by ‘A Smart, Successful Scotland’. SE believes that the Commission should be made responsible for ensuring that Scottish Water has built into its plans sufficient funding to permit further sanctioned growth.

5.0 Transparency of Costs

SE believes that costs should be transparent, appropriate and any existing cross subsidies be removed to ensure that Scottish business is only paying for what it receives. It therefore welcomes the transference of price setting to the Commission with its intention to set up an accountable system of price adjudication.

6.0 Charge determination

SE agrees in principle that charges should be set on an harmonised basis, so that customers in the same group and using the same services should pay for these services at the same rate irrespective of where they are in the country. At present, certain key SE customers receive varying rates from Scottish Water and the system of discounts and special agreements is ill-defined with a consequent lack of transparency. Despite this, the previous practice of discounting tariffs offered by Scottish Water has proved useful in attracting and retaining large water using, inward investment projects to Scotland. Potentially the removal of such discounts could make Scotland a less attractive location in the future.

SE is concerned that Scottish Water will no longer have discretion to make agreements with specific customers about the charges levied on them. Instead, it is proposed that all charges must be made by reference to a charges scheme which will require to be specifically authorised by the Commission on the basis that the charge-payer has taken action which reduces the cost to Scottish Water of serving them.

SE would prefer that a system of discounts for significant customers is continued at least in the interim and that there should be the option of approaching the Minister or the Commission to petition for interventions which are viewed as being strategically important to the Scottish economy.

7.0 Resolving Constraints to Development

SE, in its daily activities and in consultation with many of its key customers, has noticed increased instances of development constraints resulting from lack of investment/provision of water services in areas such as Robroyston in the East

---

159 At Robroyston the main constraint is insufficient capacity in the water and sewerage system resulting in spilling and flooding.
End of Glasgow and recent difficulties around Perth\textsuperscript{160}. The concern is that the Commission will not address this issue due to its focus on new environmental/qualitative standards and the recently established serviceability criteria. As previously outlined, the Commission should consider the development agenda and as an option, permit Scottish Water to increase its debt provision in order to cover the costs involved. This increase in investment would be covered by the subsequent increase in revenue.

8.0 Separation of Scottish Water

SE supports the separation of responsibilities between the wholesaler and retail side. Scottish Water should continue to be the sole supplier of water and sewerage services on the public network (wholesale), 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 (retail).

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 Commission and customers to check Scottish Water’s progress in delivering efficiency and for Scottish Water itself to identify the scope for greater cost effectiveness.

9.0 Protection of Developer Rights

At present, if there is a development constraint, then Scottish Water passes the costs of provision to the relevant developer. However any subsequent activity, which may arise in an adjacent location and not controlled by the same developer, has the right of access to the system. In theory, the original developer could have paid for provision, but due to other market factors may not be able to utilise the access paid for. Other developers would have benefited at his expense. SE suggests that there is an ability to reserve a percentage of potential capacity for the original developer for at least a restricted time period. The failure to control access, could lead to greater market failure, with developers refusing to pay for connection charges unless they can guarantee timely utilisation.

10.0 Conclusion

The significance of water provision as a component of economic development cannot be understated. SE welcomes this opportunity to comment on this Bill and hopes that the observations contained within this document as well as the forthcoming responses to the two Scottish Executive consultations, (‘Investing in Water Services 2006-14 –The Quality and Standards 3 Project’ and ‘Paying for Water Services 2006-10’) will give an accurate and true reflection of how the Network sees the Water Industry developing.

\textsuperscript{160} Scottish Water has recently indicated embargoes on accepting additional waste water to its system and treatment plants in certain areas of Tayside, this is mainly due to possible court action arising from SEPA against Scottish Water for unacceptable treated waste water being discharged into controlled waters.
SUBMISSION FROM SCOTTISH WATER

Summary

Scottish Water welcomes the opportunity to present evidence on the Water Services etc. (Scotland) Bill. This Bill proposes a range of reforms to the structure and regulation of the Scottish water industry, and Scottish Water supports Ministers’ policy aims in this Bill.

Scottish Water welcomes the overall approach to strengthening the economic regulation regime and the process for conducting Strategic Reviews of Charges. We note that the Water Industry Commissioner is in the process of consulting on his methodology on the 2006-10 Strategic Review of Charges, and we will provide detailed comments to his office on his proposals.

In respect of the proposals to introduce a retail market for business customers, we support the Scottish Executive’s proposal to establish a regulated response to the requirements of the Competition Act. The necessary changes should be introduced with the minimum possible disruption and additional costs to the business and its customers.

Scottish Water has reviewed the information set out in the Financial Memorandum (FM) and the associated Regulatory Impact Assessment (RIA). It appears that:

- The cost of implementing the regime set out in the FM may be understated, while

- The potential financial benefits of the regime set out in the RIA may be overstated. In particular, the overall level of inefficiency in the RIA may refer to a historical assessment161 and the level of costs allocated to the retail business may include wholesale customer service costs162.

Structure of this paper

1. Since the Finance Committee is concerned with the financial impacts of the Bill, this evidence focuses on the retail proposals, which have the major impacts on costs and benefits.

2. Scottish Water will provide evidence to the Environment and Rural Development Committee in respect of the wider regulatory issues raised by the Bill.

---

161 The data may be drawn from the Water Industry Commissioner’s publication “Strategic Review of Charges 2002-2006”, page 186, Table 18.4, which refer to 2000/01 analysis in respect of the predecessor water authorities
162 Evidence drawn from the Water Industry Commissioner’s publication “Our work in regulating the Scottish Water Industry: Background to and framework for the Strategic Review of Charges 2006-10”, pages 54, 75 and page 129, table 11.1
Policy aims in respect of competition

3. Scottish Water supports Ministers’ aims of responding to the requirements of the Competition Act 1998 by providing a regulated arrangement for the licensing of water and sewerage retailers.

4. The proposed retail regime may require the establishment of a retail subsidiary by Scottish Water. This should be undertaken so as to minimise the disruption to Scottish Water’s operations and to minimise the additional costs to the business and its customers.

5. It is proposed that the retail business will be subject to price regulation through its licence until there is sufficient competition in the retail market. Clearly, such a price control would need to provide the retail business with sufficient revenue to enable it to carry out its functions at the lowest reasonable overall cost. To this end, the Bill should include provisions to enable the retail business to be funded to cover its reasonable costs, for at least the period when it is subject to a price control.

Cost assessment in Financial Memorandum (FM)

6. Independent research\(^{163}\) commissioned by Scottish Water suggests that the costs of establishing and operating the market mechanisms are likely to be higher than those set out in the FM.

7. There is a range of on-going costs to Scottish Water not included in the FM. These include new functions to manage the relationships and contracts with new retailers, the duty to act as retailer of last resort, and new increased costs of managing certain wholesale customer service functions due to additional frictional costs from the proposed business separation. In addition, Scottish Water Retail will incur additional costs due its new functional responsibilities. The table below sets out Scottish Water’s current assessment of the likely costs of implementing the new retail competition regime.

Table 1: Implementation costs

<table>
<thead>
<tr>
<th>Topic</th>
<th>Cost assessment in FM</th>
<th>Scottish Water’s current assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs of establishing competitive regime and market mechanisms</td>
<td>£2.5 million plus £0.5 million per year</td>
<td>£10.8-18.4 million plus £3.1-5.1 million per year(^3)</td>
</tr>
<tr>
<td>Establishment costs to Scottish Water Wholesale</td>
<td>£5 million</td>
<td>£5.8 million</td>
</tr>
<tr>
<td>Establishing Scottish Water Retail</td>
<td>£100K</td>
<td>As per FM</td>
</tr>
</tbody>
</table>

\(^{163}\) Research has been commissioned from IBM Consulting, who have developed market mechanisms for the deregulation of a range of European energy markets
as a legal entity

<table>
<thead>
<tr>
<th>Description</th>
<th>Not included</th>
<th>£1 million plus £1.5 million per year</th>
</tr>
</thead>
<tbody>
<tr>
<td>On-going costs of Scottish Water Retail in respect of new functions and costs of separation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New wholesale functions incl. support of market and on-going costs of separation</td>
<td>Not included</td>
<td>£0.75 million per year</td>
</tr>
<tr>
<td>Commissioner's costs</td>
<td>£5 million plus £1 million per year</td>
<td>As per FM</td>
</tr>
<tr>
<td>Switching costs</td>
<td>£30-50 per switch i.e. £300-500K per year</td>
<td>As per FM</td>
</tr>
<tr>
<td>Total – “One-off” costs of establishment plus “On-going” operational costs</td>
<td>£12.6 million plus £1.9 million per year</td>
<td>£22.7-30.3 million plus £6.6-8.8 million per year</td>
</tr>
</tbody>
</table>

**Benefit assessment in Regulatory Impact Assessment (RIA)**

8. The RIA assumes that Scottish Water is 42% less efficient than competitors, a position that may refer to a historic assessment of the former water authorities’ position in 2000/01. Scottish Water has already reduced its inherited operating costs by 20% since 2002, and expects to reduce them by around 40% over the period to 2006. We expect that Scottish Water’s level of efficiency relative to the water companies in England and Wales will have improved significantly by 2006, and even further by 2008.

9. The RIA assumes that the level of retail gross margin in Scottish Water is between 15-20%. Scottish Water has undertaken a comprehensive cost assessment project to examine the allocation of its own costs between retail and wholesale activities. This indicates that the retail element of costs for non-domestic customers is between 6-9%.

10. The data given in the RIA implies that the possible efficiency savings (42% inefficiency and 15-20% retail margin) that might be available to customers could amount to £22-29 million. Scottish Water estimates that such benefits will be substantially lower than those suggested in the RIA because of our lower assessment of retail margin and residual inefficiency when the market opens in 2008.

---

164 The data may be drawn from the Water Industry Commissioner’s publication “Strategic Review of Charges 2002-2006”, page 186, Table 18.4, which refer to 2000/01 analysis in respect of the predecessor water authorities.
Impact on the Wholesale Business

11. The correct setting of the retail margin and wholesale price will be critical because of the risk of creating an unintended cross-subsidy either to or from business customers in the new competitive market – at the expense, or to the benefit, of Scottish Water’s household customers.

Transitional effects

12. The proposals to establish a retail market are helpful in avoiding the potential disruption if water competition was allowed to develop without a formal regulatory structure. Even with this regulated response, there will be inevitable disruption to Scottish Water with the creation of new market arrangements and the likely creation of a separate retail subsidiary. Establishing a fully separated retail subsidiary could involve the transfer of around 200 staff from Scottish Water.

SUBMISSION FROM WATER CUSTOMER PANELS

The Water Customer Consultation Panels were established by the Water Industry (Scotland) Act 2002, to represent the views and interests of customers of Scottish Water.

The Panels welcome the opportunity to comment on the financial implications of the Water Services Bill, however, find it difficult to form a clear view due to the lack of detailed analysis provided. The Panels would have liked to have seen further breakdown of the estimates of costs within the Financial Memorandum to allow for easier consideration and understanding. It has been suggested that the final costs may be substantially higher than the current estimates.

The Panels would be extremely concerned if uncertainty over cost estimates resulted in a severe impact on pricing policy for all customers. A visible and detailed analysis on all aspects of the Bill would assist alleviate this concern. In particular, the requirement on Scottish Water to separate its wholesale and retail operations, the development of strategies to respond to competition and the licensing regime, and the ongoing costs of serving such a regime, require careful assessment and clarity of financial impact.

The Panels are also concerned regarding the financial implications of possible disparities between Ministers principles and policy decisions on paying for water services, and their place within a wholesale charging scheme. Were it to transpire that the framework for competition led to shortfalls, this burden would then fall to remaining Scottish Water customers, or to the Executive. (For example, if Ministerial decisions on cross-subsidies could not be sustained, or potential loss of large users resulted in significant revenue deficiency.) The Panels would
Encourage clear and transparent measures to safeguard Ministerial policy objectives and the benefits to customers of those policies.

The Panel's final comment at this stage would be in considering the much broader implications that may result from the Bill, especially the potential distraction for Scottish Water and the Water Industry Commissioner from the efficient and effective delivery of the next investment programme, which will be as large in scale and scope as the current programme. The potential financial ramifications of this are understandably difficult to forecast, but must be given due care and attention.

SUBMISSION FROM WATER UK

Introduction

Water UK is very pleased to have the opportunity to comment on the Water Services etc. (Scotland) Bill. Water UK represents the water and sewerage service operators in England, Wales, Scotland and Northern Ireland, in both the private and public sectors. It is as a UK organisation that we comment here, as we commented in response to the 2000 “Managing Change in the Water Industry” and the 2001 “The Water Services Bill – the Executive’s Proposals” consultations.

We support the prime objective of the Bill, as stated in the Policy Memorandum, ‘to ensure that there is a robust transparent regime that operates in the interests of all customers.’ In particular, we agree that the competition regime proposed for Scotland should benefit all customers, not just those who are able to change service supplier. Our comments focus on the way in which the Bill proposes to achieve this objective and we have grouped them under three broad headings:

- Links with the Competition Act 1998 (CA98)
- Pricing regime
- Wholesale price charged by Scottish Water

Link with the Competition Act 1998

In many respects, the Scottish Parliament has to face the same competition issues in formulating the Bill as the UK Parliament did in passing Water Act 2003 (WA03). We note with interest that the Bill will create a different competition regime in Scotland from that now being introduced in England and Wales. The crucial difference appears to be that the Drinking Water Inspectorate (DWI) in England and Wales concluded in 2000 that the public health and water quality risks attached to common carriage were not significant provided its guidelines were followed. In contrast, the public health risks of common carriage are considered unacceptable in Scotland.

We wonder whether this judgement could be legally challenged. We also wonder how the argument that the public health risks are unacceptable could be sustained if the applicant for common carriage were a company using common carriage in England or Wales. There is also the question of whether the Bill goes further than
is necessary to protect public health when it rules out sewerage common carriage. Generally, we wonder whether two quite different solutions, north and south of the border, to, essentially, the same problem can co-exist for long.

The relationship between CA98, European law and the Bill is, of course, for the Scottish Parliament to determine. We are raising questions here because we share the Scottish Executive and Parliament's wish that the competition regime in Scotland should be primarily determined by Acts of Parliament and not through the courts.

The proposal in the Bill for a licensing regime is a solution which is common to both competition regimes north and south of the border and we very much support its principle. From the start, we lobbied hard for a licensing regime to supplement CA98 and there is now a general consensus that only licensed competitors should be allowed.¹⁶⁵

Pricing Regime

We are concerned about the provisions, as we understand them, that the Bill makes for the pricing regime which will apply in the competitive area. One concern is that, if too much of the pricing regime is left to regulator's discretion, it may be open to legal challenge. Our other concern is that the pricing regime should be fully supportive of the social and environmental objectives assigned to Scottish Water. Essentially, the issue is that competition without a proper pricing methodology prescribed by legislation could lead to cherry-picking by new entrants seeking to supply only the highest return/lowest cost customers. The likely effect of this would be twofold:

- Regional tariffs might become ‘de-averaged’, either because the undertaker chooses to de-average in order to protect its customer base, or because the regulator or courts find that this is necessary for tariffs to be cost-reflective, and therefore non-discriminatory under CA98. Since there are several cross-subsidies – which the Scottish Parliament is likely to consider socially desirable – implicit in regionally averaged water tariffs¹⁶⁶, some mechanism is needed to preserve them in the face of competition.

- Competition risks reducing Scottish Water’s ability to finance its national functions, particularly those regarding the protection of the environment. Scottish Water customers pay for these activities through water charges. An unbridled competition regime could encourage business customers to become free-riders by opting to be supplied by a competitor who does not have the same obligations as Scottish Water and can undercut it.

¹⁶⁵ Licensing has been brought into law in England and Wales with WA03.
¹⁶⁶ For example, cross-subsidies are likely to exist between urban and rural customers, and between high and low rateable value domestic customers. In England and Wales the cross-subsidy from large industrial users to domestic customers has now been unwound, primarily due to the threat of “inset” competition.
The Bill proposes to avoid these problems by setting up a retail subsidiary of Scottish Water which Scottish Water will charge on the basis of an averaged wholesale tariff. We understand that this wholesale tariff will be the same for all customers, whether they are customers of the Scottish Water retail subsidiary or of its competitors. This approach, to set an averaged price on Scottish Water activities – none of which will be open to competition – has similarities to the solution chosen in WA03, where the problem of protecting social and environmental objectives is addressed through strict pricing rules. That Act states in formal legal terms the access pricing principle that economists will recognise as the efficient component pricing rule (ECPR), also referred to as “retail minus”.

The success of the approach proposed in the Bill depends crucially on the correct setting of the wholesale price between Scottish Water and its subsidiary (discussed in the next section) and on the pricing regime applied to the retail subsidiary.

Subject to the wholesale price being set correctly, the proposed wholesale pricing regime, as we understand it, could protect Scottish Water’s objectives and its remaining customers. However, its retail subsidiary will be open to cherry-picking and free-riding if its charges are based on average accounting principles. Customers for whom retail services are relatively cheap to provide will be attractive to competitors, leaving the relatively expensive ones to the Scottish Water retail subsidiary. Moreover, if the retail subsidiary has obligations that its competitors do not, such as to provide some support services to all customers, whether domestic or business (services which are not related to billing such as operations-related calls, water conservation information, etc.), it will be unable to compete and its prices will increase for its remaining customers. Competition will be distorted, will not provide appropriate incentives to the retail subsidiary, and will provide benefits to some customers only at the expense of others.

Wholesale price charged by Scottish Water

The separation of Scottish Water from its retail subsidiary can, in principle, produce some real benefits – clarity, accountability, control - that make it worth supporting. Indeed, some of our members in England have chosen this organisational structure. However, it is not clear that the Bill recognizes the conditions that need to be put in place for the benefits of separation to arise in Scotland. More important, there is a risk that the wholesale price will be set too low, which will not protect Scottish Water’s objectives nor protect domestic customers from increases in charges as a direct consequence of competition for business customers.

Our experience of helping develop a framework for competition in England and Wales is that customer-facing activities reach deep inside operational functions. Customers are instrumental in helping to identify network or supply failures; they also need to be informed of operational events. In addition, particularly in

---

167 ECPR is the only access pricing approach that both promotes efficient market entry and prevents cherry-picking.
emergencies, some domestic customers, including those located on a business customer site, need special services that can only be provided by a water operator, not by a customer care function. We do not know the extent to which customer-facing activities will be retained within Scottish Water or transferred to its retail subsidiary, especially as it is not always feasible or desirable to separate facilities for domestic customers from those for business customers. It will be crucial to separate these functions between Scottish Water and its subsidiary most carefully, to determine how those transferred to the retail subsidiary will be financed and how the two entities will inter-act and exchange information. These questions have implications for the retail subsidiary’s ability to compete, as we said earlier, and also for the cost estimates in the Financial Memorandum. However, we are unable to quantify them and would refer to Scottish Water’s evidence to Parliament.

Crucial to the regime is the averaged wholesale price which Scottish Water will charge its retail subsidiary and, thus, the retail margin assumed to be included in end-user tariffs. We have evidence that leads us to doubt the estimates for the turnover of the Scottish Water retail subsidiary in paragraph 14 of the RIA. It gives the Water Industry Commissioner’s estimate of the retail gross margin as being in the order of 15% to 20% of business customers’ bills. Experience in the gas and electricity industries is cited in support of this estimate, which was first published in the document “Strategic Review of Charges 2002/6”. However:

- This estimate is based partly on assumed data for three English water companies; we understand from them that some of the estimates are grossly inaccurate.\textsuperscript{168} If this was corrected, the estimate above would be reduced by about half, to less than 10% of customers’ bills.

- The comparison with energy industries is likely to be misleading; there have been several publications highlighting the fact that network costs represent a much greater proportion of total costs in the water industry than is the case in gas and electricity. It is not reasonable to assume that retail costs in water are in similar proportions to those in gas and electricity.

- A recent survey by the Office of Water Services (Ofwat, the economic regulator in England and Wales) of the retail margin in England and Wales showed that water retail operating costs, expressed as a percentage of water turnover, average only 9.6%.\textsuperscript{169} We have no reason to believe the position in Scotland is significantly different.

It is also worth noting that the retail costs considered above (quoted for English water companies by the Water Industry Commissioner, in gas and electricity and in Ofwat survey) are for the costs of serving the entire customer base, both domestic and non-domestic. The retail cost of serving domestic customers in England and Wales, expressed as a percentage of the average household bill, is much greater than that for non-domestic customers, reflecting the much lower

\textsuperscript{168} A significant element of the cost assumptions appear wrong by a factor of 7

\textsuperscript{169} This covers all water customers (household and non-household). The figure for non-household customers only is much smaller, as indicated in the next paragraph.
average domestic bill. Therefore the relevant retail percentage for non-domestic customers is lower. Using Ofwat survey quoted above it can be shown that retail costs for large business customers may be as low as 4% of their total charge.

The true scale of water retail costs is obviously of interest to prospective licensees, but there is a danger from a public policy perspective of over-stating them. If the wholesale price is set too low in order to encourage the retail market to develop, domestic customers will suffer increased charges in order to maintain Scottish Water overall revenue; licensees, initially, will benefit at their expense. Later, as retail margins are competed away, the benefits will transfer to business customers, still at the expense of domestic customers. The size of the retail gross margin is therefore a very important issue and we urge Parliament to research it most carefully.

There is some recognition of the potential cost to domestic customers of not setting the wholesale price correctly in the RIA and Policy Statement, but the assumption that Scottish Water is 42% less efficient than English water companies is used to justify the financial pressure on Scottish Water’s wholesale operation. By the time the market opens in 2008 it appears likely that Scottish Water will have largely eliminated the efficiency gap. In this case, an overstatement of the retail gross margin – namely a wholesale price that is too low – will have a negative impact on domestic customers.

Conclusions

The issues of how the separation is achieved between Scottish Water and its retail subsidiary and of the wholesale pricing regime are crucial to the success of the competition regime proposed in the Bill. The Bill’s proposal to create a separate retail arm for Scottish Water does not in itself ensure that the effects of competition are confined to retail activities serving business customers. The allocation of costs to both wholesale and retail will affect the financing of the wholesale business and may ultimately affect charges to domestic customers. If these issues are not addressed, through legislation and regulation, competition in Scotland could encourage cherry-picking and leave domestic customers alone to pay for the environmental and social objectives given to Scottish Water.
When I appeared before your Committee on 14 September, I undertook to provide detail in writing of the costs of the Water Industry Commissioner establishing the licensing regime proposed in the Bill.

The Financial Memorandum estimates that the cost of the Water Industry Commission establishing the licensing regime should be around £5 million. This is based on analysis by the Water Industry Commissioner to scope the work which will be involved. As the Financial Memorandum states, there will remain some uncertainty with these costs until the initial work gets underway. Each component of the cost will be subject to careful scrutiny as part of the Commissioner’s and, in due course, the Commission’s budget.

The information below covers each of the categories of expenditure listed in Table 1 of the Financial Memorandum (page 40). The expenditure would be incurred over the period from 2005 to 2009 when the licensing regime is expected to be developed.

General administrative work is estimated to cost £2.5 million. This includes staff, based on current estimates that around 5.5 full time equivalent staff are required, their recruitment, salaries and other employment costs. It also covers the costs of the considerable consultation that will be carried out on the licensing regime and licence conditions with Scottish Water, prospective new entrants and with customers.

£1.5 million is allowed for legal advice, which will be essential to drawing up the licence conditions and considering licence applications. This is consistent with the initial findings of an independent analysis of the resources required to implement the licensing regime. The Water Industry Commissioner will publish this analysis by the end of October. Although some of this work will be done in-house by the Commission, their size and the type of assistance required means that the Commissioner has advised that their requirement for senior legal advice should be contracted out.

£0.5 million is allowed for accounting projects, which will include: designing reporting requirements for new entrants to ensure they are fit and proper; setting up databases to examine the probity of prospective new entrants, both initially and on an ongoing basis; ensuring that market participation can develop in an orderly way; and ensuring that new entrants can meet licence requirements.

The majority of the ‘other advisory work’ for which £0.4 million is allowed relates to the use of Reporters to check information provided by new entrants, verifying that new entrants can do what they suggest and the impact of precise proposals on Scottish Water. The other part of this item is an allowance for economic or financial consultancy advice required to defend a licensing decision.
And finally, £0.1 million is allowed for market research which will be required to support consultation on the licensing regime, with Scottish Water, prospective new entrants and customers, to understand their views, and, once the first phase has been completed, understand its impacts.
Appendix C

ADVICE NOTE FROM SHEPHERD AND WEDDERBURN TO THE WATER INDUSTRY COMMISSIONER FOR SCOTLAND ON APLICATION OF COMPETITION LAW TO SCOTTISH WATER

1. Introduction

1.1 Shepherd+ Wedderburn have been asked by the Office of the Water Industry Commissioner for Scotland (the WIC) to prepare this advice note in relation to the application of competition law to Scottish Water.

1.2 This note summarizes certain legal advice given previously by us to the WIC and updates our earlier advice by reference to the proposals currently before the Scottish Parliament in the shape of the Water Services etc. (Scotland) Bill (the Bill).

1.3 The WIC has asked us to comment, in relatively high-level terms, on (a) the competition law risks faced by Scottish Water in refusing to provide competitors with access to its public network and (b) the impact of the Bill on those risks.

1.4 This advice note addresses these two issues in the following way. We begin (section 3) by describing the general competition law context in which Scottish Water finds itself. We then (section 4) highlight the key areas of competition law risk faced by Scottish Water in relation to third party network access. Finally, we consider, in section 5, how the Bill may mitigate those risks.

1.5 The advice contained in this note is confidential to the WIC and should not be disclosed to or relied upon by any other person without our prior written consent.

1.6 We have agreed that a copy of this note may be supplied to the Finance Committee of the Scottish Parliament for the purposes of its current examination of the financial memorandum to the Bill.

2. Executive summary

2.1 By refusing to grant third party access to its network, Scottish Water presently faces the risk of competition law challenge.

2.2 A successful challenge could result in adverse consequences for Scottish Water’s economic viability and for its customers.
2.3 The proposal to prohibit third party use of Scottish Water’s networks under the Bill will (in conjunction with the proposals mentioned in para. 2.4) assist in tackling this risk.

2.4 By proposing to subject Scottish Water (and its revenues) to more robust, independent regulation, the Bill also contributes to competition law risk mitigation.

2.5 Taken together, these proposals would, in our view, substantially eliminate the competition law risks facing Scottish Water in this context.

3. The competition law context

3.1 The principal UK competition law rule which applies in this context is section 18(1) of the Competition Act 1998 (the Chapter II Prohibition). This outlaws abuse of a dominant position.

3.2 Also relevant are paragraphs 4 and 5(2) of schedule 3 to the 1998 Act. Paragraph 4 (the SGEI Exclusion) excludes the Chapter II Prohibition from conduct related to performance of a service of general economic interest (an SGEI). Paragraph 5(2) (the Legal Requirements Exclusion) provides that the Chapter II Prohibition does not apply to conduct to the extent to which it is engaged in in order to comply with a legal requirement.

3.3 In addition, we believe that it is important to bear in mind the relevance of EC competition law in this context. First, section 60 of the 1998 Act requires the UK rules to be interpreted (in the absence of relevant differences) so as to be consistent with the corresponding EC rules.

---

Certainly, the Chapter II Prohibition has (with some justification) attracted the greatest attention. However, it is also worth recalling the wide-ranging powers of investigation, inquiry and remedy conferred on the OFT and Competition Commission under the market investigation provisions in Part 4 of the Enterprise Act 2002.

Section 18(1) provides as follows: Subject to section 19 [excluded cases -- not reproduced], any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom; (2) Conduct may, in particular, constitute such an abuse if it consists in- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Paragraph 4 provides as follows: Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.

Paragraph 5(3) defines "legal requirement" as "a requirement— (a) imposed by or under any enactment in force in the United Kingdom; (b) imposed by or under the Treaty or the EEA Agreement and having legal effect in the United Kingdom without further enactment; or (c) imposed by or under the law in force in another Member State and having legal effect in the United Kingdom."
Second, we consider that the EC rules themselves (principally, Article 82 EC on which the Chapter II Prohibition is modelled) could apply to certain aspects of Scottish Water's activities.

### 4. Key competition law risks

4.1 In considering the risks arising from the Chapter II Prohibition in relation to third party access to Scottish Water's network, one needs to consider (a) how a refusal by Scottish Water to provide network access might fall within the scope of the prohibition and (b) the likelihood of such a refusal being found to amount to abuse.

#### Scope of the prohibition

4.2 We have little doubt that Scottish Water would qualify as a dominant undertaking for the purposes of the Chapter II Prohibition (at least in respect of its core activities). However, the prohibition is only engaged if a dominant undertaking acts abusively.

4.3 In very general terms, abuse takes one of two forms: exploitative conduct (directed at customers) or exclusionary conduct (directed at competitors).

4.4 In terms of exclusionary conduct, the 1998 Act lists some classic examples of abusive conduct directed at competitors, viz: "directly or indirectly imposing [...] unfair trading conditions" (e.g. refusal to supply), "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" (in other words, discrimination); and "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts" (e.g. "tying" or "bundling" behaviour).

4.5 In the context of a network utility business, such as the water and sewerage industry, the operator of the network is typically (and for obvious reasons) regarded as occupying a dominant position in relation to the 'downstream' markets (such as water supply and sewage disposal) which depend on access to the network. In that position (often referred to in terms of controlling an 'essential facility'), the network operator abuses its dominant position if it refuses to provide access to the network on reasonable terms and conditions.

4.6 Accordingly, a refusal by Scottish Water to provide a competitor with access to its network on reasonable terms would, in the absence of some compelling justification, amount to abuse of a dominant position contrary to the Chapter II Prohibition.
Likelihood of abuse

4.7 We are familiar with the various arguments that have been made in order to justify a refusal to provide access in the case of Scottish Water’s network, in particular those related to public health. However, we would query whether (for instance, in light of common carriage proposals in England & Wales) there are sufficiently clear public health grounds to deny third party access, as opposed to permitting it on tightly regulated terms.

4.8 There would appear to be more convincing justifications for refusing access under the SGEI Exclusion, i.e., that Scottish Water requires to maintain exclusive rights over the public networks in order to be able to carry on its public service tasks in economically acceptable conditions.

4.9 Arguments seeking to justify exclusive rights on the basis of the SGEI Exclusion have been advanced in a variety of cases at EC level.

4.10 In the Almelo case174 a local electricity distributor in the Netherlands sought to challenge, under Article 82, the requirement under Dutch law that it purchased all of its wholesale requirements for electricity from IJM, a regional distributor. IJM had, for its part, been given the task, through the grant of a non-exclusive concession, of ensuring the supply of electricity in the relevant part of the Netherlands. In particular, it had an obligation to ensure that throughout the concession territory, all consumers, whether local distributors or end-users, received uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers.

4.11 Whilst leaving it for the national courts to decide on the facts, the Court stated that exclusive rights such as those conferred on IJM, "must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject"175.

---

174 Case C-393/92, Municipality of Almelo and others v NV Energiebedrijf Ijsselmi

175 Almelo, paragraph 49 of judgment.
4.12 In the *Corbeau* case, an undertaking looking to enter the postal services market in Belgium sought to challenge under Article 82 the exclusive rights conferred on the Belgian Post Office for delivery of all mail. In this case, the BPO had an obligation to collect, carry and distribute mail on behalf of all users throughout Belgian territory, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.

4.13 The Court then set out the following legal analysis:

*The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.*

*The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.*

*Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.*

4.14 In other words, as the OFT has put it, the Court's judgment is, "based on the 'cherry picking' or 'cream skimming' argument, i.e. that the introduction of competition in these markets would have resulted in the new entrants targeting the profitable customers/sector and leaving the higher cost customers/sector to be supplied by the incumbent at a prohibitively high price, against the interest of these customers, or would result in the incumbent being made reliant upon state subsidies".

4.15 The Court in *Corbeau* made clear, however, that the grant of exclusivity had to be closely tailored to those services that comprised the universal postal service, stating that, "the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific services, by their nature and
g

---

176 Case C-320/91, *Criminal proceedings against Paul Corbeau*
177 *Corbeau*, paragraphs 16 – 18 of judgment.
178 OFT 421, op. cit., paragraph 3.6.
the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.\(^{179}\)

4.16 In the Air Inter case\(^{180}\), allegations of abuse were made in respect of a refusal to allow a private airline to operate flights on certain routes in France (Orly-Marseille and Orly-Toulouse) which were reserved exclusively to AI. For its part, AI had an obligation to operate 20 unprofitable domestic air routes regularly and at tariffs that were not prohibitive, in order to contribute to regional development. AI used revenues from the two (profitable) reserved routes to subsidise costs on the unprofitable routes.

4.17 AI claimed that, since it had to finance its air transport entirely by itself without public aid, it needed to cross-subsidize tariffs within the 22 routes. In the context of that cross-subsidy, income from the two 'money-spinner' routes were intended to finance the loss-making routes. Such a system of subsidies, according to AI, could not function without a grant of exclusivity on the 'money-spinner' routes.

4.18 The Court of First Instance was not, however, impressed by these assertions. First, AI had not put a figure on the probable loss of revenue if other air carriers were allowed to compete with it on the two routes in question. Second, it had not shown that that loss of income would be so great that it would be forced to abandon certain of the (subsidised) routes forming part of its network.

4.19 In addition, the CFI pointed out that, "the domestic air network system combined with the internal cross-subsidy system to which the applicant [i.e. AI] refers in support of its case did not constitute an aim in themselves, but were the means chosen by the French public authorities for developing the French regions. The applicant has not argued and still less established that, following the entry into force of [EC rules liberalising air transport], there was no appropriate alternative system capable of ensuring regional development and in particular of ensuring that loss-making routes continue to be financed\(^{181}\)."

4.20 It can be seen that the SGEI Exclusion cannot be used to justify the unilateral assertion of exclusive rights unless it can be shown that exclusivity is objectively justified, in all the

---

\(^{179}\) Corbeau, paragraph 19 of judgment.

\(^{180}\) Case T-260/94, Air Inter SA v Commission of the European Communities.

\(^{181}\) Air Inter, paragraph 140 of judgment.
circumstances, as a proportionate and cost effective response to a need in the general economic interest.

4.21 Looking at Scottish Water, there are two key tests which it must satisfy, in our view, in seeking to rely on the SGEI Exclusion to deny third party network access. First, the Scottish Parliament should take the step of formally conferring on it exclusive rights over the network. The present absence of legislative endorsement may undermine Scottish Water's ability to claim that exclusivity is objectively justifiable. Second, the current regulatory status of Scottish Water under the 2002 Act, in terms of which its revenue levels are fixed by its owners (i.e. Scottish Ministers) rather than an independent regulator, should be bolstered in order to support the arguments that exclusivity is being used to protect an efficiently run SGEI.²

4.22 Accordingly, as things stand at the moment in relation to Scottish Water and its regulatory status, there is a substantial risk that a court would not be prepared to support use of the SGEI Exclusion to justify a denial of network access.

Impact of enforced third party access

4.23 If Scottish Water is unable to rely on the SGEI Exclusion and third parties are able to enforce their rights to access the network using the Chapter II Prohibition, the adverse consequences for Scottish Water's economic viability – and the position of its remaining customers – could be severe.

5. Potential impact of the Bill

5.1 The proposal to prohibit third party use of Scottish Water's networks under the Bill would represent an important advance in tackling the competition law risks outlined in the previous section.

5.2 It would certainly provide Scottish Water with the ability to rely for the first time on the Legal Requirements Exclusion (as opposed to the SGEI Exclusion) as a defence to any Chapter II claim arising from refusal to grant access.

² According to the European Court, a potentially abusive situation is created by a Member State, "when the undertaking to which it grants an exclusive right extending to [relevant] […] activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision" (Case C-41/90 Höfner [1991] ECR I-1979, para. 31).
5.3 However, if that were as far as the Bill was to go, we doubt whether this ability would provide a complete defence to future competition law challenges.

5.4 This is because, whilst the Chapter II Prohibition can be ‘disapplied’ in this manner\textsuperscript{183}, its EC counterpart (Article 82 EC) cannot\textsuperscript{184}. And, as we have pointed out earlier, there are good grounds to regard Article 82 as applying in this context. It would therefore remain open to an aggrieved third party to invoke (EC) competition law to challenge a refusal to grant network access, with all of the same adverse consequences identified above.

5.5 This means that, in addition to the ban on third party access, it is important that any ban is accompanied by the necessary conditions to allow Scottish Water to rely on the SGEI Exclusion (at both UK and EC level). These would include measures to ensure that the interests of Scottish Water’s customers are adequately safeguarded in relation to the raising and spending of its monopoly revenues.

5.6 In our view, the Bill makes several important contributions in this respect by strengthening independent regulatory oversight of Scottish Water and its revenues. In particular, it grants determinative (as opposed to advisory) powers over Scottish Water’s charges to the Water Industry Commission, subject to appeal to the Competition Commission.

5.7 Indeed, we take the view that the proposals contained in the Bill, taken as a whole, would substantially eliminate the competition law risks facing Scottish Water in relation to third party network access.

\textsuperscript{183} Leaving aside the argument that the grant of exclusive rights to Scottish Water would exceed the legislative competence of the Scottish Parliament because it impinges on a reserved matter (i.e. head C3 in Schedule 5 to the Scotland Act 1998).

\textsuperscript{184} Article 86(1) EC, which provides that, "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89", would override the Scottish Parliament’s decision to insulate Scottish Water from an EC competition law challenge.
Appendix D

ADVICE NOTE FROM DUNDAS AND WILSON CS TO SCOTTISH WATER ON APPLICATION OF COMPETITION LAW TO SCOTTISH WATER
Dear Tom

**Competition law treatment of Scottish Water**

Following a number of discussions over recent months, I thought it might be useful to set out in writing our view of the potential application of competition law to Scottish Water ("SW") against a background of the regulatory framework envisaged by the Water Services etc. (Scotland) Bill (the "Bill"), introduced to the Scottish Parliament on 11 June 2004.

1. **Executive Summary**

   In short, the Bill clarifies a number of uncertainties in the current regime, vesting key decision-making powers in the hands of the Water Industry Commission (the "Commission") and the Scottish Ministers (the "Ministers") with the result that certain potential competition law challenges, in particular as regards pricing, are likely to be directed at those bodies and not at SW. In addition, the current legislative provisions under the Water (Scotland) Act 1980 do not address issues of common carriage and as a policy decision the Scottish Executive on public health grounds will include provisions within the Bill to prevent third parties placing water into SW's system. Whilst this is a decision for the Ministers, and differs from the approach in England and Wales, the impact on SW is to clarify its statutory role and responsibilities in relation to this area. In relation to retail competition the Bill improves the position of SW by ensuring not only will SW have no ultimate discretion as regards its pricing, (with further valuable protection afforded SW through its right to appeal charge determination decisions of the Commission to the Competition Commission ("CC")); but the principal trading terms which govern its relationship with retail entities ("Licensees") will also be pre-determined. The risk of competition law exposure will moreover be minimised through the setting up of a separate subsidiary company to carry out the performance and functions of SW's retail entity ("SWR"). However, since SW will not be immune from competition law challenge as a wholesale operator, it will need to implement certain internal compliance procedures to ensure that when dealing with both Licensees and other third parties, it does so without the risk of infringement.

2. **Introduction**

   As you know, the two fundamental prohibitions (on anti-competitive agreements and abuses by dominant undertakings) set out in the UK Competition Act are applied and enforced by the
Office of Fair Trading ("OFT"). It is only the OFT which can apply these provisions in relation to water and sewerage services in Scotland and unlike the Office of Water Services ("OFWAT"), the Commission will not have concurrent jurisdiction. Notwithstanding the OFT’s jurisdiction, the new legislative regime will in a number of respects effectively ring-fence SW from successful competition law challenge. As set out in more detail below, SW should now be protected from allegations of infringement in matters of pricing, the terms and conditions governing its relationship with Licensees and by virtue of the incorporation of a separate subsidiary to carry out SWR’s functions.

3. **Pricing - Charge Determination**

As summarised below, section 18 of the Bill sets out the procedure for making, approving and publishing schemes of charges.

1. Following the Ministers’ policy statement, the Commission issues a draft determination which will contain maximum charge limits (and can contain different maximum charges for different types of customers). The draft is published and a public consultation exercise will take place.

2. SW drafts its charges scheme, setting out the proposed charges for each of its services. In doing so, it cannot exceed the maximum charge limits set down by the Commission.

3. SW submits its proposed charges scheme to the Commission for approval.

By virtue of the fact that the Commission has final sign-off of the charges scheme, the provisions of section 18 appear to leave little, if any, discretion on the part of SW in this regard and therefore any challenges by Licensees on pricing issues should lie with the Commission and not with SW. It is likely that dispute resolution procedures will be included in the licences to be drafted by the Commission, referred to below. In practice, one would in any event expect Licensees to take an active part in the consultation stage referred to in point 1 above.

Although no reference is made to it in the present draft of the Bill, the policy memorandum expressly provides for an order to be made under the Scotland Act 1998 giving SW the right to appeal decisions of the Commission in relation to the charge determination process to the CC. This right of appeal represents a key protection for SW. There is no indication that Licensees will have the power to avail themselves of such an appeal process.

4. **Terms and conditions - the Licence**

The primary interface that SW will have with the Licensees, including SWR, is through the licence ("Licence"). It is expected that the Commission will issue the standard conditions of the Licence (the “Standard Conditions”) within nine months of the Act coming into force. The Licence should include terms which:

- define the service to be provided;
- set out expectations for behaviour by market participants;
• govern relationships between:
  - wholesaler and retailer;
  - retailer and customer;
  - regulator and retailer;

• allow for regulatory intervention; and

• provide a vehicle for enforcement, sanction or ultimately removal of the Licence and expulsion from the market.

Therefore, not only will SW have very little or no discretion in relation to pricing (i.e. charge determination), but its principal trading terms will be pre-determined and any dispute over the terms of the Licence (whether on competition grounds or otherwise) will be between the Commission and the Licensee, not directly with SW. However, it is worth saying that the Licence is unlikely to cover every eventuality and where a certain aspect of a trading relationship is not covered by the Licence, SW will be subject to the terms of the Competition Act. We can obviously advise you further in this regard once the Commission issues the Standard Conditions.

Moreover, the Licence will not protect SW from potential challenge from other third parties with whom it deals. By way of example, OFWAT recently investigated a complaint by the manufacturer of a particular brand of wall mounted meter box (“WMMB”) about difficulties it was facing in trying to sell its product in a particular undertaker’s area. It was alleged that the undertaker was refusing to connect the manufacturer’s brand of WMMB to its network whilst allowing the connection of other types. Any such third party complaints will be dealt with by the OFT, not the Commission. In light of the remaining potential for challenge in this way (i.e. from non-Licensee third parties), it is worth reiterating the importance of internal compliance procedures which can be put in place to ensure that any such complaints are resolved swiftly and in SW’s favour.

5. SWR

As you are aware section 12 of the Bill confers on the Ministers the power to require SW to create a separate subsidiary to perform the functions and obligations set out in the Licence as well as imposing a general duty on SW that it must not treat SWR any more or less favourably than it treats other Licensees.

As previously advised, whether the Ministers exercise this power or not, the creation of a separate subsidiary (operating as regards SW on an arms-length basis with effective firewalls to ensure that information about the retail activities of competitors or potential competitors cannot be filtered down to SWR) is likely significantly to minimise the risk of competition law challenge.

I hope the confirmation of this advice is helpful, though please do not hesitate to contact me should you require any further clarification or wish to discuss these matters further. I should reiterate that the advice contained in this letter has been prepared for the benefit of Scottish Water and is intended solely for its use.
Kind regards

Yours sincerely

Tom Usher
REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

The Committee reports to the Environment and Rural Development Committee as follows—

1. At its meetings on 28th September and 5th October 2004 the Subordinate Legislation Committee considered the delegated powers provisions in the Water Services etc. (Scotland) Bill. The Committee submits this report to the Environment and Rural Development Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

Committee remit
1. Under the terms of its remit, the Committee considers and reports on proposed powers to make subordinate legislation in particular Bills or other proposed legislation and on whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

2. The term “subordinate legislation” carries the same definition in the Standing Orders as in the Interpretation Act 1978. Section 21(1) of that Act defines subordinate legislation as meaning “Orders in Council, orders, rules, regulations, schemes, warrants, bye-laws and other instruments made or to be made under any Act”. “Act” for this purpose includes an Act of the Scottish Parliament. The Committee therefore considers not only powers to make statutory instruments as such contained in a Bill but also all other proposed provisions conferring delegated powers of a legislative nature.

Report

Introduction
3. This Bill, introduced on 11 June 2004, aims to strengthen the regulatory framework for the water industry and to provide certainty for the industry. It secures the Scottish Ministers’ public health, environmental protection and social policy objectives by prohibiting common carriage on the public water and sewerage networks and prohibiting retail competition for household customers. In addition, the Bill contains provisions relating to the Coal Authority.

4. The Bill is in four parts—

- Part 1 replaces the office of the Water Industry Commissioner (“the Commissioner”) established under the Water Industry (Scotland) Act 2002, with a body corporate, the Water Industry Commission (“the Commission”).

- Part 2 makes a series of provisions regarding the provision of water and sewerage services, including a prohibition of common carriage on the water and sewerage networks; the establishment of a licensing regime for retail competition for non-household premises; and enabling Scottish Water to establish a subsidiary for the purposes of applying for licences under the Bill.
Part 3 makes provision regarding coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution.

Part 4 makes miscellaneous and general provision, including the procedure for exercising the order and regulation making powers provided under the Bill.

5. Inevitably, the Bill contains a large number of delegated powers and has therefore been referred to the Committee for consideration of these powers under Rule 9.6.2 of the Parliament’s Standing Orders.

6. In addition to the delegated powers which are examined below, the Bill contains a number of powers to make determinations or give directions (see for example new section 1(3) on page 1 and Schedule A1 paragraph 3(1)(c) on page 25) but these powers appear to be of an executive or operational nature and therefore not of interest to the Committee.

7. The Executive provided the Committee with the usual memorandum on the delegated powers provisions in the Bill, which is reproduced at Appendix 1. Having considered the following provisions with the assistance of the memorandum, the Committee approves them without further comment: Sections 2, 7(2), 9(5), 16(3), 26, 27(2), 30, schedule 2 paragraphs 1(1) and (4), 11(1) and (2)(g).

Individual delegated powers

Part 2

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

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

Background

8. Section 4 prohibits common carriage on the public water supply system and retail competition in water services in relation to domestic customers. It does so by making it an offence for anyone other than Scottish Water or someone acting on its behalf to introduce water into the public water supply system; use the public water supply system to supply water to the premises of another person; or make arrangements for the supply of water to the premises of another person through the public water supply system.

9. Section 4(7) enables the Scottish Ministers to make regulations specifying circumstances where these prohibitions do not apply, or persons or categories of person to which they do not apply, or only apply to a certain extent.

10. The Executive envisages using these powers if it emerged in practice that the prohibitions were catching activities that it had not been the Scottish Ministers’ intention to prohibit. If this turned out to be the case, it would be necessary to
amend the provisions establishing the prohibitions in order for them to have the original intended effect.

11. Since this power could have an effect on the fundamental provisions of the Bill, provision is made for any regulations made under this section to be subject to affirmative parliamentary procedure. In addition, the Scottish Ministers are required to consult on any regulations made under this section.

12. Section 5 makes provision to prohibit common carriage and limit retail competition in relation to the public sewerage system equivalent to that provided for in section 4 in relation to the public water supply. Among other things, it makes it an offence for anyone other than Scottish Water or someone acting on its behalf to draw sewage from that system; use that system to dispose of sewage from the premises of another person; or make arrangements for the provision of sewerage to or the disposal of sewage from the premises of another person through that system.

13. The reasons for taking this power are similar to those for taking the power in section 4(7) of the Bill. Once again, given the significance of the power, such regulations are subject to affirmative parliamentary procedure and prior consultation.

Report

14. The Committee considered the justification for these powers very carefully as the Committee considered that the powers could, as recognised by the Executive, have a fundamental effect on the way in which the prohibitions operate by allowing the Scottish Ministers to extend by regulations the exemptions set out in the Bill from offences prescribed in the Bill. In particular, the Committee was concerned that the power might be capable of being used in such a way as to privatise water services.

15. The Committee appreciated that the powers were subject to affirmative procedure and that there was a limited requirement for prior consultation. However, given the use to which they might be put, the Committee indicated to the Executive that it was considering whether the provisions might be more suited to super-affirmative procedure or, indeed, whether it was appropriate to delegate the powers at all. The Committee asked for the Executive’s views.

16. In its response, the Executive reiterated the information provided in its memorandum to the Committee on the delegated powers in the Bill. It intends that these powers be exercised only where it emerges that the offences, which are broad in scope, catch activities that it had not been the Scottish Ministers’ intention to prohibit.

17. It is not the Bill’s intention to restrict inadvertently Scottish Water’s continuing ability, in accordance with existing statutory powers, to make arrangements with third parties in connection with the provision of water and sewerage services. Sections 4 and 5 of the Bill contain provisions which address one specific circumstance that might otherwise be caught by the offences contained in these sections. Sections 4(5) and 5(5), exempt third parties supplying water or providing sewerage services to others with the help of services provided by Scottish Water under section 30 of the Water Industry (Scotland) Act 2002 from the offences.
18. However, given the width of Scottish Water’s existing powers, it is difficult to predict at this stage all of the circumstances in which legitimate arrangements with third parties might be caught by the broad offence provisions in a way which was not intended. Some of these may only emerge later, once the provisions have come into force. Accordingly, the Executive remains of the view that the reserve powers in sections 4(7) and 5(7) of the Bill are necessary to reflect Scottish Water’s continuing flexibility to enter into arrangements with third parties in connection with the provisions of water and sewerage services.

19. The Executive considers that affirmative procedure and the consultation requirements set out in subsection (8) of each section provide for an appropriate degree of public consultation and Parliamentary scrutiny. The Executive’s reply is reproduced at Appendix 2.

Report

20. The Committee considered this response but concluded that it does not appear to add anything to the Executive’s position as set out in the Memorandum. In particular, the Committee disappointed that the Executive did not address the Committee’s principal concern that the power might be used to privatise water “by the back door”.

21. The Committee fully understands the Executive’s stated intention in proposing these delegated powers but has been given no explanation as to why the powers have been drafted much more widely than that intention may warrant. The Executive itself acknowledges the fundamental effect that these powers could have on the purposes of the Bill and has not denied that they are capable of being used as widely as the Committee has pointed out.

22. The Committee therefore reports to the lead committee that it has very serious concerns about the very wide extent of the powers the Bill proposes to delegate and the possible consequences that such delegations of power could have. It seems to this Committee that it is at least strongly questionable whether affirmative procedure provides sufficient safeguard given the width of these powers. This Committee therefore recommends that the Environment and Rural Development Committee consider these powers and the procedure chosen from its own perspective.

23. The Committee noted that subsection (8) of sections 4 and 5 binds Ministers to consult only Scottish Water, the Commission and “such other persons as they consider appropriate”. It seems to the Committee, however, that the proposed powers are so extensive as to require public consultation and it so recommends.

Section 17 Disconnections Code

Background

24. Section 17 contains substantive policy on disconnections. Section 16(6)(a) provides that compliance with the Disconnections Code is one of the conditions that must be satisfied if a request by a service provider to discontinue services is to be granted. The Committee considered that there might be a case for this Code to be
subject to some degree of more formal Parliamentary supervision such as laying the Code in draft before the Parliament for approval by affirmative resolution or requiring that the Code be confirmed by order made by the Ministers subject to negative procedure. In this regard, the Committee noted the example of the framework document under the Fire Bill also before it at Stage 1. The Committee asked the Executive for comment.

25. In its response, the Executive notes the Committee’s suggestion that the Disconnections Code, which is to be made by the Water Industry Commission for Scotland, be subject to a degree of more formal parliamentary supervision. However, it does not agree that this is necessary and explains the current position regarding disconnections which are essentially an operational matter for Scottish Water, taking into account the circumstances of each case.

26. Section 16(1) of the Bill makes specific provision for the discontinuance of non-domestic water supplies, at the request of licensed water service providers. It is not intended that the Code rewrite or extend the provisions of section 16 which place in statute the key provisions which must be observed in considering a disconnection. In particular, section 16(6) ensure that any disconnection must not adversely affect any supply of water to premises for domestic purposes or any supply to any other premises.

27. The Bill takes provisions which are at present left to the discretion of the industry and instead requires the regulator, with its responsibility to promote the customer interest, to set out a binding Code. Section 17(4) requires the regulator, in drawing up a Code, to consult on it, including the Convener of the Water Customer Consultation Panels who have a further responsibility to represent the customer interest.

28. In those circumstances, the Executive considers that it is unnecessary for provision to be brought into effect by the Scottish Ministers by order.

Report

29. The Committee accepts this further explanation from the Executive and approves the power as drafted.

Section 19 Powers of the Scottish Ministers

Background

30. Section 19 inserts a new section 56B into the 2002 Act. Section 56 of the 2002 Act already gives Scottish Ministers wide powers of direction over Scottish Water in relation to the exercise of its powers and functions. Section 56B enables the Scottish Ministers to make an order conferring on Scottish Water additional or supplementary functions relating to the provision of water and sewerage services. In effect these will become part of Scottish Water’s core functions (as defined in section 70(2) of the 2002 Act) and will require to be taken into account by the Commission, when assessing Scottish Water’s revenue requirements under the new regime for charging as set out in the amendments to the 2002 Act made by section 19 of the Bill.
31. The power will be subject to affirmative procedure and to prior consultation with Scottish Water and the Commission.

Report
32. This is, as the Executive recognises, a very wide power but there does not appear to the Committee to be anything inherently objectionable in it. The Committee noted that an order under the power can only add to the functions of Scottish Water. It cannot take any away.

33. The Committee therefore approves the power and the affirmative procedure chosen.

Section 20(3)  Meaning of “dwelling” in relation to eligible premises

Background
34. Section 20 defines “eligible premises” for the purposes of the licensing regime provided for at Part 2 of, and schedule 2, to the Bill. A licensed provider can make arrangements to provide services to customers in respect of such premises without contravening the general prohibitions in sections 4(3) and 5(3). By linking the definition to premises other than a “dwelling” for council tax purposes (within the meaning of Part 2 of the Local Government Finance Act 1992 (“the 1992 Act”)), the main purpose is to ensure that licensed providers cannot make arrangements to provide services to households. Section 20(3) enables the Scottish Ministers to vary, by order, the meaning of “dwelling”.

35. The Executive points, by way of example, to section 20(2) itself which already recognises that the regime under the 1992 Act to define a dwelling for council tax purposes might operate to exclude premises which, as a matter of policy, there would be no good reason to exclude from the scope of application of the new licensing regime under this Bill, such as “the residential part of part residential subjects”. This means that premises which are technically residential but which form part of a building whose main purpose is to function as a business, for example a care home, are not excluded from the scope of application of the new licensing regime for that reason alone.

36. The Executive envisages that the power under section 20(3) might be exercised should the definition of “dwelling” in the 1992 Act be further amended in a way which cuts across the policy objectives for this Bill. In the same way that the power to amend the definition of “dwelling” in section 72(4) of the 1992 Act itself can be varied under negative resolution procedure (see section 113 of the 1992 Act), subordinate legislation is considered appropriate here as the power is intended to be exercised only to ensure the policy intentions provided for in the Bill continue to be maintained.

Report
37. The Executive has explained the purpose behind this provision which it suggests would be used in only a limited fashion for the purposes outlined in the Memorandum.
38. The Committee observes, however, that the power in the Bill is very wide and could be used to amend the definition of “dwelling” in almost any way, for example by breaking the link with the council tax regime entirely.

39. The Committee therefore asked the Executive to explain further why it considers that a delegated power is appropriate in this case and whether its exercise should be subject to affirmative procedure rather than the negative proposed.

40. The Executive repeated that the power is intended to be used in very narrow circumstances and refers by way of example to section 72(4) of the Local Government Finance Act 1992 which enables the Scottish Ministers to make an order, which is subject to negative parliamentary procedure (section 112 of the 1992 Act), to vary the definition of dwelling for council tax purposes.

41. The meaning of dwelling under the 1992 Act (subject to the modification in section 20(2) of the Bill in respect of part residential subjects) is presently defined in a manner which meets with the policy objectives of the Bill, namely, to reflect the fact that domestic premises should not be subject to the new water and sewerage services licence regime.

42. If, however, the definition of dwelling under the 1992 Act was further amended, the Executive would require to consider whether this would, to any extent, cut across the policy objectives for the Bill. If it would do so, the Executive needs to have the flexibility to be able to respond to that by further modification of the definition of dwelling for the purposes of the Bill.

43. Given this, the Executive considers that the power is necessary and, given the equivalent powers in the 1992 Act, negative resolution procedure is appropriate.

Report
44. The Committee appreciates that there may be a need to amend the definition and that any amendment to the definition in the 1992 Act, if made by subordinate legislation under that Act, could not necessarily (for technical reasons) be reflected in relation to the Bill without specific powers in the Bill.

45. The Committee notes that the 1992 Act is cited as a precedent but observes that delegated powers in Bills were not subject to specialist Parliamentary scrutiny until 1992 and the establishment in that year of the relevant Committee in the House of Lords.

46. The Committee normally recommends that where a power is taken to amend primary legislation it should be subject to affirmative procedure unless good cause is shown to the contrary. The Committee is not convinced that the Executive has made a sufficient case for negative procedure and therefore, whilst approving the delegation of power, recommends that it should be subject to affirmative procedure rather than the negative procedure proposed in the Bill.

Paragraph 1(7) of schedule 2 Consideration of licence applications
Background
47. This power enables the Scottish Ministers to prescribe by order the circumstances in which the detailed provisions relating to the consideration of licence applications by the Commission would not apply. It was not entirely clear to the Committee how this power would operate or in what circumstances it was proposed that it be used. It asked whether, for example, it would be possible to exercise the power only in respect of sub-paragraph (5) so that, if the Commission were minded to refuse an application, it would not have to give the applicant notice of this fact and whether it would be open to disapply sub-paragraph (6) and ignore representations.

Report
48. The Committee observed that whilst it is not unknown for order-making powers to be conferred that authorise exemptions from certain provisions, the proposed power seems to go wider than this and, in particular, to allow the provisions of the Bill to be modified. The Committee was unsure whether, in so far as the power would allow the substantive obligations imposed by sub-paragraphs (4) to (6) to be disapplied (as opposed to the detailed requirements to be specified in orders), negative procedure would provide sufficient Parliamentary control. The Committee therefore asked for further explanation and justification of the power.

49. The Executive explains in its response the reasoning behind the provision but, in view of the Committee’s concerns, is considering further whether there are other ways to address these matters. **The Committee therefore draws the Executive's response to the attention of the lead Committee which it may wish to pursue at Stage 2.**

50. The Committee has no further comment to make on the Bill at Stage 1.
Appendix 1

SCOTTISH EXECUTIVE MEMORANDUM
TO THE SUBORDINATE LEGISLATION COMMITTEE
ON
SUBORDINATE LEGISLATION PROVISIONS

WATER SERVICES ETC. (SCOTLAND) BILL

Provisions Conferring Power to Make Subordinate Legislation

Purpose

This memorandum has been prepared by the Scottish Executive to assist the Subordinate Legislation Committee in its consideration, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of the provisions in the Water Services etc. (Scotland) Bill which confer power to make subordinate legislation. It describes the purpose of each such provision and explains the reasons why these matters have been left to subordinate legislation, rather than included in the Bill.

Outline and scope of the Bill

The objective of this Bill, as provided for in the Policy Memorandum accompanying the Bill, is to strengthen the regulatory framework for the water industry, ensuring that there is a robust, transparent regime that operates in the interests of all customers. The Bill also provides certainty for the water industry, and secures the Scottish Ministers’ public health, environmental protection and social policy objectives by prohibiting common carriage on the public water and sewerage networks, and prohibiting retail competition for household customers. In addition the Bill contains provisions relating to the Coal Authority.

The Bill is in 4 parts:

Part 1, The Water Industry Commission for Scotland
Part 1 replaces the office of the Water Industry Commissioner (“the Commissioner”) established under the Water Industry (Scotland) Act 2002, with a body corporate, the Water Industry Commission (“the Commission”), to improve the transparency, accountability and consistency of regulation in the water industry.

Part 2, Provision of Water and Sewerage Services
Part 2 of the Bill makes a series of provisions regarding the provision of water and sewerage services, including a prohibition of common carriage on the water and sewerage networks; the establishment of a licensing regime for retail competition for non-household premises; and enabling Scottish Water to establish a subsidiary for the purposes of applying for licences under the Bill.
Part 3, Coal Mine Water Pollution
Part 3 of the Bill makes provision regarding coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution.

Part 4, Miscellaneous and General
Part 4 of the Bill makes miscellaneous and general provision, including the procedure for exercising the order and regulation making powers provided under the Bill. As identified in section 27 of the Bill, the following subordinate legislation powers are contained in the Bill:

Delegated Powers

Part 1

Section 2 Water Industry Commissioner for Scotland

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

Section 1 of the Bill, by amendment of section 1 of the Water Industry (Scotland) Act 2002 (“the 2002 Act”), establishes the Water Industry Commission for Scotland, to replace the office of the Water Industry Commissioner. Section 2 enables the Scottish Ministers to dissolve the office of the current Commissioner, on such date as is appointed by order. This section will allow Ministers to dissolve the office of the Commissioner once the new Commission is established.

Reason for taking this power

It is considered that negative resolution procedure is the most appropriate procedure for exercising this power. Full Parliamentary scrutiny is not considered to be required as the dissolution of the office of the Commissioner is as a consequence of the establishment of the Commission. The establishment of the Commission is the substantive policy objective, and as such is subject to full Parliamentary scrutiny in relation to the provisions of the Bill as a whole.

Part 2

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

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

Section 4 prohibits common carriage on the public water supply system and retail competition in water services in relation to domestic customers. It does so by making it an offence for anyone other than Scottish Water or someone acting on its behalf to introduce water into the public water supply system; use the public water supply system to supply water to the premises of another person; or make
arrangements for the supply of water to the premises of another person through the public water supply system.

Reason for taking this power

Section 4(7) enables the Scottish Ministers to make regulations specifying circumstances where these prohibitions do not apply, or persons or categories of person to which they do not apply, or only apply to a certain extent. It is envisaged that these powers would be used if it emerged in practice that the prohibitions were catching activities that it had not been the Scottish Ministers’ intention to prohibit. If this turned out to be the case, it would be necessary to amend the provisions establishing the prohibitions in order for them to have the original intended effect. Since this power could have an effect on the fundamental provisions of the Bill, provision is made for any regulations made under this section to be subject to affirmative parliamentary procedure. In addition, the Scottish Ministers are required to consult on any regulations made under this section.

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

As with section 4 of the Bill which deals with the public water supply system, section 5 makes equivalent provision to prohibit common carriage and limit retail competition in relation to the public sewerage system and, among other things, makes it an offence for anyone other than Scottish Water or someone acting on its behalf to draw sewage from that system; use that system to dispose of sewage from the premises of another person; or make arrangements for the provision of sewerage to or the disposal of sewage from the premises of another person through that system.

Reason for taking this power

As with section 4(7) of the Bill, section 5(7) enables the Scottish Ministers to make regulations specifying circumstances where these prohibitions do not apply, to also be used if it emerged in practice that the prohibitions were catching activities that it had not been the Scottish Ministers’ intention to prohibit. Once again, given the significance of the power, such regulations would be subject to affirmative parliamentary procedure and prior consultation.

Section 7(2) Granting of a licence

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

Section 6 affords the Water Industry Commission powers to grant licences to persons authorising them to provide retail services in relation to water and sewerage services, in respect of premises connected to the public networks which are not dwellings.
Section 7 provides that the Commission may only grant such a licence if it is satisfied that the applicant can adequately perform the activities authorised by the licence. In assessing the ability of the applicant to do this, the Commission must have regard to the knowledge, experience, expertise, financial acumen and business viability of the applicant. Section 7(2) enables the Scottish Ministers to specify additional matters which might be relevant to the Commission’s consideration as to whether to grant a licence, which the Commission would be obliged to take into account when considering licence applications.

Reason for taking this power

The power is necessary to allow the Scottish Ministers to ensure as far as possible that licence holders from the outset are to be judged by reference to meaningful criteria on their ability to provide a consistent and reliable service to their customers, and provides for flexibility to respond to any unforeseen circumstances in relation to assessing the qualities of prospective licence holders. It is not at present anticipated that the power will be applied in anything other than exceptional circumstances, since the list of considerations provided for at section 7(2) of the Bill is considered to provide the Commission with sufficient scope to determine an applicant’s suitability. It is considered that negative resolution procedure provides sufficient Parliamentary scrutiny for this power.

Section 9(5) Commission’s power to charge fees

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

Section 9 provides for the Commission to obtain information from water and sewerage services providers as well as giving it powers, in subsection (5), to charge them fees for certain matters in relation to the exercise of its licensing functions. The licensing functions are set out in sections 6 to 11 of, and schedule 2 to, the Bill. The matters in respect of which the Commission may charge fees are to be specified by the Scottish Ministers by order.

Reason for taking this power

The subject matter of this power is a detailed operational matter and subordinate legislation is therefore more appropriate to ensure that the Commission has powers to charge fees for the range of activities it will have to carry out in connection with its licensing functions, such as, for example, processing licensing applications and taking associated enforcement action whilst affording flexibility to respond to changing circumstances resulting from the operation of the new regime. As indicated in the Financial Memorandum, this power will be used to ensure that licence holders will meet the ongoing costs of the Commission for operating the new licensing regime.
Section 16(3) Notices of Discontinuation of supply of water

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

Section 16 enables the holder of a water services licence to request Scottish Water to discontinue a supply of water to premises which that licence holder has arranged to provide with water services. Scottish Water must carry out this request provided that the conditions of the disconnection code (to be made under section 17) are met, and provided that the disconnection does not affect any supply of water for domestic purposes, or any supply of water to premises other than the premises in question.

Section 16(2) provides that a water services licence holder, at least 14 days before making such a request to Scottish Water, 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 16(3) enables the Scottish Ministers to make an order prescribing the form and content of such notices.

Reason for taking this power

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 secondary legislation. This also affords sufficient flexibility to make amendments to these details if required in light of the operation of the new regime. In any event, the substantive policy on disconnection is contained in the Bill (sections 16 and 17), and accordingly will be subject to Parliamentary scrutiny.

Section 19 Powers of the Scottish Ministers

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

Section 19 inserts a new section 56B into the 2002 Act. Section 56 of the 2002 Act already gives Scottish Ministers wide powers of direction over Scottish Water in relation to the exercise of its powers and functions. Section 56B enables the Scottish Ministers to make an order conferring on Scottish Water additional or supplementary functions relating to the provision of water and sewerage services. In effect these will become part of Scottish Water’s core functions (as defined in section 70(2) of the 2002 Act) and will require to be taken into account by the Commission, when assessing Scottish Water’s revenue requirements under the new regime for charging as set out in the amendments to the 2002 Act made by section 19 of the Bill.

Reason for taking this power

The making of an order under new section 56B is subject to affirmative procedure (as ensured by schedule 5, paragraph 7(7) of the Bill, which amends section 68 of the 2002 Act), ensuring that any amendment of Scottish Water’s core functions (as
defined by section 70(2) of the 2002 Act) will be subject to appropriate Parliamentary scrutiny, given its significance, and is subject to prior consultation with Scottish Water and the Commission.

Section 20(3) Meaning of “dwelling” in relation to eligible premises

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

Section 20 defines “eligible premises” for the purposes of the licensing regime provided for at Part 2 of, and schedule 2, to the Bill. A licensed provider can make arrangements to provide services to customers in respect of such premises without contravening the general prohibitions in sections 4(3) and 5(3). By linking the definition to premises other than a “dwelling” for council tax purposes (within the meaning of Part 2 of the Local Government Finance Act 1992 (“the 1992 Act”)), the main purpose is to ensure that licensed providers cannot make arrangements to provide services to households. Section 20(3) enables the Scottish Ministers to vary, by order, the meaning of “dwelling”.

Reason for taking this power

Section 20(2), however, already recognises that the regime under the 1992 Act to define a dwelling for council tax purposes might operate to exclude premises which, as a matter of policy, there would be no good reason to exclude from the scope of application of the new licensing regime under this Bill, such as “the residential part of part residential subjects”. This means that premises which are technically residential but which form part of a building whose main purpose is to function as a business, for example, a care home, are not excluded from the scope of application of the new licensing regime for that reason alone. It is envisaged that the power under section 20(3) might be exercised should the definition of “dwelling” in the 1992 Act be further amended in a way which cuts across the policy objectives for this Bill. In the same way that the power to amend the definition of “dwelling” in section 72(4) of the 1992 Act itself can be varied under negative resolution procedure (see section 113 of the 1992 Act), subordinate legislation is considered appropriate here as the power is intended to be exercised only to ensure the policy intentions provided for in the Bill continue to be maintained.

Section 26 Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure, unless the Order amends primary legislation, in which case affirmative resolution procedure.

Section 26 enables the Scottish Ministers to make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes or in consequence of the Bill.
Reason for taking this power

Schedule 5 of the Bill already contains amendments of enactments in light of the substantive provisions of the Bill. This power is required in the event that it becomes apparent, after enactment, that further legislative provision is required to fully implement the policy of the Bill. It is considered appropriate for such provision to be made by subordinate legislation. Section 27 provides that where an order is to be made under section 26 and the order does not amend primary legislation, negative resolution procedure will be used. Where it is intended that primary legislation is amended, the Bill provides for the closer Parliamentary scrutiny afforded by the affirmative resolution procedure.

Section 30 Short title and commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: No parliamentary procedure

Section 30 provides for the short title and commencement arrangements for the Bill. Section 30(2) provides for the Scottish Ministers, by order, to appoint a day when the provisions of the Bill are to come into force, and section 30(3) provides that different days may be appointed for different purposes.

Reason for taking this power

This is a standard order making power to ensure effective commencement of the Bill.

Paragraph 1(1) of Schedule 2 Licence applications

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

Further to Part 2 of the Bill, schedule 2 provides more detail on the operation of the licensing regime. Paragraph 1 concerns applications for licences. Paragraph 1(1) provides that the Scottish Ministers may specify in an order the exact form and information to be contained in an application for a water or sewerage services licence.

Reason for taking this power

As with the power in section 16(3) of the Bill (above), the detailed content of licence applications is appropriate to be set out in subordinate legislation for flexibility and given that these relate to technical matters arising from the operation of the new licensing regime.

Paragraph 1(4) of Schedule 2 Notices of licence applications

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

Paragraph 1(4) requires applicants for licences to publish a notice of their application, explaining the procedure whereby anyone can make a representation to the Commission about the application. The time within which the notice must be published, and the additional information it must contain, is to be specified by the Scottish Ministers by order.

Reason for taking this power

As with the power in section 16(3) of the Bill (described above), the subject matter of the power is a detailed operational matter and subordinate legislation is therefore more appropriate, and affords the Scottish Ministers flexibility to respond to changing circumstances resulting from the operation of the licensing regime.

Paragraph 1(7) of Schedule 2 Consideration of licence applications

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

Sub-paragraphs (4) to (6) of paragraph 1 of Schedule 2 provide that an applicant for a licence must publish a notice of their application; where the Commission plans to refuse an application, it must give the applicant notice of this, and specify a timescale within which the applicant may make representations to the Commission about the planned refusal; the Commission must take into account any representations made by the applicant, or any other person, in determining the application. Paragraph 1(7) enables the Scottish Ministers to make an order specifying circumstances in which these provisions do not apply.

Reason for taking this power

It is anticipated that this power will be exercised should the operation of the licensing regime highlight that certain classes of application ought not to be subject to the general procedures provided for at subparagraphs (4) to (6). Subordinate legislation is considered to be the most appropriate for this detailed operational matter and negative resolution procedure affords Parliament a sufficient degree of scrutiny.

Paragraphs 11(1) and 11(2)(g) of Schedule 2 Register of licences

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

Paragraph 11 provides that the Commission must keep a register of all water and sewerage services licences. Paragraph 11(2) prescribes the information which is to be included in the register. In this way policy intention behind this provision is currently contained on the face of the Bill. Paragraph 11(1) enables the Scottish Ministers, by order, to prescribe the manner in which the register is to be kept, and paragraph
11(2)(g) enables the Scottish Ministers to specify additional information to be included in the register.

Reason for taking this power

Once again, it is considered unnecessary to set out the detail of this on the face of the Bill. The subject matter of the power is a detailed operational matter and subordinate legislation is therefore more appropriate, and affords the Scottish Ministers flexibility to amend these details in the light of the operation of the new licensing regime. Negative resolution procedure affords the Parliament a sufficient degree of scrutiny.
Appendix 2

Water Services etc. (Scotland) Bill at Stage 1

Thank you for your letter of 28 September 2004 in which you requested an explanation of a number of matters in respect of the above. We set out our response in relation to each matter below, with apologies for not being able to meet your original deadline and with thanks for the slight extension given.

PART 2

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

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

In the Committee’s view and, as the Executive recognises, these powers could have a fundamental effect on the way in which the prohibitions operate and thereby on the fundamental provisions of the Bill.

In the Committee’s view these powers should be subject at the very least to affirmative procedure and a requirement of prior consultation. However, given the use to which they might be put, the Committee is considering whether the provisions are more suited to super-affirmative procedure or suited to delegated powers at all. The Committee asks for the Executive’s view and whether it would consider that such powers might more properly appear on the face of the Bill.

The Executive responds as follows:

Sections 4(7) and 5(7) of the Bill enable the Scottish Ministers to make Regulations to provide for exceptions to the offence provisions provided for at sections 4(1) to (3) and 5(1) to (3). As the Executive advised in its Memorandum to the Committee, it is intended that these powers be exercised only where it emerges that the offences, which are broad in scope, catch activities that it had not been the Scottish Ministers’ intention to prohibit.

It is not the Bill’s intention to inadvertently restrict Scottish Water’s continuing ability, in accordance with existing statutory powers, to make arrangements with third parties in connection with the provision of water and sewerage services. Sections 4 and 5 of the Bill contain provisions which address one specific circumstance that might otherwise be caught by the offences contained in these sections. Sections 4(5) and 5(5), exempt third parties supplying water or providing sewerage services to others with the help of services provided by Scottish Water under section 30 of the Water Industry (Scotland) Act 2002 from the offences.

However, given the width of Scottish Water’s existing powers, it is difficult to predict at this stage all of the circumstances in which legitimate arrangements with third parties might be caught by the broad offence provisions in a way which was not intended. Some of these may only emerge later, once the provisions have come into force. Accordingly, the Executive remains of the view that the reserve
powers in sections 4(7) and 5(7) of the Bill are necessary, to reflect Scottish Water's continuing flexibility to enter into arrangements with third parties in connection with the provisions of water and sewerage services.

In recognition of the fact that the making of such Regulations could have an effect on the fundamental provisions of the Bill, sections 4(8) and 5(8) provide that the Scottish Ministers must consult on any Regulations to be made under sections 4(7) or 5(7), and section 27(4) of the Bill provides that such Regulations are to be subject to affirmative parliamentary procedure. The Executive considers this provides for an appropriate degree of public consultation and Parliamentary scrutiny.

**Section 17 Disconnections Code**

Section 17 contains substantive policy on disconnections. Section 16(6)(a) provides that compliance with the code is one of the conditions that must be satisfied if a request by a service provider to discontinue services is to be granted. The Committee considers that there may be a case for the code to be subject to some degree of more formal Parliamentary supervision such as laying the code in draft before the Parliament for approval by affirmative resolution or requiring that the code be confirmed by order made by the Ministers subject to negative procedure. In this regard, the Committee notes the example of the framework document under the Fire Services Bill also before it at Stage 1. The Committee asks the Executive for comment.

The Executive responds as follows:

The Executive notes the Committee's suggestion that the Disconnections Code, which is to be made by the Water Industry Commission for Scotland, be subject to a degree of more formal parliamentary supervision.

However, at present, disconnection of all water supplies is essentially an operational matter for Scottish Water, taking into account the circumstances of each case. As indicated, section 16(1) of the Bill makes specific provision for the discontinuance of non-domestic water supplies, at the request of licensed water service providers. The Executive considered that, given the new procedure, the regulator should be required to set out, having consulted with the industry (as required by section 17(4)), essentially, a code of best practice as regards disconnections in accordance with these provisions. It is not, however, intended that the code rewrite or extend the provisions of section 16 which place in statute the key provisions which must be observed in considering a disconnection. In particular, section 16(6) ensure that any disconnection must not adversely affect any supply of water to premises for domestic purposes or any supply to any other premises.

The Bill therefore takes provisions which are at present left to the discretion of the industry and instead requires the regulator, with its responsibility to promote the customer interest, to set out a binding Code. Section 17(4) requires the regulator, in drawing up a Code, to consult on it, including the Convener of the Water
Customer Consultation Panels who have a further responsibility to represent the customer interest.

In those circumstances, the Executive considers that it is unnecessary for provision to be brought into effect by the Scottish Ministers by order.

**Section 20(3) Meaning of “dwelling” in relation to eligible premises**

The Executive states that the power would be used in only a limited fashion for the purposes outlined in the Memorandum. The Committee observes that the power in the Bill is nevertheless drafted very widely and could be used to amend the definition of “dwelling” in almost any way, for example by breaking the link with the council tax regime entirely.

The Committee asks the Executive to explain further why it considers that delegated powers are appropriate in this case and whether their exercise should be subject to affirmative procedure rather than the negative proposed.

**The Executive responds as follows:**

The Executive notes the Committee’s observation that the power provided for under section 20(3) of the Bill is widely drafted.

However, the power is intended to be used in very narrow circumstances. For example, section 72(4) of the Local Government Finance Act 1992 enables the Scottish Ministers to make an order, which is subject to negative parliamentary procedure (section 112 of the 1992 Act), to vary the definition of dwelling for council tax purposes.

The meaning of dwelling under the 1992 Act (subject to the modification in section 20(2) of the Bill in respect of part residential subjects) is presently defined in a manner which meets with the policy objectives of the Bill, namely, to reflect the fact that domestic premises should not be subject to the new water and sewerage services licence regime.

If, however, the definition of dwelling under the 1992 Act was further amended, the Executive would require to consider whether this would, to any extent, cut across the policy objectives for the Bill. If it would do so, the Executive needs to have the flexibility to be able to respond to that by further modification of the definition of dwelling for the purposes of the Bill.

Given this, the Executive considers that the powers is necessary and, given the equivalent powers in the 1992 Act, negative resolution procedure is appropriate.

**Paragraph 1(7) of schedule 2 Consideration of licence applications**

It is also not entirely clear to the Committee how this power would operate or in what circumstances it is proposed that it be used. For example, would it be possible to exercise the power only in respect of sub-paragraph (5) so that, if the Commission were minded to refuse an application, it would not have to give the
applicant notice of this fact? Would it be open to disapply sub-paragraph (6) and ignore representations?

The Committee observes that whilst it is not unknown for order-making powers to be conferred that authorise exemptions from certain provisions, the proposed power seems to go wider than this and in particular to allow the provisions of the Bill to be modified. The Committee is unsure whether, in so far as the power would allow the substantive obligations imposed by sub-paragraphs (4) to (6) to be disapplied (as opposed to the detailed requirements to be specified in orders), negative procedure would provide sufficient Parliamentary control. The Committee therefore asks for further explanation and justification of the power.

**The Executive responds as follows:**

In originally framing this provision, we had in mind the fact that, before the provisions are commenced more generally, the entity to be established by Scottish Water by virtue of a requirement in accordance with section 12 of the Bill, would require in the first instance to apply for a licence under Part 2 of the Bill to provide water and sewerage services. During that period, it was considered that there may be a case for a simplified applications procedure to be in place. It was also considered that there may be circumstances in which non-substantive amendments of existing licences e.g. to correct factual errors in the original licence, might be facilitated by means of a simplified procedure.

However, in light of the Committee’s concerns, we are considering further whether there are other ways to address these matters.

We hope that this is of assistance to the Committee in its further deliberations concerning the Bill. We would of course be happy to provide further clarification if that would be helpful.

**Scottish Executive**

3rd October 2004
ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

EXTRACT FROM THE MINUTES

16th Meeting, 2004 (Session 2)

Wednesday 16 June 2004

Present:

Sarah Boyack (Convener)  Roseanna Cunningham
Rob Gibson                  Karen Gillon
Alex Johnstone             Maureen Macmillan
Nora Radcliffe             Eleanor Scott (Deputy Convener)

Apologies: Mr Alasdair Morrison

The meeting opened at 11.32 am.

Water Services etc. (Scotland) Bill: The Committee considered arrangements for its consideration of the Bill at Stage 1 and agreed—

• the terms of a call for written evidence on the Bill;
• a timetable and programme of evidence, including proposed witnesses, for its Stage 1 consideration of the Bill;
• to delegate to the Convener authority to approve any claims under the witness expenses scheme arising from this programme of evidence.

The meeting closed at 12.25 pm.

Tracey Hawe
Clerk to the Committee
EXTRACT FROM THE MINUTES

18th Meeting, 2004 (Session 2)

Wednesday 30 June 2004

Present:

Sarah Boyack (Convener)          Rob Gibson
Karen Gillon                    Maureen Macmillan
Mr Alasdair Morrison            Nora Radcliffe
Eleanor Scott (Deputy Convener)

Apologies: Roseanna Cunningham and Alex Johnstone

Also present: Dr Sylvia Jackson and David Mundell

The meeting opened at 11.42 am.

Work programme: The Committee considered its forward work programme and—

- noted the likely timeframes for undertaking work in relation to the Water Services etc (Scotland) Bill and other forthcoming Executive legislation;

- agreed that it wished to receive informal briefings from Executive officials on consultations on Quality & Standards III and the Principles of Charging, and formal evidence from the Minister on these issues during its consideration of the Water Services etc (Scotland) Bill at Stage 1;

The meeting closed at 12.02 pm.

Tracey Hawe
Clerk to the Committee
EXTRACT FROM THE MINUTES

19th Meeting, 2004 (Session 2)

Thursday 9 September 2004

Present:

Sarah Boyack (Convener) Roseanna Cunningham
Karen Gilon Rob Gibson
Alex Johnston Mr Alasdair Morrison
Maureen Macmillan Nora Radcliffe
Mr Mark Ruskell (Deputy Convener)

The meeting opened at 10.01 am.

Water Services etc. (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1

Dr John Sawkins, Senior Lecturer in Economics, Heriot-Watt University;
Ian Jones, Chairman, Quayle Munro Holdings plc;
Alan Thomson, Chartered Institution of Water and Environmental Management;

Panel 2

Ian Duff, Chief Economist, Scottish Council for Development and Industry;
John Downie, Parliamentary Officer, Federation of Small Businesses in Scotland;
Bill Anderson, Campaigns Manager, Forum of Private Business, Scotland; and

Panel 3

Alan Barclay, General Manager – Port Dundas Whisky, Diageo;
Dr Ray Mountford, Commercial Development Manager, BP Grangemouth;
David Calder, Head of Manufacturing, Ciba Speciality Chemicals.

The meeting closed at 12.48 pm.

Tracey Hawe
Clerk to the Committee
ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

EXTRACT FROM THE MINUTES

20th Meeting, 2004 (Session 2)

Wednesday 15 September 2004

Present:

Sarah Boyack (Convener)          Roseanna Cunningham
Karen Gillon                    Rob Gibson
Alex Johnstone                  Mr Alasdair Morrison
Maureen Macmillan              Nora Radcliffe
Mr Mark Ruskell (Deputy Convener)

The meeting opened at 9.53 am.

Water Services etc. (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1

Stephen Boyd, Assistant Secretary, STUC;
David Watson, Scottish Organiser - Unison, STUC;
Bobby Buirds, Regional Officer – Amicus, STUC;

Panel 2

Nigel Bromley, Chief Executive, Gemserv;
Ceri Jones, Regulation and Competition Director – Northumbrian Water, Water UK; and

Panel 3

Professor Alan Alexander, Chair, Scottish Water
Dr Jon Hargreaves, Chief Executive, Scottish Water
Douglas Millican, Finance Director, Scottish Water.

The meeting closed at 1.15 pm.

Tracey Hawe
Clerk to the Committee
ENVIROMENT AND RURAL DEVELOPMENT COMMITTEE

EXTRACT FROM THE MINUTES

21st Meeting, 2004 (Session 2)

Wednesday 22 September 2004

Present:
Sarah Boyack (Convener)   Karen Gillon
Rob Gibson                  Alex Johnstone
Maureen Macmillan          Mr Alasdair Morrison
Mr Mark Ruskell (Deputy Convener) Nora Radcliffe

Apologies: Roseanna Cunningham.

The meeting opened at 10.34 am.

Water Services etc. (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1
Jim Lugton, Policy Officer, Scottish Council for Voluntary Organisations;
Trisha McAuley, Head of Corporate Resources, Scottish Consumer Council;

Panel 2
Ian Smith, Convener, Water Customer Consultation Panels;
Len Scoullar, Member – North West Water Customer Consultation Panel;

Panel 3
Councillor Alison Hay, Argyll and Bute Council, COSLA;
Councillor Alan Kenney, Fife Council, COSLA;
James Thomson, Finance Policy Manager, COSLA.

The meeting closed at 12.23 pm.

Tracey Hawe
Clerk to the Committee
ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

EXTRACT FROM THE MINUTES

22nd Meeting, 2004 (Session 2)

Wednesday 29 September 2004

Present:

Sarah Boyack (Convener)  Karen Gillon
Rob Gibson             Alex Johnstone
Maureen Macmillan      Mr Alasdair Morrison
Mr Mark Ruskell (Deputy Convener) Nora Radcliffe

Also present: Fergus Ewing and John Farquhar Munro.

The meeting opened at 9.38 am.

Water Services etc. (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1

Alan Sutherland, Water Industry Commissioner for Scotland;

Dr John Simpson, Director of Cost and Performance, Office of the Water Industry Commissioner for Scotland;

Panel 2

Tony Smith, Director of Competition and Consumer Affairs, Office of Water Services (Ofwat);

John Banfield, Senior Inquiry Director, Competition Commission; and

Panel 3

Stuart Rolley, Senior Development Manager, Environment Team, The Coal Authority;

Stephen Hill, Development Manager, Environment Team, The Coal Authority.

The meeting closed at 12.34 pm.

Tracey Hawe
Clerk to the Committee
Present:

Sarah Boyack (Convener)        Rob Gibson
Karen Gilon                    Alex Johnstone
Richard Lochhead               Maureen Macmillan
Mr Alasdair Morrison           Mr Mark Ruskell (Deputy Convener)

Apologies: Nora Radcliffe.

The meeting opened at 9.39 am.

1. **Petitions:** The Committee considered the following petitions—

   **PE517** and **PE645** on control of odours from waste water treatment works.

   The Committee agreed to take forward issues arising from the petitions when taking oral evidence from Ross Finnie MSP, Minister for Environment and Rural Development, under items 4 and 5. The Committee further agreed to incorporate consideration of these issues into its Stage 1 report on the Water Services etc. (Scotland) Bill.

2. **Executive consultations on water services:** The Committee took evidence from Ross Finnie MSP, Minister for Environment and Rural Development, on the following Executive consultations—

   - Investing in Water Services 2006-2014: the Quality and Standards III Project;
   - Paying for Water Services 2006-2010: a consultation on the principles of charging for water services.

3. **Water Services etc. (Scotland) Bill:** The Committee took evidence at Stage 1 from Ross Finnie MSP, Minister for Environment and Rural Development.

The meeting closed at 12.36 pm.

Tracey Hawe
Clerk to the Committee
ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

EXTRACT FROM THE MINUTES

24th Meeting, 2004 (Session 2)

Wednesday 27 October 2004

Present:

Sarah Boyack (Convener)  Rob Gibson
Karen Gillon             Alex Johnstone
Richard Lochhead        Mr Alasdair Morrison
Nora Radcliffe          Mr Mark Ruskell (Deputy Convener)

Apologies: Maureen Macmillan

The meeting opened at 10.34 am.

Item in private: The Committee agreed to consider item 4 (the draft Stage 1 report on the Water Services etc. (Scotland) Bill) in private, and to consider any subsequent drafts in private at future meetings.

Water Services etc. (Scotland) Bill (in private): The Committee considered a draft Stage 1 report, and agreed a number of changes. The Committee agreed to consider a further draft report at its next meeting.

The meeting closed at 12.36 pm.

Mark Brough
Acting Clerk to the Committee
Present:

Sarah Boyack (Convener)  Rob Gibson
Karen Gillon            Alex Johnstone
Maureen Macmillan      Mr Alasdair Morrison
Nora Radcliffe         Mr Mark Ruskell (Deputy Convener)

Apologies: Richard Lochhead

The meeting opened at 10.02 am.

**Water Services etc. (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. A number of changes were proposed and agreed to, some by division. The Committee agreed to schedule an extra meeting on 4 November 2004 to consider a further draft. The Committee also agreed arrangements for the publication of the report.

The Committee further agreed to take, in advance of Stage 2, additional oral evidence on proposed amendments suggested by the Minister for Environment and Rural Development, and agreed proposed witnesses.

The meeting closed at 11.58 am.

---

Mark Brough
Acting Clerk to the Committee
Annex B

Record of Divisions in Private

Environment and Rural Development Committee

25th Meeting, 2004 (Session 2)

Wednesday, 3 November 2004

1. The Committee divided on a proposal by the Convener:

That the Committee accepts the arguments presented by the Scottish Executive for the prohibition of common carriage.

The amendment was agreed to by division: For 6, Against 1, Abstentions 0:

For: Sarah Boyack, Rob Gibson, Karen Gillon, Maureen Macmillan, Nora Radcliffe, Mark Ruskell.
Against: Alex Johnstone.

2. The Committee divided on a proposal by the Convener:

That the Committee accepts that retail competition in water and sewerage services should be restricted to the non-domestic sector.

The amendment was agreed to by division: For 6, Against 1, Abstentions 0:

For: Sarah Boyack, Rob Gibson, Karen Gillon, Maureen Macmillan, Nora Radcliffe, Mark Ruskell.
Against: Alex Johnstone.

3. The Committee divided on a proposal by the Convener:

That the Committee recommends that the general principles of the Bill should be agreed to.

The amendment was agreed to by division: For 7, Against 1, Abstentions 0:

For: Sarah Boyack, Rob Gibson, Karen Gillon, Maureen Macmillan, Mr Alasdair Morrison, Nora Radcliffe, Mark Ruskell.
Against: Alex Johnstone.
ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

EXTRACT FROM THE MINUTES

26th Meeting, 2004 (Session 2)

Thursday 4 November 2004

Present:

Sarah Boyack (Convener)  Rob Gibson
Maureen Macmillan  Mr Mark Ruskell (Deputy Convener)
Nora Radcliffe

Apologies: Karen Gillon, Alex Johnstone, Richard Lochhead, Mr Alasdair Morrison

The meeting opened at 12.45 pm.

Water Services etc. (Scotland) Bill (in private): The Committee considered and agreed a draft Stage 1 report.

The meeting closed at 12.50 pm.

Mark Brough
Acting Clerk to the Committee
ANNEX C – ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

SUBMISSION BY DR JOHN W SAWKINS, DEPARTMENT OF ECONOMICS, HERIOT-WATT UNIVERSITY

Proposed Regulatory Regime

1. The Bill’s proposals relating to the reform of the Scottish water industry’s regulatory regime complete a process, begun in 1996, to create an independent economic regulatory body similar to that which has operated in England and Wales since 1989\(^\text{185}\).

2. To date, neither the Office of the Water Industry Commissioner for Scotland, nor the predecessor body the Scottish Water and Sewerage Customers Council, have had powers to determine charges. Instead they have acted as advisory bodies, most recently to Ministers of the Scottish Executive.

3. Although dissatisfaction with regulatory arrangements has been articulated by politicians – most recently by the Finance Committee in their Report on Scottish Water (Scottish Parliament 2004) – rather less attention has been paid to a more fundamental issue: the lack of clarity over the public (societal) perception of water and sewerage services. This in turn has resulted in a gap between what is expected of the service supplier (Scottish Water) / regulatory regime, and what they are actually capable of delivering within the current statutory framework.


   At one end of the spectrum water and sewerage may be regarded purely as economic services delivered in response to customer demand at a price which reflects the costs of supply. This perception stresses the commercial nature of the industry’s output. It is sympathetic towards metered (volumetric) charging systems, marginal cost pricing and the financing of the industry through charges which contain no element of cross subsidy. Affordability concerns for domestic users are dealt with via the tax and social security systems, and not through modified (artificially low) water charges.

   At the other end of the spectrum water and sewerage may be regarded as social services delivered to every consumer as of right. This perception stresses the public health benefits of universal access, is sceptical of metered (volumetric) charging systems lest access be denied to those unable to pay, and implies financing of the industry through general taxation.

5. On first glance we may conclude that water and sewerage should be regarded as social services from the point of view of domestic households, and economic services for commercial (business) users. In fact the distinction is less clear cut. Whilst domestic households clearly have need for a basic level of service which covers water for drinking, cooking and sanitation – implying a social service model: some households have large amounts of discretionary

\(^{185}\) Known as OFWAT.
use for luxury appliances such as swimming pools, jet hoses etc – implying an economic or commercial model.

Similarly, whilst for large commercial organisations water and sewerage services may be regarded as one of many inputs into the production process – implying the economic model: for small rural businesses in economically fragile communities it may be argued that the social service conception is more appropriate.

6. In order for the regulatory regime proposed in the Bill to function properly it is essential that policymakers clearly articulate their understanding of water and sewerage services, and therefore the role of Scottish Water as public sector deliverer and the Water Industry Commission as independent regulator. The questions that must be answered include the following:

i) Are water and sewerage charges to be regarded as an instrument of social policy? (i.e. does the Executive seek to use the charging regime to deliver social objectives such as geographical tariff harmonisation or financial relief for low income households?)

ii) To what extent will the publicly owned Scottish Water be required to deviate from its commercial objectives in order to meet the political objectives (e.g. social inclusion) of its owner.

iii) To what extent will members of the publicly appointed Water Industry Commission be required to deviate from their narrow technical task in order to meet the political objectives of the Executive? (e.g. will the Commission be asked to take a view on the question of domestic affordability?)

7. The proposals contained in the Bill are generally well designed. They bring regulatory arrangements for Scottish water services broadly into line with those in England and Wales, and should enable the new Commission to follow the five principles of good regulation set out by the Better Regulation Task Force (2000)\textsuperscript{186}.

8. Although inevitable that tension should exist between regulator and regulated, the way in which this relationship has recently been portrayed as a ‘personal battle’ by some politicians and sections of the Scottish media, has been both counterproductive and detrimental to the customer interest. The appointment of a Commission comprised of individuals with particular areas of expertise and the power to determine charges should limit opportunities for the personalisation of conflict and political intervention in charge setting.

**Outstanding Issues**

9. The Scottish Executive Minister for the Environment and Rural Affairs has commissioned the next Strategic Review of Charges from the current Water Industry Commissioner for Scotland. The latter is due to publish the Draft

\textsuperscript{186} According to the Principles of the Better Regulation Task Force (2000), good regulation should be: proportionate, accountable, consistent, transparent and targetted.
Determination of Charges at the end of June 2005, but it is envisaged that the new Commission will approve the Final Determinations in November 2005. Given the short time period between Draft and Final Determinations the new Commission will have little chance to do more than review the work of the Commissioner. Which begs the question of whether it is appropriate for the new Commission to take on its new duties between Draft and Final Determinations. It may be more appropriate to delay the transfer of responsibilities until April 2006 when the new charges come into force.

10. The next Strategic Review of Charges will cover the period 2006-2010, whereas the investment programme (Quality and Standards 3) will run from 2006-2014. There would be merit in harmonising these time periods to ensure that investment and charging considerations run side by side. Helm (2003) suggests lengthening the time between price reviews to avoid problems of uncertainty and regulatory gaming, whilst allowing greater scope and flexibility for changes to the agreed charges within periods – i.e. greater use of ‘interim determinations’.

11. At present Scottish Water has a general sustainable development duty which is not mirrored for the Water Industry Commissioner. The new Commission should have a similar sustainable development obligation.

**Competition in the Non-Domestic Sector**

12. The experience of competition within the English and Welsh water and sewerage industry is instructive. It should be noted, for example, that policymakers in England and Wales reached a conclusion in regard to common carriage diametrically opposed to that contained in the Bill. Not only is common carriage permitted, but the economic regulator, Ofwat, has worked with the private suppliers to develop access codes.

13. The short Financial Memorandum contained in the Explanatory Notes to the Bill reports estimated costs of establishing a licensing regime in the retail market for non-household customers. It should be noted that the task is highly complex, and the cost estimates subject to considerable uncertainty.

14. At one level, for competition to be worthwhile, the costs of additional regulation (including the establishment and running of the licensing regime) must be more than outweighed by the benefits to customers in terms of lower prices and improved service. This is a matter for conventional economic cost benefit analysis. At another level, the critical matter is not whether competition actually occurs, but whether the threat of competition is credible enough to induce changes in behaviour by the incumbent supplier which benefit the customer. Consequently the ‘success’ or ‘failure’ of the introduction of retail competition should not be judged in terms of the numbers of competitors actually entering the market, but the effect on tariff and service levels to retail consumers as a whole.

15. A clear, but unquantifiable, risk is that the regulatory authority itself grows in size and becomes much more demanding in terms of information requirements and funding for its own operations. In a study of competition in the English and Welsh industry I made the following remarks which might apply equally to Scotland,

“One of the ironies of Ofwat’s duty to facilitate competition has been the growth in the scale and scope of its involvement with the industry and therefore its size. The amount of information gathered for monitoring purposes has grown unremittingly as the suite of performance indicators has expanded, placing a particularly heavy burden on the small companies. In addition, further substantial informational demands are made as part of the Periodic Review process every five years.

It may be argued that an early expansion of regulatory activity was necessary to take control of an industry that was exploiting the generous post-privatisation regulatory settlement. Much early groundwork was also necessary to put in place robust and reliable reporting systems that would deliver timely information of a high quality. Nevertheless, there is little evidence to suggest a scaling-down of regulatory activities in the near future, which would be the logical concomitant of increased competition. Initiatives such as the removal of the large-user tariffs from the tariff basket, although symbolically important, have not, apparently, turned the tide of regulatory expansion.”

[Sawkins (2001) p 209]

16. According to the Bill’s Explanatory Notes, the prohibitions on common carriage and competition in the domestic sector are underpinned by public health, environmental protection and social policy objectives. It is unclear why a case for a prohibition on retail competition may not also be made on the grounds of social policy – for example, to protect the geographic harmonisation of charges.

References


SUBMISSION BY IAN JONES, QUAYLE MUNRO HOLDINGS PLC

I write as a prelude to my appearing as a witness at your Committee meeting on 9 September.

I would like to point out that I have not had any reason to examine Scottish Water’s (“SW”) affairs since the investigation by the Committee in 2001. I can therefore only comment generally on aspects on the proposed legislation.

1 The creation of the Water Industry Commission for Scotland

A strong and independent regulation regime is essential – SW is a public sector monopoly provider. The regulatory body must be skilled in its assessment of the business and internal procedures of SW. It needs resource and professional expertise of a high order. It also needs to be tough.

There are in my judgement arguments that committees can defuse rather than enhance these qualities. I understand that it is now accepted that regulators should be based on a wider constitution ie with non-executive components to oversee their executive. Ministers will be responsible for the appointments to both boards. In making appointments to the Commission it would seem highly advisable that each member should be absolutely independent of SW and indeed of ministers and have relevant professional expertise. It may be thought appropriate that major customers should be represented. If the non-executive members lack the toughness and skills which are necessary the Commission Executive will not receive the support it will require and the system will work less well than at present.

The various robust debates which have taken place between the Water Industry Commissioner, the Scottish Executive and Scottish Water over the last two years demonstrates the level of robustness required in the system.

Under the proposed legislation a major new function of the Water Industry Commission is charge determination. This contrasts with the present situation where charges are set by SW then approved by the Water Industry Commissioner but finally determined by ministers in the event of dispute. It is sensible to remove Ministers and the Scottish Executive from the charges debate which is necessarily complex and technical. Charge determination is the end product of a whole range of other key factors including investment levels, staffing levels and employment arrangements, depreciation policy etc. There is also the difficult question of cross-subsidy between customers. There is an inevitable tension between SW and its regulatory authority. The regulatory authority has a key role in ensuring the efficiency of a monopoly provider, and in assisting in or prompting SW to take some of the tougher decisions for example, extra investment may mean job cuts.

Under the proposed legislation, the Commission’s decisions on charges are subject to the scrutiny of the Competition Commission. This is in my opinion a wise move – the Competition Commission has skills additional to that of the Water Commission which can enable in depth financial analysis of the basis of key
decisions made by SW which affect the efficiency of its delivery of its services in the future.

2 The question of common carriage and the licensing regime

I recollect in 2001 that there was significant debate about the impact of the principle of common carriage through the network and what might be the effect on SW particularly in regard to the possible pricing pressure which could be exerted by major industrial customers therefore leading to upward pressure on household customers to balance the loss to SW that would thereby arise.

The introduction of legislation making the law in Scotland clearer is a necessary step bringing with it the introduction of “a retail market” for non household customers and opening up the network to other water and sewerage service providers but subject to a licensing system which will ensure appropriate quality and a pricing system which “geographically harmonises charges”.

I understand that geographically harmonises charges means prices that reflect the need to provide a general service across the whole of Scotland.

This is designed to protect SW as the monopoly but general provider across the whole spectrum of customers. It must be suspected that the principle of requiring a retail provider to charge out prices which reflects the cost of a general provider across the whole country may attract criticism. I understand there is cross-subsidy in Scotland not only from the industrial sector to the household sector but also between different classes of household user ie between the higher Council tax bands and the lower Council tax bands. These particular questions are essentially legal ones and I am not qualified to comment on whether the proposed legislation is capable of being tested or not. Undoubtedly there will be debate, cross subsidy between different classes of customer is widespread in commercial life but SW is in a somewhat unique position in view of its monopoly.

SUBMISSION BY THE CHARTERED INSTITUTE OF WATER AND ENVIRONMENTAL MANAGEMENT

PART 1 – Water Industry Commission for Scotland

Is the scope and effect of the change appropriate?

The inclusion of potential customers as detailed in 1(2)(b) is welcomed and serves as a more complete view of those affected by the actions of a service provider.

For completeness, persons not likely to be in receipt of the service but being adversely impacted by the provision of the service to others should also be included.

Will the proposals achieve the stated aims of improving the transparency, accountability and consistency of regulation in the industry?
Transparency is extremely difficult to measure objectively. Recent press releases have positioned the Commissioner and Scottish Water as opposing sides with Scottish Water defending their position against comments made by the commissioner. Other press reports have shown disagreement regarding financial calculations.

These reports do not support the case of a transparent commissioner. On the contrary it suggests that something is being hidden or the full truth is being withheld. Although this view may well be the opposite of reality, it is how many people perceive the role. This perception is unlikely to alter by changing the legislation in the manner proposed.

The proposed commission will have between three and five members excluding the Chief Executive. Increasing numbers should help improve accountability and help for a more balanced view to be formed of the various issues which will arise.

Our only concern is that the numbers may be a little low and that a membership of between six and eight or more may be more effective. Small groups can stifle healthy debate and can lead to a limited outlook within the group members.

The consistency of the application of regulation should improve with a larger commission under good leadership.

**PART 2 – Provision of Water and Sewerage Services**

Are the provisions of this Part of the Bill (i.e. the various elements of the proposed model of competition, and the framework for charge determination) appropriate and clearly defined?

Section four subsections (1) to (3) clearly states the prohibition of common carriage within the public supply system. These are appropriate as far as the legislation is structured.

Section A of the draft policy states that there is a health and environmental risk associated with common carriage. CIWEM however, have not come across any substantiation of this statement and would wish to re-assert that common carriage, under proper controls, will have no added risk to the customer. The wider choice of supplier should drive prices downward with benefits to customers.

CIWEM also recognise that the Bill is set up to prevent this course of action but fail to understand the logical process which excludes common carriage.

The introduction of retail competition is welcomed and the licensing of service providers is clearly laid out and appropriate.

Provision for a Scottish Water subsidiary service provider is an option which enables Scottish Water to supply retail services in water and waste water. The Bill provides for the transfer of property (if required) to the subsidiary including liabilities and rights. CIWEM would suggest that the Bill is more specific in that the subsidiary must be seen to be transparent in all aspects of its operation. This
transparency would provide competitors with access rights to end of year accounts and audits to provide assurance that competition is fair and no bias is afforded to “in house” provision.

What are the likely effects of the provisions on the fair and effective provision of water and sewerage services?

CIWEM believes that the interest in entering the retail market will depend on the likely opportunities for providing a competitive service. This will be influenced by the transparency of the framework and the ultimate objectives of Scottish Water and the Scottish Executive. The proposed legislative framework makes provision for entrants through the issue of licences. CIWEM do not believe that this will actively promote market entry especially when a Scottish Water subsidiary could be part of the competition.

CIWEM recommend that a target is set for competition in the retail supply of water and waste water services. This target should take the form of a market share and should have a time scale attached. This may not be possible to set into legislation but should be set as a target for Scottish Water. The target would encourage potential entrants and help develop a competitive market for non-domestic retail services.

With respect to the broader aspects of the Bill, CIWEM believe the formation of the commission would help external organisations and customers perceive a more balanced and equitable approach.

Effective provision of the services will depend on many factors some of which will be supported by the new legislation. It is the view of CIWEM that the balance of charges and investment is critical to the future of the Scottish industry and the customers that it serves. The shareholder and profit elements that complicate the England and Wales regulations have led to considerable debate in the media. These are rarely well informed and can give customers a poor perception of both companies and the regulator.

Scotland has the benefit of a much simpler arrangement and should develop this to show that the customer is getting the best deal. The proposed legislation could promote this by more open planning and prioritisation. Customers with service problems should be aware of investment criteria and of the investment programme for the next five to ten years. This would help encourage open debate of decisions and provide a more transparent and effective service.

PART 3 – Coal Mine Water Pollution

Is the scope and effect of the provisions appropriate?

The scope and effect of the new legislation are appropriate and appear to cover all likely eventualities
PART 4 – Miscellaneous and General

Is the scope and effect of the provisions appropriate?

The scope and effect of the new legislation are appropriate.

OTHER MATTERS

How helpful do you find these documents?

The explanatory notes and the consultation paper are useful in explaining the various Parts of the Bill and the key questions that the executive would like to be considered. It would be helpful to see the previous responses to the earlier consultation. CIWEM understand that these are public domain documents but they were not readily available for examination.

Are the financial consequences of the Bill sufficiently clear?

The summary table of costs clearly states estimated costs and liable parties. Licensing regime preparation is the most expensive cost at over £12m. This appears to be extremely high and should be broken down into smaller components for better understanding of the costs.

Are the effects of the Bill on sustainable development accurately and clearly described?

Part 3 of the Bill relates directly to sustainable undertakings through coal mine water pollution prevention and mitigation. The link is not explicit and to many readers of the legislation it could not be described as clear. The remaining Parts of the Bill do not have any clear links to sustainable development albeit they do impact on environmental systems and their management.

If the Scottish Executive wish to promote sustainable development through legislative measures such as the said Bill, CIWEM would suggest that sustainability is explicitly incorporated in the text. CIWEM also recognise the difficulties in drafting legislation which would cover sustainability in such explicit terms.

The larger part of the Bill is concerned with the formation of the Commission, the licensing regime for retail competition, and charge determination. All of these are related to sustainable development issues although the relationship is indirect. The relationship is not necessarily positive nor encouraging sustainability.

Do you have any comments on the consultation that the Scottish Executive carried out prior to the introduction of the Bill?

CIWEM is the leading professional and qualifying body for those who are responsible for the stewardship of environmental assets. We therefore welcome the opportunity to comment on legislative and other proposals related to the environment at all stages of progress.
The earlier consultation was submitted by CIWEM in January 2004. As mentioned earlier under “How helpful do you find these documents?”, it would be useful to have easier access to other responses at this stage. These would help to broaden the approach and evaluate the interpretation that others place on the documents. This would permit CIWEM to consider these in context of our own comments.

SUBMISSION BY THE SCOTTISH COUNCIL FOR DEVELOPMENT AND INDUSTRY


Thresholds

The consultation on the draft Bill asks, “Should the Bill include provisions for transitional thresholds, and is so how should they be set?”

SCDI is concerned that the draft Bill does not contain provisions for transitional thresholds. This is different to the model used in England and Wales. In its response to “Managing Change in the Water Industry” SCDI stated that, “competition in other utility sectors has been introduced gradually. This type of phased competition would seem sensible to allow the industry to adjust.” As paragraph F8 of the 200 consultation document states, “in other utility sectors, competition has been introduced gradually, starting with the largest customers. This has helped to stimulate competition, and iron out the technical problems, on a small number of higher value customers. Since licences impose obligations as well as rights, there is an argument for making various classes of licences available, perhaps on different timescales, such as:

- licences to supply individual, large customers;
- licences to supply all customers above a certain threshold (for example 100 megalitres);
- licences to supply all customers in an area.”

SCDI recommends that there should be a phased opening of the market beginning with all customers above a certain threshold. This threshold could be 50 megalitres as in England and Wales.

Timetable

SCDI also has concerns in regard to the timetable for the implementation of the Bill and the speed at which this would allow the market to be opened to competition. Scottish Water must be allowed sufficient time to prepare for competition to ensure that it can provide its services on the same basis as potential competitors and to accommodate the requirements of the new licensees.
SCDI does not feel that the 1 April 2006 target date, after which the market will be opened, allows enough time to confidently assume that the efficient operation of the market will continue and customers will not be affected adversely by the changes. Scottish Water should also be allowed to honour any existing legacy contracts that are outstanding once the new legislation takes effect to ensure that customers continue to be properly served.

**Cost of Market Opening**

The opening of the water market in Scotland will impose costs on Scottish Water as it undertakes the preparations necessary to cope with the opening of the market and the demands of new licensees. These include the establishment of its own retain subsidiary and the development of systems and processes to interact with the new retailers, such as billing facilities. It should also be recognised that some existing synergies within Scottish Water will be lost due to market opening and this will result in increased cost to the organisation. These cost increases will require to be funded and the burden may be passed on to the customer.

Funding should be allocated to Scottish Water to allow these preparations to be undertaken so that the financial burden placed upon the organisation does not deter it from carrying out its proper functions. It should be noted that the opening of the market is coming at a time where there are other substantial tasks being undertaken by Scottish Water to ensure that Scotland’s water systems and infrastructure are fit for purpose and meet the highest environmental standards.

**Trade Effluent regulation**

It is noted that in “Managing Change in the Water Industry” it was stated that a new charging basis to replace the Mogden formula may be considered. SCDI stated in its response to that consultation, “any proposal to changes in the Mogden formula where charges are based on the principle of “polluter pays” would be monitored with interest by SCDI. Increasing innovation in the treating of trade effluent would be of benefit to industry and the wider community and would be welcomed.” However, such innovation must be spread throughout the industry.

SCDI does not feel that the Sewerage Services retail licence should apply to the provision of trade effluent services. The charging structure for trade effluent is already subject to competition and including this in the retail licence could undermine the existing regulation in regard to trade effluent.

**Cross-Subsidy**

Finally, an issue that is not dealt with in the draft Bill is in regard to how the existing cross-subsidy between business customers and domestic customers will be addressed. As competition in the Scottish Water industry increases, the ability of Scottish Water to continue the current practice of subsidising domestic consumers from the income received from non-domestic customers will be
reduced. This issue needs to be addressed by legislation as there could be a negative impact on business customers.

**SUBMISSION FROM THE FEDERATION OF SMALL BUSINESSES IN SCOTLAND**

As Scotland’s largest direct-member business organisation, the Federation of Small Businesses in Scotland welcomes this opportunity to comment on the Scottish Executive’s proposals for retail water services in the non-domestic market. The proposals as set out in the Bill will almost certainly affect all of our 18,000 members. Accordingly we take a strong interest in the development of the proposals and would be delighted to discuss in more detail any of the comments raised in our response.

**Part 1 of the Bill: replaces the Water Industry Commissioner with the Water Industry Commission**

The Water Industry Commission

1.1 The FSB is generally supportive of the proposal to introduce a Water Industry Commission (WIC). In our response to the draft Bill, we highlighted our concerns about too much responsibility being given to an individual (the Water Industry Commissioner) particularly in light of the new licensing processes associated with the Bill and that lines of accountability had been unclear, in particular, there was little or no reference to the role of the Minister. The Bill, as published, makes significant changes to the regulator’s powers, such as setting Scottish Water’s charges, rather than advising Ministers on these. The principle that the Minister will set the policy and the WIC must deliver a charges scheme which reflects this policy, is certainly much clearer and we hope that these proposals will go some way to addressing our concerns.

**Part 2 of the Bill: makes a number of provisions regarding water and sewerage services**

**Competition**

2.1 The FSB notes that the main aim of the Water Services Bill comes in response to the Competition Act, recognising “the impact it could have on the Scottish water industry”. This means that the Scottish Executive has opted for a minimal level of competition in the water industry in order to satisfy any legal challenge under this Act. Two main reasons – social policy objectives and public health – explain this decision to opt for minimal competition. We welcome this clarity about why this route has been chosen for the industry, though we maintain that it was foolish to suggest that common carriage was impossible on public health grounds when the same process (albeit limited) was being actively considered in England. We therefore welcome the acknowledgement from the Scottish Executive to “observe with interest” developments in England in relation to common carriage.

---

188 Scottish Executive, Draft Water Services (Scotland) Bill - Report on Consultation, p3
189 ibid, p2
Licensing Regime

2.2 The FSB is happy that the licence arrangements outlined in sections 6-11 are satisfactory.

Continuation of Provision of Services

2.3 Section 15 outlines the continuation of provision of services measures, that is to say the circumstances under which Scottish Water must continue to supply water after agreements between the occupier of the premises and a provider come to an end, for example following the revocation of a licence. We would suggest that the period of 2 months referred to under subsection (2) be extended to 6 months, given the lengthy and complex delays which could arise following, for example the revocation of a provider’s licence, or the provider ceasing to trade.

2.4 In section 15, subsection (5) which amends the 1980 Act, Scottish Water would no longer be a supplier of last resort and would not be required to supply water for non-domestic purposes to a customer where it believes there is no reasonable prospect of recovering charges from that customer. However, Scottish Water would remain a supplier of last resort to domestic premises. We believe that this is a mistake and is not in line with the Executive’s wish to develop a business-friendly environment in Scotland, which does not stigmatise business failure, but encourages entrepreneurs to start new businesses.

2.5 We believe that a situation could arise where business owners who have a poor credit-rating, perhaps previously bankrupt, may be refused a supply by other providers and by Scottish Water on the basis that they are likely to be a ‘high-risk’ customer, leaving the business unviable. We cannot support this provision and suggest it be amended to ensure Scottish Water remains the supplier of last resort to non-domestic users.

Discontinuation of Supply of Water

2.6 The FSB raised concerns about timings relating to the discontinuation of supply procedures but these have been addressed by the Scottish Executive and we believe that the measures outlined in section 16 are satisfactory.

Disconnections Code

2.7 Section 17, which proposes a new disconnections code, was not mentioned in the draft Bill. We welcome this proposal and would suggest that, under subsection (4) representatives of non-domestic users be included as a statutory consultee for the purposes of devising the disconnections code.

Additional Remarks

3.1 The FSB is still unclear about provisions relating to customer care standards and customer representation for non-domestic customers who switch to alternative provider. At present, we are in discussion with the Water Customer Consultation Panels to clarify this issue.
A. Introduction

Water provision is often claimed to be a complicated business that only those with years in water services only can understand. We challenge that and believe that the provision of water through pipes is not intrinsically a complicated technology. What complicates Scottish Water is that there have been years of failure to invest in what is, in some areas, a crumbling infrastructure. Add to that stricter EU standards and a disparate pricing structure in Scotland and what we have is a major management and financial problem.

We are also keenly aware that there was no consultation at all before last year's pricing changes that resulted in huge increases in some small commercial water users' bills. There was no transparency over this and no real means of appeal against individual price increases.

B. Summary of main comments and recommendations

- We support the recommendation to appoint a Water Industry Commission, but this has to be a new start and not just the old set-up under a new guise.

- Maximum charges should apply 'across the board.' In May 2003 'revenue caps' being placed on both domestic and commercial water charges but a maximum charge (about 10%) was only applied to the domestic sector. This resulted in increases for some small businesses rising by as much as 1,000% while no domestic water user faced increases of any more than 10%. Final approval of maximum charges must lie with the Minister who should seek parliamentary approval.

- The Scottish Parliament must not lose control of Scottish Water by delegating control of policy and charging to an appointed and unelected Quango (the Water Industry Commission). Ministers must retain the power to intervene and Parliament the right to force them to do so.

- It is greatly to be regretted that there is no mention made of the obligation to consult. The failure to consult was a major criticism in the Finance Committee's report and has created something of a crisis in the relationship between the Scottish Executive and Scotland's business sector. We are aware that the consultation paper Paying for Water Services 2006-2010 says: 'Consultation is an essential and important aspect of Scottish Executive methods.' We would like to see this principle enshrined in this legislation.

- We felt that too much power was invested in one person - the WIC - and welcome the move to appoint a Water Industry Commission. However, we are concerned that in para 7, it seems that a Chief Executive can be appointed by the Minister without the endorsement of the Commission, as a whole. We would rather see the Chief Executive appointed by the Commission with the endorsement of the Minister. The Chief Executive must have the full backing of the Commission and, in turn, the Commission the full backing of the Minister.
• Business ratepayers do have the right to appeal against rateable values. No such right exists for water users. This Bill is heavy on offences and penalties but light on the rights of the water consumer. All water users should have the right of appeal against what they believe is unfair billing, service or treatment by Scottish Water. There should be a formal appeals procedure heard by either a Water Consultation Panel or by a neutral tribunal.

• No mention is made of the Water Consultation Panels in the Bill. They provided an excellent service to many distraught business water users. Whilst we can see the need to streamline this body and give it some more ‘teeth’, a consumer watchdog is essential.

C. Detailed analysis of the Water services Bill

Part 1 Water Industry Commission for Scotland

1. Water Industry Commission for Scotland

The present water Industry Commissioner was severely criticised in the Finance Committee’s report, so we support this recommendation, but this has to be a new start and not just what has been in the past under a new guise. This is the chance to put the past behind us.

3. Determinations relating to provision of certain services

We are concerned that the payment of fees [sub para 3(1)(b)(4C) and sub para 3(2)(b)(3C)] could inhibit openness and transparency.

Part 2 Provision of Water and Sewerage Services

4. Public water supply system: offences

(2) 'Any person who uses the public water supply system for the purposes of supplying water to the premises of another person is guilty of an offence.' Is this not a little harsh? We can see the reason for this where water metering exists, but surely there must be circumstances where this is acceptable, e.g. where the supply to a neighbour's premises has failed or has developed a major fault and close-down is essential. In such a case, the supply of water is no more than a neighbourly act, not an offence.

We suggest that this is made acceptable in certain circumstances as long as permission from Scottish Water is sought first.

6. Licence authorisation

In principle, we are not opposed to this as long as it does not allow 'cherry-picking' to the detriment of the majority of business water users or leave a group of businesses (say in rural areas) disadvantaged.

12. Water and sewerage subsidiaries

Again, we are not opposed to this, with the same provisos as above.
18. Scottish Water's charges
We do not disagree with what is suggested but urge transparency and full consultation with user representative groups.

29B Determination of maximum charges
Maximum charges should apply 'across the board.' In May 2003, a major contributing factor towards the increases faced by many small businesses were created by 'revenue caps' being placed on both domestic and commercial water charges but a maximum charge (about 10%) only being applied to the domestic sector. This resulted in increases for some small businesses rising by as much as 1,000% while no domestic water user faced increases of any more than 10%.

The Scottish Executive does seem to have some confusion between 'revenue' and 'burden' on other matters besides water charges.

The final approval of maximum charges must lie with the Minister who should seek parliamentary approval.

29C Exercise of functions regarding charges
The Scottish Parliament must not lose control of Scottish Water by delegating control of policy and charging to an appointed and unelected Quango (the Water Industry Commission).

We were aware of the frustration felt by many MSPs who had folios of complaints about price increases from business constituents yet seemed unable to have any impact on what was happening. The answer we got (and we gather they got) was: "We cannot intervene."

This cannot happen again. People will lose faith in their Parliament. Power and control must stay with the Scottish Parliament. 66% of our members told us so in a recent survey into Scottish Water. Only 9% advocated privatisation.

Ministers must retain the power to intervene and Parliament the right to force them to do so.

29D Statements regarding charges
It is greatly to be regretted that nowhere previously or in this section is any mention made of the obligation to consult. The failure to consult was a major criticism in the Finance Committee's report and has created something of a crisis in the relationship between the Scottish Executive and Scotland's business sector.

We are aware that the consultation paper Paying for Water Services 2006-2010 says: 'Consultation is an essential and important aspect of Scottish Executive methods.' It clearly wasn’t in the period leading up to the 2003 price increases and we would like to see this principle enshrined in this legislation.

19. Scottish Water's functions: powers of the Ministers
In addition to those listed, we strongly recommend that Ministers retain the right to intervene at the behest of Parliament.
SCHEDULE A1 Water Industry Commission for Scotland

We felt that too much power was invested in one person - the WIC - and welcome this move. However, we are concerned that in para 7, it seems that a Chief Executive can be appointed by the Minister without the endorsement of the Commission, as a whole.

We would rather see the Chief Executive appointed by the Commission with the endorsement of the Minister.

The Chief Executive must have the full backing of the Commission and, in turn, the Commission the full backing of the Minister.

We have no further points to make on the rest of the Bill as drafted but two further important general points to make: -

- Business ratepayers have the right to appeal against rateable values. No such right exists for water users. This bill is heavy on offences and penalties but light on the rights of the water consumer. All water users should have the right of appeal against what they believe is unfair billing, service or treatment by Scottish Water. There should be a formal appeals procedure heard by either a Water Consultation Panel or by a neutral tribunal.

- No mention is made of the Water Consultation Panels. Whilst we can see the need to streamline this body a consumer watchdog is essential.

SUPPLEMENTARY EVIDENCE FROM THE FORUM OF PRIVATE BUSINESS, SCOTLAND

You will not be surprised to hear that, in principle, we approve of the proposed changes to the Water Services etc (Scotland) Bill to include powers of the Water Customer Consultation Panels. As you know we expressed concern that the panels and a complaints procedure seemed to have been omitted from the draft bill. We also advocated greater powers for the Panels to take up complaints on behalf of water consumers. So we can only welcome Mr Finnie's suggestions in principle.

Looking at the proposal in detail, we make the following points: -

- We are certainly in agreement that the panels should represent non-domestic as well as domestic water customers. Many smaller water users are likely to continue to use Scottish Water rather than an alternative supplier. The point about distribution and supply is valid and Scottish Water's responsibility for waste water and environmental control enhances that argument.

- We agree in principle that Panels should have a clear opportunity to voice consumer interests in the charge determination process.

- We also agree that the Panels should take over the handling of customer complaints. That's very much in line with our recommendations to your Committee, as you know. Asking the Commission to do this as well as regulate is akin to asking it to be gamekeeper and poacher at the same time.
The Minister recommends that both individual and generic complaints should be so addressed. Maybe I should ask you to define the term ‘generic’ in this context. I take it to mean both sectoral complaints (e.g. a problem involving the food processing industry) or a particular group (e.g. the recent price increases that particularly hit the smallest water users). If that definition is correct, we agree. But there will be, from time to time, generic complaints that need particular solutions, perhaps beyond the powers of the proposed Panels. No system is perfect and no organisational set-up can prevent all anomalies and unfairnesses from happening. For example the long established valuation and rating system brings up anomalies at every revaluation. Individual complaints can be handled via the valuation appeals procedure but generic complaints may need ministerial intervention. For example, in 1985, the revaluation in Scotland brought some extraordinary results in certain places (e.g. the Borders and Angus) and in certain types of business (Retail and the licensed trade but not factories or offices). The bill that was rushed through Parliament (the predecessor to the revaluation transitional relief of today) with all-party support was a Ministerial intervention that saved many businesses. We urge you to retain that power to the Scottish Executive over our public water supply.

Yes, the weakness of the present set-up is that the Panels have no statutory status. They have done a good job, but only as a sounding-box. Minutes of public meetings were placed on their website and apparently went no further. Placing them on a statutory basis should make consumer representation more meaningful.

In conclusion we are in full agreement with the Minister's suggestions and it is a measure of the success of your Committee's work that this has been accepted.

Our only divergence from his proposal is that our members (66% of them) want the Scottish Ministers to retain an ultimate power of intervention.

SUBMISSION BY DIAGEO

Background

Diageo in Scotland operates 50 separate sites ranging from distilleries and maltings to warehouse complexes and packaging plants.

The company is the largest premium drinks business in the world and 40% of our global production is manufactured here in Scotland – this includes both Scotch whisky and white spirits such as gin and vodka. Water is fundamental to the creation of all our brands and, on average, we use over 16 million cubic metres of water per year.

Of that total, nearly 3 million cubic metres is supplied from boreholes, wells or other private supplies and 11 million cubic metres from rivers and lakes. The remaining 2 million cubic metres is drawn from the public system which costs us about £1.25 million per year.
However, the nature of the distillation process is that well over 90% of the water we use is for cooling purposes. Effectively, therefore we ‘borrow’ water and we return it to the environment back to watercourses under consent conditions.

In total, our effluent discharge whether to the public sewer or as trade effluent charges costs us £1 million per year.

Our environmental policy states that we shall ‘source water responsibly, use it efficiently and set targets for reduction in its use’.

Diageo has no strong view on proposals outlined in Parts 3 and 4 of the Bill and so our comments relate only to Parts 1 and 2.

**Part 1**

- **Is the scope and effect of the change appropriate?**

Diageo welcomes the proposed creation of the Water Industry Commission and supports the move to place powers with an expert panel rather than an individual. We would recommend that the Commission should include industry representatives and suggest that a representative from the Large Water Users Group be given a place on the Commission to provide technical and economic input.

However, we believe that the proposed system of annual review of charges could introduce greater uncertainty into long term financial planning. We believe that we have paid a fair and reasonable price to Scottish Water for water services in the past and that the relationship has been of mutual benefit. Both companies have been able financially to plan ahead because of negotiated contracts over a number of years, and there have also been cases where our use of Scottish Water’s services has made its operations more viable. An example of this was the distilling industry’s purchase of the long sea outfall at Burghead which was an innovative partnership between the public and private sector. By separating trade and domestic effluent, this drastically reduced the investment required by NoSWA for a large treatment plant to serve villages on the Moray coast.

- **Will the proposals achieve the stated aims of improving the transparency, accountability and consistency of regulation in the water industry?**

Diageo hopes the shift towards using a board rather than an individual will lead to greater accountability and transparency. We do however have some concerns with the arrangements for the right of appeal mechanism on charging. Currently this lies with the Scottish Executive but the proposals as they stand will mean that appeals are heard by the Competition Commission, which is UK based. We believe that the Competition Commission may not be in a position to best understand the unique Scottish context of the whisky distilling business.
As a company producing Scotch whisky we would prefer that any appeals are dealt with in Scotland. Whilst we can understand some of the rationale for removing Ministers as final arbiter, we prefer the current appeal system which we feel is the best model at present.

Part 2

- Are the Provisions in this Part of the Bill appropriate and clearly defined?

Diageo supports the principles of the Bill and understands the Executive’s need for prohibition of common carriage. We also support Scottish Water as the main supplier and understand the need for an upgrading of the water infrastructure. At the same time, an equitable balance of charges must be struck between domestic and commercial users.

Diageo does have concerns, however, that there appears to be no flexibility in the current proposals to allow for local negotiation on charges for water and sewerage services. There would therefore be less opportunity for large users to benefit from economies of scale or discuss potential partnerships.

An example of these special agreements is when we negotiated a long-term deal with WoSWA for the disposal of effluent from Port Dundas Distillery in Glasgow. It was at the time of a private funded initiative to expand and upgrade the treatment plant at Dalmuir. To enable this development to go ahead with some financial certainty, a five year deal between ourselves and WoSWA was agreed.

From our understanding of the Bill’s proposals, this above example would not be possible. Both Diageo and Scottish Water would thus be put at an unnecessary disadvantage.

Our view is that large water users should be encouraged to minimise use of water and effluent services. However, any high standing charge – once paid – is not an incentive for businesses to minimise use. Diageo would advocate a lower standing charge with a higher unit cost to encourage water conservation.

We would also advocate increasing the banding for water charges so that there is a broader range of bands that will take account of larger water users.

The proposed ‘principles of charging’ compares the provision of water and effluent services to other utilities for which direct payment is made and that customers should be expected to pay for the services in the same way. However, the proposals – for example the prohibition of common carriage – mean that Scottish Water will effectively hold a monopoly of supply and customers could be unable to negotiate services with other suppliers of water.

Although the Bill allows Scottish Water to act as ‘wholesalers’ of water to third party suppliers, it is not clear how this could be effected at a competitive cost. Therefore the proposals don’t appear to give businesses any real flexibility to source water services from other suppliers as they can do with other utilities. Although there will be some flexibility with the retail supplier, Scottish Water will
still supply the water to the pipes and the basic charges will remain fixed. Thus, there is little room for charging flexibility between companies and the retail supplier.

As a result we may need to look at other means of securing water supplies.

If it is the case that there is little flexibility over the basic cost of water charges as Scottish Water are the only ‘wholesaler’ then it would put our business at a clear disadvantage to those in the England & Wales where other suppliers are able to use the public network.

• **What are the likely effects of the provisions on the fair and effective provision of water and sewerage services?**

Diageo are concerned that the proposals may lead to significant increases in cost which may, in turn, impact on our cost effectiveness. Overall, our costs of water and sewerage services across Scotland are set to rise by nearly 40% under the proposals and at Port Dundas Distillery - which is our largest user of public water – we have been notified that the increase could be as much as 75%. Clearly, this represents a significant increase to our costs.

We are a global company and therefore we need to compete globally and we will need to take decisions to maintain our competitive position. Already at Port Dundas, through process improvements, we have reduced our water usage by 20%. In future, we may need to investigate ways to source ‘grey water’ from other suppliers.

In addition, companies such as ours may need to set up their own treatment plants or find alternative means of disposal. We have already gone down this route at Cameronbridge Distillery in Fife where we invested £5 million on a long sea outfall to take us out of the public system, However, by law, Scotch whisky can be made only in Scotland – even if the costs are rising.

Our concern is that if the costs of water supply and effluent treatment increase by significant amounts then many other large water users will reassess their options given the commercial environment in which we all operate.

If these large water users decide not to use Scottish Water’s services then there could be significantly less money going into the public system. This will of course impact upon the planned upgrade of the network. Thus we believe that the charging system must be carefully considered so that it does not become prohibitive to large water users.

Conclusions

• There is need for flexibility in the relationship between Scottish Water and non-domestic customers and within the proposed fee charging regime.
There needs to be clarification about the role of the newly created commission and how the right of appeal mechanism will work. We also have concerns that the UK based Competition Commission may not fully understand our industry’s issues in the same way that Executive Minister’s can.

For large users like ourselves, Scottish Water may not be the only service supplier. There are other supply and effluent treatment options that Diageo could develop.

**SUBMISSION BY BP GRANGEMOUTH**

BP Grangemouth is happy to provide this written statement to the Environment and Rural Development Committee as part of its consideration of the Water Services etc (Scotland) Bill.

Together with feedstock, manpower and energy, water services is one of our highest operational costs and a significant factor affecting the competitiveness of the Grangemouth site. Over the past few years we have worked to seek to reduce these water costs through reduced water usage, water recycle and re-use, water supply and waste water treatment cost initiatives.

The Bill is in four parts. BP Grangemouth shall restrict its response to Parts 1 and 2. Part 3 (coal mine pollution) is out with our scope of expertise and Part 4 (miscellaneous and general provisions) seems adequate but requires legal commentary.

Part 1 seeks to replace the current Water Industry Commissioner (WIC) with a body corporate Water Commission. This move from a single point to a small team of expertise is supported following wide consultation by the Executive and as reported is in line with best practice.

Part 1 also sees a significant change in responsibility for the Commission. In the past the WIC provided guidance to Ministers on Charging Schemes proposed by Scottish Water with Ministers making the final decision. This Bill seeks to give the Commission the decision making process, against directional guidance from Ministers. This should put decision making into the remit of the ‘experts’ and so long as the Commission includes business representation then this is a direction to be supported.

Part 2 seeks to provide a number of provisions regarding water and sewerage service and costs.

Fundamental to this section is the Executive decision to deal with issues relating to the Competition Act 1998 by

- Prohibiting common carriage and
- Establishing a licensing regime for retail competition for non-household premises only
BP Grangemouth questions this approach. In our opinion allowing common carriage would best demonstrate open competition and is common practice in other utilities provision. The concerns with regards safety of the water supply are well presented, but experience in England & Wales water market has demonstrated that the cost of entry to a common carriage system is sufficient for this to not be a real threat.

Whilst we disagree with this decision, as the Executive has decided upon the prohibition of common carriage the next logical approach, to demonstrate openness to competition, is to open the retail market. The Executive however has restricted this to non-household customers as full retail competition would ‘render unworkable the current arrangements whereby local authorities bill the great majority of domestic customers for water and sewerage charges alongside their council tax bills. This system contributes towards achievement of Minister’s social policy objectives’. BP does not believe that it is right that the remaining retail market base should, in effect, subsidise social policies, however worthy these policies may be.

To restrict retail competition (primarily a billing service) to non-household customers creates a market place of only some 160,000 customers. It is highly likely that this small population will result in little or no real challenge to Scottish Water’s retail business. This will be further restricted in that the ‘standard conditions’ for retail licenses are not to be published until 9 months after the passing of this Bill (since the Commission will not be in place until this time). In effect there will be no retail competition until at least 2007 at the earliest and most likely none at all for the foreseeable future. This proposed legislation is thus viewed primarily as a mechanism to demonstrate compliance with the Competition Act 1998 rather than to promote true market competition for water services in Scotland. With this in mind it seems both unnecessary and a waste of valuable Scottish Water resource in creating Scottish Water retail, alongside the uncertainty such a fundamental change brings to their workforce.

Turning to the charges section (section 18).

It is noted that the Commission is to determine the maximum amount of charges by reference to a scheme of charges and that Scottish Water must propose this scheme of charges based upon a statement of policy from Ministers that ‘shall include a statement on the harmonisation of charges (that is to say provision with a view to ensuring that a charges scheme does not fix different charges for similar services provided to persons of a similar category)” and ‘the fixing of levels of charges by reference to different categories of person to whom Scottish Water provides services’. This could be viewed as wide ranging as business customers have their own unique service requirements (be it volume, security of supply, seasonality etc). Currently this is not recognised in the ‘scheme of charges’ other than for large water user tariffs and has led to Scottish Water entering into bespoke ‘special agreements’ with business customers.

BP Grangemouth welcomes the recognition in the Bill that in the past Scottish Water required the powers to enter into ‘special agreements’ with its business customers. It is heartening to see that the Bill provides for the continuation of such
agreements through to their natural (contractual) expiry. However it is worrying that the Bill proposes that such special agreements powers should be removed in the future. Unless the ‘scheme of charges’ process allows for such deviations then the loss of these powers may ultimately drive businesses off the Scottish Water networks, reducing their income and therefore increasing the cost burden on those who remain. BP would therefore support the continuation of such special agreement powers for Scottish Water in the future.

BP welcomes the recognition by the Executive, in its recent ‘Paying for Water Services 2006-2010: A consultation on the principles of charging for water services. Published July 2004’ that the current method of collecting income for ‘surface water and highway drainage’ based on rateable value requires a fundamental change in approach.

The suggestion that the surface water charge element should be based upon a banded approach using actual surface area of the actual property drained is supported. The Executive however say such a fundamental change would not be achievable by 2006 and so propose that the Commission look to make this change for the 2010-2014 charging period. This continues to add a significant cost to businesses for a considerable period thus damaging the ‘competitive Scotland’ banner for attracting new business to the country, as well as creating competitive disadvantage for companies already based here. BP Grangemouth would urge the Executive to implement this change sooner.

The Executive also proposes that the highway drainage element continues to be charged alongside surface water drainage and becomes part of the banding system proposed for surface drainage for 2010-2014. This is to prevent this taxation being shifted to the local authorities for collection and thus its incorporation in Council tax, business rates or general taxation. The use of Scottish Water to collect non-direct water service costs, similar to providing social policy benefits, is not supported and it should not be for the Scottish Water business customer to provide a local government cross-subsidy. Recovery of highway drainage charges should be the responsibility of the authority responsible for roads and highways.

I would like to thank the Executive once more for this opportunity to comment on the above Bill and would be pleased to provide further feedback if required as this Bill progresses through Parliament.

SUBMISSION BY CIBA SPECIALTY CHEMICALS

INTRODUCTION

Ciba Specialty Chemicals is a world leader in the supply of classical pigments and has operated successfully from its Paisley site since 1949. The applications of these pigments are primarily in printing inks, paints and plastics, although we also supply into paper treatment, textile and home and personal care products. We employ over 660 people, not only in manufacturing, but also in R & D, technical support, customer service and logistics, product management and ancillary services. Our leading position has been achieved on the basis of low cost and
innovation. In 2002, 51% of our sales came from products developed within the last 5 years.

A key feature in our success has been the availability of sufficient quantities of good quality water at competitive costs. We are committed to being a responsible and environmentally aware company. As a consequence, we have operated more efficiently in recent years through improved environmental performance. Between 2000 and 2002, the quantity of water we used per tonne of output reduced by 26%. The company globally has set a target of a further 10% reduction in water per tonne between 2004 and 2006.

We export approximately 85% of our product into a global market which is becoming more and more competitive. In particular, this competition is coming increasingly from the Far-East, where labour costs are low and environmental standards and regulatory oversight are not as stringent as in the EU. At Paisley we are being directly impacted by this; over the last two years we have had to make 82 people redundant and have seen a significant fall in output as a consequence of Far-Eastern competition.

We therefore welcome the opportunity to comment on the draft bill. Our comments on the bill relate primarily to Parts 1 & 2.

**PART 1**

In principle we agree that the provisions to replace the Water Industry Commissioner with the Water Industry Commission are a positive move which will improve the transparency, accountability and consistency of regulation in the water industry. The effectiveness of the Commission will depend, however, on how much “teeth” it has, in terms of driving efficiency improvements in Scottish Water. In the past OFWAT, the regulator south of the Border, has been viewed by some as being too conciliatory to water suppliers, to the detriment of customers. The Commission must therefore be given sufficient powers to set charges based on tough but realistic efficiency improvements in Scottish Water. It must regulate fairly without favour and be transparent in this regulation.

We would also note that the Water Commissioner and the Water Industry have a mindset that year on year increases close to inflation are acceptable. This is not the case. In the face of fierce competition, most businesses have to find innovative ways of reducing costs to contain the effects of inflation and more. The water industry should be no exception. It must innovate to provide a better service at lower cost. This must be driven either by competition or by tough regulation from the Water Commission.

It is unclear whether the Commission will only have responsibility for charge determination for water supply alone, or for water supply and trade effluent. We would prefer to see the Commission having responsibility for setting charges for all aspects of Scottish Water’s operations.

The bill stipulates that Commission members will be experts qualified to manage the highly technical nature of their charge. We support this approach and
encourage the selection of individuals with strong financial as well as technical expertise, in order to maximise operational and business related efficiencies.

**PART 2**

**Prohibition of Common Carriage**

We agree with the Executive’s aims of ensuring that public health is not jeopardised by any changes in legislation and that water resource management remains under control. However, it is not clear that either the probability of public water contamination or interruption to infrastructure will increase if common carriage is introduced. The Executive has concluded that the risks outweigh any foreseeable benefits without providing real evidence of this.

Ciba Specialty Chemicals believes that sustainability and improving environmental, health and safety performance brings a competitive advantage in our business. Therefore, it is entirely possible that a private company, allowed to operate using the public networks, could safeguard public supplies using innovative solutions. Indeed, the consequences to a private business who were found to be responsible for endangering public health could be extremely serious; perhaps more severe than with a public company.

Other utilities operate safely with shared networks (eg. electricity, gas). We are therefore disappointed that no serious analysis of the risks and benefits has been presented prior to introduction of the bill. We would request that further work is carried out on this aspect of common carriage to ascertain the best solution to protect public health.

**Licensed Retail Competition from the non-domestic sector**

We welcome the introduction of licensed retail competition from the non-domestic sector as a means of providing a greater range of choice for customers. We believe it will also force Scottish Water to improve cost transparency and accuracy in both the retail and wholesale sides of their business. The retail element of the total cost should be maximised, to encourage as many new-entrant retailers as possible. At present we have heard various opinions regarding the percentage of the total cost of water supply, from 3% to 20%. Unsurprisingly perhaps, the lower percentage figures came from Scottish Water; whose interest will be in maximising the wholesale cost element. The Commission will need to be robust and technically competent to determine the real retail cost of water.

One could also question whether the retail arm of Scottish Water should remain publicly owned, or whether there would be benefit to all parties if it were eventually privatised?

Finally, the Executive clearly recognises the benefit of keener charges based on improved efficiency, but there is no mention of improved charges and services based on innovation, which would also be driven by allowing more companies to compete in the market. This drive for innovation could also be of benefit to customers if common carriage were permitted.
Charge Determination

We have some concerns with respect to provisions in the bill on charge determination. Scottish Water will no longer have discretion to make agreements with specific customers about the charges levied on them. Although presumably not the intention, this could have the perverse effect of raising charges to all customers. For example, suppose a company decides that it can invest in water supply services at a cost less than the Scottish Water standard charges. Under the new arrangements, Scottish Water will be unable to match the company’s costs. The result will be the company investing in water supply capacity that is not, in reality, required. Scottish Water will lose a revenue stream and be left with stranded assets. The lost revenue will presumably require to be made up by passing on the charges to other customers. Nobody wins. We believe the likelihood of this happening is very high, given the current scale of proposed increases in charges and probable future increases.

We are also confused by some apparently conflicting statements in the Policy Memorandum. Paragraph 64 states that “all charges must be made by reference to a charges scheme except for departures from the charges scheme which will require to be specifically authorised by the commission on the basis that the charge-payer has taken action which reduces the cost to Scottish Water of serving them”.

However, paragraph 62 states that “charges will reflect the cost to Scottish Water… irrespective of the actual cost of serving individual costs which will vary, for example, with distance from treatment works.” So, for example, if a company physically moves location to be closer to the treatment works, this will not be reflected in reduced costs, despite the company taking action to reduce the costs to Scottish Water of serving them. The meaning of paragraphs 62 and 64 are unclear.

Other Matters

As mentioned previously, Ciba Specialty Chemicals is of the view that the economic impact of the bill in terms of lower charges could be improved without detrimental impact on the environmental risks associated with common carriage. Therefore, we believe that the impact of the bill on sustainable development is insufficiently clear without the required evidence to back this up.

In general terms, we find the policy memorandum and financial memorandum useful documents. Most businesses face competitive pressures that preclude having sufficient resources to spend a lot of time examining detailed legislation. These documents are therefore generally helpful in providing interpretation and understanding of the proposals.

SUMMARY

In general we support this attempt to improve the provision of water services within Scotland. The introduction of a robust, independent Water Commission should
improve transparency and accountability in terms of charges. Competition in retail services is also to be welcomed although the impact on cost and efficiency will not be significant. We remain unconvinced of the arguments to prohibit common carriage in the absence of detailed analysis. Finally we believe that the inability of Scottish Water to provide special deals could have a negative impact resulting in higher prices for all customers.
Water Services etc (Scotland) Bill: Stage 1

10:04

The Convener: Our first substantive agenda item is the Water Services etc (Scotland) Bill. This is our first major discussion of the bill at stage 1. Today, our key task is to examine the effects of the introduction of competition for the non-domestic sector and the effects of the model for regulating competition and the proposed new charge-setting regime that the Executive has suggested. We have tried to get as representative a sample of witnesses as possible, given the limited time that we have. We issued an open call for written evidence from interested parties and the written evidence that we have received has been circulated to members.

Before we commence taking evidence on the bill, I ask members to declare any relevant interests.

Rob Gibson (Highlands and Islands) (SNP): I am a member of the Scottish Crofting Foundation.

The Convener: I welcome the first panel of witnesses, who have been sitting patiently for some time. Dr John Sawkins is a senior lecturer in economics at Heriot-Watt University and is deputy convener of the south-east of Scotland water customer consultation panel. Ian Jones is chairman of Quayle Munro Holdings plc and was an adviser to the former Transport and the Environment Committee on its inquiry into the water industry. Alan Thomson is from the Chartered Institution of Water and Environmental Management. I thank them for coming this morning. As they have all submitted extremely useful written evidence, we will not have opening statements. I am grateful that they have put their thoughts in writing—members have read the comments and reflected on them. We will go straight to questions.

Alex Johnstone: It is clear from the bill that the Executive feels that there is a clear distinction between domestic and non-domestic supply of water and water services. It seems from the witnesses’ submissions that that is not necessarily their assumption—they seem to think that the relationship is more complicated. What is the difference between domestic and non-domestic and does the bill reflect it accurately?

Dr John Sawkins (Heriot-Watt University): The distinction between domestic and non-domestic is clear: our normal understanding of the terms is that domestic consumers are household consumers and non-domestic consumers are any other consumers. I am not sure what the confusion is.

Alex Johnstone: Let me clarify. The bill treats those two groups differently. Is that appropriate and is the way in which the bill does so appropriate?

Dr Sawkins: I would need to know which parts of the bill you are talking about, rather than give a blanket answer.

Alex Johnstone: In as general terms as possible, I am talking about the fact that the bill will allow competition for the supply of non-domestic water services but seeks to deny competition for the supply of domestic services. That is a clear distinction, although the bill makes other distinctions.

Dr Sawkins: For the purposes of the competition that is envisaged in the bill, a clear distinction can be drawn between the household and non-household sectors.

Alex Johnstone: Is that distinction appropriate, or would you draw it differently if you had the opportunity?

Dr Sawkins: No. The distinction is good and it is well set out in the bill.

Alan Thomson (Chartered Institution of Water and Environmental Management): I agree with John Sawkins that the distinction in the bill is appropriate, but given what has happened in other utility markets, the bill should, if at all possible, prepare us for the domestic sector coming into the competitive marketplace in the future.

Ian Jones (Quayle Munro Holdings plc): I doubt whether it would be possible to do that in the bill, which is essentially a cleaning up of issues that have been hanging around for a few years, but as Scottish Water develops its customer relationship profile and as others develop that profile, change in due course would probably be a good idea for both sectors and for Scottish Water.

Alex Johnstone: I will extend the issue slightly. One of the bill’s main planks is the assumption that domestic charges will be levied so that those who pay for water services will cross-subsidise those who are unable to pay. Does that lend itself to the future introduction of a more commercial system in the domestic water market?

Dr Sawkins: It is essential to be clear about what we are talking about when we talk about water services to households or non-households. As I said in my written submission, there are two aspects to the supply of water. Is it a social service, or is it just another economic input into the production process? Those are the two extremes. We can argue that, if water and sewerage are a social service, the costs of supplying that service should be met out of taxation rather than charges, and it should be given as of right. There are
arguments about health benefits and so on. If we go to the other extreme and say that water and sewerage are an economic good, in a very narrow way, people should be charged for the amount that they use and strictly metered. However, it is not as simple as that. Every household has basic needs: water for drinking, cooking, cleaning and sanitation, for example. In that sense, water and sewerage are a social service for households. However, there are also households that have swimming pools, use power jets to clean their drives and so on. I would not regard those as basic needs. We must try to hold the two things together.

At the other end of the spectrum, one could argue that for very big firms water is just another input into their production process and that they should therefore be charged for what they use. However, what about a small post office that keeps local households together and is a key part of the economic infrastructure? There might be a social dimension to what it is doing. We must first get clear in our minds what we are talking about. When we have made a decision about that, we can move on to issues of how people should pay, how we should charge and whether it is appropriate in certain circumstances for cross-subsidies to flow.

**Alex Johnstone:** That is the point that I am trying to get at. I want to know where the balance ought to lie and whether the bill has it in the right place. I refer to the balance between the two extremes that you have described.

**Dr Sawkins:** At the end of the day, the balance must be struck by ministers. The structure of the bill is right, but it is for ministers to decide what the obligations should be and what they want to achieve and to be explicit up front about the fact that they want a social dimension to be taken into account in the charging scheme. At the outset, they must be clear about that, rather than fudge the issue.

**Ian Jones:** I will add a thought to Dr Sawkins’s remarks. I presume that part of the bill is looking to require Scottish Water to be thoroughly commercial. We all recognise that certain users of water will not be able to pay for it or will have difficulty doing so. I am not sure that Scottish Water is the right agency to practise social security, as it will be required to be efficient. There are other appropriate agencies that will support users who cannot pay. There may be a requirement for future legislation to provide other agencies and to take away Scottish Water’s social responsibilities, as they seem to be envisaged at the moment.

**Dr Sawkins:** Ian Jones has made my point in far fewer words and has gone straight to the heart of the matter. We have to decide whether the water and sewerage charging system is an instrument of social policy. If it is, that has implications for the charging system. If it is not, Scottish Water should not be expected to act as an agent of the social security system.

**Alan Thomson:** I will add to what Ian Jones and John Sawkins have said about whether water and sewerage are a socially based service or a commercially based service. If a decision is made that the service should lean towards the social side, that does not exclude the possibility of there being an efficient service that is driven by other drivers and frameworks within the overall delivery framework of the water service. There must be something in ministers’ considerations that will drive efficiency into Scottish Water, regardless of whether the emphasis is on the commercial aspect or the social aspect of the service.

10:15

**The Convener:** I want to pursue the point of principle that we are addressing. Does Maureen Macmillan want to follow up on that issue?

**Maureen Macmillan (Highlands and Islands) (Lab):** I want to ask about competition, which Alex Johnstone mentioned at the start of his question.

**The Convener:** We will keep going on the issue of principle before moving on to that topic.

**Roseanna Cunningham (Perth) (SNP):** My question does not follow on exactly from what has just been said, but it opens up a slightly different issue in the same area—that of the philosophy behind what we are doing. I grew up in a country—not Scotland—where water conservation was an issue. In effect, every household was given 100,000 gallons a year free. Beyond that, households paid on a meter. That was a big incentive for responsible use of the water resource in a place where water was a much more problematic issue than it is in Scotland. Following on from Alex Johnstone’s question, can you tell me whether there is anything at all in the bill that we will discuss over the next few weeks that would encourage the responsible use of water and lead people to regard it as a resource that they should not squander?

**Ian Jones:** I do not think so. That is a personal view. My immediate thought is that the bill does not do that.

**Roseanna Cunningham:** I do not think so either.

**Dr Sawkins:** I share that view. The critical question on which the issue turns is that of meters. Many people’s hackles rise when one mentions the word meters. They are terribly expensive to install and terribly difficult to maintain—they have to be put in, ripped out and are very hard to run.
There is also the issue of low-income households cutting themselves off. When installing a meter, one can give a household a free tranche of water for basic needs and impose a steeply rising price after that amount has been used. There is no sense in the charging system that we have, which allows me to pay a flat fee even if I leave my taps on all day and all night.

Roseanna Cunningham: That is the point that I am trying to make. Having a flat rate in no way encourages people to be responsible in their use of this resource. As you say, people can use as much water as they want, but the charge will be exactly the same. That encourages the big swimming pools and so on that you mentioned—a use of water that is beyond what we would consider to be normal domestic consumption. Does that apply at both domestic and commercial levels?

Dr Sawkins indicated agreement.

Alan Thomson: There is nothing in the legislation that would drive the responsible approach that the member is seeking. We must address the mindset in Scotland that water is free, as plenty of it comes down from the sky. Having worked in the industry for more than 20 years, I know without doubt that that attitude is entrenched in the Scottish approach to water. People believe that the service is or should be free, because water comes down from the sky.

Roseanna Cunningham: I am more concerned with the environmental conservation and responsible use aspect of the issue.

Alan Thomson: The two go together.

The Convener: Presumably, there is also the angle of people’s use of resources on the sewerage side. However, that is not addressed in the bill as drafted. Do you see any comparisons with other regulated utilities? Roseanna Cunningham has made a point about water conservation. Companies in the energy industry are required to promote energy conservation among their customers. Should there be a similar requirement in the bill?

Ian Jones: I wonder whether there is any point in conserving water for its own sake. Would Scottish Water benefit from such a policy, given the cost that that policy would impose? I cannot answer that question.

The Convener: All the witnesses indicated that they agreed that water metering would be a good thing, because it would automatically lead to a more careful use of water. Your comment almost contradicts that point.

Dr Sawkins: I do not say that water metering is a good thing for all households at all points in time. We must work out what the benefits and costs are on a case-by-case basis. If a region were very tight for water and required additional water resource—if an extra plant needed to be built or some large capital works needed to be undertaken—there would be a case for metering households in that zone, because it would be the cheaper option for balancing demand and supply.

It would be very costly to install meters in every household, although there are ways of moving towards that point. One example would be to ensure that a chamber was set aside in each new-build house in which a water meter could be installed. Over time, it would be possible to move in that sort of direction. That said, I would not want to be pushed right the way down to the end of the argument that says that meters are good in all circumstances and at all points in time.

Alan Thomson: If we are talking about water conservation and the installation of meters as a means to deliver that, we really have to look to the other side of the water supply system—the side that is the responsibility of Scottish Water. Not only is the infrastructure and the state of the pipes poor but we have 40 per cent leakage levels. We have to look at that side of the system before we start to ask customers to look at their side; at the very least, both sides would have to be approached with equal energy.

Maureen Macmillan: Do we have regions in Scotland that are tight for water? Obviously, if Scotland is not tight for water, we do not need metering and conservation of water may be unnecessary. Surely we would not pursue metering for its own sake?

Ian Jones: The financial interest of Scottish Water is to sell as much water as possible. In a sense, the same risk component is not found in the water industry as is the case in the energy sector, in which an ecological aspect applies. I presume that there are no ecological implications in the case of water. If Scottish Water is an utterly commercial operation, its commercial interest would be to encourage people to use more water and get marginal profitability as a result of a subtle charging system.

Maureen Macmillan: I just want to know where in Scotland we are short of water.

Dr Sawkins: I struggle with the idea that there is plenty of water and that therefore we are at liberty simply to waste it. Water falls down out of the sky and is free. We have plenty of the stuff in its raw state, but it falls down in the wrong place and at the wrong time—we cannot simply hold out a cup and have a good drink of water.
Water has to be transformed in place and time and that costs money. Although water falls down from the sky, we need sewers and mains to get it to the right place at the right time. There is a cost and there is a benefit.

Alan Thomson: Water usage has a large ecological and environmental impact. If more water is used, more sewage goes down the effluent pipes. In turn, energy is required for treatment and pumping and for the long sea outfalls that have to be installed. There is a massive impact on the environment that is not fully appreciated in respect of water as a utility.

Roseanna Cunningham: Basically, the present situation is one in which no regard is paid to the middle to longer-term issue of water as a scarce international resource. Given the amount of water that we have in this country, we could chose to go down the road of treating water as a potential international commodity. However, at the moment, nobody in Scotland is officially promoting the responsible environmental use of water. Scottish Water will not do that: its job is to sell water and it wants us to buy as much water as possible. There is nothing in the bill about conservation, which means that the Executive is not thinking along those lines either. Our present mindset is that we do not have to conserve water: no one is doing so and there is no mechanism for anybody to do so.

Dr Sawkins: I do not know whether Scottish Water is under a statutory duty to promote the conservation of water. The committee would need to ask the civil servants that question.

The Convener: There is a debate about whether there should be a statutory requirement for sustainable development. It depends how the key elements are defined, but I would be amazed if water conservation was not assumed to be a part of such a requirement, along with environmental conservation. However, it is not explicit in our background papers.

Mr Ruskell: Clearly, more indicators of sustainability need to be in the bill. Alan Thomson pointed out several in respect of the energy costs that are involved in water treatment and in aspects of water usage. In his submission, he went quite far in saying that sustainable development is not explicit in the bill. He referred to

"the formation of the Commission, the licensing regime for retail competition, and charge determination"

and went on to say:

"All of these are related to sustainable development issues although ... The relationship is not necessarily positive nor encouraging sustainability."

What is missing from the bill? How can we get sustainable development and the key sustainability indicators into the bill to ensure that the new framework for the water industry points us in the right direction?

Alan Thomson: The way in which that could be imparted in the bill is through determination by the commission of what is important and what the priorities are for Scottish Water. I am not a legal expert and I do not know how that could be put into the legislative framework, but there is no doubt that the commission could be empowered and charged with setting sustainability and environmental targets. The targets could include a reduction in energy-use levels to encourage the use, for example, of natural waste water treatment systems rather than energy-inefficient schemes, and a reduction in water throughput. We know about leakage in the system and that there are problems in respect of sewerage collapses. Such issues could be brought to the fore if the commission were to set general targets.

Mr Ruskell: Does that need to be set out explicitly on the face of the bill?

Alan Thomson: Yes, although I qualify that by saying that it should be set out if sustainability is to be an issue in the bill—

Mr Ruskell:—in terms of the power of the proposed water industry commission.

Dr Sawkins: I do not agree with that view. We have to be careful when looking at the powers and responsibilities of the new water industry commission, as it is set out in the bill. One of the difficulties with which the industry has struggled over the past few years is that responsibilities and powers are just a little bit vague. People are not quite sure where the lines should be drawn. It is terribly important at this stage to get right this aspect of the bill. The job of the water industry commission, as it is set out in the bill, is a fairly narrow one. It does not have all the baggage that many organisations doing similar jobs have. However, I would pull back from saying that the commission should have responsibility for setting targets for leakage and so forth, as that would be an extra distraction from its main task.

The Convener: In your submission you say that the commission should have a "sustainable development obligation" similar to that which is held by Scottish Water.

Dr Sawkins: Absolutely.

The Convener: Would it not be quite a broad challenge for the commission to have that role as well, rather than have a single focus on economic cost?

Dr Sawkins: Such an approach would ensure that the way in which the commission conducts itself is in line with good principles of sustainable development.
I do not see the commission going right the way down the line towards setting leakage targets and checking up on whether they have been reached. The danger in all of that would be that the industry’s economic regulator would simply get bigger and bigger. It would then be given more and more stuff to do and could begin to wander off into regions of social policy that are not its job. It is for ministers to decide what policy objectives should be achieved; the water industry commission should have a narrow focus.

The Convener: That was a helpful clarification.

Ian Jones: The key mechanism for introducing capital expenditure is the five-yearly review of charges. It is clear that Scottish Water has a role to play in sustainable development for industry and private housing development. Absence of investment will discourage such development and might even hold it back.

I understand that the Finance Committee examined that aspect and commented unfavourably on Scottish Water’s achievements. The lead must come from ministers. It is unreasonable to expect the water industry commission to take that lead, because that is not its responsibility, but somebody has to do it. In the sense that Scottish Water is a key component of that development, it is ministers’ responsibility to set the targets and ensure that they are achieved.

I support Dr Sawkins’s view on that in relation to the legislation. On the passing the parcel that might be going on with regard to the delicate question of charges, we cannot ignore the fact that some aspects of Scottish Water’s operations affect the whole community, and they need to be determined by ministers taking a strong line.

10:30

Nora Radcliffe (Gordon) (LD): Dr Sawkins has made the point that I was going to make. Policy direction should come from ministers, not from the commission.

The Convener: Do members have other questions?

Nora Radcliffe: On other areas?

The Convener: Yes, moving on to another topic.

Nora Radcliffe: I have one or two questions for Alan Thomson about his submission. The first is a fairly minor point. On Scottish Water’s move into retail services and the need for transparency, you say that such transparency would “provide competitors with access rights to end of year accounts and audits”.

Should that apply to all competitors? You say that Scottish Water should open up its books, but should everybody have to do that?

Alan Thomson: Company accounts are open to members of the public anyway. The reason for my comment is that the accounts could be buried within the larger Scottish Water accounts and so the transparency would be lost. My fear is that the accounts of the subsidiary operation for retail provision might be lost in Scottish Water’s general accounts, in which case nobody would be able to see how the retail provision operated and what was costed against it.

Nora Radcliffe: So you are underlining the importance of what I thought was the thrust of the bill: if Scottish Water is to have a retail arm, it should be demonstrably distinct.

Alan Thomson: Yes, absolutely.

Nora Radcliffe: I wonder about your recommendation that a target should be set for competition in the form of a market share with a timescale attached. Other submissions said that the threat of competition would be enough. Does the panel want to explore whether we should positively drive for competitors to come into the market or whether the threat is enough?

Dr Sawkins: The issue that underpins competition is that when there is real competition it is hard to predict the route that it will take or what it will look like at the end of the day. It is hard for us to sit down and say, “This is the framework that we are going to set up—we are going to gaze into our crystal ball and this is what it will look like in five years’ time. We are going to set a pile of targets and see whether we have achieved them.” As I said in my submission, we should test whether competition has been a success not on the number of competitors that have come in but on what it has done for prices and for the retail market as a whole. In 10 years’ time Scottish Water retail might be the only firm working in the area, but it will have behaved in a different way because the threat was credible—that is the key word. It is difficult to see how real competition can take place if the legislation is drafted in such a way that the threat of competition is not real, if Scottish Water has such control over its sector of the market, if competitors have one hand tied behind their backs, or if Scottish Water has one hand tied behind its back.

Ian Jones: I add only that competition will increase the need for cross-subsidy as prices are cut to those that can demonstrate strength and, regrettably, prices are sustained for those that cannot. The drive for efficiency might partially balance that, but I have a horrible feeling that it will not do so completely.

Alan Thomson: The suggestion in my submission that it might be worth while to consider a target is a reflection on other utility markets in which monopolies existed. Where targets were
suggested in the telecoms, gas and electricity markets, they worked extremely well. I agree with Dr Sawkins’s view that, unless there is a real framework for competition, it will not happen, but effectively the two should go together.

Dr Sawkins: We must make a distinction between water and telecoms, gas and so on. The difference is that water is a bulky, non-compressible liquid that is difficult and expensive to transport. In the bill, common carriage is ruled out north of the border. South of the border, on health grounds, the view has been reached that there should be common carriage—the committee might want to explore that later. In telecoms, real competition can take place because one is no longer fixed to the copper wires that run beneath our streets, and in gas there is common carriage. We must keep it in the forefront of our minds that we are talking about water and, although we can learn from what is going on in telecoms, gas and so on, not all the tricks can be applied.

Alan Thomson: I hasten to add that, in terms of transportation, there is little difference between fluids, whether they are gas or water, but in relation to telecoms there is a difference. Anti-competitive behaviours by the utilities in England and Wales, particularly the water utilities, are not permitting ease of entry into the marketplace.

The Convener: Rob Gibson wants to move us on to another topic.

Rob Gibson: Given that we have to have a commission, I would like to get your views about its composition in relation to different kinds of customers and stakeholders from various parts of the country. Should the commission be technical or should it be representative of the stakeholders?

Ian Jones: The commission certainly needs to be independent; it should not be part of a cosy circuit. It must be rigorous and experienced in its assessments, it must support its executive and it must understand the arguments. Stakeholders, in the form of large consumers, could undoubtedly be very useful to it. They will have the time and the ability to handle the issues because they are supported by their companies—I am not referring to avoiding conflict of interest, but they have the resources for research and examination that a private individual might not have.

The composition of the commission is certainly a delicate question, in relation to its independence, its toughness and its experience. I remember that, some years ago, the Transport and the Environment Committee talked about the need for surveillance of the regulatory committee, possibly even with a Holyrood component. The way in which the commission works will be extremely important for the consumer. Balancing the various factors will be critical because it will regulate cross-subsidy, which undoubtedly occurs, and it will assess capital expenditure and how it is funded, depreciated and applied through the charging system. There are a lot of difficult questions and there will be huge conflicts and difficulties. It will be an important and difficult task.

Dr Sawkins: From my reading of the bill, I have in mind a narrow role for the commission. It will be given a job to do and it will have to do that job. I return to the point that it is for ministers to set policy. The difficulty with having a commission that comprises particular stakeholder groups is that we might go back to what we have had in the past few years—stakeholder group A says loudly in the press, “We want this,” and stakeholder group B says, “We want that.” That does not help the poor consumer who needs to get water. My short answer to whether the commission should include representatives is no. It should be a panel of experts who conduct this narrow job. However, the wider issue of how the consumer voice is heard needs to be unpacked a little further.

Alan Thomson: In my submission, I have suggested an increase in numbers for the commission. It should be representative of stakeholders and having between three and five members is inadequate for that purpose.

Rob Gibson: We are dealing with supply to both commercial and private customers in areas in the north of Scotland and the islands that have very small, individual supplies. Those are the areas that I represent. If we had only technical experts involved in the commission at that stage, I would be frightened that the needs of such supplies—which are unique to the make-up of the water industry in Scotland—would be ignored. You say that we should have a larger commission that might take that into account. How would the technical experts deal with that situation?

Dr Sawkins: That is not the job that they should have to do under the terms of the bill. It is for the minister to make a decision on the basis of the social policy objectives of the water industry in Scotland. The minister should hand over those social policy objectives and it should be for the commission to work out the minimum cost of getting a level of service to the customers. It is not for the commission members—who will be appointed, not voted in—to set social policy or to make social policy on the hoof, which would be the worst of all worlds.

Maureen Macmillan: We also have customer consultation panels, whose relationship with the water industry commissioner has not always been terribly happy. If we have a commission rather than a commissioner, might that perhaps change?

Alan Thomson: The wider view that a commission would have simply by having a panel
of members rather than a single commissioner could only lead to a healthier debate. The commission is there to promote the interests of the customers of Scottish Water and needs to have ears that will listen to the various parties that have an interest in Scottish Water.

Dr Sawkins: As the convener said at the start of the meeting, I am the deputy convener of the south-east of Scotland water customer consultation panel. I see that the convener of the panel will speak to you later, so I will pass on that issue and leave answering that question to him.

Karen Gillon (Clydesdale) (Lab): I am interested in exploring the idea of the representation of stakeholders on the commission. There is already a bid for a cast of thousands to be included in the list of potential stakeholder representatives. My difficulty with the idea of expanding that list is the question who decides who is on the list and which geographical areas are represented. I could make a bid for my constituency, just as every other constituency MSP could make a bid for their constituency, every list member could make a bid for their area and every business organisation could make a bid for itself. Who represents the public sector? Who represents the health service? Who represents local government? Who are the stakeholders and who decides who those stakeholders are? How can we avoid discrimination against areas that are not included in the list of thousands? How can we avoid their being disfranchised, as I feel that my constituency would be if there was only a representative from the Highlands and Islands who had their own particular interests?

Dr Sawkins: You have just explained why I take the view that the commission should not comprise all the stakeholder groups. That is not its job. However, that gives rise to a further question: how are those voices to be heard? That is a question that you might like to ask other people to explore a bit further. I do not think that, as things stand, that is the job of the new water industry commission. It should not be playing that game at all, as it would get into the sort of muddle that you have just described.

Karen Gillon: In part, it is the role of the Parliament and its elected representatives to represent those stakeholders. However, there may be a need, somewhere underneath, to have some kind of forums and to develop the existing structures to make them more responsive and better listened to than they have been in the past. We must make that part of the transition to the new structure. The point is made in the submissions that we have received that we want a new start, not just to recreate the past under a new guise. We cannot go on as we have before; we have to have a new start to the water industry in Scotland.

The Convener: Over the past few years, we have had a series of different formulations of how different groups of customers are represented in the system. Going back to our initial discussion, we must be clear about the principles of the bill, how it is meant to operate and exactly who has which job. That is one of the things that we need to tease out in discussions with all our other witnesses.

I thank the three of you for being prepared to come and engage with quite a lot of difficult questions. It has been an excellent start, and we have really got to the heart of some of the tough questions that we will have to address. I thank you for coming and for your written submissions. We will take a break while the witnesses in our second panel take their places.

10:45
Meeting suspended.

10:48
On resuming—

The Convener: I call members to order. When members hear that “ping” noise in future, they will know that I am about to call the meeting to order. It is an advance warning system.

I welcome our second panel of witnesses, Iain Duff, the chief economist for the Scottish Council for Development and Industry; John Downie, the parliamentary officer of the Federation of Small Businesses in Scotland; and Bill Anderson, the campaigns manager for the Forum of Private Business in Scotland. As with the previous panel, we will not have introductory statements from you all, but we have your written submissions, for which we are very grateful.

Alex Johnstone: I will begin by asking whether each of the panelists was invited to and able to attend the water services conference that was held at the Roxburgh Hotel recently.

Bill Anderson (Forum of Private Business): I attended the conference, but I did not receive an invitation. I am told that it went missing. I found out about the conference the day before and rearranged my programme so that I could attend it. The consultation process, which was very well run, is the first proper consultation that we have had and I hope that it is not a one-off just to appease us and that the process will continue. As I said in our submission, I feel that consultation should be enshrined in the bill, because it has been lamentable up until now.

John Downie (Federation of Small Businesses in Scotland): We were certainly aware of the conference and were invited to it. Our
chairman will be chairing a seminar on water that the Executive is holding in Aberdeen on 27 September, at which the minister will be present. We have been involved in discussions on the issue with officials and ministers.

Iain Duff (Scottish Council for Development and Industry): The SCDI, too, was invited and our submission was made to a Business Commission on the draft bill. We should be acting as regards sustainability, most of which we had thought that it would. We felt that that was the way things should go if the market were to open up in the way in which we had hoped that it would.

The Convener: Although no other member seems to want to move on to another question, I do not think that we have run out of questions. I have a question for Iain Duff on an issue that no one has mentioned so far—thresholds. In your submission, you spend a bit of time discussing thresholds. Will you say a little bit more about them? I get the strong impression that you do not agree with the way in which they have been set. You make a strong argument for their implementation to be phased. Why do you think that that is so important?

Iain Duff: Our submission was made to a previous consultation on the draft bill. At the time, we felt that there had to be careful consideration of the way in which the market was going to be opened up and how that would apply to customers. In the event, the bill mentions the opening up of the market through phased thresholds as an alternative that could be considered. We felt that that was the way things should go if the market were to open up in the way in which we had thought that it would.

As it turns out, because the market on the retail side is not to be opened up at all to common carriage—a matter that I have spoken to the Executive about since the bill’s publication—thresholds are a slightly less important issue for the domestic sector. However, if, over time, the opening up of the domestic sector to common carriage began to be considered, the use of thresholds would allow us to ensure that we took a staged and measured approach to that process, so that it was conducted in a considered and sensible way. I understand that the bill does not necessarily go down the route that we envisaged, with the result that thresholds are less meaningful at this stage, but they are an issue that we should consider if the situation develops. As John Sawkins said, we do not know how competition will progress, but thresholds could be considered if a different route is taken in the future.

Rob Gibson: I want to return to sustainability issues, which the committee will be addressing more and more. The water framework directive requires that water charges provide an incentive for users to use water resources efficiently. How do you, as representatives of small businesses, respond to the idea of business using its resources efficiently? How do you think that you can meet those aims?

Bill Anderson: Roseanna Cunningham made a good point when she mentioned her view of the situation in Australia, which seems to offer a good disincentive to overusing water. We have been advising our members that, if at all possible, they should opt for metering. That is really the only way to go.

The assessment that is based on rateable value is grossly unfair—I think that the bill acknowledges that. It depends on how the banding system works, but I cannot see that that system will provide the same disincentive that a meter provides. I know the effect that a meter has on my electricity bill and I am sure that members are all aware of the effect that meters have. When we get a big bill, we do something about it, such as turning the heating down a bit. I think that the same applies to water. Meters are the best means of ensuring that we use water efficiently. That said, if we are talking about a very small business or a very small domestic house, it might not be worth the expense of installing a meter, but there must be a break-even point somewhere.

John Downie: As regards sustainability, most businesses are always thinking about resource efficiency, because that is a cost issue. That is true of telecoms, gas, electricity and water.

It is probably true that, in relation to water and waste water, not enough has been done on resource efficiency. Scottish Water has a duty to act in a sustainable manner—I forget the exact wording of its responsibility—but it is probably not being as proactive in helping businesses with sustainability and reducing costs as it should be. That is especially the case with waste water.

In working with the Executive’s energy efficiency office, we have made every effort to examine the whole issue of resource efficiency, which is becoming increasingly important for businesses. The figures in some of the submissions show by how much people have reduced their water costs. It makes good business sense for them to do so.

The Convener: I suppose the question is whether that resource efficiency duty should be included in the bill as a requirement on the water industry commission, whether Scottish Water should be responsible for it or whether it should be the job of some of the other water companies, in consultation with business users.

John Downie: Businesses should be acting sustainably anyway, because that makes good business sense. We do not think that such a duty should be included in the bill. Scottish Water has a duty to act in a sustainable manner and to pass
that on to its customers through its operational activities. We would probably agree with John Sawkins that the commission will have a clear role and responsibility and that to bring in different sustainability and environmental targets could mean that it would take its eye off the ball.

The Executive talks about achieving environmental sustainability through all its policies. The key to that is the operational delivery of that objective. We would leave that out of the commission’s remit.

**Rob Gibson:** We will have to return to the question whether such sustainability requirements should be in the bill; other people may have a view on that. John Downie has explained those requirements in some detail but does not think that they should be in the bill.

**Bill Anderson:** We could have a look at what happens elsewhere. Last summer, I was quite surprised to find that my brother’s house in Lincolnshire is metered. He said, “What’s the problem? All the houses here are metered.” I was quite surprised that the relevant authority in the east of England meters individual bungalows and houses. If that can be done down south, perhaps we should have a look to find out whether we can do it up here.

**John Downie:** That is the issue of cost-reflective charging. As Rob Gibson described, sustainability could be included in the bill, but the question is whose responsibility it should be to deliver on that. We would probably disagree that that should be the commission’s responsibility, but if you are asking whether it should be Scottish Water’s responsibility, that is a different matter. A key question is who you want to deliver on sustainability.

**Iain Duff:** An issue that arises is how easy it is to enshrine in legislation matters such as environmental targets. That may be one of the stumbling blocks to including a sustainability requirement in the bill. As Scottish Water is in the public sector and is closely accountable to ministers, ministers could give instructions to Scottish Water to take seriously the sustainability responsibilities that it must fulfil. However, it is difficult for us to get a handle on how sustainability could be sensibly enshrined in the legislation.

**Mr Ruskell:** We are talking about delivery and who is responsible for ensuring that it happens, but what kind of delivery are we talking about? Bill Anderson mentioned meters. Meters are obviously a stick, but what kind of carrots do businesses need to ensure that their water use reduces over time and that they make cost savings? Who should be responsible for ensuring delivery on that? Should it be Scottish Water? Who is best placed to give businesses what they need to reduce their resource consumption and lower their costs?

11:00

**John Downie:** Last year, in tandem with the Scottish Energy Efficiency Office we produced an environmental toolkit for our members. The toolkit looked at a range of areas including waste, water, energy and utilities. The FSBS agrees that although every business should consider the issue the agencies should be the ones to assist businesses. We see resource efficiency more as a business development issue than an environmental issue. It is Scottish Enterprise, the business gateway and Highlands and Islands Enterprise that should be looking to help businesses reduce their costs. If businesses do so, it helps them and, at the same time, helps the Executive to meet its sustainability targets. It becomes a business development issue instead of an environmental issue. Our most recent survey of our 2,000 members in Scotland showed that they want clear information on their environmental responsibilities, including information on cost benefits and on how to reduce their costs. That is a role for Scottish Enterprise.

**Bill Anderson:** I do not want to have an agricultural argument with Mark Ruskell about the difference between a carrot and a stick. At the end of the day, however, we are talking about a carrot. The stick is when the water bill is found to be far too big; the carrot is when a reduction in consumption reduces the amount of the bill.

My brother is inhibited from washing his car and watering his garden every night because to do so would add to his water bill. As a customer in Scotland, I am not inhibited in that way. When there is a drought I can water my garden until I am told not to. However, although I could carry on using water, I do not: my car is lucky if it gets cleaned once in three months.

The carrot is the prospect of lower water bills and the stick is that, if someone does not reduce consumption, they will get a whacking great bill.

**Mr Ruskell:** Usually, the carrot dangles off the end of the stick.

**The Convener:** Let us move on from carrot-and-stick analogies. Three main issues have been raised: individual users of water services actively taking steps to reduce their own consumption costs; the water industry commission looking to reduce the overall costs of water as it is supplied in the domestic sector; and competition in the business sector bringing about lower costs. It may be helpful to think of them as different objectives, as there are different ways of delivering them.
Alex Johnstone: I want to ask a specific question about a problem that has been brought to my attention on numerous occasions. It relates to those who are essentially business customers, but are at the very lowest end of demand in the business community. Typically, those business people have a shop or a workshop in which there is a single sink with a single cold tap and yet they find themselves paying £400, £500 or £600 a year for the privilege. Do you see anything in the bill that would deliver some solace to the people who continually write to me on the subject?

John Downie: No, I do not see anything in that respect. Is that an issue for the bill or for the consultation on the principles of charging that is going on at the moment with ministers? We have said clearly to ministers that they must break the link between rateable value and water usage. We have to find another way of charging businesses like that for water, a way that charges them on a usage basis.

The problem with the water industry is that it is a heavy cost infrastructure industry. There is an issue about volumetric charging and standing charges. At the moment, as we have said, the emphasis is too much on standing charges. That is why businesses have been penalised. There is also the link to rateable value in terms of water and sewerage. Clearly, we have to break that link, but it will not be possible to achieve that in the bill as it stands at the moment. Ministers seem to be listening to our concerns on the rateable value issue, but we realise that it will take time.

Bill Anderson: That is absolutely right. Many people are paying huge bills for very little use—they may have just a kettle and a staff toilet and yet their bill is £450. I got a telephone call from somebody in the north-east of Scotland—I will not identify him—who said, "I have a standpipe in my yard that used to cost me 75 poonds a year and do you know what it costs me now?" I said that I did not and he replied, "450 poonds. When I go home, my water bill in my house is 450 poonds and I've got twa quines and twa sons, all using water all day long and having baths every night. It's nay fair." I asked him whether he had complained about it and he said, "No, I'm frightened that, if I do complain, they'll put my house water up instead."

We have had several complaints of that nature. That is why we have suggested that there should be some means of appealing against bills that appear to be stupid, such as a charge of £450 a year for using one standpipe to wash down a van once a week. Metering would obviously help the situation. A person might find that a bill of £800 could be reduced to £100 if they invested in a meter. That would probably be worth it. Again, however, we have to give people some incentive for doing that.

Iain Duff: I would agree with that. The fact that having a meter can bring down the cost of water to someone who has a small usage rate is a good case for metering. As has been touched on, investing in a meter would bring savings.

I agree that the parallel consultations on investment and on the charging regime are important and, like others, SCDI is currently consulting its members to get concrete answers to the question of how we can get a more focused charging regime that takes account of small usage by extremely small businesses. I know that that might not be a matter that relates to the bill that we are discussing.

John Downie: However, it will be crucial that, when the minister writes to the commission to set out his policy, he takes cognisance of the situation in relation to the principles of charging, which is probably the most important issue for the business community at the moment.

The Convener: We are conscious that there are links throughout this issue. When we have the minister in front of us, we will be considering the quality and standards III programme and the principles of charging. The matter will come back to us and we will pick up the points that you raise when we question the minister.

Maureen Macmillan: Mr Duff, in your submission you mention cross-subsidy, which is contentious with businesses because they feel that they subsidise domestic customers. With the previous panel, we discussed the balance between the social obligations of delivering water and the commercial side of the issue. I notice that you think that the bill should deal with cross-subsidy. Would you care to elaborate on that?

Iain Duff: The cross-subsidy from non-domestic customers to domestic customers is a fact of life. As an economic development organisation, the SCDI has a responsibility not only to our members in the business community, so we are in a position to understand that in order to provide a universal service there must be some cross-subsidy in Scottish Water. As you say, it is a question of balance, but I am not sure that I can say where that balance should lie.

As I said in our submission, the ability of Scottish Water to continue the practice of cross-subsidy in the way in which customers are charged across the board might be put under threat once the market is opened if, for example, large customers are cherry picked by other providers. I do not know what would need to be done to avoid that, but, under the Competition Act 1998, there is a threat that the current structure could be undermined and, for example, customers in rural areas and others who are more difficult to service might be penalised. However, there is a...
need to take into account the fact that the balance is not quite right at the moment and is stacked against business customers. I realise that we do not have the answers, but there should be a recognition in the bill that competition and the opening up of the market might be problematic, although, of course, we cannot predict how competition will affect the situation. That is a risk of which we need to be aware and which must be addressed in some way.

**Bill Anderson:** I gave the example of the chap with the standpipe. Obviously, he felt that his business was subsidising his home. Dr Sawkins made the very good point that some businesses have a social function—he mentioned post offices. I put it to the committee that the average cafe does not provide toilet facilities for its own good, but for the good of the public, its customers. Much provision of water services has a social function, especially in businesses that may be very important to the local community. Maureen Macmillan knows that in the Highlands the local shop is sometimes on a margin. We heard from the owner of a sweetie shop in Ayrshire, who complained that she was running the shop as an annexe to her house and was being charged for water, although she never used any water in the shop but always went upstairs to use the toilet in her house. She is now paying something like £350 per year for nothing. The charge was reasonable before, but it has gone up by 600 per cent. We must consider the social dimension of businesses as well as just domestic users.

**John Downie:** The real issue as regards subsidy is clarity. As Iain Duff said, at the moment the non-domestic sector is subsidising the domestic sector. However, there are subsidies in the non-domestic sector as well as in the domestic sector. We want the principles of charging to get to the heart of the issue and to get us clarity. Whether there will continue to be subsidies is an issue for ministers. We see that there are obvious benefits to the business community in reducing subsidies. Whether we phase out subsidies is an issue to be discussed. However, ministers must say clearly where the cross-subsidies are and how much they will be, and must build that information into their policy decisions, so that we can have a debate about cross-subsidy issues. Ministers may in the end make a decision that we do not like, because we believe that the subsidies are too high, but at least we would be able to debate that with them. At the moment, there is no clarity and different figures for cross-subsidy are given by different industry experts. We would like to have some clarity.

**Maureen Macmillan:** Subsidies may be necessary. The question is, from whom should the money come to subsidise social need?

**Bill Anderson:** I am concerned because poor people do not necessarily live in the smallest houses. Council tax banding is not a good measure. Many well-off older people move to a small house. They may not need help, where quite a big family in a middle-sized council house may need it. In its submission, the Forum of Private Business mentions the need to identify the poor households that need help and cannot pay. We should not assume that the people in the smallest houses are those who cannot pay.

**John Downie:** In your social policy objectives, you have to identify the people at whom you want to target the subsidy. At the moment, cross-subsidy is a blunt instrument that is not being used effectively. The targeting of subsidies is a policy decision, responsibility for which lies clearly with ministers and the Parliament.

**The Convener:** Do you have a view on cross-subsidy between different business sectors? Large water users could negotiate deals that might be good for the nation, but who decides how the pricing structures and subsidy issues should affect the business community?

**John Downie:** At the moment, very large users are able to get a fairly good deal from Scottish Water. Cross-subsidy affects medium-sized to fairly large users, which people in the industry say are subsidising smaller businesses. However, we do not know that for sure. We do not know whether the subsidy is 5 per cent, 10 per cent or 15 per cent. In order to debate the issue, we need clearer figures. Obviously, our members do not want to be subsidised and we want an efficient, effective industry. Our aim should be to phase out subsidies and to have people pay by use, especially in the business sector. Businesses want to pay for the water or sewerage infrastructure that they use.

**Bill Anderson:** If I misquote this example the BP Grangemouth representative who will give evidence later can correct me. I gather that BP Grangemouth pressed for a much lower price from Scottish Water after it was quoted a price for drawing cooling water from the Forth-Clyde canal. Scottish Water was then able to undercut that price. One wonders whether the price that was offered to BP Grangemouth is the price that my business or any other small business would pay.

11:15

**The Convener:** We can pick that up with our next panel. We may want more information from Scottish Water and possibly from the minister on how such issues are evaluated.

Karen Gillon will move us on to a new topic.
Karen Gillon: John Downie’s submission mentions how the proposed change to the Water (Scotland) Act 1980 would mean that Scottish Water would no longer be supplier of last resort. I fully understand the point about the need to encourage entrepreneurs, but are there no circumstances in which it would be fair for Scottish Water to say, “Look, your track record has been X, Y and Z on five different occasions.” If a company that does not pay its bills moves premises again, why should Scottish Water continue to supply it?

John Downie: It should not do so in circumstances where the person is a serial bankrupt who is serially abusing the system, but we have other concerns. At the moment, UK bankruptcy legislation is being changed to make it easier for people to get back into business if they have been put out of business for genuine economic reasons and if they are not one of the phoenix companies that we all know abuse the system. Our concern is to ensure that people can still go back into business. It is probably not necessary—in time, it might be—to enshrine a limit on the number of times that someone could do that. The point is that some people whose previous business failed will go back into business and they should have access to water services. I have no clear thoughts on whether a limit should be set, such as for people who have failed to pay their bill six times over the years, but the issue could be discussed.

Mr Ruskell: Clearly, there are many unknowns about how retail competition for non-domestic customers is envisaged to work. What kind of companies might supply water in the commercial retail sector? How attractive will that be as a commercial proposition for those companies? How interested will private business be in retailing water?

John Downie: That is difficult to judge. Different figures have been given to us about what the benefits would be, but I think that our submission mentioned that the average saving might be between £20 and £40. If a major utilities company such as Scottish Power were to enter the water industry, the benefits from having one bill for gas, electricity and water might rise, but the benefits do not seem significant to our members, so that might put new entrants off. I think that there will be a wait-and-see attitude; I have not heard that there will be a major rush of companies going into retail competition for water.

Bill Anderson: I think that the issue will be a bit beyond the scope of small and medium-sized businesses; it will tend to be bigger businesses that will go for it. Iain Duff will be able to give a better reply than we can, but I point out that our submission recommended that the bill should not allow the cherry picking of customers to the detriment of the majority of business users and it should not disadvantage a particular group of business, such as those in rural areas. That should be borne in mind.

Iain Duff: The threat that larger companies will be cherry picked is highlighted in several of our submissions on water. A similar situation could arise in postal services when that market is opened up.

It is difficult to say how attractive water retailing will be. I have heard anecdotal evidence that the English water companies, which are obviously just on the doorstep, may be interested in stepping in. John Downie has mentioned other utility companies, but it is very difficult to tell how attractive they will find the bill and how easy it will be for them to pick it up on its provisions. Each company will have to consider that and will probably wait some time before moving in—there will not be an immediate effect.

Of course, such companies are able to enter the non-domestic sector already. The committee will hear from some of the bigger companies about how they are treated and how they have sought out other suppliers for their water services. It is difficult to tell how quickly the market will expand, which companies will move in and how quickly they will do so.

John Downie: The market is very small—it consists of 160,000 businesses—which, on the face of it, does not make that attractive a proposition, unless one was thinking of piggybacking on electricity, gas and other utilities.

Bill Anderson: The committee should perhaps consider an excellent paper produced by the consultation panels—‘Principles of charging for water and wastewater’—the research for which was done by John Sawkins and a colleague. Tables CS1, CS2 and CS3 use the Office of Water Services model to compare water prices for small, medium-sized and large companies in the Thames, Wessex and Wales areas, with prices in the Scottish water authority areas. The table for medium-sized companies shows that a medium-sized user—which is described as being a hotel; it could also be a factory or an office—would pay £6,815 per year in Scotland, but would pay only £2,345 per year in Wales. That means that water is three times as expensive for a company in Scotland. Welsh Water might feel that it would be worth while shipping its water up here, because companies in Wales are getting it at a third of our price. That is something that concerns business.

The Convener: Would it be possible for us to obtain a copy of that paper?

Bill Anderson: I have the tables with me.
The Convener: It would be helpful if you could circulate them to members.

Who has the final say on charges? The submissions express very different views. One of our previous witnesses thought that ministers should not play a part in the final decision on charges, but that they should just set the framework and then leave matters to the water industry commission, which would comprise a set of experts. The witness said that it should be for experts to deal with a debate that is necessarily complex and technical. However, the submission from the Forum of Private Business takes a totally different view. I want to tease out what is a key issue in the bill. You say:

“The Scottish Parliament must not lose control of Scottish Water by delegating control of policy and charging to an … unelected Quango.”

Why do you believe that?

Bill Anderson: We asked our members whether they wanted privatisation. We were quite surprised to find that only 9 per cent of them said that they wanted privatisation, whereas 66 per cent of them wanted the Scottish Parliament to have stronger powers.

I know that many MSPs had folios of complaints from very small businesses, including some in Argyll and Ayrshire, as well as several in the north of Scotland, in spite of the fact that we were told that the increases there had not been as big. I remember that there was a group of people from the Black Isle area, north of Inverness, who had files of complaints. When the issue was brought up with the minister, he told us that he could not intervene. We think that, at the end of the day, the buck must rest with Parliament. The power, which has been lost, must be taken back by Parliament. Sixty-six per cent of our members wanted the power to be reinvested in Parliament so that if they were to bring the matter up with their MSP, a power of intervention would be available.

Karen Gillon: How would that work? Would every person who had a problem with their bill come to Parliament so that it could arbitrate?

Bill Anderson: It is clear that there was a problem last May. We and John Downie’s organisation had a huge folio of complaints from people who had suffered a sixfold, a sevenfold, an eightfold or even a tenfold increase in their water bills. It was not a matter of interfering in that, but something had gone wrong. When I met Allan Wilson on 23 July last year he said, “I agree with you, Bill. I am entirely sympathetic, but I can’t intervene.” Who do those people turn to? We have suggested that there should be some means for the man with the standpipe to say, “Look, there is a ridiculous charge for this standpipe—it’s 450 pounds.” He wants to tell somebody, but he cannot.

If the principles are wrong and something like that happens, and many MSPs want to raise it—and yes, the issue was raised in the debate, but the answer was always, “Sorry, I cannot intervene”—the minister should be able to say, “What’s gone wrong? What can we do about it?” At the time, we proposed that we could take the sting out of the multiple increases and reduce them to a maximum of 100 per cent at a cost of £4.1 million, which is only 1 per cent of the Executive’s underspend. We were given the figures by Scottish Water, which was quite prepared to do that, but when we asked the minister whether he would allocate £4.1 million he said, “I agree in principle, but I can’t do anything about it.”

We think—and we have asked our members, who agree—that that power should remain within the Scottish Parliament. What else do we have a Scottish Parliament for?

Karen Gillon: Would the same facility exist for domestic customers?

Bill Anderson: You did not have the problem with domestic customers. There was a 10 per cent—

Karen Gillon: I assure you there was a problem with domestic customers because, as you correctly pointed out, there was an issue about whether people at the margins could pay.

Bill Anderson: Fair enough. I can see that now.

Karen Gillon: I know that there was a particular problem with the business community. I am just interested in how you think parliamentary intervention would work.

John Downie: The clear issue over the past two years is about roles, responsibilities and accountability. We talked to Scottish Water, the Executive and the water industry commissioner, and everybody passed the buck. The bill clarifies the issue. The minister will set the policy guidance, on which Parliament will have its say, and the commission will set the charges. As we said in our submission, the minister’s policy statement will be crucial to issues such as cross-subsidy and levels of charging. The policy statement is critical for the minister, but how it is implemented operationally is a matter for the commission and Scottish Water.

In relation to the customer having their voice heard, there will still be MSPs and the minister, but we envisage an important role for water customer panels. As we said in our additional remarks, the most important issue for us is that water customer panels represent the views of non-domestic customers as well, although that is not clearly identified within the bill. That must be made clear, so that we will have a voice, through the water customer panels, to the commission. We have not
looked at this point in detail, but it is worth exploring the relationship between Ofwat and WaterVoice, which is the customer panel south of the border. Issues in relation to water customer panels have to be clarified. They must have a strong role, as the voice of all customers.

I disagree with Bill Anderson. At the end of the day, ministers will issue policy guidance and they will change their policy guidance at different times. They can intervene if they want, so the buck stops with ministers, but the issue is clarity with regard to who delivers what and roles and responsibilities. Ministers make policy, whereas the commission and Scottish Water are operational. That is how we have to see it. If we strengthen the role of the water customer panels, customers will have a voice with which to influence the charging regime and make complaints.

The Convener: The difference with the new legislative framework is that, at the moment, the minister can finally override the water industry commissioner, but that option will be removed by the bill. That is one of the issues that I am trying to tease out.

Bill Anderson: I do not disagree with John Downie, but if the bill gives the power to the minister to intervene, so that he cannot hide and say that he cannot—

The Convener: No, it is the other way round. He has the power at the moment, but he will not under the new regime. I am trying to tease out what you think about that.

John Downie: The commission must deliver a charging scheme that reflects the Executive’s policy.

Roseanna Cunningham: Is this more an apparent difference than a real difference? Is the issue not one of ministerial direction? You are talking about policy, and policy is not direction. I think that Bill Anderson is looking for a system where the minister retains the ability to direct. The concern is that the bill would effectively remove any ministerial power to direct, which then leads us into much bigger issues such as democratic accountability.

11:30

Bill Anderson: You hit the nail on the head. Problems are always going to happen. The minister does not appear to have been aware that there was going to be a sixfold increase until it arrived and was publicised. The story was first published in The Herald, and I believe that that was when the minister first knew about it.

We raised the matter with representatives of Scottish Water, who hummed and hawed and, at the end of the day, said “We told him to look at page 237 of the Green report”. I said that he had probably fallen asleep by page 230. However, when I looked up the document—I cannot remember if it actually was page 237—with Graham Smith of the water consultation panel, we found a blank page. The information had got lost somewhere in that huge, 500-page report.

There are going to be emergencies and anomalies. During the next round, we probably will not be more involved, and someone will still say “But I’ve got a 600 per cent increase.” When that happens, the minister has to have the power to say “Hold on folks, how did this happen? I did not know about this.” If he has the power now—I was told that he had not—then he was not telling us the truth. He must retain that power.

Roseanna Cunningham: I have sympathy with what Karen Gillon is getting at. The minister’s office cannot deal with individual bills—I do not think that that is what anyone is suggesting. However, there is an issue to do with the extent of the power that is retained by the minister when an issue is flagged up, as happened last year. Can the minister use the legislation to shrug his shoulders and say, “Nowt to do with me”, or can he say, “Yes, I can see that there is a big problem that has to be dealt with and I will find a way of dealing with it”? At the moment, we are in danger of going down the road of the minister not having any responsibility or accountability.

Bill Anderson: That is right.

John Downie: Perhaps we slightly disagree on that. Our reading of the situation is that the commission performs a technical and, in a sense, financial function in setting up a charging regime under the direction of the minister, as Roseanna Cunningham said. The minister can limit the charges in his letter of direction to the commission; for example, he could say that business charges will not rise by more than the rate of inflation. How the commission delivers that is up to it and Scottish Water. The minister can influence how much businesses and domestic users pay and, as we understand it, he will still have power. However, power will no longer be invested in one water industry commissioner. There will be a commission that will have more accountability and we will have to scrutinise it much more heavily than we have done in the past. There was a failure to scrutinise the figures in the past, which was at the root of some of the problems. I agree that the issue needs clarity.

The Convener: We are bound to come back to this in subsequent evidence. It is clearly a key issue.

Mr Morrison: The proposal mirrors what happens currently in further and higher education: the minister issues a letter of guidance and then the funding councils go away and do their jobs.
Iain Duff: I agree with that approach. Because we are going to move from having an individual commissioner to having a commission, there should be much more consultation with others. The policy memorandum gives the impression that the commission might be more open to receiving submissions and to consulting on its work. I see parallels with Postcomm—the Postal Services Commission—which consults quite a lot on the work that it does and how it regulates the Royal Mail. I would like to see if that is the way in which the commission will work in the future and if that is how it will take on the views of stakeholders.

The Convener: We will have to come back to the discussion on consultation, different stakeholders and how they are involved in the process to ensure that we understand exactly how the commission will work.

Nora Radcliffe: A right of appeal is part of the process. There is the policy direction, the commission does its technical work, the whole thing is set up and, as I understand it, Scottish Water has a right of appeal, but nobody else has. Is having an appeal mechanism the right way to tackle the problem?

John Downie: There cannot be an individual appeal mechanism in the bill, as such a mechanism does not exist in any area of utilities—or anywhere else at the moment. Non-domestic customers have to have a forum where they can make their views known and influence the process.

The consultation on the principles of charging is on-going. We are running focus groups to get our members’ views, and business organisations and individuals will continue to make their views known and influence the charging regime. If we can get the principles of charging right—how businesses are charged for their water use—we will take away many of the problems that you are referring to. If we break the link with the rateable value and find a better way to charge for surface water drainage and all the issues that are causing the current problems, we must then have a debate about the principles of how one charges. Once there is a charging regime, in a sense one cannot appeal against the charges in the same way that one can appeal against a rateable value, because—I hope—that that link will be broken.

The Convener: So there will be winners and losers, but it is about drawing out the principles that shape—

John Downie: The principles are key. In discussions with our members, we have tried to focus on the big principles of how one charges, rather than on trying to design a charging regime, because that is not what we are talking about. Once the principles have been set, the regime will be up to the commission.

Bill Anderson: I diverge slightly from those comments. The first thing to remember is that it will be 2010 before the banding system is introduced, so for some the unfair system will continue in operation until then. There will still be people, such as those in the sweetie shop or with the standpipe that I mentioned, who seem to have ridiculous bills for very little water use. We have suggested that there should be an appeals procedure in exactly the same way that people will have next year when they receive their new rateable values. If somebody has what seems a ridiculous bill for a small amount of water use, they should have the right to appeal against it. There has to be some neutral appeal structure, and that is why we have suggested such a structure. There will always be anomalies and problems. We have to achieve a sense of fairness, rather than leave people feeling frustrated that they can do nothing about the situation.

Karen Gillon: I understand the point that you are trying to make. However, if a bill is based on the current charging regime and, according to that regime, the charges are right, how does one appeal against that bill?

Bill Anderson: I put it to you that if the guy I mentioned with the standpipe were in your constituency, he would be frustrated and would come to you because he would not know where to turn. All I am saying is that one needs to be able to vent that frustration.

The consultation panels have been good at representing the consumer’s point of view, both domestic and business. They have done an excellent job. However, when I met the south-west panel members in Stirling I asked, “What now happens to all this information?” and was told, “It goes on to our website.” I then asked, “Who reads the website apart from Lord God Almighty?” and the answer I got was, “Well, not the minister.” If we had a complaints procedure, individual complaints would have to get through. That is why I say that we should streamline the procedure and give it more teeth through consultation panels. There must be some means by which someone with an anomalous water bill—such bills will occur no matter what we do, even after the introduction of a new regime—can have the bill corrected.

Karen Gillon: I understand what you are saying and I agree that people have come to me. However, if the charges in a bill are right, according to the current charging regime, against what do people appeal? Let us accept that the current charging regime is wrong, inequitable and unfair or that it should be reviewed and changed, which is the process through which we are going with the present consultation exercise. However, the regime will not have been changed by next year. In the meantime, against what can people
appeal? They might not think that the charges in a bill are right but, based on the current charging regime, those charges will be right.

John Downie: The fairly simple solution in the short term is to ensure that every business customer is metered. If that were the case, they would pay according to use and metering would take the rateable value out of the equation. Ministers could direct Scottish Water to do that as quickly as possible. I accept that that is a short-term solution until we break the link with the rateable value in the charging regime, but it is a way whereby businesses would pay for their water use. It would mean that the small shop about which Bill Anderson spoke, which pays £450 a year for the use of one toilet and one sink, would pay for the amount of water it uses. There is a short-term option as well as a long-term policy change. At the moment, one can appeal against one’s rateable value and if one succeeds in reducing the rateable value, the water bill should go down. Although I take Bill Anderson’s point, I believe that there is a short-term solution.

The Convener: Okay, we will return to that issue in future, particularly when we have the minister and Scottish Water in front of us. I am keen to move on to our third panel this morning. I thank the three witnesses on our second panel for their written submissions and for being prepared to answer all our questions this morning.

11:41
Meeting suspended.

11:49
On resuming—

The Convener: We move on to our third panel of witnesses. We welcome Alan Barclay, the general manager of Port Dundas distillery, representing Diageo; Dr Ray Mountford, the commercial development manager at BP Grangemouth; and David Calder, the head of manufacturing with Ciba Speciality Chemicals. Some of you have heard the previous discussion. Again, we are not going to take opening statements from you, but we are grateful that you have given us your thoughts in writing. Members have been able to read those submissions, which I suspect will provide the jumping-off point for a number of questions. As I look around the room, Alex Johnstone catches my eye. Would you like to lead off the questioning, Alex?

Alex Johnstone: I thought that I would complete the set, convener. I have a very broad opening question. Do the panellists agree that the consumption of water services should form the basis of a system of taxation?

The Convener: It is optional to respond to the committee’s questions.

Alan Barclay (Diageo): I suggest that the answer is no. We should pay for our water services in the same way as we pay for other utilities such as gas and electricity.

Alex Johnstone: Given the fact that in effect much of the bill goes down that road, do you think that the bill provides enough protection for you from a system that is designed to be essentially redistributive in its charging mechanism? Are you adequately protected by the bill?

Alan Barclay: Again, I would suggest not. If anything, because of the way in which the bill is set out, it takes away some of our protection. We have a concern about the fact that the appeal procedure will go down south to the Competition Commission whereas, at the moment, it rests with the ministers. Given that Scotch whisky is an indigenous industry, we feel that it would be far better for any appeals to be decided in Scotland.

Dr Ray Mountford (BP Grangemouth): I echo Alan Barclay’s thoughts. We do not believe that the consumption of water services should be the basis of taxation and we do not believe that the bill protects business from that. The bill is written to provide ministers the opportunity to achieve social objectives through taxation. However, we do not think that it is right that business should pay for that through water charges.

David Calder (Ciba Speciality Chemicals): I agree with the views of the other two gentlemen. It is clear that companies such as ours are much more incentivised by the system whereby we are metered and charged for what we use than by any general taxation method.

Alex Johnstone: What changes would you like to be made to the bill in order better to protect the position of larger companies in Scotland?

Dr Mountford: The bill needs to think hard about what its purpose is. We read the bill as a means to protect against the Competition Act 1998, not as a means of opening up competition in the water industry. If that is its purpose, it is causing a lot of heartache and hard work for businesses and for Scottish Water for no real benefit. Fundamentally, you should be asking what the bill is about.

Alex Johnstone: Do you feel that the availability of retail competition will benefit you in some respects, or will it bring no advantage over the current position?

David Calder: I believe that the impact will be fairly minimal. Any competition is good, but a big opportunity has been missed by not looking at competition in its wider sense.
Alex Johnstone: Do you mean by that extending the opportunities for competition within the sector in which you are involved or extending the opportunities for competition across a range of sectors, possibly including the domestic sector?

David Calder: I am thinking more of the principle of common carriage. There is clearly a view that the risks to public health and the risk of interruption to infrastructure would be increased if common carriage were introduced. As a business, we find that rather strange. We pride ourselves on our very strong environmental health and safety performance. Not only is that good for the community as a whole, it is good for business. Other companies could be allowed to use the network that is available. That would work, provided that the right safeguards were put in place. The risk would be no greater than it is at the moment—in fact, it could be lessened.

Alex Johnstone: I have a business that tests the public water supply regularly and I assure you that you are correct that that has certain aspects to it. What would you expect common carriage to deliver for your business?

David Calder: It would give us more choice. On our site, we are a big user of all the utilities, including energy, and water is one arm of that. We are also a big user of gas and electricity. Liberalisation of the gas and electricity markets in the past few years has given us more choice. That competition has been good, and the same would be the case with water.

Alan Barclay: We understand that opening up Scottish Water’s infrastructure to competitors would involve huge problems. However, as the bill will open up only the retail sector, which covers payment for services that are supplied, such as meter readings and repairs, it will have only a small impact on our bill. We question whether there will be real competition from outside to challenge Scottish Water on that, because that contributes such a little part of the total bill.

Dr Mountford: When we asked other water providers whether they would be interested in such competition, they said that a market of 160,000 businesses for retail only was not big enough, so we do not expect competition to come into Scotland. Even if common carriage were allowed, we would not expect competition from that, either. England and Wales have common carriage, but real competition among the counties does not exist—each looks after their own—so why not just let retail competition begin and see what happens?

Alex Johnstone: So you take the view that the bill does not go far enough to encourage true competition in water supplies in Scotland.

Dr Mountford: It definitely does not go far enough—it will restrict competition. It will provide legal protection against a challenge under the Competition Act 1998.

Maureen Macmillan: I will talk about cross-subsidy. An anomaly strikes me, because if businesses such as yours want to have cut-price water, I imagine that other customers will have to pay the difference. In effect, that would be a cross-subsidy to you, yet businesses by and large say that they do not want to subsidise domestic customers, for example. The previous panel also argued that small businesses should have some subsidy. Lots of people seem to be talking with different voices.

Alan Barclay: My company feels that it has paid a fair price over the years for the water that it receives. We have special agreements for some of our supplies. For instance, when Dalmuir treatment plant was being operated under a private finance initiative, we entered into a special agreement with the West of Scotland Water Authority for five years. That allowed the authority to be sure of the revenue and allowed us to budget more effectively. Special agreements benefit both sides.

With regard to your question about cross-subsidies, business in Scotland is at a disadvantage compared with business in the rest of the United Kingdom because down south there is less onus on water charges to businesses and charges are reflected more fairly between the domestic and business sectors.

12:00

David Calder: If businesses are to subsidise the domestic sector, that is fine. That is a policy decision that has to be made. However, while companies such as ours have been working hard during the past few years to try to save water, there has been no incentive for domestic users to do likewise. We have to pedal twice as hard and help not only ourselves but other users, and that does not seem entirely fair.

I understand the rationale behind not wanting to have special deals, but if costs continue to escalate as they have in the past couple of years—and the evidence suggests that they will—more and more companies will look for alternative sources of water instead of using Scottish Water. Ultimately, that will put a bigger burden on everyone else and nobody will win. We as an organisation do not want to spend time looking for alternative sources, whether on our own or by using another company. We have enough issues to deal with running our business and producing pigment, without looking for alternative water supplies. If that is what we have to do to save costs, that is what we will do, but ultimately that will just add a burden for Scottish Water’s other customers.
Maureen Macmillan: When you talk about looking for alternative supplies, do you mean creating your own private water supply? If there is no competition, who would you go to?

David Calder: We have considered the possibility of drilling boreholes and we have a couple of test boreholes on our site. We are located beside the River Cart and we have considered the possibility of abstracting water from the river. Those are just two possibilities. I disagree a little with Ray Mountford; companies have come to us to discuss the possibilities that would exist if common carriage were allowed and I believe that there would be some interest in that, albeit not on a large scale.

Alan Barclay: The bill allows us to buy from a completely different source, as opposed to a company that supplies potable water. We, like Ciba, would consider drilling boreholes at Port Dundas, but we are more likely to use the Forth and Clyde canal, which is right next door to us, for cooling and washing water. There are alternatives open to us.

Maureen Macmillan: So it is likely that Scottish Water will lose big customers.

Alan Barclay: Yes.

Dr Mountford: The committee is probably aware that we were weeks away from coming off the network, with the competition—a third party—building its own private water supply to the Grangemouth area. That supply would not have been just for cooling water, as a treatment facility would have been included so that the water could be used for everything except drinking, and it does not cost much more to go on to make drinking water. Scottish Water saw that it was going to lose serious income and it came to talk to us, through its power to make special agreements. That is good competition and good common sense in business. We support the continuation of Scottish Water's ability to have special agreements. That is fair to the commissioner, he set up different groups to gather that information. The frustration was that the information did not seem to be used.

The Convener: The suggestion is that we have a commission of three to five experts. The question is whether the commission is seen as a vehicle of accountability for different sectors and types of user, or whether there is an alternative mechanism for those views to be heard. In this morning's debate, we discussed what it would do for users in South Lanarkshire if there was someone from the Highlands and Islands on the commission, or, if there was someone from the small business sector on the commission but not a representative of the big users, who would adjudge between them. Our understanding of the commission is that it is to make decisions on the most effective costs and to set a charging regime that works. The committee is trying to work out where the stakeholders should intervene, because we want the commission to include the best possible people to identify costs and charges. That is not necessarily an accountability process, though. Someone suggested that there should be six to eight people on the commission, rather than two to five. We have to work out whether we are trying to deal with accountability through the commission, and whether that is the right thing to do.

Alan Barclay: It should be left to the committee to decide the best way forward. One of the earlier panels said that it is important that voices are heard. I take your point about whether the commission would be able to achieve anything if it had 20 members, but whether or not the commission stays as it is, with only three or four members, I suggest that we need a small, tight group. However, there must be some mechanism for key stakeholders to have a voice.

Mr Morrison: You would not have any concerns about the commission being too unwieldy.

Dr Mountford: That is up the commission. To be fair to the commissioner, he set up different groups to gather that information. The frustration was that the information did not seem to be used.

The Convener: Are there any other questions on that topic, or do members want to move on?

Mr Morrison: I have a question on another topic. In Ray Mountford and Alan Barclay's submissions, they make the case for large water user groups and businesses being on the water industry commission. In the light of what others have said this morning, do you still resolutely maintain that position? I think that it was Karen Gillon who said that if all users were to be represented on the water industry commission, there could potentially be a cast of thousands.

Dr Mountford: Apologies—I did not hear everything that was said this morning, but I heard part of it. I strongly believe that the commission, rather than the commissioner, is a good way forward. Businesses, especially large ones, should have a voice on the commission. Our frustration in the past has been that, although we have a large water user forum, where we discuss issues, nothing gets taken forward. There is lot of theory, but no one is listening to the real world of business. We hope that the commission listens to those points of view. It should listen to the small business forum and so on.

Mr Morrison: It is a relevant issue.
David Calder: We have not taken that view. Where do we draw the line? If the commission ended up having 20 members, a lot of technical and financial competence would be lost. Someone in one of the earlier panels mentioned that big businesses would be able to provide resource to the water commission. Over the past few years, water and other utilities have taken up an increasing amount of resource for businesses such as ours. It is easy to say, “Yes, sure, we can provide somebody for the commission,” but the reality is that businesses are cost driven and do not have infinite resources to be involved in this type of activity all the time. I would much rather that the commission was made up of a small, competent team of technical and financial people.

Mr Morrison: And that there was an equally competent mechanism to allow people’s views to be heard.

David Calder: Yes.

Mr Ruskell: I want to push that a bit further, to follow on from what Alasdair Morrison and Sarah Boyack were saying. Let us assume, for example, that you cannot have a place on the commission. What other structure for engaging your views with the process would you want? Would you want to go directly to a minister, or would you want to be involved in another stakeholder group? Would that be a business stakeholder group? What are the key elements that are needed to involve your views in the policies?

David Calder: There is room for a business stakeholder group. The point is not so much what mechanism is used, but how effectively it allows views to be made known.

One of our big concerns over the past few years has been the unpredictability of what is happening. For business, it is a big thing to be able to plan into the future, knowing what will be happening in two or three years’ time. Last year, we were presented with the possibility of our trade effluent bills going up by 93 per cent next year. That is no good for businesses. We need to be able to plan and to know what is coming up. If we have some forum through which we can have effective communication in two directions and into which we can feed, we will get some sort of feeling about what is coming back the way and about what is likely to happen over the next few years. It is a two-way process.

The Convener: I suppose that you want your voices to be heard in different places. There are the policy framework and its costing to consider. There is an issue to do with how users have an input to the policy framework, which is ministerially led, and there is an issue to do with what the implication for users is and how cost is affected. That is presumably where the work of the water industry commission kicks in. It is a matter of thinking through the various roles—thinking about who is involved where and about the appropriate place and the right time for people to make known their views. We take the point about cost stability, which was mentioned by small business users on the previous panel of witnesses.

Nora Radcliffe: The witnesses have been speaking about how and where they have an input. I wish to challenge Dr Mountford about the large user group. Do I understand that you had an input and that you had access to the water industry commissioner, who set up groups to collect information? Is your argument that that access was not effective or is your gripe that the answer that the commissioner came up with, having balanced all the information, was one with which you did not agree?

Dr Mountford: It was probably a bit of both, to be fair. I think that you should ask all the large water users that, although they are obviously not all here today. That arrangement started off as being a good idea for the sharing of information. Over time, however, it became clear to me that it was just a means of trying to find out what we were up to.

Nora Radcliffe: Was it not good for the water commissioner, who makes decisions about charging, to know what you were up to?

Dr Mountford: If the arrangement was a two-way one, that would be fine. The water users group had long debates about a policy that was, at the time, driving towards fixed costs—regardless of how much water an organisation used, 80 per cent of the costs were to be fixed costs. Representatives of large businesses said that that was absurd. It did not seem that the users group was being listened to, although that impression has diminished over time. There were of course some gripes at the time.

Nora Radcliffe: The water industry commissioner stepped on a lot of toes when it came to the fixed costs of the infrastructure. It was argued that that was a huge part of the whole cost of the industry and that the charging regime should reflect that. Would you accept that in principle?

Dr Mountford: No. We do not charge people every time they step on to a BP forecourt just because they are there. They have to buy the petrol or the food first. We do not say that we want 80 per cent of our income on the basis that we have some assets on the ground.

Nora Radcliffe: On the other hand, you charge people using your BP forecourts at the extremities a hell of a lot more than you charge people in urban areas.
Dr Mountford: I do not know about that for certain.

Nora Radcliffe: Some of us living on the periphery do not think that that is very fair.

The Convener: I think that that was what we would call an exchange of views.

Karen Gillon: So who pays for the infrastructure?

Alex Johnstone: The customer.

Karen Gillon: The customer does not pay for the infrastructure, according to Dr Mountford.

Dr Mountford: The customer pays based on their use of the system.

Karen Gillon: So customers do not actually pay for pipes getting put in the ground, for having the sewerage system or for having waste treatment works and all the things that are required.

Dr Mountford: We have paid a fair amount over the past 20-odd—indeed, 50—years.

Karen Gillon: But I am asking whether you think that there should be a standing charge for the infrastructure. People would pay for the amount that they use, which means that you would ultimately pay more because you use more.

12:15

Alan Barclay: We at Diageo believe that the fixed charge, rather than the volumetric charge, should be lower and that the emphasis should be on the amount that one uses. After all, as we said earlier, people would be encouraged to save water rather than to leave a tap running because they knew that it costed next to nothing to do so. We believe that it would be better to have a lower fixed charge for meters and so on and for people to pay for the water that they use.

The Convener: Presumably the issue of maintaining the existing framework has to be dealt with before we can deal with the amount of water that comes through the system.

Alan Barclay: One would hope that we have paid in the past for the structure that is already there. The upgrading of the Dalmuir water and sewage works, which I mentioned earlier, is an ideal example, because it was funded by private finance. There is no way that anyone else pays for that facility apart from the people in the area who use it. Again, as I said, the project gave us the opportunity to go into partnership with the then West of Scotland Water. It allowed us to maintain continuity of supply and allowed the board to maintain continuity of revenue to pay for the service.

Roseanna Cunningham: I want to pick up on some issues that reflect where this debate is going. Diageo and Ciba's submissions contain explicit references to environmental policies on water reduction. Although BP Grangemouth's submission does not put the matter in quite those terms, the issue of water reduction is also raised. What are the current incentives for reducing and/or conserving water resources? What will the incentives be once the bill is passed? Ideally, what form should such incentives take?

Alan Barclay: Ideologically, we believe that we should not waste any of our raw materials, of which water is a main one. We have gone about reducing water usage in a number of ways. Basically, we have been less wasteful.

Roseanna Cunningham: Do you receive an incentive or benefit from that?

Alan Barclay: At the moment, where we pay for the water, our costs go down. Moreover, in the smaller distilleries up north, we see it as good practice not to waste our resource or to accept that it will be available ad infinitum. However, in certain areas—including Port Dundas, where I work—water and effluent represent one of our biggest costs. Obviously, the incentive is to reduce usage in order to reduce costs.

Roseanna Cunningham: So that incentive would have to be maintained.

Alan Barclay: At the moment, there is enough incentive to focus our minds on how much we spend on water.

David Calder: I agree. We have a huge incentive to save water. There is a basic conflict between the fact that Scottish Water's infrastructure costs lead to a high standing charge and the issue of sustainability, which we discussed earlier. If we really want a sustainable water supply and trade effluent network, standing charges need to be reduced. However, the tendency is for such charges to go up, which means that the incentive will not be as great.

Roseanna Cunningham: Do you accept that reducing the standing charge will mean an increase in the unit price?

David Calder: Yes.

Dr Mountford: I would say that that would give a great incentive to save water.

Karen Gillon: I take it that your unit cost is less because it is negotiated in special agreements with Scottish Water. However, if the standing charge is reduced and the unit cost rises for everyone else, medium-sized businesses which do not have special agreements because they do not consume enough water would be penalised. You guys would be okay because you have a special agreement.
Alan Barclay: We do, at the moment. However, the bill is saying to us that we will all be going on to the same charges next year.

Karen Gillon: You are obviously lobbying to have that changed.

Alan Barclay: Yes, we are lobbying for that. It would perhaps reduce our costs—although it might not—but one thing that we have found most useful in the past and that might be taken away is being able to go almost into partnerships with the water boards. In our submission, we give three examples of where working together has saved the whisky industry costs and saved the water boards costs. That has allowed a lower-cost solution on the domestic side as well.

Karen Gillon: I can see those advantages but, as Roseanna Cunningham says, every coin has a flip side. If we reduce the unit cost, the people who will be worst affected will be those who are at the high end of the market but not in the sector where they can negotiate a special agreement. We will obviously have to balance all those considerations.

David Calder: An issue that Bill Anderson mentioned earlier, to do with small businesses, was that all their costs were, in effect, a standing charge—there was just a fixed charge. We are not looking for special treatment; we are looking for the same thing for all businesses—a smaller standing charge and a metered charge.

Dr Mountford: You need to understand—and perhaps you do, Karen—that a special agreement is not just the negotiation of a number. Scottish Water had to follow clear guidelines, in our case anyway, to prove that we had a real alternative.

Karen Gillon: The small businesses were making the point that the people who would be penalised would be the medium to large businesses that are not at the top or bottom end but in the middle. They could be caught out in any potential changes.

Dr Mountford: But if there were no special agreements, those businesses would be penalised even more, because we would go and do something different.

Roseanna Cunningham: Damned if you do, damned if you don’t.

Karen Gillon: Absolutely!

The Convener: What we really need is transparency in the process. We have discussed cross-subsidies between different groups and how charges are set; we need clarity on that. You have made a case for being able to continue with special agreements and we can test that case with the minister and with Scottish Water when they come to the committee.

Dr Mountford: My understanding of the bill is not, as Alan Barclay said, that special agreements will be cancelled next year. They will continue until their contractual termination.

The Convener: We will discuss that with the minister.

It has been extremely useful to have your papers in advance and I thank you, as I thanked the other panels, for being prepared to answer our questions today. We have roamed through quite a few topics.

12:23

Meeting suspended.
SUBMISSION BY THE STUC

INTRODUCTION

1 The STUC welcomes the opportunity to give evidence to the Scottish Parliament Environment and Rural Development Committee on the Water Services (Scotland) Bill. This response needs to be seen in the context of the STUC’s and our affiliates’ submissions to recent Scottish Executive consultations on the water industry and in particular the consultation on the Draft Water Services Bill.

2 This is the latest of a number of legislative developments affecting the water and sewage industry in Scotland including the establishment of a public water corporation, Scottish Water and a revised regulatory framework. This bill focuses on changes to the regulatory framework and the development of competition in networked water and sewage. Competition already exists in off-network services.

3 In this context it is important to recognise the scale and speed of change that has already taken place in the industry and the importance of a period of stability to bed in the current structure.

Part 1: Water Industry Commission for Scotland

4 The STUC welcomes the establishment of the Water Industry Commission for Scotland as a corporate body replacing the Water Industry Commissioner. Experience elsewhere has demonstrated that regulatory frameworks that rely on one person have not operated satisfactorily and we endorsed many of criticisms of the current arrangements in the recent Finance Committee report.

5 The model proposed in the bill has many similarities to the regulatory framework that exists in private utilities. These have been subject to some criticism not only from the utility industry and trade unions but also as reflected in the recent House of Lords report on regulation. Other ideas from the think tank Demos include the concept of adding ‘public value’.

6 In essence the problem has been that regulators promote competition to the detriment of other factors. There has been an over emphasis on price and efficiency with little consideration of the impact their decisions may have on employment and other social and environmental concerns. These economic models can also be in conflict with government policy as we have seen recently over the transmission loss proposals from Ofgem that would have ended the nascent renewables industry in Scotland. Schedule 1 does not set out the type of person that should be appointed to the WIC. Membership should reflect the wider public policy considerations and not simple economic factors.

7 Getting the right framework and objectives is all the more important in a public service. The objectives of the water industry are of wider concern than simply those connected to the current system as defined in section 1 of the Bill.
8 The STUC welcomes the provisions in section 3 allowing regulations to define how the balance of costs between Scottish Water and developers will be calculated. We believe there is a strong case for developers meeting a much greater share of the cost of new water and sewerage services so that new development can proceed without detracting from the urgent need to renew the existing infrastructure.

Part 2: Provision of Water and Sewerage Services

9 The driver for this legislation is the UK Parliament’s Competition Act 1998 that seeks to prevent the restriction or distortion of competition and the abuse of a dominant market position. The STUC and our affiliates have previously highlighted the danger of this ill thought out legislation for essential public services. In essence the Water Services (S) Bill seeks to implement the provisions of the Competition Act whilst minimising the adverse impact on Scotland. It should however, remind the Scottish Parliament to be vigilant about other international competition initiatives that impact on public services. In particular, reforms of the EU internal market and GATS.

10 The policy basis for this section of the bill takes a more realistic view, than the original Water Services Bill consultation in 2001, on the alleged benefits of competition. Experience in other utilities has shown that the alleged benefits are more apparent than real and comes at a significant cost to the consumer. The STUC rejects the view that competition in essential utilities brings benefits to consumers. There is no evidence to support this often-quoted position.

11 The Competition Act 1998 introduced a new framework for competition bringing into domestic law (this is a reserved power to the UK parliament) provisions which enact European law on this issue. In particular it introduces new sanctions for anti-competitive behaviour. The Act applies to Scottish Water and is enforced by the Director General of Fair Trading (DGFT) as the WIC in Scotland does not have the same powers as the water industry regulator in England and Wales, OFWAT.

12 The Act includes provisions for exemptions and exclusions on a number of grounds. The STUC believes that the provisions of Schedule 3 (7) remain a sound basis for an exclusion under the Competition Act. Water and sewerage is an essential service in a civilised society and competition puts that service at risk, particularly for disadvantaged customers. The public policy grounds could relate to rural, economic and social exclusion strategies under this heading. In addition the Executives environmental objectives will be difficult to achieve in a competitive framework and this provides a further public policy basis for an exclusion.

Prohibiting common carriage on the public networks

13 The STUC agrees that the risks to public health and the environment outweigh any foreseeable benefits from allowing access to public water and wastewater systems. Our affiliates have previously highlighted some of the many technical difficulties in achieving common carriage including:
• Many existing mains have no spare capacity for additional water
• The Fraser Report (Burncrooks) recommended the zoning of water from different sources as a precaution against contamination.
• Arrangements for proving and compensating for mains pipes fractures caused by third party supply e.g. pressure surges.
• Responsibility for boosting disinfectant residuals.
• Backflow protection to stop accidental or fraudulent back-syphonage
• Allocation of the cost of leakage or lost water e.g. misuse of fire hydrants.
• Pipe size incompatibility when new sources are attached to the mains.

14 Scottish Water would have to be responsible for managing a comprehensive access code to ensure that there was adequate supply. This code would be enormously complex covering all possible situations including seasonal demands, bursts, drought provision etc. There would also have to be costly physical systems in place to isolate new entrants supply and provision for ‘last resort’ supply.

15 We understand that the provisions of s4(5) are intended to cover contractors working for Scottish Water. The wording could however be interpreted to allow a somewhat wider private sector access.

16 The consequences of common carriage even with costly systems intervention could include at worst contamination of water supplies or at best interruption and damage to the water and sewage infrastructure. The public health consequences are obvious and therefore the provisions in the bill prohibiting common carriage are sensible.

Prohibiting retail competition for households

17 The STUC agrees that retail competition poses risks for households.

18 For household customers water charges, linked to Council tax bands, reflect broadly the ability to pay. The current arrangements include a discount for single adult households. The STUC notes that revisions to the current banding system will be considered as part of a wider review of local government finance. Competition would bring separate water charges and the loss of the essential progressive charge basis, which is in our view a requirement for an essential public service. There is no practical alternative to piped water and sewage disposal.

19 The arrangements in place in other competitive utilities for disadvantaged consumers are generally very limited. For example fuel poverty still impacts on one in six Scottish households despite the excellent measures taken by the Scottish Executive to address this issue.

20 The original consultation paper rightly identified the serious risk that new entrants to the market would ‘cherry-pick’ high-banded properties. This has also been the experience in other utilities where existing suppliers have been forced, because of competition, to chase ‘high value’ customers at the expense of other consumers. Not only would charges increase for most consumers but Scottish Water would be left with stranded assets brought about by off network provision.
21 The STUC therefore agrees that competition would develop in a way that would not benefit all customers and welcomes the provisions in the bill prohibiting this form of competition.

Licensing non-household retail competition

22 The STUC does not support the introduction of retail competition in non-households. The 160,000 premises covered by this competition are a significant part of Scottish Water’s operation. Business separation (s12) will be a further and unwelcome disruption to the corporation, which is attempting to address the long-standing problems facing the industry.

23 Some of the main problems include:

- Experience in the energy industry shows that business separation is an expensive business. The loss of integrated operations, economies of scale, rebranding etc all add to the costs charged to customers.

- The financial arrangements for business separation are crucial to the viability of the proposed retail arm and the wholesale organisation. The assumptions built into the Regulatory Impact Assessment give us considerable cause for concern. The efficiency gap calculations (para 14) are based on the 2002 estimates and the position has changed significantly (from a claimed 42% to less than 10%) since then. The size of the retail business is also crucial. Para 23 assumes the full retail segment is £109m (15%) compared with Ofwat's estimate of 8% for England and Wales. This could lead to unnecessary burdens on the retail arm and a weakening of the core Scottish Water organisation. In essence both organisations would be set up to fail if this financial structure is put in place.

- A whole new industry is created with new customer service, billing, marketing and sales operations, all of which divert resources which could be more effectively deployed improving our water and sewage networks.

- Further systems will have to be established to allow switching between suppliers. This has caused chaos in the energy market and will inevitably do the same in water and sewage. The provisions in s10 are particularly vague and the costings in the financial memorandum are optimistic in the extreme.

- As Scottish Water will have a statutory obligation to supply everyone they will be left with disjointed operations. Many of the cherry-picking arguments set out above also apply to non-household competition. Most of the 160,000 properties are small businesses in high street locations. New entrants will inevitably focus on larger consumers or those in geographically concentrated areas such as out of town estates in urban areas. S15 will also place additional costs on Scottish Water that should be spread across all suppliers.

- The WIC will gain further powers to directly set wholesale charges. Current experience indicates that this may not be wholly beneficial to either customers
ANNEX C

or the industry. Unlike other utilities the water and wastewater systems are not organised into a cohesive network. The industry has not diverted essential investment resources into management information systems that are an integral part of a regulated market. This is reflected in the WIC’s reports on Scottish Water’s alleged performance. Despite the apparent detail the judgements are based on limited data. In the privatised utilities the companies establish extensive regulatory functions to engage with the regulator. Again all of this would be recharged to the customer.

- Whilst not set out in this bill (because it is a reserved function) it is intended that any differences over charges between the WIC and Scottish Water will be referred to the Competition Commission. This body has no experience in dealing with a public service and in particular interpreting the broader objectives that Scottish Ministers can set under s18. Their expertise is in the economic and competition sphere. The STUC takes the view that these are properly public policy interpretations that should be decided in Scotland and not handed over to an inappropriate London based organisation.

**Conclusion**

24 The STUC broadly welcomes the provisions of the bill as being a more realistic recognition of the realities of the industry that those set out in the original Water Service Bill consultation in 2001.

25 The major problem relates to the proposals for non-household retail competition. We suspect that this more modest proposal reflects a concern to be seen to provide an element of competition in accordance with the philosophy inherent in the Competition Act. However, the proposals still constitute a major upheaval for little value to the consumer. It is also a further stage along the road to the full privatisation of Scotland’s water.

**SUBMISSION BY GEMSERV**

**Introduction**

This paper is a response to the request by the Environment and Rural Development Committee for interested parties to provide evidence on the general principles of the Water Services etc (Scotland) Bill ("the Bill") and in particular the effects of the approach to competition, regulation and pricing on those involved in the industry.

For clarity, we have divided our response into 3 sections:
- A short introduction to Gemserv;
- Our overall view of the proposals; and
- Specific observations in respect of 5 key issues:
  - Avoidance of undue influence;
  - Harmonisation with England & Wales;
  - Business Separation;
  - Customer Transfers; and
Gemserv Limited
Gemserv is an independent company originally established by utility companies to manage, control and develop utility retail processes. We support de-regulated markets and provide assurance that market participants can operate in accordance with the relevant industry baseline.

We have extensive experience in the operation and development of the UK energy retail markets. Gemserv also advised the Dutch Parliamentary Committee on energy liberalisation and we are playing a key role in opening the competitive electricity market in the Republic of Ireland. In water, we have provided major input to one of Ofwat’s Advisory Groups in the production of a customer transfer protocol for the England and Wales water industry.

Overall View of Proposals
Gemserv believe that the overall approach, as described in the Bill, is appropriate for the market in Scotland.

By focusing on the delivery of retail services to customers, the complications of common carriage and the need for balancing and settlement processes have been avoided. Within the UK Electricity Market for instance, over 80% of the information exchanged (data flows) is a consequence of the settlement requirements. As a result of these simpler proposals, effective and cost efficient customer transfers should be possible, thereby attracting new entrants and minimising regulatory oversight.

We believe that the size of the proposed market is sufficiently small and well defined to minimise the risks of market opening.

Specific Observations
In implementing the Bill, the industry will need to develop an appropriate governance framework. To ensure that this framework is appropriate, we believe that there are a number of issues that need addressing more fully.

Avoidance of Undue Influence
Based on Gemserv’s experience in utility retail markets, we feel that the Water Commissioner should take an active role in the organisation of advisory, expert and representative groups in the design and ongoing development of the market. New entrant companies need to be encouraged to participate in developing the market infrastructure.

When decisions are left exclusively to commercial companies, there is a risk that some parties may exert undue influence, distorting the market design in their favour.

Harmonisation with England and Wales
It would be beneficial for those involved in the Scottish market to be cognisant of what is being developed for the competitive water market in England and Wales.
It would be appropriate that any customer transfer process be compatible across both markets. This would be particularly beneficial in enabling transfers for group (multi-site) companies who operate across the UK.

Whilst Gemserv do not advocate that the two markets should adopt the same framework, our experience has shown that there is usually a move towards harmonisation as markets mature.

**Business Separation**

European legislation has required energy companies to focus on business separation between their regulated monopoly businesses (pipes and wires) and competitive (retail/supply) businesses. This has taken time to achieve, but the physical separation of these two functions by the creation of separate companies has been successful in eliminating potential advantages for suppliers with associated distribution businesses.

The ideal position in water would be to establish regulated monopoly businesses and competitive retail businesses. A clearly defined process to determine what assets and liabilities should fall into which of the incumbents businesses should be prepared. However, given that the distribution element in water comprises such a high percentage of the overall cost, Gemserv recognise that it may not be practical or cost effective to create separate companies at this juncture. Instead, appropriate “ring fencing” between Scottish Water Wholesale and Scottish Water Retail should be required to force the incumbent supply business to operate on the same terms as new entrants. This would avoid Scottish Water Retail from deliberately or inadvertently benefiting from cross subsidies (premises costs, the cost of getting customer data, etc.) from the regulated monopoly business.

Customers can be afforded protection by the use of an independent central registration authority operated by an organisation that is not connected with any retail or distribution business in the market.

Furthermore, there may be a requirement for an independent “policeman” to ensure adherence to business separation rules.

**Customer Transfers**

A clear, simple and standardised transfer process (“Transfer Protocol”) is essential to ensure that customers can change supplier easily. An ill-defined transfer process will cause participants to devise their own systems, potentially resulting in inefficient transfers or customers being transferred in error.

There should be an agreed set of principles to provide a measure against which processes and rules are tested. These principles should recognise that:

- for any competitive market to function effectively, there must be a defined process to enable customers to switch supplier;
- existing market players and new entrants must be able to interoperate and communicate efficiently in a cost effective way;
- processes must be consistent with current legislation, existing practices, licence obligations and commercial arrangements;
data items that are exchanged between participants should be clearly defined in a catalogue that is maintained and the communication medium clear; and

the process needs to be appropriate to the level of competition (limited to 160,000 non-household premises) but be adaptable for any future lowering of the eligibility threshold, e.g. to domestic premises.

Gemserv recommend a customer transfer process comprising of an independently managed registration function coupled with the minimum number of processes and dataflows necessary to facilitate competition.

In order to minimise costs, the registration system need not be complex. As a minimum, it should support the electronic transfer of information. The system could comprise a simple database with internet based technology for communication between market participants.

As well as being able to send / receive data, the registration system should:

- allow for appropriate monitoring and interrogation on the status of competition;
- demonstrate compliance with the Protocol including appropriate audit controls; and
- ensure consistency of functionality, application and maintenance of accurate information.

As part of our work for the England and Wales water industry, a basic customer transfer process was devised consisting of only 5 dataflows. We believe that this process could also be used as a basis within the Scottish Market, potentially providing a common process across the whole of the UK.

The Ofwat Advisory Group also defined other elements of the transfer protocol that will be essential to operating an effective process. These include the definition of transfer objection & rejection rules, data validation, treatment of debt, transfer timescales, erroneous transfers, disputed meter reads and compliance to the transfer protocol.

Governance Framework
A structure allowing all parties to have representative input to the operation and development of the market is essential. Processes and data structures will inevitably change over time and it is critical that the management of change is controlled in such a way that all participants in the market are able to have input and rights of appeal.

Gemserv recommend that a Governance Framework be developed to provide:

- an issue resolution process for resolving operational issues where the solution necessitates changes to the industry design;
- a representative change management process that defines the process for initiating change, the timing and implementation of such changes and the role (if any) for the Water Commissioner; and
- any rights of appeal and the supporting funding & voting arrangements.
The Governance Framework and rules for change control should operate for the benefit of all legitimate constituencies without undue influence from any individual party.

In line with the proposals of the UK Government’s Better Regulation Task Force, we recommend the establishment of a Governance Framework enabling self-regulation to develop within the industry. Self-regulation within robust governance regimes allows all stakeholders, including customers, to play an appropriate part in shaping the pace and direction of change.

The Governance Framework should be defined within a multi-party agreement to which all parties are bound. Suppliers operating within the competitive market should be obliged to enter into the multi-party agreement as a condition of licence.

The operation of the multi-party agreement and decisions taken should be transparent to all relevant parties. The issue of participation is not merely access to the relevant documentation, but the ability to actively and effectively participate in its development. There should be no exclusion of relevant information or viewpoints and consequently, appropriate contributions should be allowed from all interested parties on key decisions.

Once implemented, parties should be accountable within the multi-party agreement for their performance against their obligations. Failure to comply with any mandatory elements could amount to a breach of licence, which would allow for enforcement action to be taken.

Summary
In conclusion, Gemserv believes that:

- the overall approach, as described in the Bill, is generally appropriate for the market in Scotland;
- the Water Commissioner needs to take an active role in ensuring that all relevant parties have the option to input into the design and development of the market;
- there should be full cognisance of the competitive market being developed in England and Wales;
- appropriate “ring fencing” between Scottish Water Wholesale and Retail will be required to ensure a level playing field for all market participants;
- a clear, simple and standardised customer transfer process should be developed, comprising of an independently managed registration function coupled with the minimum number of processes and dataflows necessary to facilitate competition; and
- a Governance Framework should be developed to allow all parties to have representative input to the operation of the market and its ongoing development.
Environment and Rural Development Committee, 13th Report, 2004 (Session 2) – ANNEX C

SUBMISSION BY WATER UK

Introduction
Water UK is very pleased to have the opportunity to comment on the Water Services etc. (Scotland) Bill. Water UK represents the water and sewerage service operators in England, Wales, Scotland and Northern Ireland, in both the private and public sectors. It is as a UK organisation that we comment here, as we commented in response to the 2000 “Managing Change in the Water Industry” and the 2001 “The Water Services Bill – the Executive’s Proposals” consultations.

We support the prime objective of the Bill, as stated in the Policy Memorandum, ‘to ensure that there is a robust transparent regime that operates in the interests of all customers.’ In particular, we agree that the competition regime proposed for Scotland should benefit all customers, not just those who are able to change service supplier. Our comments focus on the way in which the Bill proposes to achieve this objective and we have grouped them under three broad headings:

- Links with the Competition Act 1998 (CA98)
- Pricing regime
- Wholesale price charged by Scottish Water

Link with the Competition Act 1998
In many respects, the Scottish Parliament has to face the same competition issues in formulating the Bill as the UK Parliament did in passing Water Act 2003 (WA03). We note with interest that the Bill will create a different competition regime in Scotland from that now being introduced in England and Wales. The crucial difference appears to be that the Drinking Water Inspectorate (DWI) in England and Wales concluded in 2000 that the public health and water quality risks attached to common carriage were not significant provided its guidelines were followed. In contrast, the public health risks of common carriage are considered unacceptable in Scotland.

We wonder whether this judgement could be legally challenged. We also wonder how the argument that the public health risks are unacceptable could be sustained if the applicant for common carriage were a company using common carriage in England or Wales. There is also the question of whether the Bill goes further than is necessary to protect public health when it rules out sewerage common carriage. Generally, we wonder whether two quite different solutions, north and south of the border, to, essentially, the same problem can co-exist for long.

The relationship between CA98, European law and the Bill is, of course, for the Scottish Parliament to determine. We are raising questions here because we share the Scottish Executive and Parliament’s wish that the competition regime in Scotland should be primarily determined by Acts of Parliament and not through the courts.

The proposal in the Bill for a licensing regime is a solution which is common to both competition regimes north and south of the border and we very much support its principle. From the start, we lobbied hard for a licensing regime to supplement
CA98 and there is now a general consensus that only licensed competitors should be allowed.\(^{190}\)

**Pricing Regime**

We are concerned about the provisions, as we understand them, that the Bill makes for the pricing regime which will apply in the competitive area. One concern is that, if too much of the pricing regime is left to regulator's discretion, it may be open to legal challenge. Our other concern is that the pricing regime should be fully supportive of the social and environmental objectives assigned to Scottish Water. Essentially, the issue is that competition without a proper pricing methodology prescribed by legislation could lead to cherry-picking by new entrants seeking to supply only the highest return/lowest cost customers. The likely effect of this would be twofold:

- **Regional tariffs might become ‘de-averaged’,** either because the undertaker chooses to de-average in order to protect its customer base, or because the regulator or courts find that this is necessary for tariffs to be cost-reflective, and therefore non-discriminatory under CA98. Since there are several cross-subsidies – which the Scottish Parliament is likely to consider socially desirable – implicit in regionally averaged water tariffs\(^ {191}\), some mechanism is needed to preserve them in the face of competition.

- **Competition risks reducing Scottish Water’s ability to finance its national functions, particularly those regarding the protection of the environment.** Scottish Water customers pay for these activities through water charges. An unbridled competition regime could encourage business customers to become free-riders by opting to be supplied by a competitor who does not have the same obligations as Scottish Water and can undercut it.

The Bill proposes to avoid these problems by setting up a retail subsidiary of Scottish Water which Scottish Water will charge on the basis of an averaged wholesale tariff. We understand that this wholesale tariff will be the same for all customers, whether they are customers of the Scottish Water retail subsidiary or of its competitors. This approach, to set an averaged price on Scottish Water activities – none of which will be open to competition – has similarities to the solution chosen in WA03, where the problem of protecting social and environmental objectives is addressed through strict pricing rules. That Act states in formal legal terms the access pricing principle that economists will recognise as the efficient component pricing rule (ECPR), also referred to as “retail minus”.\(^ {192}\)

The success of the approach proposed in the Bill depends crucially on the correct setting of the wholesale price between Scottish Water and its subsidiary (discussed in the next section) and on the pricing regime applied to the retail subsidiary.

---

\(^{190}\) Licensing has been brought into law in England and Wales with WA03.

\(^{191}\) For example, cross-subsidies are likely to exist between urban and rural customers, and between high and low rateable value domestic customers. In England and Wales the cross-subsidy from large industrial users to domestic customers has now been unwound, primarily due to the threat of “inset” competition.

\(^{192}\) ECPR is the only access pricing approach that both promotes efficient market entry and prevents cherry-picking.
Subject to the wholesale price being set correctly, the proposed wholesale pricing regime, as we understand it, could protect Scottish Water’s objectives and its remaining customers. However, its retail subsidiary will be open to cherry-picking and free-riding if its charges are based on average accounting principles. Customers for whom retail services are relatively cheap to provide will be attractive to competitors, leaving the relatively expensive ones to the Scottish Water retail subsidiary. Moreover, if the retail subsidiary had obligations that its competitors do not, it would be unable to compete and its prices would increase for its remaining customers. It is important that the retail subsidiary be set up carefully with a remit consistent with its competition objectives. Otherwise, competition will be distorted, will not provide appropriate incentives to the retail subsidiary, and will provide benefits to some customers only at the expense of others.

### Wholesale price charged by Scottish Water

The separation of Scottish Water from its retail subsidiary can, in principle, produce some real benefits – clarity, accountability, control - that make it worth supporting. Indeed, some of our members in England have chosen this organisational structure. However, it is not clear that the Bill recognizes the conditions that need to be put in place for the benefits of separation to arise in Scotland. More important, there is a risk that the wholesale price will be set too low, which will not protect Scottish Water’s objectives nor protect domestic customers from increases in charges as a direct consequence of competition for business customers.

Our experience of helping develop a framework for competition in England and Wales is that customer-facing activities reach deep inside operational functions. Customers are instrumental in helping to identify network or supply failures; they also need to be informed of operational events. In addition, particularly in emergencies, some domestic customers, including those located on a business customer site, need special services that can only be provided by a water operator, not by a customer care function. We do not know the extent to which customer-facing activities will be retained within Scottish Water or transferred to its retail subsidiary, especially as it is not always feasible or desirable to separate facilities for domestic customers from those for business customers. It will be crucial to separate these functions between Scottish Water and its subsidiary most carefully, to determine how those transferred to the retail subsidiary will be financed and how the two entities will inter-act and exchange information. These questions have implications for the retail subsidiary’s ability to compete, as we said earlier, and also for the cost estimates in the Financial Memorandum. However, we are unable to quantify them and would refer to Scottish Water’s evidence to Parliament.

Crucial to the regime is the averaged wholesale price which Scottish Water will charge its retail subsidiary and, thus, the retail margin assumed to be included in end-user tariffs. We have evidence that leads us to doubt the estimates for the turnover of the Scottish Water retail subsidiary in paragraph 14 of the RIA. It gives the Water Industry Commissioner’s estimate of the retail gross margin as being in the order of 15% to 20% of business customers’ bills. Experience in the gas and
electricity industries is cited in support of this estimate, which was first published in the document “Strategic Review of Charges 2002/6”. However:

- This estimate is based partly on assumed data for three English water companies; we understand from them that some of the estimates are grossly inaccurate.\(^{193}\) If this was corrected, the estimate above would be reduced by about half, to less than 10% of customers’ bills.
- The comparison with energy industries is likely to be misleading; there have been several publications highlighting the fact that network costs represent a much greater proportion of total costs in the water industry than in the case in gas and electricity. It is not reasonable to assume that retail costs in water are in similar proportions to those in gas and electricity.
- A recent survey by the Office of Water Services (Ofwat, the economic regulator in England and Wales) of the retail margin in England and Wales showed that water retail operating costs, expressed as a percentage of water turnover, average only 9.6%.\(^{194}\) We have no reason to believe the position in Scotland is significantly different.

It is also worth noting that the retail costs considered above (quoted for English water companies by the Water Industry Commissioner, in gas and electricity and in Ofwat survey) are for the costs of serving the entire customer base, both domestic and non-domestic. The retail cost of serving domestic customers in England and Wales, expressed as a percentage of the average household bill, is much greater than that for non-domestic customers, reflecting the much lower average domestic bill. Therefore the relevant retail percentage for non-domestic customers is lower. Using Ofwat survey quoted above it can be shown that retail costs for large business customers may be as low as 4% of their total charge.

The true scale of water retail costs is obviously of interest to prospective licensees, but there is a danger from a public policy perspective of over-stating them. If the wholesale price is set too low in order to encourage the retail market to develop, domestic customers will suffer increased charges in order to maintain Scottish Water overall revenue; licensees, initially, will benefit at their expense. Later, as retail margins are competed away, the benefits will transfer to business customers, still at the expense of domestic customers. The size of the retail gross margin is therefore a very important issue and we urge Parliament to research it most carefully.

There is some recognition of the potential cost to domestic customers of not setting the wholesale price correctly in the RIA and Policy Statement, but the assumption that Scottish Water is 42% less efficient than English water companies is used to justify the financial pressure on Scottish Water’s wholesale operation. By the time the market opens in 2008 it appears likely that Scottish Water will have largely eliminated the efficiency gap. In this case, an overstatement of the retail gross margin – namely a wholesale price that is too low – will have a negative impact on domestic customers.

\(^{193}\) A significant element of the cost assumptions appear wrong by a factor of 7
\(^{194}\) This covers all water customers (household and non-household). The figure for non-household customers only is much smaller, as indicated in the next paragraph.
Conclusions
The issues of how the separation is achieved between Scottish Water and its retail subsidiary and of the wholesale pricing regime are crucial to the success of the competition regime proposed in the Bill. The Bill’s proposal to create a separate retail arm for Scottish Water does not in itself ensure that the effects of competition are confined to retail activities serving business customers. The allocation of costs to both wholesale and retail will affect the financing of the wholesale business and may ultimately affect charges to domestic customers. If these issues are not addressed, through legislation and regulation, competition in Scotland could encourage cherry-picking and leave domestic customers alone to pay for the environmental and social objectives given to Scottish Water.

SUBMISSION BY SCOTTISH WATER

Summary

Scottish Water welcomes the opportunity to present evidence on the Water Services etc. (Scotland) Bill. This Bill proposes a range of reforms to the structure and regulation of the Scottish water industry, and Scottish Water supports the Minister’s policy aims in this Bill. Scottish Water has also presented evidence to the Finance Committee in respect of the financial impacts of the Bill. This document discusses the wider policy implications of the Bill.

Scottish Water welcomes the changes to the structure of economic regulation and charge setting. These changes will increase the clarity and certainty of economic regulation, and will move the Scottish industry more closely into line with normal utility regulation in the UK.

In respect of the proposals for the introduction of retail competition for business customers, we support the Scottish Executive’s proposal to establish a regulated response to the requirements of the Competition Act. The necessary changes should, however, be introduced with the minimum possible disruption and additional costs to the business and its customers.

Scottish Water notes that it may be required to establish a retail subsidiary, which will be subject to price regulation through its licence until there is sufficient competition in the retail market. Clearly, such a price control would need to provide the retail business with sufficient revenue to enable it to carry out its functions at the lowest reasonable overall cost.

The remainder of this document follows the chronological sequence of sections in the Bill. The relevant sections are noted in the heading for each part of this document.

---

195 This evidence does not deal with those parts of the Bill dealing with control of water from coal mines
Changes to the Office of the Water Industry Commissioner

Sections 1 & 2 and Schedule 1

1. The changes to the office of the Water Industry Commissioner will be helpful in establishing clear and transparent economic regulation in line with the recommendations in the recent Finance Committee report. These proposals also move the Scottish system into closer alignment with the normal structure of utility regulation in the UK.

2. Scottish Water welcomes the proposal to establish a Water Industry Commission with a board structure. While we agree that the Commission members should not be representatives of stakeholder or customer groups, the Commission should contain an appropriate breadth of economic, regulatory and customer service experience.

3. It would be appropriate at this time to consider whether any changes or clarification are required in the role and responsibilities of the Water Customer Consultation Panels.

Proposals in respect of “reasonable cost” for new connections

Section 3

4. Scottish Water welcomes the provision for Scottish Ministers to make regulations dealing with the allocation of costs for new connections between Scottish Water and developers. As there is a range of potential models for the allocation of such costs, these regulations should be produced as soon as practicable to provide clarity for customers, developers and Scottish Water on their respective financial obligations. We recommend that these arrangements take into account the impact on the wider customer base.

Changes to the Strategic Review of Charges process

Section 18

5. Scottish Water welcomes these changes to the structure of the Strategic Review of Charges process. Again, we note that these changes move the Scottish industry into closer alignment with the normal utility regulation system in the UK. We note that the Water Industry Commissioner is in the process of consulting on his methodology on this subject, and we will provide detailed comments on his proposals.

6. This section gives the Scottish Executive the duty of setting public policy priorities and objectives for the water industry. It gives Scottish Water responsibility for delivering the Executive's priorities and objectives, and the Water Industry Commission responsibility for the economic regulation of Scottish Water in full accordance with these priorities and objectives. This clear definition of roles and responsibilities is welcome. The ability of Scottish Water
and the Water Industry Commission to discharge their respective roles successfully will be dependent on the Executive setting priorities and objectives that are comprehensive, clear and unambiguous.

Changes to the process for setting Schemes of Charges
Section 18 and Schedule 3

7. The changes to this process for setting Schemes of Charges moves the Scottish industry into closer alignment with the normal structure for regulated utilities in the UK, with any final determination being made by the Commission rather than Ministers. The proposal to remove from Scottish Water the power to enter into agreements with customers is more restrictive than in other UK utility markets.

Proposal to establish a retail market

Sections 4 to 17, 20 to 22 and Schedule 2

8. It is desirable to establish a regulated response to the requirements of the Competition Act, and Scottish Water supports the Minister’s aims in this regard.

9. The proposed retail regime may require the establishment of a retail subsidiary by Scottish Water. This should be undertaken so as to minimise the disruption to Scottish Water’s operations and to minimise the additional costs to the business and its customers.

10. It is proposed that the retail business will be subject to price regulation through its licence until there is sufficient competition in the retail market. Clearly, such a price control would need to provide the retail business with sufficient revenue to enable it to carry out its functions at the lowest reasonable overall cost. To this end, the Bill should include provision to enable the retail business to be funded to cover its reasonable costs, for at least the period when it is subject to a price control.

Costs set out in the Financial Memorandum

11. Independent research commissioned by Scottish Water suggests that the costs of establishing and operating the market mechanisms are likely to be higher than those set out in the FM.

12. There is a range of on-going costs to Scottish Water not included in the FM. These include new functions to manage the relationships and contracts with new retailers, the duty to act as retailer of last resort, and new increased costs of managing certain wholesale customer service functions due to additional frictional costs from the proposed business separation. In addition, Scottish Water Retail will incur additional costs due to its new functional responsibilities.

---

196 Research has been commissioned from IBM Consulting, who have developed market mechanisms for the deregulation of a range of European energy markets
The table below sets out Scottish Water’s current assessment of the likely costs of implementing the new retail competition regime.

<table>
<thead>
<tr>
<th>Topic</th>
<th>Cost assessment in FM</th>
<th>Scottish Water’s current assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs of establishing competitive regime and market mechanisms</td>
<td>£2.5 million plus £0.5 million per year</td>
<td>£10.8-18.4 million plus £3.1-5.1 million per year²</td>
</tr>
<tr>
<td>Establishment costs to Scottish Water Wholesale</td>
<td>£5 million</td>
<td>£5.8 million</td>
</tr>
<tr>
<td>Establishing Scottish Water Retail as a legal entity</td>
<td>£100K</td>
<td>As per FM</td>
</tr>
<tr>
<td>On-going costs of Scottish Water Retail in respect of new functions and costs of separation</td>
<td>Not included</td>
<td>£1 million plus £1.5 million per year</td>
</tr>
<tr>
<td>New wholesale functions incl. support of market and on-going costs of separation</td>
<td>Not included</td>
<td>£0.75 million per year</td>
</tr>
<tr>
<td>Commissioner’s costs</td>
<td>£5 million plus £1 million per year</td>
<td>As per FM</td>
</tr>
<tr>
<td>Switching costs</td>
<td>£30-50 per switch i.e. £300-500K per year</td>
<td>As per FM</td>
</tr>
<tr>
<td>Total – “One-off” costs of establishment plus “On-going” operational costs</td>
<td>£12.6 million plus £1.9 million per year</td>
<td>£22.7-30.3 million plus £6.6-8.8 million per year</td>
</tr>
</tbody>
</table>

**Benefit assessment in Regulatory Impact Assessment (RIA)**

13. The RIA assumes that Scottish Water is 42% less efficient than competitors, a position that may refer to a historic assessment of the former water authorities’ position in 2000/01¹⁹⁷. Scottish Water has already reduced its inherited operating costs by 20% since 2002, and expects to reduce them by around 40% over the period to 2006. We expect that Scottish Water’s level of efficiency relative to the water companies in England and Wales will have improved significantly by 2006, and even further by 2008.

14. The RIA assumes that the level of retail gross margin in Scottish Water is between 15-20%. Scottish Water has undertaken a comprehensive cost assessment project to examine the allocation of its own costs between retail

¹⁹⁷ The data may be drawn from the Water Industry Commissioner’s publication “Strategic Review of Charges 2002-2006”, page 186, Table 18.4, which refer to 2000/01 analysis in respect of the predecessor water authorities
and wholesale activities. This indicates that the retail element of costs for non-domestic customers is between 6-9%.

15. The data given in the RIA implies that the possible efficiency savings (42% inefficiency and 15-20% retail margin) that might be available to customers could amount to £22-29 million. Scottish Water estimates that such benefits will be substantially lower than those suggested in the RIA because of our lower assessment of retail margin and residual inefficiency when the market opens in 2008.

**Impact on the Wholesale Business**

16. The correct setting of the retail margin and wholesale price will be critical because of the risk of creating an unintended cross-subsidy either to or from business customers in the new competitive market – at the expense, or to the benefit, of Scottish Water’s household customers.

**Transitional effects**

17. The proposals to establish a retail market are helpful in avoiding the potential disruption if water competition was allowed to develop without a formal regulatory structure. Even with this regulated response, there will be inevitable disruption to Scottish Water with the creation of new market arrangements and the likely creation of a separate retail subsidiary. Establishing a fully separated retail subsidiary could involve the transfer of around 200 staff from Scottish Water.
10:00

The Convener: We move on to day 2 of stage 1 consideration of the Water Services etc (Scotland) Bill.

Today, we will examine the bill’s approach to competition, regulation and pricing for those who are involved in the industry. We have tried to arrange a representative selection of witnesses, but we have limited time. Before we take evidence, I ask members to declare any relevant interests.

As members have no interests to declare, I welcome this morning’s first panel. To represent the Scottish Trades Union Congress, we have Stephen Boyd, who is the STUC’s assistant secretary. David Watson is the Scottish organiser for Unison, and Bobby Buirds is the regional officer for Amicus. I thank you for attending this morning and for ensuring that we had a written submission in advance.

I look to members for the first question.

If nobody else has an instant question, I have one. One point that the submission makes is about the water industry’s long-term stability under the Executive’s proposals. Will you outline why you are concerned about stability? Will you give us more of a sense of why you are concerned about splitting Scottish Water and about whether cost issues would be sustainable in the long term?

David Watson (Scottish Trades Union Congress): There are two issues: one is structural and one will be in the detail if one proposal in the bill goes ahead. Splitting Scottish Water to allow competition in the non-household market would create business separation. The bill proposes a Scottish Water retail business and a Scottish Water wholesale business. Our concern, which is based largely on our experience of other utilities that went down that road some years ago, is that huge costs are involved in such separation. It involves rebranding and the setting-up of marketing, sales and billing operations, all of which have a huge cost that must be passed on to the consumer.

Another problem is how the split will be accomplished. The industry has just undergone a period of substantial upheaval in which many of the substantial savings that were passed on to consumers were achieved by the economies of scale that Scottish Water’s creation allowed. If we start to split its operations into small units, we will begin to lose those economies of scale when the next stage of efficiency savings is challenging.
Many of the opportunities for big savings arose through structural and technology changes; making such savings will be more difficult in the future.

Another point relates to costs. We set out some of our concerns in our submission and I think that other witnesses from whom the committee will hear this morning will replicate them. Our concern is that the figures for the alleged efficiency savings, which I understand were produced largely by the water industry commissioner, are clearly out of date. The 42 per cent figure that is being quoted is based on the time when Scottish Water came into being. We have given evidence to this committee and to the Finance Committee on our concern about the adequacy of figures that the current regulatory structure produces—that figure is another example of that. It is way off line and could cause us problems.

There are other questions about how to split and about what percentage of current revenue and costs will relate to the new Scottish Water retail operation and wholesale operation. We are concerned that the regulatory impact assessment implies that the retail segment’s figure could be about 15 per cent, whereas we understand from colleagues in England that the Office of Water Services puts the figure at about 8 per cent there. I know that others who will give evidence today think that the figure is even smaller and is possibly as low as 4 per cent. The problem is that if too much cost is transferred to the retail operation, it will become ineffective. Equally, if the wholesale side is undercosted, it will become ineffective. The result will be that the new structure will set up Scottish Water to fail. That is the essence of our concern.

The Convener: Given what the Executive intends to do, how would you set up Scottish Water to succeed?

David Watson: We would not split Scottish Water in the proposed way—that is the essence of our evidence. We do not believe that splitting Scottish Water is the way forward. Our view is that the business should not be separated and that non-household competition should not be created. We start from disagreement with the Executive on that point.

However, if it is going to be split, at the end of the day that must be based on an accurate, current, and up-to-date split of the costs, which for the retail sector is probably closer to 4 or 5 per cent, or maybe up to 8 per cent, with the rest being wholesale. It is vital that that figure is correct. Frankly, it cannot be based on the guesstimates that we have had from the regulatory structure so far.

Alex Johnstone (North East Scotland) (Con): I want to follow on from that. My experience is that opinion favours the view that retail competition in the domestic energy sector resulted in a significant fall in the relative cost of energy over a considerable period of time. Why do you suggest that similar competition in the water industry—whether as prescribed in the bill or beyond it—would not be equally beneficial?

David Watson: I would be happy to provide you with research that was undertaken by the University of Sussex a couple of years ago, which studied in detail the price shift in the energy market to determine how much was due to competition and how much was due to other factors. The research concluded that most of the reductions at the early stages—bear in mind the fact that we are in a situation of rapidly rising energy prices—were to do with coincident changes in raw material prices, that is, raw energy prices, and were not due to competition at all. The reason for that is that any small saving that competition may introduce is balanced by the additional costs of establishing the system, which are massive.

Our members administer many of the energy systems and they can tell you the huge costs that are involved in running them in terms of billing, maintenance, sales and the mechanism of divvying up the energy market. There is also the profit element and the return on capital invested that is required by the companies. When those costs were all taken into account it was found that they swallowed the small savings that might have arisen from competition. The real savings at the time were due to changes in the energy market, which would have happened whatever the structure of the industry at the time.

Water also has other features that make it different from the energy industry, in particular the nature of the source and the natural monopoly position. In addition, the networks—if they can be called that—are very different. I could take you to the electricity and gas control rooms and you would see a network throughout Scotland and the rest of the UK, and you could see the way our members move power around the UK. There is no comparable situation in the water industry: there is no network. We have an ad hoc collection of largely Victorian sewer and water systems, and people often do not even know where they are, so never mind the idea of sitting in a tent or shed in Livingston to see what is moving around. It is a very different industry in terms of the ability to introduce to it the competitive element. Even under the Executive’s proposals, or the equivalent ones in England, Europe or the world, the water industry structure is not equivalent to that of the energy industry. The issue is the nature of the water industry.
Alex Johnstone: Are there any circumstances in which retail competition can be beneficial to the consumer?

David Watson: In a word, no.

The Convener: That was very clear.

Rob Gibson: I will address the section 3 issue. Last week we debated the composition of the water industry commission. Paragraph 8 of your submission states that you want the “regulations to define how the balance of costs between Scottish Water and developers will be calculated”, because you “believe there is a strong case for developers meeting a much greater share of the cost of new water and sewerage services so that new development can proceed without detracting from the urgent need to renew the existing infrastructure.”

I say that clearly, because it contradicts the written evidence that we have received from Highland Council, which states that, in the Highlands, housing or industrial developments tend to be on a small scale, “undertaken in groups or small estates rather than by volume builders thus militating against developer contributions which are large enough or at the right time.”

There seems to be a contradiction between the kind of developments that you envisaged in the central belt and Highland Council’s feelings about what would happen in its area. Have you any comments on that?

David Watson: It is fair to say that local authorities’ views differ on developer costs. Indeed, the Convention of Scottish Local Authorities itself does not have a single view on the matter. We have to face the facts. The Executive’s consultation paper “Investing in Water Services 2006-2014 (The Quality and Standards III Project)” makes it clear that, over the next 10 years at least, something like £1 billion a year will have to be spent on Scotland’s water and sewerage infrastructure. Obviously, that is a huge sum of money to find, which is why the second consultation—on how we pay for it—is the more difficult one. Moreover, the construction industry needs a huge amount of capacity to deal with the issue.

There is no doubt that there have been development constraints and that those in Glasgow have received more publicity than those in the Highlands. The reality is that a cost issue is involved. Why should the public purse pick up the cost of bringing water and sewerage into, for example, a housing estate that a developer is building on the outskirts of Edinburgh? It seems only reasonable that that cost be met by the developer who will, after all, sell the houses at an appropriate profit. That principle seems to be the best way forward.

However, we accept that there will always be exceptions to that principle. For example, the public purse will have to pick up the cost of social and other developments that might arise. That said, those costs should be picked up by the appropriate public purse and not simply dumped on Scottish Water. After all, the organisation has to set its priorities in line with the minister’s view on those priorities. At the moment, the priority with regard to cost must be upgrading of the infrastructure to ensure that we have a safe water and sewerage system in this country.

Rob Gibson: I must follow that up by pointing out that, at the moment, 38 per cent of all rural settlements in the Highland Council area are constrained by inadequate water services and that three major regeneration projects involving the council are potentially at risk. We have also heard that a moratorium has been introduced in Perth. The water industry commission will have to address major deficits in many parts of the country, a recent example of which is the Western Isles. The suggestion in paragraph 8 of your submission will not meet conditions throughout the country; we need a clearer picture of how such an approach will affect the rest of the country and the background of any personnel who might be appointed to the commission.

David Watson: We need to separate out two issues in your question, the first of which is the importance of extending our networks to areas that are currently not supplied by sewerage or water systems. Clearly, as that involves public expenditure, it is a legitimate public policy issue. The second point relates to commercial developments in new housing schemes and so on. In those circumstances, it seems only reasonable that developers pay all or most of the costs that might be incurred.

We broadly welcome the new commission and feel that many of the criticisms of the current structure might at least be addressed if we could rely on a broader organisation instead of on a single named person. However, as we have pointed out in our evidence, it is important to get the right balance of people on the commission. We agree that it is not a case of stakeholder representation; however, as the history of UK economic regulation makes clear, cabals of economists have usually been appointed to such bodies and have focused narrowly on economic interests. A country such as Scotland has diverse interests; indeed, you have highlighted one of the differences between some rural and some urban areas. A number of other differences affect the water industry. Indeed, when Scottish Water was created, we expressed concern that in the chase for efficiencies that come with a big organisation, local contact and accountability would be lost. I am
afraid that that is a trade-off for going down such a road and having a cheaper water system.

10:15

The membership of the commission needs to be fairly representative of the country and should be made up of people who understand the needs of all parts of the country, from the urban central belt to the northern and southern rural areas. That is important if we are going to get the commission right. If it is left to the normal means of utility regulation, we will end up with the usual suspects. The usual economists will be wheeled out because of their alleged expertise in economic regulation.

The Convener: That is an interesting answer because we spent a lot of time arguing about this matter at our previous meeting. One of the things that we were trying to get clear in our minds was exactly how the public policy framework is set. As you rightly say, the quality and standards III process and the investment consultation are under way. We want to work out at what point an examination of efficiency and value for money delivering the service kicks in and how the calculations about various policy objectives, for example on the environment or social justice, come in. Last week, we were trying to find out whether those considerations are part of the minister’s job, in instructing Scottish Water, or whether they are part of the regulator’s job. Who makes those decisions? Does the STUC have a view on that?

David Watson: We do. In the first place, there is clear ministerial direction on investment and funding. I am sure that members of the committee have studied the current consultation documents. The “Investing in Water Services 2006-2014” document sets out the investment in Scottish Water in a particularly clear way for the first time—previously, valid criticisms were made, especially by the old Transport and the Environment Committee, about the fact that the investment was not properly explained.

Initially, it is for ministers to set out the public policy. That was the situation before the current structure was put in place as well. The change relates to the role of the water industry commissioner. The problem, under the current structure and the proposed structure, is that the WIC is concerned only with issues of economic efficiency and price control, which are the same issues that concern other utility regulators. However, the bill implies that that role is simply a case of crunching the numbers after the ministers have set the public policy priorities, but that is not the case. We have some difficulty with the idea that there would ultimately be an appeal to the Competition Commission, because it is full of people who are qualified to comment on crunching the numbers but it is simply not qualified to play that role in relation to a public service such as Scottish Water, which has clear political direction in relation to public policy. A political question arises as to whether it is right for the judgments in relation to the balance between economic efficiency and public policy considerations to be arbitrated by a body of economists sitting in London. Water is a devolved area and it is our view that such decisions are, properly, political matters.

On a flow chart, the process would go like this: a political issue for consultation and direction would be taken on board as part of the plans; the economic efficiency aspects would be haggled over by the regulators and Scottish Water; and conflicts between public policy and efficiency would be dealt with through political decision making. I am not unsympathetic and can understand why, given the history of these difficult issues, ministers might want to pass the buck. However, to be frank, ministers are there to make such decisions, not to pass the buck to a bunch of economists in London.

Nora Radcliffe: What would be your ideal appeal system?

David Watson: That is a political decision for ministers, who are accountable to Parliament. Parliament, not a London-based commission, should decide whether the balance of public policy and other issues is appropriate for Scotland.

Mr Ruskell: It is clear from your submission that you are quite sceptical about the privatisation of utilities. I share some of those concerns, particularly in relation to the pressures that come from outwith the European Union, such as those arising from the general agreement on trade in services. However, put yourself in the position of ministers. On one side there is the Competition Act 1998, which is driving some form of competition in the utilities and, on the other, there is pressure to retain the delivery and control of utilities and services in the public sector. How should that balance be maintained? Do you think that the Executive has got it right in the bill? If not, how does the STUC envisage that balance being addressed?

David Watson: This is a convenient answer, but there is no doubt that we would rather not be where we are in terms of the legislation. The Competition Act 1998 must be the most ill-thought-out piece of Westminster legislation for a long time. It sounded fine at the time, but nobody thought through its long-term consequences, particularly in the devolution settlement. The problem does not end there. One of the reasons why we highlight in our submission the importance of keeping a weather eye on the issue is that the
European Parliament has voted twice against the liberalisation of water, but the European Commission keeps coming back with other proposals. The services directive, which was published in January, is another attempt to liberalise water and there are drives within the general agreement on trade in services, particularly from the United States, to extend the neo-liberalisation of public services. The 1998 act is simply another example of that, but we are where we are and now that we have that piece of legislation we in Scotland have to manage as best we can and retain as much control as we can over our public services, including water.

In those circumstances, it seems to me that there are two ways to approach the matter. The Executive is saying that because there are major risks of legal challenge under the 1998 act—for the reasons that are set out in the policy memorandum and elsewhere—it will safeguard the necessary public policy issues, such as public health in relation to common carriage, and the wider social obligations, such as restricting competition in domestic households. In effect, the Executive will throw something in to show that it is following competition routes by opening up non-household competition. We could take the view that that is a sop to demonstrate approval or a line in accordance with the 1998 act, or we could take the opposite view, which is that it is the thin end of the wedge and gives a foot in the door to the full privatisation of Scotland’s water.

We have already had the slow privatisation of water and the bill is simply another step down that road. Our view is that there are public policy exclusions under the 1998 act, both for services of general economic interest and on public policy grounds as set out in schedule 3 to the act. A better approach would be for ministers to set out the public policy reasons for the arrangements in Scotland and to face up to the matter on that basis. I accept that either approach has its difficulties, and we would rather not be in the position that we are in, but we believe that that is a better approach than the partial, thin-end-of-the-wedge solution that is proposed in the bill.

Mr Ruskell: I am not entirely clear whether you are saying that ministers’ hands are tied. You seem to be saying that ministers could take more of a role in some areas. Will you explain that?

David Watson: We partially had this debate during the consultation in 2000. One option for ministers is to say that water is a public service issue in Scotland for public policy reasons and because it is a service of general economic interest. There are provisions in schedule 3 to the Competition Act 1998 that arise from the competition directive and they would enable ministers to make the case that water is a public service that is not open to competition. There are different views and many things have not been legally challenged in the courts so nobody knows what the outcome would be. The view that ministers took in 2000 is different from the view that they take today. In our view, there is scope to go somewhat further and use the full exclusion provisions under schedule 3 to the 1998 act—that is our preferred solution. The current proposals will not only mess up the water industry at a time when it needs to concentrate on other things but open up the possibility of further privatisation in the industry.

Maureen Macmillan: One of the issues that was discussed thoroughly last week was cross-subsidy. The business community feels aggrieved that it is, as it perceives it, cross-subsidising domestic supplies. It also seems that the large water users insist on getting cut prices, which means that they are being subsidised—perhaps by medium-sized businesses. However, the large companies say that if they do not get those special terms, they can go off network and find their own private supplies. It seems to be a Gordian knot that is almost impossible to untie. What are your thoughts on the matter?

David Watson: Provision exists for off-network solutions, which are obviously attractive, predominantly but not entirely, to large business users. There is some evidence of the alleged cross-subsidies; the Executive sets out some of it in “Investing in Water Services 2006-2014”, but it is far from proven whether there is a cross-subsidy or how large it is. Everyone accepts that if we had spent millions of pounds setting up grandiose information systems, as the WIC has argued for for some time, we might have a better feel for what the figures are, but that would be millions of pounds not spent on improving water quality and safely disposing of sewage. Such judgments always have to be made and we have always argued that we need to get the political priorities right, but nonetheless if that information was available there might be a clearer view about whether there is a cross-subsidy.

The best judgment seems to be that there may well be a modest cross-subsidy from the business sector to the domestic sector in Scotland. If that is the case, clearly a calculation must be made of what the cross-subsidies are, but it has to be understood that it will be the domestic customer and the small business customer who pick up the bill. Experience in other utilities shows that big users have benefited most from increased competition as they can negotiate larger contracts right across the United Kingdom; most big companies do that now with one or more supplier—usually one supplier—so that they benefit from economy of scale. Small businesses have not benefited from that competition to the
We would have reservations about the disadvantaged small business consumer, but in this case there may be a new system; big businesses already have options available to them that small businesses do not have. We often talk about the disadvantaged consumer, but in this case there may be a disadvantaged small business consumer, who may suffer under this arrangement.

A possibility, which we highlight in our evidence, is that there will be cherry picking in the small business area. If I were setting up as a new entrant in that area, there are large parts of Scotland that I would not touch with a barge pole, but there are other areas in which I would concentrate my effort.

The Executive is trying to deal with the issue in price terms, but it is unable to deal with it in terms of the other side of the balance sheet, which is the costs for new entrants. New entrants may be able to focus more effectively; it may not even be a matter of a rural-urban split, as new entrants may be able to cherry pick certain large industrial estates where there may be a market for them to run with. They could save on costs by concentrating geographically rather than providing customer service facilities in, for example, the Highlands or the Borders. It would be much more cost effective to provide some services in a local area.

The problem is that there could be confusion for small business in this arrangement. In the energy industry, our members in call centres deal day in, day out with domestic and business customers who are confused about the various options that are available to them. In the water industry, there is potential for chaos. When people contact customer services and call centres, there will be confusion between what is a retail operation and what is a wholesale operation. If a pipe is leaking and people are not getting water, is that wholesale or retail? All sorts of customer confusion will arise. Even the greatest advocates of competition in the market accept that we are playing with a small and marginal end of the business—perhaps 4 or 5 per cent of Scottish Water business. That is a very small percentage, so is it worth baffling and confusing all the other customers, and adding in extra costs, for that very small gain?

10:30

Maureen Macmillan: What you have said is very interesting, but I want to get back to pursuing the idea of whether there is any value in cross-subsidy. Should there be cross-subsidy between the commercial customers of Scottish Water and the domestic customers? We keep hearing about the dichotomy between the commercial and the social. For example, in the domestic market, should people who live in big houses be subsidising people on low incomes? Should that be done by Scottish Water, or should the issue be addressed in another way, perhaps through Executive policy?

David Watson: That is not an issue for Scottish Water. As you know, there is cross-subsidy at the moment between north and south. That was part of the reason for establishing Scottish Water. A number of cross-subsidies exist, but they are a matter of clear public policy. Business would rightly argue that such cross-subsidies are not necessarily an issue for them but, irrespective of the business view, Scottish Water’s position should be that it is there to provide a service in accordance with public policy considerations. The decisions are political and should be for ministers and Parliament.

Maureen Macmillan: So, any subsidy of small or large businesses, of domestic users, or—as Rob Gibson mentioned—of developments, should come from the Executive rather than from Scottish Water’s budget.

David Watson: No, I am not suggesting that the money for subsidies should come from the public purse, but the decision on whether or not to have a cross-subsidy is a public policy decision. We have cross-subsidies now, as a matter of public policy.

When it comes to questions of how we invest in the water service and pay for it, everyone would agree that a big bill has to be paid. Obviously, nobody wants to pay it; suggestions on who should pick up the bill usually involve somebody else paying—usually the taxpayer. Consultations and discussions that I have had with colleagues on a range of issues usually end with the same view being expressed: “Couldn’t the taxpayer pick up the bill?” Our view would be that the taxpayer could indeed pick it up, but that would be a matter for public policy. Do you wish to switch resources away from schools and hospitals and put them towards subsidising business users or others in the water industry? You might well want to do that, but there are legitimate political decisions on public policy to be made. If you are having a cross-subsidy, it should be transparent. People should be able to see a clear public policy reason for the cross-subsidy being in place.

Mr Alasdair Morrison (Western Isles) (Lab): I would like to ask the panel about the replacement of the water industry commissioner with a commission of three to five executive directors. What is the panel’s view on the proposed composition of the commission? How should members be chosen? Should it be on the basis of technical expertise, or to represent particular stakeholder groups?

David Watson: We would have reservations about turning the commission into a purely...
stakeholder body, which would be difficult with only five members. The primary function of the commission is not simply to represent stakeholders.

If ministers are, in effect, arbitrating on public policy issues, rather than handing the issues down to a commission in London, it seems to us that the commission could have more technical members. That would be our preferred solution. I do not mean simply people with technical expertise in economics, but people with technical experience of the water industry, how it is structured and how it works. Geographical issues could also be taken into account.

If you adopt our model, in which ministers would arbitrate, you could have a tight technical body, with three to five members with expertise in relevant technical areas. If you go with the ministers’ current proposal, under which some matters will be arbitrated in London, you will need a larger, more representative water industry commission that is more able to take on board the wider social and public policy considerations that ministers will have set out in their earlier directions. Under our model, the water industry commission could be a technical body, with ministers making the final decision, but under the bill, the commission would need to be a larger and more widely representative body.

Karen Gillon (Clydesdale) (Lab): Will the bill’s impact on employees be neutral? If not, what are the potential implications?

David Watson: The bill obviously involves further upheaval for employees. Probably some 200 staff will transfer from Scottish Water to the proposed new Scottish Water retail. The bill could have a further impact, assuming that all other things were equal and that competition worked as it is supposed to do in theory. Our concern, which is based on the financial memorandum and the regulatory impact assessment, is that the bill’s impact will be anything but neutral. There could be a serious impact for staff not only on the retail side but on the wholesale side because both operations in Scottish Water could be undermined. That is a crucial structural issue. We have touched on it already, but I cannot emphasise enough that it is essential that if the split goes ahead, which we do not recommend, we get both arms of the business right, with the right levels of cost and revenue accruing to both. That would be the best opportunity for the bill to be neutral as far as staff are concerned.

Karen Gillon: Will you expand on what the potential negative implications would be for staff and how those would impact on service to the customers, particularly where infrastructure is concerned?

David Watson: If we get things wrong—or even, to be frank, if the split goes ahead at all—and everything goes pear shaped, there will be impacts on staff job security and morale. In the energy industries, there have been problems with the constant barrage of complaints day in, day out from customers who are confused and bewildered by the structure that was established in those industries. The aggressive phone calls and face-to-face contact and the other problems that our members face daily in those industries will be replicated in Scottish Water and that level of customer confusion and upset is not something that we want to export from the energy industries to the water industry. However, ultimately, the issue is economic viability and our concern is that if the proposed structure gets the balance wrong, our members’ job security and ability to provide what they want to provide—a high-quality service to the public—will suffer in the longer term.

Karen Gillon: Might there be an impact on the number of staff who would be employed and therefore their ability to maintain the network at a standard that the customers would expect?

David Watson: Yes. That is probably focused more on the speed and scale of what are wrongly called efficiency savings. The savings that have been made so far have been made in two ways predominantly. The first is the economies of scale that the creation of Scottish Water created. Those have come at a price to local accountability, but nonetheless, any economies of scale make savings. The second way of making savings is to introduce new technology, because, when new plant and equipment are introduced, they tend to use fewer staff than were previously needed. We accept that entirely; whether the service was in public, private or any other hands that would happen as a result of the technological changes.

Some other savings are made by scale. For example, large organisations are probably more able to invest in new technology to make such savings. Scottish Water, being the fourth-biggest provider of water and sewerage services in the UK, is clearly in the position to make such investments and has done so. In fact, it has been so good at it in one or two places that it has sold systems elsewhere in the UK. Scale helps in that.

That process has been fine to date. The savings have been made at a rapid pace—twice the speed that the same savings were made in England—but it must be understood that the savings that the WIC proposes in the current strategic review of charges can be made only by cutting corners. There are two ways to cut corners. One is to cut corners in the handling of maintenance and repair work, such as by multitasking—for example, mixing up the maintenance of sewerage and water systems—which has safety implications. Savings
can also be made by keeping staffing levels in major plants very low, which has safety implications.

Our concern about the next stage of savings in Scottish Water is that the organisation will put customer service and the health and safety of the work force at greater risk than if the savings were not to be made on such a scale. In essence, we are concerned about the size of the efficiency savings and about the speed of change. We are being asked to make changes to the structure of Scottish Water at a pace at which our counterparts in England did not move. Therefore, there needs to be a review of the scale of savings and the speed at which we make the changes that are feasible.

The Convener: I thank the three of you for coming along this morning. We have noted your support for the retention of domestic customers in the public sector and your criticisms of the proposed split in Scottish Water. We have tested some of those issues on other witnesses and I suspect that we will test them on subsequent witnesses today and later. I thank you for putting your representations in writing before the meeting and for being prepared to answer our questions.

We will now have a short break as we change witnesses.

10:42
Meeting suspended.

10:45
On resuming—

The Convener: We move on to our second panel. I welcome Nigel Bromley, who is the chief executive of Gemserv, and Ceri Jones, who is the regulation and competition director with Northumbrian Water and who is here to represent Water UK. We will not invite you to make opening statements; we already have your written submissions, for which I thank you.

Nora Radcliffe: Quite a lot of the Water UK submission deals with estimates of retail costs, and much of it is disquieting. Could you expand on that? You state:

“The size of the retail gross margin is ... a very important issue”

and you urge us

“to research it most carefully.”

Could you talk us through that and point us in the right direction?

Ceri Jones (Water UK): Yes, I am happy to. Perhaps it is worth saying a few words first on why the appropriate wholesale cost is so important before I move on to the numbers themselves.

We do not think that the separation of the retail function in itself is sufficient to ensure that domestic customers are not disadvantaged by competition. What is critical is that the wholesale price is set at the right level. If it is too high, you will deter any entry and there probably will be no competition. If it is set too low, it might encourage inefficient entry. If it is set at a price that is below cost, it will create difficulties for the incumbent in terms of covering its costs, which is likely to put pressure on domestic bills. Those are similar issues to the ones that were faced south of the border. Our view is that the wholesale price should be as cost reflective as possible.

There is still an issue, in so far as charges are based on average charges. Even if you are able to allocate costs accurately between wholesale and retail functions, any average charge will give some incentive to new entrants to cherry pick, because in reality it will always be cheaper to supply some customers than others. Therefore there may be an incentive for new entrants to focus on those customers from whom they can achieve a higher margin or for whom the costs of supply are lower.

Our conclusion is that it is important to be clear about the appropriate balance of costs between wholesale and retail functions. Comparisons with England and Wales might serve some purpose there, but it is important that you focus on the actual cost to Scottish Water. Comparisons with England and Wales might be illustrative, but they can be no more than a benchmark.

We took issue with some of the numbers quoted by the Scottish water industry commissioner in relation to England and Wales, which suggested that the retail function accounted for 15 to 20 per cent of bills. The calculations were based partly on numbers from my company, Northumbrian Water, so I feel qualified to comment on them. There is no information in the public domain—and there was none at the time—that directly identifies the proportion of bills that relates to the retail function. The estimate relied on fairly major assumptions, which were inaccurate. More recently, the industry did some work with Ofwat to examine the actual level of retail costs in England and Wales. Ofwat concluded that the figure was somewhere around 10 per cent—in fact, it quoted 9.6 per cent—which is much more consistent with the numbers for my company. It is important to note that that figure relates to the total retail cost and not specifically to the retail cost to industrial customers. In general, for industrial customers, retail costs are a smaller proportion of the total cost because, while retail costs might vary slightly relative to domestic customers, the bill will be significantly larger. That means that, as a proportion of the bill, retail costs are generally lower.
The same Ofwat survey concluded that, for large industrial users in England and Wales, retail costs account for closer to 4 per cent of the total bill. I point out that that definition of large industrial users referred to those using more than 50 megalitres a year, which is the definition of the competitive market for England and Wales. The proposals in Scotland relate to a much larger market for all non-household customers, so one might expect the numbers to be slightly higher than 4 per cent.

Using the definition that has been applied in Scotland, our conclusion is that, in England and Wales, the relevant figure for industrial customers is somewhere between 4 per cent and 10 per cent. Using the restrictive definition of large industrial users, it would be closer to 4 per cent. As I say, that is purely illustrative and the key point is that we need to be clear about what the appropriate cost allocation is for Scottish Water. However, I suggest that the numbers that were proposed by the water industry commissioner for Scotland looked rather high.

Nora Radcliffe: I will ask a daft-lassie question. What is meant by retail costs? What is included under that budget heading?

Ceri Jones: That is actually a good question, because that is one of the issues that might determine the answer we are looking for. Broadly speaking, the retail function would not include production and distribution. Essentially, it relates to billing and customer service costs. However, the reason why your question is a good one is that, in order to answer it properly, we would need to define clearly which functions rest with wholesale and which rest with retail. For example, in relation to metering, we would need to be clear about where the metering function lay. Depending on the definitions that were used, it could lie on either side. Clearly, that has an implication for the cost allocation. If you were seeking to separate the functions, it would be important to be extremely clear about what precisely you were including in the retail function.

Nora Radcliffe: That is helpful.

Maureen Macmillan: I am still not totally clear about this. If the retail function is billing and meter reading, why would it be more expensive in one area of the country than in another? How would it be possible to cherry pick?

Ceri Jones: It would be easier to service some customers than others. For example, the level of bad debt might be higher among one group of customers than it is among another. I accept that the cherry-picking issue might be a greater concern in situations involving common carriage, for example, but that is not part of the proposals in Scotland.

Maureen Macmillan: I am aware of that but I did not think that the cherry picking of retail services was an issue. However, I understand what you said about levels of bad debt and so on.

Ceri Jones: The issue is more likely to be related to customer characteristics than to geography.

Roseanna Cunningham (Perth) (SNP): The first page of the Water UK submission made a great deal of play about the difference between the regime in England and Wales and that in Scotland in relation to public health risks and common carriage. In particular, it flagged up the issue of a potential legal challenge. I would like you to expand on that and talk about the reasons why there might be such a legal challenge. Would you accept that it is entirely legitimate for the Scottish Executive to come to a different view from that held by the drinking water inspectorate in England and Wales?

Ceri Jones: We were not trying to comment on the correctness of the proposals; we were commenting that it is interesting that a different conclusion has been reached. It is likely that some commentators will point to those differences and it is possible that some parties might want to challenge the fact that a different conclusion has been reached.

Our point was about whether the proposals in Scotland are consistent with the Competition Act 1998. We were not saying that they are inconsistent; we say just that it is interesting that a different view has been reached. New entrants in particular might wish to question why common carriage is being allowed in England and Wales but not in Scotland. It is legitimate that the Scottish Parliament has a view on that but, like everybody else, it must operate within the provisions of the 1998 act.

Roseanna Cunningham: So your view is that a public health issue would not be a relevant consideration for the Competition Commission.

Ceri Jones: The view that has been taken in England and Wales is that some serious issues need to be resolved. That is why much effort has been exerted to put in place a licensing regime that will ensure that any new entrant must meet the same standards as the incumbents. The industry felt strongly about that.

Initially, we had big concerns about how common carriage could be implemented if it did not fall under a properly licensed and regulated regime. The DWI reached the view that, with appropriate safeguards, common carriage would not necessarily pose a risk to public health. That is the view that the industry has reached. Given the strong safeguards that are in place in the legislation, we feel comfortable that public health will not be compromised.
Roseanna Cunningham: I appreciate that that is the DWI’s view in England and Wales and I dare say that it is a welcome view from the industry, but a different perspective is taken north of the border, where the public health issues are felt to outweigh any competition issues, so I am interested in your take on whether competition should override the perceived public health concern in Scotland.

Ceri Jones: Ultimately, that is an issue for the lawyers. I understand that the public health issue is emotive. It received much debate in England and Wales before the DWI reached its conclusion.

It is perfectly legitimate for the Scottish Parliament to reach a different conclusion. Our point is just that some people might question whether that is consistent with the 1998 act and I can easily see that some parties might wish to challenge the view. I do not suggest that Water UK wishes to challenge it, but somebody who was keen to enter the market in the UK on a common-carriage basis might question why they could not do that in Scotland, unlike in England and Wales.

We are asking whether it is sure that the bill is consistent with the 1998 act. The water industry commissioner for Scotland gave evidence recently that suggested that he was very confident that the bill would withstand challenge. That was simply the point that we raised.

The Convener: When the minister appears before us, we can ask him the same questions. The committee’s job is to scrutinise the bill and to reach its own view on the public health issue and on whether the Scottish Executive has got it right in the bill. We can follow up the question with several witnesses.

Does Gemserv have a different perspective from that of Water UK?

Nigel Bromley (Gemserv): Gemserv is not in a position to comment on public health issues. We are primarily involved in and can advise on implementation of legislation.

The Convener: Does Roseanna Cunningham have a follow-up question, or is that enough for the moment?

Roseanna Cunningham: I could go on for a bit, because the potential players do not necessarily come from the UK. We could go quite a long way in querying how widely we should impose the same standards. A French water company might have to deal with a completely different standard in France from that here, for example. However, perhaps we should move on.

The Convener: I was just giving you the final say.

Roseanna Cunningham: We should flag the matter up as an issue to explore.
situation still prevails in energy; some of the large energy companies have evolved two separate companies from ring-fenced businesses that were within one company. That is a comment on the evolution of the water industry rather than on where it should start. It might take longer to form separate companies than to ring fence businesses.

Nora Radcliffe: Is forming a separate company more onerous than ring fencing a company? Are there extra costs involved? What is the difficulty with moving from one to the other?

Nigel Bromley: I do not think that there is a difficulty. One precedes the other—that is our comment. I agree with the remarks that have been made about the proper allocation of resources and costs to each of the businesses.

The Convener: In your submission, you say: “Customers can be afforded protection by the use of an independent central registration authority operated by an organisation that is not connected with any retail or distribution business in the market.”

You go on to say that “there may be a requirement for an independent ‘policeman’ to ensure adherence to business separation rules.”

When you talk about customers, I take it that you mean business customers. It is quite confusing to think about how things would work in practice with the extra stipulations that you make. Would Scottish Water not be involved in the process by selling to different retail companies? Are you suggesting that something is missing in the bill and that new agencies need to be added to oversee the process?

Nigel Bromley: There could be more direction in the bill on how it is to be implemented. There are roles for independent organisations that are not connected with Scottish Water. Such organisations would enable the process of competition to work better—for example, it would be useful for a small organisation to control the database of which customers are owned by which retailer.

The Convener: Would that system run parallel to Scottish Water and the various water retail companies?

Nigel Bromley: It would not be a parallel system; it would be a master system that would determine which business customer is with which supplier.

The Convener: It would not be held by Scottish Water.

Nigel Bromley: No. The point is that it should not be held by Scottish Water; it should be held by another organisation or body. That would be perceived by new entrants to be fairer. Further, in the development of switching rules, it would mean that that organisation could be formed by a group of companies who are competing in the marketplace. They could collectively own a small subsidiary that manages the switching process. What surprised a lot of people in energy is that the systems and processes are not necessarily that simple. I suggest that it is worth examining what happened with some of the switching arrangements in energy.

Because of the way in which the water industry is being liberalised in Scotland, the situation is relatively simple. However, the questions that will creep in will relate to which company has a contract, whether a customer has some debt lying and whether he is allowed to change supplier. There will be lots of arguments around commercial issues of that kind and someone will be needed in the ring to maintain order. There must be a reasonable form of governance that will enable the second-order commercial issues to be resolved in a fair manner.

The Convener: Are not the points that you raise just legal issues between someone’s supplier and a future supplier? In the energy market, it does not work in the way that you suggest it should in the water market. If you have a dispute with your energy company and want to transfer to someone else, you cannot go to a third party who will arbitrate the situation; you simply have to deal with it. Why do you suggest that a different approach be taken in relation to the water industry?

Nigel Bromley: Your description of the situation is not quite correct. In the energy sector, there are arbitration organisations that are collectively owned by competitors in the market—

The Convener: They will arbitrate for businesses rather than domestic customers, presumably.

Nigel Bromley: That is right.

The Convener: So you are suggesting that we should set up new structures on top of what is already in the bill.

Nigel Bromley: I think that new structures will evolve in any case once the detail of the change-of-supply process is worked through. I have suggested that the bill could be more directional with regard to the way in which those structures are set up.

The Convener: On the subject of the independent policeman, are you suggesting that that role would be played by the water industry commission, the Department of Trade and Industry or the Competition Commission—basically, someone else again?
Nigel Bromley: The independent policeman would certainly be directed by the water industry commission. The example that I was talking about in the submission related only to business separation, where it was found necessary to direct companies to appoint an independent business separation compliance officer. That might be an interim arrangement. For example, for the first year, Scottish Water could be directed to appoint a separation compliance officer to provide assurance to the commission that it was ring fencing the businesses appropriately and playing fair.

Nora Radcliffe: I would like to get a bit more information about the registration authorities that have evolved in the energy market. Did you say that groups of competitors had set them up in order to facilitate switching between them?

Nigel Bromley: Yes.

Nora Radcliffe: So, for the customer, where does undue influence come into the situation?

Nigel Bromley: It is quite appropriate for companies to meet to make arrangements for the market to work well. In fact, if companies do not have a formalised approach to communicating with one another when customers transfer between them, that could inhibit competition.

Nora Radcliffe: Is not a customer who wants to switch in or out of that group of competitors at a disadvantage, in that case?

Nigel Bromley: The idea behind having a formalised approach to switching processes is to ensure that the process is smooth.

The Convener: Is that not afforded for in the bill already? Do you think that the arrangement that we are discussing should be utterly explicit rather than being something that evolves through custom and practice and depends on entrants to the market having a view on how they want to organise matters? Given that we have experience of how the process works in other industries, should we not set out some sort of arrangement in the bill? It seems quite vague to say that we will see how things work out once a couple of companies have decided what they are going to do.

Nigel Bromley: We are advocating that the commission ensures that companies put in place proper switching arrangements and that the commission gets directly involved in understanding that those processes are clear to new entrants and all parties.

Maureen Macmillan: Would Scottish Water retail be part of that, or would only the competitor companies have this arrangement?

Nigel Bromley: Scottish Water would be part of it; however, it should not have undue influence. It should have the same involvement in determining how switching processes work as anybody else. It would have to be involved, as it is important to be able to lose customers as well as to gain customers.

The Convener: Are you thinking about an independent organisation that would be constituted by a variety of companies? In your submission, you used the term “authority”, which makes me think of public policy. You are saying that it should not be connected with any retail or distribution business. Is it about the water industry commission having a clear set of rules rather than having another organisation on top of the water industry commission, which merely consists of the companies that are operating in the market? I am trying to tease out exactly what that implies for the way in which the structures will work.

Nigel Bromley: I would view an optimal arrangement as one whereby the commission would direct companies to form an association that would agree the baseline design for the switching process and whereby the commission would oversee a very clearly defined process for changing customers between companies—

The Convener:—so that there is an agreed set of rules for everybody to ensure that, whether someone is a customer or selling to a customer, everyone knows what the score is when they get involved in the contractual relationship.

Nigel Bromley: That is right. It is really about ensuring how things operate behind the scenes; it is not a customer-facing activity. The customer should be able to agree to a new contract with a new supplier, then the processes behind the scenes should be effected as smoothly as possible. Without a defined business process for that, there could be delays in transfers or possibilities of dual billing and some of the problems that we have seen with the energy companies. The transfer of customers between the energy companies has evolved significantly over the past 10 years. It is important that the lessons that have been learned in that market are transferred to the proposed water retail market in Scotland, England and Wales.

The Convener: I presume that the situation is slightly less complex because we are not talking about domestic customers but focusing on businesses. Getting that right is a fairly definable task.

Nigel Bromley: Yes, it is more easily defined.

Mr Ruskell: In your submission, you talk about the governance framework and transfer protocols. I presume that those will be functions of the independent body that you are talking about. I wonder what the cost will be of the industry organising itself and setting up new structures. Is
there an advantage to that for business customers? Surely, all the costs will be on the customers themselves.

**Nigel Bromley:** That would not be a function of the body that I am talking about, and the body would not necessarily have to employ many staff, if any. The body would be a place where a defined process was agreed that everybody would sign up to. You are possibly extrapolating more than the comment in our submission intended.

**Mr Ruskell:** But you talk about multiparty agreements. Those will need to be brokered and I presume that there will need to be monitoring of the agreements. I cannot envisage there being no costs associated with the commission.

**Nigel Bromley:** There will definitely be some costs; however, it is our view that formalising the process and ensuring that it is visible and that everybody can evolve it will, ultimately, cost less than the money that could be wasted through having ill-defined processes and misunderstandings between companies.

11:15

**Rob Gibson:** I want to move to a more general, philosophical point. I have been listening to your arguments about opening up the water industry to competition—at least to the limited form of competition with which the bill deals. From your experience in England and Wales, can you tell me whether objectives such as spatial planning and economic development are served by competition? And, if so, how?

**Ceri Jones:** The competitive regime in England and Wales is still in its infancy and it is probably too early to say how effectively it will work and what impact it might have on planning issues and so on. I would not immediately regard such issues as being insurmountable. It is probably fair to say that they have not had a high profile to date in discussions in England and Wales.

**Nigel Bromley:** I will step back even further and make a philosophical point. I was interested in David Watson’s evidence earlier, particularly his comments about a bunch of economists and economic rationales making certain things happen. Back in the mid-1980s, the Central Electricity Generating Board was a monolithic organisation that was directed towards building bigger and bigger power stations—that seemed to be what the CEGB wanted to do. The advent of privatisation and liberalisation in the energy market changed not only the deal for customers, but the whole strategic planning of the market; indeed, it led to the rapid transformation of the sourcing of gas by power stations for electricity. People can comment that it was not competition but a change of fuel supplies that led to a drop in prices, but without faster-moving, enlightened management trying to work in a competitive market, the gas stations would have been built later and the impact on the environment would have been felt later.

A wider issue relates to employee safety records. The incidence of accidents plummeted in the privatised, liberalised companies. A by-product of competition in energy is that fewer people get killed in power stations, because a commercial view is taken that accidents are costly and damaging to reputations. Therefore, there are wider advantages to competition. I would argue that companies operating in the private sector are, if anything, more cognisant of the type of planning arguments that you are making.

**Rob Gibson:** It seems to be the political will to keep Scottish Water, by and large, as a public utility in Scotland. Therefore, your experiences are not helpful to me at the present time in finding out whether competition has helped spatial planning, economic development or social justice. Your comments are interesting, but not necessarily relevant to the bill.

**Nigel Bromley:** I think that I responded to the wider, philosophical question that you put.

**The Convener:** Members can read the Official Report afterwards and draw their own conclusions.

**Nora Radcliffe:** You mentioned the basic customer transfer process that you devised. How widely is that being used across England and Wales?

**Nigel Bromley:** Very defined processes in gas and electricity operate across the whole market.

**Nora Radcliffe:** So that system is widely used. It has been adopted.

**Nigel Bromley:** Yes.

**Ceri Jones:** That is the case in the energy sector, but there is no equivalent at this stage in the water sector. Only when the new legislation takes effect next year will we start to see customers changing suppliers. The current proposal is that the incumbent will manage that process. There is no proposal for a central registration body. At this stage, Water UK does not see any particular requirement for such a body.

**Nora Radcliffe:** So you are giving us conflicting advice about the benefits of central registration.

**Nigel Bromley:** We clearly have a different opinion on that issue. It is certainly Gemserv’s perspective that the incumbent should not be responsible for holding the ring for customer transfers and registration processes.

**Maureen Macmillan:** Statistics show that Scots are reluctant to change companies, whether their
electricity company or their gas company—or possibly even their water company. Do you think that companies will be queueing up to compete with Scottish Water retail?

Ceri Jones: It is difficult to say. I think that some companies will want to do so. A similar question would arise in England and Wales. I think that we will see some new entrants who wish to test the market. I suspect that the level of competition will be relatively modest—at least, initially. That will probably be true on both sides of the border. That is one reason why we think that it is important that the processes are simple, straightforward and cost effective. We will find out only by testing the water. Our view is that the level of competition will probably be relatively modest and grow relatively slowly.

The Convener: That seems a good point at which to end this series of questions. I thank you both for answering a broad range of questions, including detailed, pernickety ones. I thank you for giving us your written evidence in advance, which helped us to focus our questions.

We will have a few minutes’ break to let the second panel of witnesses go and the third panel arrive.

11:21

Meeting suspended.

11:27

On resuming—

The Convener: We kick off with our third panel this morning, which represents Scottish Water. We have with us Professor Alan Alexander, who is Scottish Water’s chair; Dr Jon Hargreaves, who is the chief executive; and Douglas Millican, who is the finance director. You will note that we have amassed questions in the past couple of weeks. If we can remember them, we will direct them at you. As with other witnesses, I thank you for providing written evidence in advance. Rather than asking you to repeat that, we will go straight to our questions.

Rob Gibson: The bill does not include duties to ensure that water is used efficiently. That issue is regulated differently in England and Wales. Will that inconsistency affect water conservation in Scotland under the new bill? What are your thoughts on that?

Professor Alan Alexander (Scottish Water): I will say something in general, after which Jon Hargreaves will go into the detail. One must see the bill in the context of the other legislation under which we operate. As members know, under the primary legislation that established Scottish Water, we have a statutory duty to promote sustainability. We in Scottish Water have interpreted that on the broad rather than the narrow definition of sustainability, so that it covers efficient water use as well as the way in which water is supplied, charged for and so on in the Scottish economy. My view is that the bill is not the right vehicle to enlarge on that duty. Steps can be taken on water conservation, but this is not the right bill for that.

Rob Gibson: The Scottish Environment Protection Agency is certainly concerned about the matter, because it—and you—must deal with the physical loss of water.

Professor Alexander: Indeed.

11:30

Dr Jon Hargreaves (Scottish Water): I will expand on Alan Alexander’s answer and try to help the member. Water efficiency has impacts on two fronts: one is in the house or the factory and the other is in our pipes. We separate those two matters. It is true that for some time in England and Wales targets have been placed on companies to reduce leakage in their systems. One interesting aspect of that is that a much higher proportion is on the customer side than anybody thought before the process started.

The reason why those targets can be imposed is that district meter areas exist. That means that a confined area such as a part of Edinburgh or a rural area—it does not matter—has a district meter, so the amount of water that is being used is known and losses can be tracked. Scotland has not invested in such a system in the past, but we are doing that now. By 2006, about 60 per cent of Scotland will be covered by district meter areas.

Until we know the extent of leakage in an area, it is difficult and uneconomic to chase the leakage—that must be done in a planned way. Members all know that we have had problems in Dundee. This year, we have saved 10 megalitres of water a day that was leaking before because we have concentrated on it and because the DMAs were in place. Timing is an issue. Until we have the data that I described, sticking a leakage target on Scottish Water would be a bit futile. Obtaining those data will take several years.

Scotland has not invested in such a system in the past, but we are doing that now. By 2006, about 60 per cent of Scotland will be covered by district meter areas.

England and Wales have got a secondary issue wrong. The totalities and sustainability that Alan Alexander described make a strong argument for going for economic leakage levels. In other words, if the cost of fixing leaks becomes extortionate compared with production cost, customers suffer in the long term. That takes the whole economic argument together.

Scottish Water has done as much as—if not more than—most of the companies south of the
border to encourage our industrial customers to save water. In the past two years, we have been involved in several Government schemes, in the vision in business for the environment awards and in other schemes with SEPA to encourage our customers to reduce water use. We know that we have saved about £5 million of our revenue, which we have given away by helping customers to use less water. The same is also true of effluent. We have assisted companies and advised them on how to reuse their effluent so that they do not have to take water. In that sense, we are active in conserving water by working with our customers.

The other approach that we take arises from our belief that if we catch them young, we catch them for life. About the only initiative that Scottish Water sponsors is a fairly extensive education programme that works through schools. That has two focuses: one is on water being healthy for life, which is supported by the Minister for Health and Community Care, and the other is on using water sensibly. Although it rains a lot in Scotland, it still costs a lot to take the bits out and to take water to people’s houses.

We are pretty active in supporting our sustainability requirement. Of course, we can always do more. If legislation required us to do more, we would need funding for that, because that does not come cheap. I hope that that answers your question.

Rob Gibson: That only partly answers my question, because I am interested in what encouragement people are given to conserve water and in the measure of the effectiveness of that.

Dr Hargreaves: Do you mean encouragement through their charges?

Rob Gibson: Yes.

Dr Hargreaves: I think that all members know that our regulator feels pretty strongly about standing charges and feels that charges should reflect costs. In economic terms, he is right: 80 per cent of our costs are fixed and his view is therefore that a large proportion of a bill should be fixed. From a sustainability point of view, a fairly reasonable argument is that that inhibits people from saving water.

I have worked in organisations around the world that have no standing charges and whose revenue has huge flexibility. Revenue can vary by 30 per cent—that depends on whether the summer is dry or wet. A fixed-cost business cannot be run when 30 per cent of revenue depends on the weather, so a balance is needed.

I worked for a while in Australia—a country with full metering—and I will take Sydney as a good example. I was surprised by the amount of water usage in Sydney. Everybody in Sydney is metered but, if I remember my facts correctly, the per capita usage of water there is about three times that in England and Wales. I know that Sydney is hot, but the uses to which the water is put show that, because water is cheap, cost is no deterrent to using it. Sustainability and conservation stem from being able to measure water usage and from giving people an incentive, but they also depend on price. If water is cheap, people do not bother to watch the meter. If it is expensive, they do bother.

At the other end of the scale, the opposite has happened. We were responsible for a town in the former East Germany, where a lot of money was spent on new infrastructure. It was assumed that people would use the average 145 litres per head per day, but costs went through the roof because of the new infrastructure, so people stopped using that water and started capturing rainwater. Daily usage per head fell from 145 litres to about 90 litres. Funnily enough, that created a huge amount of problems with the pipes, especially the sewers, which had been sized to dilute the sewage that we all flush down the loo. Because the sewers were sized to take higher volumes, the sewage lay in the pipes.

One can never determine what will happen, but two things are clear: first, the issue is price sensitive and, secondly, having the ability to measure water helps people to control the amount that they use. In Scotland, about 50 per cent of our commercial customers are metered, compared with very few—just dozens—of our domestic customers. In an ideal world, we would all rush out and put meters in the ground, but that would cost in the region of £600 million to £700 million as an initial investment. There are also significant operating costs and, of course, meters have to be replaced every five or six years. Considering the big demand in Scotland to catch up with the backlog in relation to new legislation and development constraints, my view, and the company’s view, is that metering is probably not a good use of public money, despite the clear evidence that it gives people, especially commercial customers, the ability and encouragement to monitor how much water they use.

Of course, all our big customers are metered and they take conservation seriously; I read the evidence that some of them gave the committee. In our experience, they are certainly much more serious about conservation than they were five years ago. The amount of water that those companies use is declining and consequently the revenue that we collect from them also declines.

Rob Gibson: So the bill will not increase the efficient use of water.
Dr Hargreaves: As Alan Alexander said, it does not set out to do that.

Mr Ruskell: Leakage targets are one of the sustainability indicators that you might choose to use. You would probably not want them to be included in the bill, but you want to be active on a range of other aspects of sustainability in relation to the economy, social justice and other environmental targets. Is there a place for sustainable development in the bill? Should it define the role of the new water commission more stringently? If you do not want leakage targets in the bill, how do you want the bill to address sustainable development? Where do the responsibilities lie to push you towards action on such targets?

Professor Alexander: To return to my original answer, the first thing is for us to produce and consult on a sustainability policy—as we have done—and to implement it. Whether or not there are to be further statutory obligations on Scottish Water in that area—I do not comment on whether that would be right or wrong—the Water Services etc (Scotland) Bill is not the bill in which to do that, because it is about regulation and competition. That is not to say that there is no case for such obligations.

Dr Hargreaves: We have a legal obligation on sustainability, but the regulatory process in Scotland does not specifically require the regulator to take it into account. The minister can do that under the bill through his direction; we welcome the fact that the minister will direct policy in the water industry in a much clearer way than in the past, but it would be useful to us, and therefore to Scotland, for that to be mirrored by the regulator. One of the difficulties that we face is that if an obligation is placed on us but we are not funded to deliver it—as we have seen with development constraints in the past four years, which were not highlighted at the time—we end up with a lot of energy being expended in argument about why the work is not being done. If we are not funded to do work on an obligation, we cannot do it. The obligation must be matched with the ability to fund it.

Energy use has increased dramatically over the past few years in Scottish Water because obligations on bathing waters, for example, involve investing in more and more high-tech technology, which uses more and more energy. There is no point sticking an energy target on us when all the legislation that we are dealing with is driving up energy usage day by day. Every plant that we build requires more energy than the one that we built 20 or 30 years ago. That is just a fact of life. There needs to be a proper balance. Otherwise, we will end up with an obligation that it will be impossible for us to meet.

Douglas Millican (Scottish Water): As Jon Hargreaves mentioned, the bill provides for ministers to set out periodic directions to the water industry commission when undertaking strategic reviews of charges. We are pleased to see that in the bill. As for the clear operation of the whole industry, given the role of ministers in setting policy, the role of the commission in undertaking charging reviews and the role of Scottish Water in delivering, the direction function needs to be clearly specified, so that there is no ambiguity on the part of the commission in calculating prices for Scottish Water. It is clear from ministers’ policy objectives, whether they concern sustainability or economics or both, that we are being funded, ultimately, to deliver those objectives. The issue is about clarity of roles and responsibilities.

Mr Ruskell: Do you believe that those are clear in the bill?

Douglas Millican: They are reasonably clear. Whether that clarity could be strengthened further might be worthy of debate.

Professor Alexander: It is worth pointing out that there are other ways in which to bear down on issues such as leakage. Let us consider the biggest single capital project that is currently under way: the water treatment plant at Mugdock. The costs for that assumed a substantial reduction in the amount of leakage that we would tolerate in Glasgow, because that would reduce the capital cost and the operating cost. We build such considerations in where we can.

The Convener: Does anyone else want to follow up on the issue of sustainable development and sustainability?

Members: Yes.

The Convener: It seems that everybody in the committee wants to come in on that. For the avoidance of doubt, and to reassure members, I have allocated a relatively generous slot for the Scottish Water witnesses. I knew that we would be working through a number of issues this morning and I want to ensure that we finish each one. I ask colleagues to keep indicating if they want to come in on a particular issue. Otherwise, I will move on to the next one.

Alex Johnstone: We dealt with this subject previously, so you do not need to go to any great length to answer this question. I would still like to ask it, however. How important is it, particularly in the non-domestic sector, that the charges that are levied actually reflect the service that is provided? Do you believe that the introduction of retail competition will help to deal with the imbalances that exist at the moment? In particular, will it help smaller businesses that believe that they are being overcharged for water?
Dr Hargreaves: The introduction of retail competition will not do that. However, if we get it right, using the result of the consultation on charges, that will be a way in which to tackle the issue. As you heard from Mr Jones, what we are talking about is a relatively small element of the total bill—whether it is 4 per cent or 10 per cent. The costs do not go down to nothing, as the competitors have costs themselves. What is profit and what is real cost is debatable.

Fundamentally, the bill does not address the issue that we have all lived with over the past two or three years: the impact of harmonisation and the introduction of higher standing charges. The way to tackle that is through the discussions that are going on. We pushed hard to get the consultation process going. We saw huge frustration among our customers and an inability to have a debate around the issues of cross-subsidy, standing charges and all the rest of it. The bill does not change those issues. The current regime for collecting charges from customers could be left in place unchanged while retail competition is introduced. The two things happen to be getting addressed at the same time, but they require equal amounts of thought and energy to get them right.

Alex Johnstone: The reason that I asked that question was to open up a broader concept. My concern is that the form that the bill takes will result in the provision of a system that is essentially policy led rather than demand led. That covers both the domestic provision of sewerage services and the problems that I believe Roseanna Cunningham will go on to deal with in relation to development constraint. Do you believe that in going down a demand-led route in relation to sewerage provision where constraints exist, that the appropriate course of action is to load the costs on to the developer? However, to ensure that the development of sewerage systems is policy led, the Government has to come up with money to support it.

11:45

Douglas Millican: I take it that you are referring to demand for new services and connections to the system.

Alex Johnstone: That is one of the points, but we could generalise and talk about the balance that might exist between policy-led and demand-led development of the industry.

Douglas Millican: The bill provides a framework for decisions to be made on the back of the “Paying for Water Services 2006-2010” consultation about who should pay for extensions to the network; views were expressed about that earlier. There are big costs attached to resolving development constraints. There is a real issue about the extent to which that burden should be borne by current customers or by those who are creating the new demand—developers or new customers—and the bill provides a mechanism to deal with that.

The principal provision for dealing with broader customer demand is through regulation. The bill provides for evolution in regulation. Although there are weaknesses in the current regulatory arrangements, there are improvements on what existed prior to 1999. Further steps are proposed to strengthen the regulatory framework, which is the principal means by which customer demand can be satisfied. We have about 2.4 million customers; the most satisfactory way in which the needs of all customers can be satisfied is through regulation, or regulatory pressure.

Professor Alexander: The point that Alex Johnstone raised is important. I do not agree that there is necessarily a clear dichotomy between the industry being policy led and being demand led. It is really a question of how policy reflects demand. Development constraints, for example, require choices to be made. The other point that frames much of this discussion is that, whatever happens to the bill, until a mature market is created the business will continue to be strongly regulated. There is a sense in which the pressure of regulation will be more important until the market is established. I do not want to guess how long it will take for there to be a mature market, but it has certainly taken a long time in other liberalised utilities.

Alex Johnstone: This example might colour our attitude to the process. Do you agree that in going down a demand-led route in relation to sewerage provision where constraints exist, that the appropriate course of action is to load the costs on to the developer? However, to ensure that the development of sewerage systems is policy led, the Government has to come up with money to support it.

Professor Alexander: There always comes a moment in these evidence sessions when I say that members are leading us into matters of public policy and I think we just arrived there. I will try not to duck the question. Given the costs that need to be incurred to deal with things such as development constraints, particularly in the waste water network, we have to have a way of deciding how those costs are shared. They could be met through general taxation, by Scottish Water customers and they could be, as your question suggested, loaded in some way towards those who will benefit most directly, which would be developers. However, that is a matter that should come out of the “Principles of Charging for Water and Wastewater” consultation. Whatever is determined, we as a delivery company will implement it.
Dr Hargreaves: The committee made a good point during Dave Watson’s evidence. The work that we have done over the past two years on constraints in general, whether for water or sewerage, shows a clear difference between building 300 houses on the outskirts of Edinburgh, selling at £250,000 to £300,000 a house, and building a small development in the Highlands. The situation is not exclusive to the Highlands; it exists in Dumfries and Galloway, Ayrshire and most of the rural areas of Scotland where Government policy requires councils—rightly so, one could argue—to provide low-cost housing. Even when low-cost housing is not being provided, there is an issue about the number of houses that are being built on a specific plot.

Historically, developers have had a pretty good ride in Scotland because existing customers have contributed to the cost of building a house irrespective of its resale value. To most people, that seems not to be right in this day and age. One can imagine a situation evolving in which Scottish Water had a responsibility to develop what we would describe as deep infrastructure. A house connects to a small pipe that connects to a big pipe that ends at a sewage treatment works that issues either out to sea or into a river. What we describe as the deep costs are those that enable houses to be connected. By and large, in England and Wales that is what companies pay for.

Historically, developers have paid for the shallow costs—that is, the immediate connections—as they do for electricity, gas and all those other things. Why should water connection be any different? It is part of the cost of building a house. However, in Scotland, a lot of the infrastructure is undersized: it is there, but it is not big enough. There is a view that says that, if the developer wants to add another 20 or 100 houses, he should make a contribution to that infrastructure because Scottish Water customers get back the value of the bill only over a period of time.

My personal view is that, in rural areas, the best way of dealing with that has to be through the councils. Scottish Water should not be determining Scotland’s housing policy. The councils and the Scottish Executive have that responsibility. If the councils require some form of subsidy to build low-cost housing, that should be directed through those who best know where it should go; otherwise, we are starting a lottery game and if we are not careful water will end up being the single most important factor after land purchase.

I have heard the minister say—and I think that he is right—that there will be a levelling out. Land prices will reflect developers’ costs and, over time, that will level itself out. From the point of view of Scottish Water, customers should pay for the bit that we can recover through their bills over time and, in the case of big developments, pay a significant contribution to those costs. However, in some areas that cover an awful lot of Scotland there needs to be another mechanism. I am not in a position to say what that should be, but it should be allocated by those who are best capable of deciding where the money is spent. If that is not done, Scotland’s water industry will end up in a position that you should not put it in—driving development and deciding where it does and does not take place.

I do not know whether that answers your question.

The Convener: I am sure that it does. The entire committee probably wants to ask you about that.

Roseanna Cunningham: I am glad that we have got on to this general area and I was relieved to hear some of your comments, especially in connection with the enormous range of organisations that could come under the umbrella of the term “developer”. I was interested to hear you say that Scottish Water should not dictate housing policy in Scotland. In many areas, however, that is in effect happening right now: Scottish Water is dictating housing policy in Scotland. As the MSP for Perth, I have a particular, recent interest in what has been happening. Under the single umbrella term of developer, Scottish Water has imposed development embargoes the length and breadth of Scotland. However, a developer could be a massive developer, such as the one behind the Gleneagles west development, or it could be a small one such as Perthshire Housing Association. Do you agree that it would be completely inequitable to apply the same standard to both kinds of developer?

Professor Alexander: Can I say yes and no? In policy terms, it would be inequitable to apply the same standard. I grant you that absolutely. If the same standard is applied, there is a danger that any kind of social housing development will be squeezed out. I said “and no,” because when Scottish Water has to object to a development, we must do so on the ground of not condoning the breaching of our consents. There is a sense in which that is not sensitive to whether the development is one house or a major development. However, you are right in what you say, because a distinction must be made in policy terms; otherwise, as Jon Hargreaves said, we get to the point where we become the planning authority for the whole of Scotland, which is not what we are here to do.

Roseanna Cunningham: Is development constraint affected in any way by the bill—positively or negatively—either in the short, the
medium or the long term? That is a bit of a multiple-choice question, but I am sure that you understand what I mean. Will the bill’s overall impact be positive or negative in respect of development constraint? Will we get more development constraint or less as a result of the bill? Either way, might we see that impact in the short, the medium or the long term?

Dr Hargreaves: The answer is that it depends on the regulations. As I understand it, how the primary legislation will actually work will be fleshed out in regulations. The bill has raised—rightly—the issue of development constraint and it is creating the opportunity for a different solution to the current one. However, the regulations will decide how much developers will bear, how much Scottish Water customers will bear and how much the social aspect of development will be dealt with.

It might help if the bill recognised more explicitly that there are two aspects to the issue. That might strengthen the regulations. However, we know from our discussions with the Executive that it is acutely aware of the fact that multi-differences are involved and that development cannot be tackled with a single blunt instrument. Irrespective of whether the bill needs strengthened, it is the subsequent regulations that will really bite in this sector.

We talk to developers an awful lot and have done since development constraint became an issue. Believe it or not, we actually have a very good relationship with them. We have done a lot of work with them and with councils. One of the great advantages of Scottish Water is that this is the first time that we have had a clear picture of the whole Scottish development scene. We have been able to get through working very closely with councils. The situation does not look good, but at least we have the information now.

I can understand from their perspective what the developers are saying: “Please, will you give us clarity as soon as possible? We need to understand what the rules of the game are because we are buying land today.” Developers buy land every day of the week. Councils also plan for new developments further down the road. Therefore, as far as we are concerned, the earlier we can get direction on the development issue, the earlier we can have clarity. That will remove many of the current problems, which are caused by confusion. People do not understand the rules, which makes it difficult for them to plan—just as it is difficult for Scottish Water to plan.

If we know that we are responsible for all developments, our business plan will include a large sum of money to resolve the problem. If we know that developers will bear a certain amount of the cost, our investment plan will have less money in it. We are all trying to work out the right way to deal with the development situation. However, Scottish Water must know what costs to include in its business plan, which ultimately decides prices for the next four years. Therefore, it is key that the issue is resolved early.

12:00

Professor Alexander: The bill would be implemented after the conclusion of the consultation process on the principle of charging and investment, both of which feed directly into the question of how much development constraint can be relieved, and at what cost and what rate. I would regard the bill as broadly neutral as far as changing that situation is concerned. As Jon Hargreaves says, changes can be made in the implementation process and in the regulation process after the bill is passed.

Roseanna Cunningham: Do you have a rough timescale for that?

The Convener: We are effectively taking evidence on all three things at the same time: on quality and standards, on the investment framework and on the bill. When we have the minister in front of us, we will be able to put the same sets of questions to him.

Professor Alexander: There is a clear answer to the question of timescale. We know that our investment programme will cover the next regulatory period of four years, with some indication of where we will go in the four years after that. It is into that context that decisions about how much of the investment bears on development constraints need to be fed. There is very little in our current investment programme that is specifically directed at development constraints although, wherever possible, using the process of design and investment, we try to achieve the relief of a development constraint at the same time that we have to achieve a set of outputs under a regulatory settlement. There is little in the bill that specifically addresses that, however.

The decision that has to be made in the third quality and standards consultation—Q and S III—is how much of our investment programme should be related to development constraints. As far as the pricing consultation is concerned, who should pay and how should the money be paid?

Karen Gillon: This is a pretty complex argument. I have been on the other side of the debate and have seen people suffer because there was not a development constraint and their houses were flooded. There was then a difficulty with your being able to secure the resources to provide the solution because of the Q and S II process. How will it help resolve such difficulties, or will it not?
Dr Hargreaves: Do you mean the bill?

Karen Gillon: Yes.

Dr Hargreaves: It will come firmly down to ministers’ direction to Scottish Water through the regulatory process for investment from 2006 to 2010 to resolve the issues to which you are referring. The money set aside specifically for flood relief, for investment in improving drinking water quality and so on will be allocated in that direction. The bill itself does not impact on that process, although the regulatory process that will determine prices will ultimately be different, because it will be undertaken by a commission rather than by a commissioner. On the face of it, the bill does not alter how much money gets spent on what. That comes under the current extensive consultation process.

I am delighted to say that there has been an awful lot of interest in the documents that the Scottish Executive has put out. On the previous such occasion, there was very little interest. People did not quite understand the importance of the regulatory process. I have met representatives of just about all the councils over the past few months—all of them bar one, I think. People still do not understand that our programme of investment is very specific and that it is owned by individual regulators, including the drinking water regulator and SEPA. The programme is project specific. It is only with the regulators’ agreement that we may swap money from one project to another. It is not within Scottish Water’s remit simply to do that. A lot of people have found that difficult to understand. We should bear in mind where the industry has come from. Historically, councillors directed such actions and, when the three water authorities were in existence, that was done through the relevant minister.

Karen Gillon: When you responded to Roseanna Cunningham, you said that a percentage of the costs for developments should be picked up by Scottish Water. What do you think a reasonable or realistic percentage would be?

Dr Hargreaves: As Professor Alexander said, that is a policy decision. If ministers decide that all the costs can be picked up by Scottish Water, then they will all be picked up by Scottish Water. There is not an easy answer to that, although people can have a view on the matter. I have tried to express our view as clearly as possible.

We can back-calculate this. We can establish that a household generates, say, £300 a year; we can consider how long the asset will last; we can collect that amount of money from the customer; and we can apportion a portion of the money collected towards the relevant part of the service. If we do it that way, it does not come to an awful lot of money.

At the moment, we work under what are called reasonable cost rules. If somebody has developed a house, whether it is a new facility without a sewerage system or an existing facility that somebody wants to connect, we have historically used reasonable cost, which is currently about £2,000. In rural areas of first-time sewerage, the cost of connecting houses can be £60,000 to £100,000 per house. Just using "reasonable cost" does not give us the total answer. It is perhaps some guide as to what Scottish Water customers should contribute to the process, but in some cases, that leaves a massive gap.

Professor Alexander: It is worth returning to the point that Alex Johnstone made about demand and public policy. The way in which the Q and S III process will operate means that eventually we will get to the point where ministers will decide what the quantum of investment should be that Scottish Water will be tasked to achieve in its next regulatory period. At that point, our investment programme becomes a zero-sum game, in the sense that the more that is taken out for development constraints, the less there is for everything else—water quality, waste water compliance and so on. That is what makes the decision a public policy decision.

We can import flexibility into the process by deciding that somebody else should be paying for a chunk of something. The obvious candidate, as the minister hinted in something he said a couple of weeks ago, is to think about what cost developers should incur and for what. As Jon Hargreaves said, our view is that in our investment programme we should be responsible for the deep infrastructure, but there is a debate to be had about what happens with the costs for the rest. That is a public policy decision. In the end, we are the delivery company.

Dr Hargreaves: It is interesting that at the moment a number of developers—I have to admit that although they are in rural areas they are in big communities—are quite happy to discuss investing millions of pounds directly in Scottish Water’s existing infrastructure to allow their developments to proceed. What they require in return—not unreasonably—is that they bag that capacity. There is an interesting debate along the lines that, although that seems a reasonable way of solving the problem, for how long can we exclude others from taking some of that capacity? In other places, if the developer decides that he does not want to use that capacity and another builder comes along, be it for social housing or whatever, he gets recompense for the money that he has invested in our assets.

We need to ensure that the bill allows us to do that, because we are pretty convinced that that is a good way forward. It mirrors pretty well what
happens in England and Wales, which has worked well for a long time. England does not have big development constraint problems, but there are some in Wales, where the rurality issues are similar to those in Scotland, but on a smaller scale. It is interesting that England is not facing the same issues as Scotland, partly because the way that the mechanisms down there have worked over the years has enabled that sort of arrangement to be in place. We are pretty keen to have the powers to enter into that sort of agreement; it does not matter whether that is with councils or developers. The issue is how long one can reserve the capacity, because, in effect, they have paid for it.

Karen Gillon: Would that capacity be a completely separate water and sewerage system?

Dr Hargreaves: No.

Karen Gillon: So why should someone get exclusive use of something that is going into the public system?

Dr Hargreaves: They would not get exclusive use. Let us say that we have a town of 1,000 people, the sewerage system is at capacity—it cannot take another house—and a developer wants to build another 100 houses, which would add another 200 people to the population. We would say that we needed to build a bigger sewerage works and increase the size of the pipe. Let us say that that would cost £1 million, for the sake of argument. The developer would contribute that £1 million, which would allow 100 houses and maybe more to connect to the system. Let us say that he was going to phase that development over five years by building first 30 houses, then more and more over time, which is what tends to happen. He would say to us, "I'll pay you that £1 million so I can add these extra houses, but I'm going to add them over five years. What I don't want to have happen is that you spend £1 million with a view to creating that capacity, I build 30 houses and then find that Professor Alexander's company comes along and wants to build 50 houses and you give him that capacity, which I have paid for."

The developer is not excluding others from doing what he has done, and in the short term it is a way of funding the extra capacity that is required. That methodology is proven; it works elsewhere. It is not brand new. Currently, a number of developers are willing to enter into such agreements to free up that capacity.

The Convener: May I take you back a step and ask whether that is the right approach? Historically, local councils used to take decisions on the long-term planning policy for a settlement, based on the potential long-term investment costs. Let us suppose that we are talking about a development of 1,000 houses. Surely councils should weigh up the relative merits and costs of that settlement against those of a neighbouring or different settlement. Councils might want affordable housing. In Edinburgh, for example, the average house costs £250,000—it is not an affordable house, but the price reflects the market rate. What happens to the people who cannot afford 250 grand and need affordable private housing, rather than social housing provision?

There seems to be a gap between a strategic approach and an individual approach: your solution works for incremental extensions as and when individual planning applications are made, but it does not address the wider issues about towns and settlements and priorities, because it puts the onus on the developer to decide where to develop. Should there be a stage before that, at which councils consider all development plans? That would enable councils to direct public policy with the developers, so that people would know what the costs would be and could make an economic judgment about how much to pay for land.

Dr Hargreaves: I am pretty certain that in all the cases that we are currently dealing with discussions are taking place with developers and councils. The developments are part of councils' development plans, some of which include low-cost housing because councils insist on that. Members will be aware of a fairly famous example at Garthamlock in Glasgow, which has attracted a lot of publicity. That situation was resolved through the process that I described, but the process has involved working closely with Glasgow City Council.

It is possible to achieve both ends, but you are right to say that the start point should be joined-up planning. One issue for us, which councils and COSLA acknowledge, is that our investment periods do not coincide with councils' planning periods. Some councils involve us deeply in their plans; others do so to a lesser extent—perhaps that needs to change but if that is not happening, it is not through want of trying. We have sat down with councils and said, "Yes, you can do this, that and the other", only to find that there is not the money in the economic settlement to go ahead. That is the nub of the problem—it has been a problem for many years. That is what has got us out of line. We are in discussions with planning departments and others about how best to resolve the problem, but it would be terribly convenient—given that you own all of us—if the approach could be joined up a little more, to ensure that planning and investment at least come in waves. Councils look 20 years ahead and we look four to eight years ahead, so we are not on the same timescale. However, we could at least go back to councils after the investment discussion and say,
“Right. We have been allocated X amount towards increasing the infrastructure as part of your area plan.”

**Professor Alexander:** The interesting point about the Garthamlock example is that by putting money into relieving the problem, Glasgow City Council was acting—in a sense—as a surrogate developer in exactly the same way as a private developer might act, as we described. It is possible. However, I emphasise Jon Hargreaves’ point: one of the great problems that we face in Scotland is that we do not do joined-up government well. If we could join things up and get the cycles right, it might be easier to bear down on the issue.

**The Convener:** We will capture that thought and take up the matter with the minister.

**Maureen Macmillan:** Perhaps it is time to move away from that interesting topic, but I take issue with the suggestion that the matter has not been raised. I distinctly remember raising the matter with the minister in relation to rural housing development when we discussed the Water Environment and Water Services (Scotland) Bill. SEPA raised the matter then, too. I was extremely disappointed that not enough resources were provided for rural housing development.

However, I will move on and ask about water customer consultation panels. The submission makes the cryptic remark that

“It would be appropriate at this time to consider whether any changes or clarification are required in the role and responsibilities of the Water Customer Consultation Panels”.

That suggests that you feel that something needs to be done.

12:15

**Professor Alexander:** Whether we are dealing with economic regulation or customer relations, the general point is that we need absolute clarity about how the system works. My view, which I think my colleagues and board share, is that there is a lack of clarity because we have an economic regulator who is also by statute the customer champion, and we also have water customer consultation panels, which are intended to canvass customers’ collective, rather than individual, views. If we move towards a commission rather than a commissioner—which the bill proposes and which, as our submission says, we support—the question arises of where customer issues should go in that structure. We must be absolutely sure and clear about who is responsible for what.

**Maureen Macmillan:** Do you have any thoughts about who should be responsible?

**Dr Hargreaves:** The panels have been a success. When we talk to customers throughout the country, we find that the panels are well respected for their ability to capture collective views and feed them into the various processes, whether that is through consultation or directly to the WIC. However, at present the panels do not have any teeth and they have only one member of staff plus the convener and the members. I do not want to put additional costs on customers, who pay for the WIC and the panels through their Scottish Water bills, but by strengthening and clarifying the panels’ role, customers will have a more direct voice.

I have been in regulated industries since 1989. Personally, I believe that, south of the border, it is difficult for economic regulators to take on board customer views and separate them out from economic views. An economic regulator exists to balance all the parties’ needs and to come up with a pricing regime and efficiency targets for the industry. If that person is also responsible for customer issues, rather than simply representing customers’ views on prices, he will have a difficult job. That is not a criticism, but it is just the way that things have evolved in England and Wales. It is interesting that England and Wales have finally given up the case on the Office of Water Services and have created WaterVoice and a new consumer panel for water issues. Members who read the press from south of the border will know that a price-setting process is being carried out there. The WaterVoice chairman has a strong voice in the debate on behalf of customers and is independent of the regulator, Ofwat.

To return to the debate about how big the new commission should be and what sort of people should be on it, unless we have some pretty strong lobbying groups, there is a danger that we will end up with just an economic view rather than a view that takes into account the whole scene. We believe strongly that customers need a strong voice in the debate. MSPs, as customers’ representatives, regularly make their views pretty clear to Scottish Water, but those are not collective views and are not necessarily policy views; they are on individual issues. Clearly, there are exceptions to that, such as with business customers’ views on charges—a pretty collective view came from most MSPs on that issue. If one asks how much we should spend on the environment, for example, one tends to get a bit of a deafening silence, because customers’ views are not being collected on that issue, although we have done research, which will be presented in our business plan.

We must balance the various aspects. We feel that it would be better to clarify the role of the panels. Some structural changes could be made—that is not for us to say—but customers need to
have a strong voice in the process and, apart from through MSPs and ministers, they tend not to be heard.

Maureen Macmillan: Is that because there is no intimate link between the general public and the water consultation panels? It could be that the public do not know that they exist or what their role is.

Professor Alexander: It is partly that and partly the fact that, if you have a complaint about how Scottish Water is operating, the water customer consultation panel has no locus on that matter at all. Jon Hargreaves is absolutely right. I would like the economic regulation to be separated from customer representation in general and specific circumstances. If we are not simply to tear everything up and reconstuct it all from scratch, the only way to do that is to accept that what the bill says about the replacement of the commissioner by a more broadly based commission is right, but something must be done to balance that on the customer side. Since the water customer consultation panel already exists, it would be better to redefine what it is for rather than to reinvent the wheel and come up with an entirely new structure. Further, as Jon Hargreaves says, there is a model for that down south.

The Convener: I am conscious that we have only another 10 minutes scheduled for this part of the agenda and that we have not yet touched on whether the bill has got the regulatory system right. Earlier, one of our witnesses said that the bill says about the replacement of the commissioner by a more broadly based commission is right, but something must be done to balance that on the customer side. Since the water customer consultation panel already exists, it would be better to redefine what it is for rather than to reinvent the wheel and come up with an entirely new structure. Further, as Jon Hargreaves says, there is a model for that down south.

Professor Alexander: Absolutely not. I said earlier, in a different context, that we are essentially the delivery mechanism for water and sewerage services across Scotland. We operate in a regulated environment and we will operate in the way that our regulators tell us to. We have already been operating in a way that has made the industry in Scotland much more efficient now than it was two years ago, and we will continue to do that. Frankly, we do not recognise the concept of failure.

The Convener: I do not think that our previous witness was criticising Scottish Water. The comment was more to do with the framework of the bill. Given the different roles that Scottish Water has to play, others have raised its long-term stability. The crucial factor seems to be whether the price assumptions that are set at the start enable you to run a stable business in the long term. There is a wider political issue as well as some specific issues.

Professor Alexander: That is right.

The Convener: I would quite like a detailed response on the issue.

Douglas Millican: New risks are created because of the bill. The wholesale business and the new retail business have different risks.

The first source of the risks relates to the setting of the wholesale price. Part of that is the issue of what constitutes wholesale activities and what constitutes retail activities. Our understanding of the bill is that it contains certain prohibitions. For example, it has a prohibition on anyone other than Scottish Water putting water into the public system. It then allows companies to apply for a licence to be a water services provider. Therefore, by definition, the scope of that licence could be anything that is not prohibited under the bill. That means that there will inevitably be an ambiguity around precisely what is wholesale and what is retail. If we say that what is wholesale is purely that which is prohibited, a market element could develop over time whereby one new entrant could apply for a licence purely to bill while Scottish Water wholesale carries on doing everything else, and another applicant could say that they want to do anything and everything that is not prohibited. The nature of the bill is such that wholesale cannot be precisely ring fenced from retail on day one unless you reduce the definition of wholesale to that which is explicitly prohibited. However, that would be a particularly aggressive interpretation.

It flows from that that if the price that is set for the activities or services that a licensed retailer buys from Scottish Water does not properly reflect the costs of the future Scottish Water wholesale in conducting wholesale activities, new risks will be created. If the wholesale price does not fully cover the cost of carrying out all the wholesale activities that are being bought by new retailers, either there will be a risk that Scottish Water will be unable to fulfil all its obligations or, more probably, there will be a risk that the generality of customers, and in particular domestic customers, will pick up part of the financial burden that should properly be the domain of the business customers. That risk also goes in the other direction. If the wholesale price is set too high and more than covers the costs of the wholesale activities, household customers could receive a benefit at the expense of business customers. That is the risk on the wholesale side.

On risks on the retail side, we are dealing with uncertainty, because we do not know how the market will develop; we are putting in place a framework. Clearly, it is important that business customers throughout Scotland are able to have, at the very least, a water services provider that will retail services to them, and ideally they will have a choice of suppliers. We believe that it is important that customers can be assured that, at least for as long as there is not a fully developed market—in other words, until there are a number of active players in the market—they can if they want continue to get their services from Scottish Water.
retail. The risk is that the regulatory arrangements for Scottish Water retail must be set up in such a way that there is sufficient incentive for Scottish Water to want to conduct a retail operation. If retail services are to be carried out in a separate retail subsidiary, Scottish Water will set it up and run it only if it can be viable.

We are considering different risks in the wholesale and retail businesses.

**The Convener:** It is useful to have dealt with that in detail, because Nora Radcliffe raised the issue with the previous witnesses. Does she have anything to add?

**Nora Radcliffe:** I seek reassurance on issues such as data requirements and whether the data are robust enough to progress efficiently and effectively. Previous witnesses raised that point. The amount of resources that are put into management information systems are also an issue, because that takes away from fixing pipes and so on. Will the witnesses expand on that?

**Dr Hargreaves:** I think—and I give the water industry commissioner credit for this—that two years ago the Scottish water industry did not know a lot about the condition of its assets, what its customer base was and so on, but an awful lot of effort, and therefore an awful lot of money, has been spent on correcting that deficiency. You cannot run a regulated industry without the correct data. Looking forward into the next period, we will be looking for substantial sums of money to continue building and improving the data. If we do not, we will just go back to where we were. It is a bit like painting the Forth bridge: if you stop painting it for a few years, it costs a lot more to catch up.

On the business customer base, as members know we have merged three billing systems into one. We are going through a torrid time trying to clean up the customer base that the three water authorities inherited from councils. As you all know, because you send us letters on it, many customers complain about their bills. The primary reason for that is the quality of the data that we inherited. There is a view that we supply only one service, but we actually supply five services. With the switching engine that was described before, the customer has five options—not just one—because there is water, sewerage services, trade effluent, metered and unmetered. If a customer had all those, they could select them from five different retailers. To say that the issue is just straightforward water is an oversimplification, because there are five services and people can choose five different retailers.

12:30

To be able to transfer that data so that we do not end up with the problems that customers have faced in the past in other industries, we have to ensure that the database is clean. I agree with one of the previous speakers that chaos will be caused in the market if it is not clean.

If you look at our evidence and everything that we have said, you will see that although we have our own views, it is absolutely essential that we are all sitting round this table in 10 years’ time discussing how successful we have been, not saying that it did not work because we did not put the right switching engine in or because we did not get the right split between wholesale and retail, as Douglas Millican aptly described. If we do not get those fundamental things right, it is not us in this room who will suffer but the customers. We are keen to ensure that that does not happen. The fundamental issue is getting the data right. If we do not get the data right, everything else will become difficult to manage.

We are putting a lot of effort into that at the moment. One of the things to learn from down south is that the exercise is not a one-off. Customers are constantly moving house and they do not tell us when they have moved, sometimes because they do not want to tell us.

There is also the issue of debt, which has had a bit of an airing today. Perhaps Douglas Millican will elaborate on this, but debt is the biggest risk. For all sorts of historical reasons, Scottish Water customers have a much higher level of debt than do customers in England and Wales, and that debt is a major threat to Scottish Water retail. How debt is dealt with and whether it transfers with customers or whether customers can transfer when they have not paid a bill are all issues that have to be sorted out; the previous panel made that very clear. We need absolute clarity on that, because otherwise we will end up in a real mess, and the people who suffer will be the genuine customers who pay their bills and want to save a few bob by moving suppliers. They are the customers who we have to protect. There will always be people who play the market, and we have to safeguard against that.

**Douglas Millican:** On the specific question of whether we have sufficient data to make the separation, it is helpful that the market is not going to open until 2008. The principal data that we need are cost data. If there is clarity on what is wholesale and what is retail, and there is a clear division between the two, we will have a clear view of the costs attributable to wholesale and retail long before 2008. We have a reasonable view now and that is what we are able to give in evidence to the committee. If the definitions of wholesale and retail are clarified, I am confident that the opening of the market in 2008 should not be a problem.

**The Convener:** Okay. We are running over time—
Nora Radcliffe: I have two more questions.

The Convener: No, not two extra questions. I want to close this evidence session. We will have to hold back several issues for future witnesses and for the minister, such as debt, pricing and the definitions of wholesale and retail. We will come back to those points in subsequent weeks. I thank the witnesses for being prepared to answer questions for slightly longer than our previous witnesses. It has been extremely useful to us.

I suspend the meeting for a brief period so that we can change witnesses.

12:33
Meeting suspended.
SUPPLEMENTARY SUBMISSION FROM SCOTTISH WATER

(Scottish Water was asked to address in writing two questions which could not be asked during their oral evidence session on 15 September because of lack of time.)

Question 1. What is the view of Scottish water on the argument put forward by some witnesses that it is not appropriate or ideal for a right of appeal relating to the Scottish water industry to be to a UK body based in London (i.e. the Competition Commission) - and a body which has expertise on economic factors but not on the wider considerations relating to the water industry?

Given that we are benchmarked against water and waste water companies in England and Wales, and that the Water Industry Commissioner for Scotland (WIC) uses OFWAT methodologies, we support the view that there should be right of appeal to a professional, independent body with expertise in adjudicating between commercial organisations and their regulatory bodies. This is, of course, a matter for Scottish Ministers and the Scottish Parliament, but in our opinion there would be a good case for the Competition Commission to carry out this function. What needs to be clarified is that Scottish Water would only go to the Competition Commission on economic issues e.g. if the WIC does not provide sufficient funding for Scottish Water to carry out its activities at the lowest reasonable overall cost; if costs are incorrectly split between retail and wholesale activities or efficiency targets are unachievable that would affect the overall financial viability of Scottish Water.

It goes without saying that since the Scottish Executive owns Scottish Water (i.e. are equivalent to the equity shareholder in England and Wales), they would be party to any adjudication made by the Competition Commission. For example, if the WIC places targets on Scottish Water that it felt unable to sign up to, and if challenged at the Competition Commission and the Competition Committee upheld the WIC’s view, then Ministers would have to support Scottish Water in the way normal equity partners take the risks.

Question 2. What is Scottish Water's view on the proposition that the composition of the Water Industry Commission should include the chair of the Water Customer Consultation Panels?

We consider the composition of the new Commission to be a matter for Scottish Ministers and the Scottish Parliament to decide in the interests of ensuring clarity and robustness of economic and customer service regulation. The more important issue for us, however, is the need for clear, effective customer representation within the water industry in Scotland. At the very least we would expect that the Commission has a duty to take into account views of the customer representative groups and that they had demonstrated that they had done so in their role as customer service regulator.

As we discussed with the Committee on Wednesday 15 September, we believe that this would be a good opportunity to review the roles and responsibilities of the
Water Customer Consultation Panels (WCCP). It is vital that not only are the collective views of our customers heard and acted upon but that individual customers have an accessible, independent body to advise them when they are not satisfied with any aspect of our service to them. While the WCCP appears effective in their collective representation, we believe clarity is required in their role in the representation of individual customer concerns, as this is currently the responsibility of the Water Industry Commissioner.

Please contact us again if we can provide further information on this or any other matter.
SUBMISSION BY SCVO

The Scottish Council for Voluntary Organisations seeks to advance the values and interests shared by voluntary organisations by fostering co-operation, promoting best practice and delivering sustainable common services. We have 1200 organisational members and work with the network of local councils of voluntary services to reach many thousands more.

Background

SCVO first became aware that charities were suddenly being faced with water bills in the last quarter of 1997. Since then, SCVO has been involved with this issue on several levels:-

- Campaigning for action to end or reduce the impact of water charges on charities, including securing debates in the Scottish Parliament, the tabling of amendments and maintaining links to the Scottish media in presenting our case to the wider public, and in individual discussions with MSPs.
- Submitting evidence at every opportunity to committees of the Scottish Parliament to advance the case for exemption for charities from water charges, most recently earlier this year to the Finance Committee’s review of Scottish Water.
- Liaising with the former three water companies and Scottish Water on the resolution of individual cases, and promoting their wider understanding of charities and their operational context, with a view to influencing practice.
- Providing a customised service to charities and voluntary organisations to help them minimise their water bills and to plan for the likely impact of such charges on their funding position and their relationship with their main funders.
- Providing information to MSPs, trades unions, community groups, MPs and others on the debate and SCVO’s policies, but also advising on individual cases they had come across.
- Working with the industry regulator in his affordability advisory group and more generally to keep him abreast of the issues as seen from the charitable and voluntary perspective.
- Working with other interested client groups on the core issues of affordability and the principle of eligibility for charging, particularly the small business sector and poverty groups working on the impact of charges for Band A and B Council tax paying households.
- Working on the wider impact of changes to water charging such as the highly specific impact on care and nursing homes and associated Court cases, such as West of Scotland Water vs. Clydecare.

Reliefs

The success of SCVO’s campaigning was seen in the delay in introducing charges in 1999-2000 and 2000-2001, and Ministers’ introduction of a charitable exemptions scheme in 2002-03, supported by a Hardship Fund for two years, the latter to have £1 million available for each of the two years.
In making their commitment to the scheme, the then Minister told the Parliament that it was specifically designed to meet the needs of the overwhelming majority of Scottish charities which were quite small in cash income terms. It was believed by the Scottish Executive that the £50,000 income ceiling for exemptions would lead to some 80% of charities and voluntary organisations qualifying for relief.

If this is the benchmark for the scheme’s success, then it has failed quite badly. The figures show that just over 5000 have qualified for relief. Scotland has some 50,000 voluntary organisations, of which 28,000 are recognised charities. This means that a very substantial number of charities have not qualified for relief, far fewer than the Minister believed would be the case.

The Hardship Fund similarly has had little impact with only £63,000 being issued to 40 organisations.

SCVO has provided advice to over 3,700 cases, mostly via initial coverage of the issue in Third Force News and providing the services of a member of staff.

On August 31st this year at the conference on affordability Ross Finnie announced that the current scheme would be continued until 2010. This is, in itself welcome, however an opportunity to review and revise the terms of the scheme to ensure it is fully accessible and workable is now required.

**Conditions**

The difficulty with the present scheme is that it is overladen with conditions which effectively exclude from relief many organisations who, in terms of the general policy intentions ought to benefit.

There are six hurdles a voluntary organisation has to leap to qualify for the relief. The most perverse of these causes damage to groups who expend a great deal of effort in investing in their communities.

Good examples of this include Lochranza on Arran, where the former village hall had been condemned by the firemaster and the community set to with a will to raise the great bulk of the cash themselves. With a small contribution from the National Lottery, the new hall was built less than 50 meters from its predecessor on a patch of land long ago assigned for community use. The new hall is fully fitted out to meet the needs of those with disabilities, and has attracted much favourable comment from community activists from much wider afield. Yet the very first hurdle faced by the hall committee was a huge jump in water charges, by over 1000%. This was because Ministers had decreed that moving to a new location lead to the loss of all pre-existing reliefs from charges. Imagine if the same thinking were to be applied to industrial or commercial investment! The private sector receives substantial investment assistance and much of UK investment is designed to boost productivity. We saw more widely with the Millennium Halls programme in Scotland, managed by SCVO, just how much could be achieved by a combination of skilled professional support and local people working together. Yet all of the new build projects that formed part of that programme automatically lost all reliefs.
Another practical example. The marriage guidance centre in Inverness moved from a very poor second floor flat in an off-centre location to a prominent city centre location with good parking and full disabled access. Yet the water bills jumped by over 700%. When supply contracts have been entered into with local authorities and others for the following three or five years, it is very difficult to re-work these to build in such huge external cost increases.

These examples are supplemented by many more caught by the operation of the other five conditions of the charities exemption scheme. For the Ministerial announcement of 31st August extending the scheme to have been wholeheartedly welcomed, it would have been accompanied by a commitment to revisit the applicability of the six conditions and test whether they were proving practicable. It is certainly true that they have severely limited the original Ministerial intention of ensuring reliefs worked for 80% of smaller Scottish charities. The out-turn figures suggest that 19% only have had their reliefs fully granted.

Public Benefit

The key issue of principle remains the community’s support for the work of charities for the public benefit they deliver. This is why the introduction of the Charities and Investment Trustees Investment (Scotland) Bill to Parliament this session is directly relevant to this debate. The Charities Bill determines quite explicitly that charities are for public benefit.

If Scottish Water is truly to be a public corporation, there is a very strong case for it to address the key issues of affordability across the board for low income households, small businesses and charities. **It is clear, however, that there is a very particular case to be made for charities to be assured a level of relief from water charges by virtue of our intrinsic public benefit.** Unlike business, charities operate on a not for profit basis. We plough back everything into the services we provide for our clients and to meet our charitable objectives.

At the recent conference of affordability, the Minister revealed a very welcome shift in Executive policy. We welcome the injection of real public objectives into the remit of Scottish Water to meet the wider needs of the community. We regard it as an overdue response to real need. To reinforce this shift **we would suggest the Committee consider the case for assuring charities relief from water charges in the longer term by introducing an appropriate clause to the face of the current Water Services etc (Scotland) Bill.**

This is because the current policy does not address what will happen after 2010, and still leaves many charities unable to meet their bills and others reluctant to embark on new investment, because of the change in charges this would incur. In some cases, voluntary organisations are still being pursued by Scottish Water in rather pointless court actions where resolution has still not been achieved after 4 years – and Clydecare is not the only such example.

Despite these difficulties, and the hard road that has been walked in the last eight years, there is now a real chance of a secure, fair and sustainable settlement. At
the affordability conference, there was a striking consensus in favour of a contribution from general taxation to cover the costs of some reliefs, which suggest a very appropriate long term solution.

In the short term a constructive negotiation around removing all or some of the conditions of the current scheme would be extremely welcome. SCVO stands ready to discuss these issues with the Executive and the Parliament and looks forward to the debate as it develops in the coming months.

SUBMISSION BY THE SCOTTISH CONSUMER COUNCIL

INTRODUCTION

The Scottish Consumer Council (SCC)'s role is to represent and promote the interests of domestic consumers, particularly those who are disadvantaged in any way. We therefore share the Scottish Executive's policy objectives in relation to the Bill i.e. the universal accessibility of a safe and clean supply at a price that is affordable to all and an emphasis on meeting social policy objectives and protecting disadvantaged consumers.

We welcome the Water Services Bill which we believe is much improved from the draft Bill. We did not consider that the draft Bill contained enough evidence to support proposals for what will be significant reform in water services. We now welcome the responsiveness of the Scottish Executive to the previous concerns expressed by the SCC and other organisations in relation to the need for a considered approach to the introduction of any competition, a fuller debate on charging and affordability, and a strengthened framework of regulation.

We do, however, believe that there is one significant omission in the Bill relating to the fact that there is no statutory role for the Water Customer Consultation Panels within the new regulatory framework.

COMPETITION

Common Carriage
Generally, competitive markets have the potential to deliver real benefits for consumers in the form of lower prices, improved efficiency and better value for money. However, the protection of public health must be of paramount importance. The SCC therefore welcomes the cautious approach being taken in the Bill to introducing competition into the water industry.

The specific structure of the industry i.e. the high costs involved in maintaining and developing the infrastructure, together with the low marginal cost of what is a homogenous end product (potable water), leaves less scope for reducing prices and less incentive for consumers to “shop around.” The uncertain potential benefits of common carriage are outweighed by the significant risk to public health caused by even one adverse water quality incident, a risk that becomes greater as access to the network is widened. In the interests of public health, the
precautionary principle should apply and the prohibition of common carriage is the low risk option.

**Retail Competition in the Domestic Sector**
The Bill argues that the major risks for households under retail competition are related to the possible discontinuation of the current Council Tax charging arrangement. The danger is that existing protection for vulnerable consumers will disappear, that new market entrants will “cherry-pick” high-banded properties, and also that only customers whose dwellings are cheaper to supply will also be targeted. This would leave Scottish Water no option but to increase charges to groups occupying lower-banded properties or living in more rural and remote areas. We accept the argument that these groups may not benefit from retail competition and that the Executive correctly highlights the risks associated with “cherry-picking”.

**Retail Competition in the Non-Domestic Sector**
As end-users, and price-payers, of the products and services produced by businesses, the consumer plays a key part at the centre of a healthy business economy. When business costs rise consumers play a role, through increased prices, in meeting these costs. There is, therefore, a legitimate consumer interest in seeing businesses secure the best opportunity possible to keep their water charges as low as possible.

However, it will be very important that those who do not form any part of a competitive arrangement (i.e. domestic consumers) are not asked to underwrite the initial and ongoing costs of the competitive framework. The possibility that the introduction of retail competition in the business sector will impact adversely on water services for domestic consumers should not be under-estimated. Consumers will need to be re-assured that the loss of any business customer revenue base will not affect Scottish Water’s core costs and, as a result, domestic charges and standards of service. In the interests of transparency, we support the proposed structural separation of Scottish Water’s wholesale and retail arms.

It will be vital to ensure that water and sewerage providers to all business retail customers pay a reasonable price to Scottish Water for entry, water, treatment, network services and regulatory costs. The price should cover their full contribution as water customers to the cost of maintaining and upgrading the public network infrastructure. The core costs of maintaining, improving and investing in the network must be shared, and be seen to be shared, by all in order that domestic consumers do not bear a disproportionate part of these costs. This will be a key role for the new Water Industry Commission.

**REGULATION**
The SCC welcomes the move towards establishing a Water Industry Commission. This is in line with accepted best practice in regulatory accountability. We also welcome the clear distinction that is being proposed between the social policy responsibility of Scottish Executive ministers and the economic responsibility of the Commission. The Commission’s role will be clearly, and correctly, to focus on ensuring that policy is implemented rather than invented. Nevertheless, we do
believe that it should have a statutory duty of sustainability, in line with the existing requirement on Scottish Water. When deciding on processes to implement Scottish Executive policies, the Commission should be required to be mindful of the impact of its decisions on sustainable development in its widest sense i.e. economically, environmentally and socially just.

As a public body, the membership and functioning of the Commission should be consistent with widely recognised practice in corporate governance. We agree with the need for members of the Commission to possess the required expertise to deliver effective economic regulation of the industry. We agree that the membership should comprise individuals who meet the required criteria. We do not think it would be helpful for the membership to be drawn from vested interests or representative stakeholder groups. This could have the potential to divert the Commission from its focus on regulating the industry objectively. Stakeholders should of course be involved and consulted in the work of the Commission in other ways. We do believe that the Bill should emphasise the need for Commission members to be independent of Scottish Water and/or any other provider of water in Scotland. In line with the recommendations of the Better Regulation Task Force, members should be subject to regular performance appraisal. This is consistent with good practice in other NDPBs.

While accepting the principles embodied in the new regulatory framework and the respective roles envisaged for the Commission and the Scottish Executive, we do believe that the provisions in the Bill need to be strengthened to ensure that these roles and responsibilities are underpinned by more specific statutory requirements. This is to ensure that the proposals actually work in practice and that the required objectives of transparency, accountability and robustness are met.

The Bill, as it stands at present, requires Ministers to consult on their policy guidance on charging with the Commission and with Scottish Water. This should also include the Water Customer Consultation Panels and should be preceded by public consultation. The Minister should be required to report back to Parliament on the achievement of the policy objectives by the Commission and Scottish Water. The current wording of the Bill requires the Commission to submit an annual report to Ministers but there is no requirement on Ministers to lay this report before Parliament.

Stronger duties need to be placed on the Commission if transparency and accountability are to work in practice. The Commission should be required to:

- Consult publicly on its proposals and on its charges determination
- Publish its proposals so that they are accessible and understandable to the public, including vulnerable groups
- Ensure that its Annual Report, Corporate and Business Plans are in the public domain
- Hold meetings in public and publish a code on openness
- Carry out regulatory impact assessments (incorporating consumer impact assessments) on all proposals.
Water Customer Consultation Panels
Within the new framework of regulation, there are key issues where a tripartite group (comprising the Commission, Ministers and Scottish Water) will be required to be party to a process of statutory consultation:

- Section 18 requiring Ministers to consult with the Commission and Scottish Water on its proposed charging policy and requiring the Commission to consult with Scottish Water and Ministers on its proposed charges determination.
- Section 19 requiring Ministers to consult with Scottish Water and the Commission on any additional functions it seeks to confer on Scottish Water.

We believe that the consumer voice will be weakened by the omission of the Water Customer Consultation Panels from these requirements.

There are, however, wider issues with regard to the capacity of the Panels to meet the increased expectations of consumers, the Commission and the Scottish Executive within a more transparent and accountable framework. The Panels will face additional responsibilities in responding to a significant increase in consultation documents, participating in probably more numerous ongoing policy initiatives and in identifying the consumer interest across a broader and more complex range of issues, particularly the introduction of competition and changes to the charging regime. Consumers will look to the Panels to articulate the consumer interest in all of these and policy-makers will require the Panels to back up their policies with evidence which goes wider than that obtained through public meetings. The Panels will need the capacity to undertake research and to employ staff with the policy expertise to analyse evidence and translate it into practical policy proposals. The Financial Memorandum of the Bill needs to recognise the fact that the Panels will require to be equipped within the new policy environment, that they too will be expected to become more transparent and accountable, and that they will require additional, probably modest, resources to do this.

In order to be effective, the Panels will need access to the information they need about the water industry. It is likely that this information will already be possessed by the Commission. There is no point in duplicating work. Therefore, the Panels and the Commission should be required in statute to draw up a Memorandum of Understanding that sets out agreed arrangements with a view to securing co-operation and exchange of information between them and consistent treatment of matters which affect both of them. This is common practice in others sectors including energy and postal services.

We do, however, welcome the fact that the Bill provides that the Panels will only be responsible for customers served directly by Scottish Water on a wholesale basis i.e. domestic customers. This is in recognition of the fact that non-domestic customers will have a choice of supplier and protection under a licensing regime that will give them recourse to the Commission.

Large business consumers have the buying power and resources to make their voices heard and their interests are likely to vary from, and often be at odds with, those of individual consumers and smaller businesses. However, even small
businesses have a clear voice through trade associations that can campaign effectively at strategic level. Individual consumers cannot make their voices heard collectively in this way – their issues and interests will always be diverse.

The operational support which a consumer organisation will provide to an individual, very small business and to domestic consumers may, on the whole, be very similar as they are likely to experience the same service issues. However, the policy solutions for similar situations could vary for different groups. A consumer organisation which has a remit for both business and domestic consumers will have to be very clear about the impact of its policies for each and the possible tensions which might exist between the different interests. A good example of this is in relation to charges and the extent to which cross-subsidies between different groups exist.

Having responsibility for domestic consumers will target resources towards those most in need of an advocate body.

**CHARGING**

The SCC will be responding to the current consultation on paying for water. We welcome this very important initiative by the Scottish Executive. Like many other organisations, we have called for a public debate on charging for water and affordability for disadvantaged consumers. The Executive is to be congratulated in seeking to tackle this issue and in a manner that aims to secure meaningful consultation with stakeholders on the way forward.

We set out the principles we believe are important in underpinning how we should pay for water. Some of these principles mirror the Scottish Executive’s proposals and some put a different slant on them. We also have a list of additional principles that we think should be included in any framework that sets out how we should pay for our water.

Access to a water service that meets our public health needs is a right to which all citizens are entitled. On this basis, many people would advocate that the industry should be treated as a “public good,” fully-funded through taxation. However, water is also a commodity where its consumption and use is not a health pre-requisite, for example, to wash our car or hose the garden. Like any other commodity, it has to be paid for.

But we have to be clearer about this distinction and how we fund these two very different aspects of our water service, the part that is for the “public good” and the part that relates to our more discretionary use of water as a commodity. The consultation paper seeks to address both within the parameters of the charging system. This is too narrow an approach. We would like to see more clarity from the Scottish Executive on how we should identify the distinct differences that exist between citizens and consumers in relation to paying for water.

Where a supply of water is needed in the interests of social justice it should be paid for by government and citizens as taxpayers.
We agree with the principle of full cost recovery on this basis and with the following caveats:

- We fully support the notion that costs should be allocated among different customer groups on a rational basis.

- We should help those who cannot afford to pay the costs. Exceptions to full cost recovery are vital for social reasons. The essential nature of water and its importance for public health means that there is a need to protect disadvantaged consumers from costs disproportionate to their income. But help for those who cannot afford to pay must be seen as an issue of social policy, rather than service provision. It should be addressed outwith the parameters of the charging system and funded by society as a whole and not cross-subsidised by other water customers. Provision of assistance with water bills as part of Income Support has eroded and there is a responsibility on the UK government to ensure that affordability of water is seriously addressed as a social policy issue within the benefits system. The Scottish Executive and DWP need to work together to resolve this issue.

- In England and Wales, DEFRA has set 3% of household expenditure as a measure of affordability of water as part of its sustainable development indicators. It has been calculated that this affects around three million households.\(^{198}\) We need a similar indicator in Scotland so that we are able to define affordability and set targets to ensure that it is achieved. Any measure of affordability must be based on consumer research evidence. The evidence base we have at present is poor.

- We need to guard against rural disadvantage. We supported the creation of Scottish Water and the creation of a national charge as against the problems caused by the previous system where consumers paid significantly different amounts for their water by virtue of their position on either side of a somewhat arbitrary line drawn on a map. The need to address the particular geography of Scotland and the real and potential disadvantage faced by people living in remote and rural areas has long been integrated, at over-arching policy level, as a key means of achieving and maintaining social cohesion in Scotland. However, we have to be clear about and tackle the inherent tensions between harmonisation as a social policy tool and as a form of cross-subsidy. If we are going to commit to cost recovery, then this, the largest cross-subsidy of all (urban consumers to rural consumers) becomes irrational (or unfair) to urban consumers in the narrow context of the charging system. Sustaining our rural communities and protecting rural residents from the disadvantage caused by our nation’s geography is surely an issue of social policy that requires intervention by government rather than by other consumers. Paying for water could be subject to a rural assistance in the same way that our ferry services have been or in the way that our rural post offices are being protected. We refer to the recent announcement by the Scottish Executive of assistance for rural petrol stations.

We believe that a charging system should incorporate the following additional principles:

- Sustainability
- Meets public health objectives
- Is understandable to consumers
- Is transparent and clear on the nature and extent of cross-subsidy
- Is straightforward for consumers to pay and effective for Scottish Water and local authorities to administer.

With regard to the charging consultation and the Bill, there are two further issues we would like to raise:

- National Consumer Council research revealed that, in relation to essential services, disadvantaged consumers wanted face-to-face contact with sympathetic, pro-active suppliers, together with flexible tariffs and payment terms. Section 18 of the Bill gives Scottish Water the power to make provision within its own charges scheme with respect to the times and methods of payment of charges. We believe that, with regard to low income consumers, method and timing of payment can be just as important as level of charge and indeed, can, if used flexibly, make it easier for people to pay their bills. As such, we believe that this should be an issue of social policy set by Ministers rather than the service provider.

- If a system of charging were, at any time in the future, to become de-linked from the Council Tax charging arrangement and set within the taxation or benefit system, then disadvantaged consumers would be protected from some of the risks associated with retail competition. If this were the case, then we think that there would be merit in reviewing whether the scope of retail competition should extend to the domestic sector. This should be conditional on an assessment that competition would bring real benefits. There would need to be a framework that provided incentives to companies to pass benefits on to domestic consumers and which built in protection for disadvantaged consumers.

RESPONSE TO THE ENVIRONMENT COMMITTEE ON THE WATER SERVICES BILL

The Water Customer Consultation Panels were established by the Water Industry (Scotland) Act 2002, to represent the views and interests of customers of Scottish Water. The Panels welcome the opportunity to comment at Stage One of the Bill, and in doing so have reflected on the current consultations on Investing in Water Services 2006-14, and Paying for Water Services 2006-10. The Panels’ responses to the Committee’s detailed questions are:

Part 1 of the Bill: replaces the Water Industry Commissioner with the Water Industry Commission:

---

1. **Is the scope and effect of the change appropriate?**

The Panels understand that the current role of the Water Industry Commissioner is not as an economic regulator, but as an adviser to Ministers. The Panels believe that economic regulation, in an industry as important as water, should be carried out in a focused and clearly defined manner. The Panels therefore welcome the proposal to create a Commission, in line with Better Regulation and the Scottish Parliament Finance Committee's recommendations, and that the Commission's role and remit reflects the need for statutory economic regulation.

The Panels support the proposal that the Commission should comprise economic and technical experts, but hope that the composition of the Commission will draw from a broad range of experiences. The Panels do not believe that the Commission should directly represent any stakeholder interests. The Panels believe that a Commission which carries out its functions in an open and consultative manner should take the wider impact of its decisions fully into account.

The Bill currently proposes that the Commission will retain the role of promoting customer interests. From this arise the questions of how the Commission will do this: will there be any conflict of interest regarding its role as a licensing authority? How will the Commission assess the wider implications of its determinations, in particular, the effect on social considerations, environmental impacts, and sustainable development policies?

To assist address these questions, the Panels strongly advocate that consumer interests should be advanced separately, and that the roles and responsibilities of the proposed Commission and of the Panels, as the water customer organisation, should be carefully examined and clarified. This includes the relationship between the Panels and the new entrant companies, and their customers.

Since the formation of the Panels in 2003, there has been confusion on roles and remits, which has affected both customers (at complaints level) and key stakeholders (at strategic level.) The Panels believe there is now an opportunity to strengthen their powers, role and remit on behalf of all customers. This would bring clarity for customers and the industry. The Panels believe they are ideally placed to adopt an advisory role on policies within the industry (working with Scottish Water, the Water Industry Commission, the Scottish Environment Protection Agency, and the Drinking Water Quality Regulator) to represent customers effectively.

2. **Will the proposals achieve the stated aims of improving the transparency, accountability and consistency of regulation in the water industry?**

The Panels believe that the water industry has recently demonstrated a marked improvement in transparency, and that the proposals within the Bill provide for greater improvements. The Panels recommend enhancing this by enshrining consultation into the legislative framework, and by ensuring that the Commission has regard for advice and recommendations from appropriate stakeholders, such as the Panels as the customer representative organisation.
Part 2 of the Bill: makes a number of provisions regarding water and sewerage services:

3. Are the provisions in this Part of the Bill (i.e. the various elements of the proposed model of competition, and the framework for charge determination) appropriate and clearly defined?

From a layperson’s perspective, the possible implications of the Competition Act 1998 on the water industry in Scotland are not clear. The Panels believe the Executive has much to do to explain the requirement for a limited competition framework, and its pace of implementation.

The framework itself also requires clear and simple explanation by the Executive, in particular on its reasons for prohibiting common carriage. The Panels recognise the objective of the prohibition is to protect public health and to ensure water environment objectives for the water industry are met. However, reasoning for prohibition needs strengthened, especially when compared with developments in England & Wales, where limited common carriage will be permitted. This leads to the broader question of why, across the Bill, proposals for Scotland are different from those south of the border.

Regarding the arrangements for competition and the licensing regime, the Panels are concerned at the general complexity of the proposed arrangements, and the potential costs to Scottish Water of responding to them. The benefits to customers have not yet been made clear.

4. What are the likely effects of the provisions on the fair and effective provision of water and sewerage services?

The Panels find it difficult to provide a full and comprehensive response in the absence of clear and detailed information and assessments, both at consultation stage, and now with the Bill itself. The Panels’ main concerns lie around the following questions:

- How will the proposed changes affect price levels for all customers?
- How will customer service levels be safeguarded for all customers?
- What will be the effect of distracting the energies of Scottish Water and the Water Industry Commissioner away from the very challenging agenda for investment and the ambitious targets set for Scottish Water’s routine operations?
- How will Ministerial decisions and policies be affected by the competition regime (for example, if Surface Water Drainage is to be charged by bandings as of 2010, how would that work in the new arrangements)?
- How will the wholesale price be reflective of wider Ministerial policies? If it is not, will any shortfalls then pass to remaining Scottish Water customers?
- Will the separation of Scottish Water’s retail and wholesale operations introduce significant additional costs for customers, beyond those estimated?
- Is the proposed timetable for the Commission and Scottish Water over-ambitious?
• Would a 2010 implementation date not be more realistic, and more consistent with the strategic review period?
• The exemption scheme is currently funded by Scottish Water customers, and has been extended to 2010. How will these proposals impact on those arrangements?
The Panels believe there should be a more detailed assessment, followed by further debate and consultation, as a major step towards addressing the above concerns.

Part 3 of the Bill: establishes statutory powers to tackle and prevent coal mine water pollution:

5. Is the scope and effect of the provisions appropriate?

This is not within the Panels’ area of knowledge, however the provisions seem sensible. The Panels are pleased responsibility will be clear, and that these measures are mirrored with England & Wales.

Part 4 of the Bill: makes miscellaneous and general provisions relating to offences and powers created under the Bill.

6. Is the scope and effect of the provisions appropriate?

The provisions detailed in Part 4 of the Bill appear appropriate.

Other matters: Views are also welcome on the policy memorandum and financial memorandum accompanying the Bill:

7. How helpful do you find these documents?

The Panels found both documents to be clearly written, but lacking the level of detailed information the Panels feel should have been made available. The Panels believe there should be further assessment of the proposed changes, in terms of both financial and customer service benefits. The Panels also feel that the Scottish Executive should provide clear, simple, and accessible evidence for policy proposals.

8. Are the financial consequences of the Bill sufficiently clear?

No, the financial consequences are not sufficiently clear, and the Panels refer to their response to the Finance Committee, as detailed below:

The Panels … find it difficult to form a clear view due to the lack of detailed analysis provided. The Panels would have liked to have seen further breakdown of the estimates of costs within the Financial Memorandum to allow for easier consideration and understanding. It has been suggested that the final costs may be substantially higher than the current estimates.

The Panels would be extremely concerned if uncertainty over cost estimates resulted in a severe impact on pricing policy for all customers. A visible and
detailed analysis on all aspects of the Bill would assist alleviate this concern. In particular, the requirement on Scottish Water to separate its wholesale and retail operations, the development of strategies to respond to competition and the licensing regime, and the ongoing costs of serving such a regime, require careful assessment and clarity of financial impact.

The Panels are also concerned regarding the financial implications of possible disparities between Ministers principles and policy decisions on paying for water services, and their place within a wholesale charging scheme. Were it to transpire that the framework for competition led to shortfalls, this burden would then fall to remaining Scottish Water customers, or to the Executive. (For example, if Ministerial decisions on cross-subsidies could not be sustained, or potential loss of large users resulted in significant revenue deficiency.) The Panels would encourage clear and transparent measures to safeguard Ministerial policy objectives and the benefits to customers of those policies.

The Panels final comment at this stage would be in considering the much broader implications that may result from the Bill, especially the potential distraction for Scottish Water and the Water Industry Commissioner from the efficient and effective delivery of the next investment programme, which will be as large in scale and scope as the current programme. The potential financial ramifications of this are understandably difficult to forecast, but must be given due care and attention.

9. Are the effects of the Bill on sustainable development accurately and clearly described?

The Panels do not feel that the Bill has been clearly linked to sustainable development. There are inconsistencies across the industry on applying policy on sustainable development. Scottish Water has a current statutory duty to do so, however neither the Commission nor new entrant companies will have. This raises questions of socio-economic considerations, equitable pricing policies, and a sustainable industry for Scotland as a whole.

10. Do you have any comments on the consultation that the Scottish Executive carried out prior to the introduction of the Bill?

Although consultation policy was followed, the Panels would comment on the lack of detailed information available, in particular at consultation stage; the difficulty in accessing all responses to the consultation exercise; and the exclusion of the Regulatory Impact Assessment from the associated documents. The Panels would be keen to see improvements in these areas.

SUBMISSION BY COSLA

Introduction

COSLA has a strong interest in the delivery and provision of water services within Scotland. This is not merely due to the joint billing and collection we are required to undertake but also due to the impact water services have on the environment, regeneration and the everyday lives of the people of Scotland.
COSLA would like to take this opportunity to remind the Committee that the long-term impact of the lack of sustainable development being delivered by Scottish Water. The Committee must recognise that this hampers regeneration and will have a major impact on a number of Executive and Local Government priorities.

There are a number of consultations taking place at this present time on the issues surrounding water services in Scotland and it is important that these are viewed collectively. However, it is very important that this is not used as a reason to not take action. While the results of one consultation may impact on the findings of another if a fundamental principle can be changed it should be.

The Water and Billing consultation recognises that Local Authorities pay across to Scottish Water £18m of in year Council Tax revenue that is not revenue collected on behalf of Scottish Water. While this figure is reduced as collection rates reduce over time it does have a significant interest rates associated with the cash flow disadvantage. In one Local Authority this is £1.50 for each household. Both Scottish Water and COSLA have stated that their view on this cash flow advantage will not be affected by the proposals in the Paying for Water Services consultation. Therefore, COSLA would draw this to the attention of the Committee as an example of where a fundamental issue can be addressed prior to the findings of subsequent consultations.

The Main Changes Within the Bill

Common Carriage
The Bill proposes to prohibit by creating offences in relation to the unauthorised use of the public water and sewerage systems. The aim here is to ensure that other utilities will be prohibited from selling water services to domestic customers. COSLA welcomes this proposal. It is important that safety of the water supply is important and by closing the legal loophole that the Bill mentions it ensures that only one body is dealing with treatment of water. It also will ensure that in the unfortunate scenario of a problem arising that only one body is accountable.

Limit Retail Competition
The Bill seeks to introduce a licensing system to limit retail competition for the provision of water and sewerage services for non-domestic customers only. COSLA would seek further information and assurances on this issue from the Executive but if the benefit gained from this were a better value for money approach to the billing process for non-domestic customers (including Local Authorities) then COSLA would welcome this.

Water Industry Commission
COSLA supports the proposal within the Bill to introduce a Water Industry Commission for Scotland as a body corporate to replace the Water Industry Commissioner. The body would therefore share the decision making and the responsibility of their position.

COSLA also welcome the proposal that the Commission would be accountable to Ministers and recognise that not only is this in the interest of Local Government but also would be in the interests of the public and all interested bodies. However,
we do not welcome the suggestion that Ministers do not get involved in conflict resolution. COSLA would seek Ministers to take a full and active role if they were called upon. No side should be looking for conflict but it is necessary that any body can seek Ministerial intervention and guidance if the need arose.

COSLA does express caution about the reference in the proposals that information can be withheld on the grounds of confidentiality. COSLA would welcome assurances that this proposal meets with the approval of the Commissioner for Freedom of Information

**Ministerial Power to Give Direction**
The Bill makes reference to changing Scottish Ministers’ powers to enable them to give directions on Scottish Water’s functions. Again COSLA would need to seek further clarification to what the Bill is proposing on this issue before making a full response.

However, COSLA would call upon the Committee to recommend that if any such discretionary powers are to be given to Ministers we would seek assurances that such powers would be made use of.

**Fixing Water Charges Discounts**
*COSLA would now like to address a number of issues and concerns regarding recent Executive announcements and which also arise from recent consultations.*

**Affordability for Households**
The Executive proposes that affordability should be the key factor in calculating the charges for households. COSLA clearly welcomes this, as it is a position that all agree with.

**Re-Ordering Discounts**
The Minister has publicly called for the current consultation on Paying for Water Services to find that the issue of rate relief for water and sewerage charges be addressed by reapportioning of the subsidies and discounts that are currently given. For example, this would seek the reduction given to single person households being abolished and the discounts given to households who receive rate relief for council tax. The Executive hope that this will go some way to addressing the issue of collecting water and sewerage charges from low income households and would therefore address the cash flow advantage referred to in the introduction.

While COSLA welcome the aim to provide discounts for the most needy households within Scotland the reapportioning of discounts does not address the underlying principle of affordability. COSLA continues to call for the introduction of rate relief for water and sewerage charges in line with the relief given on Council Tax. This will ensure that all households who should receive full or partial relief do receive it.
Council Tax on Second Homes
The Executive have recently announced that Local Authorities can charge up to 90% Council Tax on second homes. The additional revenue from this will not be retained by Local Authorities but will be passed directly to Residential Social Landlords (RSLs).

The additional Scottish Water revenue is not ring-fenced in anyway and will go directly to Scottish Water. The Committee may wish to consider seeking Scottish Water to use this additional revenue to fund capital programmes to address the key issue of development constraints. The maximum additional revenue that would be raised for RSLs is £25m with the Scottish Water share clearly being significantly less than this. While these low amounts, even if invested, will not make a significant impact it would be a clear commitment from the Executive and Scottish Water to tackle the serious issue of development constraints.

Funding Expansion of the Public Networks
Where local capacity is not available the Paying for Water Services consultation proposes that the developer should pay for “whatever costs arise” from the expansion. The paper states that if this were for Executive or the Executive’s agencies, COSLA believe this would also mean Local Government, it would be for the public body to meet the cost.

For a private contractor this additional burden maybe incorporated within the price of land or within the sell on price of a house or housing development but where Local Authorities are building affordable social housing then this additional cost could clearly not be transferred on to a third party. This would then potentially see Local Authorities funding the role of Scottish Water. While the Executive may wish to impose this cost of the private sector it would be a further cost to Local Authorities who are trying to address the issues of regeneration and local sustainability.

Additional Points to Note
Further to the comments raised within the Bill and the additional comments referred to above COSLA would like to take this opportunity to highlight further developments and areas of concern which are related to Scottish Water and the supply of water services.

Scottish Water Debt
A recent independent report commissioned by one Local Authority found that the Scottish Executive paid off the debts of Scottish Water twice. It is important that guarantees are therefore placed on Scottish Water to adjust their spending patterns and to improve their efficiency as an organisation.

Without any such guarantees there is clearly concern that these two payments will set the precedent for Scottish Water to spend beyond their means, to continue to be inefficient, and not to worry about the consequences as the Executive will pick up the tab. This is clearly not an acceptable position especially given the tight Spending Review being forecast by the Executive and the pressure being placed on the public sector to increase efficiencies and to ensure best value is achieved.
Glasgow Council Funds Scottish Water
As the Committee will have seen from recent press coverage Glasgow City Council has recently pledged over £3.4m to Scottish Water to fund regeneration work within the city’s East end. Scottish Water had claimed that it did not have the resources to fund this and Glasgow City Council was not prepared to wait any longer to undertake this regeneration.

While COSLA support the local autonomy, which allows one authority to prioritise funds to enable it to make this funding available to Scottish Water, it is important that the Executive and Scottish Water do not see this as a precedent for funding regeneration. This should be taken as a clear example of the restrictions and frustrations faced by Scotland’s Local Authorities when seeking to work with Scottish Water to undertake long-term projects and the development constraints they are faced with.

The consultation Quality and Standards II did nothing to address the issue of sustainable development. That Glasgow City Council was required to meet the cost of the development work is a clear indication of the impact of this lack of forward planning and the Committee must call upon the Executive to ensure that Quality and Standards III addresses this issue with the weight and seriousness it requires.

Efficiency Savings for Scottish Water
The forthcoming Spending Review announcement is highly likely to include an efficiency saving for Local Government over the period of the Spending Review. This is despite the fact that Scottish Local Government has been delivering efficiency savings since the best value review in 1999, and indeed prior to this.

Scottish Water has used previous efficiency savings as a justification for reductions in service delivery and also for the inability to tackle long-term issues such as sustainable development and regeneration. This is not the purpose of efficiency savings and the Executive must hold Scottish Water accountable to the efficiency savings set.

Local Government will note with interest the level of efficiency savings applied to other public sector bodies such as Scottish Water and the accountability that is put in place to ensure these are met. The Executive must ensure that Scottish Water become an efficient organisation and that it seeks to deliver services within the short term but also tackles the serious long-term issues.

The £18m - Calculating Amounts Payable to Scottish Water
The current Billing and Collection Order requires Local Authorities to pay Scottish Water a percentage based on the total amount collected by an authority regardless of whether this is money due to Scottish Water or not. The current situation means that Scottish Water receives £18m a year that is Local Authority money. The figure of £18m is from Scottish Water’s own calculation.

The order does indicate that as collection levels increase then the £18m will reduce as outstanding Scottish Water debt will be collected. This assumption though does not recognise that the collection of outstanding debt may impact on
the current years meaning that the £18m remains but is made up of rolling debt. The consultation fails to address that there are significant interest issues associated with the cash flow delay. Within one Local Authority alone the lost interest equates to £125,000 per annum, the equivalent of £1.50 per household.

COSLA propose that the new Billing and Collection Order adopts the proposed option where a Local Authority can calculate payments by applying the formula on an individual accounts basis. This is clearly the fairest and most appropriate resolution as it will ensure that Scottish Water receive the money that has been collected on their behalf without causing a cash flow deficit to the majority of Scotland’s Local Authorities or Scottish Water.

COSLA have written to the Minister urging him to take action to address this issue but as the Minister hopes the consultation Paying for Water Services will reduce the £18m figure he feels this does not need to be addressed prior to the findings of the consultation. COSLA cannot accept this position.
Scottish Parliament
Environment and Rural Development Committee

Wednesday 22 September 2004

[THE CONVENER opened the meeting at 10:34]

Water Services etc (Scotland) Bill: Stage 1

The Convener (Sarah Boyack): I welcome people to the 21st meeting in 2004 of the Environment and Rural Development Committee.

Item 1 is our third evidence-taking session on the Water Services etc (Scotland) Bill. We have tried to get a representative selection of witnesses. We will today consider customer and consumer interests and we will also look at local authority interests.

I ask members to declare any relevant interests before we kick-off.

Maureen Macmillan (Highlands and Islands) (Lab): I am one of the directors of Ross-shire Women’s Aid, which is a charitable organisation that obviously has an interest in water charges.

The Convener: Thank you. We will put that on the record.

I welcome the first panel of witnesses. We have with us Jim Lugton, the policy officer of the Scottish Council for Voluntary Organisations, and Trisha McAuley, the head of corporate resources at the Scottish Consumer Council. I welcome you and thank you for giving us your written evidence in advance. As with previous evidence sessions, we will not ask you to repeat your evidence verbally, but we want to follow up your written submissions with questions from committee members.

Mr Mark Ruskell (Mid Scotland and Fife) (Green): My question is primarily directed at Trisha McAuley. Your submission describes the split between the Executive, which has a policy formation role, and the water commission, which has a role in implementing that policy. Your submission mentions the three elements of sustainability: economics, the social justice angle and the environment. You also say that the water commission, as well as Scottish Water, should have a statutory duty for sustainability. Why do you think that that is necessary? Should that duty be in the bill or could it be elsewhere?

Trisha McAuley (Scottish Consumer Council): We would like it to be in the bill. We have discussed the matter with Executive officials in the context of the current consultation on paying for water. We cannot have a charging system that does not look at our sustainable use of water in the future. We would like the water commission to have a similar duty to that placed on Scottish Water.

That does not mean that we would like to blur the responsibilities: there should be a clear separation between the minister’s policy obligation and the commission’s obligations. The minister should still always have his eye on sustainability in relation to water; he or she should set the policy objectives. The commission should not develop its own policy, but it will take decisions, on charging for example, which will have an effect on sustainability in the widest sense. For example, if we carry on with the same system of paying for water, we will not really tackle sustainability. We might decide to go down a different road in the future. The commission might say, “Let us have sustainable use of water and introduce metering.” We would say, “Fine. That meets the environmental element of sustainability,” but the water commission would need to be careful that the social justice element was also met, because it would have to ensure that, on usage, people did not self-disconnect.

We are saying that we would like the water commission to be mindful of its decisions at operational level. We certainly would not want to confuse that with the policy direction from ministers, but the commission has to be mindful of the impact of the decisions that it makes.

Mr Ruskell: In the past couple of weeks of evidence taking, we have talked about a number of sustainability indicators. For example, we have talked about leakage rates from the water network. Your submission mentions a water poverty indicator based on household income, which Citizens Advice Scotland also mentions. Jim Lugton’s submission mentions the proportion of charities that are exempt from water charging. Those could all be sustainability indicators of one type or another. Who should be concerned with monitoring those sustainability indicators and reporting back to the minister? Should it be the water commission, Scottish Water directly, the utility companies or what?

Trisha McAuley: I have not given that an awful lot of thought. I think that the minister should set the policy direction. The commission’s role, as I see it, relates to the setting of charges rather than sustainability targets. Scottish Water has a relevant duty as well. I would not like to go down the route of blurring the responsibilities of the commission and of ministers.
Mr Ruskell: My question is, who monitors the implementation of the policy that the minister has set? Who provides the minister with indicators relating to whether the policy is being enacted?

Trisha McAuley: That would have to be the role of the commission. The commission has to report back to ministers on how it delivers on the objectives that have been set.

Jim Lugton (Scottish Council for Voluntary Organisations): An important dimension relates to whether we continue to consider conservation on the supply side or start to address it on the demand side. From the voluntary sector perspective, we are ready to become involved in a major campaign on water conservation because we feel that that is every bit as important as the concerns that have dominated the debate so far.

Trisha McAuley: I echo that. We have a long way to go but we are not doing anything to examine the supply and demand issues. At the moment, there is unharnessed consumption and we are continually investing millions of pounds. It is true that we are meeting our directives but, 10 or 20 years in the future, there might come a point at which we are investing simply to meet unharnessed consumption. We are at the beginning of a long process and there might be some scope for starting to examine the issues more broadly.

Rob Gibson (Highlands and Islands) (SNP): The Scottish Council for Voluntary Organisations submission discusses the issue of public benefit and whether Scottish Water is truly a public corporation. The bill will require ministers to set out the principle on which water charges will be based in order to harmonise them. You would like low-income households, small businesses and charities to be treated in a similar way. Will you expand on how the bill might achieve some of those aims?

Jim Lugton: There are already special concessions for a large number of people who have medical and other needs. Further, it is recognised that key public operations such as hospitals have special needs. We need to broaden the scope of the public benefit dimension of Scottish Water’s operations. I can quite understand that, for Scottish Water’s management, that translates into a worry about who pays. However, the question for ministers is, if Scottish Water is to be a public corporation, how do we deliver the public benefit and who do we deliver it to and what for? We believe that, particularly given what is contained in the draft Charities and Trustee Investment (Scotland) Bill, there is scope for the two policy arms to be brought together. We should recognise that we have a good opportunity to set out what public benefit is and how it can be delivered to groups that have difficulties affording services.

I am not saying that there should be a carte blanche. Prior to 1996, considerable exemptions were granted by local authorities, particularly the regional and islands councils, which controlled water supply. A large number of charities and individuals in particular circumstances were granted concessions. The SCVO is arguing for a reversion to the status quo that existed before 1996.

Since the extensions that were made as a result of decisions that you made as a minister in 1999 and 2000, convener, we have seen a gradual recognition of the strength and integrity of the simple and straightforward case that we have put. We feel that this is the right time to make decisions that will be sustainable in the longer term and certainly beyond 2010.

Rob Gibson: Does the Scottish Consumer Council have a view on the issue?

Trisha McAuley: To follow on from what we said in our written submission, there is a body of opinion that says that water is a public good that should be fully funded through taxation. However, I do not think that it is realistic to go down that road at the moment. Scottish Water operates under a public sector business model and is asked to deliver along business lines. There does not seem to be enough clarity on the relationship between the charging system, as it is referred to, and the public benefit and value that we need to get from our water—we would like more clarity on that. If we are to continue with the current model—Scottish Water being in the public sector but asked to deliver according to a business model—the public good should be addressed by citizens and taxpayers rather than by consumers. In particular, people who are on low incomes and who cannot afford to pay for their water are not getting benefits—that is a cross-border issue that has not been addressed at the UK level since devolution.

Rob Gibson: Are you saying that the minister has to make things clear so that the water industry commissioner and Scottish Water start to deliver? Do you think that the minister has to have discussions with London?

Trisha McAuley: Yes. Social policy issues should be taken out of the charging system because there are too many cross-subsidies and the situation is becoming a mess.

Alex Johnstone (North East Scotland) (Con): That is the matter that I want to address. The principle of cross-subsidy in charging is enshrined in what we are discussing. We heard that the
SCVO wants exemptions to be extended, but that necessarily means that others will pay more. We heard sound arguments for the protection of business customers, on which provisions are contained in the bill along with provisions on retail competition. Is not there a danger that we will isolate a relatively small group, who will, in effect, pay tax through the water system to subsidise the social policy elements that we are trying to address?

**Jim Lugton:** That would be the case if we had not been there before. It is interesting that until the Local Government etc (Scotland) Act 1994, Mr Johnstone’s party accepted that cross-subsidy is essential to meet the needs of those who, for various reasons, such as health or public benefit activities, need help with their water supplies. The question is whether that public and private benefit on the basis of need should be resumed. We are not starting from scratch with the principle of cross-subsidy. We suggest that there were strong and rational intellectual arguments for such exemptions and those arguments still apply. Indeed, some of them may apply even more because of the problems that have developed with family structures during the past 30 years. For example, single parents find it difficult to meet water bills individually. Certain charities also face difficulties. I draw to the committee’s attention the example of Coldingham village hall. The local community is working hard to raise £150,000 for major improvements to the hall, which has an income of just over £1,100 per year, but the annual water charge for the hall is £800. Such facilities are in the heart of communities and they deliver benefits to everyone, but they will be difficult to sustain if we do not operate a system of cross-subsidy that supports certain charitable activities.

**Alex Johnstone:** I accept the priorities that you set out, but the situation that I described is one in which the burdens of cross-subsidy become large: because protection is afforded to certain groups of water users, a shrinking group becomes the target of water charges and, in effect, the taxpayers who subsidise everything that we choose to subsidise.

Do you believe that the system of cross-subsidy that affords the benefits that you have described is sustainable in the changing marketplace that the bill seeks to foster?

**Jim Lugton:** To an extent, I agree with Trisha McAuley on this issue. It would be fairer to take the cross-subsidy element out of the charging system, because it is an equalisation payment made by the Executive. In fact, doing that would also make things administratively far more straightforward. As we know the level of subsidy and who receives it, it would be a simple matter to totalise it over the year and pay it in an equalisation cheque to Scottish Water. However, although the method is simple, we have to bear in mind the principle behind it. For example, even in 1995-96, which was the last year of the previous arrangements, the cross-subsidy total for all the local authorities amounted to less than 1.8 per cent of water charges.

**Alex Johnstone:** In that case, do you agree that it might be preferable to have a system in which everyone who uses water pays their share of the total cost of water service provision and those whom society as a whole has decided through its representative bodies to make exempt should be exempted through a system that does not target the charges on an ever-shrinking group of people who can afford to pay?

**Jim Lugton:** That is based on the assumption that the group is ever-shrinking. The statistical evidence suggests that the vast majority of people are still charge payers and that cross-subsidy currently benefits a very small proportion of them.

**The Convener:** The SCC submission suggests a way of calculating affordability. Many notional affordability indicators in the energy market relate to fuel poverty. The submission says: ‘DEFRA has set 3% of household expenditure as a measure of affordability of water as part of its sustainable development indicators … We need a similar indicator in Scotland’.

Do you know how many households in Scotland that would affect?

**Trisha McAuley:** No. I just used that figure as an example. Our submission goes on to say that we would need to base our measure of affordability on evidence; however, there is a paucity of evidence on how water charges affect people in Scotland. Although the Executive is undertaking some research on cross-subsidy, far more work needs to be carried out on how the issue affects vulnerable groups and people in our society. We do not have any evidence that would allow us even to start drawing up an affordability indicator. We are well behind England and Wales in that respect.

**Jim Lugton:** At a more generic level, we might presume that because the age balance in the Scottish population tips towards older age groups, a larger proportion of households are probably being affected. However, Trisha McAuley is quite right. The water industry commissioner has been seriously constrained in the extent to which he can carry out research in this field—which, after all, requires some fairly rigorous research. The 3 per cent figure is the working assumption that the English water companies use and is the best benchmark that we have had to date in the debate in Scotland. That said, I must stress that it is only a working assumption.
Maureen Macmillan: I have some more questions about the charitable exemptions scheme. When it was introduced, we had to impose limits on who would qualify for exemptions, otherwise quite inappropriate charitable bodies would have been subsidised. As I remember, the negotiations on that issue were long and hard.

Although you say that about six hurdles prevent voluntary organisations and charities from accessing relief, you only really talk about the situation that arises when organisations have to move premises or when new premises are built. I wonder whether you could say a little more about the income ceiling. Is the £50,000 ceiling too low? Do organisations know about their ability to access relief? What is happening in that respect?

Jim Lugton: Let me deal with that last point first. Organisations do not know about the exemption scheme because Scottish Water has never made an individualised offer to charities to sign up to the scheme. At the start of the negotiations, we offered our database as a means of hitting most charities with information about the scheme, but that offer was declined by the Executive.

We feel that the £50,000 ceiling is useful and that the level has proved to be about right for the charities that have applied for the scheme. As we say in our submission, we are reasonably happy that the £50,000 ceiling should stay.

However, an utterly perverse effect of the way in which the scheme works is that it penalises charities that move premises to provide a better service for their clients or a better operating environment for their workers. For example, if a women’s aid group moves to more secure premises so that it can operate a refuge in a more defensible location, it is penalised because it loses the benefit of the water charge relief that it previously enjoyed. We think that that was not the Executive’s intention during our discussions two years ago.

Another aspect is the sheer complexity of the date arrangements, which I will summarise briefly. To benefit under the exemption scheme, the charity must have been in the premises both on 31 March 1996 and on 31 March 1999. Many charities can satisfy one criterion but not the other. A large number of charities have fallen at that hurdle.

As each of the scheme’s conditions stands on its own, a charity must satisfy all the conditions before it can qualify. On the basis of the £50,000 ceiling, which we understood to be the basis of our agreement with the Executive, the scheme has worked. However, the imposition of the other conditions needs serious examination.

We ask that Ross Finnie considers revising the statement that he made in response to Richard Lochhead’s parliamentary question on 15 June in the light of his announcement at the water services conference on 31 August.

Maureen Macmillan: We will put that point to the minister when we take evidence from him.

The exemption scheme will operate only for another four years, after which time charities will be charged according to actual usage. How do you feel about that?

Jim Lugton: There are two issues. First, in the intervening four years, the vast majority of charities will not and cannot now benefit from the exemption scheme. They have lost the possibility of applying for exemption. If the conditions stick, such charities will remain unable to apply to join the scheme.

Secondly, we could genuinely engage with the committee and with Scottish Water to help to reduce water demand. Given that we work through organisations that range from youth groups to environment bodies and others, we could help to bring about a change of culture in water demand in Scotland, whereby water is not treated as a free good but is valued as a resource that can be used for a variety of purposes. We could help to deliver some of those key objectives to reduce the need for investment and to make the industry more sustainable.

Maureen Macmillan: Finally, your answer to Alex Johnstone suggested that cross-subsidy was the best way of supporting voluntary organisations, but what do you think about providing support out of general taxation? Some argue that the extra water charges for, say, health charities should be funded by the Health Department rather than by cross-subsidy from other Scottish Water customers.

Jim Lugton: As you will know from your strenuous activity on behalf of Highland Hospice, the specific exemption for hospices, which we welcomed strongly at the time, was an example of a departmentally-led concession. We believe that, in the longer term, it would be better to provide such concessions out of general taxation. In the debate at the conference on 31 August, many people, including Trisha McAuley, were surprised at the degree of unanimity among speakers on the need for a contribution from general taxation if we are to avoid the sorts of problems with cross-subsidy that the committee has raised.

11:00

Nora Radcliffe (Gordon) (LD): You have just answered the question that I was going to ask. It was about general taxation being the appropriate
method of supporting people who require help with water charges, rather than having other charge payers picking them up.

There is one more tiny thing that I want to raise: when you offered your database to the Scottish Executive for it to disseminate information about the exemption scheme, is that a database that you used to disseminate information yourselves, or was that too expensive?

Jim Lugton: We did not have the money to be able to do that. We used Third Force News, and we used Third Force eNews—or TFE—which we continue to link with. We also used our links with councils for voluntary service, through ECVS, which is a new weekly publication. We continue to try to maintain contact with people. We have now dealt with getting on for 3,800 individual inquiries.

Nora Radcliffe: Is there any indication of a willingness on the part of the Executive to discuss with you the exemption scheme and the difficulties that have been thrown up by its operation?

Jim Lugton: At the moment, we have to rest on what the minister said on 31 August and his reply to a PQ on 15 June. There seems to be a considerable gap between those two statements.

Nora Radcliffe: Presumably, you have a request in for some sort of discussion with the Executive.

Jim Lugton: That is correct.

The Convener: If no one else wishes to fire in any more questions, I thank both the witnesses for coming in this morning and for answering what was quite a range of questions. It has been very helpful to us, and we will be following up one or two of those questions with the minister when we speak to him in a couple of weeks’ time.

We will have a pause of a couple of minutes. We will let the first two witnesses go—but you can stay in the public gallery, if you like—and we will let our next panel come to the table.

11:01
Meeting suspended.

11:04
On resuming—

The Convener: We now have our second panel of witnesses in front of us. I welcome Ian Smith, convener of the water customer consultation panels, and Len Scoullar, a member of the north west water customer consultation panel. Thank you both for joining us and for your written evidence. As with the other witnesses, we will go straight to questions. I invite someone to kick off on the interests of customers and how those could be reflected in the new system.

Nora Radcliffe: Could you expand a bit on how you wish the powers of the water customer consultation panels to be strengthened and their role and remit more clearly defined? I note that you are strongly of the opinion that the panels should not form part of the proposed water industry commission for Scotland, which should be an expert economic regulatory body.

Ian Smith (Water Customer Consultation Panels): The best way of answering that is to say that our experience of the present system over the past 18 months has led us to that conclusion. The water industry commissioner has a responsibility to promote the interests of customers, and we have a responsibility to represent them. Sometimes it is quite difficult to place a dividing line between the two.

We think that it would be beneficial for customers and for the industry as a whole to produce a situation in which expert opinion was brought to the economic regulation of the industry and we were given a clear remit to represent more widely the interests of customers. As for the detail of that, we believe that our current consultation role has been pretty effective. We think that we have brought some useful things to the table.

For the future, however, there are areas that require further exploration. I am not terribly satisfied with the way in which a disaffected customer can make a complaint. Currently, customers can complain first to Scottish Water and then to the water industry commissioner, who then reverts to Scottish Water for a resolution. I would prefer for something to be built in whereby an independent body would scrutinise any failure in service and would perhaps have the power to make a recommendation. That might be quite a big step, but it needs to be considered. That function should be kept fairly separate from the consultative function, so that there is not great confusion and so that panel members are not burdened by having to deal with too many complaints themselves.

I would like the committee to consider exploring the customer experience in a wider sense. We have a responsibility under the Water Industry (Scotland) Act 2002 to be consultees on the consultation code. The 2002 act was silent, however, on who would monitor the consultation code and we volunteered to assist Scottish Water in auditing its effectiveness on the code.

As we start to get into the detail of that job, water customer consultation panels could be in a good position to explore the whole of the customer experience. That means not doing the detailed stuff, but bringing in information from all quarters and reporting on it. One of the discussions that I had with Scottish Executive officials led me to the view that perhaps we should find a way of
assisting not only Scottish Water; we should be able to examine the whole of the water industry. We should look at the work of Scottish Water and of any of the regulators, including the Scottish Environment Protection Agency and the water industry commission, and we should be able to make recommendations to all those bodies and to ministers.

We should have the opportunity to report what we do on an annual basis, so that the Environment and Rural Development Committee could, in the course of its deliberations, get a reflection of what the customer perception has been of the water industry, not just of Scottish Water. Does that answer your question?

Nora Radcliffe: It does, and it throws up another one. If your remit were to be widened, would you be concerning yourselves with private water supplies, which are not the province of Scottish Water but which affect a great many people, particularly in my part of the world?

Ian Smith: I understand the situation in your part of the world, where there is a significant number of private water supplies. That has bothered panels over the past year. We have been dealing mainly with current customers of Scottish Water, but there are other people who would like to be customers of Scottish Water, who are not in the same position.

It seems to me that Executive policies need to be better aligned so that the housing improvement grant policy, in so far as it concerns improving water supplies, and the mains distribution policy, would be a bit closer together. I have not thought about how to do that in practice, but I suppose that by default we have been making representations on behalf of people who are not yet customers. I do not think that there is any harm in that. We have certainly exercised our minds about the moneys that have been made available in Q and S II for first-time connections and we have expressed concerns about how identifiable those moneys are and how they fit with other investment patterns.

Rob Gibson: We discussed the public benefit from the process and I have interacted with non-domestic water rates payers in the Highlands who feel particularly hard done by. Should we probe the possibility of including new ministerial powers in the bill that might help such people? There would have to be consultation on such powers before they could be included in the bill. Can you suggest specific solutions to the problem?

Ian Smith: We start with a difficulty in that we try to represent the interests of all customers. It has become clear to us that the interests of the disadvantaged domestic customer can be markedly different from those of large, high-volume industries. The only answer that I can give is similar to the one that other witnesses have given: it is problematic to have the whole body of customers paying for support to other customers. The present system is far too complicated for people to understand and should be simplified.

I am ducking the question about business interests, but we believe strongly that resolving the problem of support to different customer groups would require, first, thorough consideration of what is paid for by customers and what is paid for by general taxation—I echo what others have said. Secondly, the solution for the domestic customer who is on a low or fixed income lies not in a rearrangement of payments by customers, but in a root-and-branch review of the social security system.

Rob Gibson: I hoped that you might take that line, which seems to be becoming a theme.

Mr Ruskell: The Scottish Consumer Council suggested that the water customer consultation panels and the proposed water industry commission should be required by statute to establish a memorandum of understanding. Would that be the best way of establishing the relationship between the panels and the commission, or would the measures in the bill be appropriate?

Ian Smith: We came along very much as Johnnys-come-lately, long after the establishment of the water industry commissioner and Scottish Water. We have established a working relationship with the WIC: we not only discuss policy with him but we use his resources, because that is how things were set up. We had to grow into that role, which took a bit of time—sometimes a little longer than might have been ideal.

I understand that there are statutory memoranda of understanding in relation to other regulated industries in the UK, as Trisha McAuley said. The memorandum of understanding that we have with the WIC works reasonably well, although it has taken time to get it to work smoothly.

Other aspects of our role need to be clarified. The bill would require the Executive to consult Scottish Water and the proposed commission on various matters, but there would be no requirement for the Executive to consult anyone else. The committee should take the opportunity to consider the bill carefully and perhaps to include a requirement to consult publicly by involving the water customer consultation panels.

Mr Ruskell: That is useful. Do you anticipate that issues will arise as a result of the replacement of the WIC with a board?

Ian Smith: Not at all. The corporate dimension of the proposed water industry commission's
activity would be enhanced by the fact that there would be a board rather than a single regulator. A lot of effective work by competent and committed people in the Scottish water industry goes unnoticed and the proposed corporate structure would enhance that.

11:15

The Convener: That is useful. I have a follow-up question to Nora Radcliffe’s first question about complaints. I want to tease out that issue, which has been raised by quite a few witnesses.

There are different types of complaints: complaints about whether somebody has been given the right banding or costing—whether their bill is the right kind of bill—and complaints about the quality of the service that they have received from Scottish Water. In the energy industry, there is a different set-up, which is relatively straightforward. If someone complains to the company but does not get satisfaction, they can complain to energywatch. You said that, if someone complained to Scottish Water but was unsatisfied, they could complain to the water industry commissioner and then get referred back to the company. Am I right in thinking that the water industry commissioner does not require the company to do anything as a result of its investigations?

Ian Smith: My understanding of the process is that—as with all customer complaints across various industries—the first line of complaint is to the organisation that gave rise to the service failure. The present law provides that someone can then go to the water industry commissioner. In practice, that means that the commissioner then goes to Scottish Water and checks to see whether it did things properly.

That is not the customer expectation of complaint resolution. The Department of Trade and Industry, which is consulted on the provision of better consumer representation, is asking whether in the future there should be a separation between customer representation in the utilities on a UK basis and customer complaints. In an ideal world, Scottish Water would be resourced in a way that would enable it to take complaints seriously and resolve them, so that only a small number of complaints would require further consideration.

In the Scottish setting, it would need to be examined whether there is some kind of endemic failure in the organisation that we would want to look at. That would be more for the ombudsman than for a customer organisation. However, I do not think that we are there yet. Customer confidence needs to be addressed. In the present circumstances, that confidence could be achieved only by separating customer complaints from the commission’s economic regulation function. There is an opportunity for Scottish ministers to introduce a different approach to resolving complaints in the water industry.

However, I would not want the water customer consultation panels to become bogged down in complaints. As I said, the consultative function that we have had has been useful. There is something extra that we can do in examining the customer experience. We should perhaps be resourced to take forward an examination of individual customer complaints, in terms of both billing and customer service, to provide an assurance to the customer that their problem has been examined thoroughly and independently.

The Convener: That is often what people want. If there has been a problem, you will not be able to magic it away. What is important is how the organisation deals with that problem in the context of subsequent issues that other people might raise.

I was struck by your comments about customer confidence. The proposals in the other consultation documents about principles for charging could involve different charges being set for many people. Questions have been asked about charges for charitable and voluntary organisations. When anyone’s charge is changed, there is uncertainty and unhappiness—unless the charge goes down, which is unlikely.

I want to get to the bottom of this. If someone is unhappy, who do they complain to? Perhaps that is just the way things are—they are going to be on a new charge and, however unfair they feel that it is, the same rough justice is being applied to lots of people. There is then the issue of how they are treated as a customer if there is a fault and the supply does not come through to them. They go to Scottish Water first. If they do not get satisfaction, where do they go next? Perhaps we need to tease that out with the minister. You have suggested a different way of resolving those issues from the ways that are included in the bill. That is an interesting matter to explore further.

Ian Smith: Can I add a little about our experience? We were established at the time that the bills went out last year, when your and ministers’ postbags were full of representations from business and domestic customers about the level of charges. We had considerable sympathy for the Scottish Water staff who were fielded to respond, because they were answering for Scottish Water when what was causing the bills was not Scottish Water but the system within which the charges had been set. There was public confusion when it was explained how the bills—particularly things like standing charges—were set. People apportioned blame and were really puzzled that the advice that the water industry
commissioner had given to ministers was helping to arrive at the charging regime and that they were then expected to complain to the commissioner about bill charging. That gave rise to a lot of public confusion, so a system that produced a degree of independence and independent scrutiny would go a long way to building public confidence.

The Convener: I can see that coming with the next set of charge changes and from all the representations that we have received on cross-subsidy. Nobody likes to pay bills, and they certainly do not like paying others’ bills; if they think that they are paying others’ bills, they will be even less happy. The minister might as well anticipate that issue, rather than deal with its aftermath. We will log that for future discussion.

Alex Johnstone: What is the north west water customer consultation panel’s experience on those issues?

Len Scoullar (North West Water Customer Consultation Panel): Ian Smith has his finger on the button. Like me, you come from a rural area, as you said earlier—no, it was Rob Gibson who said that. We found that, after the imposition of the charging regime had run its course, there was a more subtle degree of concern in the remote areas, primarily about the lack of investment by Scottish Water in the infrastructure for housing and industrial premises. The story that was given was that Scottish Water did not have the money and the developer should pay. However, in a small development in a village, the developer might be building only two or three houses and might not be able to find the funds in their selling price to provide sewerage and water. As we have travelled round the north-west, the point has constantly been made to us that more investment is needed or else people will leave.

The Convener: I have a couple of questions about the suggested new model of competition and the new framework for the water industry, whereby domestic customers will be dealt with by Scottish Water and industry will be dealt with differently. We have not covered those matters in depth, but you have some views on them and on the issue of prohibiting common carriage. You say that there is a need for “clear and simple explanation by the Executive”.

Are you, in that comment, hinting at concerns that you have and will you say a bit more about them?

Ian Smith: We are puzzled. The more evidence that we read from different people, the more confused we become, because there are many views. For example, there has been a challenge as to whether the Competition Act 1998 should apply—the Scottish Trades Union Congress evidence takes us down that road—and that challenge needs to be answered clearly so that people understand that fundamental point.

Our biggest concern on behalf of all customers is about the impact of introducing the regime. What will the real costs be and what will the effect of Scottish Water responding to the competition be? If we make the assumption that the competition will be for real and the bill will not introduce false competition, Scottish Water will have to try to respond to that and move resources and energies within the organisation to give that response, but what would happen if it put too much of its energy into the retail part of the business to retain it and be really competitive? What would that do to the wholesale business, and would taking resources away from the wholesale business eventually have a knock-on effect on the domestic customer?

We are asking those questions, but we do not think that there are concrete answers to them; they need further research and explanation, as do many other matters in the water industry. Issues have also been raised about exemptions and their effects, which need to be researched. There needs to be solid evidence, rather than people thinking that they have only half the story.

We said in our submission that we are concerned at the pace at which competition will be introduced. Scottish Water is starting to become stable, having gone through a period of instability. We are seeing greater continuity in staff resources, for example. We worry that, given the demands that will be made by rolling out Q and S III throughout the industry, bringing in competition and the rules quickly will give rise to strains for both the commission and the service delivery organisation. We need to be assured that customer service will not suffer as a result of that imposition.

The Convener: You have picked 2010 as an implementation date. Is that based on evidence?

Ian Smith: It is a bit of convenient neatness. That date would sit alongside the first break point in the Q and S III programme.

Len Scoullar: I am concerned that the customer might have to foot extra charges in order for the competition regime to be brought in as quickly as is planned. At the moment, Scottish Water is committed fully to Q and S III. It will need staff to determine how the competition regime should be introduced and to introduce it. If it is introduced as quickly as is planned, I am concerned that prices will have to rise as a result.

The Convener: We might have to ask the minister who will pay for the preparation for the potential competition process and whether Scottish Water will be expected to allocate the costs back to domestic or non-domestic customers.
You gave us fairly straightforward evidence in writing, so we do not have too many questions this morning. I am giving members a last chance to ask questions, but I am not forcing them to do so.

Mr Ruskell: I want to return to sustainable development, which your submission highlights. You describe the inconsistencies whereby Scottish Water has a statutory duty but the commission and the new-entrant companies will not. Given the fact that the commission will not be a policy-making body, how do you envisage that it would discharge duties in relation to sustainable development if they were included in the bill—which they are not?

Ian Smith: I do not think that I can improve on the answer that Trisha McAuley gave you. I like to think that the commission will be composed of economic experts and perhaps customer service experts with an understanding of the water industry who are guided in their activities by principles of sustainable development, which are about environmental and social justice, following the lead that the Executive gives them. John Sawkins said that we do not want to see the commission getting into the nuts and bolts of leakage and testing on that, but we want there to be guiding principles on sustainability. If sustainability is not just going to be sloganised, it has to be taken to heart by everybody in the industry.

Mr Ruskell: Do you see the monitoring of specific indicators as a role for the commission or is that too much nuts and bolts, in which case who would do it?

Ian Smith: It would be desirable if there were self-monitoring for Scottish Water. Scottish ministers should be accountable to Parliament for sustainability in that public corporation. There has to be a dimension of ministerial reporting. We are actively involved with Scottish Water. One of our panel members participates in the working group in Scottish Water on sustainability. We might have an opportunity to measure to ensure that Scottish Water is pursuing sustainable development objectives, in a kind of ride-on role. I do not think that sustainability is the primary thing for the commission or the customer panels, but it is important that it is consistently built into thinking. One cannot compel the new-entrant companies; one can just expect that they follow the principles in their operations.

The Convener: Someone needs to be in a position to set that as a clear framework, so that everyone is operating on the same level. We should not set higher standards for Scottish Water just because it is a public organisation and not apply the same principles to private companies.

Ian Smith: Absolutely.

The Convener: We need to find out whether the water industry commissioner is responsible for that matter and whether the requirement should be on the face of the bill. We have explored that issue with witnesses.

Ian Smith: I do not have an answer for the committee. The issue remains to be tested.

The Convener: That is a good point on which to end. Thank you for your advance preparation and for coming to speak to us today. Your evidence has been extremely useful.

I suspend the meeting briefly so that witnesses may swap over.

11:30
Meeting suspended.
On resuming—

Water Services etc (Scotland)
Bill: Stage 1

The Convener: Our third panel of witnesses consists of three representatives from the Convention of Scottish Local Authorities. They are Councillor Alison Hay from Argyll and Bute Council, Councillor Alan Kenney from Fife Council and James Thomson, who is finance policy manager at COSLA.

We were keen to have the witnesses before us this morning because part 3 of the bill contains provisions for preventing and clearing up water discharges from abandoned mines. I am particularly pleased that Councillor Kenney is able to be with us this morning, as he represents a local authority with a coal mining interest. That is an element of the bill that we have not thus far explored with other witnesses, so we are keen to tackle it this morning.

As with the other witnesses who have come before us, we will not take opening statements from the witnesses, as we already have COSLA’s written statement, for which we thank you.

We shall kick off with mining, because we have not dealt with it before. I know that Mark Ruskell is interested in the subject; he has a regional interest in it. After him, I shall invite questions from other members. Once we have explored mining, we shall move on to some of the wider policy issues that other witnesses have flagged up this morning.

Mr Ruskell: Do you believe that part 3 sets out clearly enough the powers of the Coal Authority? In what way do you believe the bill might change the relationship that exists between the Coal Authority and the Scottish Environment Protection Agency?

Councillor Alan Kenney (Convention of Scottish Local Authorities): Judging from practical experience in Fife—I am sure that local authorities in other parts of Scotland have had similar experiences—we seem to find ourselves in a grey area at present with regard to admission of liability. We have experienced that in practice in respect of ex-workings and the water table with instances of coal-mine water getting into water courses and affecting communities. It is difficult to ensure that we deal with such problems promptly. Until now, our experience has been that we have had to have considerable dialogue with the Coal Authority to get it to do the job with us without its admitting any liability. That is a concern for the future, but the Water Services etc (Scotland) Bill should give us an opportunity to address that.
Mr Ruskell: Do you believe that the responsibilities are clear enough in the bill?

Councillor Kenney: In many such cases, that is not found out until there is a legal challenge, is it?

Mr Ruskell: Is that a no?

Councillor Kenney: Or a maybe.

The Convener: You are right to say that it is not until an act is implemented that we know precisely what its impact will be. Given your experience, are there specific areas about which you have concerns?

Councillor Kenney: First, the Coal Authority does not have a base in Scotland—we deal with an authority that is based down in the midlands of England. When there is pollution from mines and the environment is affected, speed is of the essence, so we must ensure—whatever is done and whatever bill is passed—that we are not sidetracked by ifs, buts and maybes. We would like stronger wording in the bill to give clear guidance on how things will be handled and who will do what.

The Convener: I suppose that that could be in the bill itself or in guidance, but we can seek reassurances from the minister on that point when we probe further.

Mr Ruskell: I was reading through the Scottish Parliament information centre’s briefing on some of the discussions on the issue that have taken place in England. There was some discussion about whether the provisions should be extended to other forms of mining, which I guess are more relevant to England than to Scotland. Do you have any opinions on that? Is coal mining the only issue in relation to which we should consider environmental liability for discharge of pollutants?

Councillor Kenney: I believe that the legislation should, as has been done in England, cover all types of mineral extraction because pollution can come from any current or past mineral extraction. Scotland has no deep mines left, so any deep-mine water pollution that we deal with is historic. However, we still do quite a lot of mineral extraction—whether it is from hard stone or sand. Those extractions have a common need for water, whether as part of the dust-abrasion process or because the machinery uses water. The contamination of water courses should certainly be considered.

Mr Ruskell: Do you have an example of where that has happened in Fife?

Councillor Kenney: We work closely with SEPA, which carries out good monitoring. We do that more so now because many of our communities self-monitor. They normally make the first contact with the local authority or SEPA to say that something is wrong. It is not only coal mining that should be looked at, but all aspects of mineral extraction.

The Convener: That is clear and helpful to the committee. If no one else has questions about mining or coal, I open up questions to cover wider issues with which we have been dealing.

Maureen Macmillan: I have a great big enormous question that other people will probably want to ask. How do you see the balance between social and commercial needs in supplying water and the matter of cross-subsidy between businesses and domestic customers? You mentioned in your submission affordability and the difficulty that people have in paying their bills and the difficulty that local authorities have in collecting payment. Will you start by teasing out the issues that you flagged up in your submission? I am sure that other members will want to ask supplementary questions.

Councillor Alison Hay (Convention of Scottish Local Authorities): That is a big question.

Maureen Macmillan: Perhaps you could start by speaking about affordability and what needs to be done to make water more affordable to households that cannot afford it at the moment.

Councillor Hay: That would take into account whether to allow people who are on very low incomes to have water rebates. Is that the sort of thing you are looking for?

Maureen Macmillan: Yes.

Councillor Hay: At the moment, there is rates rebate for single persons, for example. COSLA’s view is that that should continue and that we should ensure that people who are on any benefits also receive some sort of water rebate. We have to examine how that would be managed.

Maureen Macmillan: Is that a significant issue? Do you find that people in different local authority areas cannot afford to pay their water bills?

Councillor Hay: That is all tied in with the collection side. At the moment, we just take in a bulk collection and we pay a certain amount to Scottish Water based on what we collect in rates, but that system takes no account of whether people can afford to pay. We end up having to chase people for water rates that they cannot afford to pay if they are on benefits. It is an unfair system; we need one that is much clearer and more understandable.

Maureen Macmillan: I am trying to find out the scale of the problem that we know exists.

James Thomson (Convention of Scottish Local Authorities): We welcome the fact that affordability is the key focus; we can all hold to
that. As Councillor Hay said, some system of relief should be brought in for people who have income problems. Such problems should be recognised in the council tax relief system for people receiving full or partial relief.

The consultation document on billing and collection quoted a Scottish Water figure of £18 million, which is a transfer and revenue figure, but that is a result of the difficulties that people who receive either full or partial relief from council tax have in paying their water charges. Obviously, that relief and those rebates are offered to people because of their low income and the difficulties that they have in paying. If they have to pay the full water charge, that is a significant amount for a low-income family or in a low-income person’s budget. That is why COSLA is seeking full relief and a rebate relief rather than a stirring of the pot, which will mean reapportioning discounts to target the needy, as the “Paying for Water Services 2006-2010” consultation paper suggests. If the underlying key is affordability, we should seek to target all people who struggle in those areas.

12:00

The Convener: I have a quick follow-up question in the light of the evidence that we received from the Scottish Consumer Council this morning. The Scottish Consumer Council came up with the idea that an indicator of water poverty would be a water charge that represents more than 3 per cent of a household’s disposable income. What is COSLA’s view on that? Has COSLA done any research on people’s difficulties with paying water charges or on differential collection in respect of the council tax and water charges?

Councillor Hay: No, we have not investigated that side of things. On amounts and percentages, if people receive benefits, that is an indication that they are struggling and that the household’s income is severely limited. Therefore, we should look with sympathy on whether such people should be expected to pay full water charges. I hope that the bill will address that problem.

Councillor Kenney: Many people in the country still do not define the difference between the water charge and the council tax; indeed, they still believe that the water authority is part of their local authority. In my experience, and going by the number of phone calls that are made when people have a water problem, people still contact the local authority rather than Scottish Water: people still have the mentality that whatever is on the billing is part of their council tax.

The Convener: I take it that you are not suggesting that the system should be changed so that there is separate billing.

Councillor Hay: No. We are simply suggesting that where the money is coming from and going to should be made clearer and more transparent.

Rob Gibson: In previous meetings we have considered development constraints. We would like to hear your views on them. It is clear that there is an important difference between a developer of a large private development and a developer of small social housing developments. I want to link the question to the fact that you want to see ministerial discretion being used a good deal more. If those two matters come together, perhaps you could expand on that theme.

Councillor Hay: Development constraints are a huge issue for all councils in Scotland and we will certainly expand on the matter in our later submission, which we are currently working on.

I do not think that there is a council in Scotland that is not experiencing stagnation or problems in relation to business development, housing development or any development—you name it. Under the next quality and standards III discussion, we should consider apportioning a certain amount of the money to new development. The topic is huge and is not confined only to the environment—it involves the minister who is responsible for housing and it involves all other ministerial remits—and we think that it should be dealt with and discussed at the highest level. If we do not reach a solution to apportioning some money under quality and standards III to development in Scotland, we will see stagnation. There will be a huge loss of income generation and stagnation in job increases.

One need only consider Glasgow and some of the bigger cities to see the potential problem. Glasgow needs about £200 million to fulfil its development potential—that is just one city. If the rest of Scotland is considered, it can be seen that the problem with development is massive. Obviously I do not expect the problem to be solved overnight, but we should address it to some extent in the immediate future.

Rob Gibson: Would you say something about ministerial discretion?

Councillor Hay: Ministerial discretion is mainly for disputes that might spring up among the proposed commission, Scottish Water and other bodies in consideration of charging regimes. If ministers give themselves powers of intervention, those powers should be used when a dispute arises.

Nora Radcliffe: Do you accept that in the Q and S II discussions, development constraint was insufficiently flagged up? Local authorities have now provided information about the scope for development and about the local and structural planning implications. Are you satisfied that robust
Councillor Kenney: COSLA has robust data now and can make them available. We have striven to collect data from each local authority and I know that all local authorities will probably make submissions on Q and S III. We are collecting those data and will make a robust case.

We are discussing what is almost the number 1 problem of councils, whether urban or rural, although the problem differs between urban and rural scenarios. Developer input into larger projects might be wanted in an urban area, whereas in a rural area a project might involve just two or three houses in a small village—which will nevertheless be important to that village—and the developer will not make the same input, because that would make projects unaffordable.

James Thomson: Under Q and S II, local government wanted to tackle development constraints, but we were informed that that did not fall within its scope. When Q and S III was announced, we were told that it would allow development constraints to be addressed. As we were when Q and S II was issued, we are keen to come together. As Councillor Hay said, individual councils will submit robust examples and data. COSLA will also produce a joined-up national submission.

The Convener: That is important and it is one reason why we are asking our questions. We are conscious that implementation of the bill will depend critically on what happens with quality and standards III and the challenge of “Investing in Water Services 2006-2014”. We are trying to join up that scrutiny, if not the answers. We will certainly pose many questions to the minister when he appears before us in a couple of weeks, so your views are important to us.

Councillor Kenney: I saw nothing in the committee’s papers about an example of SUDS in Fife.

The Convener: SUDS stands for sustainable urban drainage systems.

Councillor Kenney: SUDS is favoured for the future. In Fife, we are working with a development of 6,000 new houses in which the problem is the question of where future liability will lie. I hope that the bill will cover that. The private sector has developed and built the SUDS in conjunction with the local authority, but the difficulty is with Scottish Water taking responsibility for the system’s future care and maintenance, because the system is above ground. Scottish Water says that sustainable drainage becomes its liability after it goes into pipework and below ground. If we are looking for future developments—SUDS looks to be a positive way forward—we should also consider care and maintenance and the impact of potential flooding in communities if such developments are not maintained.

Maureen Macmillan: We all agree that a way is needed of creating new infrastructure for affordable housing. Do you have any thoughts on where the money for that should come from? It could come from other water users, but should it come from Communities Scotland? Do you care where it comes from, if all that you want is the money?

Councillor Hay: There has been some discussion—and recently, some movement—in relation to charging for second homes, which will bring extra money to Scottish Water. It has been suggested that that extra money could be used to fund the infrastructure that is needed for the new affordable housing. It would be useful if we could marry the extra money that is given to the registered social landlords with the extra income that Scottish Water will receive as a result of charging for second homes. We think that that would make a nice, round package. It will not solve the whole problem, but it would be a start.

Maureen Macmillan: How far would that go?

Councillor Hay: We have not done any detailed work on the issue. We were discussing it in relation to a submission that we have yet to make.

Maureen Macmillan: We heard from the SCVO about the problems that voluntary organisations are facing. Does COSLA have any experience of voluntary organisations being in difficulties because of the hoops that they have had to jump through to access support?

Councillor Kenney: I sit on the board of the Scottish Association of Local Sports Councils. For a number of months, we have had a great deal of discussion with voluntary sporting groups who have identified the fact that their bills have increased considerably due to water charging—some groups’ bills have gone up by 700 per cent. That has had a great impact on the voluntary sector. I know that the minister was considering that carefully. Our submission to the Executive should focus on how we can avoid disadvantaging communities by over-charging voluntary groups for their water.

Nora Radcliffe: The corollary of that is the question of who should pay for that support. Should it be the water charge payer or the general taxpayer?

Councillor Kenney: That is a good political question.
Maureen Macmillan: COSLA is not taking a collective view on that, I take it.

Councillor Hay: No.

Nora Radcliffe: Previously, consumer panels have suggested to us that their role and remit should be strengthened and extended. I do not expect you to answer a question on that today, because it has come out of left field, but I suggest that it might be possible to expand their remit to include all water users, including private users, which come under the aegis of local authorities rather than Scottish Water. Would it be possible for you to give us a response to that idea in the next few weeks?

Councillor Hay: Yes.

The Convener: There would be a deadline of two weeks for that response if we are to incorporate it in our report. That would be helpful.

I wanted to talk about the principles of the bill. You have said that you would be keen to get further information and assurances on the licensing system, which would limit retail competition to non-domestic supply only. What kind of reassurances are you seeking?

Councillor Hay: COSLA is not happy about competition being extended to the domestic sector, which we think should be safeguarded in the interests of quality, sustainability and safety.

Alex Johnstone: That is common carriage.

Councillor Hay: COSLA is not happy about competition being extended to the domestic sector, which we think should be safeguarded in the interests of quality, sustainability and safety.

Councillor Hay: Our view is that there is provision for upgrade, should that be necessary. Those safeguards should be wrapped up in such proposals.

James Thomson: You were talking about the limiting of retail competition in the non-domestic sector and phasing it in slowly, the bill recognises what COSLA is trying to say. We need to take a cautious approach, and to analyse how effective competition can be, as well as the implications and limitations of such a system. We are seeking further reassurance and more information. As the bill seeks to introduce limited competition, we should learn from and assess that. It is not about opening up the doors, but reviewing how the system proceeds and, if necessary, being able to stop the process if it is adverse to what we want.

The Convener: What assurances are you after? Are you worried about the impact of retail competition in the non-domestic sector on domestic consumers? Do you want more information about how the system will work and the impact on local authorities and non-domestic customers? I am trying to tease out what that paragraph in your submission means. I take the point that you agree with the principle that the domestic customer market should not be opened up for retail competition. I am just trying to get a sense of your concerns about the limiting of retail competition.

Councillor Hay: We are advocating a cautious approach. We are not saying that the market should be opened up completely and immediately with no one watching what is happening. If we start allowing companies other than Scottish Water to come in and sell water, we must be sure that we are safeguarding the infrastructure and that there is provision for upgrade, should that be necessary. Those safeguards should be wrapped up in such proposals.

James Thomson: You were talking about the impact on local authorities. As with all areas, we would hope that the commissioner would consult COSLA and local government on the impact that the system will have so that we can be aware of that, and advise or offer experience.

Alex Johnstone: Most objections to the idea of retail competition in the domestic sector seem to relate more to common carriage, which is a different argument and we might have different views on that. The main argument that has been made against retail competition in the domestic sector is that current pricing in the domestic sector is designed to facilitate massive cross-subsidy within that sector. That takes us back to the question that one of your colleagues resisted answering a few minutes ago. Who should be paying for those who cannot afford to pay water charges? Should it be other water charge payers or should it be a broader, social security issue?

Councillor Hay: I will stick my head above the parapet. We should be helping those who are less well off. I would want a cross-subsidy to continue. Where we can cost-effectively raise finance in a more compact region, and get surplus money, that money should be used to help those in regions where we cannot raise money and the service costs more. It makes sense to view the domestic sector as a Scotland-wide set up. We should be making sure that everyone gets their water as cheaply, cleanly and sustainably as possible. If that means that certain regions have to subsidise others, that is only right and proper. For example, we want to take care of the least well-off in our
communities, so those who are well off and are able to contribute more should do so. That is how society should work.

Alex Johnstone: Is there not an argument that it would be more appropriate to go down a road where water customers paid for the services that they got and we eliminated cross-subsidy? You expressed a desire to ensure that the less well-off and those who need assistance are provided with that assistance. Should that not be handled in conjunction with, say, housing benefit rather than as a cross-subsidy within the water charges system?

Councillor Hay: It could be a bit of both. I do not think that there is an easy solution. We should charge domestic customers as little as possible; we should ensure that those who can afford to, do pay; and we should ensure that those who are having difficulty because they have limited incomes and limited ability to raise income are helped by others. It is your decision whether that is done through a cross-subsidy on the water side or through benefits.

The Convener: It will be the minister’s decision, but we are taking evidence on the subject.

Councillor Hay: I meant the politicians’ decision.

The Convener: On a related point, I presume that COSLA supports the geographical subsidies that are in place and the fact that there is one charge regardless of where people live.

Councillor Hay: Yes, we do.

The Convener: Do colleagues have any other questions?

Mr Ruskell: I would like to go back to water poverty. We have been talking about people on benefits, but people who are in waged poverty—on low incomes but not in the benefits system—will perhaps fall within the water poverty threshold. How do we ensure that those people are captured within that net? The current focus seems to be on rebates through the benefits system. What about people in waged poverty?

Councillor Hay: I suppose that the question is where we draw the line. If people are slightly over or under the line, they tend to get squeezed. It is difficult to know how to deal with that. I do not have an easy answer.

Mr Ruskell: The suggestion was made earlier of 3 per cent of household income being a good indicator of the sustainable affordability of water.

Councillor Hay: Not having thought about that, I do not feel qualified to make any comment on that at the moment.

Mr Ruskell: It would be useful to know COSLA’s position on that. Other organisations are responding to us on it.

Councillor Hay: Can we get back to you on that, having given it some thought?

Mr Ruskell: Yes. That would be great.

Councillor Hay: We will give you that answer in writing, along with the answer to the other question, in two weeks’ time.

Mr Ruskell: Thanks.

The Convener: No one else is queuing up with a question. Thank you for coming along and giving evidence today.

We have dealt with all our other agenda items, which we rolled forward to fill the gap earlier. Our next meeting will be on Wednesday at 9.30 am. We will discuss a motion for the annulment of a statutory instrument on the restriction of the use of lead shot. The Deputy Minister for Environment and Rural Development will be with us for that discussion at the beginning of the meeting. I thank colleagues and witnesses for their attendance this morning.

Meeting closed at 12:23.
SUBMISSION BY THE WATER INDUSTRY COMMISSIONER FOR SCOTLAND

We are pleased to have this opportunity to provide evidence on the Water Services etc. (Scotland) Bill to the Environment and Rural Development Committee.

I welcome the Bill. This Bill should help to protect the interests of all customers in Scotland.

Strengthened Regulatory Regime

This Bill will establish a strengthened regulatory regime. I have advocated the creation of a regulatory board for some time. A regulatory board would be an invaluable source of advice and support to the executive staff of WICS. I had sought to gain some of the long term benefits of a regulatory board by establishing an advisory panel in 2002.

This advisory panel comprised the former Director General of Ofwat, a former Finance Director of a major English water company, business people, a lawyer, a consultant in public health medicine and the former Chief Economic Advisor to Standard Life. The panel invited experts in engineering, regulation, finance and the development of competition to contribute views on regulatory issues where I sought advice.

The creation of a Water Industry Commission could also depersonalise regulation. Similarly, changing the remit of the regulator to make a decision on charges on the basis of a policy framework set by Ministers should ensure that roles and responsibilities are clearer. It is important that Scottish Water should be able to appeal a decision to the Competition Commission or could challenge process through a judicial review. We already endeavour to ensure that the targets that we set are challenging but achievable, but the proportionality of the regulatory regime can only be strengthened if Scottish Water is seen to have a right of appeal.

In March, I wrote to the Finance Committee:

“You asked whether it is realistic to expect Scottish Water to achieve the improvements in performance, from which customers south of the border already benefit. I have no doubt that most, if not all, of the gap in performance could and should be eliminated.

It may be instructive to examine the reasons behind the companies’ success in England and Wales. In recent years, companies have delivered significant and sustainable efficiencies for customers and (again as discussed in my recent paper) survived corporate shocks. A key common thread behind the companies’ success is the existence of a sound regulatory, financing and corporate governance structure for the industry. Its features include:

- Independent regulation with powers of determination, subject to appropriate appeal
A clear and appropriate role for ministers to provide guidance to the regulators

• Ring fencing of core water and sewerage activities (this ensured Wessex Water's survival after the collapse of its parent Enron)
• Financial discipline and tight budget constraints
• Audit by Reporters, independent of both company and regulator
• Effective incentives on companies to deliver, through accountability to stakeholders and the publication of objective performance assessments by regulators.”

Many of these key success factors are now in place in Scotland. As a result, by 2006, I expect Scottish Water to have been able to reduce its inherited level of operating costs by some £145 million annually in real terms. Customers' bills will consequently be around 15% lower (over £40 a year for an average household) than they would otherwise have been.

Rigorous, objective regulation is therefore beginning to deliver real value to customers. However, much remains to be done and the strengthening of regulation is likely to ensure that customers will see further benefits.

The proposals for the competition framework and the definition of the core activities included in the 2002 Act should ensure that customers are able to benefit from the tight budget constraints and financial disciplines that exist south of the border. In short, customers would only pay for efficient expenditure.

Background to the Competition Framework

The possibility of competition in public networks has increased since 2000, when the Competition Act (1998) came into force. Although the Competition Act (1998) was to some extent the starting point for introducing competition into the water sector, a degree of competition did already exist, through ‘off-network’ deals and some small-scale brokerage (retail) deals.

The Competition Act (1998) prohibits agreements, business practices and conduct that damage competition in the UK. More specifically, the Act prohibits:

- anti-competitive agreements (known as the Chapter I prohibition); and
- abuse of a dominant market position (known as the Chapter II prohibition).

The impact of the Competition Act on the water industry would not become clear until there was a challenge. However, such a challenge may result in the framework for competition in the public water industry in Scotland being determined by the Courts. Any interpretation of the Act by the Courts may not be consistent with the broader policy objectives of the Scottish Executive for the water industry in Scotland. At the same time, the Scottish Executive has also recognised that, subject to safeguards, which ensure broader policy objectives can

Brokerage : a deal by which water is sold to customers by a third party, who is not responsible for anything other than the final supply of water to a customer's premises. Off-network : a privately owned water supply or waste water treatment and disposal system that reduces or eliminates the need for a connection to the public water and waste watersystem.
be delivered, it may be beneficial to allow the introduction of some competition into the water and sewerage industry in Scotland.

Scottish Water currently handles all aspects of the water and sewerage service. Its activities can be represented in a value chain.

We believe that Scottish Water’s wholesale activities include all of the operational activities that do not involve interaction with the end customer. Our initial view is that retail activities (as you will note a relatively small part of the value chain) would include all matters relating to:

- retail pricing and tariffs;
- the billing process;
- collection of charges;
- debt follow up and debt management;
- meter reading, customer meter operations and ownership;
- call and correspondence handling;
- responses to customer enquiries, complaints or requests for information;
- key account management;
- liaison with the wholesaler to deal with customer issues; and
- marketing.

We currently plan an extensive consultation on both the detailed principles of the licensing regime and then the detail of a draft licence for Scottish Water Retail before the end of the 2005-06 Financial Year. This licensing regime will clarify the responsibilities of both the retailer to the wholesaler and the wholesaler to the retailer. The split of activities will, of course, have to be defensible if challenged under Competition law. We are proposing that there would be at least two further rounds of consultation before a licence was issued to a new entrant.

In our current Strategic Review of Charges methodology consultation, we are proposing to include the split of retail activities as a “notified item” within the price settlement. This would mean that if new information came to light on the appropriate split between wholesale and retail, the Water Industry Commission could review the wholesale price (during the 2006-10 regulatory control period) in an Interim Determination.

We believe that the framework proposed in the Water Services etc (Scotland) Bill will benefit all customers. It will also reduce the likelihood of legal challenge under the Competition Act. Such a challenge could, if successful, disproportionally affect vulnerable domestic customers. A successful challenge could place restrictions on:

- harmonised charges;
- cross-subsidy to assist vulnerable customers; and
- government lending to Scottish Water.
We would expect that new entrants, as focused, specialist retailers, could improve the level of service offered to customers. For example, they could offer customers multiple payment alternatives (in method of payment and frequency), could combine the bills of various locations into one single bill (for multi-site customers), or could offer advice about how to reduce consumption. Further opportunities could exist if the retailer were already providing the customer with another utility service, as they would benefit from economies of scope, and could offer their customers a single bill that covers a number of utility services.

**Possible approaches to setting wholesale prices**

The Committee will no doubt hear a lot of evidence (much of which is likely to be conditioned by self-interest) about how prices should be set and all the dangers that could result. We would like to assure the Committee that we intend to take a balanced, considered and objective approach to setting a wholesale charge. Again, it may be worth re-emphasising that the Competition Commission represents an important procedural safeguard. The potential scrutiny of the Competition Commission will ensure that the decisions taken by the Water Industry Commission will be demonstrably even-handed - if not either a new entrant or the incumbent is likely to seek to appeal a decision. This should reassure all stakeholders.

There are four approaches to setting wholesale charges that we intend to consider:
- the efficient component pricing rule;
- the long run marginal cost approach;
- accounting approaches;
- comparator approaches.

**The efficient component pricing rule**

Economists developed the ‘efficient component pricing rule’ (ECPR) during the 1980s as a method of setting charges for access to an essential facility. The ECPR applies the concept of ‘avoidable costs’. An avoidable cost is the cost that a company no longer has to bear if it ceases to supply a customer.

ECPR was developed to set an access price when the incumbent would provide retail services itself – not to set a wholesale price for an arm’s length subsidiary company. The separation of Scottish Water’s retail arm is important because otherwise there would be a risk of challenge from new entrants that the retail business [with access to cheap Government borrowing] has an unfair advantage.

**The long run marginal cost approach**

A second approach to access pricing would be to set the access charge at the ‘long run marginal cost’ (LRMC) of providing access to the network. The LRMC is a measure of those costs that could arise in the future if demand were to change. There are two potential problems with using LRMC. These are that there is insufficient information on the very long-term investment needs of the water
industry in Scotland and the approach does not take account of central overheads. Modifying LRMC to take account of central overheads is possible but is likely to result in the same answer as the accounting approach.

The accounting approach

We would use our proposed regulatory accounts to define the accounting costs of the wholesale and retail businesses. These accounting costs would include all:

- direct and indirect operating costs (indirect costs include items such as shared legal, IT, and head office functions);
- direct and indirect capital expenditure; and
- financing costs.

The comparator approach

We also propose to analyse other network utility industries that have wholesale and retail activities. In both the gas and electricity industries there has been structural separation between the vertical components of the businesses. The monopoly elements of the businesses have been separated from those elements that are subject to competition.

While we recognise that there are differences both in terms of cost structure and in the extent to which the industries have been opened up to competition, we believe that there could be important lessons to be learned. These would include:

- What does a gas retailer do that a water retailer does not?
- What are the costs of the gas retailer?
- Why should the water retailer’s costs be different?

SUBMISSION BY THE OFFICE OF WATER SERVICES (‘OFWAT’)

This is Ofwat’s written evidence for the Scottish Parliament’s Environmental and Rural Development Committee. It focuses on the issues highlighted in parts 1 and 2 of the Water Services etc. (Scotland) Bill under the headings:

- Ofwat structure and governance.
- Development of competition in England and Wales.
- Setting and monitoring prices in England and Wales.
- Sustainable development.

In our evidence we have described briefly how these features of the regulatory competition frameworks operate in England and Wales, and how they are being changed as a result of the Water Act 2003. As regulator for England and Wales, it is not appropriate for us to comment about the situation in Scotland.
Ofwat structure and governance

Present situation
The Director General of Water Services (‘Director’), supported by the Office of Water Services (‘Ofwat’), is responsible for economic regulation of the water and sewerage industry in England and Wales. The regulatory framework within which the Director operates is set out in the Water Industry Act 1991 (as amended) ("WIA91"). The Secretary of State for Environment, Food and Rural Affairs (the “Secretary of State”) appoints the Director.

Following regulatory best practice, the Director has established a board structure. The Ofwat Board, which comprises the Director, Ofwat's four executive directors and four non-executive advisory directors, meets monthly and acts in an advisory capacity. The Director makes decisions with the advice of his Board. The Board ensures that Ofwat's strategic decisions are:

- subject to prior high level internal critical review;
- well informed and innovative;
- politically sound and deliver effective outcomes.

The Board monitors performance against Ofwat’s forward programme and oversees corporate governance. Both Ofwat’s remuneration committee and its audit committee have members who are non-executive advisory directors.

The day-to-day operation of Ofwat's activities is delegated to the Management Committee, which comprises the Director and his executive directors.

Water Act 2003
The Director’s powers will shortly be amended by the Water Act 2003 (‘WA03’). The Director will be replaced by the Water Services Regulation Authority (‘Authority’) in April 2006, which mirrors recent changes to other regulators (eg Ofgem). The Authority will consist of a Chairman – appointed by the Secretary of State in consultation with the Welsh Assembly – and at least two other members appointed by the Secretary of State in consultation with the Assembly and the Chairman.

It will be for Ministers to decide whether they wish to appoint a separate Chairman and Chief Executive. The Authority can establish committees, and committees can establish sub-committees. Membership of these committees can include persons that are not members of the Authority.

The Authority must prepare a code of practice covering the discharge of its functions, and in exercising its functions have regard to the code. We have already produced a code of practice for Ofwat and have said that we expect the Authority (once established) to review it.
Development of competition in England and Wales

Prior to the WA03, opportunities for competition were the same in England and Wales as they were in Scotland, except that the Water Industry Act 1991 provided for inset appointments in England and Wales. Inset appointments allow an existing statutory water and/or sewerage company to be replaced by another for a specific area.

The WA03 provides for prospective competitors to enter the water industry as licensed water suppliers ("licensees"). Licensees may obtain either:

- a “retail licence”, which enables them to purchase water on a wholesale basis from an incumbent water company and transport it through the public distribution network; or
- a “combined licence” which entitles the supplier to input water from its own water source into the network for onward retail to its clients.

The key distinction between this regime and the one envisaged for Scotland is the provision for combined licensees with access to common carriage.

Ofwat’s role

Under the WA03 Ofwat will have a primary duty to protect the interests of consumers, wherever appropriate by promoting effective competition. This will include:

- Developing appropriate guidance – in consultation with stakeholders and updated when necessary – to implement the competition provisions of the WA03;
- Monitoring the new regime and advising Defra where necessary of possible changes to improve its effectiveness;
- Using its powers to determine disputes, thereby setting suitable precedents for parties to agree terms without recourse to Ofwat;
- Discussing potential licence applications with applicants, assessing formal applications and granting licences where appropriate. Before deciding whether to accept or reject an application, Ofwat will consult publicly on the licence application and take account of any representations made.

Current progress with the new regime

In order to assist in producing guidance for the new regime, Ofwat set up two industry advisory groups and a project sponsor group to oversee the project. One advisory group was to discuss price and non-price access terms, and the other was to discuss licensing and eligibility issues. With the groups’ help, we have produced draft guidance. We will consult on this draft in October and November 2004. By summer 2005 we expect to have all the necessary guidance and regulations in place. The regime will then commence in autumn 2005.

Provision for common carriage – protecting public health

The Government has decided to make provision in England and Wales for both retail and common carriage competition. It concluded that public health could be safeguarded with appropriate legislation. There are three main provisions to protect public health:
1. Potential common carriage licensees will only be granted a water supply licence if they can satisfy the DWI and Ofwat that they have sufficient technical expertise and understanding of the regulatory regime.

2. As part of the access agreement, licensees will be required to supply to the incumbent water company regularly updated information on predicted quality of water and possible impacts such as chlorination, plumbosolvency control and fluoridation practices. A licensee must provide the incumbent water company with additional information including a risk assessment of its water source; the type of treatment proposed, with safeguards and processes should that treatment fail; and the impacts on supply and demand balance.

3. The Water Act 2003 (WA03) amends WIA91 to extend the offence to supply water unfit for human consumption to anyone concerned in the supply of water.

**Protecting ineligible customers**

Like the Scottish Parliament, the Government has been keen to ensure that competition in England and Wales will not lead to higher prices or lower service standards for those customers who cannot (or do not) switch supplier. It has sought to provide this protection by establishing a “Costs Principle”, in accordance with which incumbent water companies must set their wholesale and common carriage access prices. Ofwat will produce guidance to these companies, explaining how they should implement the Costs Principle in practice. And Ofwat will have powers to determine access and wholesale prices in the event of a dispute between an incumbent water company and a licensee.

Under the Costs Principle, incumbent water companies can recover not only the direct costs that they incur in providing access to licensees, but also an amount that they would otherwise have recovered from the switching customer, net of any expenses that they can avoid, reduce or recover in some other way (ARROW costs). This means that incumbent water companies will set common carriage and wholesale prices by charging the prevailing retail price, less any ARROW expenses, plus any additional expenses. This is usually referred to as a “retail minus” approach to pricing.

The Costs Principle protects the incumbent water company’s remaining customers from the consequences of it losing customers to a competitor. For example, it saves remaining customers from having to finance any assets that are wholly or partly stranded as a result of a customer switching to a licensee. Under the Costs Principle, the incumbent would be able to recover from the licensee an appropriate share of the costs of any unavoidably stranded assets. This is because these assets do not count as an avoidable or reducible cost, so the incumbent can recover from the licensee the share of the asset that it previously recovered from the switching customer.

Similarly, the Costs Principle will ensure that licensees are unable to exploit geographic cross-subsidies by supplying only those customers who are least costly to supply. In low cost areas, access prices – set on the basis of the prevailing retail price less ARROW costs – will be relatively high, reflecting the fact that ARROW costs are low. This approach to access pricing will mean that incumbents do not have to deaverage their tariffs geographically in order to compete with licensees.
Protecting licensees’ customers
When agreeing terms for access to the water supply system both incumbent water companies and licensees will have to specify arrangements for customer service. This is to ensure that customers have a clear point of contact at all times for emergencies, general enquiries and complaints. In the event of a supply problem such as failure of a licensee or its water source, the WA03 and access codes provide mechanisms to ensure supplies are maintained to licensees’ customers.

Incumbent water companies must not discriminate between customers connected to the supply system, whether they are their own customers or those of licensees.

Protecting licensees
The WA03 requires each incumbent water company to publish an Access Code setting out the terms for access to its water supply system (including price). The WA03 requires incumbents in producing this Access Code to comply with Ofwat’s guidance. If they do not, they could be in breach of their appointment. Incumbents must offer reasonable terms to licensees and must not discriminate unduly between licensees when making access and wholesale agreements. Where licensees believe that they are being unfairly treated, Ofwat can determine disputes.

The Government chose not to pursue the forced separation of incumbent water companies’ retail activities from the rest of their businesses. But we will continue to review options to ensure that incumbents’ common carriage and wholesale prices are set using transparent and audited cost information.

Competition in sewerage services
The Government decided to apply its framework for competition only to the sale of water, and not to the provision of sewerage services. Its view was that there was already a significant level of competition in sewage and effluent treatment, provided through, for example, on-site facilities and tankered removal and treatment of sewage and effluent.

Phasing in competition for non-household customers
The Government chose to take a cautious approach to competition by restricting it initially to customers using at least 50MI of water per year. This will allow the Government to assess how the competitive framework operates in practice before extending it to more customers. The Government has committed itself to making such an assessment 3 years from the start of the new regime.

Setting and monitoring price limits in England and Wales

Setting price limits
Ofwat sets price limits for each company every five years by forecasting the revenue that it is likely to need to run its business efficiently. We then compare this with the revenue the company is expected to receive and calculate the percentage change needed after allowing for inflation. Ofwat’s objective is to set price limits no higher than they need to be to allow efficient companies to finance their functions.
In setting price limits, Ofwat takes into account guidance from the Secretary of State and the Welsh Assembly Government on the improvements to drinking water quality and the environment that the companies are required to deliver between 2005 and 2010.

Companies can ask for their price limits to be re-examined by the Competition Commission. At the last price review in 1999, two small water only companies used this referral mechanism. The Competition Commission decided that the price limits for these companies should be revised upwards, but by a smaller amount than the companies had requested.

**Approving charges schemes**

Price limits apply to a basket of charges. Once price limits are set, companies are responsible for deciding individual charges within that basket. These charges then form part of a company’s charges scheme. The Water Industry Act 1999 (WIA99) requires all companies to have a charges scheme approved by the Director. It prohibits companies from charging household customers other than in accordance with an approved charges scheme\(^{201}\).

In approving companies’ charges schemes, we make sure that their charges:

- comply with price limits;
- are neither unduly preferential nor unduly discriminatory;
- are consistent with guidance on charging matters from the Secretary of State and the Welsh Assembly Government; and
- are consistent with the Director’s duty to protect customers.

Companies are also entitled to charge their non-household customers by agreement, rather than in accordance with charges published in their charges scheme. They do this to reflect the unusual conditions of supply in some cases. Agreements that commenced after privatisation are subject to the requirement that the charges they contain must be neither unduly preferential nor unduly discriminatory.

**Sustainable development**

When implemented, the Water Act 2003 will oblige the new Water Services Regulation Authority (WSRA) to carry out its duties in the manner which it considers is best calculated, amongst other things, to contribute to the achievement of sustainable development. This obligation is not yet in force. However, we believe that the concepts underlying sustainable development are consistent with our current statutory duties. We aim to act in a way that contributes to social progress, effective environmental protection, prudent use of natural resources and maintenance of high and stable levels of economic growth.

\(^{201}\) This does not affect agreements made between companies and households before WIA99 took effect.
Although at a price review we inevitably concentrate on the next five years we set this within an evolving longer-term perspective. For the present price review, we asked companies to set out proposals that extend to 2014-15, with longer-term projections for asset maintenance requirements, and water resource plans that cover a 25-year period.

SUBMISSION BY THE COMPETITION COMMISSION

Role of the Competition Commission

1. One of the functions of the Competition Commission (CC) is to conduct in-depth inquiries into the regulation, including the price regulation, of the major regulated industries. Such inquiries, like all its other inquiries, are undertaken in response to a reference made by another authority, such as, in England and Wales, Ofwat, the economic water regulator.

Role in relation to the Water Industry Commission for Scotland

2. The Bill confers on the Water Industry Commission for Scotland (the economic regulator for the water industry in Scotland) two new functions.

- The first is the function of licensing those bodies who wish to provide retail water and sewerage services to non-household customers in Scotland in competition with Scottish Water (the publicly owned service provider in Scotland).

- The second is the function of determining Scottish Water’s charge caps in much the same way as Ofwat determines price caps for the water companies in England and Wales. (This is a change from the present position, where the Water Industry Commissioner advises Scottish Ministers about the amount of revenue that Scottish Water should raise from charges and in the light of that advice, Ministers determine Scottish Water’s revenue cap.)

3. The CC understands that these changes are to secure that essentially technical decisions in relation to matters of economic regulation are taken by a duly constituted authority, possessing the expertise necessary for the task; and that it is further the intention to subject the Water Industry Commission’s licensing determinations and charge determinations to independent and expert scrutiny.

4. Accordingly, the CC has been asked, and the Secretary of State has agreed, subject of course to statutory authority:

- to consider appeals from retail water/sewerage providers (as defined in the Bill) against:
the inclusion by the Water Industry Commission of a condition in a licence on the grounds that it is unreasonable in the circumstances of the case; and

the modification by the Water Industry Commission of a condition in a licence on the grounds that the condition as modified is unreasonable in the circumstances of the case; and

• to consider appeals from Scottish Water against price controls determined by the Water Industry Commission.

5. That is, in relation to licence conditions, a reference to the CC will provide an opportunity for a licensed retailer to appeal a decision by the Water Industry Commission on public interest grounds where matters of competition policy are concerned, in the same way that licence conditions in water and energy industries in England and Wales may be appealed to the CC now. In relation to charge caps the approach will be similar to that in England and Wales for challenging Ofwat’s determination of price controls as part of the conditions of a water undertaker’s appointment.

6. These two new tasks for the CC would make good use of its experience in determining water and other utility references and the CC will be pleased to have such determinations referred to it.

The legal position

7. These functions are not described on the face of the Bill because the statute needs to be supplemented by secondary legislation at Westminster to confer new functions on the CC. This can be done means of an order under section 104 of the Scotland Act which provides the means by which UK legislation can be amended in consequence of an Act of the Scottish Parliament.

8. The CC understands that Scottish Ministers have agreed in principle with the Secretary of State to make such an order. This would be made after the Water Services (Scotland) Bill had been enacted and commenced. That is likely to be in April 2005, which would enable the Water Industry Commission’s decisions on determining charges for the period 2006-10, as well as its decisions on licensing, to be subject to the new arrangements.

9. The CC is ready to work with DTI officials and Scottish Executive officials to prepare such an order.

Costs

10. It has been agreed in principle that the Scottish Executive will reimburse the CC’s costs.
SUBMISSION BY THE COAL AUTHORITY

1. Minewater pollution – the problem

During coal mining operations it is necessary to dewater the mine workings in order to keep the mine dry for both operational and safety reasons. In some cases extensive drainage systems were installed and even today these remain impressive engineering feats.

Once a mine, or complex of mines, is closed the pumping is discontinued and the mine allowed to flood. The influent water comes into contact with iron pyrite in the exposed surfaces of the coal and the surrounding strata which has become oxidised with exposure to air during the operating life of the mine. Should this water then discharge from the mine (as is often the case as water levels return to a pre-mining position) the ensuing chemical reactions produce acids and ferrous sulphates which result in the trademark orange coloured (ochreous) water. The deposited ochre smothers the riverbed and any invertebrate life on which fish depend for their food chain. Stretches of river are therefore devoid of fish and the effects, both visually and biologically, can impact for up to 10 kilometres downstream of the discharge point.

2. The Coal Authority’s Role

Prior to The Mines (Notification of Abandonment) (Scotland) Regulations 1998 a person was not guilty of the offence of causing or knowingly permitting the pollution of controlled waters if he is merely ‘permitting’ a discharge from an abandoned mine. As a consequence minewater pollution from the many mines closed prior to this legislation was generally uncontrolled and without a legal owner.

The above factors led to representations to Government in 1993/4 by a number of bodies including the National Rivers Authority, Coalfield Communities Campaign and various local authority’s. The concerns arose due to the fear of the consequences of pollution arising from the abandoned mines and the fact that no-one could be held legally responsible.

Representations were made during the consultation process for the Coal Industry Bill in 1994 and subsequently, Lord Strathclyde, outlined the Government’s expectations of the soon to be formed Coal Authority in this area;

"The Government will expect it (the Authority) to go beyond the minimum standards of environmental responsibility which are set by its legal duties in these areas and to seek the best environmental result which can be secured from the use of the resources available to it for these purposes "

Since that time the Authority has developed this area of work to be one of its core activities.
In the early stages of the Authority’s work, most of the activity related to providing treatment schemes to clean up pollution caused by existing minewater discharges. More recently, efforts have been targeted on developing a better understanding of the minewater ‘recovery’ position in all of the UK coalfields and developing preventive schemes where future outbreaks are predicted to arise.

The work principally covers three main areas:

i) Minewater monitoring
ii) Pumping operations to prevent future polluting discharges
iii) Remediation of existing discharges

2.1 Minewater Monitoring

Since many of the feared consequences of the most recent closure programmes have not yet manifested themselves, it is important to have an understanding of what is happening below ground in terms of minewater ‘recovery’, to enable informed decisions to be made on the need for future preventive action.

The Authority inherited a number of monitoring facilities at disused shafts and boreholes from British Coal. It has supplemented these with additional monitoring points by drilling boreholes into workings or through shaft caps. Regular monitoring and evaluation of the position allows consideration of future actions which may be necessary to control pollution due to rising minewaters.

In 1999 the Coal Authority commenced a series of reviews of the minewater recovery position and the adequacy of existing monitoring in each of the UK coalfield areas. The extent of monitoring facilities left by British Coal on closure of the coalfields varied widely with the north east of England being best served with over 40 monitoring points.

Monitoring points in many other coalfields were very sparse and as a result of these studies over 50 new monitoring boreholes were sunk from 2001 to 2004 into blocks of mineworkings where outbreaks of minewater were considered likely but predicting when they might occur was difficult due to lack of monitoring facilities. Further boreholes will be required over the coming years to continue to investigate the potential risk of new polluting outbreaks posed by rising minewaters.

2.2 Pumping operations to Prevent Future Discharges

Many mines were closed and the shafts filled without leaving facilities to monitor minewater recovery and without predictions as to the likely impact on the environment. That is not to say that other implications of underground water movement were not recognised or considered. If operational mines remained, the safety implications of water build up was
given due regard and often pumping operations were established at closing mines to protect connected mines which were to remain in production.

This was largely the case in County Durham in the north east of England until late 1993 when the last mine in the coalfield was closed. The proposal by British Coal to cease all pumping operations was met with stern opposition from local authority's who made representations at the highest political level. As a consequence, the pumps remained and were inherited by the Coal Authority in October 1994.

The Coal Authority has continued to operate the Durham pumping regime, which is a substantial and expensive operation with the 9 remaining stations pumping around 8 billion gallons of water per year at a cost approaching £1.5 M p.a. At some stations the water pumped is of reasonable quality and assists with dilution of other pollutants in the River Wear and its’ tributaries.

Similar pumping and treatment schemes have been established at Frances in Fife, Monktonhall in East Lothian and Polkemmet in Midlothian. These installations control the underground minewater at a level that precludes surface discharges.

It is considered that further preventive pumping regimes will need to be established in other coalfield areas in future prior to the water reaching the surface to prevent significant environmental damage from occurring. Although it may be possible to occupy parts of former colliery sites for this purpose, often this is not possible and new sites may need to be acquired for the operation with boreholes sunk into the workings to allow pumping to take place. The suitability of potential sites are therefore often constrained by the configuration of the underground workings limiting the options available.

### 2.3 Remediation of Existing Discharges

The Coal Authority minewater remediation programme is focussed on a ‘priority list’, currently numbering over 100 discharges which cause significant pollution of controlled waters. The list is drawn up by SEPA (and the Environment Agency in England and Wales) and is reviewed annually. In addition, there are believed to be a further 300 to 400 less significant discharges whose impact is such that remediation is not at present considered necessary. However, standards may change. In particular any proposed initiatives from Europe need to be monitored closely.

The work is carried out through a rolling programme starting with feasibility studies for each discharge. These studies consider many issues including the mining situation, appropriate treatment technology, planning and land availability. These issues are then progressed for the preferred option to seek to arrive at a viable project for detailed design and construction. Generally passive treatment technologies are preferred since they are more
sustainable and can be made to integrate much better into their surroundings.

The programme has developed substantially over the last 7 years with 33 major schemes (10 in Scotland) being completed.

3. Land issues

The schemes so far completed lead to significant improvements to previously polluted Scottish rivers, together with the watercourses protected by preventive schemes. Feasibility studies have been carried out at numerous other sites and work continues to resolve outstanding issues to enable the desired progress to be made.

The Authority has in the past commenced construction of an average of four new schemes in each year and although the programme has been widely welcomed, the fact remains that approaching 90 discharges still have to be dealt with. If this is continued it will take well over 20 years to reduce pollution from minewater to acceptable levels. This is not consistent with the requirements of the recent EC Water Framework Directive, which is a principal driver in the Authority seeking to accelerate the programme.

The Authority's programme was therefore accelerated to 6 schemes in 2002 and to 8 schemes from 2003 and thereafter.

Unfortunately some of the most significant and highly polluting discharges have not yet been dealt with due to difficulties encountered in acquiring the necessary land upon which to construct a treatment system. This can be either due to a flat refusal to sell or grossly inflated values being sought by landowners. It must be stressed that in all cases a number of options are considered and explored in order to seek a solution to the problem and this has in the majority of cases led to a satisfactory resolution through negotiation.

Compulsory purchase powers are being sought through the Water Services etc (Scotland) Bill and are seen as very much a last resort where solutions cannot be found through negotiation or exploring other technical solutions.

Clearly the compulsory purchase process will be tightly defined and the consideration for land will reflect open market value.

Further monitoring boreholes will be required over the coming years to continue to investigate the risk of new polluting outbreaks posed by rising minewater. It is critical to be able to hit the appropriate underground roadways in order to obtain accurate information and so access to surface land is necessary to enable this. The proposed Bill contains provisions to gain access to land to allow this monitoring to take place but, as with the treatment schemes, other options are carefully considered and are seen as a last resort when all other reasonable options fail.
On resuming—

**Water Services etc (Scotland)**
**Bill: Stage 1**

**The Convener:** Today is the fourth day of our consideration of the Water Services etc (Scotland) Bill at stage 1. We will be focusing on the model of competition and regulation that is proposed and on comparisons with United Kingdom bodies. We will also have a go at examining the charge determination regime and the provisions on coal mine water discharge in part 3 of the bill, so we need to take some quite specific evidence.

A series of witnesses has been selected to enable us to tackle those issues in depth. As members have no relevant interests to declare, we can move straight to our first panel. I welcome Alan Sutherland, who is the water industry commissioner for Scotland, and Dr John Simpson, who is the director of cost and performance in the office of the WIC.

We will not have opening statements. I am very grateful that, as with other witnesses, you have provided evidence in advance, which will form the basis for our questions. You may also find that we put the same questions to you that we have put to previous witnesses, to find out whether we get the same answers. I invite Rob Gibson to kick off with the first question.

**Rob Gibson:** I welcome the chance to talk to the water industry commissioner and his colleague on the regulatory regime that they have been seeking to apply. The tone of your paper seems to acknowledge that that is the means by which utilities will be regulated in future. Some of us, at least, find that the move to competition is not necessarily related to the best interests of customers, many of whom have been failed by the current system. Debate has developed in other committees, such as the Finance Committee, about exactly what kind of and how much investment Scottish Water should have.

Your evidence states that much of the evidence that we have heard on the setting of wholesale prices

"is likely to be conditioned by self-interest".

Why should I think that your submission is not conditioned by self-interest?

**Alan Sutherland (Water Industry Commissioner for Scotland):** My submission is conditioned by and based on the interests of customers in general. On my comment about self-
interest, the evidence from the gas and electricity industries is fairly clear that, when a split is suggested or imposed, the incumbent companies inevitably say, "You don't understand how difficult the split will be—it cannot be done and it will not benefit customers." However, the evidence from general utilities sectors is that splits have brought benefits.

Rob Gibson: You are talking about non-domestic users, but the fact is that the bulk of the people whom we represent—the domestic users—are not likely to be materially affected by the thrust of the proposals. The retail and wholesale issues relate more to the operation of the Competition Act 1998 and not to the reasonable provision of water supplies to domestic customers in Scotland.

Alan Sutherland: When we prepared the strategic review for the minister in 2001, we suggested that the introduction of retail competition could benefit customers in general and that the benefit of simply injecting greater transparency into the industry’s cost structure would be at least as great. I have talked at length with people in industries that have been through similar splits and I have often been told about the debates that happen between companies at the time of the splits. One company might say, "That's your cost," while the other replies, "No it's not; I don't want that cost." Many activities that do not really add value for customers, both domestic and non-domestic, are identified in that process and companies ask why they are doing them. Therefore, the overall costs for the industry come down.

Transparency is important. There can be no real doubt that the transparency on cost that has resulted from the work of the regulatory regime in the past three or four years has brought about the 20 per cent reduction in Scottish Water’s operating costs in the past two years. That is money that would otherwise have had to come from customers. By the end of the present regulatory period, as a direct consequence of the reductions in operating costs, customers’ bills will be 15 per cent lower than they would otherwise have been.

Rob Gibson: You describe a process, but it is difficult to bring competition to bear in a system in which there are around 200 different sources of water. The system is different from that anywhere else, apart perhaps from Yorkshire, which is the nearest possible comparator in England. The idea that the reduction in water prices that you talk about has somehow helped people to get more water supplies is not correct because we know that it has not tackled development constraints. That shows a direct mismatch between the reduction in prices and the ability of many communities to get the water supply that they require. You certainly make the case that there has been a reduction in costs, but you do not address the fact that many of our witnesses have said that the proposals are a total mismatch with what is required.

Alan Sutherland: Several issues are tied up in that question, but let me tackle development constraints. Of the three options in the Executive’s consultation on quality and standards II, ministers adopted the middle option. Post consultation, ministers recognised that not too much money had been provided for dealing with development constraints, so they added in £50 million to deal with first-time connection to the water supply and rural sewerage. However, 5 per cent of the post-efficiency £1.8 billion investment programme—that is, £90 million—was put in to handle growth issues in addition to that pre-efficiency £50 million allocation, which was reduced to £42 million to reflect the efficiency target. Those moneys were in addition to the industry’s basic maintenance of capital—some £500 million to £600 million over the regulatory period—that will also marginally affect the ability to connect to water supplies and sewers.

The delivery of the investment programme is a different issue. In our revenue settlement, we charged Scottish Water with delivering that £1.8 billion in roughly equal instalments in each of the four years. To date, that has not happened. In our April investment and asset management report, which was based on Scottish Water’s first almost two years, we highlighted the fact that, if it was to complete the £1.8 billion programme by the end of the regulatory period, Scottish Water would have to spend at a rate that was unprecedented in monetary terms. The percentage increase that is required has been achieved only once before.

I suggest that the mismatch is not between the reduction in operating costs and the development constraints—we are well aware of what people are saying about those constraints—but between the delivery of the allocated investment programme, which is being paid for by customers at this time, and the development constraints. Operating cost reductions are not the issue.

Rob Gibson: If there is a disagreement between the regulator and Scottish Water about how that can be achieved, will providing a clearer definition of the water industry commission’s powers solve that problem?

Alan Sutherland: Solve what problem?

Rob Gibson: Will it meet the need to tackle development constraints at the levels that require to be spent?

Alan Sutherland: It is important to understand that the current function of my office is to advise Scottish ministers on the revenue requirements for delivering the investment programme that
ministers specify after consultation. Under the new system, the office will have a slightly different function. Scottish Executive ministers will still have the responsibility to define the investment programme that they want, but the commission will then have to reach a decision, rather than simply offer advice, on what pricing level is required to fund that investment programme.

The Convener: That is a helpful clarification.

Nora Radcliffe: Further to Rob Gibson’s question, I want to ask whether Alan Sutherland’s impression is that Scottish Water will fulfil its investment programme even if the programme is back-loaded. Will the work get done even if it is all concentrated in the final part of the investment period?

Alan Sutherland: It is not for a regulator to predict how Scottish Water will do. We thrive on evidence and data; we do not like hypothesising. I can only repeat that, in pound terms, the extent of spend that is still required to be delivered has never been achieved in the history of the UK water industry. In percentage terms, as an increase over what was delivered in the first two years, the amount of expenditure that has still to be delivered has been achieved only once. It was achieved only by one company, on the basis of a much smaller capital programme than that which is to be delivered in Scotland. The delivery of the entire programme by 1 April 2006 would represent a significant achievement—it would be a first. Nora Radcliffe asked whether everything would ultimately be delivered, to which I reply yes, because regulation will ensure that that happens. We are working hard to ensure that we have proper definition of the capital programme and can vouch for its delivery and the benefits that customers have been promised.

Maureen Macmillan: I want to pursue that point a wee bit. What has caused the bottleneck? Is it true that, as some people suggest, the downsizing of the water industry and loss of personnel have led to a lack of capacity to deliver?

Alan Sutherland: It is not for me to comment on how Scottish Water is managed. Scottish Water still has more operating cost available to spend in relation to its size and geography than has any company in England and Wales, which is why it is still rather inefficient, despite its creditable performance in its first two years—we look forward to more of that. There is still an efficiency gap. The resources are there and it is for management to consider how to use them. Customers are certainly providing an adequate amount of money.

Nora Radcliffe: I would like clarification on some of the points in your submission. You say:

“It is important that Scottish Water should be able to appeal a decision to the Competition Commission or could challenge process through a judicial review.”

Can you clarify that statement and expand on what it means? Does it refer to two different types of appeal or are you suggesting that there should be an appeals process beyond an appeal to the Competition Commission? What are the pros and cons?

Alan Sutherland: When the proposed new water industry commission determines how much it should cost to deliver the policy objectives that ministers will set out in January, it is right and proper that there should be a mechanism whereby Scottish Water can appeal if it does not like the commission’s analysis. It is likely that such an appeal would be complex, because it would involve many issues—colleagues keep telling me that I assume the issues are too simple. The issues are complex and our method of going about the process will fill five thick volumes, which gives an indication of the volume and detail of activity that we have to deal with. It is reasonable that an appeals body should have the expertise and experience to be able to respond to those issues.

Judicial review, as I understand it, is different and involves the consideration of whether we have acted in accordance with the proper process. If we do not act in that way we, like other public bodies, can be subject to judicial review.

Nora Radcliffe: Are you suggesting that there should be two routes of appeal for two different types of dissatisfaction?

Alan Sutherland: Yes. I think that that is in line with general regulatory practice.

Nora Radcliffe: That is fine. I just wanted clarification because I was not sure whether the statement about two types of appeal represented an either/or approach—

Alan Sutherland: We were not proposing a three-tier system.

The Convener: Are you happy with the drafting of the bill in that respect, or should it be amended?

Alan Sutherland: I am not a lawyer, so I am probably not the best person to comment on the drafting of statute. The bill seems reasonably clear to me, but that might be because we think that we understand the regulatory process in England and Wales and in other utility industries. Perhaps that conditions our view, but I think that the question should be answered by someone who is rather more specialised in legal drafting.

The Convener: But you are saying that you are pretty happy with what is in the bill and that it seems to do the job. Someone else can debate the question whether it does exactly what it is intended to do.

Alan Sutherland: The policy memorandum has moved us forward considerably. Indeed, it and the
letter that Mr Finnie sent me in May about starting work on the next review have very much clarified what the responsibilities of ministers are and what the responsibilities of the commissioner/commission will be in order to calculate the costs of the very important ministerial policy objectives that I am sure will be debated by members.

11:15

The Convener: Following on from Nora Radcliffe's question about appeals and our discussion about whether Scottish Water should be able to appeal certain decisions, I wonder what your view is on the suggestion that there should also be an appeal process for individual consumers who are unhappy about their banding or the amount that they are being charged.

Alan Sutherland: The third volume of our approach sets out a number of questions for consultation on the introduction of what are called tariff baskets, which are effectively the tariffs that apply to discrete groups of customers. Instead of trying to predict in advance each particular tariff, of which there are about 250 in Scottish Water, we would set only 10 price limits for the various baskets. We expect guidance from ministers in January on the exact weightings that they want between the various groupings in light of the consultation paper, “Paying for Water Services 2006-2010”, which the Executive has already launched and the study that it has commissioned on cross-subsidy in the water industry. After those two processes are complete, we expect to receive fairly clear statements from ministers about what they expect each group to pay in relation to the other groups.

In the consultation, we have suggested that metered customers with household-type characteristics—which would cover the few hundred households in Scotland that have a meter, or smaller businesses—are grouped together instead of being lumped into a tariff basket with all other metered customers, which is what happens in England and Wales. As a result, you would be able to look at prices or receive clear guidance from ministers about how they expect the household or small business user to be treated in relation to the various other water service users.

The Convener: But what about appeals? What happens if someone is not happy with the bill that they end up paying? This is particularly important, given that bills have been rising. I know that people can complain to Scottish Water, but if they are not happy with its response, should they have recourse to someone else? No one has suggested that the water industry commissioner should take on the job; however, it has been pointed out that with other utilities people can complain to bodies such as energywatch.

Alan Sutherland: In that respect, the committee might want to discuss the water customer consultation panels. I was keen for them to be set up at the time and I feel that they play a valuable role. Perhaps members will feel it appropriate to give the panels the additional function that you outlined. I certainly think that their role should be expanded and strengthened. A customer group should be able to lobby with regard to particular situations; on the other hand, I am required by statute to fulfil a regulatory function that immediately has to reach the general customer interest by balancing one group against another.

The Convener: I think that I understand that. The representations to the water customer panels are to do with different key interest groups but, a couple of weeks ago, we were debating the issue of individual customers who are unhappy with their bills. Whom do they go to? I do not think that the water customer panels want to hear those complaints.

Alan Sutherland: If someone is paying on a rateable value, I suppose that one of their options is to appeal it. If they are unhappy with their council tax banding and the charge that relates to that, I assume that they can appeal the banding. I appreciate that that is probably not terribly helpful, but it is not the commission's role to consider individual customers.

The Convener: I was not suggesting that it would be a role for the commission. I was saying that we were talking about regulation of utilities and that other utilities industries have organisations to which people can complain. Do you think that that is a good idea? It has been suggested by other witnesses that there is a gap in the water industry.

Dr John Simpson (Office of the Water Industry Commissioner for Scotland): The parallels in the water industry in England and Wales and in other regulated utilities would be where a customer who was unhappy with the level of their bill and who appeared to have no recourse of complaint to the company complained to a body similar to the panels that we have in Scotland. For example, they could complain to WaterVoice or energywatch. Dealing with complaints would be the day-to-day activity of that type of body. There is a role for the panels in Scotland in dealing with that kind of issue. It would be very difficult for a regulatory body to do it.

The Convener: We will come back to that. I would like to read the evidence because I do not think that that was the view of the water customer panels.

Nora Radcliffe: There are four things in the submission that I would like to clarify. Convener, is it all right for me to carry on and for other members to come in behind me?
The Convener: Yes, if you keep your questions focused.

Nora Radcliffe: Page 3 of your submission mentions the consultation on the detailed principles of the licensing regime, the draft licence and the fact that you are proposing to hold

"two further rounds of consultation before a licence was issued to a new entrant".

Are you referring to a new entrant other than Scottish Water?

Alan Sutherland: Absolutely. Assuming that the bill goes through, in April next year we plan to consult on the principles that we should include in the licence for the retail arm of Scottish Water. There would then be a separate consultation on a draft licence for Scottish Water retail. Between 2006 and 2008, when it is suggested that new entrants might be able to come into the market, we plan to have a further two rounds of consultation, basically structured in the same way, on the principles that ought to be put into a new entrant’s licence and on a draft base licence for a new entrant. Hopefully, we can expand the consultation and ensure that people have a full opportunity to comment on the process as it progresses.

Nora Radcliffe: Presumably, if the second consultations came up with a slightly different licence, Scottish Water would have to be relicensed under the modified arrangements.

Alan Sutherland: The normal process is that either the licence giver and licensee agree or such matters get referred to the Competition Commission.

Nora Radcliffe: Thank you, that is helpful. The final two questions are about your possible approaches to setting wholesale prices. I burned a lot of midnight oil trying to get my head round this. Are those approaches mutually exclusive or are you likely to arrive at a combination of one or more of them?

Alan Sutherland: Three of the approaches are mutually exclusive. We do not consider the efficient component pricing rule to be appropriate when two businesses have been physically split, because it concerns the pricing of access and not a wholesale price per se. However, some of the principles that underlie that rule could be used. To ensure comparability in the next review, we will calculate the initial wholesale price on a retail-minus basis, but it will probably be a retail-minus accounting basis rather than an ECPR basis.

The long-run marginal cost approach is almost the mirror image of the ECPR. It would probably give extra benefit to new entrants at the incumbent's expense, so we are not terribly keen on it.

The other two approaches that we talk about, which are the accounting approach and the commonsense check of how much it costs the gas industry to read a meter and to serve and bill a customer, for example, are not mutually exclusive. We hope that it is reasonably good practice analytically to reach one answer based on a debate with Scottish Water about where activities go and what the costs are, but to compare that with other industries and processes, to ensure that the answers that we receive are realistic.

Nora Radcliffe: If you go for the comparator approach and consider other utility industries, I presume that the state of infrastructure will be a major factor in your comparisons, because the state of the infrastructure in the water industry is different.

Alan Sutherland: We would examine retail processes, not pipes and assets. We are often told how bad the infrastructure assets in Scotland are. For anyone who is interested, we reported in our investment and asset management report in April on what Scottish Water’s data say versus the situation in England and Wales. The infrastructure may well not be in as good nick as it could be on either side of the border—it is not just a Scottish problem. Perhaps we ought not to beat ourselves up too much on how much worse Scotland’s infrastructure is, because the objective data do not support that.

Nora Radcliffe: I was talking about comparisons of utilities. Some utilities have a far better, more efficient and more modern infrastructure than the water industry does.

Dr Simpson: Our intention is not to compare the wholesale parts of water and gas businesses, because it is clear that the activities and engineering are different. We want to compare the retail parts—

Nora Radcliffe: The administrative operations.

Dr Simpson: That is because common sense suggests that those activities should be broadly the same in different utilities.

Mr Ruskell: I will ask about the composition of the water industry commission. The commission’s role concerns price regulation, but that is with a view to facilitating Scottish Executive policies on economic development, social equity and environmental protection. Should the commission be composed entirely of economists, or should other advisers have a role? I raise that because the submission to the committee from the Office of Water Services talks about the water services regulation authority in England and the establishment of sub-committees. I presume that sub-committees will work on aspects of stakeholder involvement or even policy objectives and their delivery. Will you share your thoughts on
The size and nature of the proposed solutions.

Alan Sutherland: The size and nature of the commission are decisions for ministers. Clearly, the results of the commission’s price determination will have consequential impacts on customers, businesses, households and all sorts of issues. One of the strengths of what is being proposed is that, after a draft determination of prices is produced in June next year, there will be an opportunity for people to make representations and for ministers to decide that they do not like the price outcome and that they want something else included or something removed. One of the strengths of going for this structure is that there will be clarity between the ministerial responsibility to make policy decisions and the commission’s ability to price the lowest sustainable cost of delivering the policy objectives. That clarity is important.

It is for others to decide who should be a member of the commission. Clearly, the role of the commission should be to cost what ministers state the policy rather than to get involved in the interpretation or development of policy. To do otherwise would be for the commission to turn itself into a mini-representative body, which is not what it is meant to be.

Mr Ruskell: But clearly you are enabling Executive policy to be implemented. I accept that price is crucial to investment in environmental protection and to the cross-subsidies between domestic and non-domestic consumers and between large and small businesses. In effect, you are recommending those major decisions to ministers.

Alan Sutherland: No. Ministers are saying—

Mr Ruskell: But you are coming up with proposed solutions.

Alan Sutherland: No. As we speak, the quality and standards III process is under way. The process involves multiple stakeholders, including the Scottish Environment Protection Agency, the Convention of Scottish Local Authorities, the drinking water quality regulator, business, the Scottish Consumer Council and water panels. They are looking at all the investment requirements over the next eight years in Scotland. The Executive has raised a number of issues that are out to consultation at the moment.

In January, post the consultation, ministers will reach a decision on what needs doing. We will then look at the programme, cost it and include the costs in the price determination. The programme has been costed by Scottish Water, but the costs do not get reviewed until ministers say what bits of it they want. After the draft determination is concluded in June, there will be a second opportunity for people to say that they want a bit more or a bit less environmental benefit, given what they are willing to pay. The draft determination will become final only at the end of November next year and it will take effect for customers in April 2006.

Neither the commission nor the commissioner is taking any decisions about whether to protect a particular estuary or whether to give people in Dundee a better quality of water supply. Those decisions are part of the ministerial process, post consultation.

The Convener: We will be discussing the issues with the minister next week. Given that we have been debating quality and standards III and “Investing in Water Services 2006-2014” for the past few weeks, we have an overview on that.

I will stick to the issue of the task of the water industry commission. Would it be helpful to have a requirement in the bill that, when you are reaching your conclusions, sustainable development should be one of the guiding issues that you must consider, as it is for the water services regulation authority?

Alan Sutherland: That is one of these questions that is difficult for me to answer.

The Convener: You can give the committee your thoughts, without necessarily giving us a yes or no.

Alan Sutherland: My thoughts are that we should all live by principles of sustainable development. We all ought to be conscious of what we are doing now and the impact that that has on others now and in the future. However, when I think about the issue, which is something that we have done a lot, I keep coming back to the point that there is a clear distinction between the policy side, which has to be the responsibility of ministers, and what ought to be the responsibility of the bean counters—us—which is to cost that policy. I would expect ministers to tell us that they want us to take sustainable development into account and that they want the investment programmes to deliver sustainable development, and to say what they mean by “sustainable development”. Although I am ready to be corrected on this, I do not think that it is right that the people who are charged with calculating how much ministerial policy costs should interpret what sustainable development means or decide to include additional costs that ministers have not said that they want, following their consultation and according to their definitions.
There is a role for sustainable development but, particularly given the need to avoid replicating what was probably a lack of clarity in the old regime, I am not sure that we should have a lack of clarity in this framework about what ministers are responsible for, what the commission is responsible for and what Scottish Water is responsible for. Clarity is important and we should not do anything to compromise that.

The Convener: We may come back to that point with other witnesses.

Alex Johnstone: I will move away from what we have been saying and go back to basics. You made it clear earlier that you believe that competition is beneficial to customers. Given some of the reservations that have been raised by other witnesses, do you think that the model of competition that is provided by the bill is adequate to deliver enough competition to deliver such benefit?

Alan Sutherland: Rob Gibson raised an issue about the number of sources of water. If I remember rightly, the committee has heard evidence on the absence of a national water grid. That limits the areas of the water industry where there can be competition in the sense of different people doing the same activity, as opposed to competition for who can do something cheapest—for example, deciding whether to contract something out or to do it yourself is a form of competition. We went through a fairly extensive analysis of the matter back in 2001. We concluded that the only area where there can be in-the-market competition, as we economists would call it, where different people do the same thing, is in the area of retail.

Such competition can bring benefits in a couple of ways. First, retailers typically up their game when they are in competition with one another—they give a better service, their billing is more accurate and timely and they respond more quickly to queries. Secondly, a new entrant will often have significant advantages in terms of the scale and scope of their activities. If they already have a billing system for customers—if they already send out bills to customers for their electricity, gas and, perhaps, their telephone—issuing another bill through the system would only have a marginal cost. Therefore, that would allow a company to consider going into another market and unless an incumbent expanded the scale and scope of its billing system, it would be relatively disadvantaged. There is typically a margin compression.

Alex Johnstone: We have heard concerns that retail competition would be possible in such a limited area that it would be unattractive for many companies to become involved. Is there a danger that the bill’s scope will not extend far enough to create the kind of regime that would begin to deliver benefits? I think that you have answered that question already, but I am putting it in a more straightforward form.

Alan Sutherland: We are not short of approaches from people who are interested in doing various things in the Scottish water industry. People are interested in coming into the market. They would probably come into it now if Parliament was not considering this bill. Rather than making their intentions known now, they are waiting for the clarity that will come from the bill.

I think that there will be entrants to the market and that you will get messages. Some of the submissions to you are interesting on the subject of the market being terribly small and uninteresting. That is what people said about the gas and electricity markets.

Alex Johnstone: I will try a third time. Might some of the potential new entrants to the marketplace be more attracted if the terms of the bill were slightly broader in creating the opportunity for them to enter?

Alan Sutherland: If the Parliament was interested in exposing the entire industry to competition and throwing all the domestic customers into the same pot, I am sure that the market would inevitably be bigger and that there would be more interest. I have my views on whether that is worth doing in public policy terms and I am sure that you all have your views on that.

Alex Johnstone: I think that I have got the answer that I was after.

The Convener: Okay. If there are no other questions, I thank the witnesses for coming along. It has been useful having your written evidence and being able to ask you questions.

We will have a quick, two-minute recess while we let the first set of witnesses escape—although they are obviously allowed to stay for the next evidence—and the second panel come to the front.

11:42
Meeting suspended.

11:46
On resuming—

The Convener: I welcome the second panel of witnesses. We have with us Tony Smith, the director of competition and consumer affairs at the Office of Water Services—Ofwat—and John Banfield, the senior inquiry director at the Competition Commission. I noticed you in the gallery earlier and I thank you for being here.
will not take opening statements from you because we already have your written submissions, so I will go straight to members for questions. Alex Johnstone will kick off.

Alex Johnstone: Thank you.

Do the witnesses think that the bill will open up competition in the Scottish water industry, or do they regard the bill as an attempt to restrict possible current competition?

Tony Smith (Office of Water Services): I do not think that it is particularly for us to comment on the choices that are made in Scotland. You will have read in our evidence about what is planned as a result of the Water Act 2003 and you will have noticed a couple of key differences between England and Wales and Scotland. First, there will be no forced retail separation in England and Wales. However, the flip side is that there will be the potential for new entrants to access the water undertakers’ networks.

Another feature that is different is the fact that, for the first three years of the new regime, there will be a threshold that will mean that only customers who use more than 50 megalitres a year will be open to competition. That is the amount that a large hospital, a school or a university would use, or, in the business sector, a company that uses water for its processes—for example, a company in the brewing industry or a paper manufacturer.

A combination of features will make the markets somewhat different. Our view is that there will be interest in the market in England. Initially, the market will be limited and is likely to have only around 2,300 customers. It would be helpful for potential new entrants if the market was bigger—people have already said that down in England. Nevertheless, we think that there will be interest, both in the retail market, which is more restricted than it is up here, and in common carriage, which is the aspect that you do not have up here. I do not know about the situation in Scotland.

Alex Johnstone: Following on from what we heard from the water industry commissioner, I wonder whether you believe that the bill’s proposed model of competition will be robust enough to stand up to challenge?

Tony Smith: That is a tricky one because none of this has been tested in the courts yet. Down in England and Wales, there are debates about whether the model there is legally sustainable. Certainly, the Department for Environment, Food and Rural Affairs’ view is that it is; hence DEFRA has put that sort of regime in place.

There have not been any challenges to the regime as a whole, although we are aware of companies that would challenge our interpretation of what we call the costs principle, which is a key element of the regime in England and Wales that concerns how prices are set. It is too early to say whether there will be a challenge. Only time will tell.

Alex Johnstone: Finally, I have a question on how we should defend the concept of competition. One of your roles is to monitor the effectiveness of competition in the industry. Do you believe that competition delivers cheaper water?

Tony Smith: We expect it to, but we will have to see. As a result of the way in which the regime will be structured in England and Wales, due to the costs principle that I mentioned, competition should occur where it is effective. The regime will not be based on companies and new entrants who try to pick cherries, to use the jargon, and to get the most attractive customers who cost the least to serve—companies will not be able to do that under the regime that will exist in England and Wales. There will be competition where there is a competitive advantage for a company that comes in to compete with the incumbent water company. In that respect, we expect that there will be benefits to customers.

As far as the Government’s objectives are concerned, it is equally important that there will not be disbenefits to customers who cannot get into the competitive market because of the limit on the regime or who choose not to get into it; therefore, there is protection for such customers in how things are set up. However, I hope that there will be direct benefits for those customers who are competed for.

The experience of other utilities in England and Wales and elsewhere is that there are knock-on benefits. There is no doubt that even the prospect of competition causes companies to raise their game—we are seeing that even in the water industry in England and Wales. When companies start to understand their customers better, they will ensure that they provide a better service and they will understand their costs much better, which makes them far more effective in dealing with customers and with the costs of doing so.

The new regime in England and Wales might be small—certainly for the first three years—but we think that it will be attractive to new entrants. It will have benefits for customers and will not have any disbenefits for customers who are not directly touched by competition, which is important.

Alex Johnstone: Is the Competition Commission in a position to compare the model that has been chosen in Scotland with the model that is operating south of the border? Can you say whether the levels of competition that they provide are equal or different?
John Banfield (Competition Commission):
No, unfortunately. As yet, we have not looked at competition in water supply even in England and Wales. We have been involved in competition issues in other utilities—especially gas—but the contexts of utilities differ somewhat. I would not want to express a view on the matter.

Maureen Macmillan: The Ofwat submission talks about setting and monitoring price limits in England and Wales, and states:

“In setting price limits, Ofwat takes into account guidance from the Secretary of State and the Welsh Assembly ... on the improvements to drinking water quality and the environment that the companies are required to deliver”.

Where does the Welsh Assembly’s agenda for social development, or that of the United Kingdom Parliament, come in there? You might have heard in earlier evidence that we are quite concerned about, for example, expanding infrastructure for social housing and so on. Where do such matters sit with you? How are they dealt with?

Tony Smith: We receive guidance in various respects, and not only to do with the periodic review, which is referred to. We receive guidance from ministers and the Welsh Assembly Government for us to take into account in the price-setting process. As the paper says, that guidance is primarily around the big items of the programme, such as the environment and water quality.

They also put in issues that they are concerned about. For example, we are currently reaching the end of our price review. Affordability is an issue for customers who already find it difficult to pay and who will find it even more difficult to pay after the review, when prices are likely to go up. Both the Secretary of State for Environment, Food and Rural Affairs and the National Assembly for Wales have expressed their concerns about that. They have given us their view on the issue and have told us what they are doing on the topic. A review is considering the options for customers who find it difficult to pay their bills.

That is one angle; however, it does not stop there. The prices are set for five years, but each year we have to approve the charging schemes of all the companies. When we do that, we consider tariff proposals to ensure that they will not discriminate against groups of customers and that they are cost-reflective. We also take into account guidance that is given to us by the Secretary of State for Environment, Food and Rural Affairs about things such as vulnerable groups of customers and ensuring that, if there is any rebalancing to be done between customer groups, that happens gradually and price changes are phased in so that a customer whose demand has not changed does not have a rapid change in price from year to year. Ministers’ views are made known to us through various sets of guidance that we observe as we do our job.

Maureen Macmillan: So, is there cross-subsidy in the pricing structure?

Tony Smith: Cross-subsidies between groups—say, between domestic and non-domestic groups—have probably been largely unwound since privatisation. However, to the extent that there are still prices across a company for a particular set of customers, there is a cross-subsidy. Within any particular company, there are some customers in regions which it is easier and cheaper to serve and other customers in areas of the company’s territory that are more expensive to serve. When it considered the provisions in the Water Act 2003 relating to competition, the Government was keen not to unwind those cross-subsidies.

Maureen Macmillan: It does not want to unwind them.

Tony Smith: It does not want to unwind them. It wants to maintain common, cross-company prices for customers.

Maureen Macmillan: When people pay for their water, does an element of the charges pay for the development of infrastructure—for example, for social housing in rural areas—or is that paid for by a separate Government department? Do you know how it works?

Tony Smith: I am not sure how that specific aspect works. Each time that there is a pricing review, development and growth are considered as part of the companies’ plans, which must respond to development demands. The situation in England is somewhat different from the situation in Scotland, in that developers pay for connection to the system. Indeed, they pay at two levels: they pay an infrastructure charge for the impact that they will have on the system as a whole; and they pay a site-specific amount for connection.

The companies’ plans and the pricing deal for the next five years that we have to come out with will include the work that the companies have to do to respond to development. In some areas of England and Wales, that involves a pretty significant amount of money, especially in the south-east of England where there is pretty rapid growth in some areas. Development issues have to be addressed constantly, but they are addressed overall rather than, for example, rural housing being dealt with specifically.

Maureen Macmillan: Yes. We have made a distinction between commercial development, which the developer will make money out of, and development for social purposes to meet a need in a community.
Mr Ruskell: I want to pursue the issue of guidance. To what extent are indicators and targets part of the guidance that you work with or things that you must be aware of? I am thinking of indicators on water poverty or investment in social housing, or targets on leakage, for example.

Tony Smith: Ministerial guidance has clear implications for the environment and water quality, because it is translated into standards that companies must deliver or consent levels for discharges of effluent. Ofwat and the environmental and water quality regulators consider what the guidance will mean for companies and companies consider the investments they will need to include in their plans if they are to deliver what is required. In that sense, there are specific outcomes.

12:00

Mr Ruskell: That applies to issues on which there is statutory guidance, but how would the policies of the National Assembly for Wales or the Westminster Parliament be delivered?

Tony Smith: I think that it is true to say that ministers have not set a target on water poverty that identifies percentages for the maximum amount of money that a customer should have to spend on water, for example. There are guideline levels, but the guidance does not specify limits. We are not allowed to set prices in a way that is driven by the amount that people who can least afford water can spend; we are statutorily required to set prices that allow the companies to do what they need to do—to “finance their functions” is the term that is used.

However, we take account of the implications for customers because not only is the Government concerned about those implications but the companies themselves are concerned about them. If a customer cannot pay, the company has to deal with debt issues and all the rest of it and, as members know, other water customers pay more. The approach is less specific than setting targets in the way that Mark Ruskell mentioned.

Mr Ruskell: The WIC said that, in essence, you have a bean-counting function. I am concerned to know whether you count the right beans and whether you design pricing in a way that reflects an awareness of the various policies.

Tony Smith: As you can imagine, we take part in stakeholder discussions and do a huge amount of research on what people are thinking. Various poverty groups tell us about their issues and we encourage that, both in the lead-up to the review and in the aftermath of it. There are two stages to the process: a draft determination, which contains our proposals; and a final determination. During the four or five months between the two stages, we take account of everybody’s comments. In England and Wales, we encourage discussion even before the review process starts, by asking the water companies to put their business plans in the public domain. That encourages a debate around the consequences of proposed price increases or around the environmental and price implications of proposed programmes. There is plenty of opportunity for everybody to input to the process. As you can imagine, people are not slow to come forward and tell us about their concerns.

Rob Gibson: I am intrigued by your comment that the Ofwat board tries to make decisions that are politically sound as well as trying to deliver effective outcomes. Given that you interpret ministers’ indications of what should happen, how are you dealing with the emerging targets and indicators on sustainable development? Your submission discusses the matter in terms of your general aims—thank you for that—but, during the next few years, there will be much more specific indicators and targets for sustainable development.

Tony Smith: I ought to say that the sustainability duty will come into force only when the new water and sewerage regulatory authority is in place, in 2006, so we are not formally obliged to meet that duty at the moment. However, as we pointed out recently in our draft determination document, we already act as if that duty were in place. We take account of the four threads of sustainable development. The water services regulation authority will have to work on that area, because you are right—targets on sustainability will become more specific as we move forward.

We address each of the elements of sustainability as a result of the various aspects of guidance that we get, but as yet there are no specific measures on sustainability. The issues are there—environmental protection and social development are examples of issues that we must take into account. In our draft determination document, we have outlined how we have taken account of each of those elements this time. It will be for the new regulatory authority to consider how that develops over time, in the light of progress in understanding what sustainable development means. It is critical to consider how we trade off the four threads of sustainable development against each other. We still have thinking to do on that, in preparation for the establishment of the new authority.

Rob Gibson: I want to explore a little more of your thinking on water conservation, how you have tackled that this time and how you think that progress on that will be made.

Tony Smith: As you will recall, leakage is quite a big issue. In the mid-1990s, the water industry, prompted by Ofwat, put in place a set of targets—
which it is largely achieving—which have resulted in, for example, a reduction of well over 25 per cent in the peak levels of leakage.

There is also the subject of metering. I think that it is true that there are many more meters in England and Wales than there are in Scotland. Although we would not advocate universal metering, we would support certain customers opting for meters and the selective use of meters in particular circumstances.

We operate in a way that we think seeks to conserve water, but we take account of the economics of the situation—as we should do, given our role. For example, we do not want leakage to be reduced at all costs; we want it to be reduced to the point at which it would be uneconomic to go any further.

It is interesting that, under the Water Act 2003, the secretary of state will have a role to play in achieving water conservation; I think that he or she will have to produce a report every three years on what actions have been taken to do that.

Rob Gibson: That was useful; thank you.

The Convener: That was helpful. Although we focus on water conservation, there are obviously other issues that we should think about when we consider sustainable development, such as the use of energy for processing water. It gets very difficult to work out the trade-offs between the different decisions. We are keen that such trade-offs are made and that they are part of the process. We do not want it to be assumed that such matters are being considered; we are eager to find out where that is put into the system. Everyone has to do that in different ways. We would not expect the WIC or the minister, who sets policy objectives, to do that to the same extent. It is a question of ensuring that sustainable development is taken into account throughout the process. That has been our concern when we have discussed whether there should be a statutory function at the regulatory end.

Tony Smith: That is a political choice. One could give each of the regulators—the quality regulators as well as the economic regulator—a specific role. That could produce a healthy tension between the regulators, who have a narrow set of objectives and whose activity has limited scope, and the ministers, who set the objectives. Alternatively, one could get the regulators to share a common agenda by giving them a broader set of complementary duties. That choice exists.

The Convener: That is a very concise way to put it, and I think that we shall put that to the minister next week when we have him before us.

I would like to ask John Banfield about two angles on the same question, which we have heard from a number of witnesses. If we are talking about the Scottish water industry, why should we go to the United Kingdom Competition Commission as a last port of call on competition issues? That question was raised both by a large company and by those representing consumers, and they came at it from two different angles. There is a general sense of concern about how, as an overarching UK organisation, the Competition Commission can be in tune with the policy issues and the reality on the ground in Scotland. There is also concern about the whole issue of competition, as there will be different regimes operating to slightly different policy objectives.

There is a concern that, because England and Wales is a bigger area, that would shape the Competition Commission's views in considering decisions in the Scottish water industry. Some people fear that that would push us down the route towards greater privatisation than is necessarily wanted in Scotland. I am putting to you what has been said to us, and I would like some reassurance from you. Do you think that those are fair concerns? How would you attempt to reassure people that they will not be a problem?

John Banfield: They are understandable questions. We are quite used to dealing with Scottish references. We have done quite a few over the years and I have done two in the past two years that solely concerned parts of Scotland, the latest being the bus-rail merger. We have Scottish members. On the specific legal context of any case, we do every regulatory inquiry in the context of the slightly varying sets of statutory objectives that apply in the particular case, so we are broadly adaptable. Nevertheless, there tends to be a common thread in how we approach regulatory inquiries.

We would undoubtedly take evidence and as many views as possible would be invited, and we would have hearings in Scotland. In other water inquiries, we have always had hearings with local consultative committees, and I am sure that we would do that in this case as well. In my view, we would be well aware of the local views on specific issues. On competition issues, we have not actually dealt with water competition cases as such in England and Wales, so we might find that things actually work the other way round if we come across such issues in the Scottish water context before we come across them in an English and Welsh water context. However, every inquiry that we do is done in the context of the specific statutory duties. We would take into account the local context and we would undoubtedly get evidence from the Scottish Executive and from consumer groups.

The Convener: That is helpful. We are all aware that competition policy is set at UK level, but a
clear policy on how the water industry is operated is coming through in the bill that we are debating. It is quite important that that issue is addressed up front and in an open way.

John Banfield: Going through the papers makes it clear that your focus is different from that in respect of other utilities that I have dealt with in other parts of the country, and we would be alert to that.

The Convener: That is useful. I thank both witnesses for their written evidence and for being prepared to come along and answer our questions today.

12:13
Meeting suspended.

12:16
On resuming—

The Convener: We now move to our third panel of witnesses. We shall try to create a bit of sparkiness in the committee, because we have been in session since 9.30 this morning. Our witnesses are Stuart Rolley, senior development manager, and Stephen Hill, development manager, from the environmental team of the Coal Authority. I thank them both for attending.

As with previous panels, we will not hear opening statements from you, but we have copies of your written evidence. We were particularly keen to have you along this morning, because part 3 of the bill has probably had least attention. We had a brief discussion of part 3 last week, when representatives from the Convention of Scottish Local Authorities were here, with regard to the Fife interests, but we want to ensure that we scrutinise that element of the bill more fully.

I think that I should give Mark Ruskell the opportunity to kick off, as he expressed an interest last week in the practical application of the bill, particularly in the area that he represents, Mid Scotland and Fife.

Mr Ruskell: Do you believe that the bill is clear enough in setting out your responsibilities with regard to discharges from mine workings?

Stuart Rolley (Coal Authority): I believe that it is. For some time now, we have had an on-going programme of remediating mine water discharges. There are issues with liability on a site-specific basis, as you would imagine, but our focus is very much on cleaning up mine water pollution. We work closely with SEPA, which provides much of the information on the discharges that it considers are in need of remediating. We use SEPA’s priority list as the basis for our work and cleaning up mine water pollution is very much the focus of that work.

Mr Ruskell: Will the bill affect your relationship with SEPA? I know that, at the moment, you work through a memorandum of understanding.

Stuart Rolley: That is correct.

Mr Ruskell: Will that change in any way?

Stuart Rolley: No, it will continue in much the same way. Until now, we have been working under the auspices of Lord Strathclyde’s statement on the coal industry in 1993-94. The bill gives us a more formal statutory basis for the work that we are carrying out.

Alex Johnstone: Thank you for your submission; I now understand your role much better than I did before.

The one issue that has been brought to my attention, and which I would like to raise briefly, is the compulsory purchase powers. I understand why compulsory purchase powers would be necessary—your submission is very detailed on that matter—but I would like to clarify the nature of what you would be seeking to compulsorily purchase. In the event of access being denied, would you seek to purchase land in order to gain access to a mine, or are we talking about the purchase of abandoned mines?

Stuart Rolley: The mine workings underground are virtually all vested in the Coal Authority, so they are, in effect, our property. Problems occur when the water rises and comes out of those mines and causes pollution. Our preferred way of trying to treat that is by means of a type of reedbed site whereby we can clean up the water. We go through a feasibility process to work out all the possible ways in which we can treat water. As members might imagine, in some circumstances, such as those involving reedbeds and ponds, we need the land to be reasonably flat and close to the discharge. Indeed, when the requirements of a piece of land are very distinctive, we require reasonable amounts of it to construct reedbeds and other facilities to clean up the water.

Alex Johnstone: In this case, we are talking about land to access and perform certain works. I presume that, in the vast majority of cases, agreements can be reached well in advance of compulsory purchase orders having to be made.

Stuart Rolley: Absolutely. We see compulsory purchase orders very much as a last resort. During the feasibility process, we consider all the options, some of which centre on land. However, in some cases, because of geography and the underground situation, we are limited in that respect. It is pertinent to point out that we have been delayed in dealing with two of the most polluting discharges on SEPA’s priority list because we have been unable to gain access to the land.
Alex Johnstone: How likely is it that the power will be used? Are the two cases that you mentioned the only current examples in Scotland?

Stuart Rolley: They are the most pressing cases, simply because they are the worst examples in the country. To be perfectly honest, I think that they are the worst examples in the UK and, under normal circumstances, we would have resolved them. However, because of access problems, we have had to resolve problems further down our list. That said, because we are working on a phased basis, we have not reached the bottom of that list, but I imagine that there will be problems further down it: there always are.

Alex Johnstone: But I am sure that you will agree that the compulsory purchase option can often smooth negotiations.

Stuart Rolley: It helps.

Rob Gibson: Alex Johnstone has asked many of the questions that I wanted to ask. Have you ever had to have recourse to the compulsory purchase option in England and Wales?

Stuart Rolley: No.

Rob Gibson: The compulsory purchase process usually takes quite a long time. Are you prepared to comment on the nature of the powers that might be required?

Stuart Rolley: We are aware that the process can be complicated and long-winded; that is another reason for it being our last resort. However, as has been mentioned, the important point is that we have the powers. People are no longer able simply to say no and to leave the matter at that. We have another option, even though we would not ordinarily choose it.

Rob Gibson: At the current rate, it will take almost 20 years to deal with the nearly 90 discharges that have still to be tackled. Should we not consider introducing enhanced compulsory purchase powers, even if only to persuade people that we are serious about dealing with such matters?

Stuart Rolley: We hope that under our current programme we will complete our work on the discharges by 2015. That is not quite 20 years.

As I have said, the very threat of our being able to use compulsory purchase powers will unlock the majority of situations. I genuinely do not think that we will ever exercise them.

The Convener: In your submission, you say that the extra powers that you have to access land and monitor the situation will help to concentrate landowners’ minds. Is that how you intend to use those powers?

Stuart Rolley: We need to monitor what is happening underground. However, British Coal left us very little information about the underground water situation in some areas, which means that we have to drill boreholes at certain places. As you might imagine, the position of underground workings determines where we can drill boreholes for access. On occasion, we have found it difficult to get a certain piece of land, which has meant that we have had to compromise on where we have positioned the boreholes. Obviously, that also compromises the kind of information that we receive from below the ground, which is not as good as we would like it to be.

The Convener: How does your work relate to SEPA's work as our environmental regulator? Your submission comments that it will take 20 years to deal with some of the pollution problems and says:

“This is not consistent with the … EC Water Framework Directive”.

At what point does a system kick in and say that it must be done faster? You have raised a big issue.

Stuart Rolley: We intend to comply with the water framework directive, and that is why 2015 is an end date for us. The polluting discharges on the list that SEPA and the Environment Agency in England and Wales have identified are programmed to have been processed by that time.

Stephen Hill (Coal Authority): In addition, although the majority of the known discharges will have to be treated by 2015, the underground situations are developing and will develop at different rates. Some might not need anything doing with them until beyond 2015.

The Convener: Equally, they might deteriorate and you would need to work on or monitor them.

Stuart Rolley: That would add to the number.

The Convener: How do you report discharges? To most of us, what you do is new. What is your process for communicating the level of the problem? In the Parliament, we debate environmental justice issues and SEPA bringing cases against companies that pollute the environment. Not a great deal of attention has been paid to that in Scotland in recent years, and what you have said has put it on our agenda.

Stuart Rolley: We are aware that there is a public relations problem. We have six-monthly meetings with SEPA at which we go through what we have done in the previous six months. SEPA sometimes adds items to the programme and sometimes takes them off. At the local level, a planning process accompanies our construction of the schemes and there is advertising alongside that. Beyond that, it is difficult for us to get our work out into the public domain, although we use all the usual publications and take interested people round what we do. We are proud of the
programme, because it has made a real difference in the 10 years that the authority has been around, but we would welcome any suggestions on how to publicise the work more.

The Convener: Have any mine owners or owners of polluted land been prosecuted for not dealing with the problem or not helping you to address the issue?

Stuart Rolley: That is probably a question for SEPA; I do not know.

The Convener: I just wondered whether you were aware of it happening.

Stuart Rolley: Not to my knowledge.

The Convener: Your work is a good way to concentrate the mind, and I know that SEPA has used it as a way of highlighting which companies have not helped them to tidy up environmental pollution.

Nora Radcliffe: You say that anything that you plan goes through the planning process, so I assume that you are not exempt from it.

Stuart Rolley: We have permitted development powers for certain elements, but, in essence, we still go through the full planning process and end up with planning permissions and conditions like everybody else does.

Nora Radcliffe: There is a safeguard in that.

If you drill a monitoring borehole, what is the evidence of the hole above ground? I presume that it does not occupy a big footprint.

Stuart Rolley: Most of the time, a borehole would simply be covered by a grate that we would lift up to get access to it.

Nora Radcliffe: So there would not even be a building above it; it would be only a hole in the ground with a cover on.

Stuart Rolley: Yes, exactly that.

Nora Radcliffe: You talked about how important it is to get access to the roadways, but do you have reasonable plans of the mines with which you expect to have to deal?

Stuart Rolley: Yes, we have. One of the authority’s major functions is to provide information on coal mining, and we have a repository for all the old mining plans from British Coal and way back, so we have access to all available mine plans. As you can imagine, the more modern plans are very accurate and useful because of surveying techniques, but the older the plans get, the more unimpressive and difficult to use they are.

Nora Radcliffe: Are you the holding body for that information?

Stuart Rolley: Yes.

Nora Radcliffe: When new railways, for example, are built, we keep getting nasty surprises, but as you are the repository for such information, anything that comes to light will be fed to you.

Stuart Rolley: In the same way, when somebody buys a house in an old mining area, the mining report that they do comes through us. We use the information that we hold to give them that report.

Rob Gibson: Does the bill go far enough? Is there a need, or is there scope, for similar legislation to be introduced for other types of mine working?

12:30

Stuart Rolley: The authority was set up, resourced and funded on the basis of coal mining pollution. We have plenty to do in dealing with that. If mines other than coal mines were to be considered, resources and budgetary concerns would have to be addressed.

In purely practical terms, the treatment of coal-mine water is similar to that of water from other mines. Our technical knowledge—again, it is something of which we are proud—is nationally and internationally renowned. Many people from various countries visit us to see how we work and what we do. We are quite capable, technically, of taking on other types of mining.

Rob Gibson: Should we be concerned about other types of mine working? Have such concerns reached your horizon?

Stuart Rolley: We consult and work closely with SEPA and the EA and we know that they are concerned about other types of mining. We have no detailed knowledge on the subject as it is outside our remit.

Alex Johnstone: Is it the case that all active mining operations, including opencast mines, fall under the auspices of SEPA and therefore would not be your responsibility?

Stuart Rolley: That is right. In the case of closures post-1999, it is the operator’s responsibility to satisfy SEPA that no pollution will result from the closure of their operation.

The Convener: I thank you both for coming along and helping us to understand how the bill will be enacted and what its impact will be. Your point about the topic’s low profile should be of concern to everybody. It is obvious that, although this is a big environmental issue, it is not as visible as some of the other issues that have come before us. Thank you for answering our questions and for your submission.
That concludes today’s evidence-taking session. Next week, the minister will be before us. Following discussions with the clerks, we have asked the Scottish Parliament information centre to refresh the list of issues on which we might want to focus with the minister. We have covered a huge amount of ground over the past few weeks and we do not want to lose sight of any of the key issues in our questioning of the minister. In addition to looking at the bill, we will look at the consultations on the principles of charging, quality and standards III and the investment programme. The real challenge for us next week will be how to get through everything.
LETTER FROM MINISTER FOR ENVIRONMENT AND RURAL DEVELOPMENT TO EQUAL OPPORTUNITIES COMMITTEE

Thank you for your letter of 30 June regarding equal opportunities issues and the Water Services etc. (Scotland) Bill, which has been referred to your Committee for Stage 1 scrutiny.

The Executive shares with the Parliament and the Committee a strong and clear commitment to equality and to the mainstreaming of equal opportunities issues. The Executive’s approach was outlined in its equality strategy, published in November 2000. This is a long term strategy which recognises that effective change requires equality issues to be built into the policy process from the earliest possible stages, and that responsibility for equality lies with everyone.

The Executive supports the Parliament in its commitment to mainstream equal opportunities issues in all policy areas, and I am pleased to provide answers to the 6 questions you posed, which are set out in the attached Annex. These provide more information about how equal opportunities have been taken into account in all the policy consideration which has taken place prior to introduction of the Bill and will be taken into account when the Bill is implemented.

A key objective of the Bill is to safeguard the Executive’s public health, environment protection and social policy objectives. In the case of the last of these, the Bill will ensure through the provisions on setting charge limits and licensing that customers in parts of the country that are relatively expensive to provide with water services pay the same as customers elsewhere in the country. This will provide protection against discrimination in charging to those living in more remote and rural areas. More generally however, the Executive does not consider that its provisions will affect people differentially on the basis of any of the personal attributes you mention.

ROSS FINNIE

Annex A

Water Services (Scotland) Bill: Equal Opportunities Questions

What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

The Bill aims to strengthen the regulatory framework for the water industry, to ensure that there is a robust and transparent regime that operates in the interests of all customers. It will also provide certainty and stability for the Scottish water industry, in particular through securing Ministers’ public health, environmental protection, and social policy objectives in response to the risks introduced by the Competition Act 1998.

The main provisions of the Bill are intended to:
• Increase accountability and transparency of regulation by re-structuring the office of the current individual regulator as a body corporate, the Water Industry Commission;
• Strengthen the regulatory framework by giving the new regulator powers to determine charges within a policy framework set by Ministers;
• Safeguard public health and the environment by prohibiting common carriage on the public water and sewerage networks;
• Safeguard social policy objectives by prohibiting retail competition for domestic customers; and
• Provide a licensing regime to regulate retail competition in the non-domestic sector, to ensure all customers make a fair contribution towards the costs of the public network as a whole.

The desired and anticipated outcome of the policy is that the Bill will provide a strong and highly transparent regulatory framework for the water industry in Scotland, improving understanding of charges and costs at all levels and securing Scottish Water’s effective function at the lowest reasonable cost. This is in the interests of all customers, regardless of any personal factors.

The prohibition on common carriage ensures that Scottish Water will continue the physical provision of water and sewerage services to all household and business customers connected to the public networks, to avoid increased risk to public health or the environment through persons other than Scottish Water introducing water to or draining waste water from the public networks.

The prohibition on domestic retail competition means that local authorities will continue to carry out billing functions for domestic customers on behalf of Scottish Water. This arrangement ensures that water charges broadly reflect ability to pay, by allowing council tax banding and the complex system of discounts which is applied to council tax to also apply to water charges. The Executive’s current consultation paper on Paying for Water Services proposes a more targeted system of discounts for low-income households to further address affordability issues. It is through the prohibition on retail competition for household customers that local authority billing can continue which makes the changes proposed by the consultation possible, given their dependence on detailed information on household circumstances available to local authorities.

The regulatory framework has an effect on water charges for every customer connected to the public networks. Public health and environmental issues affect everyone living in Scotland. The provisions of the Bill are therefore “for” the whole of the population. The Executive’s social policy objectives, as safeguarded by the Bill, are aimed at ensuring that the most vulnerable people in our society can afford this essential service.

Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?
Given that its provisions relate mainly to the regulation of the water industry, the Executive is confident that the Bill does not have a differential impact on equalities groups, and therefore it has not been considered appropriate or necessary to carry out research into the Bill’s impact on these groups.

However, the Executive has tried to ensure that the development of the policy generally has been transparent, and to give any member of the public who wants to, the opportunity to comment. During the consultation carried out between October 2003 and January 2004, the consultation document was circulated widely. The main national equality groups, including the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, were asked to comment. In all the responses received, no equality issues were raised. Prior to this, two other relevant consultations were carried out (“The Water Services Bill, The Executive’s Proposals” (June 2001), and “Managing Change in the Water Industry” (September 2000)) but again no relevant concerns were raised.

This consultation will continue as the Bill is implemented and these consultations will be required to be accessible to all equality groups, with any consultation documents available in alternative formats if required. We will also ensure that further consultation documents are sent to equality groups. A key process will be the Commission’s draft determination of Scottish Water’s charges and it is required to consult on this and have regard to the representations received through consultation. The Bill also makes a wide range of requirements for the Commission and Scottish Water to make information available to the public, including publishing the disconnection code, charges schemes, departures from charges schemes and many details related to the licensing regime. Specific provision is made for each case, but broadly these require the Commission or Scottish Water to publicise each action or publication and make arrangements for copies to be obtained or inspected by members of the public, including, naturally, any equality group or member. As provided by the Disability Discrimination Act 1995, the Commission or Scottish Water will be required to make reasonable adjustments for disabled people which may include making documents available in alternative formats if requested or finding other suitable methods of ensuring that disabled people can access information.

The Bill should not be considered in isolation from existing statutory obligations under the Race Relations Act, the Sex Discrimination Act and the Disability Discrimination Act. All three Acts make discrimination in service provision unlawful. The Water Industry Commission and Scottish Water will be obliged to carry out their functions under this Bill in accordance with this legislation.

Has the full range of options and their differential impacts on all equality groups been presented?

The Policy Memorandum that accompanies the Bill considers the impact of the Bill on equal opportunities, human rights and island communities. However, as set out there, since the provisions of the Bill are concerned with the regulation of the water industry in Scotland there is not considered to be any differential impact on
equality groups. The Policy Memorandum also sets out consideration of policy alternatives considered in the Bill’s development, along with reasons why the given policy has been chosen and why the potential alternatives have been rejected. Extensive consultation, including with equality groups, did not raise any concerns or objections relating to potential discrimination or disadvantage on grounds of equal opportunities.

What are the outcomes and consequences of the proposals? Have the indirect as well as the direct, effects of the proposals been taken into account?

The provisions of the Bill have been subject to wide consultation and the outcomes and consequences have been considered in depth. Since the Bill introduces a new mechanism for setting water charges across Scotland, the implications affect the whole population indirectly.

Apart from the high level policy objectives outlined above, the new charge setting mechanism in the Bill ensures that the principle of harmonisation of charges will continue to be adhered to. The alternative to this would be to allow those customers who cost less to provide with water services (e.g. occupiers of premises situated near reservoirs and treatment works) to pay lower charges. However, this would necessarily mean that those who were more expensive to serve, e.g. in remote areas or those served by costly infrastructure, would face increased charges. The Executive considers this inequality undesirable and the Bill provides a statutory basis to harmonisation, requiring that similar customers receiving similar services are not subject to different charges.

The Executive realises that these issues surrounding charging do not specifically address the equality groups which are the focus of the Parliament’s mainstreaming equality policy. Nevertheless, it considers that the policy in the Bill plays an important part in maintaining a fair system of paying for water charges which does not discriminate on the basis of geographical factors or many other factors which affect the costs of individual service provision, e.g. water usage. In this way the Bill protects groups which could be disadvantaged by any alternative policy.

How have the policy makers demonstrated they have mainstreamed equality?
The Executive has endeavoured to be aware of any potential effects for equality groups of this legislation, and consultations have included representative organisations. It has also consulted the Equality Unit in the Executive to ensure our policy complied with the Executive’s equality strategy.

How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?
The Executive will be monitoring the implementation of the legislation as the various provisions come into effect, including key stages of implementation, for example, as places on the proposed Water Industry Commission are advertised (this will follow the public appointments process, as regulated by the Scottish Commissioner for Public Appointments).
LETTER FROM MINISTER FOR ENVIRONMENT AND RURAL DEVELOPMENT TO ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

In advance of my appearance before your Committee on 5 October to give evidence on the general principles of the Water Services Bill, I hoped it would be useful to set out some developments that the Executive is minded to make to the role of the Water Customer Consultation Panels through the Bill.

As you are aware, two significant additions were made to the Bill prior to its introduction, the charge setting process was altered to strengthen economic regulation of the industry, and the Water Industry Commission was proposed to replace the current Water Industry Commissioner. However, the role of the Water Customer Consultation Panels was left largely unaltered. We have been giving further consideration to whether either the changes to economic regulation proposed in the Bill or the developing experience of the Panels since their establishment in early 2003, requires or would benefit from further statutory change.

I have concluded that much of the Panels’ current role is developing sustainably and they are proving a valuable and valued customer representative in the water industry. However, their role could and should be enhanced to ensure they continue to be as effective in the more robust, transparent and accountable regulatory framework proposed in the Bill. I am therefore minded to propose the following policy changes:

(a) Make provision for the Panels to represent non-domestic as well as domestic customers

The Bill makes a clear distinction between domestic and non-domestic customers in respect of retail services, prohibiting retail competition for domestic customers but providing a licensing regime for the orderly provision of retail services by licensed retail providers. Under these proposals, non-domestic customers would receive retail services from licensed retail providers rather than directly from Scottish Water. On this basis, the Bill currently provides for the Panels’ only to represent those customers directly served by Scottish Water. However, this has been given more thought since the Bill was introduced and I am persuaded that it is important that the Panels can, where appropriate, speak for all end-users of the public water supplies. Non-domestic customers will continue to have a keen interest in Scottish Water’s service, given their continuing responsibility for all aspects of distribution and supply. For this reason, we would propose to revisit the amendment the Bill makes in respect of the Panels’ to the Water Industry (Scotland) Act 2002.

(b) Give the Panels a clear point at which to input to Ministers’ consideration of objectives for the industry

I am minded to provide the Panels, in their role representing the interests of all users of the public water and sewerage networks, with a clear opportunity to voice the customer interest in the charge determination process. The improved regulatory framework proposed by the Bill rests on the transparent separation between Ministers setting policy objectives and investment standards for the industry, followed by the Water Industry Commission calculating charge limits to
deliver these objectives. The Panels’ clear interest is in Ministers’ policy objectives and I would therefore propose adding the Panels to the Commission and Scottish Water as the bodies which must be consulted in drawing up the statement of objectives.

**(c) Transfer responsibility for handling customer complaints to the Panels**

Statutory responsibility for customer complaints regarding Scottish Water, once a complaint has been pursued in the first instance with Scottish Water, currently lies with the Water Industry Commissioner. I am minded to transfer this responsibility to the Convener of the Customer Panels. This would mean that the small team in the Commissioner’s office currently responsible for considering complaints would in future sit within the Convener’s office, and he would be responsible for ongoing liaison with Scottish Water to address individual and generic complaints. I believe that this would offer a more coherent split of responsibilities between the Water Industry Commission and the Panels in future, and help to provide clarity for the public as to the Panels’ role as the customer champion.

**(d) Enhance the Panels’ reporting function and put it on a statutory basis.**

To ensure that the Panels have the tools to operate as effectively as possible in the customer interests, I am minded to enhance their current power to publish reports. This might be done by specifying that these reports may be directed to any of Scottish Water’s regulators, to Scottish Water itself or to Ministers, and by requiring the recipient to respond to a report within a reasonable period, for example, six months. Alongside this strengthened reporting power, I think it would be appropriate to provide for the Panels’ current Annual Report to be laid before Parliament reporting on their activities.

These are our policy proposals, but I would be very interested to hear your Committee’s views next week, and will give full consideration to any recommendations regarding the Panels in your Stage 1 Report. Subject to these, it would be my attention to bring forward Stage 2 amendments to achieve these ends.

ROSS FINNIE
On resuming—

**Water Services**

(Executive Consultations)

The Convener: Agenda item 4 is on Executive consultations on water services. Over the past few weeks, we have received background papers and have heard many comments from witnesses in taking evidence on the Water Services etc (Scotland) Bill. In this discussion, we will focus in particular on the Executive’s consultations, “Paying for Water Services: A consultation on the principles of charging for water services”, relating to the period 2006 to 2010, and “Investing in Water Services 2006-2014: The Quality and Standards III Project”.

Members will be aware that, although the Water Services etc (Scotland) Bill will not change the principles of the charging scheme and does not deal directly with investment priorities, the consultations are being conducted in parallel with stage 1 of the bill. I propose to discuss the consultations first and then move on to agenda item 5, to enable the minister to address issues that we want to take up with him about the bill. A couple of weeks ago, we were given an informal presentation by the minister’s officials, who outlined the main points in the consultations. For us, that was a useful backdrop to getting evidence from other witnesses.

Before we take evidence, I ask members to declare for the Official Report any relevant interests that they may have.

As members do not have any relevant interests to declare, I welcome back the Minister for Environment and Rural Development, Ross Finnie, and his officials. Minister, do you want to make any opening remarks about the consultations on Q and S III and the investment programme?

Ross Finnie: I will make some brief remarks only, as members have been given a presentation by my officials. It is clear that the investment programme is hugely complex—indeed, in recent months, we have all become much more aware of the extent and nature of that complexity. When my officials and I looked back at the consultation for the Q and S II programme, we found that nobody—with perhaps one exception—raised issues relating to development constraint as factors that would come into play. Similarly, on technical issues, members will find that even placing more emphasis on odour control did not feature in the earlier consultation. Therefore, in forming the £1.8 billion programme for 2002 to
2006, we were very much driven by a consultation that invited us to place almost the entire emphasis on drinking water quality, on matters relating to improving sewage outfall and on dealing with other regulatory processes.

In the consultation process, I have been, and I am, anxious that there should be a broader and wider understanding of all the elements that properly have to be considered in developing an investment programme and that there should be a better understanding of the hard choices that will have to be made in balancing regulatory requirements, issues such as development constraint and other matters that, in general, members of the public have properly pushed up their agenda. The water team and I have been at pains to conduct consultations and to hold seminars and meetings throughout the country to raise the level of understanding; we have genuinely invited wide participation in the process of bringing forward evidence about the elements that should be included in the investment programme.

There has clearly been a lot of misunderstanding about the basis for charging for water services. I have been extremely anxious that all facets of Scottish society should have the opportunity in the consultation to gain a better understanding of the principles of charging—how it impacts, the basis on which we seek to charge water customers, whether domestic or non-domestic, and how we would do that uniformly on a geographical basis. It is important to acknowledge that water plays a significant part in public health, so there are real issues in ensuring that those who are least able to pay are not debarred from access to water by virtue of their circumstances.

Those are a range of important issues on which we are genuinely consulting. I hope that the process has been much more open, transparent and thorough. We spent much more time on preparing the consultation documents prior to issuing them than we did previously. I hope that we have learned a lot of lessons from the situation that we largely inherited in 1999.

The Convener: The consultations are running concurrently. Is there a logic behind having both discussions together, rather than deciding what is needed and then working out how to pay for the changes?

Ross Finnie: We are not expecting to come to any decisions until well into 2005. Extending the length of time that the consumer had to consider these matters—given the time for an appropriate parliamentary procedure—would have been difficult. There might have been some logic to what you suggest, convener, but it would have been difficult, as the process would have been overly prolonged. We have had good attendance at some of the seminars and meetings that we have called. I rather suspect that if we had had two separate bites at the cherry, we might not have had that same level of active participation in the process.

The Convener: The consultation has obviously concentrated minds. There is a huge amount of potential investment out there. I suppose that the issue is about working out the criteria by which you make decisions about what to put in quality and standards III. Quite a few of our witnesses have raised that issue.

Rob Gibson: I hope that we can establish that, in your role as Minister for Environment and Rural Development, you have some idea of the need for housebuilding in rural areas. You said that the fact that few consultees came up with arguments about development constraints in the last round has led us into difficulties. We all agree about that. However, in your role as the minister dealing with rural development, did you not have any inkling that there would be problems around extending settlements in rural areas?

Ross Finnie: I referred specifically to the evidence submitted by the planning departments of each of the 32 local authorities in Scotland, including those in rural areas. Although we are all conscious of development, the fact of the matter is that authorities’ formal responses to the consultation in 1999 did not draw attention to the potentially serious situations in which we now find ourselves. My response to that has not been to go backwards; it has been to say, “This perhaps points to a flaw in the process in 1999.” That is why, in my opening remarks, I made it clear that we undertook far more preparatory work with local government and other key stakeholders, even in preparing the material that is in the consultation documents. Aside from the factual matters, we sought to ensure that the consultation would have a much firmer foundation and that it would elicit a much more detailed response from the respective planning authorities.

Rob Gibson: The Scottish Water mechanism was new and SEPA’s regulations were being tightened up, but people were perhaps not relating the two. Local authorities might have been slightly underpowered in responding to the number of consultations that were cropping up. Nevertheless, we find ourselves with particular projects being stopped in their tracks. For example, it might not have been possible to build sewerage infrastructure because there was not enough money or because other work needed to be done. Do you think that the backlog that has built up, of which you are well aware through your discussions with Scottish Water, can be tackled as part of the first work undertaken through Q and S
Ross Finnie: There are two difficulties. It is all very well being wise after the event but, as you and I both know, a capital programme does not just take place overnight. Scottish Water has more than 30 projects in the pipeline. Those projects were agreed in principle some time ago and they were worked up as engineering solutions in the relevant groups. Scottish Water has been seeking planning permissions for those developments. We are talking about months and months of planning problems.

I am well aware of the problem that you identify, but we have to be realistic. When we set a capital programme in train, as we have, we cannot just turn it on or off. The crucial thing is that the plan has to be underpinned with seriously good information. What has emerged—regrettably—is that the basic information underpinning the last investment programme was flawed. I am anxious about that. I must confess that I have been much more encouraged by the latest responses of local authorities and other persons who are engaged in strategic, regional and local planning, including those in the private sector. There has been a much greater understanding of the importance of getting the information for the planning process.

Looking forward, I believe that it is crucial that we strike the right balance in Q and S III. Scottish Water, SEPA and others are trying hard, where they can, to address the blockages that exist. In recent months, they have unblocked a number of projects. I am thinking in particular of a situation in Perthshire, which had seemed intractable, but for which a solution was in fact found.

We are not giving up on those projects; we are trying hard to accommodate them. It is extraordinarily difficult, however, to intervene in a capital programme. We cannot stop a process and suddenly turn on a planning permission or a detailed engineering drawing and make that the solution to a technical problem. These things are complex. That is why we must get the consultation process right.

Rob Gibson: So we can expect that some of the things that are blocked by Scottish Water at present could take several years to sort out. For example—

Ross Finnie: I am not into these pejorative terms. We agreed a programme of £1.8 billion. It is all very well to turn round now and say that we should not have done that, but on what basis? We have to move forward.

There are two elements in the capital programme. First, there is capacity, which is evidently an issue for Scottish Water, whether that is capacity in drinking water or in sewage treatment plants. Secondly, some development constraints are not just about capacity; some of them are infrastructure issues and concern specialist developments in particular. One of the suggestions that is out for consultation—it is mentioned specifically in the charging regime booklet “Paying for Water Services” and it is alluded to in the investment programme documents—is that, as the infrastructure benefits are exclusively for the development, the developer should pay for part of them. If that general proposition were to be accepted as a consequence of the consultation, that would go some way towards unblocking one element of the development constraints from which we have come to suffer.

10:30

Maureen Macmillan (Highlands and Islands) (Lab): When we were considering the Water Environment and Water Services (Scotland) Bill, I raised issues that had been raised with me by rural housing associations, which were concerned that they would not be able to develop more rural housing because of constraints on water supply and sewerage. I attended the rural and islands housing associations forum at the weekend. As you may imagine, all the housing associations were extremely agitated about the constraints that still exist in places such as Orkney, Shetland and the Western Isles.

Rob Gibson has gone over some of the general issues that the housing associations have raised; I would like to ask about some of the more focused issues that have been raised with me. First, there is the business of reasonable cost. I am hearing that, where there are small sewage works—say, in the Western Isles—Scottish Water will not take them over because it will not gain enough income from the system. I am talking about small, private works that have been put in by the local people. Might that be looked at?

Secondly, there is the whole business of modelling. In Orkney, for example, Scottish Water has been asked to undertake a modelling exercise to see whether sites can be connected to the present sewerage system. However, I am told that Scottish Water will not even do that, because it is not in the programme. Orkney Housing Association cannot get funding from Communities Scotland to commission a modelling exercise. Could greater flexibility be built into Q and S III so that people can at least plan what will be possible or needed in the future, rather than coming up against a brick wall?

Ross Finnie: I will make a couple of points about the general issue first. I understand that the issue in relation to any sewage works—in the Western Isles or elsewhere—is not about income.
I am pretty certain about that, although Andrew Fleming will check it out. We are pretty certain that the only reason why a works would not be taken over would be that it did not meet the required standard. There would be an issue of Scottish Water spending money to bring it up to the required standard. However, the only reason for a works not being adopted would be that it did not meet the required standard.

I am aware of the difficulties that Orkney Housing Association has had and I have been in correspondence with it. Sadly, there was no real, effective response to Q and S II. The issue is about trying to get greater flexibility under Q and S III. We have fixed the programme and have asked Scottish Water to produce and deliver it; we have not built into that programme a way of saying to Scottish Water that we want things done slightly differently. Therefore, we will have to do something in the next few years to try to get greater flexibility into how we manage things.

Maureen Macmillan: Another issue that the housing associations raised with me was the possibility that, if they could not get Scottish Water to deliver infrastructure, they could do so privately and have, for example, a septic tank connecting three or four houses plus a private water supply. How would that be viewed?

Ross Finnie: I would have to address the specifics of that. The issue of quality and standards is still imperative. If Scottish Water has a responsibility to pay for that work, that would have to be built in. The issue is not about not contracting out the work; it is about ensuring that, in the specific circumstances, both the drinking water quality standard and—especially in the case that you mention—the standard required by the sewage outfall and septic tank regulations are being entirely adhered to. Again, the issue is not about trying to be inflexible; it is about trying to maintain the standards that Scottish Water has to meet on a regulatory basis.

Maureen Macmillan: The other issue that has been raised is how we pay for getting to grips with the development constraints and whether that should be done by cross-subsidy or through general taxation. The consensus of opinion across the housing associations seems to be that it should be done through general taxation. What are your views on that?

Ross Finnie: The consultation paper raises the question of how we address the need for affordable housing as opposed to general housing developments. A clear differential is to be drawn in relation to affordable housing. We need to have a clear view of the way in which we can avoid burdening those developments with the cost of some of the infrastructure. Of course, some developments come in two parts, because it suits the developer both to have some housing that is to be sold for an entirely commercial price and to make provision for affordable housing as part of the development. I have been in close touch with the Minister for Communities in an attempt to ensure that, when we finalise the consultation, due regard is paid to the need for a flow of affordable housing. We need to ensure that the system is not caught up because the business of ensuring that commercial developers pay their fair share of development costs is overly regulated.

Maureen Macmillan: I feel that I ought to leave some room for other members to ask questions on this subject.

Mr Morrison: Scottish Water talked about the need to have clarity about who is responsible for paying for new connections. Will that clarity be provided for in the bill?

Ross Finnie: No. When the consultation is concluded, we will make a statement about the level and the basis of the investment programme. The question whether commercial developers will have to make a contribution will be determined at that point. If there is any third element relating to affordable housing, that will have to be dealt with at that time, because that information has to be set out before the water industry commission first. We will set the objectives for Scottish Water from a political point of view and it will then be for the water industry commissioner to take a view as to how the publicly owned water monopoly can deliver those objectives at the most effective price. That clarity should emerge in the early part of next year.

The Convener: I am trying to see how all the elements join up. It would be a mistake to think of affordable housing as a separate issue, because there could be mixed developments that have affordable housing and private development. That is certainly the solution that is being considered in urban areas. I suppose that the issue relates to your comments about relative costs.

What is the next stage after we have gone through this process? At the end of the consultations on the quality and standards III programme and the principles of charging, you will have a series of bids from local authorities, which will be based on their structure plans and local plans. How will you decide between the bids of local authorities? If a bid is not accepted or if investment for the future is not accepted, will the local authorities be under any obligation not to give development approval for projects that do not have investment coming along behind them? I understand that some local authorities have refused development on the basis of a lack of water and sewerage capacity, whereas other authorities are letting proposals through without any prospect of investment by Scottish Water.
Again, we are talking about clarity and certainty for the future and how these issues slot into the forward planning process, which, historically, has been where decisions about future capacity are taken and where local communities and councils take decisions on the relative merits of projects. What will happen in the future? After the investment framework is established, what happens next? That is a fundamental question.

**Ross Finnie:** I agree. If you read the relevant consultation point in “Investing in Water Services 2006-2014”, you will see that that issue is referred to specifically. Notwithstanding the need for us to have a view about what is manageable and affordable, we point out the real concern that, in determining the bigger picture, we have to settle issues of strategic economic planning and modelling in and across local authorities. We are conscious that in some cases an appropriate amount of economic modelling has not been carried out between adjacent local authorities, particularly on the boundaries. As I said, we refer explicitly to that issue in the document. We are looking to Scottish Water and the local authorities to show a better method of doing that.

A difficult balance needs to be struck in relation to the scale of development. We need to optimise the amount of total investment, to ensure that efficiencies are brought to bear and, in purely commercial developments, to make use of the call on the developer to pay a proportion of the costs, if that is the result of the consultation. After balancing all those considerations, we return to the question what the respective customer can afford.

On the point about priorities, all that I can say is that they will have to be determined some time before we finalise the programme. Although we will give the broad parameters to the water industry commissioner in the early part of the year, it will be some months before we will have the detail of the consultation—in particular, the detail on developments between the local authorities and Scottish Water. By that time, all that we will have done is to narrow the focus slightly; we will not be at the detailed end of the process—the calculations are complex.

**Maureen Macmillan:** The point that I was trying to make on modelling was that, if you want to know what is needed in Q and S III, you should be doing the modelling now, but it seems that Scottish Water, Communities Scotland and the local authorities will not do it. How will the modelling be done? Surely it needs to be done before we know what is needed.

**Ross Finnie:** Some of it is being done. However, I agree that the examples that you cited where it is not being done are disappointing. The local authorities and Scottish Water have a mutual interest in the process. At the end of the day, however, it is the local authorities that grant the planning permissions and development programmes for new housing. We asked Scottish Water to include modelling as part of its costing process. We do not want a repeat of either Scottish Water or the local authorities saying, “It’s no us.” We want to encourage Scottish Water to build into its costings the need for some kind of modelling process.

**The Convener:** It is useful to have that on the record. Over the past few weeks, we have all heard a variety of witnesses say different things in public and private. It will be interesting for us to follow up on that.

**Mr Ruskell:** A couple of weeks ago, we had a useful presentation from your officials about the two consultation processes. However, I came out of it with the distinct impression that, beyond pure compliance with EU environmental regulations, there are no real policy drivers driving sustainable development. Leakage is not really an issue in Scotland because water is relatively plentiful. To what extent are you using the Q and S process to find out how sustainable development indicators—in particular, odour nuisance, water poverty as a proportion of household income, leakage and energy usage—might be barometers of your policy’s progress?

At the briefing, I learned that a large amount of money needs to be invested in our infrastructure to deliver the different sustainable development priorities. However, although the first two indicators involve investment, the final two are about saving money in the long term. I wonder about the extent to which you are working to those indicators to deliver your policies, which I must say do not seem to have been made explicit in the consultation process.

10:45

**Ross Finnie:** I am sorry if they have not been made explicit. Section 51 of the Water Industry (Scotland) Act 2002 places a very clear obligation on Scottish Water to act and operate in a way that is entirely consistent with sustainable development. Given that Scottish Water has to adopt the plans and that it is obliged under the terms of the act that set it up to operate with due regard to sustainable development, energy savings will be made.

We must remember that there is an enormous range of competing demands, which in many areas are driven by sustainability and requirements under the Water Environment and Water Services (Scotland) Act 2003, which seeks to deliver the water framework directive. As a result, Q and S III has to operate within a very robust framework. It might well be that the
headline priorities head towards removing development constraints, although I should say that there is a mutual interest in tackling odour nuisance. The consultation document “Investing in Water Services 2006-2014” covers major elements such as how we develop within the water framework directive, which itself contains a robust series of sustainable aspects that govern developments.

Mr Ruskell: I appreciate all that. However, I suppose that my question is about how you set, see through and monitor priorities. We might be able to follow things through if, for example, the indicator on development constraint were made one of your priorities. How do you set your priorities? I know that it is not an easy task.

Ross Finnie: It is not easy. The priorities will be set by the policy framework for Scottish Water. That framework has two key elements, one of which involves the overarching provision in section 51 of the Water Industry (Scotland) Act 2002. Under that section, in whatever Scottish Water does, it must have due regard to the impact on sustainable development. Moreover, the organisation must also meet a number of clear regulatory requirements with regard to drinking water quality and sewage outfall and disposal. Those aspects make the task of checking regulatory requirements and the time by which those requirements should be met slightly easier, because it is possible to see a phased development. After that, there is a different order of more economically and socioeconomically driven priorities with regard to, for example, affordable housing.

We must ensure that in delivering the whole programme we have due regard to the overarching concept of sustainable development. I do not decry that suggestion at all. The question is about how we get the various huge building blocks into the one mix and make sure that each element goes to make a cohesive whole in meeting the objective that it has been set.

Mr Ruskell: Do you see a role for indicators in that framework?

Ross Finnie: Yes, but again I have to be careful about who does the monitoring and how it is carried out. Leakage is a nightmare that Scottish Water would dearly love not to have, because not only is it an environmentally non-sustainable use of the resource, but it places a severe economic restriction on Scottish Water. It is not about an indicator for Scottish Water; it is about an engineering resource that has to be devoted to elements of the network that are not well mapped. For example, there are one or two areas in which Scottish Water has renewed lengths of the carriage only to discover that although the water flows better when the carriage does not leak, the amount of leakage increases when the pressure is increased a few miles down the road. Parts of the network are in such poor condition that for every bit we do better, there is a downturn on the other side. It is not as if Scottish Water is not trying, but there are areas throughout Scotland where the consequence of renewing piping has an impact further down the chain. It is not about not having enough resources; it is about getting a handle on a water network that has suffered from huge underinvestment.

The Convener: I want to follow up Mark Ruskell’s point about odour issues, on which we took evidence earlier today. The consultation does not estimate the cost of dealing with odour problems at sewage works. We have done a fair amount of consultation on that while following up some petitions that have been presented to the committee. Will you have those costings in front of you when you make the decisions on investment priorities, given the need to invest both to comply with environmental legislation and to maintain the network and to balance that work with an affordable investment package? How will you make that calculation to deal with investment to address the odour problems that have been forced on the committee’s attention?

Ross Finnie: In my opening remarks, I acknowledged that during the past three to four years, people’s expectations of sewage outfall works have risen and so have their expectations that odour nuisance would be addressed in a more satisfactory way. That is why we make that comment in the investment programme.

On the responses to the consultation, we do not have the detailed costings but we are working on them so that before we make a decision we will have a view on the overall level that might be required as part of the quality and standards III programme.

Richard Lochhead: I am sure that the minister shares the objective of ending the situation in which many people, particularly young people, cannot get access to housing in their local community and so have to leave. One of the biggest priorities that I am sure the committee will have identified is that of development constraints. How do you balance the different priorities in your two portfolios? Surely if you want to help rural Scotland, you have to increase the supply of housing so that the value of property comes down. That means giving access to land and water and sewage infrastructure. How will you determine your priorities between your rural development portfolio and your responsibility for water?

Ross Finnie: It does not matter whether a minister holds two portfolios or one, as the Executive has to balance those priorities in any event. All that I can say is that I might be more
acutely aware of the differentials that have arisen in rural areas as a consequence of the historic underinvestment in water. I do not see that there is a conflict.

I readily acknowledge that determining the balance of the Q and S III programme will be extraordinarily difficult. Some of the numbers in the consultation document are frightening. That is why responses to the consultation have been helpful and important, as will be the committee’s report. That information will give us a much better handle on the priorities—including the geographical priorities of different local authorities—before we have to come to a decision. That is why we are engaged in this very full consultation.

Richard Lochhead: To what extent are you working with the ministers responsible for housing and planning? Last week, after the spending announcements, the minister responsible for housing announced that several thousand houses were to be built over the next three or four years. Clearly, those houses can be built only where water and sewerage capacity exists. What is the Executive’s strategic plan? Where will those houses go? That decision will surely be influenced by considerations of where infrastructure exists. How do such considerations affect investment decisions?

Ross Finnie: All the Executive’s work in relation to housing involves close collaboration between the minister responsible for housing, housing officials and planning officials. No one in the Executive wants to work in a separate compartment.

When considering the money available to develop more affordable housing, we have to get the balance of investment right in Q and S III, to ensure that as many affordable houses as possible are built. We also have to consider—this may not have received enough attention before—the priority given to developments to ensure that we have the double benefit of meeting regulatory requirements and meeting development constraint requirements.

Richard Lochhead: Maureen Macmillan spoke about the campaign to use taxation to put in new infrastructure, especially in rural areas, to try to prevent depopulation and the loss of young people. Many parts of Scotland are becoming exclusive to wealthy retired people. The only way of giving such areas an economic future is through Government intervention.

Did the spending review process have any influence on investment in water infrastructure? It may be that more announcements are to be made. Have you sought any subvention from general taxation or the Scottish block to address this urgent situation, which has been neglected for decades? Simply listening to the local authorities that shout the loudest may not work; we have to consider where the real need is and get the cash there as soon as possible.

Ross Finnie: I wholly agree that development constraints are way up on our list of priorities. Richard Lochhead talks about using general taxation, but I am not sure that this is entirely a funding problem; it is more a capacity problem. We have to consider the availability of cash and the availability of expertise to work up the capital investment programme to deliver the volume of investment required. Let us consider the target set for Scottish Water even in Q and S II. When I have attended this committee before, I have referred to the difficulties that Scottish Water encountered in its inheritance from North of Scotland Water, West of Scotland Water and East of Scotland Water. As we speak, Scottish Water is delivering £40 million-worth of pipes and so on a month. We think that the annual figure will be some £500 million. If that happens, it will mean that Scottish Water will be delivering a higher level of water infrastructure investment than any other company in the United Kingdom. I say that not just to pat Scottish Water on the back, but to try to put the scale and nature of the problem into some perspective. It is not only about money but about managing the way in which we raise the level of investment in Scottish Water efficiently, effectively, cost-effectively and qualitatively. There are other issues besides money; it is also about management.

11:00

Richard Lochhead: I ask for a specific answer to my question on whether the budget that was announced last week has had any direct impact on the level of investment that is available for the water industry.

Ross Finnie: Within the settlement, we have secured access to borrowing levels that we believe will be sufficient to enable us to carry out a programme under Q and S III.

The Convener: We have spent most of the morning so far talking about quality and standards III and what we want to add to the list of future development, and it strikes me that we have not spent much time considering the consultation on the principles of charging. However, Alex Johnstone wants to ask about development constraints.

Alex Johnstone: I am surprised that some members who are present believe that huge infusions of public money are the only solution to the problem of development constraints; I will explore another potential route and the possible impact of legislation on it. I am aware that there are different priorities in different areas to facilitate
the development of housing, but in the area from which I come, there are huge constraints, and there seems to be a willingness among developers to become involved in financing the necessary infrastructure to facilitate the developments with which they would like to proceed. My concern is that the opportunities that are afforded by that approach are constrained by the proposals in the Water Services etc (Scotland) Bill to prevent the principles of common carriage from becoming the norm in Scotland. Could we not, by allowing Scottish Water to permit common carriage in certain circumstances in which public benefits could be achievable, allow developers to make investments and become involved in the provision of capacity that could, ultimately, facilitate housing in some of the areas in which development constraints are in place?

Ross Finnie: There are two separate elements to that matter, which calls for some judgment. First, access to carriage is a question of competition, but it is not necessarily the same as increased capacity. Secondly, if we did not use the provisions in the bill but permitted private developers not only to have access but to undertake developments of their choosing, we would have two separate problems because, genuinely and simply, we would be going into open competition in access and carriage. In that case, we would end up with development by private developers and access to carriage by private operators, which takes us back to the circumstances that might have obtained had we not created Scottish Water. There is an insufficient number of customers in the north, the Highlands and Islands, the south and the south-west of Scotland to sustain a water company with an investment programme, so we would be cherry picking and would put at risk the ability to supply a Scottish water service throughout Scotland.

Alex Johnstone: The minister has answered a question that I did not ask. I am trying to examine the opportunities for co-operation between private developers and Scottish Water where development constraints exist and the will exists among the developers to become involved in the provision of infrastructure.

Through the Water Services etc (Scotland) Bill, we are building a system in which decisions on where investment will take place will, in effect, be made centrally. If Scottish Water was granted the power to become involved in joint projects in which the provision of the necessary infrastructure was, in certain cases, the financial responsibility of the developers and the principles of common carriage were employed to ensure that the developers and Scottish Water worked hand in hand to make sure that such provision was made available publicly as well as to the private developments, is there not a way in which we could exploit—

Ross Finnie: As I have already indicated, one must draw a distinction between infrastructure that is required exclusively for a development and infrastructure that is capacity in a sewage disposal works or a drinking water supply works. The consultation on charging suggests that, with infrastructure that is just for a development, we should move from a position whereby all such infrastructure is provided by Scottish Water. The consultation also sets out the proposition that, where infrastructure is required exclusively for a development, there is a strong case for the developer who provides that infrastructure to link it to the Scottish Water network, provided that the development meets the construction standards that are set out in the relevant water industry regulations. My view is that there should be no obstacle to that, but a difficulty arises when there might have to be joint expenditure on capacity for the network in a sewage works or a water supply works because, at that point, a decision would have to be made that might affect the meeting of some other priority or objective in another area. The consultation suggests nothing that would prevent private developers from building the infrastructure for a specific development, provided that there was capacity further down the line.

Alex Johnstone: In many circumstances, that remains the limiting factor.

Ross Finnie: That means that you are talking about joint ventures, because the new infrastructure would not be used exclusively by the developer. In the general framework of Q and S III, choices would have to be made about what priority to give a particular piece of infrastructure. However, there are developments in relation to which the developer could provide the necessary infrastructure.

Alex Johnstone: I will have a final stab at explaining what I am trying to get at.

The Convener: As long as it is a brief stab, because we will come back to the issue when we move on to our stage 1 consideration of the bill.

Alex Johnstone: In relation to such downstream provision, is there not an argument that if the principles of common carriage were employed, they could allow the direct charging of developers for the use of services? In other words, could developers buy the services that they required on a commercial basis?

Ross Finnie: No, because a developer who is not adding to capacity but is only buying services commercially would have to buy them from Scottish Water.

Alex Johnstone: But is the developer not facilitating development over time by providing the necessary money?
Ross Finnie: No. I think that you slightly misunderstand what would happen in such circumstances. There is a distinction between using private money to invest in a specific development and seeking to influence a development priority elsewhere. A developer will certainly not pay 100 per cent of the cost of a shared facility. What you are talking about would involve changing the order of priority in Q and S III. I do not think that one could order priorities according to who was paying the most money.

Alex Johnstone: I think that the minister understands what I was after.

The Convener: We have teased out that issue. Other members might want to read the Official Report to make sense of parts of that exchange.

I remind colleagues that, so far, we have dealt pretty exclusively with the quality and standards III consultation paper. We have highlighted the fact that the improvements will cost more, but we have not focused on who will pay for them. That is dealt with in the consultation paper on the principles of charging, which we should consider before moving on to discuss the bill. Other witnesses have put to us a checklist of issues, including charitable relief, cross-subsidies and local government finance.

The charitable sector made quite a few pleas that the water charge relief scheme is too complex and too onerous for charities. The sector believes that charities do not benefit from the charitable relief scheme because of the way in which the scheme operates. It was put to us directly that the number of charities that benefit is significantly lower than was initially estimated when the scheme was set up. Does the minister agree that the scheme is not operating as intended, or does he have a different interpretation?

Ross Finnie: I do not wholly agree. The scheme was intended to grant relief to smaller charities and voluntary organisations that were in receipt of relief as a consequence of the previous involvement of local government. We have now made it clear that the regime that will be in place will exempt a range of organisations from charges until 2010.

The consultation seeks views on the slightly broader question of to whom exactly we should provide relief and whether it should be up or down that chain. Like the committee, I have received representations from charitable bodies, some of which have asked that the scheme be extended to cover all charities. One difficulty that I have with that request is that although certain charities could undoubtedly do with additional assistance, many of them have a relative state of income that is no better or worse than that of some private individuals. I am concerned lest we end up not directing the benefit to those who are least able to pay. There are also issues with how water costs should be measured and therefore with the burden that any person should be asked to pay.

Extending the scheme would simply mean that someone else would need to pay. We have considered the operation of the scheme. We know that some people are agitated because they feel that they should be included in it, but we have tried to be fair to charities that already benefited from the scheme by indicating that, whatever else we do, they will remain exempt from charges until 2010.

The Convener: The other issues that arose from the consultation paper on the principles of charging were water poverty and cross-subsidies. We received representations on the need for an agreed definition of water poverty, just as a definition exists for fuel poverty. Has the Executive considered whether the assumptions that the Department for Environment, Food and Rural Affairs makes on water poverty should be debated? Also, the consultation paper says that the Executive, Scottish Water and the water industry commissioner are conducting research into cross-subsidies. When might that research be completed and when is it intended to be published? Where is the Executive going on those two issues and how will they fit into the outcome of the consultation process?

Ross Finnie: On the latter point, we anticipate that the work that we have asked economists to undertake will come to a conclusion just before the end of the year. Prior to the consultation process, evidence was put to us that suggested that Scottish Water’s structure still provided a cross-subsidy from the non-domestic sector to the domestic sector. However, that evidence was sketchy at best, which is why we have brought people in specifically to look at that. Whatever their conclusion is, there is no question but that we will have to look carefully at how we can try to unwind those subsidies. It is not something that we would contemplate doing overnight if it was going to have a serious effect on a specific sector.

There are two elements to our looking at and targeting support towards water poverty. I will ask Andrew Scott to comment on the DEFRA scheme in a moment, but there is also the issue of where the support ought to be targeted. At the moment, we use the local authority banding system for partial remuneration, and there are other schemes in the consultation document. We talk about being much more specific and targeting those who are in receipt of benefits. We are trying to concentrate the support very much at the bottom end. Perhaps Andrew Scott can comment briefly on the operation of the DEFRA scheme.
Andrew Scott (Scottish Executive Environment and Rural Affairs Department): It is hard to find an absolute definition of water poverty, but, as a rule of thumb, people who spend more than 3 per cent of their available income on their water bill experience some kind of water poverty. We do not operationalise any definition like that in our paper, as it is quite hard to justify any particular definition. However, the proposals that we set out in the paper are about taking the help that is currently spread across 900,000 customers, which is worth about £75 million, and concentrating it on roughly half that number of customers.

The Convener: I could not hear that. Whom did you say the help is proposed to be concentrated on?

Andrew Scott: The help that we give at the moment is worth about £75 million, and it is generated by recycling charges from affluent houses to less-affluent houses. About 900,000 houses receive that help. The proposal is that that volume of help will be concentrated on about half that number of households in the future.

The Convener: So, some people would be less subsidised and some people would be more heavily subsidised.

Andrew Scott: Yes, that is right.

Ross Finnie: Without a definition, the rule of thumb would be that those who are in receipt of benefit for council tax purposes would be regarded as being most susceptible to water poverty.

The Convener: So, in a sense, there will be winners and losers but a more aggressive targeting of people at the lower end of the income scale.

Ross Finnie: Yes. That is what is proposed in the consultation paper, but we have not finalised our view.

Mr Ruskell: That does not take into account the fact that some people are in waged poverty. They might not be on benefits, but they are on low incomes. The council tax banding system, similarly, does not address the problem of people who are in waged poverty.

Ross Finnie: Someone on a wage can be on council tax benefit. Sorry—I referred earlier to the local authority banding system, but I am talking about council tax benefit.

Mr Ruskell: A water poverty indicator level would pick up not just the people who are on benefits, but those who are in waged poverty. There would be advantages to having a water poverty policy.

Ross Finnie: I do not necessarily disagree with you. However, there are people who are waged but who are in receipt of council tax benefit. I am not suggesting that that system is the perfect model, and I would be interested in alternative views. Nevertheless, that calculation includes people who are in receipt of income but who, without any shadow of doubt, are deemed to be at the lower end of the scale. That is the group that we suggest should be targeted.

The council tax benefit system is not perfect. As we suggest in the paper, however, using that system would, without reinventing wheels, be a method of capturing a class of people who are already regarded as susceptible to poverty and who will clearly be susceptible to water poverty. I would welcome any refinement of, or alternatives to, that suggestion.

The Convener: That is useful, thank you.

Rob Gibson: Our current pricing structure includes a high standing charge. Domestic water charges are based entirely on a fixed charge and charges for larger users have a significant fixed-charge element. The committee has heard that that structure acts as a disincentive to water conservation. Would it be possible for water charges to contain a bigger volumetric element but for us still to protect the social objectives by having a lower unit price for those on the lowest incomes?

Ross Finnie: There are two issues. First, the practical issues relating to the delivering of water mean that the major costs are of a fixed nature. Secondly, the practical problem with moving to a volume-based system would be that we inherited a non-metered domestic sector. Changing to a volumetric model, therefore, would not be quickly achievable. I am not disagreeing with you philosophically; I am merely pointing out a practical difficulty. There are few domestic customers who have meters.

Rob Gibson: We heard that it would cost a lot of money to put meters into domestic premises. However, are you considering moving further towards a system that would allow volumetric measuring or will you continue with the high standing charges approach?

Ross Finnie: As we have said, a huge number of challenges face Scottish Water. It would be lovely to be able to say that, at the same time as meeting those challenges, we could move towards an entirely metered system. For different reasons, the non-domestic sector is keen to move towards greater metering.

At the moment, Scottish Water is unable to work out what the impact of metering would be. I get somewhat exercised about the conservation aspects of metering, but that might lead me to place higher priority on bringing greater metering...
to non-domestic customers than on doing so in relation to domestic customers.

Another issue relates to simply rearranging the total amount that is being charged in an attempt to address the amount that low users are being charged, notwithstanding the fact that the delivery of water—actually getting it to your tap—is the highest part of Scottish Water’s present cost structure.

Rob Gibson: So the matter will not be dealt with in the bill. I suppose that it is more of a matter for the quality and standards III exercise.

Ross Finnie: Yes.

I should point out that the drivers are going in the direction of metering. One such driver is the issue of conservation and use; another is the need to find, over time, a way of more equitably distributing cost. The difficulty is that we do not have the meters.

The Convener: In all the discussions that we have had with witnesses, it has been clear that people think that this issue needs to be addressed. However, it will not be addressed in the bill. If we say that we are going to introduce water metering in five years’ time, we are talking about a phenomenal cost without knowing what the benefits would be. The issue is to do with finding ways of getting people to use water conservation methods. There are all sorts of ways to conserve water and it is important to get them on the agenda.

The water framework directive allows for water charges to be used as an incentive to encourage people to use water resources efficiently. However, the costs and benefits agenda does not seem to have got past water metering. It is important to remember that there might be another way of moving towards volume-based charging. Perhaps we could all reflect on that.

We have just about exhausted the topic of the two consultation exercises. I suggest that we take a comfort break.

11:25

Meeting suspended.

11:33

On resuming—

Water Services etc (Scotland)
Bill: Stage 1

The Convener: We come back fresh to item 5, which is our fifth day of evidence on the Water Services etc (Scotland) Bill. Witnesses have raised a range of issues with us over the past month, of which we have a running checklist that we wish to raise with the minister. This morning is our last evidence session, so we will see how far through our checklist we get.

I welcome the minister and pretty much the same team from the Executive. Minister, do you have any brief remarks? I draw to my colleagues’ attention the fact that we have a letter from the minister on the water customer consultation panels, which everyone should have received yesterday. That is the only extra information that members need for the discussion.

Ross Finnie: The phrase “pretty much the same” rather understates Clare Morley’s appearance at the committee. She is in charge of the bill team. She was sitting behind us, although she is now at the table.

I want to put the Executive’s position on record. The bill is about strengthening Scotland’s water industry. We believe that it takes prudent, precautionary steps to ensure that competition will not disrupt the supply and distribution of water, and to protect vulnerable customers from the potential impact of retail competition in this essential service. We believe that the bill strengthens the regulation of the industry, ensuring that it serves the customers’ interest in a robust, transparent and accountable way.

The bill achieves those objectives in several ways. It clearly prohibits common carriage and retail competition for domestic customers. Without those prohibitions, accountability for public health would be undermined and support for vulnerable households could not necessarily be continued. The bill reforms the charge determination process. It defines with new clarity ministerial responsibilities for policies that shape the water industry, and it strictly defines the economic regulator’s role, which is to price the ministerial investment and charging policies that Scottish Water must deliver. I have indicated that we will balance the water industry commission’s charge determination powers with a right for Scottish Water to appeal to the Competition Commission. That possibility will provide the rigour that the system requires. There will be independent expert investigation of determinations.
This committee recommended the creation of the water industry commission. I believe that that will greatly improve economic regulation. Being led by a body corporate will offer a more accountable and transparent decision-making process. It is essential that the commission can understand and measure ministerial policy objectives and Scottish Water’s functions. It will not be the commission’s job to interpret or judge between the two. The bill makes a clear distinction between setting policy and objectives for the industry—which are for ministers and the Parliament—and the commission’s duty to calculate the resources that those require.

I know that the committee has heard much evidence on the requirement for due regard to be paid to sustainable development—a point that Mark Ruskell raised earlier. I can only repeat that this bill in no way overrides the requirements of the Water Industry (Scotland) Act 2002—it is subsidiary to that act. The act requires Scottish Water to “act in the way best calculated to contribute to the achievement of sustainable development.”

As the convener said, I wrote to the committee yesterday to outline changes to the functions of the water customer consultation panels that I am minded to propose at stage 2. I apologise that those changes were not incorporated in the bill as introduced. However, it has been necessary to reflect on the implications of the bill for the customer panels, and also to listen to stakeholders’ views. I believe that my proposals will offer a coherent strengthening of the customer voice. They will ensure that the panels have a specific input to the ministers who are setting objectives for the industry, and that the panels—representing households and businesses as users of public water and sewerage, and taking on complaints handling and a stronger reporting function—will offer a right of reply. Panels will be able to speak directly to and for customers.

The Convener: I should have said that the committee also has a report from the minister on equal opportunities and the bill, and one from the Finance Committee on the financial memorandum. That information will help us in the preparation of our own report.

Mr Ruskell: Thank you for your statement, minister. You will be aware that the water services regulation authority, which will replace the Office of Water Services in England and Wales, is under an obligation to carry out its duties in the manner which it considers is best calculated “to contribute to the achievement of sustainable development.”

That is a quote from the Water Act 2003.

We have heard a lot of evidence on the water industry commission’s role and powers, and it was said many times that the commission should have a statutory responsibility for sustainable development that is similar to that of its equivalent in England and Wales. Why did you decide not to give the commission that responsibility?

Ross Finnie: That was done because I believe that any operation of the water industry is regulated by the Water Industry (Scotland) Act 2002, and that any policy decision that is taken by ministers and guided by the Parliament on how Scottish Water should operate must be taken within that framework. Delivering sustainability is a policy matter and is not necessarily for a regulator, who should monitor the performance—and particularly the economic performance—of the industry. It is not the function of the commissioner—or the water industry commission, as it will be—to deliver on wider policy objectives. Rather, the commission has a clear role to play in the delivery of economic performance and investment, as set out in the particulars. Policy objectives are a matter for ministers and in setting them ministers must have regard to obligations under the act. There is a distinction. Giving people a job that they are not necessarily qualified to do will not improve matters—indeed, doing so might confuse matters, as it would then be suggested that there are policy objectives that ought properly to be for the commission. I do not believe that that should happen.

Mr Ruskell: I understand what you are saying. It is appropriate that you, as the Minister for Environment and Rural Development, should set the policy direction for the economy regarding water services, the environment and social justice. Those are the three elements of sustainable development that you must put in place in setting a direction. The problem is that the proposed water industry commission will not work to that policy framework. It will work to a policy framework that is about lowering costs to consumers. Therefore, there is a mismatch.

Ross Finnie: We all understand that there is a water industry commissioner because Scottish Water is a monopoly body. Therefore, it is not open to consumers to bring pressure to bear on that body to gain the advantages that they might in an open market. There are good policy reasons for that being the case. It is for the water industry commissioner—among other things—to set objectives within the policy framework to ensure the delivery of a service to a prescribed quality, to deliver quality in other policy objectives and to ensure that, in delivering its investment programme, the body works within efficiency parameters that make it comparable with other operators. Historically, the water industry commissioner has used the operation of similar sized companies in England and Wales as a benchmark.
The question arose from We are talking about the surely we need to join up the three areas. and the regulator should be mindful of it as well. you are pushing. Scottish Water must work to it sustainable development policy framework that bear on Scottish Water, while being mindful of the commissioner, so that he can bring pressure to sustainable development on the water industry surely it is better to place the duty to promote price and working within a competitive framework. context, but from one of lowering the economic coming not from a sustainable development coming from a different policy framework. It is minister, the pressure that is coming to bear is coming from a different policy framework. It is coming not from a sustainable development context, but from one of lowering the economic price and working within a competitive framework. Surely it is better to place the duty to promote sustainable development on the water industry commissioner, so that he can bring pressure to bear on Scottish Water, while being mindful of the sustainable development policy framework that you are pushing. Scottish Water must work to it and the regulator should be mindful of it as well. surely we need to join up the three areas.

11:45

Ross Finnie: But they are joined up. Maybe we are just not going to agree on this. In assessing the financial requirements of Scottish Water, the water industry commissioner cannot disregard the fact that Scottish Water has a clearly stated objective, as set out in section 51 of the Water Industry (Scotland) Act 2002.

In setting the financial framework for efficiency and effectiveness and, more particularly, comparability—because there is no ability to buy out—the commissioner cannot suddenly say, “I want you to be more efficient and more effective and, by the way, I see you’ve listed all these issues. Why are you dealing with them?” “They are sustainable development objectives, and they are set out in your requirements.” “I’m not funding them.” The commissioner cannot do that. He is required to produce financial parameters that bear down on Scottish Water in terms of reasonable efficiencies in comparison to other operators. He is also required to allow Scottish Water to operate a budget that enables it to deliver the objectives that are set by ministers and fulfil the functions that are specified in the overarching act. You cannot allow the commissioner to decide on his own which policy objectives he will feed into the process. He is setting economic parameters for Scottish Water.

The first of your complaints may be that you are not yet satisfied that Scottish Water is delivering fully on its obligations under section 51. I am not going to debate that with you this morning. However, it is under section 51 that sustainable development obligations ought to be raised and addressed within Scottish Water’s programme. It is not the function of the water industry commission to impose them.

Mr Ruskell: We have probably taken that subject as far as we can. The policy framework that is being adopted by Scottish Water, your department and the commission is not coherent. I cannot see why it has been adopted. There is a coherent framework for England and Wales in the Water Act 2003, but not here. I do not see why there is an objection to putting sustainable development in the bill, given that you are saying that the commission will work in due course—

Ross Finnie: It may be that with a privately owned water body you need someone else to impose public policy. We actually have a means of imposing public policy. We have a commissioner operating a publicly owned body, but I would not want there to be confusion between policy objectives and regulatory functions.

The Convener: The question arose from evidence that we received that in England and Wales the regulatory body has that function, whereas our body will not. We can go back to the Official Report, read the evidence and reflect on it.

Ross Finnie: Indeed. We are not comparing apples with apples. We are talking about a body, the policy objectives of which are set by ministers and the Parliament. I am not sure that the situation is comparable with that in England, where the water industry is privatised. I have no intention of going down that road.

The Convener: We are talking about the regulatory function.

Ross Finnie: You may desire to impose a regulatory function because you cannot have it at parliamentary level, but that does not suggest that you need to do it. We have opportunities to set objectives at ministerial level, and to ensure that Scottish Water has a requirement to meet them. I humbly suggest that in such circumstances there is no advantage in confusing a policy objective with the role of the regulator.

The Convener: We will think about that. It was described to us as a bean-counting process. We will want to take a view on whether we think that that should have a wider objective.

Ross Finnie: If you do, you will have to look at wider policy objectives. I do not see why you would narrow the field. That is why I have an objection—
The Convener: I do not think that we see it as a narrowing of the field: we see it as ensuring that all the objectives that have been set are properly addressed. We are talking not about focusing down on one issue, but about the kind of trade-offs that we have talked about before in terms of sustainable development.

Ross Finnie: It is for you to decide, convener, as long as you look not only at the role of the commission, but at the role of Parliament, which has no bearing on the water industry in England and Wales. I think that we have a different structure in Scotland.

The Convener: We will think about that.

Karen Gillon (Clydesdale) (Lab): We got your wee letter this morning, minister. I am interested in where this has come from and where the evidence is. I am particularly interested in where we will take evidence on these changes. I do not know whether we have taken evidence on the kind of changes that you are suggesting. I am concerned that, if the proposals in your letter are carried through, we will give considerable powers to an unelected, unaccountable body. Why have you made that decision?

Ross Finnie: In representations to us from time to time, we have received requests on two grounds. We have heard, first, that the water consultation panels are slightly ineffective and that, secondly, given the fact that the customer base is both domestic and non-domestic, it does not make sense for us to draw an unnatural distinction between the two. We have been asked why domestic and non-domestic customers should not both have access to those panels.

We have also been asked whether a clearer view could be given of the process of the receiving and delivering of a complaint and of the requirement of the commissioner—and, indeed, of Scottish Water—to be seen to be dealing with the complaint. There is a general wish, not necessarily for us to give powers and take away from any parliamentary scrutiny, but simply for us to give the customer an opportunity to ventilate through a proper process and be assured that they can deal with a consultation panel that has statutory backing to ensure that they are going to get an answer. They want us merely to firm up the panels in what is very much a public body.

Karen Gillon: You are giving the panels quite serious powers to deal with complaints, yet they are appointed by ministers and are unaccountable to the public. Or are they elected? How do the panels become accountable to the people whom they are supposed to represent if they are not elected by them?

Ross Finnie: Well, I suppose the same problem is faced by the water industry commission. That is a difficulty.

When we established Scottish Water, we tried to create a structure whereby, instead of the customer feeling that they had to deal directly with the board, which was employed by Scottish Water, there would be groups through which the customer could ventilate either a specific complaint or a range of connected complaints that might be better addressed together and put to the board and senior officials in Scottish Water in a more coherent way. That was the whole purpose of customer consultation panels at the outset. The intention was never to create a different democratic process, but simply to give the individual customer dealing with a range of local complaints a different method of gaining access to Scottish Water. The democratic control of Scottish Water rests with the Parliament.

Karen Gillon: I am slightly concerned by the issue and think that we will have to return to it before stage 2.

Ross Finnie: As a matter of courtesy, I am giving the committee my latest thinking on the issue, and I am happy to give evidence on that.

Clearly, when we present the proposals as amendments at stage 2, there will be opportunities for you to consider them in detail. I know that you have only recently had the letter, but I hope that there will be ample opportunity to consider the proposals. I am certainly not trying to impose them and rush them through, but merely to give an indication of our thinking at as early a stage as I can and to develop the role and powers of the water customer consultation panels.

The Convener: We understand where you have got to in that process. The difficulty is that, when we took evidence on the bill and considered complaints, neither the water industry commissioner nor the water customer consultation panels expressed any enthusiasm for the proposals. We must think about how we take evidence on this point, because we have a tight stage 1 timetable and the Department of Trade and Industry is undertaking parallel consideration of the issue.

There are differences in the energy markets, and you have already made the point about Scottish Water being public, but we are conscious that the bill will set up a different system. We have taken evidence that there may be a need for a complaints process for non-domestic customers, but there may equally be a need for a complaints process for non-domestic customers, so we might want to take written evidence on that before we hit the stage 2 consideration. Once we are into the detailed discussion of the bill, there will be no opportunity for the committee to come up with amendments that it prefers as a way to solve the problem, so we want to take a step back rather than be rushed into a particular outcome.
Ross Finnie: I am happy with that; I am entirely in your hands. I would, however, like to clarify something: I think that you suggested—I do not want to put words into your mouth—that the water customer consultation panels do not want to move in the direction in which I am moving.

The Convener: No. As I recall, we took evidence from the water customer consultation panels that they were not enthusiastic about being a repository for complaints.

Ross Finnie: I take your word for that and do not dispute it, but that comes as a surprise; we have had discussions with the panels, and the convener of the water customer consultation panels indicated quite a different view to us. In fact, he supported a development in the proposed direction. I am not suggesting that he agreed with every detail, but he did agree with the general thrust.

The Convener: That evidence is in the Official Report of the discussions that we have had over the past few weeks with a range of people.

Rob Gibson: To come back to the consumer’s point of view, some witnesses have argued that ministers should not introduce a bill to regulate competition, but should simply be prepared to defend Scottish Water against any legal challenge. In other words, they argue that its services qualify for exclusion from competition for compelling reasons of public policy. Why, minister, have you not chosen to defend your objectives for the industry by that route?

Ross Finnie: On a reading of the Competition Act 1998, it was my view that it was necessary to set out with total clarity and in legislation the precise way in which Scottish Water would operate and not simply await a challenge. I am not clear that, in such a challenge, I could point to the statutory framework within which Scottish Water operates and show why it meets the minimum standards of opening up competition under the Competition Act 1998. I understand the view that we should simply wait for the challenge, but the Water Industry (Scotland) Act 2002 does not indicate that we are compliant with some of the requirements of the Competition Act 1998.

Rob Gibson: We are dealing with an organisation that has hundreds of different sources of water and it is not really comparable to many of the other water companies to which the Competition Act 1998 applies. At this stage, the industry is merely settling down into a structure that might be workable. In other words, this is a catch-up phase. Is that not reason enough to argue that the Competition Act 1998 does not apply in this case?

Ross Finnie: No, I simply do not agree. With all due respect, although our detailed knowledge suggests that Scottish Water is still settling down, that is not relevant in this regard. It is in being and has a constitution and a structure. However, the fact that it falls broadly within the mischief of the Competition Act 1998 is a matter that we must address. The best protection for Scottish Water as a publicly owned company is to make its obligations clear in statute and to outline how it as a corporate body proposes to address the requirements of the 1998 act. That clarity will make it difficult, if not impossible, for anyone to challenge its operations or its compliance with that act’s requirements.

Rob Gibson: Finally, is it the fact that the kind of challenges that might come would be from potential competitors for the delivery of parts of the service? It is unlikely that another Government body would challenge the act. Indeed, it is the people who wish to cherry pick who might question the response that you have given to the Competition Act 1998.

Ross Finnie: They might. There are two points at which such a challenge might be made. Without this bill, a potential competitor, cherry-picker or however you might wish to describe them could raise a challenge, because Scottish Water’s constitution and regulatory framework is otherwise silent on the issue of competition under the Competition Act 1998. I have made it clear that I believe that Scottish Water would be vulnerable to such a challenge in the absence of the bill. Introducing the bill and making it clear that it complies with the minimum requirements of the Competition Act 1998 will greatly strengthen Scottish Water’s position. Under the bill, it will be extremely unlikely that anyone would challenge Scottish Water, which means that we will avoid unnecessary legal and other expenditure defending such actions.

Alex Johnstone: How do you see the role of competition in the supply of water services in Scotland?

Ross Finnie: Politically?

Alex Johnstone: Yes.

Ross Finnie: I do not see any role in that respect.

Alex Johnstone: Do you not see any role for competition at all?

Ross Finnie: We are talking about a publicly owned body that I want to operate at the maximum possible efficiency in order to deliver the highest-quality water and sewerage service at the most efficient price. I appreciate that we face huge hurdles and difficulties in getting there; in any
case, I do not think that you and I are ever going to agree on this matter.

Alex Johnstone: Have you targeted the bill to minimise any interference from existing legislation in how it frames water services in Scotland?

Ross Finnie: To fulfil my clear, unambiguous and public intention of having a publicly owned water company, I have sought to read, interpret and give effect to the Competition Act 1998 in such a way as to minimise potential competition against Scottish Water. I have no need to apologise for that stance, because it is entirely consistent with my public policy objective.

Alex Johnstone: Are you content that the water industry commission, as defined in the bill, will ensure that the water industry in Scotland offers a pricing policy that is competitive with that of comparable organisations south of the border?

Ross Finnie: Yes.

Alex Johnstone: Is that the only provision in the bill that matches your aims with regard to water service provision with the operation of the more competitive marketplace elsewhere in the UK?

Ross Finnie: That is indeed the whole purpose, as I indicated to Rob Gibson. Where there is a monopoly, the consumer is at risk. There might be several ways in which the customer might benefit from public ownership, but one of the risks is that the fact that the service provider is not subject to a degree of competition might ultimately affect the price at which the service is delivered. The purpose of the water industry commission is to bring to bear on the operations of Scottish Water comparative evidence from other similar bodies, in this case mostly located in England and Wales. Scottish ministers, in consultation with Parliament, deliver the policy objectives to Scottish Water. Scottish Water then produces its detailed plans and programmes, which are subjected to critical analysis by the water industry commission to ensure that they are delivered within the policy framework, while meeting all the objectives that are set out and coming in at the most competitive price. That seems to be a perfectly fair way of delivering a public policy objective.

Alex Johnstone: Is that concept of competitive price the only criterion by which water services in Scotland are measured against a more liberated marketplace?

Ross Finnie: No. Most of the other matters that affect and are crucial to the consumer, such as drinking water quality, environmental requirements, and sewage discharge consents, are covered in statute. Scottish Water still has to meet its requirements to have regard to the best interests of the consumer and to public health, and other regulators deal with that. The drinking water quality regulator has a statutory duty to ensure that Scottish Water complies with its requirements with regard to drinking water. SEPA is a regulator with the specific responsibility of ensuring that Scottish Water meets its regulatory requirements. Consumer protection comes from several sources, one of which is the operation of the water industry commission.

Alex Johnstone: The concept of a free—or more liberated—market has the potential to deliver several benefits and competitive pricing is one of them. I understand that you have explained clearly several times this morning that that will be tested against the views of the regulator and compared with other parts of the country. The most basic provision that a marketplace delivers within a market is the matching of supply and demand. Does the regulatory structure make any attempt to mimic that part of a market economy within the water industry in Scotland?

Ross Finnie: No, because demand in Scotland comes from people in the north of Scotland who want to have a public water supply and if it was left to the free market, there would be no such supply. In the south and south-west of Scotland, Scottish consumers demand a water supply and if it was left to the free market, again there would be no such supply. I am not in the business of defending the fact that Scottish Water does not meet the perfect model of supply and demand. I am suggesting that it is in the interests of the Scottish people to have their own water company to ensure that in a country that is 85 per cent rural, those people who live in rural areas are served just as well and to the same standards as are those who live in the conurbations. That is one of the aims of having a publicly owned water supply and I am happy to defend it.

Alex Johnstone: Of course, we are—

The Convener: Just a second, Alex. I do not want to hear a dialogue between you and the minister.

Ross Finnie: We can all join in.

The Convener: No, we cannot all join in. It should be one at a time. We could go on about this endlessly.

Alex Johnstone: I have one final point.

The Convener: It will have to be a short final question.

Alex Johnstone: The minister is telling us that instead of pursuing demand-led provision, he is going to pursue policy on matching supply with demand and on water service provision including sewerage.

Ross Finnie: I do not think that that is true at all. What I am saying is that I am driven not by a
purely economic model but by a socioeconomic structure that requires Scottish Water to ensure that, ultimately, it is able to deliver a uniform quality of water supply and sewerage service throughout the whole of Scotland, irrespective of whether the supply would be supported in an ordinary economic model.

I have no hesitation in saying that that is for the benefit of Scotland. The fact of the matter is that even the publicly owned North of Scotland Water Authority could not have survived much longer. Its customer base was so low that it was financially impossible for it to meet its investment and other requirements in the kind of free-market model to which you allude.

Alex Johnstone: But—

The Convener: No, Alex. I am sorry, but I want to move on. If you have other issues to raise, I am happy to put them to the minister. We have the Finance Committee’s report on the financial memorandum which, at the very least, should surface in public before we consider our report. That committee raised a number of major concerns and I want to give the minister a chance to move on. If you have other issues to raise, I am happy to put them to the minister. We have the Finance Committee’s report on the financial memorandum.

Ross Finnie: I am well aware of the issue. I appeared before the Finance Committee shortly after it received the information. It was based on independent work that was done by a third party in estimating the costs, particularly in relation to the costs of a switch engine, metering costs and other costs. I regret to say that, as we speak and despite my request—I do not know what has happened and I do not want to blame anybody—we have not received the detail of the independent report. Essentially, I am still operating on the information that we discussed with Scottish Water at the outset, which is the information that we discussed with the water industry commissioner and applied in respect of the cost estimates that are set out in the financial memorandum.

Our view was that it would be fairly simple to estimate the water retail market, particularly by comparison with the electricity market in which retailers need to estimate and balance usage every half hour, 24 hours of the day and 365 days of the year—a process that involves over 17,500 usage figures.

We took the view, the commissioner took the view and we understood that Scottish Water initially also took the view that the water sector was a simpler operation than other utilities. Until I have sight of the new evidence, I regret to say that I am unable to comment on it. I am happy to write to the convener on the subject, however.

The Convener: That is helpful. It does not answer the question, but it shows that you are aware of the issue and will come back to us on it.

Ross Finnie: I am deeply concerned that this gap has arisen. I must also confess that I am puzzled about it. Given our close examination of the issues and the non-comparability of the water sector and other utilities, I am left in some doubt as to how the gap has arisen.

The Convener: That clears up the matter for the moment. My other question concerns the regulatory impact assessment in the bill. Estimates of the retail gross margin for the average business customer are given in the region of 15 to 20 per cent of the total bill. However, a series of very different estimates was put in front of the committee. Some witnesses put the margin at between 4 and 8 per cent and others cited the work done by Ofwat, which put the average margin for English and Welsh water companies at 9.6 per cent. That is obviously important information for determining the accurate level of wholesale water charges and an important factor in terms of retail competition, but it is also an important factor in apportioning costs through Scottish Water. If the right margin is not set, domestic customers might have to pick up the tab. Those figures are quite at variance. Could you comment on them?

12:15

Ross Finnie: There are two aspects to that. The question of the different estimates is quite difficult, because they are estimates and no one has done detailed work on that. I concede that, but what are much more important are the points that you made in the latter part of your statement. Before the regime is ever established, it will be critical that both Scottish Water and the water industry commission are in possession not just of estimates—that will not do—but of detailed information. As you say, an inappropriate allocation of cost could have a serious bearing on the situation.

I shall ask Clare Morley to comment on that. You have given a good deal of thought to the nature of
the regime, and broadly we do not disagree with you, but our concern is not so much about differences in the estimates but about the point at which cost allocations are fixed and the impact that that could have on Scottish Water having to recover those costs. In our view, those are the critical factors.

Clare Morley (Scottish Executive Environment and Rural Affairs Department): Getting that allocation of the retail gross margin wrong could have a serious impact on the wholesale price, and we have said that there will be a right of appeal to the Competition Commission for that to be challenged. However, it is important to remember that the water industry commission will be setting charge limits. It is possible that the wholesale price that is set will have to be challenged, but as price limits will be set for all customers, including domestic customers, there will be no room for reshuffling within customer categories by Scottish Water if the charges are wrong. If the charges are wrong, they will have to be contested with the Competition Commission. Increased charges cannot be imposed on domestic customers in an attempt to balance the books. We believe that the bill protects customers—domestic customers in particular—from any adverse impact.

The Convener: I had understood that it would be the domestic customers who could suffer if the margins were set at the wrong level. That is the evidence that the committee heard.

Clare Morley: If the margin was set too large, so that Scottish Water was left bearing more costs than it felt it could, it would be Scottish Water wholesale that would be left short, but it would not be open to Scottish Water to try to make that up through domestic customer bills. It would have to seek an interim determination or challenge the initial determination to get more resources.

The Convener: Would that not undermine Scottish Water’s effective operation as a company?

Clare Morley: Getting the margin wrong would undermine Scottish Water, but there is access to the Competition Commission to appeal that.

The Convener: I am just concerned that there is disagreement at the outset as to where you set the levels. One of the witnesses suggested that Scottish Water was being set up to fail, which was vigorously denied by Scottish Water. However, there is clearly some nervousness about getting those figures right at the outset so that we do not have an unstable organisation. You have, quite rightly, outlined the Government’s objectives and why you are setting out the framework in the bill, but if the figures are wrong, it could become a very difficult issue to resolve.

Ross Finnie: I have to go back to my opening remarks. The estimates are just that. If the bill is passed, the commission, Scottish Water and others will have a considerable amount of work to do not to deliver an estimate but to deal with actual figures. I can understand people perhaps making a speculative comment based on a range of margins, but I do not agree with the comment that Scottish Water is being set up to fail. Nevertheless, people may say, “Ah, well, you just picked one of those numbers.” That is not how the process will work. The commission and Scottish Water will be dealing with numbers. Of course the commission will then be under a slightly different pressure once the bill goes through. Previously, no one with any particular expertise would necessarily be challenging it but, by the time the bill goes through, Scottish Water will have access to the Competition Commission, which will put real pressure on the water industry commission to get things right first time.

The Convener: I am just worried that it will not. It has been suggested that the commissioner’s estimates are out at the moment.

Ross Finnie: They might be, but estimates are estimates. I am suggesting that the commissioner has not spent the amount of time with Scottish Water that will be required to get the allocation right once the bill is through, which I think he would acknowledge, because the process will be different.

The Convener: So what you are outlining will happen after the bill has been approved.

William Fleming (Scottish Executive Environment and Rural Affairs Department): Yes, the commissioner is engaging consultants whose task it is to help him to prepare a means of having better regulatory information for his accounting purposes. That work is in hand. It will enable him to have a much more robust grip on the figures when it comes to doing the proper allocations.

The Convener: The Finance Committee has expressed concern that the water industry commissioner and Scottish Water have different views of Scottish Water’s efficiency. Do you have a view on how that might be resolved?

Ross Finnie: They have disagreements, but I suppose that that is always going to be the case. There is no question about it: Scottish Water after two years is very much more efficient in absolute terms than it was and it feels strongly about that. That is slightly different from the view of the water industry commissioner, who is constantly updating his comparator with reference to the performance of other companies. He might take a view that in relative terms there is still much to be done and he will be redefining his targets. I do not regard it as
entirely alarming for Scottish Water to have a view that it is making real progress and improving its efficiency, while a regulator, looking at the comparative model in order to bring pressure to bear on Scottish Water, takes a slightly different view. I do not regard that as either necessarily unhealthy or something about which we should be too surprised.

Maureen Macmillan: The bill neatly divides customers into domestic and non-domestic. Given that the Justice 2 Committee—the other committee of which I am a member—is considering the Fire (Scotland) Bill, I realise that there is also the fire brigade to consider. We took evidence from fire brigades and it seems that they are responsible for the upkeep of hydrants and maintenance of ring mains, which are maintained by Scottish Water, which then charges the fire brigades. The fire brigades are not terribly keen on that arrangement. Are there other special arrangements with other public services that do not fit into the bill?

Ross Finnie: We are not aware of any. The fire brigades provide an essential service for which hydrants have to be provided. One of the major issues, which I am sure you have heard about in evidence, is the enormous cost of vandalism to hydrants. I might have to check my figures, but I think that in the Glasgow area last year it cost something in the order of £1 million just to repair fire hydrants that had been vandalised.

Maureen Macmillan: Yes, and that cost falls on the fire brigades rather than on Scottish Water, which is presumably why the fire brigades are not terribly keen on it.

Ross Finnie: I rather suspect that Scottish Water would not be too keen to take on the fire brigades.

Maureen Macmillan: I suspect that we have to sort out the vandals.

Ross Finnie: Indeed.

The Convener: Rob Gibson has a brief follow-up question.

Rob Gibson: It is on the same point. The servicing of hydrants has to take place regularly. How often does servicing take place in areas in which there is no vandalism, such as rural areas? Can the fire service rely on the hydrants in areas in which usage and servicing is minimal? You might not be able to provide an answer just now.

Ross Finnie: As Maureen Macmillan said, financial responsibility for hydrants rests with the fire brigades. In certain parts of the country, there are arrangements between the fire authority and Scottish Water and service level agreements set out minimum standards for the servicing that ought to be carried out. That is a matter that can properly be dealt with jointly by the fire authorities and Scottish Water. I do not think that any new provisions are required; certainly, no such provision is needed in the bill.

The Convener: I want to get your views on three issues, the first of which is the charge determination process. The bill seeks to end Scottish Water’s freedom to negotiate individual agreements with customers. Will you outline the reason for that change, which it is clear is an issue for some of the larger-volume customers who, if they do not see a deal on the table, will go automatically to an alternative supplier? There are obviously implications from that for Scottish Water’s revenue, as well as for its existing customers.

Ross Finnie: We are not trying to interfere with business decisions. There are situations in which authorised departures from the charging regime will not be prevented and will be justified. Some large customers in the chemicals and distilling industries have internal arrangements whereby they take steps to reduce the cost of being served by Scottish Water. The bill does not prevent us from reaching different charging arrangements that take cognisance of the fact that those customers have their own water plants to deal with certain aspects of water provision. However, there are situations in which those special arrangements simply require cross-subsidy by other smaller customers. We are trying to be fair to all customers and to secure harmonised charges throughout Scotland.

The Convener: I was thinking of the implications for smaller customers of some of the bigger customers going off network or using alternative suppliers. That could have an impact on Scottish Water’s ability to serve smaller customers for the same cost. I understand the logic of what you are suggesting, but I am asking about possible unintended consequences.

Ross Finnie: There are several other issues that must be taken into consideration. Some of the older arrangements were put in place when the relevant water authority could not have claimed to have been able to deliver the service at anything like an efficient cost. On comparability, the real issue is about driving forward with efficiency in capital procurement, capital delivery and revenue costs within Scottish Water. In my view, the big issue in being able to retain customers is efficiency—efficiency in a broad sense. We do not want to cut across quality and other indicators and factors, such as those that relate to sustainability. Unwinding individual arrangements could not and would not happen overnight; it would have to be done gradually. I cannot remember what period we have set. We could not interfere with existing arrangements—they would have to run their course. We could not break a contract.
The Convener: So no one who has negotiated a deal will lose out immediately; the provision in the bill is just about new deals.

Ross Finnie: Yes.

The Convener: The Federation of Small Businesses suggested that the removal of Scottish Water’s duty to act as supplier of last resort for non-domestic customers could be a problem for people who have previously been declared bankrupt. Potentially, that could prevent new businesses from getting access to water supplies. Will there be safeguards in place to avoid that happening?

Clare Morley: The bill provides for Scottish Water wholesale, rather than Scottish Water retail, to act as supplier of last resort. That is to ensure that Scottish Water retail will be on a level playing field with any other new entrants. The bill includes detailed provisions to ensure that disconnection happens only as a last resort and after a reasonable period. However, the view taken in the bill is that there might be circumstances in which supply should be cut off.

12:30
The Convener: The question was more about supply for new businesses. Would a person who was previously declared bankrupt or had a company that went out of business be given access to the network?

Clare Morley: It will be for the licensing regime to ensure that no customer is put in that position and to ensure that new entrants are under an obligation not to pick and choose merely the attractive customers.

The Convener: So the licensing system will have safeguards to protect potential businesses.

Clare Morley: Yes.

The Convener: My final question is on the new ministerial powers of direction in section 19. What is it envisaged that those powers will be used for? It was suggested to us that section 19 provides ministers with very broad powers, which could perhaps be defined more narrowly. Can the minister give an example of how the power to direct Scottish Water might be used?

Ross Finnie: Following the extensive discussion that has been mentioned this morning, we will arrive at a view on the objectives for Scottish Water’s investment programme and, under section 19, we will instruct and direct Scottish Water to meet those objectives. Following the consultation on the principles of charging, we will direct Scottish Water and the water industry commission to adopt the principles that are agreed in determining final charges. In setting the principles for charging and the objectives for the investment programme, we will have regard to all the factors that have been set out. There will be a distinction between the Executive, which will set the objectives, and Scottish Water and the water industry commission, which will set the framework within which those policy objectives are to be discharged.

The Convener: I want to check whether we are reading the bill correctly, given that we had assumed that those directions would be issued under section 18. I think that the minister’s answer is what we expected, but I am trying to work out which section provides for that set of directions. We had assumed that they were provided for in section 18.

Clare Morley: Section 18 sets out the new charge determination process and it provides that the water industry commission must fully fund all Scottish Water’s functions, including any functions provided for by a direction made under section 19. Section 18 also provides for a statement on charges. The two sections are intricately connected. Section 18 cross-refers to the direction power in section 19.

The Convener: Is that the only reason for the inclusion of section 19? Does section 19 not provide wider powers?

Clare Morley: The powers of direction are mentioned separately because they are inserted into a different place in the Water Industry (Scotland) Act 2002. The bill ensures that all the objectives that are set for the industry through the quality and standards process are functions that have to be funded by the water industry commission.

The Convener: That is a helpful clarification.

Mr Ruskell: I have two questions on reporting back to the Parliament. First, the Water Act 2003 places a duty on the secretary of state in England and Wales to report to Parliament every three years on what steps are being taken to encourage water conservation. Why does the bill not include a similar provision? Secondly, is the minister minded to impose a duty on SEPA to report to the Parliament under part 3 on what progress is being made on coal mine water pollution?

Ross Finnie: I am much more persuaded that Scottish Water should be required to report to the Parliament on its functions and accounts annually. Indeed, the chairman and chief executive of Scottish Water are required to report to the Parliament, presumably through this committee. That is a better way for Scottish Water, which is a publicly owned company. I am intrigued by Mark Ruskell’s passion for importing all the Westminster sections into the bill but, with respect, I am bound to say that the requirement that Scottish Water...
present an annual report to the Parliament and that its officials appear before the Parliament to be subjected to questioning presents an opportunity for monitoring progress that is far more alive and alert than a requirement on a privatised business to report to Parliament every three years.

Under the Water Environment and Water Services (Scotland) Act 2003, SEPA already has powers to address water pollution from disused mines and to ensure the ecological status under the river basin management plans.

**The Convener:** Okay, that is excellent. Our questions on the high principles and minor details have been exhausted, so I thank the minister and his team for taking us through exactly what is meant by the bill. It is helpful to have the authors of the bill explain how its different sections interrelate.
SUPPLEMENTARY EVIDENCE FROM MINISTER FOR ENVIRONMENT AND RURAL DEVELOPMENT

When I appeared before your Committee on 5 October, I undertook to comment on the disparity in cost estimates for establishing the market mechanism and switching engine required for licensed retail competition under the Water Services etc. (Scotland) Bill.

I continue to stand by the estimates I gave the Parliament in the Financial Memorandum which accompanies the Bill: we believe that we have provided for a simple market where costs will be reasonable. I concede that they are estimates and work continues on improving them. In considering the range of possible costs associated with the Bill, however, I must emphasise my belief that the costs, even if they lie at the higher end of this range, are far outweighed by the benefits of this legislation. In strengthening the regulation of the industry, increasing accountability, and providing a robust framework for any competition which may develop, the Bill ensures protection for domestic customers and stability for the future of the water industry in Scotland.

I have now had the benefit of considering the research produced for Scottish Water by IBM Consulting upon which its estimates are based. But the first observation I make is that several of the key assumptions listed in it are at odds with those proposed by the Executive and the Water Industry Commissioner and set out in the Financial Memorandum. These differences go some way to explain the difference in costs.

Our consideration of the research finds that Scottish Water’s figure for establishing market mechanisms and a switching engine is based on very different assumptions about the complexity and division of roles and responsibilities in the market, resulting in estimates of much greater total costs than estimated by the Executive. As I stated when I appeared before you, our belief is that retail competition in the water industry in the absence of common carriage should be relatively simple and requires none of the complex balancing of supply and demand typical of the gas and electricity markets. However, IBM’s costings assume that this type of data does require to be collected and handled, but provides no explanation as to why this is necessary.

My further concern is that in the model envisaged by IBM, the majority of work establishing the market mechanisms appears to be the responsibility of the wholesale part of Scottish Water, whereas the legislation clearly requires this to be carried out by the Water Industry Commission. Given this different allocation of work, which is reflected in Scottish Water’s higher estimate of the cost of establishing the market mechanisms, it is surprising that Scottish Water do not suggest a commensurate reduction in the costs for the Water Industry Commission. In my view, this work would only be required by one party, and for reasons of avoiding serious risk of challenge from new entrants, this must be the Water Industry Commission.
I am sorry that I cannot provide an exact reconciliation of the difference, but I hope that in setting out two reasons to believe the total to be closer to that estimated in the Financial Memorandum, I can reassure your Committee to some extent. It is an issue that I take very seriously and, while I think it likely that there would be always be a range associated with the possible costs, I will continue to examine the issue with a view to narrowing this.

In particular, we have funded work by Shepherd and Wedderburn on behalf of the Water Industry Commissioner to carry out a detailed scoping study on the activity required to establish the licensing framework and the costs of this. This study is due to be completed and published shortly.

I hope this is helpful.

ROSS FINNIE

SUPPLEMENTARY SUBMISSION FROM THE WATER INDUSTRY COMMISSIONER FOR SCOTLAND

I am pleased to have the opportunity to address the Minister’s proposal to strengthen the role of the Water Customer Consultation Panels and in particular to transfer responsibility for complaint handling to the Convenor of the WCCP. This letter outlines:

- Our current process for handling complaints;
- The resources involved in handling complaints;
- Potential advantages for customers in the Minister’s proposals;
- Stakeholder consultation, water environment or local government related complaints; and
- Impact on the proposed Water Industry Commission.

Our current process for handling complaints

We have noted a large increase in the number of complaints from customers of the water industry in Scotland. The following table shows complaints, by category, in the past three years.

<table>
<thead>
<tr>
<th>Complaint type</th>
<th>2002-03</th>
<th>% of Total</th>
<th>2003-04</th>
<th>% of Total</th>
<th>2004-05 (to date)</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water Supply</td>
<td>55</td>
<td>9%</td>
<td>122</td>
<td>10%</td>
<td>42</td>
<td>10%</td>
</tr>
<tr>
<td>Water mains and pipes</td>
<td>62</td>
<td>10%</td>
<td>87</td>
<td>7%</td>
<td>40</td>
<td>9%</td>
</tr>
<tr>
<td>Water Pressure</td>
<td>27</td>
<td>4%</td>
<td>50</td>
<td>4%</td>
<td>16</td>
<td>4%</td>
</tr>
<tr>
<td>Sewerage Service</td>
<td>56</td>
<td>9%</td>
<td>68</td>
<td>5%</td>
<td>48</td>
<td>11%</td>
</tr>
<tr>
<td>Sewers and drains</td>
<td>28</td>
<td>5%</td>
<td>28</td>
<td>2%</td>
<td>13</td>
<td>3%</td>
</tr>
<tr>
<td>Billing</td>
<td>104</td>
<td>17%</td>
<td>208</td>
<td>17%</td>
<td>178</td>
<td>42%</td>
</tr>
<tr>
<td>Charges</td>
<td>211</td>
<td>35%</td>
<td>540</td>
<td>44%</td>
<td>54</td>
<td>13%</td>
</tr>
<tr>
<td>Administration</td>
<td>49</td>
<td>8%</td>
<td>66</td>
<td>5%</td>
<td>27</td>
<td>6%</td>
</tr>
</tbody>
</table>
We use a three-tier process to handle complaints from both domestic and non-domestic customers.

- **Level one complaints:** If a customer has not complained to Scottish Water, we will forward a written complaint to Scottish Water and ask to be copied on the reply to the customer. If a customer telephones our Office and he has not yet contacted Scottish Water, we will ask the customer to telephone Scottish Water. We believe that it is important that Scottish Water has an appropriate opportunity to resolve any customer service issues.

- **Level two complaints:** When a customer has complained to Scottish Water and still believes that he has been unfairly dealt with, we will look at the complaint in some detail. There are normally two potential outcomes: firstly, we may consider that Scottish Water has handled the matter appropriately in which case we will seek to explain this to the customer; secondly, we may consider that the customer does have reasonable cause to be dissatisfied. In this instance, we will write to Scottish Water outlining why we think their previous response was inappropriate. Level two complaints can typically arise for three reasons: firstly, some of Scottish Water’s staff who deal with complaints seem to misinterpret the policies of their organisation (e.g. on response times); secondly, Scottish Water employees have redirected issues relating to charges to this Office, explaining that we approved the scheme of charges; thirdly, there are cases when customer complaints have not been dealt with appropriately either because of administrative failures or because Scottish water has no clear policy on the level of service issue.

In most cases, we are able to resolve level two complaints to the satisfaction of the customer.

- **Level three complaints:** If it proves not to be possible to address a customer’s complaint, we may seek to launch a formal investigation into the handling of the complaint. Fortunately, such cases are very rare.

**The resources involved in handling complaints**

We currently have one dedicated complaints officer. He is managed by the Corporate Affairs Team Leader and assisted by other members of that team. If a complaint involves more specialist knowledge, the Corporate Affairs team can draw on expertise from other areas of the Office (e.g. investment and asset management and revenue and tariffs). We estimate that handling complaints accounts for approximately 1.5 full time equivalents in the Corporate Affairs team, costing c.£45,000, and perhaps as much as a further full time equivalent in terms of additional specialist advice on the issues raised in complaints from elsewhere in the office, costing c.£30,000. The total
budgetary cost of this is therefore approximately £75,000, or 5% of the annual on-going budget of the Office.

Potential advantages for customers in the Minister’s proposals

I support the proposed strengthening of the Water Customer Consultation Panels. In my evidence to the Committee I sought to explain that the determination of prices is essentially a technical exercise that establishes the cost of policy objectives that are set by Ministers. It is important that in setting prices we consider the interests of both all current customers and future customers and set prices that are financially sustainable (i.e. prices that do not favour either this or future generations). When we handle complaints, we have to ensure that we act in the general customer interest. It would not be appropriate for us to take a view on, for example, the social, environmental or public health policies of government.

In other utilities, the complaints handling function has been separated from the price setting function. In the energy industry, complaints are handled by Energywatch. In the water industry south of the border, the recent water Industry Act establishes a separate consumer council for water and formalises the independence of Water Voice from the regulator, Ofwat. Water Voice manages complaints and lobbies on issues that it considers are important to customers. This has recently included questioning the proposed size of the environmental investment programme in England and Wales. Water Voice has questioned whether vulnerable customers should have to face significant increases in bills to finance extra investment in the environment.

I consider that such customer representation is an important function. It is, however, not consistent with the obligation on the price-setting organisation to assess the lowest sustainable price that is consistent with the objectives for industry that are established by Government. Government sets out its policy objectives for the water industry in England and Wales in guidance to Ofwat. I expect to get similar guidance from the Scottish Ministers in January.

The transfer of responsibility for the management of complaints is a sensible move to clarify the roles and responsibilities of both the proposed Water Industry Commission and the Water Customer Consultation Panels. The panels may seek to champion the case of a particular customer or group of customers, whereas the role of the Commission is likely to continue to be the promotion of the general customer interest, in other words ensuring that customers receive the best sustainable value for money possible.

The strengthening of the Panels will give them a clearer and more independent voice in representing customers. The handling of complaints is likely to highlight issues on which they may wish to do further research or to make representations to Ministers. Such representations may favour some customer groups to the detriment of others and it would therefore be appropriate for Ministers to decide whether it was appropriate to change an element of policy. It would, however, not be appropriate either for this Office
or potentially the Commission to make any such representations that favour one customer group at the expense of another.

Stakeholder consultation, water environment or local government related complaints

From time to time we will receive complaints that relate to charging issues that are not within the control of Scottish Water or its economic regulator. These often concern the Council Tax band or the rateable value that has been allocated to a property. In such circumstances an appeal should be directed towards the local council. The broader principles of charging are a decision for Ministers and customers who consider the current charging mechanism to be unjust should draw this to the attention of Ministers. Clearly, it would not be consistent with my current statutory remit to intervene in such circumstances. This could, however, be an issue that the Water Customer Consultation Panels may wish to draw to the attention of Ministers. This would seem to be an additional advantage of the transfer of responsibility for complaint handling.

A second area of potential complaint relates to the management of flooding risk. Scottish Water clearly has a responsibility for the maintenance of the sewerage system, but many flooding incidents are caused by extreme weather conditions and not by an operational failure of the sewerage system. Responsibility for flooding is therefore split between different bodies including Scottish Water, local councils, SEPA etc. It is clear that it may, in some instances, be appropriate for complaints to be handled by Scottish Water, but in many cases responsibility actually for preventing or managing the incident lies elsewhere.

The Water Customer Consultation Panels have recently agreed a Consultation Code for Scottish Water. My office had no role in the development of this code. The code is a useful step forward because the significant investment programme that Scottish Water will have to manage for the foreseeable future will impact local communities and businesses. It is important that there is appropriate consultation about how the activities of Scottish Water will impact the community and that accurate information is given about the duration of any disruption. It is not clear where responsibility for handling complaints about the Consultation Code lies.

My Office currently has responsibility for dealing with customer complaints. However, complaints about poor consultation may be from non-customers or from customers who do not receive benefit from a proposed investment, but who are impacted by the proposed disruption. Given that our responsibilities are to all customers, it would be difficult for us to deal with these complaints. It may be that the concerns of local stakeholders are valid, but that the proposed benefits to other customers are significant. I would suggest that the Water Customer Consultation Panels who were involved in the development of the Consultation Code would be better placed to handle any such complaints.
Impact on the proposed Water Industry Commission

I believe that the proposed strengthening of the WCCP is in the customer interest. It brings us more into line with the situation in other utilities (and the postal services and rail industries). Summary information about the types of complaint or response times is important to our overall measurement of customer service performance. It would be important that the WCCP made this available to the Commission. One possible way forward would be for the level of service report to be a joint publication between the Commission and the WCCP. This would be consistent with the situation south of the border.

SUPPLEMENTARY EVIDENCE FROM THE WATER CUSTOMER CONSULTATION PANELS

Thank you for your letter, and the opportunity to comment on the Minister’s proposals on the future role and remit of the Panels. We welcome the Minister’s proposals, and subject to sufficient resources being made available, we believe that we will be in a position to represent the interests of customers in a much more effective way, and will do so on the basis of evidence based research and analysis. We would be concerned if the Committee were to focus solely on complaints handling which forms an important but relatively small element of the work that we should be undertaking as the customer representative organisation.

Our understanding of the current complaints process is that in the first instance the customer should contact Scottish Water. Both the WIC (Water Industry Commissioner) and the Panels undertake to direct customers to this step where appropriate, if it has not been taken. Where customers are dissatisfied with Scottish Water’s response, they may choose to direct their complaints to a higher level within Scottish Water, or to seek the advice and assistance of the WIC. The WIC then has the power to make representation to Scottish Water on the customer’s behalf and to secure a response from Scottish Water within an agreed timeframe.

We understand that the WIC will be providing the Committee with detail on the levels and complexities of current complaints. This may provide a better gauge for understanding where confusion for customers has arisen. We believe there should be no distinction between domestic and non-domestic customers, and that individual customer complaints fall into either practical or policy complaints. Broadly speaking, the former are the domain of the WIC and the latter that of the Panels. Distinguishing and separating out these issues can often be difficult, and certainly unclear for customers.

We agree that the former (practical complaints) should become the responsibility of the Convener’s office, and the latter remain with the Panels. This brings clarity to the process by ensuring customer complaints of either nature fall within the remit of one body, the customer representative organisation.
We would also want to take the opportunity to review fully the current system in detail, to be confident that, on undertaking complaints handling, the needs and expectations of customers would be met. We would wish to take the interim period before transfer to develop a complaints process that drew from best practice, and to test the adequacy of Scottish Water’s internal complaints procedures. We are aware that the trend in Scotland, England, and Wales shows a modest increase in complaints from customers. That trend needs to be recognised when developing the new system.

For the Convener’s office to take on the role of second tier complaints handling, the organisation would require adequate powers to address complaints, both individual (practical) and generic (policy), on behalf of customers. The Minister’s proposal to extend the Panels’ power to recommend more than covers policy complaints, and secures a response on these matters. Widening the scope to include Ministers, and all industry regulators, recognises that policy complaints often raise issues beyond Scottish Water. To be in a position to make informed and in depth recommendations the Panels need to have an adequately resourced policy research capacity.

For individual practical complaints, a well constructed, easily understood, and timely framework must be built between ourselves and Scottish Water to ensure the best possible outcome for the customer. This would include provision for escalation when required. The Panels are keen for Scottish Water to drive forward its customer service improvements, and enhance its own internal complaints procedures. Scottish Water is best placed to bring about resolution in these cases. The Panels will have a strong role in monitoring Scottish Water’s effectiveness in this regard.

With regard to emergencies, we would expect to respond to any concern about the way in which emergencies have been managed. There would be occasions where we would respond to a direct individual customer complaint, to a request from Ministers, or from a regulator. There may also be circumstances where we would, at our own initiative, enquire into the management of an emergency.

It should be a key indicator of performance for the industry that there is a reduction in volume of complaints and concerns from customers. This may seem obvious in theory, but is often lost in practice. Complaints handling should be viewed within the overall framework of the industry.

The Minister’s proposals to involve us at the policy development stage, and to give us the power to recommend across the industry thereafter, creates many valuable opportunities to advocate the customer interest. We hope that this will lead in time to minimising the need for customers to raise concerns or complaints. We need to have adequate policy and research resources to address the advocacy role.

We would also like to draw the Committee’s attention to the recent research “What customers expect of the Consumer Council for Water”, conducted for
WaterVoice, and enclose a copy of the executive summary. The results provide a good focus for further thinking on future development of the Panels.

SUPPLEMENTARY SUBMISSION (2) FROM SCOTTISH WATER

Thank you for your letter of 7 October 2004 requesting our views on the proposed changes to the powers and functions of the Water Customer Consultation Panels (WCCP).

Scottish Water supports the Minister’s proposals and believes that they will both enhance the voice of the customer and provide clarity of purpose.

With regard to the specific point about complaint handling I would comment as follows –

There is the opportunity to mirror the existing complaints process, simply switching the role of complaint management from the Water Industry Commissioner for Scotland (WICS) to the WCCP. This would provide the quickest and least disruptive solution and would ensure parity with England and Wales.

Under the present agreed protocol Scottish Water is always given the opportunity to resolve the customer issue first i.e. WICS will simply pass on a complaint that has not been referred to Scottish Water in the first instance. This ensures that the relationship between Scottish Water and the customer is maintained and that simple issues can be resolved quickly. If Scottish Water cannot, or does not resolve the complaint and the customer contacts WICS then WICS will investigate the complaint and ask Scottish Water to report on actions taken previously and to explain what action will be taken to resolve the issue, or reasons why a resolution cannot be achieved.

All complaint types follow this protocol, save for general complaints about charging principles, where WICS staff will explain the principles to customers directly, without involving Scottish Water.

All WICS complaint traffic is sent through our Regulatory Mailbox and closely monitored to ensure compliance with the relevant Guaranteed Standard of ten working days.

WICS may well suggest a course of action to Scottish Water in order to help resolve an issue. However, the crucial point is that this is always done before responding to the customer to ensure that all relevant facts are known.

Moving responsibility from WICS to WCCP need not impact the above process, indeed it would be beneficial for WCCP to adopt the WICS approach as that has been developed over a number of years and strikes the right balance between ensuring due process and getting a speedy resolution for customers.
I hope these comments are of assistance to your Committee in its consideration of the proposed changes to the WCCP. I am very happy to discuss our views further with you if this would be helpful.

SUPPLEMENTARY EVIDENCE FROM THE SCOTTISH CONSUMER COUNCIL

Thank you for giving the Scottish Consumer Council (SCC) the opportunity to comment to the Committee on the Minister’s proposed changes to Stage 2 of the Water Services etc (Scotland) Bill. This response is written from the perspective of domestic consumers which is where our remit lies.

In our earlier written evidence to the Committee we highlighted our concerns that the Bill was lacking in its failure to provide for a statutory role for the Water Customer Consultation Panels at key stages within the new regulatory framework. We also emphasised the wider issues that would need to be addressed with regard to the capacity of the Panels to meet the increased expectations of consumers, the Commission and the Scottish Executive within a more transparent and accountable framework. We therefore welcome the Scottish Executive’s general intention to enhance the role of the Panels. Our comments on the Minister’s detailed policy proposals, as set out in his letter to you of 4 October 2004, are detailed below.

Transfer responsibility for handling customer complaints to the Panels

In the event of Scottish Water being unable to resolve a customer complaint, the second avenue of redress for a customer currently lies with the office of the Water Industry Commissioner. We consider this to be anomalous in the context of the Commissioner (and subsequently the Commission)’s responsibility to balance the interests of the general customer base and the industry as a whole rather than advocate on behalf of specific customer groups. A complaints handling function should also be independent of any price setting responsibilities. Based on our own research experience and on research undertaken with consumers by others in Scotland, for example, the recent NHS review of its complaints procedure, we believe that the following general principles should apply in considering complaints handling procedures in the water industry. This view is broadly consistent with the previous work of both the Citizens Charter Complaints Task Force and the Cabinet Office’s Service First initiative.

Stage One: Informal Resolution

We are content with the current wording of the Water Industry (Scotland) Act 2002 which provides that a complaint need not be investigated “if the complainer has not pursued the complaint with Scottish Water.” It is accepted good practice that the provider of a good or a service should respond itself to the concerns of its customers and that it should have an accessible and speedy mechanism for doing so. The onus should always be on Scottish Water to provide optimum customer care by resolving complaints quickly and
informally at the front line, and to provide a better service to future consumers through the lessons learned from its own complaints data.

**Stage Two: Internal Review**
Scottish Water should have in place an internal system of recourse for customers who remain unhappy after Stage One has been exhausted, overseen at a higher level and by members of the management team who have been un-involved in the initial stage. However, it will be important to ensure that having an internal second stage does not result in a protracted and bureaucratic system and that steps have been taken to ensure that it is seen to be fair in the eyes of the consumer.

**Stage Three: Independent Review**
The rationale for the third stage lies in providing consumers with an independent and impartial review of their complaint outwith the court system. In our view, there are two options open to the Scottish Executive:

The first option lies in utilizing the office of the Scottish Public Services Ombudsman (SPSO) in relation to Scottish Water, to both deal with individual, unresolved third tier complaints and investigate general cases of service failure. The Ombudsman’s website lists its powers as extending over complaints about the Water Industry Commissioner (WIC) but refers customers of Scottish Water to the WIC. The responsibilities of the SPSO will have to be clarified in any case in the light of the Minister’s proposed changes to the complaints handling function and the option to use or extend the existing offices and capacity of the SPSO as the third stage should be considered. The SPSO would have the teeth to intervene and require Scottish Water to resolve an individual issue or improve on an aspect of service failure.

The second option lies in transferring the complaints handling function to the Panels, as proposed by the Scottish Executive. This option is equally valid in ensuring an independent and impartial means of review for consumers who remain dissatisfied with Scottish Water’s treatment of their complaint and it would sit well with the Panels’ role as consumer interest advocates.

We do, however, have concerns about the Executive’s view of how this might work in practice, and in conjunction with the additional proposals to enhance the Panels’ role in relation to policy.

The Minister’s letter is limited to stating that the small team in the Commissioner’s office currently responsible for considering complaints would in future sit within the Convener’s office. We understand that the WIC team comprises two people and the WIC office has informed us that it handled 609 complaints in 2002/03 and 1,240 complaints in 2003/04. We would expect this trend to continue to rise as Scottish Water’s public profile increases, the structure of the industry changes and the expectations of consumers rise. Moreover, the scope for achieving real benefits for consumers may well be limited if the Panels are not concurrently bestowed with formal powers of intervention, rather than as, at present, relying on influencing and persuading.
Our work with other consumer organisations such as energywatch has given us a good picture of the resource-intensive nature of complaints handling. The National Audit Office too has published, in the last week, its report of a benchmarking exercise into the efficiency and effectiveness of energywatch and Postwatch. The NAO has reported that, in 2003/04, energywatch incurred direct staff costs of £5.4 million, 42% of its running costs, and Postwatch incurred £2 million, 20% of its running costs, on complaints handling. The report highlighted the considerable amount of staff time spent on complaints that varied in scale and complexity and many of which required considerable effort in resolving the issues with the service provider. The report also highlighted the dangers of staff time being tied up in audit and satisfaction monitoring of the internal complaints handling process rather than the outward effect of the market on the overall consumer experience.

This has been recognised at UK level by the DTI which is proposing to pass responsibility for complaints handling from consumer bodies to Consumer Direct, a new UK-wide information and advice line. The first phase of Consumer Direct was launched in Scotland in July 2004. The DTI report Consumer Representation in the Regulated Industries raises the possibility of a Utilities Consumer Council for industries in reserved areas. The Council would have a central focus on working with policy makers, regulators and service providers on making markets work for consumers with the aim of reducing the number of complaints and preventing the issues that cause them from arising in the first place.

There is therefore a risk that reactive complaints handling could dominate the agenda of the Panels and skew the focus of their work to picking up the pieces when things go wrong. The NAO report highlights the dangers of relying on complaints data to identify problem areas as the number and profile of complaints may not accurately reflect the overall problems and experiences of consumers. This would divert its attention from making the water industry work for consumers from the beginning by undertaking the policy, advocating and influencing role envisaged by the Scottish Executive. Complaints handling by the Panels will only work for consumers if these aspects of the Panels role are given equal, and even greater consideration and allocation of resources.

Consumer organisations need to work from a base of evidence about how the market is working for all consumers. This means undertaking research on what consumers want and need from their water service, gaining further evidence by listening to and engaging with stakeholders, and having the expertise and the resources to develop, with Scottish Water and the Water Industry Commission, a forward, pro-active agenda for the industry.

---


We also believe that the current powers of the Water Industry Commissioner to audit Scottish Water’s complaints handling should be transferred to the Panels as part of their remit to help Scottish Water deliver a better service for consumers and to help tackle the underlying causes of complaints. In England and Wales, this is a statutory function of the consumer body, Watervoice, and it has a formal role into feeding into Ofwat’s performance assessment framework of companies’ performance.

Our position with regard to who should handle complaints can therefore be summarised as follows:

- It would not be appropriate for the Water Industry Commission to handle complaints.
- The independent review mechanism for complaints should lie with either the Panels or the Scottish Public Services Ombudsman.
- The respective merits of both options should be considered. The responsibilities of the SPSO with regard to the new structure of the water industry being proposed by the Bill should be clarified.
- The role of the Panels in handling complaints should not be seen in isolation from, or be allowed to subsume through lack of resources, its wider functions to develop evidence-based policy and to advocate and influence for change on behalf of consumers.
- Systems for sharing information about complaints trends and implications for service improvement between the complaints handler, the consumer body, the service provider and the regulator, will require to be established.

Make provision for the Panels to represent non-domestic as well as domestic customers

The SCC would not support this proposal and refer to this extract from our earlier written submission to the Committee:

“We do, however, welcome the fact that the Bill provides that the Panels will only be responsible for customers served directly by Scottish Water on a wholesale basis i.e. domestic customers. This is in recognition of the fact that non-domestic customers will have a choice of supplier and protection under a licensing regime that will give them recourse to the Commission.

Large business consumers have the buying power and resources to make their voices heard and their interests are likely to vary from, and often be at odds with, those of individual consumers and smaller businesses. However, even small businesses have a clear voice through trade associations that can campaign effectively at strategic level. Individual consumers cannot make their voices heard collectively in this way – their issues and interests will always be diverse.

The operational support which a consumer organisation will provide to an individual, very small business and to domestic consumers may, on the whole, be very similar as they are likely to experience the same service issues.
However, the policy solutions for similar situations could vary for different groups. A consumer organisation which has a remit for both business and domestic consumers will have to be very clear about the impact of its policies for each and the possible tensions which might exist between the different interests. A good example of this is in relation to charges and the extent to which cross-subsidies between different groups exist.

Having responsibility for domestic consumers will target resources towards those most in need of an advocate body”.

Our only additional comment to this position would be in relation to complaints handling. We have no data on the proportion of domestic and non-domestic complaints about the industry at the moment, whether by individuals or resourced representative groups, and the complexity and level of workload each different sector has generated for the WIC’s office. We would want any move to widen the remit of the Panels to include the non-domestic sector to have taken full account of this data. We have some concern that the capacity of the Panels to deal with the needs of individual consumers and vulnerable groups will be compromised in having to respond to the more organized representations of business and the concerns of very large users. Many of these complaints are likely to be focused around the licence conditions set by the Commission and we see potential for a muddying of roles in this respect and for time wasted by the Panels in referring these issues onward to the Commission.

Give the Panels a clear point at which to input to Ministers’ consideration of objectives for the industry

In our written evidence to the Committee, we considered that the consumer voice would be weakened by the absence of the Panels, as statutory consultees, from:

• Section 18 requiring Ministers to consult with the Commission and Scottish Water on its proposed charging policy and requiring the Commission to consult with Scottish Water and Ministers on its proposed charges determination.
• Section 19 requiring Ministers to consult with Scottish Water and the Commission on any additional functions it seeks to confer on Scottish Water.

We are therefore very pleased to see the Minister’s intention to add the Panels to the Commission and Scottish Water as the bodies that must be consulted in drawing up the statement of charging policy.

However, we would still wish to see the Panels having the other powers that we have asked for, particularly in relation to being consulted on the Commission’s proposed charging determination. The Minister’s letter says that the Panels will have a clear interest in policy objectives. Our view is that there is a subsequent, legitimate interest in seeing charges that reflect policy and that this is no different for the consumer body than it is for Scottish Water or Ministers as part of the consultation process.
We commented above about resources for the Panels and their capacity to undertake an enhanced role in policy, as proposed by the Minister. The Panels must be able to give an informed, evidence-based, and therefore credible policy contribution. The position that we outlined in our earlier evidence remains:

“The Panels will face additional responsibilities in responding to a significant increase in consultation documents, participating in probably more numerous ongoing policy initiatives and in identifying the consumer interest across a broader and more complex range of issues, particularly the introduction of competition and changes to the charging regime. Consumers will look to the Panels to articulate the consumer interest in all of these and policy-makers will require the Panels to back up their policies with evidence which goes wider than that obtained through public meetings. The Panels will need the capacity to undertake research and to employ staff with the policy expertise to analyse evidence and translate it into practical policy proposals. The Financial Memorandum of the Bill needs to recognise the fact that the Panels will require to be equipped within the new policy environment, that they too will be expected to become more transparent and accountable, and that they will require additional, probably modest, resources to do this.”

We also stand by our earlier position that, in order to be effective, the Panels will need access to the information they need about the water industry. It is likely that this information will already be possessed by the Commission. There is no point in duplicating work. Therefore, the Panels and the Commission should be required in statute to draw up a Memorandum of Understanding that sets out agreed arrangements with a view to securing cooperation and exchange of information between them and consistent treatment of matters which affect both of them. This is common practice in others sectors including energy and postal services and it ensures that a proper system for the sharing of information is sustainable and not reliant on individual working relationships or changes in policy.

Enhance the Panels’ reporting function and out it on a statutory basis

We fully support enhancing the powers of the Panels to publish reports and to require the recipients to respond. This will bring greater public accountability and transparency for consumers and the public. We again emphasise our concerns about the capacity of the Panels to take on this additional function and do it well without an accompanying recognition that it will require additional resources.

We also fully support the proposal that the Panels should be required to lay their Annual Report before Parliament. This will enhance the accountability of the Panels as publicly-funded bodies.
SUPPLEMENTARY SUBMISSION FROM THE FEDERATION OF SMALL BUSINESSES

Thank you for your invitation to respond to the proposed changes to the Water Customer Consultation Panels (WCCP) outlined by the Minister for Environment and Rural Affairs in his letter dated 4 October. We are pleased to see that our concerns about non-domestic customer representation following the introduction of retail competition have been addressed by the Minister.

I will deal with the Minister’s proposals one by one, before answering some of the specific queries made in your letter:

a) We support the proposal for the panels to represent both domestic and non-domestic customers, and believe it is essential that business customers have an effective customer representative even in a competitive market. It has been suggested in committee discussions that the panels do not want to represent non-domestic customers but Ian Smith, Convener of the WCCPs, has assured us that this is not the case.

b) We agree that there must be a clear mechanism through which the panels can input to minister’s consideration of objectives for the industry. Their role in dealing with all types of customer complaints means that the panels are the most appropriate body to advise ministers on the principles of charging as they affect broad customer groups, and we would recommend that the panels produce some form of annual report on the complaints they have received, with specific purpose of informing ministers’ decision making.

c) Again, we are happy to support this proposal. However, this will inevitably lead to an increase in the workload of the panels and we would seek assurances that they will be adequately resourced to carry out this work.

d) We would agree to the strengthening of the panels’ powers to publish reports and the requirement for the panels’ annual report to be laid before Parliament.

In terms of how complaints are handled, we accept that customer complaints must first be directed to Scottish Water (or other supplier). However, we have particular concerns about Scottish Water’s handling of specific customer complaints and know of various businesses which have had no resolution to a complaint several months after contacting Scottish Water. We therefore believe that a stringent timescale for resolving complaints should be applied before the complainant is able to take his/her case to the WCCPs.

We believe that the Water Industry Commission must have some form of statutory responsibility to consult the Water Customer Consultation Panels before finalising the next year’s charging levels.
Finally, while we are happy with the Minister’s broad proposals, we will of course have to consider the detailed amendments once put before Parliament.

SUBMISSION BY FORUM OF PRIVATE BUSINESS, SCOTLAND

A. Introduction
Water provision is often claimed to be a complicated business that only those with years in water services only can understand. We challenge that and believe that the provision of water through pipes is not intrinsically a complicated technology. What complicates Scottish Water is that there have been years of failure to invest in what is, in some areas, a crumbling infrastructure. Add to that stricter EU standards and a disparate pricing structure in Scotland and what we have is a major management and financial problem.

We are also keenly aware that there was no consultation at all before last year’s pricing changes that resulted in huge increases in some small commercial water users' bills. There was no transparency over this and no real means of appeal against individual price increases.

B. Summary of main comments and recommendations

- We support the recommendation to appoint a Water Industry Commission, but this has to be a new start and not just the old set-up under a new guise.

- Maximum charges should apply ‘across the board.’ In May 2003 ‘revenue caps’ being placed on both domestic and commercial water charges but a maximum charge (about 10%) was only applied to the domestic sector. This resulted in increases for some small businesses rising by as much as 1,000% while no domestic water user faced increases of any more than 10%. Final approval of maximum charges must lie with the Minister who should seek parliamentary approval.

- The Scottish Parliament must not lose control of Scottish Water by delegating control of policy and charging to an appointed and unelected Quango (the Water Industry Commission). Ministers must retain the power to intervene and Parliament the right to force them to do so.

- It is greatly to be regretted that there is no mention made of the obligation to consult. The failure to consult was a major criticism in the Finance Committee’s report and has created something of a crisis in the relationship between the Scottish Executive and Scotland’s business sector. We are aware that the consultation paper Paying for Water Services 2006-2010 says: ‘Consultation is an essential and important aspect of Scottish Executive methods.’ We would like to see this principle enshrined in this legislation.
• We felt that too much power was invested in one person - the WIC - and welcome the move to appoint a Water Industry Commission. However, we are concerned that in para 7, it seems that a Chief Executive can be appointed by the Minister without the endorsement of the Commission, as a whole. We would rather see the Chief Executive appointed by the Commission with the endorsement of the Minister. The Chief Executive must have the full backing of the Commission and, in turn, the Commission the full backing of the Minister.

• Business ratepayers do have the right to appeal against rateable values. No such right exists for water users. This Bill is heavy on offences and penalties but light on the rights of the water consumer. All water users should have the right of appeal against what they believe is unfair billing, service or treatment by Scottish Water. There should be a formal appeals procedure heard by either a Water Consultation Panel or by a neutral tribunal.

• No mention is made of the Water Consultation Panels in the Bill. They provided an excellent service to many distraught business water users. Whilst we can see the need to streamline this body and give it some more ‘teeth’, a consumer watchdog is essential.

C. Detailed analysis of the Water services Bill

Part 1 Water Industry Commission for Scotland

1. Water Industry Commission for Scotland
The present water Industry Commissioner was severely criticised in the Finance Committee’s report, so we support this recommendation, but this has to be a new start and not just what has been in the past under a new guise. This is the chance to put the past behind us.

3. Determinations relating to provision of certain services
We are concerned that the payment of fees [sub para 3(1)(b)(4C) and sub para 3(2)(b)(3C) could inhibit openness and transparency.

Part 2 Provision of Water and Sewerage Services

4. Public water supply system: offences
(2) ‘Any person who uses the public water supply system for the purposes of supplying water to the premises of another person is guilty of an offence.’ Is this not a little harsh? We can see the reason for this where water metering exists, but surely there must be circumstances where this is acceptable, e.g. where the supply to a neighbour’s premises has failed or has developed a major fault and close-down is essential. In such a case, the supply of water is no more than a neighbourly act, not an offence.

We suggest that this is made acceptable in certain circumstances as long as permission from Scottish Water is sought first.
6. **Licence authorisation**

In principle, we are not opposed to this as long as it does not allow 'cherry-picking' to the detriment of the majority of business water users or leave a group of businesses (say in rural areas) disadvantaged.

12. **Water and sewerage subsidiaries**

Again, we are not opposed to this, with the same provisos as above.

18. **Scottish Water's charges**

We do not disagree with what is suggested but urge transparency and full consultation with user representative groups.

29B **Determination of maximum charges**

Maximum charges should apply 'across the board.' In May 2003, a major contributing factor towards the increases faced by many small businesses were created by 'revenue caps' being placed on both domestic and commercial water charges but a maximum charge (about 10%) only being applied to the domestic sector. This resulted in increases for some small businesses rising by as much as 1,000% while no domestic water user faced increases of any more than 10%.

The Scottish Executive does seem to have some confusion between 'revenue' and 'burden' on other matters besides water charges.

The final approval of maximum charges must lie with the Minister who should seek parliamentary approval.

29C **Exercise of functions regarding charges**

The Scottish Parliament must not lose control of Scottish Water by delegating control of policy and charging to an appointed and unelected Quango (the Water Industry Commission).

We were aware of the frustration felt by many MSPs who had folios of complaints about price increases from business constituents yet seemed unable to have any impact on what was happening. The answer we got (and we gather they got) was: "We cannot intervene."

This cannot happen again. People will lose faith in their Parliament. Power and control must stay with the Scottish Parliament. 66% of our members told us so in a recent survey into Scottish Water. Only 9% advocated privatisation.

Ministers must retain the power to intervene and Parliament the right to force them to do so.

29D **Statements regarding charges**

It is greatly to be regretted that nowhere previously or in this section is any mention made of the obligation to consult. The failure to consult was a major criticism in the Finance Committee's report and has created something of a
crisis in the relationship between the Scottish Executive and Scotland’s business sector.

We are aware that the consultation paper *Paying for Water Services 2006-2010* says: ‘Consultation is an essential and important aspect of Scottish Executive methods.’ It clearly wasn’t in the period leading up to the 2003 price increases and we would like to see this principle enshrined in this legislation.

19. Scottish Water’s functions: powers of the Ministers
In addition to those listed, we strongly recommend that Ministers retain the right to intervene at the behest of Parliament.

SCHEDULE A1 Water Industry Commission for Scotland
We felt that too much power was invested in one person - the WIC - and welcome this move. However, we are concerned that in para 7, it seems that a Chief Executive can be appointed by the Minister without the endorsement of the Commission, as a whole.

We would rather see the Chief Executive appointed by the Commission with the endorsement of the Minister.

The Chief Executive must have the full backing of the Commission and, in turn, the Commission the full backing of the Minister.

We have no further points to make on the rest of the Bill as drafted but two further important general points to make: -

- Business ratepayers have the right to appeal against rateable values. No such right exists for water users. This bill is heavy on offences and penalties but light on the rights of the water consumer. All water users should have the right of appeal against what they believe is unfair billing, service or treatment by Scottish Water. There should be a formal appeals procedure heard by either a Water Consultation Panel or by a neutral tribunal.

No mention is made of the Water Consultation Panels. Whilst we can see the need to streamline this body a consumer watchdog is essential.
ANNEX D

OTHER WRITTEN EVIDENCE

SUBMISSION BY AQUAVITAE

As written evidence we are pleased to submit this letter; the enclosed response by Aquavitae and Direct Water to the Consultation Document* on the proposed provisions of the Water Services (Scotland) Bill; and correspondence between Aquavitae and Scottish Water (in paper format)*. We are happy for this letter and the associated documents to be circulated as written evidence to the Committee meeting scheduled for 15 September 2004.

This letter reflects both our own interests as a company intent on holding a licence and trading as a water and sewerage retailer in Scotland and the interests of our current and potential customers. Although invited to give verbal evidence we have recently withdrawn due to the protracted implementation now being proposed. The proposals give an economic advantage to the incumbent over new entrants, are in our view anti competitive and work to the detriment of customers.

The attachments of our correspondence with Scottish Water are submitted as in our view they demonstrate the gaming played to exclude Aquavitae from the market. The incumbent appears to have succeeded in their attempts to slow progress by gaining support for a three-stage liberalisation that excludes Aquavitae from the market for 4 more years while all market intelligence is passed to “Scottish Water Retail” and could be seen as anti competitive, with the added problem of a cushion of funding to establish “Scottish Water Retail” by customers.

Scottish Water have already stated their intent to operate in England and Wales as a “retailer” and this will be welcome to assist with the growth of their market. However customers in Scotland will now clearly fund this expansion without the competitive test of customer retention. A discussion document tabled by Scottish Water (attached) clearly demonstrates an advanced understanding of retail and the margins yet no offer was made to Aquavitae and supports an anti competitive stance.

We have also noted in various sections of data, references to “cherry picking” by new entrants and wish to state that this in our view has been already been completed by Scottish Water who already offer long term contracts to their most profitable customers. Scottish Water may feel the need to respond to this view.

Although Aquavitae are happy with the licensing of new entrants it must be remembered that we already hold comparable licenses for other utilities and this market holds no risks to the quality and quantity of water, it is purely a commodity sale market and the liberalisation holds nothing but benefits for customers as commodity price will be a key component. Therefore while England and Wales liberalise in November 2005 at the 50,000metres³ per year level and seek to re-evaluate the threshold in 3 years Scottish customers will bear the strain of a
monopoly provider who seeks to maintain pricing levels in the home market unhindered.

With no prospect of liberalisation until 2008 Aquavitae have currently withdrawn significant funding proposals in Scotland, which would have supplied resource to current activity in England and Wales to concentrate on more proactive markets. This will we feel act to the detriment of the Scottish economy in the form of higher water charges for all consumers who do have options when seeking manufacturing bases.

Aquavitae are content with the ability of the Water Industry Commissioners Office to segment pricing to enable accurate wholesale prices and this has been demonstrated on a number of occasions commencing with the Strategic Review of Charges 2002 – 2006. What the Office cannot achieve is an economic advantage to customers driven by competition and this will not come to fruition until at least 2008 under current proposals. Further the establishment of a “board” as a first stage under current proposals will attempt to put a small but significant change in motion with no economic or service benefits to customers.

The risks associated with introducing retail competition are very low, and of a completely different order compared with those involved in common carriage or inset competition. In addition our legal advice is that retail competition is already permissible and feasible under UK law. The Water Commissioner for Scotland refers to existing brokerage deals in the document (Strategic Review of Charges 2002 –2006) but we see no appetite to tackle anti competitive behaviour.

Aquavitae have displayed a patient strategy with regard to market entry, however the possibility of expansion and investment in Scotland is now prevented by the proposals and monopolist behaviour, which is detrimental to the commercial well being of many Scottish companies.

* The response from Aquavitae and Direct Water to the Scottish Executive’s consultation on the Bill, and correspondence between Aquavitae and Scottish Water are available from the Clerks on request.

**SUBMISSION BY CITIZENS ADVICE SCOTLAND**

We wish to restrict our comments to one aspect of the bill – that of affordability.

*The present system*

Water and sewerage charges are currently collected through council tax and there is a transitional relief scheme in place to assist with these charges where the bill is more than £240.

*Problems with this system*

It is not targeted at the lowest incomes
A single Income support/Jobseeker’s Allowance claimant receives £55.65 per week. Under the current transitional relief scheme, with it’s £240 threshold, they pay £3.46 per week towards water and sewerage charges, equivalent to 6.2% of their total income. This is an unsustainab le proportion of income to pay towards water and sewerage.

Administration through council tax causes delays, confusion and hardship

As of August 2003, 523,900 households were in receipt of council tax benefit – which equates to 24% of all Scottish households. Of that figure – 345,600 were also in receipt of Income Support or Jobseeker’s Allowance and therefore entitled to full relief from Council Tax, but not water and sewerage.

Delays, problems with administration of council tax and council tax benefit and a lack of understanding of liability for water and sewerage all contribute to council tax arrears. In 2002 almost 140,000 people in Scotland faced some sort of recovery action in relation to council tax and community charge debts. In 2002/2003 the Scottish CAB service dealt with 13,473 enquiries in relation to council tax benefit and a further 6,004 enquiries in relation to tax (mainly council tax) debt.

An East of Scotland CAB reports of an unemployed client in receipt of full council tax and housing benefits. She was about to be re-housed because her current property was damp. She was entitled to a £1,500 home loss grant, but council tax arrears of £735 were to be deducted from this. The client disputed the arrears figure. On further investigation, the bureau established that the arrears amounted to water and sewerage charges for the past four years, plus statutory and legal penalties. The client needs the home loss grant as her belongings have been damaged by the dampness so she is unable to take them to her new home.

It is therefore crucial that the measures contained in the bill and the regulations regarding affordability ensure that there is adequate relief for those on low incomes.

The new proposals

The proposals outlined are to abolish the single adult discount and use the money saved (£75 million) to create a new relief scheme targeted at those in receipt of council tax benefit. Council tax benefit is a means-tested benefit available on a sliding scale for those on low to those on the lowest incomes. Because of this, the proposal provides a very welcome opportunity to create a direct link between level of income and receipt of help with water charges.

The current system of relief is more crude because it is based on council tax banding and an assumption that those with the lowest incomes live in the lowest council tax bands.
Concerns

A major concern about the proposals is that it is not clear what threshold the Scottish Executive might set in relation to the relief scheme.

The threshold at which help is provided under the current transitional relief scheme is £240. That means that those in Band A properties get no help at all and those in Band B get only marginal help.

UK figures from 2002 indicate that 49% of those receiving Council Tax Benefit were in Band A and 24% were in band B. This is therefore an important issue. A relief scheme based on council tax benefit will not address affordability for those on the lowest incomes unless it is available to all bandings.

Furthermore, relief must ensure that those on the lowest incomes do not have to pay up to a high threshold price before receiving help.

The proposals create an opportunity to provide total relief to those on the lowest incomes by enabling those who get 100% relief with council tax benefit to also receive 100% relief in relation to water charges.

However it does nothing to address on-going problems with the administration of council tax. See the CAS report Won’t Pay Can’t Pay (July 2000) for more information, available on www.cas.org.uk. Further, council tax benefit has relatively low take-up rates, especially among pensioners.

The need to tackle water poverty

If additional income is required to finance such a scheme, whether through general taxation or other means, this needs to be considered. A system of Water Rebate, linked to council tax benefit, would ensure that those in receipt of council tax benefit received a rebate to their water bill proportional to their council tax benefit entitlement.

The Executive has pledged to eradicate fuel poverty by 2016. A similar pledge to eradicate water poverty, and concerted efforts to target relief at those on the lowest incomes would be very much welcomed.

A system of relief based on income is welcome, however

- It must be available across all council tax bands
- It must provide significant relief to those on the lowest incomes
- It must therefore be adequately financed
- If it is to be based on council tax benefit then administration must improve
SUBMISSION BY CITY OF EDINBURGH COUNCIL

Planning and Strategy Response to Scottish Executive Consultation Paper “Paying for Water Services 2006-2010” (DRAFT)

This paper describes the Executive’s proposals, included in the Water Services etc (Scotland) Bill, for reforming the economic regulation of Scottish Water and how these will affect the management of the next strategic review of water services.

The Bill itself makes a number of changes to the regulation and provision of water and sewerage services, including amending the system for fixing charges for services provided by Scottish Water. This includes the proposed ending of the current practice whereby the water authorities contribute £1000 to each new property being connected to the system.

In contrast, the Bill also proposes extending the public networks in areas that are currently not served and where the cost of extension though possibly somewhat in excess of the reasonable cost threshold can be justified in terms of improving public health or protecting the environment. The intention behind this proposal is to encourage developments and improvements in rural areas, without incurring disproportionate cost.

However, it is left to this consultation paper to address how the costs of expanding capacity on Scottish Water’s systems should be shared among existing customers and those seeking to develop sites not served at present by Scottish Water.

It proposes that customers would be expected to meet all the costs of maintaining, operating and upgrading Scottish Water’s infrastructure at current levels of capacity, so as to meet the quality standards set by the Executive at the conclusion of Q&SIII. In addition, they would be expected to meet the cost of expanding Scottish Water’s strategic capacity, in terms of developing new reservoirs and treatment works, as these are major, long-term assets that are necessary to secure future services for existing customers, which clearly are not attributable to any single development proposal. However, insofar as expenditure was required to provide additional capacity for specific local developments, those seeking to advance these developments would be expected to meet the cost of the additional capacity, for example by providing local distribution networks, or service reservoirs, or pumping stations.

City of Edinburgh Council’s Response

The fact that the consultation paper addresses the issue of who pays for expanding capacity to accommodate new development is welcomed. This issue of providing additional capacity to support the development strategy of recently approved development plans across Scotland (specifically for City of Edinburgh Council, the Edinburgh and the Lothians Structure Plan 2015) needs to be addressed more seriously. It is the Council view therefore that it should also be addressed in the content of the Water Services (Scotland) Bill as well as in this paper.
The paper’s suggestion that customers meet the cost of expanding the strategic network where it clearly is not attributable to any single development is welcomed. As is the proposal that developers be expected to fund those infrastructure improvements that are directly related to their proposed development.

In contrast, it would be entirely unacceptable to ask developers to fund infrastructure improvements that provide capacity for more than a single development as this would cause problems in a number of areas:

a) linking the contribution being sought with the development;
b) determining how much a contribution should be; and

c) allowing a developer to pay the whole bill for increasing capacity would then mean they could sell on that capacity to the highest bidder which is entirely at odds with a development plan lead system.

An example would be justifying asking developers in, for example, Penicuik to fund the upgrading of the Coastal Interceptor Sewer? It is difficult to prove a direct link to the development and to work out what proportion of the overall works they should pay for.

Therefore need to very clear on when infrastructure becomes “strategic” and is paid for by Scottish Water.

Finally, whilst addressing the issue of who should fund strategic development options is welcomed, this is too little too late for some parts of the Lothians. The Lothian Authorities are experiencing a failure by Scottish Water to advise on the ability of the Coastal Interceptor Sewer to accommodate the development arising from the 1994 Lothian Structure Plan and identified in Local Plans. While Q&SIII will consider investing in capacity to serve new development, this will not be available until at least 2006. If development is unable to proceed now as a result of capacity issues in this part of the Lothians, the implication is that areas elsewhere in the region will come under pressure to accommodate a much higher proportion of the growth. This will probably be in less sustainable and more environmentally sensitive locations and where there are likely to be other significant infrastructure constraints. The presumption is that Ministers would not wish to see development in unsustainable locations, but would wish to support the strategy set out in the Structure Plan which they recently approved.

SUBMISSION FROM SARAH HENDRY, LECTURER IN LAW, UNIVERSITY OF ABERTAY, DUNDEE

I have been following with interest the committee proceedings on stage 1 of the Water Services Bill. I note that at the meeting of 22 September c. col.1219, where Councillor Kennay is giving evidence, there is discussion of SW’s apparent reluctance to adopt SUDS systems where these systems consist of above-ground structures, rather than below-ground pipe work.

In part 2 of the WEWS Act, there is provision for SUDS systems, including in s.33 a statutory definition and in s.30, provision for SUDS systems to be adopted and
subsequently maintained by SW, as long as they are constructed to appropriate standards. By s.30, a new s.14A is inserted into the Sewerage (S) Act 1968 allowing construction standards for SUDS systems to be made by regulation in the same way as it will be possible to specify standards for private sewerage to allow adoption. I am aware that some of part 2 - notably the SUDS definition - was inserted into WEWS at stage 3 and therefore the committee did not have the opportunity to consider those provisions, and may not have been fully aware of s.33. As the definition of a SUDS system is quite broad it could not possibly be read as extending only to underground pipes, which would defeat the purpose (as I understand it) of s.33 WEWS. Perhaps the committee would investigate this matter with the Minister and also query when the Minister envisaged bringing these provisions into force, and developing the associated secondary regulations. As I understand it, s.29 WEWS will also enable the Minister to determine in regulations what is "reasonable cost" for the provision by SW of new sewerage, and this may also be of interest to the committee in its current deliberations over network extensions.

On the same issue, the committee might wish to consider whether there is a problem with the s.33 definition of "public SUDS system" vis a vis the definition of "SUDS system". The purpose of defining "public" SUDS system is to provide for maintenance by SW. However, as the definition stands, a SUDS system serving 1 premises only (eg SW's own HQ at Dunfermline) will not be a SUDS system at all. This was surely not the intention. If the intention was that only SUDS serving 2 or more premises could be vested in and maintained by SW, the reference to "2 or more premises" properly belongs in s.33(1) within the definition of "public SUDS system", not in s.33(1)(a) in the general definition.

Of course it may be that both of these issues reflect the difficulty of making substantive additions at stage 3.

SUBMISSION FROM THE HIGHLAND COUNCIL

1. Introduction

The availability of adequate capacity in water services infrastructure is vital to the continued population and economic growth of the Highlands. Over recent decades, population decline has been reversed in many parts of Highland. If this trend is to continue it needs to be matched by the provision of adequate services. Increasingly, however, development in many parts of the region is constrained by a lack of adequate capacity in water services infrastructure. Currently in 53 settlements (or parts) across Highland there is an embargo on development because of inadequate water services capacity and in a further 61 settlements the service capacity threshold is being approached.

Success in turning around population decline has not, however, been accompanied by a parity in income and quality of employment with many regions elsewhere in the UK. Incomes in Highland are almost 20% below the UK average and costs for many vital services are invariably higher than elsewhere. For these
reasons, the Council is particularly concerned at the affordability of water services charges.

The Council is therefore highly supportive of the proposal that Scottish Ministers will retain full policy control over Scottish Water’s functions. In particular the Council welcomes the power of Ministers to stipulate to Scottish Water additional functions or objectives which are non statutory, to achieve wider policy objectives. To be meaningful, however, there is a need for Ministers to fully address the ‘wider picture’ in setting these ‘additional functions or objectives’. Current thinking, as set out in recent consultation documents, appears somewhat narrow and the Council would wish to take this opportunity to address some key issues in relation to future Scottish Water investment programmes and charges.

2. Economic Development and Regeneration

The Scottish Executive’s recently published National Planning Framework For Scotland (NPFS) identified priorities for investment in strategic infrastructure to enable each part of the country to play to its strengths in building a Scotland which is competitive, fair and sustainable.

The Scottish Executive has as its top priority the sustainable growth of the Scottish economy but the NPFS acknowledges that development in many locations is constrained by a lack of capacity in water and drainage infrastructure. Special mention is made of the Glasgow contribution, North and East Ayrshire, the Falkirk Council area, parts of the Highlands and the South of Scotland.

Scottish Water’s current investment programme for 2002 to 2006 totalling £1.8 billion does not, however, specifically allocate any funding to remove development constraints.

These development constraints not only stifle economic development but they damage the effectiveness of the Scottish Executive’s social justice programme by delaying regeneration initiatives in both urban and rural locations. In Highland, development in 38% of all rural settlements is currently constrained by inadequate water services infrastructure and 3 major regeneration projects involving the Council are potentially at risk.

This difficulty is further compounded in the current investment programme by a decision to strip out growth from all new projects in order to meet a saving of £500 million requested by the Scottish Executive and the Regulator. This effectively imposes a development constraint in those areas to be served by new works under the current programme, with any extension to these works being funded by developers at a higher cost per head than would have been secured by building in a growth factor to the works at the outset. Further in most of the Highlands, housing development is undertaken in groups or small estates rather than by volume builders thus militating against developer contributions which are large enough or at the right time. This does not accord with Best Value principles or contribute effectively to achieving sustainable development.
3. **Paying for Public Infrastructure Investment Programme**

The priority afforded to meeting environmental targets, particularly in relation to European Union Directives, means that there is little opportunity within Scottish Water’s investment programme to remove development constraints. Whilst the Council recognise the need to meet legal obligations it would be interesting to know whether the United Kingdom and Scotland are alone in Europe in finding it difficult within our water services programmes to meet environmental and economic/social objectives and if not what measures other countries have taken.

The current consultation ‘Paying for Water Services 2006-2010’ is, however, based on an agenda that Scottish Water’s investment programme can only be funded through charges to customers and that all borrowing costs need to be fully met by the existing customer base. This raises a number of issues:

**General Taxation**

The Scottish Executive considers that Scottish Water’s main function is to serve customers despite the acknowledgement that it provides a wider public service. Scottish Water is seen by the Scottish Executive in the same light as other utilities services (all, of course, private sector) where customers make direct payment for services consumed. None of these utilities are, however, so fundamentally important as Scottish Water is in delivering Scottish Executive objectives for spatial planning, economic development and social justice. The case for general taxation to contribute to future Scottish Water investment programmes needs to be debated.

**Balance between Charges and Borrowing**

The Scottish Executive in its recent consultation on paying for Water Services in the 2006-2010 programme raises questions over the sustainability of using borrowing to fully fund enhancement of Scottish Water assets. The issue is not over the principle that enhancement of the asset through borrowing is sensible (in that it spreads the cost over the lifetime of the enhancement and it would be unfair to ask a current customer to pay for an asset that may be with us a 100 years hence) but rather that the scale of enhancement work required means that costs will unfairly hit future customers. In contrast, it is argued that funding enhancement of assets from current customer charges would be to the benefit of future customers so a compromise is proposed.

This merits considerable further debate because current customers have a very considerable stake in the future development of their area either directly (development will provide jobs, housing for another family member, an improved physical environment) or indirectly (sustaining their community, maintaining or improving service levels etc). Put quite simply, today’s customers will equally share in the benefits that will be brought to future customers.

Scottish Water’s investment programme will be pivotal to the long term sustainability of communities across Scotland. Whilst there are communities in a
favourable position to accommodate new development, the development prospects of many are dependent on new water services infrastructure. Whilst the scale of the problem means that work will necessarily have to be programmed over a number of years, surely no community should be denied the opportunity for much needed development because of arguments as to who should pay?

Developer Contributions

It is suggested that Scottish Water should fund strategic assets (reservoirs, waste water treatment plants) while developers (or future customers) should fund local distribution networks. Whilst this arrangement appears on the face of it sensible (if you feel that the interest of current and future customers are different – see above) it poses difficulties in rural areas where the unit costs of providing infrastructure are invariably high and the scale of development is low. There is a very real danger that with the proposed arrangements, development in such locations will not be viable and these communities will wither. In these circumstances the Scottish Executive does appear to recognise the need for public support and identifies Communities Scotland and the Enterprise network, as the appropriate bodies to support infrastructure provision for new housing and business development. Does this not emphasise the point that public support can be argued for in a number of situations where public goods are being secured? Is there any guarantee that the funding will be forthcoming?

4. Affordability

The Scottish Executive’s principle that Scottish Water charges for households should be set with a view to ensuring that they are as affordable as possible for low-income households is admirable. Unfortunately the principle that Scottish Water’s investment must continually be met by the current customer base and an apparent unwillingness to consider meeting the costs of investment programmes through general taxation, or increased borrowing, means that costs for low income households are unlikely to be affordable. The Council believe that the totality of the service provision should continue to have a proportion of the investment programme funded from general taxation to recognise that there is inequity in the ability to pay for services, inequity of a system that seeks to charge for a service based on a non service related categorisation (council tax banding) and inequity between the interests of different clients groups.

Charges on households for water services founded on the size/value of the property, rather than on consumption. The basis of charging for services is therefore flawed at the outset offering advantages to some consumers over others. In addition it limits the potential for low income households to effect change on their costs or from an environmental standpoint encourage consumers to reduce consumption. The Scottish Executive have operated a transitional relief scheme to assist households in some parts of Scotland, namely the east and west of Scotland, who were faced with large rises on their bills equalised up to the charge levels in the north of Scotland. The Scottish Executive has largely accepted that Council Tax banding is a sufficiently strong indicator of a household’s ability to pay. This is despite the fact that many pensioners find themselves capital rich, living in a large house, but income poor. A study of the impact of the transitional
relief scheme in Fife, seen as representative of Scotland as a whole, noted that of
the many low income households eligible for benefits such as Council Tax benefit,
all Band A households received no material assistance from the relief scheme.

The Council welcome proposals by the Scottish Executive to put in place a
scheme that allows low income householders access to a simple and effective
payment relief scheme. The Council also wishes to convey its support for the
continued collection of water charges from Scottish Water by local authorities.
This has many advantages and can allow for the easy identification of households
that are most likely to be in need of a water charges relief scheme.

In relation to business and especially retailers, the present system is
unsatisfactory linking charges to rateable values on which there is no direct or
specific correlation. The proposed introduction by the Scottish Executive of a
scheme that relates charges to the surface area of a business has more logic, but
still does not allow customers to effect savings on charges from perhaps the
deployment of private waste water collection and treatment activities.

All the indicators are that water services charges are expected to continually rise
above inflation for all households and most other client groups. Comparisons with
the lower charges levied south of the border are constantly referred but this
ignores the fact that the creation of the private water companies in England and
Wales was accompanied by debt write off. Public expenditure thereby being used
in a creative way to reduce household bills and the costs on commerce and
industry. The Council would argue that the Scottish Executive should similarly find
ways to minimise water and waste water charges on households, the voluntary
sector, commerce and business to ensure equity and competitiveness within the
UK and with other EU countries.

5. **Duty of Scottish Water to engage in Development Planning**

In spatial planning terms, the critical importance of Scottish Waters’ future
investment programmes cannot be under-estimated. This is perhaps reflected in
the Scottish Executive’s Consultation document – ‘Making Development Plans
Deliver’, suggesting that key public agencies, including Scottish Water, should
have a statutory duty placed on them to engage in development planning. This is
eminently sensible. There is little point in Local Planning Authorities engaging with
the community and partners to develop a framework for future development
without the involvement of Scottish Water and securing its commitment to the
policies and allocations in the adopted plan. Whilst this duty can be imposed in a
future Planning Bill there may be merit in also including this duty within the Water
Services (Scotland) Bill. Equally, would there be merit in referring in the Bill to
Scottish Water’s responsibilities in relation to Community Planning?

6. **Summary**

Scottish Water is a public utility, vital to the health and welfare of the people of
Scotland. It is a key body in helping achieve the Scottish Executive objectives in
a number of areas, not least those covering the economy, social justice, spatial
planning and the environment. It is not just providing services to customers but a
wide range of public goods. As such the Council believes that the Scottish Executive should consider the case for a degree of public funding support. This would recognise inequities within the current water charges arrangements and the affordability issue.

Expansion of the water services networks brings benefits to all. Decisions on the balance between charging and borrowing to meet the cost of future investment programmes should not be complicated by agonising over whether current customers are subsidising future customers or vice versa. The Council believes that there are good reasons to place more emphasis on borrowing to enhance Scottish Water assets.

There is a need for future Scottish Water investment programmes to pay more attention to achieving economic and social objectives by removing development constraints. Whilst the Council acknowledges the need for environmental improvements, the lack of balance in the current programme threatens the policy of sustaining communities across Scotland.

SUBMISSION FROM THE OFFICE OF FAIR TRADING

I apologise for the delay in responding to your request for a view from the Office of Fair Trading on the general principles of this Bill. As you will know, the Office is responsible for oversight and enforcement of the Competition Act 1998 (CA98), which came into force in March 2000. The CA98 introduced two prohibitions: one applying to agreements between undertakings which appreciably prevent, restrict or distort competition in the UK (the Chapter I Prohibition) and the other of conduct that amounts to the abuse of a dominant position in a market (the Chapter II Prohibition). The Director General of Water Services has concurrent powers to apply and enforce the CA98 in England & Wales but no such powers in Scotland leaving the Office with this responsibility in relation to water. In applying and enforcing the CA98, the Office will apply the same principles as those applied by Ofwat and will liaise closely with the Water Industry Commission/ Commissioner in Scotland where this is appropriate.

The Office welcomes the Bill, which is intended to increase competition in the Scottish water industry and bring with it improved efficiency, better service to customers and lower charges. The Office notes that the prohibition on common carriage may make it more difficult for new licensees to compete with Scottish Water (SW), the incumbent, on equal terms. In England & Wales, regulation of water quality is intended to allay those fears expressed by the Scottish Executive about the risk to public health and environmental concerns arising from a common carriage regime. However, the Office recognises the need to balance the potential benefits arising from competition against the possible duplication of resources and the ability of SW to carry out its duties as a provider of a public service.

A. Prohibition of Common Carriage

The Scottish Executive has long considered proposals to deal with the prospect of competition on SW’s public network, including the creation of a regime to license
new entrants to the water market. The licensing regime envisaged by the Bill does not allow for common carriage and is therefore a different position than that of England & Wales, where the Water Act 2003 (WA03) will allow licensees to purchase water on a wholesale basis from incumbent suppliers and transport it through the public distribution network, with appropriate safeguards in place to protect public health. As far back as 1997, The Scottish Office noted that “the introduction of competition through common carriage would lead to a rise in the total costs of delivering the same level of service, and thus would represent a loss of economic efficiency. Common carriage would in any event be anomalous, given our structure of public authorities and the duties placed on them. The Team concluded that common carriage should not be pursued in Scotland.”

Further debate considered the possibility of allowing common carriage under licence but this option was not pursued.

Common carriage involves the shared use of assets, in circumstances where it would be uneconomic for a competitor to duplicate the provision of large assets such as a pipeline network or a treatment facility. The prohibition on common carriage envisaged by the Bill removes the possibility that a refusal by SW to allow third party access to its pipeline infrastructure could be found to be an abuse of dominance because such behaviour would be excluded from the CA98 as being necessary to comply with a legal requirement. This clarification is important in understanding the application of the CA98 to SW in its operation of the pipeline network.

B. Licensing for supply to non-domestic customers

Licensing will allow competition in the supply of (potable) water to non-domestic customers in Scotland so that competition will develop in retail services such as billing, aggregation of bills and water conservation. In the absence of common carriage, licensed suppliers will purchase potable water from SW to supply their non-domestic customers. The separation of the wholesale and retail businesses of SW is fundamental to ensuring that new licensees are able to compete on equal terms against the retail business of SW.

The licensing framework will set out the context and background against which the provisions of the CA98 can potentially apply. Hence the proposed arrangements directly limit the scope of competitive activity but any enforcement of the provisions of the CA98 will take into account the legal framework governing company behaviour. The framework for licensed competition in England and Wales is equally limited to non-domestic customers by the WA03.

SW already faces competition from off-network suppliers: these are suppliers who source and transport their water privately and do not need to use SW's pipeline network. Generally, off-network suppliers supply non-potable water to non-domestic customers for use in industrial processes. Large users may switch from sourcing water from SW to off-network suppliers if this provides a cheaper option:

---


205 Paragraph 5, Schedule 3 of the Act.
SW has responded to off-network competition by introducing a Large Users Volume Agreement (LUVA).

C. Water pricing and charging

The establishment of the Water Industry Commission and the appointment of Members with expertise and specialist skills means that the Commission will be well placed to decide on the determination of charges. The Bill allows Scottish Ministers to make policy decisions and the Commission to determine how much SW can charge its customers. For retail competition to develop effectively, SW’s wholesale price needs to be set at a level that allows new licensees a sufficient margin. Equally, the setting of price caps on SW will be an important factor in allowing competition to develop. The WIC in setting prices might consider drawing on the considerable expertise of Ofwat, which has a good understanding of the difficulties of asymmetric information and the principles of comparative regulation.

The Bill also removes from SW the right to negotiate charges with specific customers, except where such customers take steps to reduce SW’s costs in serving them. Where such customers are considering switching to off-network suppliers, this provision means that off-network suppliers face more certainty about charges levied by SW.

Where charges are disputed, there remains the option of challenge before the Competition Commission (CC). The CC has considerable expertise in the water sector, having investigated several water mergers. In addition, the Competition Appeals Tribunal (CAT) has before it an appeal in relation to (wholesale) water charges which will cast further light on this issue.

SUBMISSION BY PHIL OLSON

I understand that one provision in the current water charging regime is that holiday home owners receive a discount in their water charges.

I have, in person, heard the Scottish Water Commissioner state that water used/wasted is of little financial moment, the cost of water lies in the delivery infrastructure. All connected properties have the total infrastructure at their disposal whether they use water or not. All connected properties should therefore be regarded similarly.

Social concerns may demand variance in charges to families or individuals in certain circumstances. Such variances should be a matter for social agencies or socially oriented legislation.

Unmetered premises, business and domestic, should be encouraged to become metered. The volume of water used should become a matter concern in a business or in a family just as the amount of energy used. Metering allows the consumer to know they are contributing to a deficit in a local supply; this is not so much about the cost of the water used but the availability where a local supply may not be as plentiful or as quickly replenished in, say, times of dry weather.
1. **Introduction**

1.1 We have just learnt that the committee has decided to consider not just the Bill but also the position with regard to Q&SIII. We therefore make a wide ranging submission.

1.2 This section gives background. Sections 2 – 3 detail the problems we face. Discussion with association colleagues has shown that this experience is reflected throughout much of both urban and rural Scotland.

1.3 Supporting information is available.

1.4 The drivers of the existing policy on water services do not appear to marry up water service objectives with social justice objectives, based as they are on the twin assumptions of (a) no general taxation funds should be put into water services and (b) the absolute need to meet European Union environmental directives. The assumptions appear to ignore the Executive’s social justice objectives (eg tenure and community choices open to all) and lay the Executive open to challenges under the European Convention of Human Rights (ECHR) as:

- the right to a family life is a basic ECHR right
- a home is a basic component of family life
- access to water and sewerage is a statutory requirement (eg in the statutory tolerable standard)

1.5 The Association:

- is a charity controlled by an entirely voluntary management committee
- is regulated by Communities Scotland under the terms of the Housing (Scotland) Act 2001
- is the only Association in Orkney and works closely with Orkney Islands Council as the strategic housing authority
- has completed over 500 units
- believes that a suitable home is a basic need and a fundamental right
- is dependent on Housing Association Grant (HAG) in order to provide homes at affordable rent and for sale to those who cannot afford to purchase outright but can afford a stake in their homes (shared ownership scheme)
- has a waiting list that has grown from 257 (31.03.02) to 485 (01.04.04)
1.6 Orkney has one of the lowest percentages of social rented housing in Scotland. The Council, in its Local Housing Strategy, has identified the need for a substantial increase in the number of social rented homes. This would represent a considerable increase in HAG and the Association therefore welcomes the Executive’s commitment to provide substantial additional funding to associations.

1.7 We have grave concerns, however, about the position on sewage services. Historically we have had problems outside Kirkwall with 201 units completed outside Kirkwall of which
- 91 had water service problems (50%) within which
- 59 had sewerage problems (29%)

The position has now worsened in Kirkwall and problems in our active developments are as follows:

<table>
<thead>
<tr>
<th>Grant Spend</th>
<th>Total Spend</th>
<th>Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>£000</td>
<td>%</td>
<td>£000</td>
</tr>
<tr>
<td>No problems</td>
<td>£2,380</td>
<td>17</td>
</tr>
<tr>
<td>Unknown</td>
<td>£4,851</td>
<td>34</td>
</tr>
<tr>
<td>Problems</td>
<td>£6,926</td>
<td>49</td>
</tr>
<tr>
<td>Total</td>
<td><strong>14,157</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

2. Schemes with Problems

2.1 This section deals with the 101 homes shown above with problems and sets out suggestions for change. More detailed information is available.

2.2 We have 4 units ready to start on site but which are at risk if Scottish Water (SW) does not meet its commitment to have temporary sewerage arrangements in place by March 2005. Over the years SW, and its predecessor authority, has given differing dates for this but, last year, its Director of Asset Management gave assurances that this would be March 2005. We await confirmation of this.

Conflicting information has caused us enormous problems.

2.3 All the other units at risk are in Kirkwall and, we believe, illustrate (a) that Executive funding is required to eliminate development bottlenecks in 2004 – 2005 and 2005 – 2006 as well as throughout the Q&SIII period and (b) expecting individual developers to pay is impractical.

2.3.1 Currently, the Association could secure Communities Scotland funding for 4 units to start on site in January 2005 but SW, without warning, declared Kirkwall a restrained area on 27 September 2004, indicating that mitigation work would involve a modelling exercise which it was not resourced to undertake and that any subsequent work would have to be funded by others.

2.3.2 Preceding discussions had taken place about this modelling but in
the context of subsequent, larger, developments.

2.3.3 SW’s position is that work downstream from a pumping station is a developer responsibility as is the sizing up the waste water treatment works while work upstream of the pumping station would be SW’s responsibility.

2.3.4 A further series of Association developments amounting to 65 – 85 units are also served by this particular pipe.

2.4 The developer pays principle breaks down in respect of this particular pipe for a number of reasons.

2.4.1 The pipe downstream from the development is in poor condition and developers paying for an upgrade would amount to a cross-subsidy from developers to SW. The first 200 metres or so from the pumping station have tar residues from discharges from the former Kirkwall gasworks that reduce its capacity. Additionally, the pipe is believed to be cracked and/or porous; in conditions of prolonged rainfall, seawater is entering the sewage system leading to discharge of sewage at the treatment works. The most likely explanation is that the pumps are taking in water from the vicinity of the low lying pipes.

*We suggest that this is a prime candidate for SW exercising some flexibility to contribute towards the upgrade of the pipe as suggested by the Minister when he appeared before the Parliament’s Environment Committee (Column 1710).*

2.4.2 The logic of the developer paying would mean that these 4 units have to pay entire cost of upgrading some 625² metres of pipework. This burden would be completely unviable.

2.4.3 The pipe is in fact a strategic one. Downstream of the Association’s proposed development there are branches to areas of the town in which significant other development would take place as well as one specific site that is designated as a preferred site for a travel centre for which Executive funding is available on a time limited basis. Upstream the pipe serves major NHS funded developments.

*Is it appropriate for one 4 unit development to pay costs that will benefit so many other developers? We suggest that general taxation is the appropriate method to fund this, which failing SW ought to fund and recoup from developers as they develop.*

2.5 We sought to use formal complaints mechanisms against SW in respect of the case referred to at 2.2 above. In practice SW at director level may have exercised flexibility but:

* • the Water Industry Commissioner has taken no real interest in the case
  • SW responses from those charged with investigating the complaint
have been both slow and inadequate

We suggest, therefore, that new provisions need to be put in place to give more effective redress to the customer with an independent complaints mechanism that has power to make awards against SW. We suggest also that if developers are funding infrastructure upgrades then clear contracts with penalty clauses need to be in place.

3. Schemes where we are waiting for information from Scottish Water, small scale systems and first time provision

3.1 The 66 units here have a longer timescale but we need information from Scottish Water on whether there are either water or sewerage problems.

3.2 In the event that there are problems, similar issues of funding will arise.

3.3 Some schemes fall in unidentified Initiative at the Edge category. Scottish Ministers recently created 4 new Initiative at the Edge areas within Orkney within which agencies should co-ordinate their efforts. In these areas, we have concerns that Executive policy, and SW practice, may be against the adoption of small scale collection and treatment systems.

3.4 The evidence for this interpretation is:

- amendments made by the Water, Environment and Services (Scotland) Act 2003 to the Water (Scotland) Act 1980 and the Sewerage (Scotland) Act 1968 which enabled income and expenditure to be taken into account
- colleagues in the Western Isles who have experienced this. They state this was because SW would not adopt schemes of less than 6 units on policy grounds.

3.5 On the other hand the Minister suggested that this was not the case when he appeared before the Environment Committee.

3.6 To enable affordable housing to be delivered in rural areas we suggest that the Committee recommends that SW is required to adopt small scale distribution and collection systems as well as the necessary infrastructure even where it will make a revenue loss in doing so.

3.7 A related area is first time provision. Many of these communities do not have public sewage systems. To enable affordable housing to be delivered in these communities We suggest that there needs to be clarity on:

- whether the extension of first time sewerage is important or not
- the inter-relationship between development constraints in these small village and first time sewerage

We feel public policy at the moment is ambiguous about first time provision.
If it is to be extended, probably over several Q&S investment periods, then there needs to be a series of policy changes and have made suggestions in response to the Executive’s consultation on Maintaining Houses – Preserving Homes. If, on the other hand, it is not to be extended, then clear policy guidance needs to be given to various agencies and very little funding provision should be made.

3.8 A further example of the ambiguities in the first time provision issue is SW, in the current investment period, not being able to connect private discharges into its pipework even where as in many Orkney villages:

- there are private discharges
- are unauthorised discharges
- across SW’s pipes on the way to the sea

A typical example is in the village of St Mary’s, Holm where 19 unconsented properties cross SW’s pipes and where sizing up the treatment works to accommodate them would cost some 19% of a project costing £900,000. Correspondence between Jim Wallace as constituency MSP and the Customer Services Director of SW indicate this concern is shared by both.

Notes
1 Seafield, Finstown
2 The measurements given for distances are broad brush but have been professionally calculated. We have not, however, involved engineers, or SW, in considering current and alternative prospective routes.

SUBMISSION BY THE SCOTTISH ENTERPRISE NETWORK

1.0 Introduction

Scottish Enterprise (SE), alongside HIE, is the main economic development agency for Scotland covering 93% of the population from Grampian to the Borders. The Scottish Enterprise Network consists of SE and 12 Local Enterprise Companies. Working in partnership with the private and public sectors (including Scottish Water), the Network aims to build more and better businesses, to develop the skills and knowledge of Scottish people, and to encourage innovation to make Scottish business internationally competitive. SE’s activities focus on the three priority areas laid out in ‘A Smart, Successful Scotland’: Growing Businesses; Global Connections and Skills and Learning.

SE recognises the aspirations behind the proposed changes to the Water Services (Scotland) Bill and has consequently made the following comments to the consultation process. The first two points,(paragraphs 2 and 3) are general comments on the Water Industry, the latter reflect changes proposed by the Bill.
2.0 International Competitiveness

It is important that Scotland can compete effectively with its international competitors. However, Scotland is presently internationally uncompetitive in terms of water charges, ranking fifth most expensive in a recent survey conducted by NUS consulting\(^{206}\). Key sectors such as paper processing, pharmaceuticals as well as the chemical industry are especially price sensitive, given their large water usage. It is our opinion that the principal responsibility should remain with Scottish Water to invest and structure prices to ensure a sufficiently competitive environment in which all businesses in Scotland can succeed.

3.0 Development Constraints

The Committee should note the significant constraints to development which SE and its client companies are facing in their achievement of the ambitions of ‘A Smart, Successful Scotland’ and would call upon the new Water Commission to recognise that the principle responsibility for overcoming these problems should not be left to the development agencies but resolved by an adequately resourced Scottish Water. SE is currently working with Scottish Water to evaluate the impact of development constraints on the achievement of SE’s Five Year Investment Plan.

4.0 Restructure of the office of the Water Industry Commissioner

SE welcomes the development of the Water Industry Commission for Scotland, but is concerned that there is no mention of its role in supporting economic development, one of the principal aspirations of the Scottish Executive.

SE recommends that the Water Commission is required to consider the impact of any action on the Scottish economy and that its own actions and those of the water industry as a whole, should contribute to the achievement of the ambitions highlighted in ‘A Smart, Successful Scotland’. This should be central to the future objectives of both the Water Commission and Scottish Water.

However, the proposed stance for the Water Commission is more concerned with ensuring that qualitative standards are met and that issues of continued serviceability are maintained. In short, it highlights the preservation of the status quo and does not promote a development agenda, which is again contrary to the ambitions highlighted by ‘A Smart, Successful Scotland’. SE believes that the Commission should be made responsible for ensuring that Scottish Water has built into its plans sufficient funding to permit further sanctioned growth.

5.0 Transparency of Costs

SE believes that costs should be transparent, appropriate and any existing cross subsidies be removed to ensure that Scottish business is only paying for what it receives. It therefore welcomes the transference of price setting to the

\(^{206}\) Countries more expensive than Scotland are Germany, Denmark, Netherlands and France. However water standards in Germany, Netherlands and Denmark exceed the maximum requested in the UK and may contribute to the higher costs
Commission with its intention to set up an accountable system of price adjudication.

6.0 Charge determination

SE agrees in principle that charges should be set on an harmonised basis, so that customers in the same group and using the same services should pay for these services at the same rate irrespective of where they are in the country. At present, certain key SE customers receive varying rates from Scottish Water and the system of discounts and special agreements is ill-defined with a consequent lack of transparency. Despite this, the previous practice of discounting tariffs offered by Scottish Water has proved useful in attracting and retaining large water using, inward investment projects to Scotland. Potentially the removal of such discounts could make Scotland a less attractive location in the future.

SE is concerned that Scottish Water will no longer have discretion to make agreements with specific customers about the charges levied on them. Instead, it is proposed that all charges must be made by reference to a charges scheme which will require to be specifically authorised by the Commission on the basis that the charge-payer has taken action which reduces the cost to Scottish Water of serving them.

SE would prefer that a system of discounts for significant customers is continued at least in the interim and that there should be the option of approaching the Minister or the Commission to petition for interventions which are viewed as being strategically important to the Scottish economy.

7.0 Resolving Constraints to Development

SE, in its daily activities and in consultation with many of its key customers, has noticed increased instances of development constraints resulting from lack of investment/provision of water services in areas such as Robroyston in the East End of Glasgow and recent difficulties around Perth. The concern is that the Commission will not address this issue due to its focus on new environmental/qualitative standards and the recently established serviceability criteria. As previously outlined, the Commission should consider the development agenda and as an option, permit Scottish Water to increase its debt provision in order to cover the costs involved. This increase in investment would be covered by the subsequent increase in revenue.

8.0 Separation of Scottish Water

SE supports the separation of responsibilities between the wholesaler and retail side. Scottish Water should continue to be the sole supplier of water and

---

207 At Robroyston the main constraint is insufficient capacity in the water and sewerage system resulting in spilling and flooding.
208 Scottish Water has recently indicated embargoes on accepting additional waste water to its system and treatment plants in certain areas of Tayside, this is mainly due to possible court action arising from SEPA against Scottish Water for unacceptable treated waste water being discharged into controlled waters.
sewerage services on the public network (wholesale), 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 (retail).

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 Commission and customers to check Scottish Water’s progress in delivering efficiency and for Scottish Water itself to identify the scope for greater cost effectiveness.

9.0 Protection of Developer Rights

At present, if there is a development constraint, then Scottish Water passes the costs of provision to the relevant developer. However any subsequent activity, which may arise in an adjacent location and not controlled by the same developer, has the right of access to the system. In theory, the original developer could have paid for provision, but due to other market factors may not be able to utilise the access paid for. Other developers would have benefited at his expense. SE suggests that there is an ability to reserve a percentage of potential capacity for the original developer for at least a restricted time period. The failure to control access, could lead to greater market failure, with developers refusing to pay for connection charges unless they can guarantee timely utilisation.

10.0 Conclusion

The significance of water provision as a component of economic development cannot be understated. SE welcomes this opportunity to comment on this Bill and hopes that the observations contained within this document as well as the forthcoming responses to the two Scottish Executive consultations, (‘Investing in Water Services 2006-14 –The Quality and Standards 3 Project’ and ‘Paying for Water Services 2006-10’) will give an accurate and true reflection of how the Network sees the Water Industry developing.

SUBMISSION BY THE SCOTTISH ENVIRONMENT PROTECTION AGENCY

Part I of the Bill: replaces the Water Industry Commissioner with the Water Industry Commission: Is the scope and effect of the change appropriate?

SEPA welcomes the proposal to create a Water Industry Commission to replace the existing Water Industry Commissioner. The proposals provide for the further development of the role of the economic regulator by providing responsibility for the final determination of charges following a period of public consultation.

SEPA already works closely with the Commissioner and considers that the cooperation between the environmental (SEPA) and the Economic Regulator (WIC) will be enhanced by these proposals.

SEPA does have concerns over the absence of balancing duties for the Commission. Regulators normally have a range of duties to ensure that they do
not become focused on a single objective without considering the wider implications of their actions.

The Water Act 2003 in England and Wales places duties on OFWAT (Water Services Regulatory Authority) in relation to sustainable development, requiring the Authority to exercise its powers and perform duties in 'a manner which they consider is best calculated to contribute to the achievement of sustainable development'. The Act also requires the Authority to have regard to any guidance issued by the Assembly or Secretary of State on contribution by the Authority towards the attainment of any social or environmental policies set out or referred to in the guidance.

The Bill does not include specific duties to ensure that water is used efficiently in Scotland. This is in contrast to the position in England and Wales, where both the Environment Agency and OFWAT have responsibilities to promote efficient water use which is further enforced by new duties under the Water Act 2003. Promoting efficient water use is an important component of providing environmental protection. Inefficient water use leads to pressures upon existing water resources and the development of unnecessary additional water sources e.g. reservoirs.

The difference in duties between the WIC and OFWAT will result in an inconsistent approach to water conservation and sustainable development within the UK water industry. SEPA considers that the Bill should include duties for WIC in relation to water conservation and sustainable development as that contained within the Water Act 2003 for England and Wales.

The importance of this issue is raised to a statutory requirement by Article 9 of the EU Water Framework Directive (2000/60/EEC). The Directive imposes the following requirements.

Member States shall ensure by 2010:

- that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive,

- adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services, based on the economic analysis.

It should be noted that the Water Framework Directive definition of water user in Article 9 includes dischargers of waste water. Consequently, the charging scheme should provide incentives which promote waste minimisation and therefore reduce pressures upon the water environment.

Scotland could delay implementation of this requirement until 2010. This would, however, be counter-productive. The purpose of the Bill would be to set up a stable economic framework that allows the development of market confidence. Clearly, this could be undermined if it was known that additional environmental constraints were to be introduced within a relatively short period.
Will the proposals achieve the stated aims of improving the transparency, accountability and consistency of regulation in the water industry?

SEPA considers that the requirement for the Commission to consult on the draft determination should ensure that the determination of charges is a more transparent process.

Part 2 of the Bill: makes a number of provisions regarding water and sewerage. Are the provisions in this Part of the Bill (i.e. the various elements of the proposed model of the competition, and the framework for charge determination) appropriate and clearly defined.

It is important that competition in the water industry is introduced with the appropriate policy framework which will ensure a level playing field between Scotland, and England and Wales. This emphasises the importance of the balancing duties already held by OFWAT which were described above.

Part 3 of the Bill: establishes statutory powers to tackle and prevent coal mine water pollution: Is the scope and effect of the provisions appropriate?

SEPA welcomes statutory powers to strengthen the current position of the Coal Authority in dealing with coal mine water pollution in Scotland. This will enhance the Coal Authority’s ability to address pollution caused by abandoned mines. The compulsory purchase requirements are especially welcome as land acquisition problems have proved to be a major impediment to providing for the treatment of discharges from abandoned mines.

Are the effects of the Bill on sustainable development accurately and clearly described?

See comments above on balancing duties.

SEPA also considers that the Bill should emphasise the importance of first-time provision of sewerage networks and treatment as a method of contributing to achievement of sustainable development in rural areas. This is especially important to address rural development constraints.

SUBMISSION BY TILLCOULTRY COMMUNITY COUNCIL

Part 1 of the Bill

It is accepted that another Quango in the shape of the proposed Water Commission is probably the best way forward. It is suggested that the Commission should be made up of experts in the field. There is considerable doubt that two, or even four, experts for a complex operation would be effective in supplying a regulatory system for the water industry in Scotland. It would be appropriate if the Commission members had expertise in all aspects of the water industry, environmental issues and the financing of water supply and sewage treatment.
The proposals do not particularly improve transparency or accountability although the consistency of regulation would be welcome. There is little in the proposed Act which allows communities to be consulted although it would seem that a particular community could appeal to Ministers if it was perceived that the Commission had made a wrong decision regarding its locality.

It is the view of Tillicoultry Community Council that a Commission to oversee and have significant powers with regard to the services provided by Scottish Water, or others, must have teeth and a great measure of independence. The legislation does not appear to satisfy this requirement.

Part 2 of the Bill

The various elements of the proposed model of competition are acceptable.

The framework for charge determination is, neither clear nor concise. It can be deduced with much effort and would appear to be reasonably appropriate.

The likely effects of the provisions are an increase in the cost of water and sewerage charges, because of the increase in the complexity of the charging system. Fairness and effectiveness are perceptions of individuals and the vast majority of people will accept the new regime because they have no option. The system seems to be reasonably fair but its effectiveness remains to be seen.

Part 3 of the Bill

The powers to control coal mine water pollution seem to be adequate. They will probably be effective with the co-operation of SEPA.

Part 4 of the Bill

The scope and provisions of this part of the Bill are reasonable.

Other Matters

The documents were quite helpful. The Bill Clauses were quite heavy reading and, if possible, should be written in clearer English.

The financial consequences of the Bill are totally inadequate. There was no explanation of how the costs would arise and consequently it is impossible to determine if they are reasonable or not. It also does recognise that the customer will pay one way or another.

The effects of the Bill on sustainable development are indistinct. It is difficult to imagine how the Bill provisions will affect such development.

There are no comments on the consultation prior to the introduction of the Bill.
FINANCE COMMITTEE

EXTRACT FROM THE MINUTES

21st Meeting, 2004 (Session 2)

Thursday 9 September, 2004

Present:

Ms Wendy Alexander  Mr Ted Brocklebank
Fergus Ewing (Deputy Convener)  Kate Maclean
Des McNulty (Convener)  Jim Mather
Dr Elaine Murray  Jeremy Purvis
John Swinburne

Water Services (Scotland) Bill: The Committee took evidence on the Bill’s Financial Memorandum from—

Dr Jon Hargreaves, Chief Executive; Douglas Millican, Finance Director; and Ian McMillan, Non-Executive Board Member, Scottish Water; and

Alan Sutherland, Water Industry Commissioner and Dr John Simpson, Director of Cost and Performance, Office of the Water Industry Commissioner
On resuming—

Water Services etc (Scotland) Bill: Financial Memorandum

The Convener: The third item on our agenda is consideration of the financial memorandum of the Water Services etc (Scotland) Bill. The bill was introduced on 11 June 2004 by Ross Finnie. We have with us the water industry commissioner, Alan Sutherland, and with him is Dr John Simpson, the director of cost and performance. We also have with us from Scottish Water Dr Jon Hargreaves, who is the chief executive, Douglas Millican, who is the finance director, and Ian McMillan, who is a non-executive board director. I welcome you all.

Committee members have a copy of a submission from Scottish Water, and also a submission from Water UK, Scottish Enterprise and the water customer consultation panels. I remind members that—as we agreed at our away day—the Minister for Environment and Rural Development will be coming before the committee on 28 September. He will talk about broader water issues, so today and next week we will concentrate on the financial memorandum. I will be reasonably strict about that, because we must focus.

I will ask the two groups of witnesses whether they would like to make a brief opening statement; I begin by asking the two Scottish Water witnesses.

Ian McMillan (Scottish Water): Good morning. Thank you for your invitation, which went to our chairman. Unfortunately, Alan Alexander is unavailable today and sends his apologies. He has asked me to come here on behalf of the board of Scottish Water.

I will give a brief personal introduction. My utility credentials come from a career in the electricity industry, not in the water industry: I spent my career with Scottish and Southern Energy and its predecessor, Scottish Hydro-Electric. Having experienced full economic regulation and, indeed, the introduction of competition, members can probably guess why I have a particular interest in the proposals in the bill.

Today we are primarily concerned with the financial aspects of the bill, but it is important to summarise Scottish Water’s view of the policy proposals in their entirety. Members will gather from our submission that we are pleased that the Executive is proposing the introduction of more certain and transparent economic regulation, in response to this committee’s earlier report. We
I will also take an opening statement from the water industry commissioner before I proceed to ask members whether they want to put any questions to our witnesses.

Dr Murray: I am grateful to Mr Sutherland in particular for explaining to us what the alternatives would be if we did not introduce the licensing regime and what the costs to Scottish Water would be if that did not happen. Initially I was a bit alarmed by the costs of establishing the licensing regime and wondered whether it was going to be worth it. However, the question remains whether the financial memorandum is accurate.

Scottish Water’s current estimates, which are based on independent research, suggest that establishing the competitive regime will be a lot more expensive than is suggested in the financial memorandum. Do you want to comment on the independent research and the possible costs to Scottish Water, as well as on the statement in the financial memorandum that some of those costs could be offset by a benefit from the division of the retail function? The submission from Scottish Water shows that instead of the costs being £2.5 million plus half a million a year, they tend to be something like £10 million to £18.4 million. I have concerns if the financial memorandum has the potential to be that inaccurate.

The Convener: It is a big gap.
Douglas Millican (Scottish Water): Scottish Water has no experience yet of operating in the competitive retail market. We have been keen to take sound advice from those who have experience of setting up new markets as to what might be involved and what the costs might be. Our primary concern is to ensure that, when the market is set up, it is set up in such a way that it operates in an orderly fashion to minimise the risk of confusion for customers who want to stay with Scottish Water, for customers who want to switch, and for new retailers within the market. We believe, therefore, that the market should be structured in an orderly fashion. It is important that the appropriate thinking and design in investment are done up front to facilitate the orderly introduction of the market.

With that in mind, we sought advice from IBM Consulting—the former PricewaterhouseCoopers Consulting—which has done similar work in a number of countries throughout the world, on what it would take to set up the market in an orderly fashion. The consultants do not suggest that there is a precise estimate; they have given a cost range of £10 million to £18 million. The cost might be lower or higher, but time will tell. Our main plea is to ensure that, when it happens, the market is set up in an orderly fashion.

Alan Sutherland: I have not had the advantage of seeing any consultants’ report from Scottish Water, but I have seen the numbers in its submission to the committee. The most significant difference is in the costs of managing the customer information and the market mechanism.

Among the critical issues is to hear what the regulated company says its costs will be, to challenge those costs, and to understand what scope for efficiency the company believes will arise that would offset the costs in some way. Until we have gone through that process, which is an important part of economic regulation, it would not be appropriate for me to comment in detail on those numbers.

Dr Murray: I flag up a concern that we will also pursue with the Executive—the fact that your consultants consider that it could cost five to seven times as much to set up the competitive regime and that the on-going costs could be six to 10 times as much as are stated in the financial memorandum.

Would it be possible for us to have further detail of the research that was commissioned by Scottish Water in advance of following up the matter with the Executive, so that we can probe it further?

Douglas Millican: We are happy to check with IBM whether it is willing to divulge those details to you.

The Convener: That would be helpful.

My question concerns charges determination. The financial memorandum states that it is not possible to predict what the costs might be of complying with the ministerial direction. The costs would depend on the nature of the direction that is given. Have you done any scenario planning on the anticipated costs of certain kinds of ministerial direction? That question is first for Scottish Water and subsequently for the water industry commissioner.

Douglas Millican: The principal circumstance that we envisage in that respect is the direction that ministers will provide at the start of each strategic review charge setting process in relation to the standards and objectives that they want Scottish Water to follow in a given period. The Executive is consulting at the moment on the quality and standards III process in the upcoming period from 2006 to 2010.

We expect to receive guidance from the Executive in January that it expects us to cost in a business plan to be submitted in April. The consultation document on quality and standards III sets out the Executive’s thinking on what the range of costs might be for those investment obligations.

Alan Sutherland: From a regulations standpoint, we have an additional budget this year of £1 million to conduct the strategic review. That is in addition to approximately £1.5 million, which is our annual budget.

We are about a quarter of the way through conducting the strategic review. The budget is tight, but it is manageable. I hope that the experience of going through the determination process to the current level of detail, and the set-up costs that are inevitably being incurred as this is the first time that we have done it this way, will mean that the process will cost about £1 million every four years in the future.

The Convener: I have a question about the costs that will be associated with setting up the body corporate, which is covered in the bill. Will there be only marginal, additional administrative costs associated with the process and are the quantifications in the financial memorandum accurate?

Alan Sutherland: When I saw the figure of £150,000, John Simpson and I sat down and counted up the salaries, the number of days and the likely on-costs that go with having a commissioner. We came to £149,000. Even on a bottoms-up costing basis, which everyone who tries to maximise their budget uses, the £150,000 seemed about right.
We take that on board.

I would like a response to the

We do not have a document

It would be useful to get the

Yes, indeed. The legal advice

Sutherland questions that arise from their opening

Each gentleman said that the bill is

necessary because if we do not have it, we might

be exposed to risks. I think that Mr McMillan said

that, and Mr Sutherland referred to some of the

sanctions that are contained in the Competition

Act 1998—10 per cent of turnover and so on. Each

described those as potential problems.

I appreciate that the question whether there is a

potential risk, a real risk, an actual risk or a

notional risk, might depend on an interpretation of

the Competition Act 1998 and its application to the

particular circumstances in Scotland where we

have a monopoly supplier. However, given that we

are to embark on the bill, which has costs of

establishing a licensing regime of £10 million plus

£2 million each year, should not we be absolutely

clear in this Parliament whether there is a real risk

or a non-risk? Will Mr McMillan and Mr Sutherland

comment and indicate whether they have had legal

advice on the matter and, if so, whether we can be

in receipt of it?

Ian McMillan: Yes, indeed. The legal advice

that we have at the moment is that we are exposed. The problem with being exposed to, say,

the Competition Act 1998, is that the exposure is

unquantified, so one tends to use the top limit,

which we believe is of the order of £100 million.

Whether that sanction would ever be invoked is
debatable and, as you well know, there is only one

place in which it could be tested. There is a clear

exposure at the moment under the Competition

Act 1998, and the bill is a way of circumventing it.

Within Scottish Water’s risk management,

because of the quantum of that exposure, the

directors would need to ensure that it was high on

their agenda.

11:30

The Convener: I would like a response to the

converse of that question. I presume that a

company could challenge whether the new

arrangements satisfy the requirements of the

Competition Act 1998. Have you received advice

that a successful challenge is unlikely, based on

the proposed arrangements?

Dr Hargreaves: One can never be certain in an

area such as competition, but we are as satisfied

as we can be, given the advice that we have

received and the way in which we have examined

the bill, that it addresses the fundamental issue of

the current exposure. One never knows in a

market—somebody may find a different angle or

make a challenge based on something that

happens in the future, therefore it is probably

correct to say that such challenges can never be

legislated out of existence. However, the bill will

achieve its primary aim of protecting domestic

customers, which is part of the Scottish

Parliament’s desire, and it looks as though it will

do that very well.

The bill will open up the market in a way that

reduces the possibility of introducing an

unquantifiable—and perhaps minute—risk to

public health. That exists in England and Wales

with common carriage, although they have

decided that common carriage is not a risk. Until

somebody has run that market for a period of time

and lived through several incidents—which

inevitably will happen in the industry—it is difficult

to say what will happen. The aim is to avoid

introducing a risk to public health, the protection of

which is fundamental to the water industry. In both

senses the bill achieves the objective.

The Convener: We take that on board. However,

Mr Ewing’s point was that we would like to

see the advice that you have received that

substantiates your points. If you cannot give us the

original legal advice, a summary of it would be

helpful.

Dr Hargreaves: We do not have a document

sitting in Scottish Water that says, “Here is the

advice on the bill.” The advice has been built up

over time—it is not a single piece of advice—but

we can let you have what we have got.

The Convener: It would be useful to get the

advice from both sides that states that the bill is

necessary and will be effective. Mr Sutherland,

what is your view on those questions?

Alan Sutherland: Likewise, we can share with

you the legal opinions that have been provided to

us.

It is not just new entrants who could challenge

Scottish Water; a customer could challenge

Scottish Water. It is important to have the

framework, because any such challenge could

have consequences. Yes, it is not possible to say

when or if a challenge will come, but we are aware

from customers of Scottish Water and potential

new entrants who have contacted us that

challenges are likely. They are considering

challenges, and they are waiting to see what

happens and whether the bill is passed before

they decide whether to challenge.

Fergus Ewing: Who is contemplating a

challenge?
Alan Sutherland: It would not be appropriate for me to divulge commercial confidences that have been shared with us.

Fergus Ewing: I do not agree with you, sir, because this committee is examining expenditure of £10 million for risks that I am not satisfied will ever occur. As a Parliament, we need to be clear when we authorise expenditure of £10 million that there is a real risk. I am grateful that Mr Sutherland has undertaken to provide us with the original legal advice. I think that that is correct, is it not?

Alan Sutherland: We will provide the advice that we have.

Fergus Ewing: However, I was not quite so enthused—

Dr Hargreaves: We will do the same. The assumption was that there was a single document, but because the bill has evolved we have taken advice at different stages. We will let you have that advice.

Fergus Ewing: I have a separate question. The figures for the cost of establishing a licensing regime seem to be vague, ball-park figures. Do Scottish Water and the WIC have confidence in those figures? Can we have more detail on how they were arrived at? Whenever we see a figure of £5 million, I immediately think, “Has someone worked out this huge figure on the back of an envelope”? and I would like to see how the figures are made up. From past experience, when we probe the detail behind a big number we find suddenly that no-one has worked it out or thought it through. Could the representatives of the two bodies give us some comfort on that general point?

Ian McMillan: Yes, we can. Douglas Millican will help with the detail, but I make the general point that the experience of every utility is that the cost of the regime and systems that underpin the industry is always greater than was originally estimated. There is an interesting record of that happening. Equally, until such time as the details of the regime are laid out and specified, it is difficult to cost it. You are right to say that we are dealing with estimates, but they are estimates based on similar types of systems that have to be implemented.

Douglas Millican: On the specific point of the £5 million to establish the licensing regime, the cost of which would fall on the water industry commission, the financial memorandum was based on advice given by the water industry commissioner, and we have no reason to believe that that advice did not reflect fairly the underlying costs.

Alan Sutherland: We have had advice on the legal component of £1.5 million and the accounting projects of £0.5 million. On the other advisory work, the figures are in line with our observed experience of changing elements of the regulatory regime. There is a market research budget of £0.1 million, which is one major project. The £2.5 million is over five years—it is £500,000 a year—and covers all staffing, developing licences and consulting extensively on the introduction of those licences over five years.

The Convener: A written note of the breakdown would be helpful.

Fergus Ewing: I have one point specifically for Mr Sutherland. He can correct me if I am wrong, but the budget of the water industry commissioner was overspent by £140,000. That is a matter of considerable concern, given that the WIC is a financial regulator and there is a substantial overspend in relation to the total budget. Can you reassure us that that overspend was a one-off mistake and will not recur?

Alan Sutherland: It is certainly a one-off, and was a direct function of extra work that we were asked to undertake.

Jim Mather: Going back to the regulatory impact assessment, paragraphs 14 and 16 give different figures for the reduced bill for standard connections. One refers to £30, and the other states that there will be a minimum benefit of £25 per standard connection. Is that anticipated to be an annual saving?

Alan Sutherland: The difference between the two figures is that £30 is the pre-cost amount, and £25 is what you would expect the supplier to pass on.

Jim Mather: So that is the anticipated annual saving.

Alan Sutherland: Yes, for an average bill.

Jim Mather: The RIA goes on to say that the water industry commissioner estimates that there is an efficiency gap of 43 per cent between Scottish Water and most comparable companies in England and Wales. Is that figure agreed between both parties represented? If not, could we hear Scottish Water’s standpoint on the matter?

Douglas Millican: It would be appropriate for the commissioner to explain where that figure came from before we comment.

Alan Sutherland: In our costs and performance report of last year, which covered until the end of the 2002-03 financial year, the gap to the leading company in England and Wales was assessed as 53 per cent. In its recent draft determination, the Office of Water Services—Ofwat—has said that the industry as a whole is likely to be moving forward at around 3 per cent per year. Conservatively, we could consider that as a couple of per cent per year for the frontier company.
John Simpson will take members through the detail, but it is important first to recognise a couple of things. Over the past two years, Scottish Water has made quite impressive progress in reducing its operating costs. We have been particularly encouraged by the progress that has been made over the past year and by the information that is beginning to come out on the trend line for the current financial year. There is good news, but there is still a considerable gap to the frontier company. The estimate that is contained in the financial memorandum is of the right order.

Dr John Simpson (Office of the Water Industry Commissioner): As Alan Sutherland said, the estimated gap in our 2002-03 report was 53 per cent. I would like to take members through some numbers. It is easier to deal in pounds and pence. On the basis of the gap that we published, it would cost Scottish Water £1.86 to deliver a service equivalent to that which the leading company can deliver for 87p. That comparison or benchmark uses tried and tested benchmarking models, which were developed by Ofwat. In fact, the models were developed by me when I worked at Ofwat. We have applied those models to Scotland and we have done a lot of work to ensure that the additional costs of operating in Scotland—which do exist—are properly taken into account.

The latest comparisons that we have are for 2002-03; Ofwat has not yet published any information for 2003-04. I would regard the efficiency gap, as stated in the impact assessment, as of the right order. It is interesting to note that both Scottish Water and Water UK have thrown doubt on that, but I would say that that doubt is premature.

Scottish Water has made substantial and welcome improvements over the past financial year, and that is continuing today. On the basis of the figures that Scottish Water has provided to us, my £1.86 figure becomes £1.67 thanks to the 10 per cent improvement of last year. Scottish Water says that it expects to improve by a further 10 per cent in this financial year; that takes us to £1.51. Another 10 per cent improvement in the following year would take us to £1.36. That last improvement would deliver the targets that we set in the strategic review of charges.

11:45

Remember that the leading company can deliver for a cost of 87p and falling. Companies continue to improve. If we ask where the leading company will be by 2008, we can only speculate but, if we assume that the leading company improves by 2 per cent per year, which is in line with what Ofwat is saying, then the figure of 87p becomes 77p, so the respective figures for that year would be £1.36 and 77p. By my calculation, that is a 43 per cent gap. The gap is 59p—a 43 per cent gap when divided by £1.36.

If Scottish Water continues to improve, as I am sure it will, the gap will be smaller. If it improves by 15 per cent, the £1.36 becomes £1.16, and the gap is then 39p, or 34 per cent. My point is that there will still be a significant gap in 2008. I do not know whether the gap will be 42 per cent.

Jim Mather: Does your methodology factor in topography, geography, the sparsity of population and the relatively smaller market in Scotland?

Dr Simpson: Very much so. That is at the heart of the benchmarking and modelling process. It is absolutely about that kind of thing.

Jim Mather: A response from Scottish Water would be appropriate at this point.

Douglas Millican: The discussion shows that the relevant question is what the level of efficiency will be in 2008, when the market opens. I am not going to predict what that will be, because it all depends on how we and the companies down south reduce our operating costs.

In England and Wales, there is a wide range of performance. John Simpson has highlighted his assessments relative to the leading company. If you consider the efficiency performance for the companies in England and Wales, which has been quoted by Ofwat, you will see that there is a wide range between the most efficient company and the least efficient company. The relevant factor with respect to the benefit that would be available to customers in Scotland who choose to go with a retailer, rather than with Scottish Water, will be the operating cost base of that retailer compared with that of Scottish Water retail in 2008.

Jim Mather: We are talking about a minimum saving to a business of £25 per annum. We know that charges have been high for the business community here. Is it likely, in the opinion of the Scottish Water witnesses and, perhaps more important, in the opinion of the water industry commissioner, that the new regime will force an improvement in the ratio of capital expenditure funded from borrowing, and possibly even a rethink on some of the accounting protocols through which so much of the infrastructure has been written off in year one?

Alan Sutherland: As far as the price determination is concerned, we will shortly publish for consultation our proposals on how we will set prices for the regulatory period. We are in the fortunate position of having considerably more information about the industry in Scotland. In particular, we have a much higher quality of information on Scottish Water’s assets compared with the information that was available when there were three water authorities, when the 2002-06 review was written.
We propose to use a method of setting prices that assesses a regulatory capital value, which will be in line with the process that is used in the water industry in England and Wales and in other utilities. That will facilitate comparison: it will make possible, immediately and directly, comparisons on the basis of funding or financial ratios, and without any adjustments being required. In essence, the regime will allow people to make representations in a transparent way.

The current proposals are that, if the bill is passed, we will publish a draft determination at the end of June next year. There will then be a period lasting until about the end of September next year, during which people may comment in detail, having seen the answers—but prior to a final answer being struck. If Scottish Water was not happy with that answer, or if it did not think it to be manageable, it would have the right of appeal to the Competition Commission, in line with that of other utilities. There is a very robust process in place to ensure that we have a proper and transparent regulatory regime for the calculation of prices. Many of the issues that we have discussed previously are therefore being addressed.

The Convener: Dr Simpson gave us a projection using pounds and pence. It would be useful if members of the committee could have that in writing. I am also conscious that the witnesses from Scottish Water have not had a chance to comment on the pounds and pence figures, so if they would like to they can do so now.

Douglas Millican: I tried to address that issue previously by saying that I would not want to make projections as to where the companies in England and Wales will be in 2008 when the market opens. Ofwat will make assumptions, just as it did at the last periodic review. It is interesting that some of the predictions that were made at the 1999 periodic review of the companies in England and Wales are not holding true. Operating costs in companies in England are tending towards being higher at the end of the current regulatory period than Ofwat predicted. There are always dangers with predictions.

We expect that the gap will be much narrower in 2008 than it is at the moment. However, the most relevant aspect is not what the gap might be against the leading company, because that leading company might have no interest in competing in the Scottish market. The relevant issue is the cost base of Scottish Water’s retail activities compared to the cost base of new retail companies that want to come into the market. Those are the companies that might provide benefits to Scottish customers.

The Convener: Is that the cost base across the current activities of competitors? If we take Thames Water as an example, are we talking about that company’s current costs or what it would cost for it to enter the Scottish market and compete here?

Douglas Millican: Under the proposals that are set out in the bill, the cost of the retail activities is of primary relevance. The wholesale monopoly activities of providing water and treating sewage will continue to be provided by Scottish Water. The most relevant comparison is of the costs of the activities that fall into the new retail element and which will be licensed by the new commission. If new entrants to the market can operate their retail activities for a lower cost than Scottish Water can, that might offer a competitive advantage to customers. Clearly, that will also give Scottish Water retail an incentive to continue to bear down on its retail costs.

Mr Brocklebank: I was interested in Dr Simpson’s figures, and I take the point that he compared the best, most efficient and most economic of the English and Welsh companies against Scottish Water. Can he produce an average figure that might provide a more direct comparison? Is it anything like 29 per cent by 2008?

Dr Simpson: The pounds and pence were carefully chosen so that the average company in 2002-03 would have delivered the equivalent service for £1. We have Scottish Water at £1.86, the average company at £1 and 87p for the leading company. Ofwat tells us that the companies are set to improve at a rate of 3 per cent per year. 2008 is five years away from 2003, so that would result in improvement of the order of 15 per cent on our £1, which will mean an amount of 85p by 2008. I return to my original point that the figures are £1.36 for Scottish Water, about 85p for the average company and 77p for the leading company. Douglas Millican is correct to say that the gap is narrower; nevertheless, there is a gap.

There is also a point to be made about retail costs. It was said—rightly—that what matters is the retail cost base. There are issues there with economies of scale and scope in that Scottish Water can allocate its billing costs only across non-domestic customers. The water and sewerage companies down south can allocate those costs right across their customer bases, which gives them better cost bases from which to compete.

Mr Brocklebank: Ultimately, what concerns us all is how much our water is going to cost us, whether as individual customers or businesses. I do not know whether you have seen Scottish Enterprise’s submission, but I found it to be fairly damning in that it claims that Scotland is not competitive in terms of water charges because it is the fifth most expensive country, with
“countries such as Belgium, Italy and Spain having a comparative advantage in terms of pricing.”

I am an amateur, but given the rainfall in Spain and Italy and all the rain that we have seen here this summer, it seems to be utterly incredible that Scotland is among the most expensive countries in Europe. The Scottish Enterprise submission goes on to suggest that the situation makes us particularly uncompetitive in sectors such as paper processing, pharmaceuticals and so on. There are two paper mills in the constituency that I represent: can they look forward to any improvement in that competitive situation five years down the line as a result of the bill?

Alan Sutherland: In the previous review, we said that if Scottish Water were to deliver on its targets, and were the capital programme to run at or around the same level as it does in the current regulatory period, there would be no need for real price increases across the board. The division of who pays what is something on which we will get guidance from ministers in January after the principles of charging consultation closes. Once we get that, we will be in a position to look forward and say what that revenue line will mean for prices for individual customers.

Dr Hargreaves: I have a comment on the international comparisons. The data are sometimes difficult to collect, but let us assume for a minute that the data are correct. We are not talking just about Scotland but about Britain, and Alan Sutherland will agree with me that the English and Welsh water companies are now probably among the most efficient in the world after 15 years of pretty tough regulation. I am concerned about where we are going to end up with those data, mainly because of the way in which improvements in environmental conditions and other issues associated with the water industry are funded in the UK versus the funding in other countries in Europe. I am not saying that those countries do not implement European directives in the same way as we do; members are probably a lot closer to that than we are.

The only real example I can give is of a Scandinavian country where nitrogen removal from the water supplies was funded through a grant system rather than its being paid for directly by customers. Such things lead to an ongoing, but false, view that water prices in such countries are lower. Other countries use subsidies that are not used in Britain, in which I include Scotland.

Looking down the line, how we will end up is of concern. At the end of this period, Scottish Water will not be the least efficient of the big water and sewerage companies. We believe that that is an amazing—I mean that—feat given that we have had four years to achieve it when the other companies have had 15 years and some time before that. It is important that Scotland should recognise that.

Nevertheless, the amount of money that needs to be spent on the infrastructure in order to maintain and improve the standard of service to customers, and the continuing flow of environmental legislation requiring huge sums of money are of concern in respect of the bill and as a general question about the competitiveness of the water industry. Although water falls out of the sky a lot in Scotland, that does not mean that it is cheap. Parts of Spain have much higher rainfall than Scotland. It is about the treatment that the water requires once it has been collected, whether it has to be pumped over hills, how far it has to be pumped and so on.

Ms Alexander: Like other members, I was struck by the figures that John Simpson offered the committee. I want to pursue them.

Obviously the committee’s concern is about stewardship of the public purse and value for money for Scottish consumers and taxpayers. I seek a professional opinion. I am struck by the fact that having a near-monopoly provider and a sole regulator—with all the risk of regulatory capture that that carries—is not a structure that has commended itself historically to closing efficiency gaps, to reducing cost bases or to innovation. Most historical evidence suggests that a more competitive market will close an efficiency gap. Will you comment on whether, based on the evidence of which you are aware professionally, we have a structure that commends itself to closing the efficiency gap? I will ask a follow-up question.

12:00

Dr Simpson: There is no risk of regulatory capture.

Ms Alexander: I take that point.

Dr Simpson: The regime that Ofwat has operated in England and Wales has shown that an independent regulator can create a regime and incentives under which companies feel pressure to improve. It is fair to say that since the companies became fully regulated by Ofwat, they have made great strides in improving their efficiency—that is true of every company. If there had been no regulation, but there had been competition instead, would improvement have been greater? I do not know. All I know is that the regime under Ofwat seems to have worked and to continue to work.

The arrangements in the bill to establish powers of determination and so forth will give us a similar regime to Ofwat’s. We have made a good start—Scottish Water has made a good start by
achieving considerable efficiencies. I hope that we can now build on that initial progress.

Ms Alexander: In your professional opinion, are savings such as have been made in England and Wales more difficult to achieve because, although we have an independent regulator, we have a sole provider in large parts of the market?

Alan Sutherland: We are in a fortunate position because we have access to all the information that comes from England and Wales. If we had no easy benchmarking opportunities—as was the case with the Royal Mail and the Postal Services Commission, Postcomm, which cannot make immediate and easy comparisons because of accounting differences and statutory and other legal differences in postal services—regulation would be much more difficult. However, when information about 10 large water and sewerage companies and another 13 water-only companies is being collected and audited consistently on both sides of the border, very detailed comparison work can be undertaken. John Simpson has talked about that important point.

Most economists would probably argue that at least the potential for competition—if not competition itself, the idea that competition may occur, which might be market competition, outsourcing or competition for capital in financial terms—would help to stimulate further improvements.

Ms Alexander: I say with respect that John Simpson has not had the chance to answer my question; he may choose not to. The question is whether, in your professional opinion, having a sole provider in large parts of the market in Scotland in any way inhibits closure of the efficiency gap.

Dr Simpson: The answer is no, for the reasons that Alan Sutherland gave. We have the information and techniques that we think we need to establish the relative level of performance, which allows us—through committees such as this and through the Scottish Executive—to put appropriate pressure on Scottish Water.

Ms Alexander: I will ask just one follow-up question. If the sole-provider ownership structure, which was chosen several years ago, does not of itself represent a barrier to closing the efficiency gap, why have we made such slow progress on delivering the promise that was held out for the sole-provider model just a few years ago?

Dr Simpson: I am not sure whether I understand the question. We had three providers in 2001 and our judgment at that time, in the strategic review of charges, was that the best chance to close the efficiency gap would arise from having a sole provider, rather than three providers. That was our judgment then and I would not revise it now.

Jim Mather: In the past, we have had flawed and unhelpful comparisons with England and Wales, so I am keen to go through the methodology of your comparison of charging down south and up here in Scotland. Does your methodology adjust Scottish Water’s accounts and those from England and Wales on to a similar basis for borrowing levels and the protocol of writing off infrastructure replacement in the year in which it occurs?

Dr Simpson: At the heart of the comparisons that we make are comparisons of cost—operating and capital cost.

Jim Mather: So that is a no.

Dr Simpson: We think that because the inefficiencies lie in those costs. The regime that we have established for the current strategic review, with a regulatory capital value, will allow us to make direct comparisons going forward, but we are not in a position to make exact like-for-like comparisons along the lines that you described.

Jim Mather: Would going along the lines that I suggested present a truer and fairer view?

Dr Simpson: It would do so for a comparison of the businesses as a whole, but it would make no difference in respect of efficiency.

Jim Mather: Has Scottish Water recalculated the figures to deal with an assumption that the water boards down south applied a similar ratio of capital expenditure from charges and therefore did not borrow as much, for example? Has it reworked the numbers to show its numbers in a proper and fairer light?

The Convener: I will let Scottish Water answer that question, but I am anxious to draw us back to the bill and the financial memorandum, which is what we are meant to discuss.

Douglas Millican: At the moment, we are concerned primarily with planning for the next regulatory period. We are due to submit our first draft business plan to the water industry commissioner at the end of October—obviously, part of that will depend on his draft methodology, which he will publish later this month for consultation. In submitting our business plan, our main aim will be to give the commissioner all the information we believe we have, which he needs to ensure that he can undertake proper like-for-like comparisons and that the draft determination that he will publish in June next year is comparable with that of Ofwat for the companies in England and Wales.

John Swinburne (Central Scotland) (SSCUP): As always, I have sat and listened to beautiful rhetoric and must try to separate the wheat from the chaff and, as usual, there is more chaff than wheat.
Alan Sutherland said that the budget is "tight, but it is manageable".

The budget of the people whom I represent is tight, but totally unmanageable, and pensioners found out that in the last tranche of increases, the increase was 5 per cent. Mr Ian McMillan made a lovely statement that boosted my confidence. He said that part of the remit was to ensure that customers do not suffer disadvantage. How can you reconcile that with the fact that every senior citizen in the country has been disadvantaged by a 5 per cent increase while their pensions have increased by only 2.5 per cent? You have disadvantaged every senior citizen with that little increase. I suppose that that will continue next year and in the future and the £1.87 increase—or whatever it is—will go up and up.

No one ever seems to think about the people at the bottom of the scale. The Executive, in conjunction with you, came up with a beautiful deal of 2 per cent for small businesses. What about senior citizens who are on a fixed income? You people have got to get real.

The Convener: I am not sure that we are getting to the bill.

Fergus Ewing: I wonder whether I missed something. Dr Simpson read out a series of statistics that justified his conclusion that there is a 43 per cent gap in efficiency between Scottish Water and the most efficient English or Welsh water company. Have we received an explanation of how those figures were arrived at?

Dr Simpson: Yes. We published—

Fergus Ewing: Has the committee received a submission from you?

Dr Simpson: Do you mean the figures on the financial memorandum or the pounds and pence that I described?

The Convener: I think that the problem is that the committee has not received a written submission from your organisation. I have asked for the figures to be provided to us, perhaps with an explanation. I am sure that that is what Mr Ewing is suggesting.

Fergus Ewing: Yes. The figures are obviously important and underlie many of the assumptions that make the bill necessary, in your view. The bill will involve £10 million of initial set-up costs—money that I, like Mr Swinburne, believe would be better used to cut water rates. It is unfortunate that we have not received a submission that shows how you calculated those figures.

I will move on and raise two matters that arise from the figures that you gave this morning. First, Scottish Water began life with accumulated debt of about £2 billion. Senior citizens face swingeing water charges, as John Swinburne rightly said, partly because the customer has to pay back that debt through the interest element that must be met each year. The WIC compares Scottish Water with the 10 privatised companies south of the border, but is not the debt that the Scottish water-rates payer must pay back much greater than the debt of the English and Welsh water companies? I recall that those companies received a green dowry as part of the privatisation package, when their debts were written off. Are you not therefore comparing apples with pears?

The Convener: It might be more appropriate to put that question to Mr Finnie when he comes before the committee. I have been very specific; I said that we are concerned with the financial memorandum to the Water Services etc (Scotland) Bill. Members should direct their questions accordingly.

Fergus Ewing: With respect, convener, I understand from the Scottish Parliament information centre’s briefing paper that the Executive’s figures are based on information from the WIC. However, the WIC has not given us a computation of the figures that he brought to this meeting. It is highly relevant to request an answer to a simple question: is there a comparison of apples with pears, because Scottish Water began life with a massive debt of £2 billion, which was not the case south of the border? Any comparison must surely take account of that fact and make it explicit. Has that been done in relation to your figures?

Dr Simpson: I will make three points in response. First, there is an account of how the figure of £1.87 was derived. Secondly, the debt in England and Wales currently stands at about £20 billion—I do not have the exact figure to hand—so we in Scotland are not out of kilter in relation to the debt borrowing by water and sewerage businesses in England and Wales.

12:15

There are one or two myths about the green dowry. In our costs and performance report, we explained the amount of debt that was commuted when the industry was privatised in 1989, which was just short of £5 billion. The Treasury provided a cash injection—the green dowry—of about £1.6 billion. The total cost of the transaction was therefore about £6.5 billion, which is equivalent to £275 for each household in England and Wales. Privatisation raised £5.2 billion as proceeds, so the net cost to the Treasury was £1.3 billion. The net cost per household was approximately £55. Tax losses were also transferred by the Treasury.

In Scotland, £700 million of debt was commuted when the three water authorities were set up, leaving £1 billion debt on the books. The cost to the Treasury of that transaction was £700 million,
which equates to £330 per household in Scotland. The cost to the Treasury in Scotland was about six times greater than that which was incurred by the privatisation arrangements in England and Wales. As it happened, there were also transfers of tax losses as in England and Wales.

The Convener: Thank you for that explanation. If Fergus Ewing has another question, I would prefer it to relate specifically to the financial memorandum.

Fergus Ewing: I have a question that relates specifically to the memorandum. I have read before the figures that Dr Simpson cited, and I believe that they are being examined by experts to determine whether the conclusions that have just been expressed are challengeable.

I raise a specific concern that BP and Unison have expressed about the requirement that Scottish Water set up a subsidiary. BP and Unison are not the most traditional of partnerships, but they have argued that the requirement to set up a subsidiary, which obviously has huge cost implications, would detract from the main task of meeting efficiency targets. I agree with BP and Unison. Attention is drawn specifically to one concern which is, namely, that in Scotland the market will be open; any customers will be open to competition. However, in England only customers who use 50 million litres of water a year—which would probably exclude most householders—will be open to competition.

At the beginning of the meeting, we heard both Scottish Water and the WIC say that we need to spend £10 million because we must have open competition and if we do not set up a subsidiary we may be sued and face swingeing charges. However, we do not have open competition. Again, apples are being compared with pears. I understand that, in England, only the biggest customers—those who consume 50 million litres a year—will be open to competition. In Scotland, everyone's water supply is open to competition. In England, there will be common carriage. In Scotland, common carriage—that is to say, use of the water pipes by more than one company—is prohibited. Do we not again have different situations in Scotland and England? Are we not comparing apples with pears? Why do we need to spend all this money?

Alan Sutherland: The bill will allow for competition for all non-domestic customers. It will not allow competition for household customers. We are talking about between 120,000 and 130,000 businesses in Scotland that could benefit from having a choice of supplier.

I understand from conversations with the Executive that the bill was designed as a precautionary bill. It will not introduce competition, but will put in place a framework that will protect the Government’s social, environmental and public health policies. As I said in my opening remarks, there is a real possibility that a challenge under the Competition Act 1998 will impact on things that are the prerogative of the Parliament, and that would have consequences for customers. Therefore the costs would seem worth the benefits.

The Convener: The concern was raised initially by Scottish Water, so it would be appropriate to give it an opportunity to comment.

Dr Hargreaves: On the setting up of the subsidiary, which was the first part of your question, there is a timing issue: when should we do that? Competition comes into being in 2008, so clearly it needs to be done before then. There is no doubt that creating a subsidiary—taking people who work in one part of the business and dividing up call centres and billing staff—will be disruptive to the business. Will that inhibit Scottish Water driving out more efficiencies? In the past two years, Scottish Water has delivered more efficiencies than any other water company in a two-year period. It will continue to drive out efficiencies, but will creating a subsidiary stop us continuing with that trend? The answer to that must be no. Ministers and the Parliament will expect Scottish Water to manage both activities at the same time.

Fergus Ewing: Sorry—I do not think either of the gentlemen has answered the question that I raised. Scottish Water has raised the specific concern that Scottish Water retail will not be treated equally with other retailers. This is due to the fact that the Scottish retail water market will be wholly open to other retailers, whereas the retail water market in other parts of the UK will not be wholly open because retailers will only be able to compete for non-domestic customers who use over 50 megalitres.

Why has the bill been framed in such a way that your concern has not been taken up?

Dr Hargreaves: We did not say that in our evidence, but I am happy to comment on the point. England and Wales have chosen, quite simply, to take a different route to achieve the same objective. The Scottish Executive has chosen—it is not Scottish Water’s choice, but ultimately your choice, as Parliament—to take a different route. As I said earlier, although one quality regulator south of the border believes that common carriage is not a risk, the view of the Scottish regulator is that there is a residual risk. If an operator in the water industry can avoid putting two or three lots of water from different ownerships down the same pipe and still achieve its objective—as Alan Sutherland said, the objective is to prevent challenge—that is by definition a good thing to do. I am not saying that it is impossible.
England and Wales have chosen to go down a different route. They are trying to mirror what happened with electricity and gas and create the market gradually, that is at 50 megalitres. It is highly likely that that figure will reduce in future, but of course customers will get the benefit of either retail competition or common carriage. I question the English system—why do they believe that retail per se is not a good thing for their commercial customers?

Fergus Ewing: I have one final question. We have heard the WIC argue that Scottish Water is massively less efficient than the most efficient water company in England. You will be exposed to competition from that company. If that company can supply water at 43 per cent of the cost—or anything remotely like that—it will be able to steal your customers. That will mean that the business customers will be the customers of the most efficient English company and you will be left with exactly the same costs. You will lose revenue massively to your more efficient competitors and the victims will be the remaining customers of Scottish Water who, instead of paying for part of the costs, will pay for all the costs.

I am trying to put this as clearly as possible. Does not the bill really represent a gigantic threat to the ordinary domestic water-rates payers in Scotland? If I am wrong, can you explain why I am wrong?

Douglas Millican: Central to the successful operation of the bill will be the clear setting of the price that Scottish Water will, in future, charge businesses for the wholesale supply of water. It is critical that the wholesale price that Scottish Water will charge retailers is properly set so that it fully covers—but no more than that—all Scottish Water's future costs of providing treatment and distribution activities. If those wholesale charges are set properly, there will be neither a benefit nor a disbenefit to household customers arising from the bill.

Fergus Ewing: What is the point of the bill, then? If the price is going to be set artificially at a level that enables Scottish Water to supply the water, what is the point of the bill?

Douglas Millican: The water side of our business runs everything from raw water resource abstraction through treatment and distribution to the selling and delivery of services to customers. The bill proposes that companies will be able to obtain licences from the commission to undertake those aspects of activities that are not prohibited under the bill. Therefore, Scottish Water's future wholesale price will not be for the same service that it provides today; it will be for those elements of the service that remain with Scottish Water and that are not provided by newly licensed entrants.

The Convener: I think that we are reaching the end of this process.

Mr Brocklebank: Can I just clarify something?

The Convener: Fergus Ewing's points were on policy, not the financial memorandum. It is important that we confine—

Mr Brocklebank: My point is related to Water UK's apparent criticism of what is proposed in the bill.

The Convener: Okay.

Mr Brocklebank: In its conclusions, Water UK basically says what Fergus Ewing has pointed out. If these issues are not addressed through legislation and regulation, competition in Scotland could encourage cherry picking and leave domestic customers alone to pay for the environmental and social objectives that are given to Scottish Water. Is that not a real danger? Water UK points that out in its submission.

Douglas Millican: Absolutely. That is why it is critical that the wholesale price is set correctly.

The Convener: I thank our witnesses for coming along. We will have Executive officials at our next meeting, and you have given us food for thought and ammunition for questions to those witnesses. Thank you very much for coming along today.
Present:

Ms Wendy Alexander
Mr Ted Brocklebank
Fergus Ewing (Deputy Convener) Kate Maclean
Des McNulty (Convener) Jim Mather
Dr Elaine Murray Jeremy Purvis
John Swinburne

**Water Services (Scotland) Bill:** The Committee took evidence on the Bill’s Financial Memorandum from—

Andrew Scott, Head of Water Services Division; Clare Morley, Water Services Bill Team Leader; and Tom Harvie-Clark, Economist, Analytical Services Division, Scottish Executive.
Water Services etc (Scotland) Bill: Financial Memorandum

10:40

The Convener: Agenda item 2 is further consideration of the financial memorandum to the Water Services etc (Scotland) Bill. Last Thursday, we took evidence from the water industry commissioner and from Scottish Water. Today, we will hear from Scottish Executive officials: Andrew Scott, who is head of the water services division of the Environment and Rural Affairs Department; Clare Morley, who is the bill team leader; and Tom Harvie-Clark, who is an economist in the department's analytical services division.

As I said last Thursday, I am anxious that the committee concentrates on the financial memorandum. We can address the broader issues about water when we take evidence from the Minister for Environment and Rural Development, who is due to appear before us on 28 September. Later this week, we will receive additional legal information from the WIC and from Scottish Water.

I invite Andrew Scott to make an opening statement before we move to questions.

Andrew Scott (Scottish Executive Environment and Rural Affairs Department): Briefly, we believe that the benefits of the bill will substantially outweigh its costs. Important public health benefits will be gained by safeguarding against the diluted accountability that would result from common carriage. Important environmental benefits will be safeguarded by, for example, the prevention of sewer flooding. The bill will also safeguard important social inclusion benefits, such as the harmonised charge throughout Scotland and the system of discounts that are worth a great deal to vulnerable households across Scotland. Finally, the bill will enable us to ensure that we can continue to provide discounted finance to Scottish Water from the public purse. We believe that the benefits of the bill substantially outweigh the costs.

Jeremy Purvis: The financial memorandum says that advice was received from the water industry commissioner on the cost of setting up the licensing regime. A cynic might say that the water industry commissioner would be unlikely to suggest a low cost—although the commissioner said in his evidence that it was a bottom-up exercise. Was advice sought from other regulators in Scotland or the UK on the potential cost of setting up a licensing regime? For example, was advice sought from the Office of Gas and Electricity Markets?

Andrew Scott: I know that Alan Sutherland consulted other regulators in coming to his
estimates. He also set up a project to examine the costs in some detail. Clare Morley can explain how the costs were arrived at.

Clare Morley (Scottish Executive Environment and Rural Affairs Department): The costs that the water industry commissioner gave were the best estimate that was available at the time. He continues to work on costs and, I understand, he will publish a scoping study in the next couple of months. The figures that he has provided to date confirm those in the financial memorandum. The financial memorandum breaks down the £5 million costs into five categories. Would it be helpful if I talked more about each of those categories?

Jeremy Purvis: I would be happy to get more details. My reason for asking is that Ofgem is changing the licensing regime through the British electricity trading and transmission arrangements, the legislation for which is proceeding through Westminster. The work that has been done on that should give us a direct parallel for the costs of this process. It would be useful to have more details on the licensing regime costs.

The Convener: I presume that we can get that information in writing.

When we took evidence from Scottish Water and the WIC last week, we talked about the financial risks—as opposed to the other kinds of risks that Andrew Scott referred to in his opening statement—that might arise if the bill were not introduced, such as the possibility of a challenge under the Competition Act 1998. I understand that the Executive has received legal advice on that, but how do those policy issues impact on the financial calculations?

10:45

Andrew Scott: The current situation in Scotland is that the industry is entirely unprotected from the effects of the Competition Act 1998. The Water Act 2003 protects the industry in England and Wales from the effects of the Competition Act. In Scotland, we are taking a similar precautionary step, although in a slightly different way.

The principal public health and environmental risks are to do with the possible introduction of common carriage, which would dilute accountability for public health. The principal financial risks are that we would not be able to maintain our policies for social inclusion in water charging, which are provided through a series of discounts that are worth around £75 million per year. With competition in common carriage in the domestic market, the discounting system that transfers money from affluent to less affluent customers would break down. We would be unable to maintain those discounts, so affordability for vulnerable households would suffer.

Another financial risk is that, if the market were to become entirely contested, the terms on which we grant loan funds to Scottish Water might also be challenged. We cannot be sure about that, but it is possible. We lend Scottish Water money at rates that are much more favourable than those it could get on the open market. I think that that difference is worth about £40 million or so each year. Is that right, Tom?

Tom Harvie-Clark (Scottish Executive Environment and Rural Affairs Department): Yes.

Andrew Scott: That £40 million difference is for Scottish Water’s entire loan stock. It is difficult to model that risk, but it is potentially quite substantial.

The Convener: How effective will the bill’s provisions be in deterring large-scale industrial operators from going to a supplier other than Scottish Water? What inhibitions does the bill provide?

Andrew Scott: Such companies can already go to other suppliers and it is not the bill’s intention to deter them from doing so where that is in their interests. However, the bill makes various provisions for handling special circumstances so that industrial operators that take steps to reduce the costs that they place on the public network can get a discount on their bill. That is the principal step to ensure that large users remain on the network where it is economic for them to do so.

The Convener: I thought that the bill also imposed requirements on operators who enter the market so that they cannot simply pick and choose.

Andrew Scott: The bill will set a national harmonised charge, which will be segmented according to the circumstances of different users, such as large and small users. The principle of the national harmonised charge is not to keep large users on the network everywhere—for example, they might sink boreholes in areas where they have ready access to low-cost water—but you are right in so far as the harmonised charge will maintain a level playing field across Scotland.

The Convener: Is it your argument that the costs that are entailed in the bill are justified, at least in part, by having a controlled market that does not create sudden incentives for large water users to bail out of the system and leave other consumers to pay for a network that has to be there anyway?

Andrew Scott: That is right. Widespread, unregulated common carriage would result in regional de-averaging of price.

Dr Murray: The financial memorandum provides figures for the operation of a competitive retail
market, but Scottish Water’s independent consultant—IBM Consulting, which has done similar work in other parts of the world—came up with figures that were rather higher than those provided by the Scottish Executive. Are you aware of that work? Have you had a chance to examine those figures? We asked Scottish Water whether IBM could divulge the results of its research to us. Have you had an opportunity to discuss that work with Scottish Water? How robust are the Executive’s figures, given that IBM has provided very different figures?

Andrew Scott: We discussed with Scottish Water the costs in the financial memorandum, but it was unable to provide us with alternative figures. Our view is that the financial memorandum’s figures are reasonably robust. That is largely because what will be set up will be a simple sort of market. Tom Harvie-Clark will elaborate.

Tom Harvie-Clark: The figures in the financial memorandum were based on advice from the WIC, whose estimates were informed by previous research that had been done for him. The proposed water market will be a much simpler market than the electricity and gas markets because there will be no multiple generators, nor common carriage. There will also be no storage issue such as there is with the electricity market, in which half-hourly balancing must be undertaken. That means measuring every customer’s usage every half hour each day of the year, which is over 17,500 usage figures each year for each customer. The water market will need just one annual figure, so it will be a simpler market to operate. That is why we think that the cost of the switching engine will be modest compared with that of other utility markets.

Dr Murray: I believe that the attitude to common carriage south of the border is different to what the Scottish Executive proposes. Is it part of your rationale that common carriage would make it simpler to operate the market? Is that a financial consideration for you?

Andrew Scott: No. The reason why we are not proposing common carriage is that we think that it poses a risk to public health and the environment. We do not have reasonable grounds for setting a policy objective that would eliminate retail competition within the business market. That is why we are allowing it.

Mr Broicklebank: The bill will allow new ministerial powers of direction, but I am not sure what they would be. You claim in the financial memorandum that it is not possible to predict what costs might arise in complying with a direction. Why is that? Are you not able to get into scenarios that might estimate costs?

Andrew Scott: Which direction are you referring to?
the draft determination will be published and there will be a process by which people can modify that in leading to the final determination in December.

Mr Brocklebank: So it has not been possible to create economic models for differing scenarios and try to come up with some kind of costing for them.

Andrew Scott: There are broad hints in the quality and standards consultation document. If you have a chance to read it, you will see that some very large figures are posited for future investment requirements. To fund those figures we would need to increase water bills substantially. Inevitably, other factors will come into play—for example, affordability and deliverability. There is no point in raising water charges to such a point that people cannot afford them and there is no point in specifying a capital programme that cannot be delivered—or that cannot be delivered efficiently. Ministers will take all those matters into account at the end of this year, when considering their response to the public consultation. They will publish their deliberations at the beginning of next year.

Jim Mather: I did not hear you make much mention of economic impact in your opening statement. Do you envisage the bill having an economic impact?

Andrew Scott: I think that the best way to regard the bill is to see it as a precautionary measure; if we do not enact the bill, bad things will happen. That is the first point. The second point is that some of the most important aspects of the bill are not directly addressed in the financial memorandum because no novel costs are associated with them. Undoubtedly, the move to independent regulation will bring substantial additional efficiency incentives to bear upon the industry, which can only be good for taxpayers and charge payers.

Jim Mather: My concern is that the bill could create an acceleration of larger businesses opting out of Scottish Water service provision and that that might blow back on the generality of domestic users and the poorer users that you mentioned at the outset. Has anything been done to evaluate that risk and to take steps to prevent it?

Andrew Scott: It is very hard to put figures on that. Inevitably, when one talks to large users they always play up the threat of leaving the network, particularly when they have alternative supplies. However, we have introduced arrangements that enable large users to reduce their water bills when they have taken steps to reduce their calls on the public network. An example of that might be a whisky distillery that takes raw water rather than chlorinated water into its distillery. That imposes less cost on the public network, so the distillery will get a discount on its charge. Another example might be a large water user that installs storage tanks on its site to limit its peak consumption, which would qualify it for a discount on its bill. It is also the case that the national wholesale charge is in part a notional idea because charges will be set to be cost reflective and there will be categories of users. Because large users impose less cost on the system in various ways, they will still qualify for a discount. Therefore, the large-user tariff will continue, but it will be the same across Scotland.

Jim Mather: You mentioned at one point that without the bill Scottish Water’s ability to borrow at favourable rates would be limited.

Andrew Scott: It might be.

Jim Mather: What are the implications of that in interest rate terms?

Tom Harvie-Clark: Scottish Water borrows from the Executive and gets Government borrowing terms, which gives it cheaper debt than any other company. Our estimate of that margin is that it is about 2 per cent. Scottish Water’s debt is about £2.2 billion, so the benefit from cheaper debt comes to about £44 million a year.

Jim Mather: With competition legislation bringing pressure to bear on Scottish Water, surely that is not the only change that you would expect to see.

Andrew Scott: If Scottish Water were to be challenged in the courts, anyone seeking access to its facilities or seeking to compete with its facilities would say that Scottish Water receives state aid, which distorts competition because no other company can compete so favourably. It would be argued that the interest rates—

11:00

The Convener: I am sorry to interrupt you—I should have mentioned this earlier. We agreed that we would stand to observe a minute’s silence at 11 o’clock in memory of the people of Beslan.

11:01

Jim Mather: I did not want to dwell in particular on the matter, but I wanted to make the point that if the windows and doors were open to let in some fresh air on the issue and allow the scrutiny of Scottish Water in relation, for example, to borrowing and the prospect of state aid, there would be another side to the equation. In such circumstances Scottish Water might be forced to be more competitive about charging and perhaps borrow more and factor things over time. I wanted to put that on the record.

Andrew Scott: We are strengthening the provisions for independent regulation, to make them much more akin to the system that operates down south. There is very little competition down
south; what has brought the huge efficiency gains is benchmarked, comparative competition. We are introducing that properly in Scotland and I expect that to bear down substantially on Scottish Water’s costs.

I also expect that Scottish Water would find it easier to reduce costs in an environment in which it did not have to look over its shoulder all the time at competitors who might be trying to cherry pick various customers and in which it would be able to concentrate on a narrower range of matters.

**Jim Mather:** At last Thursday’s meeting the committee again heard concerns that we are not comparing like with like. I would be grateful if you would have a look at the *Official Report* of that meeting and give some thought to the matter.

I have a final question. In your opening statement you said that public health and environmental considerations are key drivers behind the bill. The financial implications are bleak for the people I know in places such as Campbeltown, which has been flooded on several occasions. They have difficulty obtaining insurance cover, let alone coping with the disruption, the costs and the loss of business. How would the bill help such people?

**Andrew Scott:** First, I do not know about the cost of serving Campbeltown in particular, but I presume that it is one of the more expensive areas to serve. The bill would enable us to preserve a national approach to charging, which might benefit Campbeltown.

Secondly, the strictures on efficiency would mean that bills in Campbeltown would be lower than they would be otherwise, so we would be able to afford more investment than we would otherwise because there would be a rigorous process for ensuring that investment is delivered efficiently—in general terms.

**The Convener:** I return to the competition modelling that would be allowed under the bill. You made great play of the fact that there would be a national charging system, which would permit some measure of cross-subsidy between different parts of Scotland and different types of users. Although people might support the principle of cross-subsidy, I think that there will be much interest in its extent in different parts of Scotland. Do you anticipate that the competition mechanisms in the bill and the scrutiny process that would be associated with the role of the proposed water industry commission would allow the level of cross-subsidy to be carefully considered, not just on an on-off basis every four or six years, but as part of the process of considering investment, for example?

**Andrew Scott:** People are much more sensitive to the price of water than they have previously been and are much more mindful of what they are getting in return for their bills. As part of our preparations for advising ministers on how they should approach setting objectives for the period from 2006 to 2010, we have commissioned a project that will provide a model of current cross-subsidies in Scotland. The results of that project will be published in the new year at the same time that ministers publish their objectives for the industry. Indeed, one of the objectives that ministers will have to consider is whether they unwind any existing cross-subsidies in the business community and from business to domestic charge payers. As a result, subsidies will be thoroughly examined and decisions will be taken in December or January about what any future subsidies should be.

**The Convener:** If one follows an argument based on social or environmental drivers, as opposed to an argument that is driven by economic growth, one will end up with different kinds of outcomes for investment. For example, if you argue that economic growth should be the prime driver, you will presumably try to deal first with the most serious constraints to development in Scotland. However, that approach will apply to the more industrialised parts of the country instead of to the more remote rural areas, which will argue that their needs are equally important. How do we deal with that? How will the mechanism that the proposed legislation seeks to put in place allow us to identify and balance the different factors such as rurality and urbanity, growth and social inclusion and so on that have to be taken into account in making such decisions?

**Andrew Scott:** We have this wonderful thing called a minister who, if the bill is passed, will be obliged to set objectives for Scottish Water. That is the mechanism proposed. In support of that, we are currently carrying out two consultations. The consultation that deals with investment, called “Investing in Water Services 2006-2014”, is quite a large project that has been running since January 2003. It comprises all the principal stakeholders of the industry, who have been systematically examining what we need to spend on infrastructure maintenance, drinking water quality, environmental compliance—there is a lot of money tied up in that—development constraints and odours. As a result, the consultation is a comprehensive examination of investment needs that is built from the bottom up. Rather depressingly, it has produced a very large figure. Ministers will simply have to make judgments on their priorities and make them explicitly clear. That was not the case when quality and standards II was established.
The Convener: The process seems to have been driven largely by environmental compliance, particularly with European directives. How does the introduction of competition to the industry that we have been talking about link into an agenda of competitiveness or growth across Scotland? Has there been any consideration of that issue as part of this exercise or is it a separate matter? Will you examine competitiveness purely in the context of managing the balance within the industry and not necessarily in the context of managing the development and growth of Scotland?

Andrew Scott: The straight answer to your question is that the issues are separate. I do not think that a more competitive market will cause infrastructure to spring up in places where it does not exist. Nonetheless, ministers will have to make a judgment about the extent to which the network should be developed when they set objectives as the proposed legislation will require them to do. In January, ministers will have to make such judgments explicit. As a result, they will trade off bills against the extension of the network, the cleanliness of the environment and the quality of drinking water.

You are right to point out that environmental drivers represent a significant proportion of Scottish Water’s new investment requirements. When ministers set the objectives for the programme, they will take into consideration the risk of infraction from the European Community in determining just how far they can go. It will be one issue versus another. There will be a series of difficult trade-offs in the new year, but the bill makes those trade-offs explicit. It gives the political choices to ministers and it gives the technical function of determining the cost of those choices to the water industry commissioner.

Jeremy Purvis: I have a question about the “eligible premises”, where competition will apply. The intention is obviously for eligible premises to exclude domestic premises, so that retail competition will not apply to domestic billing procedures. Collection will remain with local authorities, hence the financial memorandum indicates no cost to local authorities through a loss of revenue because of their no longer having the charge to collect. Is consideration being given to the independent review of local government finance? If a recommendation that council tax should be replaced by another system comes out of that review, that would radically change some of the bill and the whole structure of the collection of charges through the council tax.

Clare Morley: The bill does not attempt to pre-empt that in any way. It refers to charges being set by reference to council tax bands so as to ensure that that is a clear principle by which domestic charges may continue to be set. It does not require that, however. We will have to wait for the outcome of the review. The bill does not pre-empt such a recommendation, nor would it necessarily need to be rewritten should events unfold as you suggest.

Jeremy Purvis: It would, however, be quite a radical change to Scottish Water’s financial role if its retail subsidiary contracted out to collecting agents or if it took over the collection role itself, dealing with all the administration for the discounts and so on that are currently linked with council tax.

Clare Morley: The bill leaves the billing of domestic households with Scottish Water wholesale, as it prohibits competition for domestic households. That would not be an issue for Scottish Water retail to consider. At the moment, the local authority collection of domestic water charges is highly cost effective.

Jeremy Purvis: Therefore, it would not be cost effective for Scottish Water wholesale to—

Clare Morley: It might result in increased costs if Scottish Water were to lose access to the existing mechanism.

Andrew Scott: Broadly speaking, it costs Scottish Water between £4 and £6 to issue a domestic bill. In England and Wales, where companies do not bill through local authorities, it costs several times that. Figures in the region of £15 to £20 have been used. Billing through local authorities not only enables us to achieve our social objectives, but it is pretty cost effective.

Jeremy Purvis: Is it the case that that does not open up liability under the Competition Act 1998? Is there not then a monopoly for the collection of tax? For electricity and other utilities, companies compete as collecting agencies.

Clare Morley: The bill contains a prohibition of retail competition for domestic users on the grounds of protecting vulnerable households. As the policy memorandum says, that is the only way in which we think we can continue to deliver the current discounts, which are associated with council tax collection, including the banding and the single adult household discount. That will also be the key to any future discount package that might be associated with council tax benefit, as was suggested in the consultation on paying for water services.

Andrew Scott: If you were to do away with the discounts altogether and if you encouraged innovation around sending bills to households, it is quite possible that private companies might be able to serve Scotland a bit more cheaply than we think they might be able to do at the moment. The trouble is that they would have to go a very long way to be able to reduce their cost to the extent that local authorities can do now. Local authorities
complain to us that they do not get paid enough for collecting each household’s bill, and there is an issue about bad debt. However, broadly speaking, the arrangement commends itself on the grounds of cost.

   The Convener: I thank the witnesses very much for coming along and answering our questions.

   If members want to give the clerks some guidance on specific issues that they would like to be incorporated in our report, they should mention them now. However, the main issues have probably been raised during our questions. We will circulate a draft report to members.
Note: (DT) signifies a decision taken at Decision Time.

**Water Services etc. (Scotland) Bill – Stage 1:** The Minister for Environment and Rural Development (Ross Finnie) moved S2M-1463—That the Parliament agrees to the general principles of the Water Services etc. (Scotland) Bill.

After debate, motion was agreed to ((DT) by division: For 96, Against 24, Abstentions 0).

**Water Services etc. (Scotland) Bill – Financial Resolution:** The Minister for Environment and Rural Development (Ross Finnie) moved S2M-1567—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Water Services etc. (Scotland) Bill, agrees to—

(a) any expenditure or increase in expenditure of a kind referred to in Rule 9.12.3(b)(ii) or (iii) of the Parliament’s Standing Orders, and

(b) any payments in relation to which Rule 9.12.4 of the Standing Orders applies, arising in consequence of the Act.

The motion was agreed to ((DT) by division: For 113, Against 7, Abstentions 0).
Water Services etc (Scotland) Bill: Stage 1

The Presiding Officer (Mr George Reid): The next item of business is a debate on motion S2M-1463, in the name of Ross Finnie, that the general principles of the Water Services etc (Scotland) Bill be agreed to.

14:33

The Minister for Environment and Rural Development (Ross Finnie): I am very pleased indeed to open this debate on the Water Services etc (Scotland) Bill—the first opportunity for Parliament as a whole to consider this important piece of legislation.

I begin by thanking the Environment and Rural Development Committee for its consideration of the bill over recent weeks. The committee’s stage 1 report attests to the amount of work that the committee has done in coming to its conclusions.

I am very pleased that the committee has endorsed the principles of the bill. There are several points on which the committee has asked me to provide further information. Subject to the vote of Parliament today, I will do so in good time for the start of stage 2.

This is a bill that defends public sector water provision in Scotland, puts public health first, safeguards the environment and protects vulnerable households. It does that by ensuring that competition law will not lead to the piecemeal involvement of the private sector in delivering Scottish Water’s core functions. It will ensure that economic regulation is accountable and that public policy objectives will be delivered transparently and robustly. It will also deliver a stronger and clearer voice for customers.

I am proud that Scottish Water is in the public sector. The bill secures that public sector delivery for the future, but not at any price. The challenge is to operate a transparent and accountable water industry—a water industry that spends customers’ money wisely, responds to business needs and works in the customer interest.

Mr John Swinney (North Tayside) (SNP): The minister will know of my concerns about issues that affect Scottish Water’s ability to deliver, especially the development constraints that exist around Scotland. Given that he wants Scottish Water to be transparent, is he concerned about the fact that the company is giving up on commitments that it has given to local authorities to provide water and sewerage capacity for particular developments? A commitment that was given by Scottish Water on a development at Alyth in my constituency has now been torn up. What does that do for the transparency of the workings of Scottish Water and for development at local level in our country?

Ross Finnie: There are two separate aspects to that. The matter to which John Swinney refers does not impinge on the general principles of the bill that we are debating. However, I am concerned if commitments, commercial undertakings or contractual obligations are being torn up.

The member is well aware that I have made it clear to the Parliament that the process by which the previous capital programme for Scottish Water was drawn up some years ago was not fully satisfactory. That is why we have embarked on a wholly different process. We also want to place on Scottish Water obligations to be more open and transparent, so that it will not be susceptible to the kind of difficulties to which the member has referred.

Mr Swinney: Will the minister give way?

Ross Finnie: No, I must make progress.

The prohibition on common carriage is key to the principles that are embedded in the bill. As the Environment and Rural Development Committee acknowledged, competition law holds out the prospect of third parties being able to seek access to Scottish Water’s infrastructure for the purposes of competing with Scottish Water in the provision of water and sewerage services.

The quality of the public water supply is fundamental to individual and public health. Likewise, the effective collection, treatment and disposal of waste water play a key role in protecting our environment. I am not willing to compromise the safety of those crucial services by contemplating the possibility that third parties might become involved in any part of the operations that surround those services.

Supplying water is not only about pipes—bills must be sent, charges collected and meters read. Retail is the other element of Scottish Water’s responsibilities. For domestic customers, there would be a significant risk if other companies were to become involved in providing those services to households. That would remove our ability to link households’ charges to their council tax band and would prevent council tax discounts being applied to water charges. Such arrangements provide valuable assistance to many vulnerable households. I am not prepared to add to the difficulties that vulnerable households face. That is why the bill protects those charging mechanisms, by prohibiting any organisation other than Scottish Water from supplying retail services to households.
Mr Brian Monteith (Mid Scotland and Fife) (Cons): I am interested to hear what the minister says about the difficulties that Scottish Water would have in collecting charges if that was not done through the council tax mechanism. Why might there be a problem, given that although the water companies in England are privatised, I am not aware that there has been a particular problem with collection?

Ross Finnie: The member obviously misheard me. I did not say that there would be collection difficulties; I said that there would be difficulties with our ability to apply discounts favourable to our most vulnerable households. That is a very different situation to that which exists with privatised water companies, which the member favours. His party is less interested in vulnerable households than are coalition members, who are extremely concerned about them.

For non-domestic customers, the situation is different. The system of discounts does not apply, so there is no need for one particular organisation to provide retail services. Accordingly, there are no grounds for prohibiting other organisations from providing those services to business customers.

Instead, the bill provides for a robust licensing regime. It will ensure that the benefits of competition—choice, greater efficiency and innovation—are not enjoyed at the expense of customers in general. Moreover, the regime will ensure that any competition that develops in the sector does so in a manner that is orderly and that is not to the detriment of Scottish Water and the core water and sewerage business. Taken together, the prohibitions and licensing provisions put beyond doubt the continuing role of Scottish Water as the sole provider of core services.

I share the Environment and Rural Development Committee’s concerns that our estimates of the cost of the licensing regime differ from those of Scottish Water. I stand by the costs that are set out in the financial memorandum. They are based on advice from the water industry commissioner and are the best available estimates. In advance of stage 3, I will submit an updated financial memorandum to the Parliament that will take into account information that will have become available and further work that will have been done by the water industry commissioner.

Contingent on making a public sector water industry work is the provision of a strong policy framework, strong regulation and fair customer representation. The bill provides stronger regulation through the replacement of the water industry commissioner, who is a one-man regulator, with a water industry commission that comprises non-executive members including a chairman and chief executive. That will help to ensure that highly technical matters of economic regulation are settled by a small group of well-qualified experts. Their analytical role will be carefully balanced by provisions that will make clear the responsibilities of ministers for setting the public policy framework within which Scottish Water and the commission perform their functions.

In future, ministers will specify two sets of factors. First, they will set the investment objectives that Scottish Water is to achieve in a given period and, on the basis of those objectives, the commission will have a duty to calculate the lowest reasonable cost within which Scottish Water can deliver the objectives and translate that into charges for customers. That process will ensure that customers pay no more than is necessary for the services that they receive. Secondly, ministers will also specify the principles that the commission is to apply in setting charge limits, determining, as a matter of public policy, the costs that different groups of customers should bear.

Mr Swinney: As part of that debate, will the minister share with the chamber today some of his thinking on the scale of the difference in approach that needs to be taken to expand the development potential of the water industry? The experience in my constituency is that affordable housing projects are not going ahead because of development constraints—indeed, all members are encountering similar examples. Can the minister give some hope that investment opportunities will become a greater priority for ministers? So far, there is little evidence that the ministerial team is taking the issue seriously.

Ross Finnie: I know that Mr Swinney is vexed—and rightly so—

Mr Swinney: Exactly.

Ross Finnie: Well, exactly, but let us not go down to a low level of debate. Mr Swinney also knows that the investment plans were set after full consultation with the relevant the local authorities, which made no mention—absolutely no mention at all—of development constraints when the plans were put in place. I regret that.

If Mr Swinney had listened to the debate, he would have been fully aware of the present consultation process on the development of our programmes and the level of investment that is required to deal with development constraints. He would know that all of that has been much more fully addressed than was the case in the past. If he were to speak to any local authority, or anybody else who is dealing with the present proposals for the programme, they would tell him how much more thoroughly the current programme is being developed.

Richard Lochhead (North East Scotland) (SNP): Will the minister give way?
Ross Finnie: No, I want to press on.

We will ensure that customers pay no more than is necessary for the services that they receive. Ministers will specify the principles that the commission has to apply in setting charge limits. The principles will determine, as a matter of public policy, the costs that different groups of customers should bear. The balance between ministers’ policy statements and technical expertise will ensure that regulation operates in the customer interest.

Again, I welcome the Environment and Rural Development Committee’s endorsement of the process: the added accountability and transparency of these measures will serve the customer interest more effectively. It is important that the customer’s voice is heard. That is why I have indicated that I will seek to amend the bill at stage 2 to enhance the role of the water customer consultation panels. That will give customers a stronger, clearer voice with which to comment on the policy objectives of the industry and to make recommendations to ministers.

In addition, I will give the convener of the panels a direct interface with customers to help when things go wrong, through handling customer complaints. I have read carefully the committee’s comments on those proposals and it can be assured that in lodging amendments I will ensure that customer panels are given the powers and responsibilities to deliver their new functions effectively.

While I believe that we are building a first-rate public water industry, I am not complacent. The Environment and Rural Development Committee’s report makes a number of valuable recommendations. I will give them my full consideration and respond to them well before stage 2, subject to today’s vote.

Of course, we are already listening on customer issues. For example, we are carrying out a consultation in relation to a voluntary code on odour control at waste water treatment works. That is an important area of customer concern; thus we intend at stage 2 to introduce a provision that will give Scottish ministers the power to issue Scottish Water with a statutory code on that significant question. The cost of such an approach is being assessed in the current quality and standards exercise.

Looking to the future, it is vital that we do not take water resources or the environment for granted. We must ensure that Scottish Water’s investment programme—the largest single environmental programme in Scotland—is based on sound principles and that water charges are kept to levels that people can afford. That requires a sustainable approach and I am committed to ensuring that that is what Scottish Water delivers. I will examine further how that sustainable development agenda is delivered under the bill, to put beyond doubt its importance in policy making.

The bill looks hard at the water industry in Scotland and takes responsible steps to secure its effective operation in the future. It seeks to define and make more transparent and accountable the different roles within the water industry. It will secure absolutely Scottish Water’s responsibility for supply and distribution to all customers, protect all domestic customers by preserving the current charging mechanisms and will license limited competition to ensure that that cannot be for the few at the expense of the many. The bill will provide certainty and stability for Scottish Water and its customers, it will put in place a proven model of economic regulation, which will operate in the customer interest, and it will secure a clear voice for customers in shaping policy.

I move,

That the Parliament agrees to the general principles of the Water Services etc. (Scotland) Bill.

14:47

Rob Gibson (Highlands and Islands) (SNP): Unfortunately, the general principles of the Water Services etc (Scotland) Bill are driven by the need to conform to the constraints of the Competition Act 1998. It will do little to lift the development constraints on the supply of drinking water and the provision of waste water treatment that plague many communities large and small throughout our country. The SNP wants careful scrutiny at stage 2 of the means whereby quality and standards III can deal with that matter.

The Executive is trying to protect the public water utility in Scotland from the rigours of privatisation, because Scots have stated clearly that we wish to keep our water services in public hands—two cheers. Therefore, common carriage of water, which in England allows others to input water supplies into the public distribution system, is, in Scotland, kept solely in the control of Scottish Water. The SNP agrees with that principle, if not with the current delivery model.

The bill will give competitors of Scottish Water a foot in the door, by opening up to tender the billing arrangements for non-domestic customers. While that might be welcomed by those who, like the World Trade Organisation, believe that public services should be opened up to commercial competition in the future, I hope that the minister will state that it is not on his mind and that he will do his utmost to stop that process taking place, as it is against the wishes of Scots.

Mr Monteith: I suspect that the member’s argument that the views of Scots are known is
based on the plebiscite on water privatisation by Strathclyde Regional Council. Would he similarly support a plebiscite on a total ban on smoking in public places, to establish whether the Scots support it?

**Rob Gibson:** Let us try to keep what we say relevant to the debate about water and not to stray into other debates that we will have in the Parliament. Mr Monteith ought to know better than to try to muddy the waters of this debate in that way.

The SNP is pleased that the water industry commissioner is to be replaced by a commission of five members with a wide range of technical expertise, because experience has shown that we need such a range of experience to demonstrate that the regulator has the best interests of consumers, rather than the best interests of competition, at heart. Scottish Water’s delivery outputs cannot be measured by comparisons with English and Welsh privatised water companies because those companies have had many more years to arrive at their present working practices and pricing systems. We should be comparing our industry with that down south of perhaps 10 years ago; to do otherwise would be to make a truly unfair comparison.

It is essential that we do not go down any further roads that allow those who are in charge of competition to have more of a say in the way that the public water system runs, but I welcome the way in which Scottish Water has sought the help of Scottish Water Solutions Ltd to deliver a more uniform service throughout the country. Indeed, we await with interest the development of the work of Scottish Water Solutions to see whether it produces the goods.

The bill clarifies the powers that the minister, the water industry commission and Scottish Water will share for the delivery of the service, but Ross Finnie has said that hard decisions will still have to be made in allocating the budget, which accounts for about 4 per cent—a large chunk—of the Scottish Executive’s total spend.

On 5 October, Ross Finnie told the Environment and Rural Development Committee:

“When considering the money available to develop more affordable housing, we have to get the balance of investment right in Q and S III, to ensure that as many affordable houses as possible are built.”

He also said that we must consider that “this may not have received enough attention before”, and he has admitted as much in his answer to the question that my colleague John Swinney asked. He continued:

“We also have to consider ... the priority given to developments to ensure that we have the double benefit of meeting regulatory requirements and meeting development constraint requirements.”—[Official Report, Environment and Rural Development Committee, 5 October 2004; c 1299.]

That is a laudable aim, but it will take more, very clear direction from the minister for us to be able to deal with the backlog of work that still remains in the current round of Q and S II, meet the standards of the European water framework directive and start to deal with the development constraints. At present, there is so much inflexibility in the system that we look for political direction that will try to open doors to Scottish Water being given more options to deal with the issues as they come along. There are far too many examples throughout the country of the economies of large and small communities being stymied by that inflexibility.

I must deal with customer complaints and references to the Competition Commission. The SNP wants the customer complaints process to be made much more transparent. My village has just experienced a cut in water supplies. The repairs have been handled excellently, as has the compensation for customers who were affected, but the sources of information for those in the midst of a crisis were poor, and the SNP would like to think that Scottish Water will be given the opportunity to create better communications with the public that it exists to serve. Above all, the SNP wants the customers, who are paying for the water, to be given the service that they deserve. They must be told what is happening as it happens so that they can have confidence that Scottish Water will meet their needs.

On the charge determination process, we do not think that it is a good idea that appeals should go to the Competition Commission down south, and we will examine that measure closely at stage 2. The Environment and Rural Development Committee heard from the Competition Commission that it is perfectly capable of dealing with a public water system as well as privatised water companies, but we want to examine that point very carefully to see whether the appeals procedure could be handled differently.

We have given general support to the way in which the bill has been laid out, but there are areas of it that open the door to other aspects of competition thinking that are not appropriate in the Scottish context.

Scottish Water uses around half the engineering capacity that is presently available in Scotland. The levels of investment concerned amount to around £500 million a year—such investment will be needed for 10 years or more to give us a public water system fit for the Scotland of the 21st century. That will require a lot of confidence on the part of the public that, in the next period of
development, many of the complaints made about development constraint will be dealt with up front.

The SNP will cast a fair but critical eye over the proposals contained in the bill, and we look forward to the debate developing. Some of my colleagues will deal with the financial memorandum and with other questions about development constraint as we move along. We will try to develop a positive engagement with the Government and, through the Environment and Rural Development Committee, with the process of making the bill stronger than it is at present.

14:56

Alex Johnstone (North East Scotland) (Con):
I thank the clerks for their hard work during the evidence-taking process and for writing up the stage 1 report. I am always pleased to thank people such as Mark Brough, who made the effort to accommodate the one member of the committee who did not seem to see eye to eye with the other members on one or two issues.

That is where I will begin to deal with the stage 1 report, which serves to remind me why I got involved in politics in the first place. Unlike many experiences that I have had in the Parliament, I agree with many of the minutiae that are contained in the bill. I agree with the details that have been put in place to achieve the process that the Executive has sought to pursue. For instance, I am perfectly happy with part 1, which sets up the water industry commission for Scotland. I am delighted with the information that the Minister for Environment and Rural Development has given us today and with his commitment to extend the powers of water users’ representatives so as to feed into the process. I am also perfectly happy with the provisions of part 3, which addresses the need to control coal-mine water pollution. With the powers that have been added to the bill, the measures are sensible, and they will receive my support.

The real problem—and where I have a problem with what the Executive is trying to achieve—lies in part 2. I see the bill as introduced as being not about extending or defining competition in the water industry in Scotland, but about simply preventing competition and serving to protect a monopoly that is already in place. For that reason, I dissented from the committee’s stage 1 report in three places. The first of those is paragraph 60, which seeks to prohibit common carriage. The committee agreed with that principle, but I dissented in a minority of one. Again, in relation to paragraph 63, which represents an attempt to prohibit retail competition in the domestic sector, I dissented from my committee colleagues. Paragraph 180 states: “the Committee recommends that the general principles of the Bill should be agreed to.”

Once again, I chose to dissent. That is why the Conservatives will vote against the motion today.

The reason for the Conservatives taking that line is fairly straightforward, and the line is consistent with that which we have taken previously on water legislation. The model for competition that has been proposed is, unfortunately, just that—a model. It misses the point about real competition. Our political opponents like to think that our support for competition is all to do with profit and loss, but the Executive ignores the fact that competition is also about supply and demand. We hear people such as John Swinney complaining about a failure to provide services where the demand exists. That is a prime example of the necessity of having a system that is more responsive to supply and demand.

The Executive argues that retail competition for household supply would force a change to the current system, under which local authorities bill domestic customers for their water and sewerage charges. That would mean that water charges would no longer reflect the customer’s ability to pay. Although we on the Conservative benches agree that it is essential that everyone in Scotland should have access to water and drainage services, we believe that the correct way to address that in the future is not by institutionalising the principle of cross-subsidy, which the bill seeks to do, but by seeking ways to reflect it, ultimately, through the benefits system, if that is what society wishes to achieve.

Furthermore, charges should reflect the amount of the service that is used, as in England, where the denationalisation of water companies has resulted in 24.8 per cent of domestic users being billed on a metered basis, compared with less than 1 per cent of domestic users in Scotland being metered. That arrangement has the double benefit of people being given a greater incentive to save a precious natural resource and their receiving reduced bills, given that the average metered household bill in England and Wales is now 15 per cent lower than the average unmetered household bill.

The Executive’s excuse for prohibiting common carriage is that it wishes to safeguard public health, but it appears that there is no justification whatever for that point of view. In fact, not a shred of evidence was presented to the committee to suggest that the practice would present any such danger. By prohibiting the common carriage of water, we are missing an opportunity to gain efficiency in the marketplace.

My experience is that we already have difficulties with managing water quality in
Scotland. Members might know that, given that I am a dairy farmer, I have been required in the past to ensure that my water, which is publicly supplied, is tested if there is any danger on the quality front. Consequently, I know exactly what I am being delivered through the public water supply, which can be frightening at times.

Rob Gibson: The member ought to tell us that the state that his water supply is in has a lot to do with the lack of investment during the Tory years.

Alex Johnstone: It became clear during the speech that we heard earlier from the SNP benches that the SNP, along with the rest of us, believes that Scotland is 10 years behind in terms of public investment in water, because we missed the opportunity 10 years ago to go down the road of public investment in water. We should take that seriously for the future.

I welcome one or two things that the minister said today. I welcome the commitment to review the financial memorandum before the bill completes its passage. It was clear from the evidence that was given to the committee that the financial memorandum that we see today might have little to do with the one that we will need to see at the end of the process. I welcome the minister’s commitment to strengthening the role of customer panels in protecting water customers and to introducing odour-control measures over time. Unfortunately, however, we are going down a road that takes us in entirely the wrong direction. The opportunity to have massive investment in Scotland’s water and to create a demand-led system of water and sewerage provision has been missed. All that we have been offered from the SNP benches is a different flag, but the same policies.

15:03

Sarah Boyack (Edinburgh Central) (Lab): We on the Labour benches welcome the bill, because it gives us a clear framework for the provision of high-quality water services in Scotland. It is important that we have cost-effective provision that will enable new development to take place—I will talk about that later in my speech—because we think that that should be a top priority for the Executive.

We must enable househoolders on low incomes to afford the water that they use. We support the bill because it provides the potential for us to have a stable water industry with accountability in the provision of this essential service. Crucially, it also builds in a commitment to social justice. It is important that the bill is capable of delivering on both public health and environmental standards. Only Scottish Water should be permitted to use the public networks to carry out the physical supply of water and sewerage services.

In the consultation exercises that were carried out by the Scottish Executive and the Environment and Rural Development Committee in advance of the preparation of the committee's stage 1 report, there was overwhelming support for the Executive’s approach. As Alex Johnstone made clear, only the Tories fundamentally opposed the principle of ensuring that we have high-quality public sector water services for domestic users. It is critical that we have a policy position that protects people on low incomes. Competition in the domestic market in Scotland would lead to the cherry picking of properties and to people in the high bands leaving the Scottish Water network, which would leave the rest of us to pick up the tab with increasing bills for the rest of the customers. Given the geography of Scotland and the opportunity to cherry pick, we have to protect those customers.

Murdo Fraser (Mid Scotland and Fife) (Con): Will the member give way?

Sarah Boyack: No; the member’s party has already made several interventions.

Labour MSPs believe that low-income and vulnerable households—for example, single parents and families—need the protection that the bill will bring about. We also need to protect our long-term ability to deliver cross-subsidies and discounts. The evidence that we saw was persuasive.

Alex Johnstone: I am the first to accept that there are public health issues associated with water. However, does Ms Boyack accept that using the system as a means of taxation in order to produce cross-subsidy is distorting the water market and damaging those who are outside that system?

Sarah Boyack: I could not disagree more with Alex Johnstone’s comments. We pay for our water through charges, and the Executive puts in extra investment from the public purse. One of the key things that emerges in the Executive’s consultation paper, “Investing in Water Services 2006-2014”, is that, where new and additional infrastructure is to be put in place, there is a role for the private sector to build on facilities that it will need for its developments. I think that the Executive has got the balance absolutely spot on.

One of the key things that we need to do is to ensure that the transition to the water industry commission, which we fully support, is brought about effectively. We need to keep a focus on driving down costs in the industry and on ensuring efficiency. The Scottish Water organisation is accountable to the Scottish Parliament through ministers, but we must ensure that the way in which the water industry commission works, and the pricing and licensing regime that is adopted, is examined extremely carefully.
One of the key criticisms that was raised in the committee was the issue of getting the pricing correct under the new regime. The evidence that we were given caused us to understand that, if the price were to be set too low, domestic customers could be left to pay higher Scottish Water costs. I ask the minister to ensure that the situation is absolutely correct in that regard before the bill is passed. The issue relates not to what is in the bill, but to what happens in terms of the financial memorandum. Des McNulty will address the financial memorandum later.

I welcome Ross Finnie’s commitment to produce a new financial memorandum before stage 3. In the evidence that we took, many criticisms were made about the financial memorandum and it is right that the situation be addressed properly. We want to come back to that issue again.

Labour members had a number of concerns about the detail of the bill. We are keen for robust systems to be put in place for future investment and it is only fair that developers pay a contribution for new additions to the network. One of our concerns relates to the need to ensure that the priorities that are set by Scottish ministers’ directions to Scottish Water will give us the investment that we need around the country.

There are huge challenges across Scotland at the moment and the position that was outlined by the Tories would make the situation worse. We would end up with no forward planning, no capacity to plan new developments across the country and chaos in our communities. We want an assurance from the Scottish Executive that, once it has identified the investment strategy, robust mechanisms will be put in place to ensure that local authorities consult on their development plans and Scottish Water consults on its implementation plans. Once those plans are in operation, monitoring and review of investment programmes and development plans must take place. There is a danger that such plans might get out of sync, and a question arises about contingency planning.

I am concerned to hear about local authorities approving proposals for development where there is no agreement or commitment in place for water and sewerage services. That will not help anyone in the long term and it certainly does not help to give certainty in the development industry. We are all concerned about how the issue affects rural housing—Maureen Macmillan will speak about that—but it also has an impact on investment for housing and affordable development throughout Scotland. Communities Scotland faces a real challenge in relation to picking up the tab. The issue is not one for the ministers to consider, but is one that must be considered in both the rural and the urban context.

The final issue that I want to focus on is odour. We have had petitions in the Parliament on that subject for years. Local residents and MSPs have identified problems in Seafield in Edinburgh, and in Kirkcaldy and Methil in Fife. We know from the Scottish Environment Protection Agency that it faces a challenge in measuring and identifying odours. I am sure that Susan Deacon will testify, once she has made her bid to speak in the debate, that the residents in her constituency do not have that problem in their communities. Surely it is common sense to address the issue of odour up front when new sewage works are being designated and designed, rather than having to make expensive adaptations afterwards. I cautiously welcome the minister’s statement—I say “cautiously” because I would like to see the fine print. One thing that the Environment and Rural Development Committee is very concerned about is the lack of progress. We know that there is a voluntary code, but we think that it will not be followed by Scottish Water or by the companies that are bidding to do work for Scottish Water unless it is underpinned by statutory force. That issue must be addressed urgently.

I have not covered all the issues that the committee dealt with in its report. I am sure that other members will raise issues relating to the complaints procedure, ministerial accountability, and the water industry commission’s consideration of sustainable development requirements. I hope that the Executive will take on board many of those issues when it responds fully to the committee before we reach our detailed discussions at stage 2.

There are details that we must get right, but the bill is fundamentally good. The principles are right and we can get the detail right at stage 2. I call on members to support the bill at stage 1.

15:11

Mr Mark Ruskell (Mid Scotland and Fife) (Green): My first piece of work as a new member of the Environment and Rural Development Committee was scrutinising the Water Services etc (Scotland) Bill. Doing so felt more like a drowning than an introduction by baptism. Like Alex Johnstone, I thank the clerks who guided us through the process.

There are central and important political issues at the heart of the bill. There will be much debate this afternoon about privatisation, and it is clear that the Executive has put in place a regulatory framework that allows a very limited form of privatisation—that is, privatisation of the sale of water to non-domestic customers. I share many of the concerns of the Scottish Trades Union Congress.
Ross Finnie: Will the member take an intervention?

Mr Ruskell: I want to develop my point.

We must remain opposed to privatisation in principle. However, we must realise that we live in an age of globalisation and that there has been an erosion of public control of public services over the decades through the actions of the WTO and through the general agreement on trade in services, which will kick in in the next few years. Those actions have been supported over time by successive Tory and Labour Governments, which puts us in a difficult place in Scotland in keeping our public services in public control, especially given the provisions of the Competition Act 1998. That said, if the Executive had gone for a much harder line by putting in place a regulatory regime that would have pushed away any corporate involvement in the delivery of our water services in Scotland, there would have been an implicit danger, as I think that there would have been a legal challenge under that act to the legality of that regulatory regime. In itself, that would have put the future of our water services into the hands of multinational corporations, which would act through the courts to decide the future of our public services.

The STUC has described the bill as the thin end of the wedge. Perhaps that is right, but at least the thin end of the wedge has been sawn off from the fat end—the fat end being the supply of water to domestic customers and the common carriage of water, which will remain in complete public control. That is to be welcomed. The Executive has had to strike a difficult balance.

On the water industry commission, which will be the new regulator, I welcome the fact that there will be a new role for the water customer consultation panels in dealing with complaints. I was somewhat disappointed that the minister’s proposals came quite late in the stage 1 process—that will certainly create more work for the committee at stage 2. Whatever is decided by means of amendments, we must ensure that those panels are properly resourced to perform that role.

However, we have a problem with the water industry commission—the regulator—regarding sustainable development. The equivalent regulator in England and Wales has a duty to have regard to sustainable development. The minister will, no doubt, say that there is no need for that in Scotland because Scottish Water already has a duty under the Water Industry (Scotland) Act 2002 to deliver sustainable development. Nevertheless, two problems arise. First, the new entrants in Scotland who will supply water to business customers will not have a duty to deliver sustainable development.

Ross Finnie: I am sorry to interrupt again, but that is the second or third time that the member has said that there will be a supply of water to non-domestic customers. There is no such provision in the bill. The only area in which the bill will allow competition is in retail provision: there is no provision in the bill for the supply of water by a private party.

Mr Ruskell: I have already mentioned the fact that the Executive is keeping common carriage within the public sector. However, the sale of water will be carried out by private companies. The private companies that will enter the market to sell water to business will not have a duty to have regard to sustainable development; therefore, we need to take action on the issue through both the licensing regime and the regulator.

The Deputy Minister for Environment and Rural Development (Lewis Macdonald): Will the member give way?

Mr Ruskell: No. I do not have time. I am sorry.

Secondly, although the minister rightly sets the policy regarding sustainable development and water services on the basis of the economy, the environment and social justice, and although Scottish Water rightly delivers that, the regulator has to have regard only to delivering the lowest price to the consumer, not to sustainable development. There is, therefore, a mismatch.

Alongside the bill, the committee considered the quality of services and the level of investment because the Executive’s consultations dovetail with the new framework that it is establishing through the bill. A huge amount of investment in our water services will be needed over time just to ensure compliance with environmental directives, let alone to address some of the investment priorities that John Swinney and others have highlighted. We urgently need indicators that can tell us about issues such as development constraints, leakage, the need for water conservation, odour nuisance and household water poverty. We need those indicators so that we can know whether the three aspects of sustainable development—the economy, the environment and social justice—are being delivered on. We need that transparency to know whether the water services industry is improving in certain areas or getting worse, and we need the Executive’s decisions on prioritisation and investment to be transparent.

I welcome the minister’s announcement on odour nuisance. As a former resident next to the Seafield sewage works, I am aware of the misery that is often caused by such works. I very much hope that, at stage 2, the minister will be able to ensure that the code of conduct is given a statutory basis in the bill.
Frances Curran (West of Scotland) (SSP): The Scottish Socialist Party thinks that this is the wrong bill and that it has been introduced for the wrong reasons. The bill intends to introduce competition to the sale of water in Scotland, and it is driven not by the interests of domestic customers or the people on low incomes whom Sarah Boyack wants to help through cross-subsidy, but by the World Bank, the general agreement on trade in services and the Competition Act 1998. None of those will do water customers in Scotland any favours. Who will be the main beneficiary of the bill? The private water companies that will get to sell Scottish water to big business in Scotland.

Maureen Macmillan (Highlands and Islands) (Lab): Will the member take an intervention?

Frances Curran: Not just at the moment, thank you.

The bill’s intention—which the Tories will agree with—is to make water in Scotland cheaper to big business. BP, the pharmaceutical industry, the cement industry and all the big companies use much more water than we do. Water is a natural and limited resource. Those companies use much more of it than ordinary people do, yet the bill intends to help those companies to pay less.

Alex Johnstone: Will the member take an intervention?

Frances Curran: The member and I will be voting together against the bill, so we might have something in common by the end of my speech. [Interruption.] I am sure that the Tories are in favour of big companies paying less for their water.

If the big companies will be paying less, the question that the minister and the Executive must answer is who will be paying more. The answer to that question—Sarah Boyack commented on this—is domestic customers. I agree with Sarah Boyack that if the price that is set is too low, private companies will cherry pick and domestic customers will pick up the tab.

The lunacy of the bill is that it will allow Scottish Water to set up a subsidiary company whose role will be to compete with the private companies that are going to enter the market to sell Scottish Water its own water. How on earth can that make sense? Scottish Water already owns the water, but it will have to compete for its sale.

Lewis Macdonald: Will the member give way?

Frances Curran: I have only a couple of minutes left, so I might let the minister in in a moment.

There is an issue about fair competition. The Competition Act 1998 insists that competition must be fair. I agree with Mark Ruskell and the STUC, which asked for an exemption under the Competition Act 1998 for Scottish Water. We do not know why the Scottish Executive did not apply for that exemption. The unfair competition issue is interesting. What is unfair competition? How will the new private companies make a profit? What will be the source of that profit?

One of the sources of profit will be the cost of labour in those companies. There will be lower wages and fewer workers, and the workers in those companies will be worse off than those who will work in Scottish Water’s retail subsidiary. I call that unfair competition. The companies will undercut others in the market by paying their workers and their work forces even less. That is one of the main issues that the STUC and the water industry’s trade unions are concerned about.

Alex Johnstone: The member has expressed her concern about those who will work in the retail water sector in the future. What about the workers in those industries that use large amounts of water and which depend for their commercial viability on competitive water supplies? They must be entitled to competitive water prices.

Frances Curran: Why? What does competitive mean? It is not a problem in Ireland. The Tories are always going on about the Celtic tiger, Ireland and lower corporation tax. Why have we not considered the model in Ireland, in which there is no domestic charging for water? That is the direction that I would like to investigate. Companies pay the water charges and there is no issue of levying for domestic use.

My final point is about the difference between the Executive’s bill and the bill that the Tories would introduce on reforming how water is sold in Scotland. The Executive’s bill is privatisation by baby steps. Commercial carriage is ruled out, but it is required by European law. It is a little bit like the boy who has his finger in the dyke. This is privatisation by baby steps, whereas the Tories would introduce privatisation by a hop, a skip and a jump.

If the bill represents the Executive’s ideology—if the Executive is not in favour of keeping water public and investing in it through taxation and public investment instead of by the private finance initiatives that we have now—the Executive should go the whole hog, take on the Tories’ mantle and privatise all the way. It is just a question of timing; the Executive is introducing privatisation to our public water service.

Susan Deacon (Edinburgh East and Musselburgh) (Lab): Two and a half years ago, a group of my constituents, the Leith links residents association, brought a petition to the Parliament.
Petition PE517 addressed an issue that had blighted their community for far too many years: the smell from a sewage works. I pay tribute to the Public Petitions Committee which, under the convenership of Michael McMahon—and John McAllion before him—has actively pursued the issue and given a voice to people who are affected by such issues, such as my constituents in relation to the Seafield works and, subsequently, other communities who have come forward and spoken out. It is worth underscoring the importance and effectiveness of our Public Petitions Committee, which is unique in the United Kingdom.

I thank members of the Environment and Rural Development Committee—and the Transport and the Environment Committee in the first session of the Parliament—and in particular I thank the current committee’s convener, Sarah Boyack, for taking the issue seriously and doggedly pursuing the Executive for responses and ultimately, we hope, action. I am delighted that the committee’s stage 1 report addresses the issue head-on and makes a number of recommendations on legislation and investment.

I give a cautious welcome to much of what the minister said—I will return to that. However, the onus now lies firmly with ministers and Scottish Water not just to say the right things about the issue but to take the right action and ensure that the views of communities and their local representatives, which the Parliament has heard loudly and clearly, are acted on.

The odour nuisance caused by sewage works—or waste water treatment plants, to give them their Sunday name—is a real issue. How would members feel if they had to keep their children indoors on a hot, sunny day because the children felt sick from the smell when they played in the garden? How would members feel if they could not hang out their washing because it would smell worse when they brought it in than it had done when they put it in the washing machine? How would members feel if they had to keep their windows tightly shut in the height of summer, to prevent the house from stinking? That has been the reality for far too many people who live in close—and sometimes even not-so-close—proximity to a waste water treatment plant. Indeed, an independent customer survey commissioned by Scottish Water in response to pressure from me and my community found that those were exactly the kinds of experiences that people who lived in the community surrounding the Seafield waste water treatment plant in Edinburgh were having.

In recent years I have spent more time on the issue than I think is healthy for anyone to spend and I am in no doubt that solutions to such problems, be they technical or regulatory, are neither simple nor cheap. However, it is absolutely clear to me that odour in general and odour from waste water treatment works in particular should be taken far more seriously in the future than it has been in the past. It is simply not good enough to say, as I have sometimes heard, that odour is too difficult to measure. Quality of life is something that people experience; it is not just something that sophisticated gadgets quantify. As a constituent said to me, “Two thousand noses cannot be wrong.” The Executive has acted on a host of issues that impact on quality of life, such as noise, air quality, litter, vandalism, graffiti and water quality. It must also act to address odour.

I welcome the Executive’s long-awaited consultation on a voluntary code on odour control and I acknowledge the efforts that Allan Wilson made to progress the issue before he moved on to pastures new. I hope that the code will lead to improvements in the design and operation of new and existing waste water treatment plants. However, as Sarah Boyack and the Environment and Rural Development Committee have said, the code must be given statutory underpinning if it is to be effective. Ministers have agreed to that in principle, but they need to translate that agreement into practice at the earliest possible date. Like the committee, I believe that the Water Services etc (Scotland) Bill provides an early and appropriate opportunity to do so.

I listened carefully to Ross Finnie and I have a couple of concerns about what he said about the code. First, with his deliberate and distinctive intonation, he placed an emphasis on the word “voluntary” with which I was a little uncomfortable.

Secondly, I think that I quote correctly Mr Finnie’s specific commitment that at stage 2 ministers would introduce

“a provision that will give Scottish ministers the power to issue Scottish Water with a statutory code”.

I would like the minister to decode that statement so that I can find out what it means for my constituents, whether it will have any practical and early effect and how it differs from the committee’s clear and precise demand that the voluntary code that is currently being consulted on be given statutory weight.

Leaving that crucial issue to one side, I should also emphasise that action on other fronts is needed. The regulatory regime in this area is complex and confusing and in its report the committee pointed out that

“consistency of implementation and enforcement of the regulatory regime requires to be improved as a matter of urgency”.

We also need to clarify the role of local authorities and SEPA in given practical situations in local areas. As the issue of investment is key, I
welcome and strongly endorse the committee’s recommendation that odour nuisance is addressed in the Q and S III period to ensure that it is properly considered as part of Scottish Water’s investment programme. Again, I ask the minister in winding up to give me some comfort that he is sympathetic to that point.

It is only right to say that I recognise that over recent years both Scottish Water and the Executive have made significant progress in improving our sewerage system and waste water treatment. Seafield, like other plants, has benefited from enormous investment. For example, I am pleased to say that the Gardyloo boat that routinely dumped almost raw sewage in the Forth is a thing of the past. Local beaches are altogether cleaner than they once were and kids can now paddle safely in the sea with far less exposure to bacteria and certain foreign bodies. Such progress is very real and meaningful to my constituents in places such as Portobello and Musselburgh.

That said, we must ensure that waste water treatment plants give communities fresh air as well as clean water. Many warm words have been spoken on this issue over the months and many more have been spoken today. However, I ask the minister to make clear his commitment to ensuring that we get not just words but action and that people who live close to Seafield sewage plant and other such facilities throughout the country can see improvement in future and can see that their Parliament and Government has been listening to them.

The Deputy Presiding Officer (Murray Tosh): As a member has withdrawn from the debate, I am happy to give members in the open debate seven minutes each.

15:32

Roseanna Cunningham (Perth) (SNP): I was still a member of the Environment and Rural Development Committee when consideration of the bill began. At the outset, I must say that I am a little confused by the discussion over whether the bill is about the sale of water. I might be wrong, but I thought that it was about billing mechanisms and certain aspects of retailing. Perhaps when he closes the minister will confirm whether my recollection is right in that regard.

Even in my absence, the committee rightly accepted the Executive’s arguments about prohibiting common carriage. I welcome its position that such a prohibition is justified on public health and environmental grounds. That said, I hope that, by handing over final say on certain matters to the Competition Commission, it has not introduced the thin end of the privatisation wedge.

It was clear from the evidence-taking session with Ceri Jones of Water UK that the private water companies resent both the bar on common carriage and our view that public health issues should outweigh competition issues. Mr Jones described the public health issue as “emotive”, as if that somehow condemned the concern. That is of course not the case, and I hope that the minister will assure us that public health issues will continue to be paramount.

Another issue that I have raised on more than one occasion and that has already been raised in this debate concerns the embargoes on development that are in place all around Scotland. Huge swathes of the country are blocked for any kind of housebuilding because of sewerage and drainage constraints. Earlier, the minister argued that such issues were not raised at what he considered to be an appropriate time some years ago. However, we can equally respond by pointing out that Scottish Water did not flag up any advance warnings. Indeed, three weeks before the embargo on the whole city of Perth, Scottish Water explicitly denied to council officials that there was any problem at all. It is difficult to see how officials could be expected to deal with such circumstances other than as they have done.

Currently, in Perth and Kinross as a whole, 25 sites are constrained, but only four of those fail SEPA discharge constraints. Attempts by a local builder to establish why the remaining 21 sites were constrained have failed. The question is whether some embargoes are placed on sites prematurely to avoid attracting SEPA notices in the future, and indeed whether that is done on sites where agreements were previously in place. That, of course, is the point that my colleague John Swinney was trying to make with regard to Alyth.

Current constraints are potentially blocking the development of more than 1200 open-market houses and, worse, 250 affordable houses. In a report published in June 2003, Scottish Water acknowledged that

"Constraints on development due to the lack of capacity in the water and sewerage infrastructure are a growing concern to Local Authorities across Scotland."

Scottish Water also pointed out that it continues to receive representations from the development sector on the impact that development constraint has on employment, economic growth and the housing land supply. That includes representations from the likes of the Scottish Federation of Housing Associations on affordable housing sites.

The report from June last year calculates a total cost for alleviating constraints for the whole of Scotland of £647,730,487—that is well over half a billion pounds and big money in anybody’s book.
The independent consultants who evaluated the report make the point that

“Despite the rigour in the approach adopted by Scottish Water ... the schedules may ... underestimate constrained sites and land.”

Who is going to pay for that? The relationship between that question and the bill is that Scottish Water warned last June that because of

“the implications of the ... Competition Act and ... stringent efficiency targets set by the Water Commissioner, subsidising development through Scottish Water charges could no longer be an option.”

However, Scottish Water also said:

“the current demand to have development pay for itself ... has engendered significant concern in the development sector”.

We know that.

I know that the stock response is that private developers will just have to pick up the cost themselves. Many are indeed willing to do so, but that is not as easy as we might think. I have received a letter from a prominent local building firm, A & J Stephen Ltd, which was referred to earlier—indeed, representatives of the firm are here this afternoon. The letter made the point that the firm’s attempts to fund infrastructure have been met by Scottish Water with

“no meaningful response or alternatively rejection.”

I know that that particular building company has written to the minister’s department. Can the minister explain in his closing remarks what is going on? If we assume that what the firm says is true—there is no doubt that it is—it seems that builders are damned if they do and damned if they do not and that Scottish Water is in effect banning development in rural areas.

When Professor Alexander and Dr Jon Hargreaves of Scottish Water came before the committee, I raised that issue with them, asking whether the problems of development constraint would be affected in any way—negatively or positively—by the bill, either in the short, the medium or the long term. The answer that they both gave was that it depends on the regulations. Dr Hargreaves said:

“the regulations will decide how much developers will bear, how much Scottish Water customers will bear and how much the social aspect of development will be dealt with.”—[Official Report, Environment and Rural Development Committee, 15 September 2004; c 1169.]

I hope that the minister will bear all that in mind when he comes to lodge amendments to the bill and when the regulations are drafted.

15:38

Alex Fergusson (Galloway and Upper Nithsdale) (Con): I am happy to underline the fact that we on this side of the chamber agree with the majority of the bill. I particularly welcome the minister’s announcement about giving extra powers to the water customer consultation panels. I hope that the powers will be extensive and enforceable and will turn what are currently well-meaning but toothless organisations into ones with meaningful power and a beneficial output.

As Alex Johnstone said, although we are in favour of the bill, we cannot support it because it shows a lack of desire to embrace the full benefits of choice and thus displays a lack of understanding of the benefits that true competition would bring. I am constantly amazed by the number of my constituents—not all of whom, by any means, are members or supporters of our party—who now passionately declare the wish that Scotland’s water industry had been privatised many years ago. I for one do not believe that we would be facing the problems that we currently face had that been the case. One of the problems with the current set-up is the almost complete lack of accountability of Scottish Water to its customers. It simply cannot be right that that massive monopolistic giant can be virtually unanswerable for its actions, and I sincerely hope that the new commission will get a grip on that situation.

It is not just me who is calling for that greater accountability. I would like to quote from Dumfries and Galloway Council’s response to the consultation exercise, which says:

“there should also be ‘accountability’ to stakeholders as a criteria for Q&SIII. Scottish Water should also be required to constructively engage in Community Planning. Unless this occurs it will not be possible to have a genuinely joined up approach to Public Service provision in Scotland. The criteria as drafted lend themselves to supporting cost effective sustainable urban solutions, rural areas like Dumfries and Galloway with a large number of small settlements however will be disadvantaged by these criteria and a different approach is required.”

I welcome the proposed commission in the hope that it will provide a different approach, or help to do so, and it will certainly not be short of issues to deal with, many of which are covered in the parallel consultations that are running alongside the bill. I feel that there has been a missed opportunity to use the bill to encompass any recommendations or changes that are agreed or proposed as a result of those consultations, but I am willing to bet that every response from rural agencies, organisations and councils will concentrate on the current development constraints imposed by Scottish Water, as Roseanna Cunningham has underlined.

I have said before that Scottish Water has in effect imposed another layer of planning requirements and constraints across my constituency, which is hugely constricting
desperately needed developments of affordable local housing. One of the problems is that Scottish Water itself sometimes appears not to know the status of many of the systems to which it is refusing to allow connections under Q and S II, never mind Q and S III. If it were simply a case of the left hand not knowing what the right hand was doing, it might be manageable, but Scottish Water appears to outnumber an octopus when it comes to limb numbers and there appears to be very little joined-up thinking between any of them.

In a recent case in which I was involved, Loreburn Housing Association in Dumfries and Galloway had sought Scottish Water's permission to connect to the sewerage system in Gatehouse of Fleet. It got three different replies from three different Scottish Water offices. Following consultation with SEPA, which had no reservations about the capacity of the system to absorb that development, Scottish Water eventually withdrew its objections, at the very last minute, on condition that Loreburn undertook to pay the extra modelling and connection charges. That ensured—only just—that an injection of valuable housing capital into an affordable local housing project went ahead, when it would otherwise have been lost.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Will the member give way?

Alex Fergusson: The only water that Jeremy Purvis needs is a sprinkler outside his office window, in case he is tempted by the odd cigar. Having said that, I shall give way to him.

Jeremy Purvis: It is more than gracious of Alex Fergusson to give way following that very well-scripted and rehearsed comment.

Is Alex Fergusson seriously saying that the knowledge of the network and water supply in Scotland is less today than it was in 1997? If he is, he is countering every single piece of evidence that the Finance Committee and the Environment and Rural Development Committee received from witnesses.

Alex Fergusson: I am saying only what has become absolutely apparent to me at constituency level. It appears that development officers in Scottish Water, who are based in Aberdeen or Inverness, do not know the status of some of the smaller systems in my area of Dumfries and Galloway when it comes to allowing or refusing connections. That is backed up by SEPA locally.

I am also flattered that Jeremy Purvis thinks that I might think of scripting such a reply. I can assure him that I did not.

Jeremy Purvis: Did someone script it for him?

Alex Fergusson: No, they did not. It was purely off the cuff.

The example that I have given leads me to another problem—the insistence by Scottish Water that developers pay for the extra costs where connection is permitted. That was mentioned by Roseanna Cunningham. I will quote again from Dumfries and Galloway Council's response, which said:

“The problems faced in rural areas like Dumfries and Galloway are different from urban areas. The scale of the problems ... and the large geographical area affected by development constraints is a serious concern. The economies of scale which may be available in urban areas, to enable developers to make contributions as part of large development sites to solve infrastructure problems are not readily available in areas like Dumfries and Galloway which for example require affordable housing in small settlements.”

Recently, a small building company wished to build three houses in the village of Kirkinner in Wigtownshire. After a struggle, Scottish Water agreed that the houses could be connected to the public system if the developer paid the extra costs. The developer, not unnaturally, inquired what those costs might be and was told that the figure would not be known until the houses had been built. That is nothing less than diabolical and it sums up perfectly the rural dimension of the issue.

Connection and modelling costs are probably quite sustainable when they are spread over 200 houses but not when they are applied to three houses. To put that into context, Loreburn Housing Association, to which I have referred, which is the only mechanism through which local affordable housing is built in Dumfries and Galloway, builds considerably fewer than 200 houses a year throughout the region. The vast majority of its developments are the small-scale ones that are being penalised most by Scottish Water. There is a need for heads to be knocked together. Interagency co-operation and consultation, in particular between SEPA and Scottish Water, are essential, but they do not seem to be happening. If the new commission can get a grip on that situation, good will come of the bill. I sincerely hope that that is the case, but I am not holding my breath.

15:46

Des McNulty (Clydebank and Milngavie) (Lab): A number of members have raised constituency interests. I suppose that I should do so at the start of my speech because work on the Milngavie reservoir, one of Scotland's biggest civil engineering projects, is under way at one end of my constituency and, at the other, at Dalmuir, there is a waste water plant that takes a significant amount of waste water from Glasgow.

I have worked closely with Susan Deacon on the odour issues to which she referred. I certainly echo many of her comments and I welcome what the minister said—although I hope that we can
make better sense of it. We look forward to receiving some clarification. The idea of moving towards a system of statutory regulation of odours is certainly welcome, but I hope that there will be flexibility in how that is done. There is a concern about the effect of the instructions that the water industry commissioner puts in place when he makes his financial projections on what work Scottish Water can do on the quality of odour treatment in plants. We are told by Scottish Water that those instructions impede its freedom of action and the amount that it can spend on putting the appropriate mechanisms in place. I want clarification on that point.

I will give two reality checks on what the Conservatives have said. First, if they speak to local authorities and customers south of the border, they will find that England and Wales are not nirvana as far as development constraints are concerned. There are substantial development constraints in other parts of the United Kingdom. The problems that are associated with fragmentary privatisation mean that in many ways developers in some other parts of the country have greater problems in getting water companies to provide infrastructure. One of the improvements that I hope emerges from the new system and the new arrangements is that development constraints can be dealt with in the context of more co-ordinated planning. I hope that the minister will encourage Scottish Water to work with local authorities, economic development agencies and others to create a planned mechanism for dealing with development constraints, rather than dealing with them on an ad hoc, individual basis. This is a national problem and huge amounts of money are involved. The investment is substantial and it needs to be properly planned.

The second point on which we need to correct the Conservatives is that the reason why we do not have privatisation of water in Scotland is that the Conservatives did not privatisate water, and the reason why they did not is that they could not. There was not a practical mechanism whereby business would put in the investment that was required, given the 18 years during which the Conservatives had failed to invest in water services. We were so far behind the requirements and there were so many constraints that the private sector was not interested. That is why we ended up with the current situation. In making noises about privatisation, the Conservatives created such a backwash of antipathy towards themselves and everything that they stood for that in 1997 they ended up without a single member of Parliament in Scotland. What the Conservatives tried to do with the water industry was important in leading to that favourable result. They have not been able to come back particularly well.

I turn now to the specifics of the bill. I welcome the minister's statement that a second financial memorandum will be produced. I believe that that will be a first for the Parliament and that it means that ministers have accepted what the Finance Committee said and the Environment and Rural Development Committee endorsed—namely, that the original projections for the core costs associated with the bill were inadequate. As a matter of legislative competence, the Parliament has to insist—and members of the Finance Committee certainly will insist—that when the Executive introduces bills, we see robust, realistic and consistent mechanisms of costing, so that we can identify the basis of the legislation and link that to our budgetary considerations. If the Parliament is to be taken seriously—not only by the general public but by business interests and other people whom we serve—it is vital that we ensure that legislation is subjected to that level of scrutiny. When legislation does not meet those requirements, it must be changed so that it does.

I look forward to reading the revised financial memorandum. I hope that it will be available in time for the Finance Committee to have a good look at it before we come to stage 2.

The Executive's broad approach to establishing the licensing regime is correct. Many would say that it is a very clever approach, but some serious concerns have arisen. The trade unions have concerns about the implementation of the division within Scottish Water that the bill will necessitate. The combination of three water authorities to form Scottish Water was achieved only with considerable pain for employees. I hope that the division that will follow the bill will be better managed than what happened two or three years ago.

The bill's changes to the regulatory regime—particularly the establishment of a water industry commissioner, as opposed to a water industry commissioner—are an important step forward in transparency. Again, that has come out of the work of the Finance Committee: it was one of the key points in our very thorough report on the water industry. I am very pleased that the minister has taken the findings of our report seriously and has responded as he has done.

There is much to welcome in this bill, but we have to acknowledge that Scottish Water and its development are vital for the future of Scotland. We all have a shared interest in ensuring that we get this right. In the scrutiny of the bill at stages 2 and 3, I hope that rather than making purely political points—although I have made one or two myself—members will focus on what we have to deliver for the benefit of everybody in Scotland. Very few bills will be more important than this one.
Jim Mather (Highlands and Islands) (SNP): As my party’s enterprise spokesman, I am keen to contribute to this debate on a bill that will undoubtedly impact on Scottish economic competitiveness. Also, as one of the signatories to the minority report on Scottish Water, I am keen to repeat my concerns about the overall management of the industry; and, as a member of the Finance Committee, I am keen to support what Des McNulty has just said and to reiterate some of the issues that the committee has raised about the bill and the debate between the water industry commissioner and Scottish Water on costs and efficiency.

I will start with competitiveness. In broad terms, the experience to date of creating national competitive advantage from our water industry has been disappointing. Water is yet another vital resource that we in Scotland have in plenty. However, in international comparisons, Scotland is uncompetitive in terms of water charges. We are the fifth most expensive in a recent survey by NUS Consulting. That means that, amazingly, most competitive countries have a comparative advantage over us on water pricing.

However, we are not simply facing the loss of comparative advantage in specific industries and export markets. The Scottish economy in general is suffering a double whammy. Current water charges are having an adverse impact on all Scottish businesses in comparison with most United Kingdom and international competition. As we have already heard, the delays in Scottish Water’s replacement and new infrastructure programmes have inhibited and delayed other residential, commercial and industrial developments that would all have helped our economy to grow and improved our overall ability to compete.

My historical concerns centre on the fact that I remain convinced that errors were made at the time of the most recent strategic review of charges in the financial control of Scottish Water, primarily by the Executive and the water industry commissioner. The minority report that was produced by three members of the Finance Committee—Fergus Ewing, John Swinburne and me—in April this year established the justification for that strong statement.

We came to the conclusion that there had been serious mistakes in the management of the financial control of the water industry during the key period when the strategic review of charges was being carried out. Those mistakes resulted in the revenue caps that were recommended in the review being too high by a significant margin and they had a corresponding impact on the amount of capital investment that it was intended would be funded from borrowing, which was too low. In my opinion, the upshot of that is that charges for water users in Scotland have been set too high—probably by a cumulative amount of at least £300 million between 2002 and 2006. That means that water users in Scotland have suffered needless financial hardship and that the competitiveness of Scottish industry has been damaged.

Ross Finnie: We are all fascinated by the figures that the member cites and the allegations that he makes, but can he confirm that the three members who produced the minority report are the only people who take that position? The rest of the committee was against it and the financial adviser to the committee did not support it, so it represents a singular view. The report makes an outrageous contention about the state of Scottish Water and its lack of competitiveness.

Jim Mather: I look forward to adding the minister’s name to that list when he replies to the letter that I have written to him, which reiterates those points.

The high level of charges, combined with the underspend on the capital investment programme, has meant that Scottish Water has been operating with a financial cushion. That is not consistent with forcing it to achieve the efficiency gains that are being required of it. To remedy the mistakes that have been made, we believe that there should be a thorough review of the financing of Scottish Water and of the operation of the regulatory system for water.

The planned move to a water industry commission means that some of those messages have been taken on board, but the concerns linger and the bill does little to remove them. I still think that a thorough and open review would have provided a better basis for the new bill.

Jeremy Purvis: On that point, Mr Mather might be able to help members by clarifying whether the minority members of the Finance Committee received advice from the consultants the Cuthberts. Can he confirm whether the Cuthberts have been in the employ of the Scottish National Party at any stage and whether, since the publication of the minority report, it has received third-party endorsement, other than from the Cuthberts?

Jim Mather: That is scurrilous. The member is willing to drag down people who were motivated enough to contribute to the debate by giving advice and guidance pro bono. He disapproves of the work that the Cuthberts did, but they were helpful and I am grateful to them. They have done Scotland a service and what they proved has yet to be rebutted by the Executive.

I and my colleagues on the Finance Committee are not entirely convinced by the stated costs of
establishing the proposed licensing regime, given that it is apparent that there is open disagreement between Scottish Water and the water industry commissioner. The figures that Scottish Water produced show one-off costs that are £10 million to £18 million higher than those in the financial memorandum to the bill, and on-going costs that are approximately £5 million to £8 million higher.

I note the minister’s acceptance of the financial memorandum, but I reiterate that the setting up of the licensing regime accounts for the majority of the costs that will arise from the bill. It is right that we have solid and accurate figures to base that on. I also note that the water industry commissioner is continuing to work on the costs. The minister has confirmed that he will soon have more detailed information, which I look forward to seeing. However, that means that, to date, the committee has not been able to assess the accuracy of that part of the financial memorandum and, as I have said, I have found errors in the past.

It is imperative that the reconciliation is reached so that there can be more certainty over costs. I continue to believe that that would best be done by way of a fundamental and open review of Scottish Water and its charging mechanisms. The setting of a more appropriate and lower level of capital expenditure should also be funded from charges, which currently are running between 68 and 86 per cent. It would be fairer to current users and also improve Scottish competitiveness if we were to move away from the current charging regime, which is unnecessarily high, especially for business water-charge payers.

The current situation is such that business payers are left with the choice of either passing the higher charges on, thereby reducing the competitiveness of their internal and export markets, or bearing the higher charges, thereby reducing their profitability and perhaps even their viability or ability to exist as independent entities.

That is why competitiveness raised its head again for the Finance Committee. In our evidence-taking sessions, we could not miss the other open disagreement between the water industry commissioner and Scottish Water about the calculations and assumptions that underlie Scottish Water’s comparative level of efficiency. Given the importance of that issue, the committee recommended that the disagreement needs to be openly debated and more widely understood, particularly in the Parliament and by ministers.

16:01

Nora Radcliffe (Gordon) (LD): Liberal Democrats support the bill, which is the last in a trilogy of water bills. Part 2 wraps up the work begun by the Water Industry (Scotland) Act 2002, which set up Scottish Water, the office of the water industry commissioner and customer panels, but left competition issues for this bill.

Part 1 of the bill revisits some of the provisions of the first bill. It provides for the metamorphosis of the water industry commissioner into a commission—preferably one that is five-strong—makes changes to the flow of instruction and decision-making between Scottish ministers and the commission and beefs up the customer panels.

Part 3 of the bill seeks to give the Coal Authority similar powers in Scotland to those that it has in England and Wales. The powers will enable the authority to deal effectively with pollution from old coal mines. The Coal Authority and SEPA have a close working relationship and the decision to give the authority greater powers has the potential to lighten parts of SEPA’s work load. The provisions in the bill and the remit of the Coal Authority relate only to abandoned coal mines, however. My committee colleagues and I thought that many of the same problems could arise from other types of mine workings. As a result, we made a request to the minister in our report that he should consider whether and how issues relating to those other types of mine could be addressed.

Part 2 of the bill deals with the way in which competition applies to the water industry in Scotland. The Executive has retained Scottish Water as a publicly owned utility company, but opened up competition in the retailing of non-domestic water and sewerage services.

Section 18 adjusts the way in which charges are to be set. Ministers will set out the principles and objectives that are required to be met and the commission will price them and determine the level of water charges that Scottish Water will be allowed to make. Various issues relate to charging, including those of transparency, cross subsidy within and between domestic and non-domestic sectors and charity relief. The committee has asked for clarification on a number of those issues.

The bill provides for the Competition Commission to be the final arbiter of appeals against charges. A variety of concerns were raised about the appropriateness of that provision. Although the committee accepted the proposal on balance, we added a recommendation that it should be kept under review in order to see how the arrangement works in practice. I will return to the issue of the way in which complaints are to be dealt with when I talk about the provisions for consumer panels.

Richard Lochhead: It is kind of the member to take us on a tour through the committee report.
Will she address one of the biggest issues that has come to the fore during this debate and during previous debates on the water industry, which is the issue of development constraints? How do the Liberal Democrats intend to tackle that?

Nora Radcliffe: If Richard Lochhead lets me continue with my speech, I will come to that in due course.

There is wide support for part 1, which sets up a commission in place of the single commissioner. I agree with the majority who see the commission as an expert technical body instead of a stakeholder representative body. That was the committee’s view of the commission.

There was some discussion about whether a sustainability obligation should be laid on the commission. Both Scottish ministers and Scottish Water are bound by such an obligation and the commission will have to take its decisions in cognisance of them. That said, I agree with the committee’s view that it makes sense for sustainability to be pursued consistently at all levels of the industry—regulatory, as well as political and operational. I would also like an obligation to act sustainably to be extended down the line—or down the pipe—to any new entrants to the industry. The committee has asked the minister to examine how that can be achieved.

Part 1 also deals with the role of customer panels, and seeks to give them much more input at the policy determination stage, and a wider reporting role, both of which are welcome.

There has been considerable discussion around the complaints procedure and where it sits in a revised framework in which the role of the commission will be different in some respects from the role of the commissioner. The minister suggested latterly that the commissioner’s team dealing with second-tier complaints could be moved to the office of the convener of customer panels. While that seems to be a good idea, the committee did not have time to consult properly on it before preparing the stage 1 report, so it will take evidence on it prior to stage 2.

Stage 1 consideration has run alongside work on setting the quality and standards for Scottish Water’s third investment programme, of which I will address a couple of aspects. First, recognition of the need for investment in infrastructure to allow development to go ahead is extremely welcome. My experience of development constraints in Gordon goes back to the late 1980s and early 1990s, where the sewerage services for a significant number of communities throughout the district were at capacity, and we could not allow any new housing to be built. The situation is still not satisfactory. I could match many of the examples that other members have cited. However, as the report highlights, prioritisation of new infrastructure provision has to be closely integrated with local and structure plans. Much better liaison is needed. The planning framework and co-operation on joint working need to improve massively.

Secondly, I strongly endorse the committee’s recommendation that odour nuisance should be addressed in a much more robust way. Statutory underpinning is required. The water industry is by no means the only offender where odour nuisance is concerned, so stronger and more effective ways of dealing with odour nuisance would benefit many more people than only those who live near sewage treatment works.

The bill is useful. It has been helpful to tackle water industry legislation in more than one bill over a couple of years. The water industry had been through so many changes that it made sense not to try to do everything in one go in 2002. The period between the first and third bills has, in the light of experience and with the benefit of hindsight, given us a valuable opportunity to revisit and improve the framework that was set up initially.

A number of unresolved issues were flagged up at stage 1, but none of them is insuperable. I am sure that by the end of stage 2 we will have a workmanlike and workable piece of legislation. The Liberal Democrats support the general principles of the bill.

16:08

Maureen Macmillan (Highlands and Islands) (Lab): While I agree wholeheartedly with the principles of the bill there is, as others have said, need for clarification on some of the details of how it will be implemented, and on some of the surprises that were sprung on us by the Executive during the course of our evidence taking.

The Environment and Rural Development Committee was concerned about the resourcing of the customer consultation panels to handle complaints, about the lines of communication between the commission and the panels, and about how the Executive will ensure that sustainable development obligations are fulfilled and promoted. We wish the Executive to elaborate its thinking on all those matters.

I accept the proposal to limit competition to the retail functions of Scottish Water, but we were concerned that there are uncertainties about how that will be achieved, as there is no definition of the differences between the wholesale and retail functions. Having heard speeches from Mark Ruskell and from the SSP, we need urgent clarification as to what constitutes retail competition, because there seems to be a great
deal of misinformation, or perhaps deliberately not addressing—

Lewis Macdonald: I ask Maureen Macmillan to accept my assurance that in introducing competition to the retail function it will be confined to precisely that, in other words, to the billing process, and not in any sense to the sale or supply of water.

Maureen Macmillan: That clarification was useful.

Just as important as the bill to the general public will be what emerges from the quality and standards III consultations—what the priorities for investment will be and how they will be funded. Discussion of that has become inextricably linked with discussion of the bill, and that is what politicians, including me, find most fruitful.

Although the committee heard evidence from the Federation of Small Businesses and others that they approved the transparency of the new proposals for determining charges, a great deal of the committee’s time was taken up with discussions on how to separate the social and commercial aspects of water infrastructure and whether support, when it is deemed necessary, should be delivered by cross-subsidy from one type of customer to another or by subsidy from general taxation through appropriate Executive departments or agencies. That is particularly relevant in two areas: funding for charitable and voluntary organisations and the facilitation of housing and other developments.

During the passage of the Water Industry (Scotland) Act 2002 through Parliament, we spent much time negotiating with the Executive to shield small, local, strictly defined charities from the effects of rising water charges. We believed that we had been successful in working out a fair formula for transitional funding, but, unfortunately, far fewer charities qualified than anticipated, because any that moved premises—even for the best of reasons—lost their transitional funding and others could not fulfil the £50,000 income criterion. I am pleased that the minister is continuing his support for charities that already qualify but regret that the scheme cannot be extended to capture those that moved premises, as many have found themselves in severe difficulties. I am concerned about what will happen to those voluntary organisations and charitable trusts—I do not include charitable businesses—that have found themselves facing enormously increased water bills. How can they make up the shortfall? For example, Atlantis Leisure, the community company that runs Oban swimming pool, has seen its water bills rise from £5,000 to £20,000, but its grant from Argyll and Bute Council has remained the same and it is restrained by the council from increasing its charges, so how should it deal with the gap?

Are funding bodies taking account of the gap between income and expenditure that, over the past two years, has opened up for many organisations that rely on grants and fundraising, especially grants from local authorities and agencies that, in turn, rely on the Executive or the national lottery to underpin their expenditure on the voluntary sector? Can the minister assure us that funding bodies that disburse Executive and lottery funding will take account of increased water charges, just as they take account of increases in heating and lighting bills? I do not expect Scottish Water to continue to subsidise charities, but the funding must be found and we have a responsibility to say where it will be found. If members will excuse the metaphor, we cannot wash our hands of the matter.

Development constraints are just as problematic. The lack of water and sewerage capacity in rural and urban areas has held back badly-needed development, and a clear decision must be made about how we deal with commercial and social development, as well as how we define the two. The minister knows my concern about affordable rural housing—both my general concern and my concern about the particular cases that I have outlined in the past.

Insufficient attention was paid to the need for new infrastructure in the Q and S II consultation. As the minister said, it was not flagged up by local authorities at that time and, in its evidence to the committee, the Convention of Scottish Local Authorities confirmed that. I hope that local authorities and the Executive now have a better idea where infrastructure constraints lie, although I am not sure that all the local authorities have done the required research, and I ask the minister to check that. If they do not have a better idea, they must find out where the constraints lie and inform the consultation so that planning decisions and infrastructure capacity can be better integrated and so that Communities Scotland can consider what responsibility it has for funding the necessary infrastructure for affordable housing. Affordable housing must be built where it is needed, and I do not need to tell the minister again that constraints on affordable housing are constraining development, particular in the area that I represent.

I turn to an issue that has been raised with me in correspondence. The Association of Scottish Shellfish Growers is concerned at the low targets for improving marine water quality in Q and S III. Only 22 per cent of shellfish waters that are currently below class A will be improved. The industry relies on a pure environment and has the potential for real growth if class A waters can be further expanded, so I ask the minister to consider whether the investment that is proposed in Q and S III to deal with sewage discharges into our
coastal waters will deliver the objectives of “A Strategic Framework for Scottish Aquaculture”.

I welcome the bill and support its principles. However, I am anxious about the outcomes of Q and S III and about a lack of clarity in some of the Executive’s proposals. I ask the Executive to ensure that decisions are not set in stone for the duration of Q and S III, but that there will be room for manoeuvre should our priorities change or should we discover that local authorities have underestimated the infrastructure that they need. I do not want to have to go through this whole debate again.

16:15

Mr Brian Monteith (Mid Scotland and Fife) (Con): There has been much criticism of privatisation or private companies. I remind members that co-operatives are private companies and that Dŵr Cymru Welsh Water is a private co-operative. All those members who sign up to fair-trade motions advocating co-operatives in Africa or who speak in debates in favour of social enterprises, workers’ co-operatives or credit unions should recognise that those are private, not public, entities. There are many models that can be used for the private delivery of water. Simply to dismiss privatisation as some sort of hegemony by big business is to live in a different universe.

I asked the Minister for Environment and Rural Development if he had any concerns about the collection of domestic water charges if they were privatised and did not involve council tax collection as a vehicle. My question was courteous but—typically for a Liberal Democrat, I thought—the minister questioned my motives and sought to take the moral high ground, portraying himself as a protector of the poor and saying that discounts for water could not be passed on if Scottish Water was a private, not a public, entity. Members know that the facts tell a different story. The minister is not a defender of the poor, no matter how sincere his motives—which I shall not question. Scottish Water is more expensive for rich and poor alike. Its water quality is poorer than that of many private companies south of the border. As Rob Gibson unwittingly argued, Scottish Water is 10 years behind English companies. If there are to be benefits or discounts to water consumers, they can be delivered through the benefits system, leaving a commercial enterprise to work commercially.

There is a great deal of hubris and hypocrisy from the socialists—of all parties. They display false pride about public ownership. The evidence shows that competing private companies perform more effectively and efficiently. Members have shown double standards, including Rob Gibson, who is willing to parade public support for his views when it supports him, but completely ignores public opinion when it conflicts with his dogma. I suggested that there be a plebiscite on smoking, but was ridiculed for that having nothing to do with this debate. Smoking and water are not directly related, but public health issues are associated with both. I argue that politicians cannot pick and choose when public opinion is right, so as to suit themselves. Such arrogance only damages the member’s case.

Ross Finnie: Will Mr Monteith give way?

Mr Monteith: I am happy to take an intervention from the minister, who wants to defend Rob Gibson.

Ross Finnie: No—I do not think that I said what Mr Monteith suggests at all. It is amazing how he can lip-read even when I have not moved my lips.

On the question of efficiency, given that at the present rate of investment Scottish Water, the wholly publicly owned company, is achieving a run rate of £50 million of investment a month, a figure that is not achieved by any private company in England and Wales, would Mr Monteith care to develop his idea of why it is that a publicly owned company is not capable of meeting the tests and requirements of the public?

Mr Monteith: I have no difficulty in answering that. If the minister picks the period from which he takes his data, he can produce figures like that. We also know that the water commissioner has told us a completely different story—it is the water commissioner to whom the minister must listen.

Members of the public will notice that socialists cling like limpets to the idea that utility companies will cherry pick the best customers. That has been said by a number of members today. They claim that that will leave other customers behind to pick up the tab and that public health will suffer if companies are private. They claim that that would mean no forward planning.

Frances Curran: Will the member take an intervention?

Mr Monteith: Oh yes—another intervention. Certainly.

Frances Curran: The data about private companies in the health service, such as Sodexho, are clear. The statements on efficiency and public health are contradictory. We know that private companies are less efficient.

Mr Monteith: I know a bit about contracting out in the health service, I have read Audit Scotland’s reports and I have seen that the incidence of MRSA has nothing to do with, for instance, whether a cleaner is employed publicly or privately. If we are going to deviate into that
debate, let us have it another time—I will certainly be there to take part.

It is clear that some of the arguments are spurious and illusory. The same arguments were put in relation to British Telecom, the power companies and the English water companies and those companies proved them to be wrong. Surely, if the arguments were based on reality, we could expect to be drowning in news reports from England of deaths from cryptosporidium, scandals about water quality, and housing developments being halted because of a lack of forward planning by private water companies. The reality is different and needs to be explained to Rob Gibson, Sarah Boyack and Ross Finnie, for example. The most recent death from cryptosporidium was in Glasgow, not Gloucester and the most recent scandal about water quality was in Milngavie, not Monmouth. The problems in forward planning are everywhere to be seen in Scotland, as members such as Roseanna Cunningham have explained, with far fewer examples of such difficulty in England.

Richard Lochhead: Will the member give way?

Mr Monteith: No. I must finish.

The reality is that 10 years after privatisation the public sector in Scotland is failing and, despite Scottish Water’s best efforts, it cannot catch up. I believe that it is trying to run the business as best it can within the constraints that it is experiencing. The minister is not waving but drowning, and the bill is a straw that will not save him from that fate.

16:22

John Swinburne (Central Scotland) (SSCUP): The minister said to Jim Mather that there were only three dissenting voices on the Finance Committee. Perhaps he could have stated, in a more balanced manner, that 33 per cent of the committee did not accept his findings. If we extrapolated that throughout the Parliament, we would arrive at a total of 43 MSPs.

The situation regarding Scottish Water falls far short of utopian. The minister stated that the adviser to the Finance Committee endorsed the bill. The evidence that the Cuthberts presented to the committee was extremely lucid, informative and, at times, rather disturbing. In my opinion it was pushed aside on political grounds, rather than for basic financial reasons. I have no axe to grind politically; I simply weigh up the evidence that is presented and arrive at a conclusion. I did not find in favour of the minister.

The minister said that the best way for water rates to be paid is through council tax. That does not fill me with confidence. Is he not aware that the rate of non-payment of council tax can be between 7 and 9 per cent? Surely such inefficient collection of rates cannot be acceptable to any efficient organisation, including Scottish Water.

The minister said that customers will be asked to pay only their fair share of costs. Surely if up to 9 per cent of rates fail to be collected, the burden of the shortfall must fall on those who pay all their council tax and rates. Ross Finnie spoke in typical tunnel-vision fashion of care for the most vulnerable in our society. He undertook to protect all customers but, at the same time, he condones the completely unacceptable imposition on them of the greater hardship of a 5 per cent increase in water rates, which are to be paid through council tax.

Pension increases are tied to the cost of living. The 5 per cent increase in water rates means that every pensioner in the country who pays water rates and council tax will be further financially disadvantaged, because they are on a fixed income. The minister defends and promotes that further imposition on senior citizens in a week when Age Concern Scotland has released the horrendous statistic that, last year, the number of victims of winter-related death rose from 2,500 to 2,900. Next year, yet another increase will be associated in part with the unacceptable 5 per cent increase in water rates for pensioners.

If the minister can curtail increases for small businesses to 2 per cent, surely he can do likewise for pensioners. It is essential that he do so. Both groups need that reduction to survive. However, small businesses will at least still be alive despite water rates. In 2005, the most vulnerable in our communities could be an addition to Age Concern’s statistics if this last straw finally breaks the camel’s back.

Susan Deacon spoke eloquently about the environmental problems across the country, which Scottish Water must address.

There is a great deal of good in the bill. However, I have listened to the extensive arguments in the Finance Committee about underinvestment on the part of Scottish Water—or, rather, its failure to implement the maximum investment—and to the evidence of the inability of many projects to proceed nationwide because they are handicapped by the lack of water and sewerage facilities. Those factors, coupled with the cavalier manner in which increases are being imposed on the elderly, mean that I cannot support the bill.

16:26

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): This has been an important debate on an important bill. Indeed, at the beginning of the afternoon, we had two party leaders in the chamber. Of course, if comrade
leader Leckie and comrade leader Curran had been joined by their colleagues, there would have been even more.

Murdo Fraser: What about John Swinburne?

Jeremy Purvis: Of course, Mr Swinburne is a party leader as well.

As the Parliament knows, the Finance Committee conducted an inquiry into the accountability of Scottish Water, the delivery of the capital programme and the effect of the current charging structure on small businesses and the knock-on effect on the competitiveness of the Scottish economy. Throughout our inquiry, Scottish Water was open and helpful, as was the minister. I was pleased with the response that the minister gave the committee, which endorsed many of our views.

There is much in the bill that was in the committee’s report. In some crucial areas, the Executive goes further than the committee did, which is to be welcomed.

My remarks in support of the bill will address the accountability of the industry and the water commissioner. Throughout the Finance Committee’s inquiry, we found considerable frustration among the public and businesses about their inability to hold the industry to account for its actions and, in particular, about the poor standard of consultation. That was seen at public meetings attended, no doubt, by many colleagues with their constituents. In those meetings, senior Scottish Water staff and the water industry commissioner presented their work to an often frustrated audience.

On that subject, the report said:

“The Committee believes that consultation is not simply making presentations and asking for views of decisions already taken but that the public should have a real opportunity to contribute to decision making”.

I welcome the response of the Scottish Executive and Scottish Water, which is that a robust consultation code will be established. Further, I am pleased that, during our inquiry, the Scottish Executive agreed to have a full review of the charging mechanism.

It was right to focus on consultation and on the need to take the industry forward. In particular, it was right to focus on the accountability of the industry through the office of the water industry commissioner. The minister knows that, during the inquiry, I argued for reform of that office. My view, supported by the committee, was that there was a structural deficiency. Although the committee was satisfied with the overall legal framework involving the commissioner, the Executive minister and Parliament, it recognised that there was a less than satisfactory focus on an individual commissioner rather than a group. Indeed, that does not provide continuity and support for the industry, nor does it protect or promote the interests of the consumers.

The minister has clearly outlined the role of the water industry commission, as proposed by the bill. As the author of the recommendation in the Finance Committee’s report that dealt with this area and called for an improved structure, I think that the Parliament will welcome the minister’s response.

The proposal will provide much-needed independent regulation and—crucially—transparency across the industry. In its report, the committee also recommended that the office of the water industry commissioner should include non-executive membership, which could provide greater accountability and continuity for the Scottish water industry.

That there will be more support for the customer panels is particularly welcome. The panels do good work, and they will welcome what the minister has said today. I feel that there is cross-party support for the panels having a direct and strong link with users, and that a waterwatch that sits alongside energywatch and Postwatch Scotland, as robust customer voices, is needed in Scotland.

Mr Swinney: In the garden of roses that is the regulation of the water industry in Scotland, how does Mr Purvis deal with representations from his constituents about the development constraints that have dominated the debate, the arguments about which the Government has not addressed? How does he address the concerns of members of the public that we cannot undertake developments in our communities because the Government has not put a framework in place, which the bill will do nothing to help?

Jeremy Purvis: I notice that the member has just come back into the chamber, and he has asked the same question that he asked shortly before he left it earlier in the debate. I will touch on investment in a moment, but I say to housing associations, local authorities and private developers that development constraints are one of many issues relating to local development plans. There will be an onus on private developers to contribute to water supply connections. On investment, the figures that I will give in a moment speak for themselves.

There was no surprise that much of Mr Johnstone’s speech on behalf of the Conservatives detailed his dissent from the committee’s report, although he dissented with his customary decency. Indeed, there is a difference in the Conservatives’ philosophical approach. When Mr Johnstone said that he agreed with one or two elements of the bill, he meant it.
Sarah Boyack raised one issue that the Conservatives have not addressed: how we ensure that vulnerable members of society are protected. The bill is right to offer protection against cherry picking, which is a policy that the Conservatives seem to be comfortable with. They state that the average metered charge per household is 15 per cent lower than that of Scottish unmetered households, but they do not say whether they favour wholesale metering in Scotland.

There should be no doubt about the investment that the Executive has committed. Brian Monteith asked us not to compare current Scottish Water investment with local authority spend in the Tory years and not to pick the relevant years. He asked us to believe the water industry commissioner. However, the WIC figures show that comparable investment per connected property by Scottish Water is £1,050, which is higher than investment by the three bigger, privatised English companies—Thames Water, Severn Trent Water and United Utilities—during their largest four-year investment programme since privatisation. Even with many more customers, those privatised companies invested less in their biggest investment period.

That is one of many reasons why the bill should be supported. Alex Fergusson said that he supported the bill, but could not vote for it. I am happy to support the bill and to vote for it.

16:33

Murdo Fraser (Mid Scotland and Fife) (Con): As my colleague Alex Johnstone said at the outset, we welcome part 1 of the bill, which would bring in a new regulatory regime, and part 3, which would give new powers to the coal authority to tackle coal-mine water pollution. However, we cannot support part 2 of the bill, which seeks to restrict competition and prohibit common carriage.

As the minister said in his opening remarks, part 2 would reinforce the water monopoly that is held by Scottish Water. He used water quality as an excuse to justify the prohibition of common carriage, but there is not a shred of evidence that water quality is at risk from common carriage. As my colleague Brian Monteith said, the cryptosporidium scare a few years ago occurred in a public water supply in Scotland, not south of the border. Therefore, there is not much to be learned in that context.

Mr Purvis raised the issue of cherry picking customers, which Sarah Boyack raised. I remind him that exactly the same complaints were made when we proposed the privatisation of British Telecom and the power companies. All the voices of doom said that there would be cherry picking of customers and that costs would go up for the vulnerable and those living in remote areas. There is not a word of truth in that, as people must know by now. They were wrong then and they are wrong now. The fact is that privatisation delivers lower costs for every customer; that has been the experience in the past and it will be so again.

Stewart Stevenson (Banff and Buchan) (SNP): Will the member take an intervention?

Murdo Fraser: Mr Stevenson has not sat through the debate and has only just entered the chamber, but I will give way in the interests of debate.

Stewart Stevenson: I am most obliged to the member. Can he tell us how many cable telecom companies or other local loop suppliers there are in the area that he represents?

Murdo Fraser: I can tell the member that the real cost of telecom supply in my area is considerably lower than it was 20 years ago and that there is competition between suppliers. That is what delivers. Perhaps Mr Stevenson would like to confer with his colleagues on the front bench who, not so long ago, were pursuing a pro-enterprise agenda—but perhaps that has been abandoned under the party's new leadership.

Jeremy Purvis: Will the member give way?

Murdo Fraser: No. I would like to move on and deal with some other points.

Mr Finnie said that he is proud that water is in the public sector. Let us consider the record. Domestic customers in Scotland are paying more than their equivalents in England and Wales. Commercial customers are paying, in some cases, five to 10 times more than their equivalents in England and Wales. Other members have made the point that small businesses are paying greatly increased sums, and that includes charities, as Maureen Macmillan said. We have also had a much lower level of investment over the past 13 years, with £1 billion being invested in Scotland compared with £50 billion in England and Wales, and we have poorer water quality.

Des McNulty said that it is all the Tories' fault for not privatising the water industry. We plead guilty. We should have privatised water when we had the opportunity and we would all be reaping the benefits now.

On funding, I remind Mr McNulty that, for most of the 18 years of Conservative Government, responsibility for funding water services rested with local authorities—the self-same local authorities that today complain about the funding allocation from the Executive, which is much tighter now than it was in the Conservative years. We do not need any crocodile tears from the likes of Mr McNulty on the issue.
**Des McNulty:** It is very straightforward. Every year that I was a member of Strathclyde Regional Council, we applied to the Scottish Office, which was under Conservative administration at the time, for permission to spend more money on water investment. We were refused as a matter of Government policy. In fact, it was a matter of Government policy from 1976 onwards, so the tail-end of the Labour Government was also responsible. However, there were then 18 years of a Conservative Administration when not enough investment was made in the water industry, and the current situation is the Conservatives’ responsibility.

**Murdo Fraser:** That is exactly why the water industry should be in the private sector—to provide the investment that we have seen in England and Wales.

**Jeremy Purvis:** Will the member take an intervention?

**Murdo Fraser:** No, I need to move on.

Development constraints have been raised by members of all parties and are the number 1 issue in relation to water services. Such constraints limit economic development and growth in Scotland, and organisations such as Homes for Scotland have made the case for the impact that development constraints have on the Scottish economy. They also have the potential for social impact. If there is an embargo on development in certain communities, it means that people cannot get on the housing ladder, house prices go up and young people are often forced to live in other communities or in sub-standard accommodation. Demands then start coming in for more affordable housing. If the development constraints and the embargo were lifted, we would probably not need so much subsidy for affordable housing, as house prices would be more realistic.

Numerous communities throughout Scotland are affected in that way. Roseanna Cunningham referred to Alyth. I live in Alyth and I know all about the situation there. If I were being selfish, I would say that we should keep the embargo on house building there, as the price of my house would go up even more; however, being a generous-hearted soul, I want to see more house building, so that more people will have the chance to live there and to share the benefits of living in such an attractive small town if they so wish. Nevertheless, developers cannot build there at the moment.

To Roseanna Cunningham and her colleagues I say that, although we heard three speeches from Scottish National Party members, not once did we hear about the SNP alternative. We have proposed our alternative to the current situation. What is the SNP model for the water industry? There has not been a squeak. Once again, the Tories are the real Opposition, because we are the only ones with a real alternative. Perhaps Mr Lochhead will enlighten us when winds up.

We cannot support the bill because it is a tremendous lost opportunity for Scotland. Clear benefits come from opening up competition and could come from moving water into the private sector. As I have said, there would be lower bills, better quality and higher investment. In particular, we must address the need to lift the development constraints that are crippling so much of our economy and society in Scotland. Because the bill fails to address those needs, it must be opposed.

16:40

**Richard Lochhead (North East Scotland)** (SNP): This is the third bill on the water industry that has come before the Parliament since devolution six years ago. That speaks volumes about the huge task that faced the new Parliament in bringing Scotland’s water infrastructure up to scratch and improving water quality after decades of neglect by Conservative and previous Labour Governments and local authorities.

We welcome the debate. Because it is a debate on the water industry, it has provided an opportunity to see Des McNulty getting animated about the issue that is closest to his heart. We also welcome the committee’s report. I have just joined the committee, so I missed out on the evidence-taking sessions, although I was there for the report stage. Many of the themes today are familiar and have figured in every water debate since 1999.

The SNP supported the creation of Scottish Water because of the economies of scale, because we wanted to make the industry more efficient and because many customers in Scotland were carrying too much of a burden.

The water industry has had a tough time. It has had to implement the new European Union directives and to modernise a crumbling water infrastructure. However, today’s debate is about turning attention to how we can protect the industry from its latest challenge, which is the Competition Act 1998.

Frances Curran, who spoke for the SSP, must have been speaking about a different bill. This bill is about protecting the industry from competition, not about introducing competition to the supply of water to businesses and domestic customers. Frances Curran should read up on the background to debates before she participates.

We have had debates about competition in the water industry before. When I was water spokesperson for my party a couple of years ago, I remember standing during many debates, taking on the minister on this subject, explaining that we
could avoid having common carriage in the domestic and non-domestic sectors and avoid introducing competition to the domestic sector. Time and time again, the minister told me that I was talking rubbish and that I should sit down when we disagreed on those issues, so I was delighted when the Government dropped its proposals to introduce competition to the water industry; clearly ministers began to listen to the SNP’s arguments.

Frances Curran: If no competition is being introduced in the bill, does the member agree that the bill is in contravention of the Competition Act 1998 and so could be challenged?

Richard Lochhead: The competition that the bill introduces is for the billing process; it is not for the supply of water, as the member said when she was speaking. She got that wrong.

We welcome the fact that the bill is about protecting the Scottish industry. It is important that we support the bill so that we can have a statutory framework that will allow us to see off competition. We welcome the rejection of common carriage and the fact that competition will not be introduced to the domestic sector.

There are dangers. We do not know to what extent competition will be introduced for the billing process. Mark Ruskell’s point that we should tighten up regulation as much as possible so that we can chase off any competitors to Scottish Water on the retail side of the non-domestic sector was valid. That will depend on the retail element. The greater that element, the more attractive it might be to foreign interest to try to compete with Scottish Water for retail services.

Alex Johnstone: The member says that Scotland’s water industry would be a victim of foreign competition. Does he not realise that if we raise our eyes to the hills slightly, the possibility exists for Scottish Water to be a major player in that business, as long as we release it from the constraints?

Richard Lochhead: If full competition were to be introduced throughout the water industry in Scotland, Scottish Water would be dwarfed by the multinationals that exist elsewhere in Europe and throughout the world, which would cherry pick aspects of the industry or take over the entire industry.

The bill will scrap the office of the water industry commissioner and I think that it is fair to say that no tears will be shed if that happens. The current situation lacks transparency, as many members said, and the WIC is far too remote. The current WIC constantly compares the Scottish industry with the industry south of the border, but the situations are not all that similar. It is unfair constantly to compare the performance of Scottish Water with that of water authorities south of the border.

A message that has come through in the debate is that there must be clarity about the role of the customers’ champion. Water customers need a strong champion. We welcome the beefing up of that role through water customer consultation panels, which will take responsibility for dealing with customers’ complaints. However, we must ensure that the process is explained to customers, so that the panels can be true customers’ champions.

Perhaps the biggest issue that has been raised is the situation in relation to development constraints in Scotland. It is not good enough for the minister to continue to pass the buck for the fact that the matter was missed out in the consultation exercise on Q and S II to everyone else in Scotland. He was the Minister for Rural Affairs at the time and if anyone in Scotland was aware of the difficulties that development constraints would cause, in particular for rural communities, but also for urban communities, it is the minister. He should have put on his rural development hat and told himself to do something about the matter.

Now, the minister takes the view that a way round the problem is to make developers responsible for paying for water and sewerage infrastructure to be installed. That might work in some situations in parts of the country, but it will by no means work throughout the country. We must consider social housing and the affordability of housing; we cannot afford to create a situation in which developers just pass on the cost of developing land through house prices, as that would do nothing to tackle the shortage of affordable housing in rural Scotland.

Members, including Susan Deacon and Sarah Boyack, mentioned the proposals on odour nuisance, which are welcome. Like other members, the SNP supports the call for the code on odour control to be statutorily underpinned.

Stage 2 will offer the Parliament the opportunity to make considerable improvements to the bill and we will seek to make such improvements. It is imperative that we ensure that customers get value for money from the water industry, that we ensure that we have the best water quality in Europe, and that we take the industry forward and keep it well within the public domain.

16:47

The Deputy Minister for Environment and Rural Development (Lewis Macdonald): I am pleased to be able to welcome much of what has been said in the course of the debate. As members have said, the debate is about how we secure a high-quality public sector service provider
and how we enable Scottish Water to address, in the investment programme ahead, issues such as development constraints and odour nuisance.

I was pleased to hear Alex Johnstone say that the bill reminds him of why he got involved in politics. He is not the only one; many people who are involved in Scottish politics campaigned for a Scottish Parliament precisely because of the Tories’ obsession with privatising everything. The bill represents a bulwark against that Tory obsession. We are committed to keeping Scottish Water in the public sector and to ensuring that it delivers first-rate water services for Scottish customers. The bill provides robust statutory measures in response to the Competition Act 1998 to secure those objectives, which would otherwise be at risk. We are committed to providing stability for the industry and we believe that the bill will allow us to achieve that aim.

Those who raise the spectre of privatisation need to understand that under the bill no private company will sell or supply water or sewerage services. New entrant companies will be able to compete only for billing and retailing to business customers. The idea that Frances Curran promoted, that competing for billing services somehow amounts to water-service privatisation by neglect, is bizarre in the extreme.

**Mr Ruskell:** I do not want to get hung up on semantics, but one aspect of the supply of water to businesses is the sale of water to businesses. The sale of water requires a licensed billing mechanism, which the bill would regulate. That is the element of supply that I talked about and which represents an area into which some privatisation is being introduced. I am not condemning the Executive for that; I do not believe that it has any alternative, which is why the Green party is supporting the bill.

**Lewis Macdonald:** I am glad to receive that clarification of Green party policy and I welcome its support for our approach.

By contrast, the Scottish Socialist Party boasted today that it looks forward to voting side by side with the Tories against the bill and asked Scottish ministers why we did not “go the whole hog” and sell off Scottish Water. We reject that invitation from the Tories and the SSP precisely because we believe that a public sector Scottish Water is the best way of delivering core water services.

**Frances Curran:** If the minister did not want any element of competition in the bill or in water services in Scotland, why did he not follow the Scottish Trades Union Congress suggestion and ask for exemption from the Competition Act 1998? With those demands, ministers are simply going along that route bit by bit.

**Lewis Macdonald:** If Frances Curran had read the evidence that was given in committee, she would know that we have taken the best advice on what we need to do to meet the requirements of the Competition Act 1998. When the Office of Fair Trading makes a submission to the committee that confirms our view, I am pretty comfortable to rest on such assurances.

We seek to introduce two prohibitions and a detailed licensing regime that will secure public health, protect the environment and allow us to maintain a charging system that protects the interests of low-income customers. Clean drinking water is fundamental to health and we are not prepared to compromise on that or to blur accountability for water supply. The same applies to sewerage services. The prohibition on retail competition for domestic households secures our continuing ability to ensure that water charges are linked to other means of raising funds and that they reflect ability to pay.

Concerns that GATS might require us to privatise water services are without foundation. As my colleagues have pointed out on a number of occasions, we have ensured that the UK Government’s representations to the European Union on those negotiations reflect its commitment to retain Scotland’s water service in the public sector. The UK Government has confirmed to us that no requests have been received for the UK to include water services in future GATS commitments and the UK, of course, has no intention of moving in that direction. It is precisely because of our certainty on that matter that we seek to introduce explicit prohibitions in the bill against any third-party involvement in the physical provision of water and sewerage services.

Under the bill, the industry will also remain accountable to Parliament. Although the proposed water industry commission will acquire powers of determination over charges in order to bring its technical expertise to bear, responsibility for deciding on public policy objectives will rest entirely with ministers: we will state the level of investment that Scottish Water must achieve during a regulatory period; we will determine the drinking water quality and environmental standards that Scottish Water must meet and the timescale in which they must be achieved; and we will decide on the principles of charging, including how costs are borne by different customer groups. As far as the water industry is concerned, ministers who are accountable to Parliament will own Scottish Water and set the public policy that it must achieve.

Sarah Boyack and other members raised the important public policy issue of sustainable development. We are committed to ensuring that sustainable development is fully embedded in decision making in the water industry and will seek the best way of delivering that. We will consider
carefully the Environment and Rural Development Committee’s recommendations on that, particularly on the question whether additional sustainable development duties, such as licensing of retail providers by the water industry commission, are appropriate. However, it is worth noting that the bill reinforces the requirement on Scottish Water to have regard to sustainable development issues, because the water industry commission must fully fund all Scottish Water’s core functions, which include that sustainable development duty.

Many members rightly highlighted the issue of development constraints, and we are fully committed to addressing that complex problem. Some have pointed out that it was not fully recognised at the time of quality and standards II; however, £200 million has been made available in the current programme to provide positive benefits with regard to existing constraints and a further £41 million has been allocated specifically to address some of the rural issues that members mentioned.

We recognise that constraint is a real issue. The current situation will be specifically addressed and we are determined to ensure that it will not arise in the next investment programme period. Indeed, the issue was addressed in the consultation on Q and S III—a whole chapter was devoted to discussion of extending the public networks. We are keen to ensure that a workable and affordable mechanism is put in place. That work will be done in liaison with local authorities.

The convener of the Environment and Rural Development Committee referred to the fact that the investment programme will be informed by the priorities for economic development and area regeneration that are set out in the “National Planning Framework for Scotland”. That is precisely the commitment to investing in water services that was given in the consultation document. We are working with a number of parties—including the Convention of Scottish Local Authorities, Communities Scotland, the Scottish Federation of Housing Associations and Homes for Scotland—on considering what that will mean in detail and in tactical terms. Again, we will return to that in January when we announce the results of the Q and S III process. The conclusions that we come to then on environmental issues that affect industries such as aquaculture will be significant indeed.

A number of members sought clarification on Ross Finnie’s announcement at the commencement of the debate on the problem of odour, which is one of the key environmental issues that members have raised. As members will know, we are consulting on a voluntary code of practice; that consultation will run until January. The draft voluntary code will then be finalised and published in the spring. It will form the basis of our proposed statutory code of practice on odour control, which will be brought in by an amendment to the bill at stage 2. The intention is, of course, to consult on that and to issue a regulatory impact assessment. Our expectation is that the statutory code’s introduction will be dovetailed with the beginning of the next investment programme period, which is due to commence in April 2006. I hope that the Environment and Rural Development Committee and, in due course, Parliament will support that amendment when it is moved.

We will lodge another amendment on the convener of the water customer consultation panels taking over responsibility for handling individual complaints. We are grateful to the Environment and Rural Development Committee for its consideration of the proposed amendments and for the evidence that it will take next week. We look forward to lodging the amendments in good time for stage 2 and to working with the committee on them. We believe that what the consultation panels amendment will propose will be a step in the right direction and that it need not, and will not, take away from the wider responsibility of the panels for dealing with wider issues that affect all customers.

I thank the members of the Environment and Rural Development Committee for their detailed consideration of the bill’s general principles. The committee’s report on the evidence that it took has allowed a thorough assessment of the Scottish water industry and the bill’s aims. We look forward to working with the committee at stage 2.

Today’s debate has been useful. It has marked out clear dividing lines, but it has also marked out clear common ground that I think will attract wide support in Parliament. I believe that it will allow us to deliver the kind of public sector Scottish water services that we want in the future. I commend the general principles of the Water Services etc (Scotland) Bill to the Parliament.
The Presiding Officer (Mr George Reid): The next item of business is consideration of motion S2M-1567, on the financial resolution in respect of the Water Services etc (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Water Services etc. (Scotland) Bill, agrees to—

(a) any expenditure or increase in expenditure of a kind referred to in Rule 9.12.3(b)(ii) or (iii) of the Parliament’s Standing Orders, and

(b) any payments in relation to which Rule 9.12.4 of the Standing Orders applies,

arising in consequence of the Act.—[Ross Finnie.]

The Presiding Officer: The question on the motion will be put at decision time.
Decision Time

17:10

The Presiding Officer (Mr George Reid):

There are five questions to be put as a result of today's business. The first question is, that motion S2M-1463, in the name of Ross Finnie, that the general principles of the Water Services etc (Scotland) Bill be agreed to, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Baker, Richard (North East Scotland) (Lab)
Ballantyne, Johann (South of Scotland) (Green)
Ballard, Mark (North East Scotland) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Cunningham, Roseanna (Perth) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Locharber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Davidson, Mr David (North East Scotland) (Con)
Curran, Frances (West of Scotland) (SSP)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Carr, Frances (West of Scotland) (SSP)
McKethen, Mr Mark (Mid Scotland and Fife) (Con)
Ruskell, Mr Mark (Mid Scotland and Fife) (Con)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, Tavish (Shetland) (LD)
Welsh, Mr Andrew (Angus) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Carr, Frances (West of Scotland) (SSP)
McKethen, Mr Mark (Mid Scotland and Fife) (Con)
Ruskell, Mr Mark (Mid Scotland and Fife) (Con)
Scott, Tavish (Shetland) (LD)
Welsh, Mr Andrew (Angus) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)
The Presiding Officer: The result of the division is: For 96, Against 24, Abstentions 0.

Motion agreed to.

That the Parliament agrees to the general principles of the Water Services etc. (Scotland) Bill.

The Presiding Officer: The second question is, that motion S2M-1567, in the name of Andy Kerr, on the financial resolution in respect of the Water Services etc (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Baker, Richard (North East Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Cunningham, Roseanna (Perth) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eddie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorre, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (North East Scotland) (SNP)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mathers, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
May, Christine (Central Fife) (Lab)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeil, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Montelth, Mr Brian (Mid Scotland and Fife) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Mundell, David (South of Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Raffan, Mr Keith (Mid Scotland and Fife) (LD)
Robison, Shona (Dundee East) (SNP)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stevenson, Steward (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Swinney, Mr John (North Tayside) (SNP)
Tosh, Murray (West of Scotland) (Con)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Welsh, Mr Andrew (Angus) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)
AGAINST
Byrne, Ms Rosemary (South of Scotland) (SSP)
Curran, Frances (West of Scotland) (SSP)
Fox, Colin (Lothians) (SSP)
Kane, Rosie (Glasgow) (SSP)
Leckie, Carolyn (Central Scotland) (SSP)
Sheridan, Tommy (Glasgow) (SSP)
Swinburne, John (Central Scotland) (SSCUP)
The Presiding Officer: The result of the division is: For 113, Against 7, Abstentions 0.

Motion agreed to.

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Water Services etc. (Scotland) Bill, agrees to—

(a) any expenditure or increase in expenditure of a kind referred to in Rule 9.12.3(b)(ii) or (iii) of the Parliament's Standing Orders, and

(b) any payments in relation to which Rule 9.12.4 of the Standing Orders applies,

arising in consequence of the Act.
I am happy to attach a detailed response to the Committee’s Stage 1 Report. In doing so, I would like to take the opportunity again to commend your Committee’s work on the Bill, and the weight of evidence you heard. I hope you will see from the response attached, and when we come forward with the Stage 2 amendments referred to, how seriously the Executive takes the Committee’s views and the careful consideration we have given each recommendation.

I know that two issues to particularly concern the Committee have been reaching a firm view on the costs associated with the Bill, and having sufficient time to consider our proposals in relation to the Water Customer Consultation Panels. We look forward to providing the Committee with a supplementary Financial Memorandum providing further detail on the costs provided in advance of Stage 3. And I trust that the Committee’s additional evidence session on the Panels, and the response attached now, provide the detail you sought in scrutinising the role for customer representation in the industry.

We look forward to providing further details of our proposed policy, both in Stage 2 amendments to address the issues that have arisen in relation to the Bill, and in my statement on policy objectives for the industry early in 2005.

ROSS FINNIE MSP
Minister for Environment and Rural Development
December 2004
ANNEX A

DETAILED RESPONSE TO THE RECOMMENDATIONS IN THE STAGE ONE REPORT ON THE WATER SERVICES ETC. (SCOTLAND) BILL

The Committee considers that it would be more appropriate for the Commission to have 5 ordinary members than 3, as 3 remains potentially too close to a ‘personalised’ relationship between regulator and regulated. (paragraph 16)

It had been the Executive’s intention to seek at least four non-executive members of the Water Industry Commission in the first place. We recognise the vital importance of establishing a strong Commission that contains the expertise to lead economic regulation of the water industry, and are happy to agree to seek five ordinary members, including a chairman, for this purpose.

The Committee considers that the structure of the Panels must enable the full range of regional stakeholder interests to be taken into account, as well as both domestic and non-domestic customer perspectives. (paragraph 25)

In establishing five Water Customer Consultation Panels, Ministers were concerned to ensure that the Panels could be effective representatives of their regions, and relate to the operational areas of Scottish Water to provide coherent customer input at this level as well as nationally. Nothing in the Bill or our proposed amendments to the Panels' function is intended to detract from that regional structure.

The Committee requests the Minister’s comments on the proposal by the Scottish Consumer Council for a statutory Memorandum of Understanding to secure appropriate co-operation between the Commission and the Panels. (paragraph 25)

The Executive welcomes the proposal from the Scottish Consumer Council that there should be a statutory Memorandum of Understanding between the Panels and the Water Industry Commission. In view of the enhanced role of the Panels and the need to secure efficient and effective information exchange between them and the Commission we agree that it would be worthwhile to put their current informal Memorandum on a statutory basis, and we will bring forward an amendment to achieve this.

…the Committee remains concerned that handling individual complaints has the potential to swamp the representative role of the Panels. The Committee has not received sufficient evidence from the Minister to assure it that the Panels will be robust enough and resourced to a level that will minimize this risk. In this context, the Committee recommends that considerations be given to producing clear guidance for customers which will allow different types of complaints to be appropriately directed. (paragraph 33)

The Executive gave careful consideration to the balance between the different aspects of the Customer Panels, and the need to ensure that their role remains coherent and effective in the customer interest, when proposing redirecting the complaints handling function. We agree that the individual Panels would not be best placed to handle customer complaints, and that it would be undesirable to allow such a role to divert their attention from their representative role, which itself should be enhanced, the intention behind our strengthening of their powers to make recommendations. However, we do believe there is a good case for the Customer Panels in general being responsible for handling complaints, giving them a direct interface with customers and being better placed to represent the concerns of individual customers than the Water Industry Commission.
Our amendments will seek to reconcile these two concerns by placing responsibility for handling complaints on the Convener of the Customer Panels, in his own right. As the Committee are aware, the Panels have one Convener who is a member of each Panel and is appointed by Ministers under the public appointments process. We believe that the Convener will be able to manage this addition to his responsibilities appropriately, building it into the Panels’ expertise on customer issues without reducing their ability to engage in other ways. We would expect the Convener to be supported in this function through the Panels’ central office employing staff to handle complaints.

The Executive will work with the Convener to ensure that this function is adequately resourced. Subject to approval of the amendments that we will bring forward, we would propose to provide evidence on the modest resources required for this and the other changes to the Panels’ functions as part of an updated Financial Memorandum in advance of Stage 3.

We also welcome the Committee’s recommendation that clear guidance should be made available to customers on the complaints process, both as handled by the Convener but also in approaching Scottish Water. The Convener sees this type of information provision as a valuable function the Panels could supply and we would look forward to him providing this in the future.

*The Committee*… **requests that the Minister provides clarification on whether Scottish Water will have a duty to report data on all complaints it receives, and its decisions on them, to the Panels.** (paragraph 34)

The Executive agrees that the Convener and the Panels will have an interest in tracking trends in complaints received by Scottish Water. Our amendments to require the Convener to handle complaints will include a specific power to require information from Scottish Water in relation to that function, and we would expect to give the Convener the power to require this type of data from Scottish Water. The Memorandum of Understanding will also cement co-operation between the Panels and the Water Industry Commission, with their extensive rights to require information from Scottish Water. In this and other cases, we have sought to avoid duplicating powers between the Panels and the Commission to avoid placing an undue burden on Scottish Water.

*The Committee also requests clarification of the potential role of the Scottish Public Services Ombudsman in relation to the water industry.* (paragraph 34)

The amendments the Executive will propose will include provision to bring the Customer Panels under the regime of the Scottish Public Services Ombudsman, allowing her to investigate their actions in response to a complaint.

*The Committee, therefore, recommends that the Minister gives further consideration to how sustainable development can be promoted throughout the industry – whether by imposing a statutory duty on the Commission, or by imposing sustainable development obligations on water and sewerage service providers through the licensing regime.* (paragraph 44)

The Executive is fully committed to sustainable development, and ensuring that the principles of sustainability are embedded in the water industry at all levels. As the Committee recognises, it is an important tenet in the provisions set out in the Bill that Ministers, who are accountable to Parliament, are responsible for setting the policy framework for the water industry, whereas the Commission has the technical and economic role of delivering the charge determination which will implement those policy decisions.
There is also no doubt as the Bill stands that Ministers’ policy statement and the Commission’s charge determination must reflect the duties on Scottish Water. This is made explicit in the Bill in relation to the Commission (in the new section 29C inserted into the Water Industry (Scotland) Act 2002 by section 18 of the Bill). We are considering whether there is any further action that could be taken to make this more explicit in relation to Ministers’ decisions.

However, the Executive welcomes the Committee’s suggestion that explicit provision should be made to ensure that retail providers contribute to sustainable development. The Bill secures that Scottish Water’s retail subsidiary must be treated equally and consistently with all other retail providers, ensuring that it is not subject to any more onerous duty than new retail providers. But given the contribution that these retail providers should make to sustainable development, for example, through providing advice and assistance to customers on reducing their water usage, we are minded to make clear provision for this through the Bill. We will bring forward Executive amendments to address this.

The Committee is, however, concerned at the potential for disruption to Scottish Water’s on-going delivery of challenging investment priorities and efficiency improvements. (paragraph 79)

Ministers are committed to ensuring that Scottish Water continues to deliver the challenging investment priorities it has been set, and improving its efficiency. The Bill provides the stability Scottish Water needs to meet these challenges with the certainty that the core business will continue to be delivered by Scottish Water, and that retail competition, should it develop, will do so in a licensed and regulated manner with stringent protection for the core supply.

Requiring Scottish Water to separate its wholesale and retail functions is an important element of the robust statutory framework proposed in the Bill. The Executive welcomes the Committee’s recognition that separation is required to demonstrate an equitable basis for potential new entrants to the retail market, and to provide the security that the Bill aims to provide against challenges under the Competition Act.

Ministers take seriously the importance of managing the transition in such a way as to minimise the risks of disruption. However, rather than putting at risk the efficiencies that Scottish Water has already achieved, the regulatory framework proposed in the Bill is aimed at strengthening the rigour and expertise that are brought to bear in regulatory decisions. This will promote greater understanding of costs and potential efficiencies and work to deliver better value for customers. Of itself, accounting separation into a wholesale and retail business is recognised to be a valuable step in improving understanding and transparency in costs, and we would hope to see benefits to customers from this move alone.

The Committee… recommends that the Minister provides, as a matter of urgency, further explanation of how the distinction between retail and wholesale functions will be defined for the purposes of the Bill, and how the costs will be accurately apportioned. (paragraph 80)

The Executive notes the Committee’s concern about how the distinction between retail and wholesale functions will be defined and the costs of the two apportioned accurately. The Bill provides for the Water Industry Commission to perform this function as part of the charge determination (i.e. strategic review of charges) process. In anticipation of this, the Water Industry Commissioner has consulted on the methodology that would be most appropriate
for this exercise as part of his consultation on the methodology for the 2006-10 strategic review as a whole. The range of methodologies that could be deployed and the Commissioner’s proposed methodology are described at pages 19 to 21 of Volume 3 of the methodology consultation. We attach a copy of these pages for the Committee’s information.

In summary, the Commissioner is proposing that what is termed the “accounting approach” should be used to determine the wholesale price. In practice, this means that the Commission will assess the total revenue needs of Scottish Water as a whole. Having done so, it will then allocate the revenue to the two parts of the business on the basis of the regulatory accounts for Scottish Water.

Regulatory accounts are used by all economic regulators as the means of obtaining accurate, comprehensive information on the activities and costs of the businesses that they regulate. Their purpose is quite distinct from that of the audited financial accounts of the business in that they provide a very detailed description of business costs and activities, whereas the audited accounts provide a high level overview of the costs and revenues of the business.

The Commissioner has asked the accountancy firm Ernst and Young to assist him in establishing the basis upon which regulatory accounts for Scottish Water should be created. He has consulted Scottish Water about this work. The work takes the form of breaking down Scottish Water’s operations into a large number of very detailed activities, each of which is assigned to either the wholesale or retail part of the business.

A strength of this approach is that each activity must be assigned to one or other part of the business. The costs and revenues associated with each assigned activity are then allocated to the relevant part of the business on a matching basis, so that each part of the business carries the costs and revenues associated with the activities that it has to perform. Therefore, even if there is any doubt about where an activity should be assigned, or any question that it might have been assigned incorrectly, there can be no question that this will cause under-funding, or over-funding, of either part of the business, as the costs and revenues associated with the activity will have followed the activity into whichever part of the business it has been assigned.

Ernst and Young are expected to conclude – and to publish the outcome of – this work before the end of the year. Subject to the outcome of the consultation on methodology, it is likely to be on the basis of this work – and of the allocations to wholesale and retail that it will establish – that the Commissioner will determine the draft wholesale charges that he will publish next summer.

We consider that this provides a safe and accurate means of allocating costs to wholesale and retail. Furthermore, there will be opportunities for external scrutiny of the allocation, and of the proposed wholesale charges that will flow from the allocation.

First, there will be full public scrutiny of the proposed charge limits, including the wholesale charge limits, when the Commissioner publishes these in June next year. This will enable Scottish Water and any other interested party to challenge the proposed limits and the basis upon which they have been calculated. Subject to the Parliament’s approval of the Bill, we expect to have appointed the new Water Industry Commission in time for it to consider any such representations and, if it judges it appropriate, to take these into account in setting the definitive charge limits by December next year.
Secondly, the planned right of appeal to the Competition Commission means that Scottish Water will be able to challenge the charges determination by the Commission should it judge that there are any flaws in it. Again, this includes the ability to challenge the wholesale charge and the basis of its calculation.

We are satisfied that these arrangements as a whole provide a transparent and robust means of setting wholesale and other water charges.

The Committee recommends that the Minister should consider further whether his proposals for ensuring supply to non-domestic customers are sufficiently robust. (paragraph 83)

The Bill makes a number of provisions to ensure security of supply for non-domestic customers and these are at or beyond the level of protection currently available to these customers, either in Scotland or in England and Wales. The Bill provides that the core Scottish Water business must act as supplier of last resort to any customer in the event of their being unable to identify a retail provider. It provides that no customer can have their sewerage services disconnected, and that water services can only be disconnected after a rigorous process is followed, and provides for a Disconnections Code governing this to be drawn up and agreed. Taken together this provision ensures that the only circumstances in which a business risks being disconnected is persistent non-payment of water charges, and the Executive believes that it is unreasonable in those circumstances that the generality of customers should continue to support that customer.

The Committee recommends that the Minister should consider further whether his proposals for switching arrangements are consistent with those operating in England and Wales. (paragraph 83)

In common with the proposals in the Bill, the Water Act 2003 does not include specific provision for switching arrangements, or prescribe a process for the transfer of customers between suppliers. However, Ofwat is currently consulting on a Customer Transfer Protocol which, once agreed, will require licensed providers to adhere to specific arrangements with regard to customers transferring suppliers. It is vital that these arrangements are flexible enough to reflect the development of the market, and the Executive considers that it would be inappropriate to be more prescriptive in primary legislation.

However, the Bill provides a framework to ensure that switching arrangements can develop in an orderly manner. It gives the Commission general powers to direct both Scottish Water and any licensed provider in order to secure their orderly participation in the market, and specifies that such directions may relate to the provision or exchange of information about customers. This will ensure that the Commission can develop secure customer switching arrangements which reflect the needs of Scottish Water and retail providers and operate in the interests of customers. It will be for the Commission to determine what the most appropriate mechanism will be as part of its work on establishing the licensing regime. These arrangements mirror the work Ofwat is currently undertaking in England and Wales.

The Committee welcomes the Minister’s further proposal to include the Panels as statutory consultees before a Ministerial statement on the principles of charging is made (under the proposed new section 29D(4) of the 2002 Act). The Committee recommends, however, that the Panels should also be included as statutory consultees in the proposed new sections 29B(4)(a) and 56B of the 2002 Act, as suggested by the Scottish Consumer Council. (paragraph 88)
We agree that it would be appropriate for the Customer Panels to be consulted in each of these ways, by the Water Industry Commission on a draft determination of charges, and by Ministers on a statement on charging and on investment objectives for the industry, and we will bring forward amendments to this effect at Stage 2.

The Committee accepts, on balance, the proposed rights of appeal being to the Competition Commission. The Committee recommends, however, that the operation of this right be kept under review to assess whether it is operating in the best interests of the Scottish water industry. (paragraph 92)

The Executive welcomes the Committee's agreement to the Competition Commission's involvement in the charge setting process. We believe that this is the most appropriate mechanism to ensure that economic regulation of the water industry works in the best interests of customers and the industry. However, we agree that it would be sensible to keep this provision under review once it is in place.

The Committee is concerned that the proposed limited departures from the charges scheme may not strike the correct balance for businesses and for the revenue base of Scottish Water. The Committee recommends that the Minister gives further consideration to this. (paragraph 95)

The Executive remains convinced that the provisions set out in the Bill to permit authorised departures from standard charges do strike the right balance between allowing for reduced charges where those are merited, and ensuring that all customers make a fair contribution to the cost of serving them. Furthermore, we believe that limiting provisions of this kind is vital to uphold the principle of harmonisation in the Bill, which ensures that customers living in remote or difficult to serve areas do not end up paying higher charges than those in areas that are cheap to serve.

In reaching this view, we are aware of the arguments that some businesses may decide to leave the public networks in the absence of the ability to make special deals with Scottish Water. However, it cannot be for Ministers to seek to interfere in those customers' business decisions to prevent them making that decision, nor to choose to subsidise those customers who have a choice of water source at the expense of other customers, including smaller businesses and households. For that reason we think the Bill offers the right balance between allowing existing special agreements to continue to their agreed end but concluding that wider provision for special agreements or departures would not be in the public interest.

In order to achieve the required balance between different priorities, the Committee considers that a consistent and robust system must be established for prioritising investment in new infrastructure. (paragraph 107)

Ministers are currently in the process of considering their priorities for the next investment programme and prioritising investment in new infrastructure is one of a number of issues on which Ministers will announce decisions in a statement early in the New Year.

The Committee also requests the Minister's comments on the position of local authorities which grant planning permission to developments when it is known that there is insufficient network water and drainage capacity. (paragraph 108)
We are not aware of such circumstances as described by the Committee having arisen to date. However, we are aware that Scottish Water wrote recently to a local authority indicating that if planning permission was given in an area where constraints applied, they would have to revert to statute and refuse connection where appropriate. In terms of recourse for the developer, this could result in appeals to Scottish Ministers and possibly the Courts.

It should be noted that making further connections into an overloaded system could potentially result in flooding and breaches of environmental consents for discharges.

*The Committee remains strongly committed to seeing statutory underpinning for the proposed code of practice on odour nuisance. The Committee strongly recommends that the Minister should consider again whether the Water Services etc. (Scotland) Bill could be used to give statutory basis to the code.* (Paragraph 116)

The Executive recognises the importance of addressing the problem of odour nuisance from waste water treatment works, given its impact on quality of life for those living near to affected installations. Therefore, as announced during the Stage 1 debate, Ministers have decided to act on the recommendation of the Committee to provide a statutory vehicle for resolving this issue. While a voluntary Code of Practice is currently being consulted on, we will bring forward amendments at stage 2 of the Bill to give Ministers statutory powers to issue a Code of Practice to Scottish Water and its operators, which will be binding on those recipients and must be complied with. The Code will include technical and management mechanisms for the control of odour at installations such as waste water treatment works, pumping stations and main sewers.

*The Committee considers that there are a number of general issues which must be addressed about the investment programme. Firstly, in the context of an 8-year plan with finite investment funds and finite civil engineering capacity, the Committee considers that the process by which investment projects are identified and implemented must be subject to continuous monitoring and periodic review. This monitoring and review must involve both Scottish Water and local authorities.*

*Secondly, the Committee considers that progress should be benchmarked and made as transparent as possible through the establishment and publication of a robust set of indicators. This will assist in enabling decisions about the priority order of projects to be clear and equitable. Alongside this, the Committee considers that any new processes should not be allowed to jeopardise the progress Scottish Water has made in its business management and the improving efficiency in its investment programme.*

*Thirdly, the Committee considers it unacceptable that Scottish Water may be unable to respond to any unforeseen need which arises during an investment period. The Committee recommends that sufficient flexibility and contingency funding should be available within the investment programme to allow Scottish Water the scope to respond appropriately to unforeseen investment needs.* (paragraphs 119, 120 & 121)

As stated above, Ministers are currently in the process of considering their priorities for the next investment programme and look forward to announcing decisions in a statement early in the New Year. The issue of monitoring and reviewing the capital programme once it has been agreed is currently under active consideration by officials and with SW’s regulators.

The need for an appropriate review mechanism was identified and raised in the Investing in Water Services 2006-2014 consultation. That mechanism will ensure that the investment
programme is monitored and remains practical and relevant throughout the investment period. In early 2005, Ministers will specify the objectives they wish Scottish Water to address in the next regulatory period. These objectives will form the basis of an appropriate monitoring system. In addition, we plan to put in place appropriate mechanisms involving its regulators to identify and respond to unforeseen requirements. We expect the statement in 2005 will provide more detail on this issue.

*The Committee requests that the Minister provides the Committee with the research on cross-subsidies and a comprehensive analysis of the winners and losers in the proposed changes being considered by the Executive. (paragraph 131)*

The Executive has commissioned the economic consultants Stone and Webster to analyse whether there are significant cross-subsidies between the different customer groups served by Scottish Water. Stone and Webster’s report, which we expect to receive shortly, will help to inform the decisions on charging policy for the period 2006-10 that we will announce in our statement on the water industry in the New Year. We will publish the report when we make the statement.

*The Committee also requests further clarification on the eligibility for, and operation of, the charges exemption scheme for charitable organisations. (paragraph 132)*

The exemption scheme, which was established by the Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002, is administered by Scottish Water. It provides that organisations are eligible for a total exemption from charges if they:

- received relief on their water charges in March 1999;
- have a net annual income of less than £50,000;
- are not a retail outlet;
- do not have a permanent liquor licence; and
- are not part of a local authority.

These criteria were set to achieve our policy objective, which was to help organisations on modest incomes cope with relief on water charges being withdrawn. It is worth noting that the scheme is not exclusive to charities, but is open to any organisation that had been granted relief on its charges by the former regional council when they were responsible for providing water and sewerage services.

As the consultation *Paying for Water Services* outlined proposals for charging all un-metered non-domestic premises on a new and more equitable basis with effect from April 2010, and as all premises exempted under the scheme fall into this category, we announced in August that the scheme would be extended to 2010. We made it clear that from 1 April 2010 organisations and premises benefiting from the exemption will become liable to pay water and sewerage charges on whatever basis is established for charging un-metered premises generally. As the purpose of introducing these new charging arrangements for these is to ensure that they pay for water services in a manner that reflects more closely the cost of the services that they consume, we consider that it is fair to expect those currently benefiting from the exemption to pay on this basis. We expect to say more about how this fairer basis of charging will be developed during the period 2006-10 in the statement on Scottish Water’s objectives and the principles of charging that that will be made to the Parliament early in the new year.
Scottish Water reports that at present 6,148 organisations are in receipt of an exemption under the scheme. These include sports and youth clubs, community centres and church premises. This contrasts with a total of some 13,600 premises that were affected by the withdrawal of relief from these types of customer.

The total value of the exemption amounts to £3.4m in 2004-05, the cost of which is met by Scottish Water’s other customers. The value of the exemption to individual organisations varies, though for the most part is relatively modest, with the great majority of customers saving between £100 and £1,000 a year. The amounts saved by individual organisations can be summarised as follows:

<table>
<thead>
<tr>
<th>Range (£)</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 100</td>
<td>384</td>
</tr>
<tr>
<td>100 to 200</td>
<td>754</td>
</tr>
<tr>
<td>200 to 500</td>
<td>2538</td>
</tr>
<tr>
<td>500 to 1000</td>
<td>1832</td>
</tr>
<tr>
<td>1000 to 2000</td>
<td>562</td>
</tr>
<tr>
<td>2000 to 5000</td>
<td>71</td>
</tr>
<tr>
<td>5000 to 10000</td>
<td>5</td>
</tr>
</tbody>
</table>

In addition to the scheme, we established a water charges hardship fund that was administered on our behalf by the Scottish Community Foundation. The fund ran from 1 April 2002 to 31 March 2004. It had a budget of up to £500,000 for each year, with the purpose of providing discretionary assistance to any of the 7,450 organisations that had lost relief, were not eligible for the exemption scheme, and could demonstrate that they were suffering hardship as a consequence of withdrawal. In the event, however, only 63 organisations applied for help to the fund, of which 40 received assistance totalling £62,000. As the fund had been well publicised at the time of its creation, the relatively modest demands made upon it suggests to us that the exemption scheme has been successful in providing assistance to those most affected by withdrawal of relief.

The Committee raised the matter of organisations losing their entitlement to the exemption when they move premises. The exemption criteria provide that organisations that have moved premises after 31 March 1999, from which date no new reliefs were granted, are not eligible for an exemption. This reflects the fact that when relief was granted to organisations it was tied to particular premises and could not be transferred if an organisation moved premises. It would have been inconsistent with this practice to have enabled organisations receiving an exemption to transfer the exemption when they moved. In the circumstances, we consider that this restriction is reasonable and that it would be impractical to amend it now, or when regulations extending the scheme are brought forward in 2006. As the scheme is not exclusive to charities, the forthcoming charity reform legislation would not necessarily provide a means of assisting all those affected by the operation of the restriction.

The Committee remains concerned about the issue of accountability, given that Scottish Ministers will make regulations and investment disputes will in future revert to the proposed Water Industry Commission rather than to the political level. (paragraph 137)

The powers in section 3 for the Commission to determine disputes over reasonable cost are narrow and will only require the Commission to determine whether or not the regulations have been correctly applied in a certain case. Regulations, as the Committee says, will be made by Ministers. This is in line with the approach outlined in the Bill, whereby Ministers
set policy and the Commission is responsible for carrying out technical functions within this framework.

The Committee also requests further explanation from the Minister... on how the regulation-making power in section 3 of the Water Services etc. (Scotland) Bill will interact with the decisions on investment and charging. (paragraph 137)

The likely implications of the regulation-making power in section 3 of the Bill, on the basis of the charging principles Ministers will set in their statement in the New Year, will be factored into their investment objectives also announced at that time. But it will be for the Water Industry Commissioner to estimate the likely cost of these on this basis. Should this need to be revised once the regulations have been agreed, it can be addressed through any review process put in place for the programme.

The Committee remains concerned that there does not appear to be any current consideration of issues of efficient water resource use and measures for water conservation. (paragraph 142)

The Committee recommends that the Minister gives serious consideration to measures and incentives for efficient use of water resources. In particular, the Committee recommends that the Minister should commission research to investigate this issue and identify potential strategies. The Committee also considers that there is a strong argument for non-domestic customers to move towards metering as a long-term goal. (paragraph 143)

The Executive agrees that efficient water resource use and measures for water conservation are important, and is committed to ensuring that these are promoted through the Scottish water industry. However, it would not be appropriate to re-state this in the Bill. Scottish Water has a primary duty under section 1 of the Water Act 1980 to promote the conservation and effective use of water supplies throughout Scotland.

For example, Scottish Water currently undertake various initiatives relating to water conservation and sustainable use of resources, including advice to large water users on reducing water use, running efficiency workshops, and providing information for domestic customers about saving water in the home. Scottish Water is also currently carrying out a comprehensive evaluation of the impact and scale of leakage on the water network by area. This will quantify the impact of leakage on operation costs as well as benchmark performance against English and Welsh companies, allowing for targeted investment in those areas where leakage control is proven to achieve operational and capital efficiencies.

Wider aspects of water conservation will be addressed through implementation of the Water Framework Directive. The Water Environment and Water Services Act establishes River Basin Management Plans, which introduce a “source to sea” approach to the management of the water environment. The Act also provides for regulations ensuring that human impacts on the water environment, such as abstraction or diffuse pollution, are properly controlled.

The Executive acknowledges the Committee’s concerns about the need to provide incentives to use water efficiently and its view that there is a strong long-term argument for extending metering to all non-domestic customers. We are considering how best how to make progress on this matter and will address it in the statement on Scottish Water’s objectives and on the principles of charging early in the New Year.
The Committee recommends, however, that the Minister gives further consideration to how the work of the [Coal] Authority in addressing mine water pollution is reported. (paragraph 151)

The Executive has given further consideration to the means by which the work of the Coal Authority to address coal mine water pollution is reported. The Coal Authority itself produces an annual report detailing progress on its mine water programme and the funding for it that is provided by the DTI. SEPA has also included some information on this work in its current Annual Report. We will commend to SEPA that it continues to include such information in future reports. Its annual reports are presented to Parliament each year, which would meet the Committee's suggestion about the reporting of information on mine water pollution to the Parliament.

The Committee also requests the Minister to consider further whether additional powers are required to address water pollution from other types of mineral workings and landfill sites in Scotland. (paragraph 151)

The Executive is satisfied that additional powers are not required in this Bill to address water pollution from other types of mineral workings and landfill sites in Scotland. SEPA currently has powers under Part II of the Control of Pollution Act 1974 to deal generally with discharges of poisonous, noxious or polluting matter to controlled waters. In the near future these powers will be replaced by the wider provisions of the Water Environment and Water Services Act 2003.

More specifically, the Executive consulted earlier this year on extending the controlled waste regime to cover non-mineral wastes from mines and quarries. The Scottish Executive expects to lay Regulations in relation to this shortly. Tightening up the waste regime will lessen the potential for pollution of, amongst other things, the water environment. Landfills are regulated under The Landfill (Scotland) Regulations 2003, which use as a foundation the permitting requirements of Waste Management Licensing. (Landfills which do not fall within the scope of the 2003 Regulations fall to be regulated under general powers, including the Control of Pollution Act 1974 referred to above.)

The Committee shares the concerns of the Subordinate Legislation Committee, and recommends that the exercise of these powers [under 4(7) and 5(7)] should be subject to a degree of scrutiny beyond that provided by the usual affirmative procedure. (paragraph 155)

The Executive understands the Committees’ concerns over these powers being used inappropriately in a way other than that intended in the policy of the Bill, although we believe that it would not be possible to use secondary legislation to circumvent the clear purpose of primary legislation. However, in order to place this beyond doubt, we will bring forward amendments to narrow these powers, to make explicit that these powers could not be used in any way which would prejudice Scottish Water’s responsibility for the provision of water and sewerage services through the public networks.

The Committee requests that the Minister provides further detailed explanation on how he intends to use the powers set out in section 19. (paragraph 159)

The provision in section 19 is a piece of the framework largely set out in section 18 of the Bill. The powers set out in section 19 are related to the Bill’s approach of separating policy and technical functions, the former being the responsibility of Ministers and the latter the duty of the Commission. Given the clear separation required, we felt it necessary to
explicitly set down on the face of the Bill, Ministers’ powers to set a complete policy framework for Scottish Water, rather than simply relying on Ministers’ powers to direct Scottish Water under section 56 of the 2002 Act. Therefore section 19 states that directions under section 56 may in particular relate to the standard of services provided by Scottish Water, and the timescale within which these standards are to be achieve. This places with Ministers the policy responsibility for clearly setting the objectives for Scottish Water, in terms of both service standards and capital investment, and ensures the Commission must provide for this in its determination of charges.

Section 56B, also provided in section 19 of the Bill, allows Ministers to require Scottish Water to carry out additional functions in relation to the provision of water and sewerage services. The inclusion in section 56 of this power for Ministers is, as the Committee recognises, to ensure that every objective set by Ministers for the industry is included by the Commission in its determination of the income Scottish Water needs. This removes any doubt that it could be for the Commission to decide what exactly Scottish Water is to do, or risk that something required by Ministers would not be funded in the Commission’s determination. The section essentially provides Ministers’ clear policy control of the investment requirements for the industry.

The Committee endorses this recommendation [that affirmative procedure be required to alter the meaning of ‘dwelling’]. (paragraph 160)

We have given careful consideration to this recommendation from the Subordinate Legislation Committee. However, we continue to consider that it would be inappropriate to apply an affirmative procedure to this power when the original definition in the Local Government Finance Act 1992 requires negative procedure for amendment. This inconsistency could lead to unavoidable delays in reacting to changes to this original definition and we believe that this would be unacceptable.

The Committee is also unconvinced that negative procedure provides the appropriate level of Parliamentary scrutiny for the exercise of this power [to specify that normal licence procedures should not apply]. (paragraph 162)

The intention behind this power is to allow Ministers to provide for particular licensing arrangements for the retail entity created by the separation of Scottish Water under section 12 of the Bill. Since this retail entity will be the first and initially the only licensed provider in the retail market, it is appropriate that the licence application procedure can be modified in this case if necessary. However, given this narrow requirement, we have given careful consideration to whether the more general provision currently in the Bill is required, and have concluded that there is a more appropriate way to address this issue, and meet the concern raised by the Subordinate Legislation Committee. We will therefore bring forward amendments at stage 2 to narrow this provision.

The Committee recommends that the Executive’s further work on establishing the costs of the licensing regime should be concluded as a matter of urgency. If possible, this should be presented to the Parliament before it considers the Financial Resolution for the Bill. The Committee further recommends that an updated Financial Memorandum should be provided to the Parliament prior to Stage 3. (paragraphs 177 & 178)

The Executive understands the Committee’s concern regarding the different cost estimates that were presented to it. It is an issue that we take very seriously and, while it seems likely that there would be always be a range associated with the possible costs, we will continue to examine the issue with a view to narrowing this. As we announced during the Stage 1 debate, we are happy to agree to come back to the Committee with a supplementary
Financial Memorandum containing any further detail or refinement of these costs that is available in advance of Stage 3.

However, we stand by the estimates contained in the Bill’s Financial Memorandum: these are the best estimates of the costs that were available at that time and, while further information is being gathered as work continues to be done on this issue, there is as yet no indication that these estimates will alter significantly.
Present:
Sarah Boyack (Convener) Rob Gibson
Alex Johnstone Richard Lochhead
Maureen Macmillan Mr Alasdair Morrison
Nora Radcliffe Mr Mark Ruskell (Deputy Convener)

Apologies: Karen Gillon

Water Services etc. (Scotland) Bill: The Committee took evidence on changes to the Bill proposed by the Minister for Environment and Rural Development, from—

Panel 1
Trisha McAuley, Head of Corporate Resources, Scottish Consumer Council;

Panel 2
Professor Alan Alexander, Chair, Scottish Water;
Dr Jon Hargreaves, Chief Executive, Scottish Water;
Cheryl Black, Customer Service Director, Scottish Water; and

Panel 3
Alan Sutherland, Water Industry Commissioner for Scotland;
Ian Smith, Convener, Water Customer Consultation Panels;
Dr John Sawkins, Deputy Convener, South East Customer Consultation Panel.
Scottish Parliament
Environment and Rural Development Committee
Wednesday 24 November 2004

[THE CONVENER opened the meeting at 10:02]

Water Services etc (Scotland) Bill

The Convener (Sarah Boyack): Good morning. I welcome members, the public and the press to the meeting and remind colleagues and people in the gallery to switch off their mobile phones. I have received apologies only from Karen Gillon.

Agenda item 1 concerns the Water Services etc (Scotland) Bill. Members will remember that, during stage 1, the Minister for Environment and Rural Development said in a letter to us that he wanted to change the role of the water customer consultation panels. In particular, he suggested changes to the procedures for handling complaints about Scottish Water. The committee wanted to take supplementary evidence on that issue, as we did not take evidence on it from the minister at the time. Therefore, we will now hear additional oral evidence, so that we can clarify our thoughts before moving into detailed discussion at stage 2.

Three panels of witnesses are lined up this morning—I think that all the witnesses are here. On panel 1, I welcome Trisha McAuley, who is head of corporate resources at the Scottish Consumer Council. I thank her for her written evidence, which has been most helpful. All members have a copy of it and of the previous written submission, which has been recirculated.

I invite colleagues to kick off the questions.

Maureen Macmillan (Highlands and Islands) (Lab): I have read the latest submission, which rather darns the minister’s proposals with faint praise. On balance, would putting complaints to water customer consultation panels be a good move? Does the Scottish Consumer Council believe—as is possibly suggested—that other things could be done, and that complaints could be dealt with by Consumer Direct, for example?

Trisha McAuley (Scottish Consumer Council): We must start from the current position. For the reasons that we outlined in our evidence, which the committee has already put in its report and which I will not therefore go through again, we do not think that complaints should sit with the water industry commissioner’s office. We must not forget that it is for Scottish Water to deal with complaints in the first place, because the customers are its customers. The debate is about where complaints go if they are not resolved by Scottish Water. There is merit in the argument that in principle they should be handled by a consumer body.

You talk about damning the minister with faint praise. First, if one is going to have a complaints-handling function, one needs to get it right, and we have suggestions to make on that. Secondly, complaints are an important part of a consumer organisation’s work, but they are a small part. Research that we did for the panels and which MVA did for WaterVoice showed that respondents had little experience of any problems or complaints. They are quite happy with their water service—I am sure that Scottish Water would back that up—so they have given little thought to whom they should contact if they need help. If one focuses too much on complaints, one will not see the balance of the consumer experience.

Consumer Direct was referred to. Evidence shows that bodies such as energywatch and Postwatch are quite well resourced to deal with complaints at United Kingdom level and have offices in Scotland. However, they have become quite inward focused and the complaints function has dominated their agenda. A damning report by the National Audit Office stated that because they have been focused more on fixing problems after they have arisen than on examining the underlying causes of market failure, they have not been able to evaluate the consumer benefit from complaints in a systematic manner. They have not undertaken a comprehensive analysis of all the factors that influence consumer behaviour and they have failed to focus on the wider experiences of consumers. In particular, disadvantaged and hard-to-reach groups were mentioned, which might not be so vocal in making complaints.

We would not have a problem with the panels having that role, because it fits with what a consumer body would want to do, but at the moment there is nothing in the bill to suggest that the panels will have the teeth or the formal intervention powers that are required to have an effect for consumers. At the moment, the only body in Scotland that has those teeth is the Scottish public services ombudsman. I am not saying that it should do it but, unless we build into the bill powers for the panels, I doubt how effective they can be. They need those powers. To balance that, we need to consider ways of building in better powers for the other aspects of their work. That has been done with UK energy and postal services legislation, which I can elaborate on later.

Complaints will keep arising for various reasons. I do not expect Scottish Water’s customer service levels to drop, but the industry is changing and is becoming much more complex. Competition is coming in and we are building in increased
accountability. We expect Scottish Water to become more aware and I would want the panels to increase their consumer awareness. Consumers’ expectations will be raised and that will generate more complaints. That has happened in other areas and, in a way, it is not a bad thing. The issue is not whether you get lots of complaints, but whether they are resolved satisfactorily.

Maureen Macmillan: Thank you. I do not know whether anyone wants to follow up on those points.

The Convener: I am interested in the idea that there will be more complaints. I can see that having publicity and making people aware of the complaints process might tip them over to make the effort. You say that the industry is becoming more complex, with competition being brought in. However, for domestic customers, the situation should remain exactly the same, so why would there be more complaints from domestic customers?

Trisha McAuley: Panels will deal with complaints for the whole customer base. Domestic customers will become more aware, and I would expect complaints to rise through the increased accountability that we are building in with the commission and through increased awareness of the bodies that are providing services. With the advent of competition, things will continue to develop in that area, and there is a danger that the panels will have a big workload because of an increased number of complaints from the business sector.

The Convener: Would it be appropriate to give business sector complaints to the panels? Not everyone agrees with that.

Trisha McAuley: Whether the panels should also cover business customers is an issue that goes wider than complaints; it concerns the entire remit of the panels rather than just the complaints-handling function. I know that Ian Smith does not agree with me but, as an organisation that represents domestic consumers, we have always said that there are tensions for an organisation that needs to find policy solutions for both consumers and businesses. For example, the policy solutions for unwinding the existing cross-subsidy between the two sectors might be different for each group and it would be quite hard to bring those things together. That is part of a wider debate about the role of consumer organisations in general. If the customer panels are to have a remit that covers both domestic and business customers, I am not sure that it would help matters to split their remit for one particular function. The debate is wider than just complaints handling and is about all the panels’ functions.

Mr Mark Ruskell (Mid Scotland and Fife) (Green): Why are you not in favour of extending the remit of the customer panels to include the representation of non-domestic customers, given that that might create a level playing field for non-domestic and domestic customers?

Trisha McAuley: We do not agree. Our position is that businesses have more buying power and more resources to voice their feelings, whereas individual consumers are non-homogeneous. Domestic consumers are disparate, are often disadvantaged and are not grouped together in any way. That is why organisations such as ours have been set up. I take the point that some issues that small businesses face are similar to those of domestic consumers, but they might require different solutions.

Probably not all small businesses have a voice, but there are vociferous organisations such as the Federation of Small Businesses and the Forum of Private Business and, for bigger businesses, the Confederation of British Industry Scotland and the Scottish Chambers of Commerce. Given that those bigger organisations are well organised and well resourced, we need to be careful to ensure that the panels’ limited resources are not taken up in responding to them at the expense of those who are most in need in our society. As a consumer organisation, that is where we are coming from generally.

Mr Ruskell: That is true, but the panels will become much stronger and will be given more teeth, which is what you want to see develop. In that context, if an organisation that represents big business lobbies the Parliament, surely MSPs can turn around and say, “Sorry, but you need to work through the panels.” If the panels are the place where solutions are discussed and put forward for customers of all types, both domestic and non-domestic, might not there be an advantage in getting everyone together to work out solutions?

Trisha McAuley: No. In our experience, big business does not come to the Parliament but meets behind closed doors with civil servants. Businesses can put in much more resources and time. To take an example from another area, I have done a lot of work on the Communications Act 2003 and on media ownership in Scotland, which involves some big business interests. I go along to those meetings on my own, but Scottish Media Group has a team of 20 people. That is the level of resources that SMG can put in for behind-the-scenes lobbying, for example in the current review of public service broadcasting.

Maureen Macmillan: Will you clarify how you think complaints from non-domestic users should be addressed? It cannot all happen behind closed doors. There must be a process.
Trisha McAuley: I have not really given the issue any thought because our remit is to advocate solutions for domestic consumers.

Maureen Macmillan: Are you not bothered how non-domestic customers are dealt with as long as they are not covered by the customer panels?

Trisha McAuley: It is not that we are not bothered but that we have focused our attention on domestic consumers. However, businesses that decide to take on a different supplier from Scottish Water will have recourse to the water industry commission under their licence agreement.

The Convener: My only other question is on whether any powers need to be added to the powers of the water customer consultation panels. Is a requirement to consult the panels before a charging policy is issued the main additional power that the panels would need if they are to be given powers to deal with complaints?

Trisha McAuley: There are other issues, but that is one power that we want to see in the bill, and we are grateful that the committee has put that in its report. The minister has given a commitment to ensure that the panels have adequate resources to do the other parts of their work, so that complaints will not dominate their agenda. I have to say that I have heard that before, when the Water Industry (Scotland) Act 2002 was passed. With the best will in the world, different people saw that the panels needed different resources to get established and to get up and running. If you put other things in to underpin in statute what the panels can do, you are committing the Executive and ministers to resourcing those issues. I am probably not making myself very clear.

10:15

The Convener: Could you give us an example of the specific initial powers that you want?

Trisha McAuley: The panels could be given a statutory role in examining emerging issues, rather than just in dealing with complaints. For example, energywatch and Postwatch have statutory requirements to publish forward work programmes, which the Utilities Act 2000 stipulates must contain “a general description of the projects, other than those comprising routine activities in the exercise of its functions, which it plans to undertake during the year.”

They are required by statute to identify emerging issues, rather than just to react to complaints or to one aspect of the customer experience, and to develop an evidence-based strategy for how they plan to deal with issues in future. That challenges the market to adopt a proactive approach, rather than to consider just one area of customer experience.

One of the other areas covered in the Water Act 2003 is the identification of both existing and future consumers, so that WaterVoice will have a remit that covers not only customers but how the industry impacts on consumers as a whole, rather than just on customer service.

The Communications Act 2003 concerns the requirements on the Office of Communications, which is a regulator. The act “requires OFCOM to make arrangements to ascertain public opinion and the experiences of consumers” across the board. Ofcom also has a statutory requirement to carry out consumer research and to publish the results.

We would probably want the panels to have a remit to increase consumer awareness and to ensure that the panels are accessible, particularly to disadvantaged groups. The last thing that I want to do is to heap more work on the panels, but if we build in statutory balancing powers over and above their complaints function we then put the onus on ministers and on the Executive to resource that work. If those functions are in statute, they are not amenable to political change or to the next round of budgetary cutbacks; the panels will have powers that cannot be taken away from them and which must be resourced.

Rob Gibson (Highlands and Islands) (SNP): I take it that you are talking about sharing information about complaints trends and about the implications for service improvement, which you have highlighted as a starred item in your paper. That has to be spelled out quite clearly.

Trisha McAuley: Absolutely. In that respect, it does not really matter who deals with complaints, as long as someone is dealing with an individual consumer’s problem. However, I would expect the trends and issues that come to Scottish Water to be analysed and examined—I am sure that Scottish Water does that. Whoever handles complaints, the information needs to be shared among the customer group, the regulator and Scottish Water. Complaints are not the only aspect of implementing a policy, but they cannot be separated from policy, and it is certainly true that complaints data will generate policy issues.

I reiterate that complaints are really for Scottish Water to deal with. I think that the committee’s report mentions the fact that somebody—possibly the panels—could look at every single complaint that Scottish Water deals with. I do not think that that is practical, but I do think that there is a role for the panels in auditing Scottish Water’s complaints-handling process by conducting random sampling. That is done in other sectors,
and I know that the water industry commissioner for Scotland has had that role in the past. That seems to me to be one way of providing a safety net, and that is what the National Audit Office says is not happening at the moment with some of the other organisations. They are dealing with complaints and becoming so reactive that they are unable to demonstrate that they are having an impact on consumer benefits.

Richard Lochhead (North East Scotland) (SNP): I apologise for being a few minutes late. I guess that you are really the customers’ voice out of today’s witnesses. In their submission, the water customer consultation panels say that the set of changes that the minister has proposed “brings clarity to the process”,

but I am slightly concerned about that.

I agree with many of the changes that have been proposed, but Scotland is a wee country. We have our water industry, but it is now being proposed that the office of the convener of the water customer consultation panels has a distinct role, the panels themselves have a distinct role, the water industry commission for Scotland has a distinct role, ministers have a distinct role and Scottish Water has a distinctive role. If all the changes go ahead, there will be five key players in Scotland’s water industry. What will consumers make of that? Will customers of Scottish Water understand where to go if they have a complaint? It all seems quite complex.

Trisha McAuley: There are two issues there. First, there is the issue of signposting consumers to the right place and having a clear and simple system, and I will return to that. Secondly, on the water customer consultation panels’ evidence, there must be one avenue by which consumers can approach panels. Separating out practical complaints from policy complaints is an artificial distinction. Complaints can result in policy change.

The five panels have done a good job over the years, despite not having the resources that they should have had. They carry out an important local function, but I would like them to have central support so that complaints can be dealt with in a central office, on a one-stop-shop basis. Our research and the evidence of other organisations indicate that consumers need to find an easy, accessible place to go.

That said, consumers should go to Scottish Water first, and there is a responsibility on Scottish Water to ensure that consumers know that. There will also be responsibilities on the panels in the future. Those are key challenges. I hope that that answers your question.

Richard Lochhead: Do you think that there should be a snappy name for where consumers go with their complaints?

Trisha McAuley: Yes.

Richard Lochhead: If I understand this correctly, Scottish Water is saying that if people are not satisfied with what it is doing, it will refer them to the office of the convener of the water customer consultation panels. That does not really get the message out to the Scottish public. There could be a specific, snappily named body that people could approach with their complaints—perhaps Waterwatch or something like that.

Trisha McAuley: I would agree with that. Energywatch and Postwatch both have posh names—that is the sort of name that consumers go by. I made a submission to the Executive’s transport division a couple of years ago regarding representation and ferries. It went nowhere, but we asked for a consumer body to be called Ferrywatch. It is all about public awareness and accessibility. It is only a name, but people need a simple, one-stop place to go to, and it must be accessible to them.

The Convener: Presumably, that is why the organisation in England and Wales is called WaterVoice.

Trisha McAuley: Yes.

The Convener: Thank you very much for coming and for being prepared to be grilled in detail on your submissions. It has been very helpful to us.

We will suspend the meeting for a couple of minutes to let Trisha McAuley vacate the witness box and to allow the next set of witnesses to come forward.

10:23

Meeting suspended.

10:24

On resuming——

The Convener: I welcome the second panel of witnesses, who are from Scottish Water: Professor Alan Alexander, who is the chair; Dr Jon Hargreaves, who is the chief executive; and Cheryl Black, who is the customer service director. Our research and the evidence of other organisations indicate that consumers need to find an easy, accessible place to go.

That said, consumers should go to Scottish Water first, and there is a responsibility on Scottish Water to ensure that consumers know that. There will also be responsibilities on the panels in the future. Those are key challenges. I hope that that answers your question.
you able to deal with? What proportion relates to practical water policy matters?

**Professor Alan Alexander (Scottish Water):** I will start by giving an indication of the scale of the issue. Scottish Water receives about a million contacts per annum, of which only around 1 per cent eventually become what can be described as complaints. Only a tiny fraction of those complaints have to be referred beyond Scottish Water.

You are right to distinguish between direct service issues and policy issues. If the water customer consultation panels are to be one-stop shops, as we very much hope that they will be, they will act first as the postbox and then as the filter for the very few complaints that we cannot resolve. In other words, the panels will decide what kind of complaint they are dealing with. If it is a service complaint that Scottish Water has failed to resolve to the customer’s satisfaction, the panels will take one course of action, but if the complaint relates to a policy issue, the answer might have to come from the regulator or from ministers. It is important to set that context.

I have given you the numbers, but Cheryl Black will respond to your specific points about the split of complaints that we deal with.

**Cheryl Black (Scottish Water):** The proportion of complaints that relate to policy issues changes, depending on what is happening in the industry. For example, the analysis of complaints that the WIC’s office provided indicates that last year there was a dramatic rise in the number of complaints that related to charges. That happened around the time when the way in which business customers are charged changed significantly. Many complainants asked why standing charges were high, rather than about personal bills. There is a standard answer to most of those questions, because they simply raise a policy issue.

I will back up Alan Alexander’s point: it is important that there should be one place to which customers can direct their complaints. How issues are dealt with will vary, depending on the nature of the question, but the key point is that there will be a separate body that monitors whether the customer gets a response from the most appropriate source. People will be able to complain to one place, which will ensure that the problem is resolved.

**Alex Johnstone:** Would it be fair to say that Scottish Water resolves internally most complaints about operational or practical matters relating to the supply of water and sewerage services, but issues relating to policy matters are likely to pass out of your hands?

**Cheryl Black:** Yes. The vast majority of complaints relate to an issue that a customer has with their premises or their company’s bill. However, in the context of the hot topics of the moment, such as development constraints, a developer might ask why they cannot build a property on a particular site. That issue relates to capital funding for Scottish Water, which is not a matter that we can dictate, so the most effective solution would be to refer the complainant to the policy decisions that relate to our capital investment programme. We do not want to fob customers off by saying, “Sorry, guv. It’s not our fault and we can’t do anything about it.” We want to ensure that people understand who took the decision and why they took it. However, we receive a very small number of such complaints.

**Professor Alexander:** A large number of policy issues arrive on my desk or Jon Hargreaves’s desk. In cases in which we can simply explain the policy, of course we do so. There is a distinction to be made between asking, “Have we handled the matter right?” and asking, “Is the customer happy?” The answer to the first question might be yes, but the answer to the second might be no. At that stage the correspondence needs to be referred to a single body, which will decide what should happen next.

**Alex Johnstone:** What I am trying to get at is the nature of the material that eventually passes into the hands of those at the next level—the panels that we are talking about taking that role. Are we talking about issues to do with the practical application of services, or is the vast majority of what will be passed to them essentially to do with policy and policy application?

**Dr Jon Hargreaves (Scottish Water):** You are right. The complaints that end up going all the way to ministers. It is important to set that context.

I have given you the numbers, but Cheryl Black will respond to your specific points about the split of complaints that we deal with.

**Cheryl Black (Scottish Water):** The proportion of complaints that relate to policy issues changes, depending on what is happening in the industry. For example, the analysis of complaints that the WIC’s office provided indicates that last year there was a dramatic rise in the number of complaints that related to charges. That happened around the time when the way in which business customers are charged changed significantly. Many complainants asked why standing charges were high, rather than about personal bills. There is a standard answer to most of those questions, because they simply raise a policy issue.

I will back up Alan Alexander’s point: it is important that there should be one place to which customers can direct their complaints. How issues are dealt with will vary, depending on the nature of the question, but the key point is that there will be a separate body that monitors whether the customer gets a response from the most appropriate source. People will be able to complain to one place, which will ensure that the problem is resolved.

**Alex Johnstone:** Would it be fair to say that Scottish Water resolves internally most complaints about operational or practical matters relating to the supply of water and sewerage services, but issues relating to policy matters are likely to pass out of your hands?

**Cheryl Black:** Yes. The vast majority of complaints relate to an issue that a customer has with their premises or their company’s bill. However, in the context of the hot topics of the moment, such as development constraints, a developer might ask why they cannot build a property on a particular site. That issue relates to capital funding for Scottish Water, which is not a matter that we can dictate, so the most effective solution would be to refer the complainant to the policy decisions that relate to our capital investment programme. We do not want to fob customers off by saying, “Sorry, guv. It’s not our fault and we can’t do anything about it.” We want to ensure that people understand who took the decision and why they took it. However, we receive a very small number of such complaints.

**Professor Alexander:** A large number of policy issues arrive on my desk or Jon Hargreaves’s desk. In cases in which we can simply explain the policy, of course we do so. There is a distinction to be made between asking, “Have we handled the matter right?” and asking, “Is the customer happy?” The answer to the first question might be yes, but the answer to the second might be no. At that stage the correspondence needs to be referred to a single body, which will decide what should happen next.

**Alex Johnstone:** What I am trying to get at is the nature of the material that eventually passes into the hands of those at the next level—the panels that we are talking about taking that role. Are we talking about issues to do with the practical application of services, or is the vast majority of what will be passed to them essentially to do with policy and policy application?

10:30

**Cheryl Black:** The vast majority of complaints that come into the water customer consultation panels’ offices under the proposed scheme would be directed straight back to Scottish Water and we would resolve them. If it is a matter on which, as Alan Alexander described, we felt that it would help the customer to give them further information about policy, strategy or whatever, the customer panels could direct the complaint on to the commissioner’s office or wherever else is appropriate. They would ensure that the response got to the customer.

**Alex Johnstone:** The type of problem that remains unresolved and must be dealt with ultimately by the process that we are talking about will be very different from the typical problem that is reported.

**Dr Jon Hargreaves (Scottish Water):** You are right. The complaints that end up going all the way and require an investigation—currently by the WIC’s office—tend to be about issues such as investment, when somebody does not like the fact
that we are going to build a sewage works somewhere and they want it to be built in Carlisle or somewhere else. We increasingly go and visit customers when we see that a tricky issue is likely to arise. That often defuses the situation as we are able to explain the position much better in person than we can on paper. That is not reflected in the statistics, but we are undertaking more and more such visits.

Occasionally, a customer or a group of customers—even a community—will write to us and we will give fulsome responses, but they will not like the answer. There may be several community meetings and they still might not like the answer. What tends to happen then is that they get the support of MSPs, who will also write to us and we will respond accordingly.

Alex Johnstone: Guilty.

Dr Hargreaves: In a few cases—it is a handful of cases—the matter currently ends up at the WIC’s office and in future such matters will end up at a WCCP. What the investigation calls for in effect is our file—we are asked what evidence we have given and what options we have considered. A decision, backed up by that evidence, will be made for or against us. It is inevitable that most of the cases go back to a policy decision in the past. For example, in the case of a treatment plant, it may be the case that the regulatory regime that we operate under was fixed some years ago. The fact may be that we do not have the money to build a tertiary treatment plant and everybody, including the Scottish Environment Protection Agency, is telling us that primary basic treatment will do the trick. That is about providing value for money for customers. Those are the intractable issues.

Where we make an unholy mess, by and large we get in and sort the problem out. That is not to say that we always get 100 per cent resolution of those issues. A classic example of that might be a claim for flooding, where damage has been done to property. We may have gone through a proper process that was agreed by everybody and settled what we believe is a reasonable amount of money, but the customer does not think that it is enough so they continue to go for more. It is totally understandable that they will use any avenue that they can to achieve that.

Such cases are absolutely in the minority. The WCCPs and the WIC act as a frustration relief for some customers. The customers have heard what Scottish Water said and they do not like it, do not believe it or do not want to hear it, so they need to go to somebody else—perhaps to hear the same message. Often the message is the same, particularly when it relates to policy issues—some of which will go back as far as two or three years.

They might not be policy issues that have arisen in, say, the past two weeks.

Alex Johnstone: If there are issues that you cannot resolve, is it fair to say that resolution will often be difficult or impossible?

Professor Alexander: There is a distinction between whether a person is unhappy with the process or unhappy with the outcome. From our point of view, if we are clear that we have done everything that we can to resolve the issue and have explained why we cannot satisfy the customer, the customer’s concern is not about the process but about the outcome. Any organisation that deals with complaints finds that there comes a point when what the customer is unhappy about is not what the organisation has done but what it was not possible to do.

The Convener: Or whether you have dealt with a complaint in such a way that they feel that the issues have been addressed effectively.

Professor Alexander: Absolutely.

The Convener: I want to ask you a couple of questions that I asked a previous witness. First, for the domestic customer, should the process be complex, given that nothing is really changing?

Professor Alexander: I do not think that it should be complex, for the reasons that I gave earlier. We need to give the consumer a direct single route for action when we do not resolve their complaints. I have sympathy with the view that Richard Lochhead expressed about the number of bodies that apparently exist. The way to deal with that is to say to customers, “If you are not satisfied with the primary service provider, this is where you go and after that the handling is the panel’s responsibility.” The panel then has to decide what complaint it is dealing with and act as the primary filter. If it is dealing with a service complaint that Scottish Water ought to have resolved, but has not, it will come back to us, ask for the file, consider it and see whether it can improve matters. If it is dealing with something relating to policy or the tariff structure, the complaint will go elsewhere. The process has to be seamless as far as the customer is concerned. The customer has to say, “That is the box that says ‘complaints about water’ and that is where we put it. Someone decides the routing after that.” The process can be simplified in that way.

The Convener: Do you agree with the minister’s proposal that all complaints from the domestic and non-domestic sectors would go automatically to the water customer consultation panels should you not resolve them?

Professor Alexander: Absolutely. From our point of view, there has to be a one-stop shop for all customers. I listened to what Trisha McAuley
said earlier. There is a distinction to be drawn between the big customers, such as BP and Caledonian Paper, which have the kind of representative bodies and the muscle that she described and—given how competition is being introduced—a large number of our non-domestic 160,000 customers, who have much more in common with you and me as domestic consumers. The starting point has to be that if there is a complaints procedure, we do not discriminate between our customers; they choose whether they use the procedure.

The Convener: Do the panels have the powers to address those issues? Your submission states that under the current system

"WICS may well suggest a course of action to Scottish Water in order to help resolve an issue. However, the crucial point is that this is always done before responding to the customer".

That is obviously about ensuring that there are clear lines of communication in dealing with a complaint. The phrase “WICS may well suggest” implies that the water industry commissioner can say, “Here’s what I think should happen,” not “Here’s what you must do.” Have I picked that up right? Under the Executive’s proposals, will the panels have enough power to resolve complaints?

Cheryl Black: The fact that the panels are being given the authority to handle complaints from customers almost implies that power. From our point of view the objective is to end up with a satisfied customer, so Scottish Water is not going to ignore a recommendation from the panels or the commissioner; if it did so, all that would happen is that the customer would continue to complain. Enshrined in the proposals is sufficient authority for the panels to come back and discuss further solutions for the customer. Nothing more is particularly required. I cannot think of any complaints for which the commissioner's office had to issue any formal instruction for us to change our position. We all share the objective of satisfying the customer as far as is humanly possible.

Dr Hargreaves: What makes us different from England and Wales is that we are talking about public money. Where complaints get really protracted is where compensation is involved. If we give WCCPs the ultimate power to instruct Scottish Water to do something, which inevitably costs money, we have to take into account the fact that we are spending public money, not shareholders' money or dividend money that is being diverted for service. We see an increasing tendency—as we do throughout society—for people to claim for wrongs that have been done. I am not saying that that is wrong, but we are seeing more and more of it.

A balance has to be struck between the power to instruct a problem to be resolved and the cost of resolving it. We also have to consider the knock-on effect in some cases. If WCCPs are given that power, there must be some counterbalance in relation to the costs, because we are spending public money. A resolution might look effective for a particular incident, but if that became the policy, we could easily get into a position where we spent millions of pounds a year on compensation—flooding is a good example of that. We usually take the insurance route which, by and large, works pretty satisfactorily. Insurance companies are getting more wary of flooding incidents and that will become a bigger issue down the line.

We have to keep that balance in mind. First, if we are instructed to do certain things, it has to be within our powers to do them, and secondly, we have to have the wherewithal to do them. We cannot just nip off to our shareholders and say, “We’ve made a mess of this, can we have some money?” The costs come out of funding that would be used for other things.

The Convener: I presume that an individual complaint of the kind that you describe could be precisely the kind of issue that might kick across to become a general policy issue. The customer panels would want to address that sort of issue. That takes us back to the previous point about how you identify upcoming issues and problems that consumers generally have as opposed to one-off individual issues.

Dr Hargreaves: Yes. It is right that the minister is directing the WCCPs to make that forward-looking issue one for ministers because that is where it should sit. It is not a responsibility for Scottish Water.

Cheryl Black: It is worth adding something about the way in which Scottish Water operates with the customer panels at the moment, despite the fact that they do not yet have any responsibility for dealing with complaints. We share the trend data about complaints with them on a regular basis and we discuss jointly the upcoming issues for customers. We are already operating in that way.

Mr Ruskell: Further to that, one of the concerns that the panels brought up was that there might not be adequate resourcing to look at policy research issues in particular. If the panels are given a strengthened role in scrutinising policy objectives and looking at complaints that have a policy angle, do you foresee implications for Scottish Water in that there might be a mismatch of resourcing and expertise between you and the panels, which might be under-resourced?

Professor Alexander: The answer must be that, whatever happens about the handling of
complaints, Scottish Water must continue to provide the first line of resolution. Therefore, nothing should change from our point of view. If there is then a need for policy considerations to be addressed as a result of the pattern of complaints, it is proposed that that will be a matter for the panels. Common sense suggests that they would have to be resourced to do that if that is what is expected of them.

Cheryl Black: It can only help us and customers if the panels carry out that work. Far from giving us additional work, it is more the case that it will be easier for us to discuss matters with them. They will have the resource and the information to debate some of the issues that we are raising with them at the moment. Their work will be quite complementary.

Dr Hargreaves: It should be made clear to customers where the money to fund this is coming from. We should be transparent because customers will be paying for the panels. Unless someone has an idea to fund them through general taxation, I understand that they will be paid for, as the water industry commissioner's office is, by Scottish Water and therefore by customers. There is an issue of accountability and customers need transparency because this is their body and they are paying for it.

Richard Lochhead: How easy is it for customers to complain, and to what extent do they know where to go to make a complaint? Given that the water bill is also the council tax bill, I assume that a number of people must complain to the local authorities. To what extent do local councils refer complaints to you or do people who want to complain get lost in the ether?

10:45

Cheryl Black: The mark of a successful customer-focused business is that it is easy to complain to. That is something that we are striving for. At the moment, the situation for customers is confused. That said, people can always contact us at Scottish Water. The customer consultation panels are visible in communities, yet, if customers speak to the panels about complaints, they are directed to the water industry commissioner.

Much of the confusion arises because, in the past, the water service was almost invisible to our customers. It is only in the past few years that the service has started to have any sort of profile. Nowadays, our customers are telling us that they expect us to communicate with them in the same way as they are communicated with by companies such as Scottish Gas or Scottish Power. That is not an approach that would have been taken in the days of the old water authorities.

We need to do a lot to ensure that our customers are clear about our responsibilities and about how they can contact us. We get complaints via the local authorities, although they are fewer in number than the committee might expect. That does not mean that we should not make it easy for people to reach us through that route. Our job is to communicate much more effectively the routes, what customers can expect of us and what the next step is if they need to escalate their complaint.

At the moment, the situation is not clear, but it can be made clearer. Obviously, there is a cost on us if we are to communicate with 2 million households. We have to trade spending on that with spending on other things. I accept that customers are confused at the moment, but it would not be difficult to clear up the confusion.

Dr Hargreaves: The suggestion that Richard Lochhead made earlier about having a snappy name is a useful one. In England and Wales, the complaints body had a long convoluted, technical-sounding name—I am sorry, but I cannot remember what it was. Giving the body the name “WaterVoice” helped people to focus on its activities and made it is clear what it does. In the recent debates in England and Wales about pricing, WaterVoice has been effective in getting its voice heard on issues such as affordability. It is taken seriously by politicians and the media, and customers—particularly domestic customers—know that there is a voice out there for them.

We should learn from some of the lessons down south, particularly from success stories such as WaterVoice. I do not think that the name change that is proposed for WaterVoice is taking it in the right direction, although that is its decision to make. Richard Lochhead made a good point: there is no point in having all the processes if people do not know how to use them. That is not what we are about.

Professor Alexander: It is worth pointing out that we get one crack at directly addressing our customers. That is when the bill goes out and we can put one piece of paper into the envelope along with the bill. We try very hard to give people as much information as we can about the content of the bill. We set out what the water element is of the bill that they are being asked to pay, how the bill is constructed in terms of what we spend and what someone can do if they need to contact us. We try to maximise the amount of clear information that we give out.

Jon Hargreaves is right. There is no question but that if there were a body with a snappy name and we could say, “This is where you go with your complaint,” that would be helpful.
The Convener: I want to pick up on Jon Hargreaves’s comment about the proposed change to WaterVoice’s name. Can you clarify what is going to happen? Was your reference to the consumer group that was mentioned by the first panel?

Dr Hargreaves: Yes. WaterVoice is changing its name to one that makes it sound like it has a consumer council activity. It would appear to be distancing itself even further from Office of Water Services, which is the water industry commissioner equivalent down south. Perhaps Alan Sutherland can give the committee a better answer. To be honest, I cannot remember the details.

WaterVoice was born out of the way in which the WCCPs started off as Ofwat’s eyes and ears for customers. There were 10 chairs and 10 panels around England and Wales and they dealt with some of the issues around complaints. The WCCPs evolved into WaterVoice, which had more independence from Ofwat. I think that everybody would agree that the transition from one to the other has been beneficial.

To take the debate a stage further, the idea behind calling something “WaterVoice” is a good one, as it is pretty clear what it is. If WaterVoice becomes a consumer panel or a consumer something or another, its role will not be as clear. WaterVoice’s powers may be strengthened in terms of making determinations on behalf of customers, but there is a need to have a clear focus.

We have to accept that a large number of our customers continue to think that they get their water from the council—and not even a council that has existed since the last reorganisation. The fact is that customers contact us only rarely at the moment. They have cause to complain to us, or even contact us, once every nine years—I think that that is the figure. Most of the contacts come from people who are moving house or because of a change in their circumstances.

We are not like a normal retail business whose customers would be constantly in contact with it. The fact that people have cause to contact us only rarely is a sign of success; we do not want to have people ringing us up every day.

Nora Radcliffe (Gordon) (LD): I want to get some sort of feel about the current way in which complaints come in and are dealt with. You said that you have 1 million contacts and that most of the complaints that are resolved are operational ones. The WIC’s office will redirect stuff to you about operational matters and a tiny amount of contacts—which, by and large, will be operational in nature—are redirected to you by the local authorities. How is all that contact logged, accounted for, audited and passed on? Who is it passed on to? Are there formal mechanisms for doing that?

Cheryl Black: Contacts that arrive at Scottish Water by telephone, e-mail or letter are logged on our customer management system. The vast majority of issues are resolved through the normal process and the customers are satisfied. For the small percentage of contacts—1 per cent or whatever—that turn into complaints, either a customer writes directly to say that they are unhappy about something or, in the course of the phone call, a resolution cannot be achieved. There is then an escalation process; we have a customer relations team whose role is to handle and record the next stage of those cases.

For a complaint that has come to us via the WIC’s office or when someone has written, as they often do, and the case has escalated to the next level, we appoint a case officer. As Jon Hargreaves described, we have a team of people who visit the customer and seek a resolution. All the steps in that process are recorded in our systems. The number of contacts and complaints is reported to the commissioner’s office as part of our quarterly and annual reporting. The volume of contacts is recorded, as is the nature of complaints according to a set of descriptions that are set by the WIC’s office. That is all fed through to him.

In the past, there have been quality auditing processes whereby somebody from the WIC’s office would come and listen to calls, for example, or take away a sample of letters to ensure that there was external monitoring not just of the quantity but of the quality of the resolutions. That was a fairly comprehensive process.

Some complaints get to the point at which we simply cannot find a resolution. In many cases, one of us will speak to the customer, who may have involved their elected representative—either their MSP or their local councillor—on matters of policy decision. We know that, sometimes, the customer is unhappy with the answer. However, we can demonstrate that we have gone through a lengthy process to ensure that the customer feels that we have dealt with their complaint in the most effective way.

I am not saying that there are not times when we get the handling of complaints wrong; we still do, and that is something for all of us in the business to focus on. However, by and large, complaints are handled with empathy.

Dr Hargreaves: Believe it or not, we get a number of thank-you letters. Perhaps we should have brought some.
Cheryl Black: We get more thank-you letters in this industry than in any other industry that I have worked in before.

Rob Gibson: It is relief.

The Convener: If it is so awful, it must be nice when it stops.

Nora Radcliffe: I have another question on the idea that domestic and non-domestic complaints should all be referred to one source. There was some debate about whether that would level the playing field. To me, it seems that doing that would take out the unfair advantage of extra resourcing that some players have. Would you see it as levelling the playing field if domestic and non-domestic complaints were directed in one way?

Professor Alexander: At the risk of repeating myself, I would say that, from our point of view, they are all our customers and, if they have a problem, we should try to resolve it. After that, it is important to keep the process as simple as possible for the customer, whoever the customer is. The process involves a combination of the customer’s response and what the postbox—which, under the present proposal, would be the WCCPs—decides to do with it. That keeps it as simple as it needs to be for customers without depriving individual customers of other routes if they wish to take them.

Dr Hargreaves: The main difference between business and domestic customers is the billing. We bill businesses ourselves and bill domestic customers through councils. Through the process of harmonisation, there has been quite a lot of concern in that area. If those issues are stripped out—they have died down significantly in the past six to 12 months—the sort of complaints that we get from domestic and non-domestic customers are about the same things. We might, for instance, get a complaint about flooding in a street from the owner of a corner shop and from householders in the same street. We might, similarly, get a complaint about odours from a sewage works from householders in the same street.

It is not that business customers want special favours; the lobbying that goes on behind the scenes happens when there is a big event. For example, at the moment, the Scottish Executive is considering restructuring the tariff baskets for business customers. Business customers will always use as many avenues as they can. If they know that the one that really counts is the WCCP, or whatever we are going to call it, they will use it, although they will still use other methods of getting an answer.

Nevertheless, 99 per cent of the complaints that we get from business customers are pretty similar to the ones that we get from domestic customers. If we tried to separate them, we would end up causing unnecessary frustration to our business customers. As was suggested earlier, our business customers are capable of looking after themselves. We do a lot of work with the chambers of commerce, the FSB and other organisations, which provide us with a ready access to the voice of those customers. We do not have such access to the voice of domestic customers, so domestic customers need to take slight priority. However, separating complaints from domestic and non-domestic customers would—to return to Richard Lochhead’s point—lead to a lot of confusion. Business customers are also domestic customers and it is not always easy for people to remember which one they are when they go home at night.

Maureen Macmillan: Let us return to the process and the points that were raised by Richard Lochhead and others. When you talk about people contacting Scottish Water to make complaints, are you talking about Scottish Water’s head office or about the local office as well? People often pick up the phone and call their local office. If they do that and are not satisfied, are they told what they can do next?

Cheryl Black: If one of our customers speaks to anybody at Scottish Water—whether it be at our headquarters or elsewhere—the member of staff should own that problem and create the link back to the customer service department to ensure that we record it as a case and follow it up with the customer, rather than ask the customer to go and find their way into the organisation. By and large, contact is made via our main helpdesk or through letters to our head office. We now have very few local offices that are equipped to handle those contacts. We would either direct the customer or own the case ourselves.

Maureen Macmillan: I suggest that we should not call the new contact “Watergate”.

Professor Alexander: I counsel against calling it “Waterpan”.

The Convener: Let us move swiftly on. I thank our three witnesses for answering our questions this morning. That has been very helpful. We will take a couple of minutes’ break before we welcome our third panel.

10:58

Meeting suspended.

11:00

On resuming—

The Convener: I welcome our third panel of witnesses, who are Alan Sutherland, the water
industry commissioner for Scotland; Ian Smith, the convener of the water customer consultation panels; and Dr John Sawkins, the deputy convener of the south east water customer consultation panel. I thank them for their written submissions, which members have read.

Nora Radcliffe: People are concerned that if the complaints function is handed over to the customer panels, there will be blurring with their present work. My understanding is that there will be a discrete office to handle complaints, under the chairmanship of the person who also happens to be convener of the customer panels. I do not see a danger of blurring, but I am interested in the witnesses’ views on that.

Ian Smith (Water Customer Consultation Panels): I say up front that we welcome unequivocally the minister’s proposals. Panel members would not welcome having to deal with complaints, individually or collectively—doorbells would ring on Saturday nights, which would not be terribly convenient. It is important that there be a clear one-stop shop for complaints, so the best way to do that within the Scottish structure is to create a central office to which complaints can be referred. That office can operate as the mechanism for pushing complaints to Scottish Water or for putting complaints about policy issues alongside the ingathering of information, which the panels do anyway.

Dr John Sawkins (South East Water Customer Consultation Panel): I endorse that. It is essential for consumers that there be a one-stop shop. To pick up on what Alan Alexander said, the office will act as a filter.

Richard Lochhead: Alan Sutherland is obviously keen to keep putting the boot in to Scottish Water and to make what are—to some people, including me—unfair comparisons with the water authorities south of the border. I ask him to describe any comparisons between authorities that he has done in respect of handling and definition of complaints and the various processes.

Dr Sawkins: Richard Lochhead mentioned five key players in the water industry in Scotland, which I suggest is a complex system for a small country, and there is a debate about whether the proposed changes should go ahead. Are there too many players or, to get round that complexity, do we simply have to ensure that, in the public eye, there is a one-stop shop to which people can go with a complaints?

Finally, what should we call you if these changes go ahead, given that your current acronym is COWP, which I suspect you do not want to be called?

Ian Smith: I do not know how appropriate COWP might be.

There is a perception among various customers that the system is complicated. However, under the proposals, it would not be as complicated as it is at the moment. One of the frustrations that panel members have suffered over the 18 or 20 months of the panels’ existence is that they have had to refer matters to the water industry commissioner or to Scottish Water and the impression has been given to domestic and business customers that we are not much more than a letterbox. The proposals are welcome, in that they would ensure greater clarity and provide a better comparison with England and Wales.

The brand name has troubled me a great deal. “Water watch” would be nice, but someone got there before us—I think that that is the name of an environmental group that examines water quality issues. “Water voice in Scotland” has potential sensitivities connected to it. However, we agree that the water customer consultation panel is a bit of a mouthful and does not sell the idea of what we are about.

If there is to be an effective one-stop shop for complaints, we will need a tag that gives clarity about how people would complain. We must develop something like that; any good ideas would be welcome.

Dr Sawkins: Richard Lochhead mentioned five key players, but I think that there are a good deal more than that. It is important that customers are clear about where they go if there is a complaint or if something cannot be resolved by Scottish Water in the first instance. They do not need to know about the functioning of the drinking water inspectorate, the Scottish Environment Protection Agency and all the rest of it. If I turn on my tap and
discover a problem, I will go to Scottish Water in the first instance. However, where would I go if the problem was not resolved at that stage? There must be a clear answer to that question.

The helpful thing about the Water Services etc (Scotland) Bill is that it encourages a move to a situation in which everyone’s role will be clear. In the past, people have not been clear about their roles and have had to work out what they were doing in an ad hoc way. However, the bill will make it clear who does what and where they do it. From the consumer’s point of view, there must be a one-stop shop for all customers of Scottish Water.

On the name, given that I toyed with calling Alan Sutherland’s office “OfScotwat”, I think that I should not make any bright suggestions about the name of the consumer panel.

Ian Smith: To underline what John Sawkins said, I will quote from the foreword to WaterVoice’s programme for this year, which was written by its chairman, Maurice Terry. He captures in a few words what we would want the panel’s role to be. He talks about

“a credible and effective one-stop shop for customers, with strong powers to obtain and publish information and to resolve complaints.”

We see that public information dimension as being absolutely crucial.

Rob Gibson: On the WIC, you say that a recently agreed consultation code has been drawn up between WCCP and Scottish Water but that you had no role in that process. Given that you have a responsibility for dealing with customer complaints, do you think that you should have been more proactive?

Alan Sutherland: That code was something that ministers asked the panels to draw up; we were not given a role in the process. When we sought clarification of the situation, we were told that because it is unclear who should deal with any complaints about consultation, we should be working on something in this regard but that the Water Services etc (Scotland) Bill would clarify the situation.

Rob Gibson: That is interesting. In that case, I would like the other witnesses to say whether they think that the consultation code should be produced in a firm form that people can understand and, perhaps, be written into the bill.

Ian Smith: The current consultation code is statutory under the Water Industry (Scotland) Act 2002. It has been brought about through Scottish Water’s initiative but we have the responsibility of working with Scottish Water on approval of the code.

We are taking a sensible step together and using real collaboration to pilot the code. Between now and March, we are working with Scottish Water at different activity levels, to understand how the consultation process has developed. We are looking at pretty low capital investment levels but big schemes. We are considering the impact of different aspects of consultation on Scottish Water’s customers. We will trial the code, after which we will see how effective it has been in practice.

I add the rider that many of the arrangements between the five players in the water industry can be dealt with effectively in the future by clearer memoranda of understanding and other methods. The new arrangements provide scope to have behind the defined roles defined arrangements for consultation and internal discussion.

Rob Gibson: Is Dr Sawkins happy with that?

Dr Sawkins: Yes.

Mr Ruskell: My question is to the WCCPs—or Cowpwatch or whatever the organisation will be called in the future. Through the bill, ministers will give panels a more central role in examining policy objectives when they are being drafted. Will you be concerned primarily with social justice policy objectives, the economy or the environment?

Ian Smith: We have tried to give appropriate and almost equal weight to all the policy dimensions. We have probably taken a stronger role on environmental issues than was expected. We spent much time on considering social justice dimensions in relation to the inclusion agenda. Much of the work that we undertook early doors has awoken a United Kingdom debate about the affordability of water charges. We seem to have influenced WaterVoice to examine affordability across the piece.

We have undertaken much work on charging principles for the business community. The simple answer is that we need to be vigilant enough to consider the different impacts of water policy on customer groups and to have sufficient resilience not to advance one customer group’s view to the exclusion of others. We must represent all customers.

Mr Ruskell: The economic concerns will be reflected in more depth when you work with non-domestic customers.

The factors that I mentioned are the three aspects of sustainable development. The minister sets policy objectives that relate to that and Scottish Water has the function of delivery. We will have to see what happens, but the WIC could have regard to the matter. How will you implement the sustainable development function? You described how you have worked on those themes
in the past year or so. Would it be useful for the same policy framework to apply to your work?

**Ian Smith:** We assume that we have that policy framework. It is fair to say that the panels have not tired of reminding Scottish Water of its sustainability obligations. One of our panel members is active in Scottish Water's sustainability group and he reports to all the panels. We have tried to take as broad a view of sustainability as we can and to ensure that it influences everything that we consider. I do not think that much more needs to be done to focus our role on sustainability in the three aspects that you described.

**Mr Ruskell:** You would prefer the system to remain voluntary—you do not want anything to be put in the bill.

**Ian Smith:** Changing the law would add nothing to the present position. We have a sound basis for what we do. In that, we reflect several key interests among Scottish Water customers and the wider community.

**The Convener:** I have a couple of questions about who takes up complaints. I have concluded that sending everyone to the same person to complain would provide clarity. That is straightforward. However, we have the possibility of retail competition for non-domestic customers. Should complaints in that market take the same route? Could it be argued that they need a slightly different route? I am hoping for an answer from Alan Sutherland or Ian Smith—or Dr Sawkins, if you have all thought about this. The issue of switching suppliers was raised, and whether a complaints system should kick in at the point at which there is a licensing regime.

11:15

**Ian Smith:** To give the others time to think about the best answer, I shall give a glib answer, which is that there are two things to consider. There are complaints about the customer service aspect of what you described, and there are complaints about the policy aspects. I think that we can take those through the same route. However, there are also complaints about licensing arrangements, which are probably more appropriate for the commission. I do not know whether that opens up a can of worms for the other witnesses.

**Dr Sawkins:** I do not like thinking on my feet on this issue. Presumably, trying to explore the issue of complaints about the way in which the licensing regime is run and the licences are given out and so on—

**The Convener:** It was suggested at the first stage of evidence that the proposed system would not be sufficiently robust, and that if somebody did have a complaint about the licensing process and the allocation of licences, there was not a clear route for them to complain. I am trying to pick that up, because it is a complaint. I would like to be clear about whether we have got that right in the bill, before we debate the detail of the bill.

**Ian Smith:** I think that the grey matter has worked a bit better. There is something in the minister's proposals that is very powerful and that we have not discussed at all this morning. One of his proposals is that I will be under an obligation to come back to Parliament every year with a report that will analyse how the five different complications work. The way in which the licensing regime works could be a heading in that report. There would be joint preparation of such a report with the commission.

**Dr Sawkins:** As a point of principle, the new commission must be very clear about what its job is and is not. There is a temptation to draw any office of this sort into the day-to-day micromanagement of the body for which it is supposed to be the economic regulator. If some sort of pseudo-complaint role were given to it, it might be tempted to be drawn into micromanagement, and we would take our eye off the ball again. Perhaps—again, I do not like making such things up on the hoof—the first point of complaint should be the commission for the licensing regime. Stage 2 of the process would have to involve some other body.

**Alan Sutherland:** Are we talking about a complaint about how a license is issued or administered, or are we talking about a customer's experience as a customer of that licensed new entrant to the market?

**The Convener:** I was thinking of both situations. I was thinking about my experiences in the energy market as a consumer, but not from the non-domestic point of view. I am just trying to work out where each kind of complaint would go.

**Alan Sutherland:** The second example should be fairly straightforward. I cannot see any reason why a business customer who chooses to switch their supplier should have less right than a private customer to complain or to make representations about the level of service that they are getting. If that person has complained to their supplier and is still not happy, they should be able to go to someone else. I suggest that the panels—or whatever they will be called in the future—would be appropriate. I do not think that that is a particular problem.

On the process of issuing licences, I think that I explained to the committee previously that we are planning a four-stage consultation process between now and the issue of the first licence to the first new entrant, and two stages of
consultation before a licence is issued to the retail business of Scottish Water in April 2006. That will cover the process by which applications on licensing will be made. It will also have to take full account of ministerial guidance under the proposed legislation that will set out for the commission the process of issuing a licence and the criteria that we will have to bear in mind.

Clearly, the experience in the independent energy sector ought to teach us some lessons, particularly about ensuring that the entities that come into the market are properly resourced to provide a reliable service to the customer and to avoid the kind of debacle that marred the early days of electricity supply competition.

The Convener: I simply wanted you to put that on the record. Unless we delve into the matter, it will not be 100 per cent clear.

Our first witness this morning made a strong point about resources. The water industry commissioner’s paper makes it absolutely clear that the cost for handling complaints will be about £75,000, or 5 per cent of the office’s total budget. I am trying to work out how that squares with the WCCP’s current budget. After all, the Scottish Consumer Council estimates that the office can expect to spend about 45 per cent of its resources on that function. Have ministers assured you that you will receive sufficient resources? If so, will those resources be based on the current level of complaints or do you accept the claim that you will receive more complaints when a formal complaints system is introduced and publicised?

Ian Smith: On the first question, I have been assured by ministers that once the function is clear, the form will follow from it and will be adequately resourced.

The second point is that we are not simply looking at inheriting an existing system. Instead, we will take the precaution of thinking through complaints management from first principles and we will base what we think we require on that analysis. That is the only proper way forward.

The Convener: So you are not necessarily considering the cost of the current system. You are doing everything from scratch.

Ian Smith: I am sure that those who give advice on the customers’ levy to ministers and to Scottish Water on behalf of the customers will, for comparative purposes, consider existing expenditure. However, it would be quite wrong simply to take the current situation and assume that that is how things will be in the future. It is only right to examine the situation properly.

Richard Lochhead: If the panels’ successor will be funded by a levy on customers, how will that work for non-domestic customers?

Ian Smith: The levy is on Scottish Water for all customers. You must appreciate that we already carry out a great deal of activity with non-domestic customers. That area is not new to us.

The Convener: I think that we have exhausted our questions. I thank all the witnesses for attending the meeting and for making advance submissions. The evidence session has been very useful; indeed, I am interested to see that everyone sat through it all. I hope that it has cleared some matters up—it has certainly allowed the committee to go into the matter in some depth.

Now that we are about to go on to stage 2 of the bill, I should highlight one or two pieces of information. The first day of stage 2 proceedings on the bill is likely to be 8 December, which means that the deadline for lodging amendments for consideration on day 1 is 2 pm on Monday 6 December. As ever, the clerks will provide advice and guidance on lodging amendments and other procedures. Given that we are still on the record, I should say that I have agreed not to go any further than the end of section 11 on day 1. I have just come back from Wales and have given the matter and the clerks’ advice a great deal of consideration. I hope that we have got that right.

I suspend the meeting briefly to allow the final set of witnesses to leave.

11:24

Meeting suspended.
Water Services etc. (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

<table>
<thead>
<tr>
<th>Section</th>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1</td>
<td>Schedule 1</td>
</tr>
<tr>
<td>Sections 2 to 11</td>
<td>Schedule 2</td>
</tr>
<tr>
<td>Sections 12 to 18</td>
<td>Schedule 3</td>
</tr>
<tr>
<td>Sections 19 to 23</td>
<td>Schedule 4</td>
</tr>
<tr>
<td>Sections 24 and 25</td>
<td>Schedule 5</td>
</tr>
<tr>
<td>Sections 26 to 30</td>
<td>Long Title</td>
</tr>
</tbody>
</table>

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 3

Lewis Macdonald

1 Move section 3 to after section 19

After section 3

Lewis Macdonald

2 After section 3, insert—

<Customer Panels

(1) In section 2 (Water Customer Consultation Panels) of the 2002 Act, for subsections (3) to (5) there is substituted—

“(3) Each Customer Panel is, in relation to the provision of services by Scottish Water in the exercise of its core functions, to have the general function of representing the views and interests of persons whose premises are in the Panel’s area and—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both, or

(b) might reasonably become connected to either or both of those systems.

(4) A Customer Panel—

(a) must publish reports on any matter it considers relevant to the interests of those persons in relation to such provision,

(b) may make recommendations to the Commission as to the promotion of the interests of those persons in relation to such provision, either generally or in relation to any specific matter,

(c) may make recommendations, on any matter it considers relevant to the interests of those persons to—
(i) the Scottish Ministers,
(ii) the Drinking Water Quality Regulator for Scotland, and
(iii) the Scottish Environment Protection Agency,
in connection with such of their functions as are exercisable in relation to
such provision, and
(d) may make recommendations to Scottish Water on any matter it considers
relevant to the interests of those persons in relation to such provision.

(5) Scottish Water must have regard to—
(a) any representations made to it by a Customer Panel, and
(b) any recommendations made to it under subsection (4).

(5A) Any other persons to whom—
(a) any representations are made by a Customer Panel, or
(b) any recommendations are made under subsection (4),
must, in exercising functions in relation to Scottish Water, have regard to the
representations or (as the case may be) recommendations.

(5B) A Customer Panel—
(a) must publish a summary of any representations it makes under
subsection (3) and of any recommendations it makes under subsection
(4), and
(b) may do so by including the summary in a report.

(5C) Any persons to whom recommendations are made under subsection (4) must,
within 6 months of receipt, publish a summary of their responses to the
recommendations.

(5D) Two or more Customer Panels may exercise their functions under subsection
(4) and (5B) jointly.”.

(2) In section 3 (functions of the Commissioner) of that Act, subsections (1) to (5) are
repealed.

(3) After section 6 (funding of the Commissioner) of that Act there is added—

“6A Convener of Customer Panels to investigate complaints

(1) The Convener of the Water Customer Consultation Panels (referred to in this
Part as the “Convener”) must investigate any complaint made to the Convener,
a Customer Panel or the Commission as respects any of Scottish Water’s core
functions by any person whose premises—
(a) are connected to the public water supply system or the public sewerage
system (within the meaning of Part 2 of the Water Services etc.
(Scotland) Act 2004 (asp 00)) or both, or
(b) have been, or might reasonably become, connected to either or both of
those systems.

(2) Where any such complaint is made to a Customer Panel or the Commission,
the Panel or (as the case may be) the Commission must refer the complaint to
the Convener.
(3) The Convener need not investigate a complaint under subsection (1) if—
   (a) the complainer has not pursued the matter with Scottish Water, or
   (b) it appears to the Convener that the complaint is vexatious or frivolous.

(4) The Convener may, on behalf of the complainer in a complaint investigated under subsection (1), make representations to Scottish Water about any matter—
   (a) to which the complaint relates, or
   (b) which appears to the Convener to be relevant to the subject matter of the complaint.

(5) Where the Convener investigates a complaint referred under subsection (2), the Convener must send to the Panel or (as the case may be) the Commission a report of the investigation.

(6) Where the Convener decides not to investigate such a complaint, the Convener must send to the Panel or (as the case may be) the Commission a statement of the reasons for not investigating the complaint.

(7) Scottish Water must, on being requested to do so by the Convener, provide the Convener with such information held by it as the Convener may reasonably seek in the exercise of the Convener’s functions relating to complaints under subsection (1).

(8) Where Scottish Water and the Convener cannot agree as to whether information is sought reasonably, either of them may refer the matter to the Scottish Ministers, whose decision is final.

6B Annual reports and information regarding Customer Panels

(1) The Convener must—
   (a) as soon as practicable after the end of each financial year, submit to the Scottish Ministers, and publish, a report on the exercise of—
      (i) the Customer Panels’ functions during that year, and
      (ii) the Convener’s functions under section 6A, and
   (b) provide the Scottish Ministers with such information regarding the exercise of those functions as they may require.

(2) The Scottish Ministers must lay before the Parliament a copy of each report submitted to them under subsection (1)(a).

6C Co-operation between the Commission and Customer Panels

(1) The Commission and the Convener (as appropriate, representing the Customer Panels as a whole) must together make arrangements with a view to securing—
   (a) co-operation and the exchange of information—
      (i) between the Commission and Customer Panels,
      (ii) between the Commission and the Convener, and
   (b) the consistent treatment of matters which affect—
      (i) both the Commission and Customer Panels,
      (ii) both the Commission and the Convener.
(2) The Commission and the Convener—
   (a) must set out the arrangements in a memorandum,
   (b) must keep the arrangements under review, and
   (c) may from time to time revise the arrangements.

(3) A copy of the memorandum, and of any revised memorandum, must be sent
    jointly by the Commission and the Convener to the Scottish Ministers.”.

Rob Gibson

2A As an amendment to amendment 2, line 83, at end insert—
    <( ) The Scottish Ministers must specify a name by which the Convener or the
    Convener’s office is to be known for the purpose of publicising the Convener’s
    role under subsection (1).>

Section 4

Lewis Macdonald

3 In section 4, page 4, line 7, at end insert—
    <( ) It is competent to make regulations under subsection (7) only if the effect of the
    regulations would not be prejudicial to the exercise of Scottish Water’s core functions as
    respects the supply of water.>

Section 5

Lewis Macdonald

4 In section 5, page 5, line 5, at end insert—
    <( ) It is competent to make regulations under subsection (7) only if the effect of the
    regulations would not be prejudicial to the exercise of Scottish Water’s core functions as
    respects the provision of sewerage and disposal of sewage.>

Section 6

Lewis Macdonald

5 In section 6, page 6, line 9, at end insert—
    <( ) The references in subsections (1) and (3) to the occupier of premises are, if the premises
    are unoccupied, to be construed as references to the owner of the premises.>

Schedule 2

Lewis Macdonald

6 In schedule 2, page 30, leave out lines 32 and 33
Lewis Macdonald
7 In schedule 2, page 31, line 3, at end insert <on a question of law>

Lewis Macdonald
8 In schedule 2, page 31, line 7, after first <licence> insert <on a question of law>

Lewis Macdonald
9 In schedule 2, page 32, line 39, leave out from second <the> to end of line 40 and insert <a question of law>

Lewis Macdonald
10 In schedule 2, page 33, line 4, leave out from third <the> to end of line 5 and insert <a question of law>

Lewis Macdonald
11 In schedule 2, page 33, line 7, at end insert—

<Conditions: sustainable development>

(1) The Scottish Ministers may issue to the Commission guidance as to how water services and sewerage services providers might, by the manner in which they perform the activities authorised by their licences, reasonably contribute to the achievement of sustainable development.

(2) In exercising its functions under paragraph 2, the Commission is to have regard to any guidance issued under sub-paragraph (1).>

Lewis Macdonald
12 In schedule 2, page 33, line 9, leave out <sub-paragraph (2)> and insert <sub-paragraphs (2) to (4A)>

Lewis Macdonald
13 In schedule 2, page 33, line 29, leave out from beginning to end of line 2 on page 34 and insert—

<(4A) In relation to a transfer—

(a) an application for consent is to be made by the transferee; and

(b) sub-paragraphs (1) to (6) of paragraph 1 apply as regards an application for consent as they apply as regards an application for a licence.

(4B) Any applicant for consent to a transfer of a licence who knowingly or recklessly makes a statement, in connection with the application for consent, that is false or misleading in a material particular is guilty of an offence.

(4C) A person who is guilty of an offence under sub-paragraph (4B) is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on indictment, to a fine.>
14 In schedule 2, page 34, line 12, leave out <withholding of consent> and insert <decision to do so>

15 In schedule 2, page 34, line 13, leave out <withholding of consent> and insert <decision on a question of law>

16 In schedule 2, page 34, line 14, at end insert—

<(10A) Where the Commission consents to the transfer, Scottish Water may, within 14 days of the date on which the decision to do so was intimated to Scottish Water under sub-paragraph (9)(b), appeal to the Court of Session against the decision on a question of law.>

17 In schedule 2, page 34, line 15, after <(10)> insert <or (10A)>

18 In schedule 2, page 34, line 16, after <transfer> insert <or (as the case may be) to consent to the transfer>

Section 17

19 In section 17, page 12, line 39, after <Panels> insert <(representing the Panels as a whole)>

20 In section 17, page 12, line 39, after <Panels;> insert—

<(  ) the Drinking Water Quality Regulator for Scotland;>

Section 18

21 In section 18, page 14, line 21, leave out <and Scottish Water> and insert—

<(  ) Scottish Water, and
(  ) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole)>

22 In section 18, page 15, line 3, leave out <issued> and insert <given>

23 In section 18, page 15, line 40, at end insert—
In preparing a statement under subsection (1), the Scottish Ministers must have regard to Scottish Water’s duty under section 51(1).

Lewis Macdonald

24 In section 18, page 16, line 2, leave out <and> and insert—

<( ) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole), and

( )>

Section 19

Lewis Macdonald

25 In section 19, page 19, line 19, at end insert—

<( ) In formulating objectives of a type referred to in subsection (1) for inclusion in directions under section 56, the Scottish Ministers must have regard to Scottish Water’s duty under section 51(1).>

Lewis Macdonald

26 In section 19, page 19, line 19, at end insert—

<( ) Before giving directions under section 56 which set objectives of a type referred to in subsection (1), the Scottish Ministers must consult the Convener of the Water Customer Consultation Panels (representing the Panels as a whole) on the objectives.>

Section 20

Lewis Macdonald

27 In section 20, page 19, line 30, after <are> insert <(or are to be)>

Lewis Macdonald

28 In section 20, page 19, line 33, after <are> insert <(or are to be)>

Schedule 5

Lewis Macdonald

29 In schedule 5, page 46, leave out line 10

Lewis Macdonald

30 In schedule 5, page 46, leave out lines 20 to 25

Lewis Macdonald

31 In schedule 5, page 46, line 26, leave out from <after> to end of line 31 and insert <in subsection (6)—
( ) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both”; and

( ) in paragraph (b), for the words “it conducts its relations with its customers or potential or former customers” there is substituted “Scottish Water conducts its relations with those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”.>

Lewis Macdonald

32 In schedule 5, page 46, line 31, at end insert—

<( ) In section 5 (annual reports by, and information from, the Commissioner), in subsection (2)—

(a) in paragraph (a), for the words “to such representations, reports and recommendations as are mentioned in section 2(5)” there is substituted “to—

(i) any representations made to it by a Customer Panel, and

(ii) any recommendations made to it under section 2(4)”; and

(b) in paragraph (b), the word “, report” is repealed.>

Lewis Macdonald

33 In schedule 5, page 46, leave out lines 33 to 38 and insert—

<( ) in subsection (1)—

(i) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both”; and

(ii) in paragraph (b), for the words “its customers or potential or former customers” there is substituted “those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”; and

( ) subsection (2) is repealed.>

Lewis Macdonald

34 In schedule 5, page 47, line 17, leave out <paragraph 55 of schedule 2 (listed authorities)> and insert <schedule 2 (listed authorities)—

(a) after paragraph 21A there is inserted—

“21B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 55>
Lewis Macdonald

35 In schedule 5, page 47, line 20, leave out paragraph 106 of schedule 1 (Scottish public authorities) and insert schedule 1 (Scottish public authorities)—

(a) after paragraph 62A there is inserted—

“62B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 106>

Section 27

Lewis Macdonald

36 In section 27, page 24, line 12, leave out <, (4) or (7)> and insert <or (4)>
Water Services etc. (Scotland) Bill

Groupings of Amendments for Stage 2 (Day 1)

Water Customer Consultation Panels and representation of customers
1, 2, 2A, 19, 21, 24, 26, 29, 30, 31, 32, 33, 34, 35

Offences relating to public systems: limitation of regulation-making power
3, 4

Provision of services to eligible premises
5, 27, 28

Licences: procedure for applying
6, 36

Licences: appeals regarding applications and transfers
7, 8, 9, 10, 14, 15, 16, 17, 18

Sustainable development
11, 23, 25

Licences: procedure for transfers
12, 13

Disconnections code: consultation
20

Charges
22
Present:
Sarah Boyack (Convener)  Rob Gibson
Karen Gillon  Alex Johnstone
Richard Lochhead  Maureen Macmillan
Mr Alasdair Morrison  Nora Radcliffe
Mr Mark Ruskell (Deputy Convener)

Also present: Mr Jamie McGrigor

**Water Services etc. (Scotland) Bill:** The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

Section 1, schedule 1, and sections 2, 3, 7, 8, 9, 10 and 11 were agreed to without amendment.

Sections 4, 5 and 6, and schedule 2 were agreed to as amended.

Amendment 2A was not moved.

The Committee ended consideration of the Bill for the day, schedule 2 having been agreed to.
The Convener: Item 4 is stage 2 consideration of the Water Services etc (Scotland) Bill. I invite members to declare any interests that they need to bring to the attention of Parliament.

Karen Gillon: I am a member of Unison, so I put that registered interest on the table.

The Convener: I welcome the Deputy Minister for Environment and Rural Development, Lewis Macdonald. He will steer us through the bill today, as he has a series of amendments. I also welcome his officials.

The committee has not dealt with a bill at stage 2 for some time so, for the record, I remind members how we handle such matters lest we get ourselves tied up with the procedure. In front of them, members should have a copy of the Water Services etc (Scotland) Bill as introduced; the first marshalled list of amendments, which was published yesterday; and the groupings of amendments. On my authority, the amendments have been grouped into a logical order to facilitate debate. However, the running order of the amendments is set by the rules of precedence that govern the marshalled list. Therefore, we need to move through both the groupings paper and the marshalled list. All amendments will be called in strict order—we can move only forwards, not back and fro—as we go through the marshalled list. Our target today is to complete consideration of sections 1 to 11, together with schedules 1 and 2.

We will debate amendments group by group. Today, the first amendment in each group is in the name of Lewis Macdonald, who has the lion’s share of the amendments. I will call him to speak to all the amendments in the group and to move only the first amendment. After that, other members who wish to speak can catch my attention in the usual manner. Only one amendment has been lodged by a committee member—Rob Gibson—and I will ensure that he is given the opportunity to speak during the debate. For winding up the debate on each group of amendments, I will invite the minister to make any comments that he may have, although my reading of the amendments suggests that that may not be necessary in every case. I remind everyone that only committee members can vote on amendments.

As well as considering the amendments, we must decide whether to agree to each section of the bill. Therefore, we may have a short debate on each section to cover any issues that have not
been raised in amendments. That is the general outline of how we will go through things today, so I will now get my marshalled list organised and we will begin.

Section 1 agreed to.
Schedule 1 agreed to.
Section 2 agreed to.

Section 3—Determinations relating to provision of certain services

Section 3 agreed to.

The Convener: Group 1 is on the water customer consultation panels and the representation of customers. Amendment 1, in the name of the minister, is grouped with amendments 2, 2A, 19, 21, 24, 26 and 29 to 35.

10:15

The Deputy Minister for Environment and Rural Development (Lewis Macdonald): It is useful to begin with this group of amendments, because of their significance. They relate to water customer consultation panels and the proper representation of customers. The various amendments in my name make a coherent set of changes. They are designed to strengthen the representative functions of the panels, making provision for them to influence the water industry’s policy framework and providing for the convener of the water customer consultation panels to handle complaints from individual customers, while ensuring that the appropriate powers and safeguards are in place.

As was indicated at stage 1, we have considered the implications of the proposed new regime on the panels. We consider it right for the panels’ role to be expanded and for them to be given a strong voice, both to influence policy and to deal with individual complaints. It is important that those who have been given responsibility for taking key decisions about the industry listen to the panels’ voice.

Many of the critical provisions lie in amendment 2, which enters into some detail. The first part of amendment 2 seeks to strengthen the role of the panels. It provides that they will represent the views and interests of all customers—domestic and non-domestic—who use the public water supply and sewerage systems. That includes non-domestic customers who are not direct Scottish Water customers; it excludes the licensed providers, which will be brought into being by the bill. That provides the right balance, allowing all those who use services—the ordinary domestic and non-domestic customers—to be represented.

Under the bill, Scottish Water will continue to provide water and sewerage services and will be responsible for their physical provision to all customers and for dealing with domestic customers in every respect. The proposals will allow the convener of the panels to deal with complaints about services from customers of all kinds. We want the panels to have an input into the charge determination process and, in doing so, to be able to speak for all users of the public water and sewerage systems.

New section 2(4) of the Water Industry (Scotland) Act 2002, which is added under amendment 2, ensures that a panel can “publish reports on any matter it considers relevant to the interests of” customers, and that it can direct recommendations to Scottish Water, to the Scottish ministers or to any of the industry regulators. New section 2(5) of the 2002 act would require those people to whom recommendations have been made to respond to them.

New sections 6A, 6B and 6C of the 2002 act cover a number of important matters. New section 6A gives the convener of the panels a duty to investigate customer complaints and a right to request information from Scottish Water in relation to that duty. It is important that it is the convener who is given that responsibility, rather than the panels. We believe that placing complaints in the hands of the representative consumer body strikes the right balance, allowing panels to continue to focus on their wider representative functions as the convener deals with individual complaints. We hope that that will provide customers with greater clarity as to how complaints may be dealt with.

New section 6B of the 2002 act requires the convener of the panels to submit an annual report to ministers, which is to be laid before the Parliament, enhancing the accountability of the panels. New section 6C provides for a statutory memorandum of understanding between the water industry commission for Scotland and the panels. That responds to a specific recommendation that the committee made earlier and we believe that it will work in the interests of customers.

Amendment 2 and the consequential and associated amendments take forward and put into practice the commitments that were given towards the end of stage 1. I hope that they will attract support on that basis.

I will say a word or two at this point about amendment 2A, in the name of Rob Gibson, as it will be the subject of some discussion in the debate on the grouping. I have sympathy with the view that a snappier title than convener of the water customer consultation panels could have been found. Although I can see the argument for a snappier title, I am not persuaded that that needs
to be done in statute. I therefore do not support amendment 2A.

The wording of amendment 2A would see the title being limited to the consultation panels’ function of dealing with individual complaints. The Executive’s view, which I know is shared by the committee, is that panels should be a one-stop shop for customers and should be recognised and identifiable by customers not only in regard to their complaint-handling process but also in regard to the other inputs that they make.

There is no requirement for a different title to be laid down in statute. Members may be aware that the English equivalent body has one title in statute, which is rather formal, and another in general use, which is a little bit more recognisable and, indeed, snappy. Although I do not recommend support for amendment 2A, I have some sympathy with the purpose behind it. If Mr Gibson were minded not to move amendment 2A, I would be happy to consider the matter further before stage 3 and see what we can do to respond to the purpose that lies behind the amendment.

Members will see that there are a number of other Executive amendments in the group. In order to allow full debate on the grouping, all that I will say is that they are in line with amendment 2. The intention behind them is that they reinforce the provisions of amendment 2 throughout the bill—where that is required.

I move amendment 1.

Rob Gibson: I thank the minister for his words on the snappy title issue. In paragraph 7 of its response to the committee’s stage 1 report, the Executive says:

“We also welcome the Committee’s recommendation that clear guidance should be made available to customers on the complaints process, both as handled by the Convener but also in approaching Scottish Water. The Convener sees this type of information provision as a valuable function the Panels could supply and we would look forward to him providing this in the future.”

The committee is agreed that that is precisely what we want to happen. At our last committee meeting, we discussed the need to have a snappier title. Someone has to start the process and I had hoped that the imagination of the Executive would be brought to bear in that respect. It is a pity if that is not going to happen. I am minded to hear the views of other members, after which I will consider my approach.

Nora Radcliffe: First, I will speak to amendment 2A. I agree with everything that Rob Gibson says, but a title is not something that we need to put into primary legislation. It is better for it to happen outwith the bill process if for no other reason than that Scottish ministers might be skilled in all sorts of ways but not necessarily in finding snappy titles for things.

I have a point of clarification. I assume that if we are moving section 3 to after section 19, all the things that are introduced after section 3 move as a consequence and come after section 19. Is that right?

The Convener: Amendment 1 does not change the position of anything else.

Nora Radcliffe: Right. So, when we move section 3, everything that goes in after section 3 goes in after that section in its new position after section 19. The clerk is indicating that that is not the case. If only section 3 moves, all the stuff that comes in after section 3 stays between sections 2 and 4. Is that right?

The Convener: Yes.

Nora Radcliffe: Thank you.

The Convener: I am glad to see this full group of amendments because a few weeks ago we had a useful discussion about seeking supplementary evidence from a variety of interests including Scottish Water and consumer organisations on the issue of how complaints should be dealt with. At the time, we were assured that the process would be resourced adequately and monitored. That will need to be kept under review, but the process that these amendments seek to introduce should be a step forward.

Rob Gibson has raised a pertinent point about what the system will be called. I take the minister’s point that it does not need to be set out in statute, but I am prepared to accept his offer to come back at stage 3 after reflecting further on the matter. Rob has made his point quite effectively in amendment 2A and I hope that at stage 3 the minister will come up with something that is close to the spirit of Rob’s suggestion. Perhaps they should have a mini-competition. The issue needs to be addressed if the bill is going to set out the complaints process and the panels’ more proactive role. I take the minister’s point that amendment 2A is not necessarily the way of doing that, but nevertheless it needs to happen.

Lewis Macdonald: I am very happy to exercise the Executive’s corporate imagination and discuss the matter with the convener of the panels and panel members. I will come back at stage 3 with some imaginative suggestions.

The Convener: Rob, you can tell us what you want to do with amendment 2A when we reach that point in the marshalled list. I want to keep everything in a strict order so that I do not get lost.

Amendment 1 agreed to.
After section 3

Amendment 2 moved—[Lewis Macdonald].

The Convener: I call Rob Gibson to indicate whether he will move amendment 2A.

Rob Gibson: Given the minister’s assurance that he will reflect on the matter, I am happy not to move amendment 2A.

Amendment 2A not moved.

Amendment 2 agreed to.

Section 4—Public water supply system: offences

The Convener: Group 2 is on the limitation of regulation-making powers with regard to offences relating to public systems. Amendment 3, in the name of the minister, is grouped with amendment 4.

Lewis Macdonald: Amendments 3 and 4 seek to respond to an issue that was raised by the Subordinate Legislation Committee and are intended to put beyond doubt the prohibitions that the bill seeks to establish.

Members will recall that sections 4 and 5 seek to create new offences that will prohibit common carriage and unlicensed retail competition for non-domestic premises that Scottish Water serves. They also seek to provide an order-making power to modify those offences that would, for example, prescribe circumstances in which the offences do not apply. That position is quite clear. However, the Subordinate Legislation Committee expressed concern that the powers might be used to circumvent the bill’s objectives or to disapply one or more offences in the bill. Obviously, that would nullify the bill’s purpose.

The Executive’s view is that it is not possible to use secondary legislation to overturn the stated purpose of primary legislation, because in such cases the courts will always ask about the Parliament’s intention in passing a particular piece of legislation. In that respect, I think that the Parliament’s intention is clear. That said, amendments 3 and 4 make it clear beyond any doubt that the order-making power can be used only in a manner that does not prejudice Scottish Water’s responsibility for providing core water and sewerage services through the public networks. The amendments seek to reinforce the offences that sections 4 and 5 set out and provide that they may be modified only in a way that does not detract from Scottish Water’s responsibility for the networks and the provision of services to domestic households.

I move amendment 3.

Alex Johnstone (North East Scotland) (Con):

I want to give a brief explanation of my position. The minister is aware that I am opposed in principle to the prohibitions in the bill. However, given the will of the Parliament, I feel that, on balance, amendments 3 and 4 will improve the bill as it stands. Therefore, I will not oppose them.

10:30

The Convener: As no one else wants to make such fulsome comments, I invite the minister to wind up. I am not sure that he needs to say much.

Lewis Macdonald: I am pleased to have unanimous support for the proposed changes.

Amendment 3 agreed to.

Section 4, as amended, agreed to.

Section 5—Public sewerage system: offences

Amendment 4 moved—[Lewis Macdonald]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Licence authorisation

The Convener: Amendment 5 is grouped with amendments 27 and 28.

Lewis Macdonald: Amendment 5 seeks to change section 6 and amendments 27 and 28 seek to change section 20. The amendments are somewhat technical, but they are nonetheless important. They seek to ensure that arrangements can be made between a customer and a licensed retail provider as conveniently as possible.

Section 6 provides for licences to be granted authorising a water services or sewerage services provider to make arrangements with occupiers of premises to retail services to them. However, where premises are unoccupied, the owner may wish retail arrangements for water and sewerage services to be put in place. Amendment 5 will ensure that that would be possible. For example, where a newly built office block does not yet have an occupier, the proposals in amendment 5 will ensure that the owner of the block could make arrangements for water and sewerage services in advance of occupation.

Section 20 defines “eligible premises” for the purposes of retail licensing as those that are connected to the public water supply or sewerage system, but which are not a dwelling. Amendments 27 and 28 will amend the definition to enable premises that are to be connected to the public networks, as well as those that are already connected, to be eligible for supply on the basis of retail competition, as long as they are not a dwelling. The amendments will give an owner or an occupier the required flexibility to make
arrangements in advance of the premises being connected.

I move amendment 5.

Amendment 5 agreed to.

Section 6, as amended, agreed to.

Sections 7 to 11 agreed to.

SCHEDULE 2—LICENSES AND COMPLIANCE: FURTHER PROVISION

The Convener: Amendment 6 is grouped with amendment 36.

Lewis Macdonald: Again, amendments 6 and 36 respond to an issue that the Subordinate Legislation Committee raised in relation to an order-making power in subparagraph 1(7) of schedule 2, which amendment 6 will remove. Our intention in providing the order-making power was to recognise that flexibility might sometimes be required to streamline the licence application procedure, particularly in making representations about an application—for example, in relation to the initial application by Scottish Water’s retail subsidiary, which will be established under section 12.

The order-making power, as it is currently drafted, is drawn somewhat widely and we are happy to make specific provision in section 12 for procedures to be modified in relation to the first application for a licence by Scottish Water’s retail subsidiary only. I hope to bring an amendment to section 12 to the committee next week.

In the meantime, amendment 6 will simply remove the general order-making power and the redundant reference to it in the bill to allow the subsequent amendment to be lodged next week. It is fairly technical and is intended to make it clear that the power relates only to the setting up of Scottish Water’s retail subsidiary body.

I move amendment 6.

The Convener: That sounds like quite a technical but important piece of tidying-up work. I do not see any member requesting to speak—we are all totally convinced by that explanation.

Amendment 6 agreed to.

The Convener: Group 5 is on the licensing process and appeals regarding applications and transfers. Amendment 7, in the name of the minister, is grouped with amendments 8 to 10 and 14 to 18.

Lewis Macdonald: The amendments concern the appeal provision that is part of the procedures for applying for, transferring or modifying the conditions of a retail licence under schedule 2. The bill includes provisions for an applicant to appeal, for example, against the refusal of a licence application; against the conditions in a licence; or against the refusal of consent to transfer a licence. Provision is also made for Scottish Water to appeal against the granting of a licence to another body that it feels ought not to receive that licence.

We are keen to ensure that such appeals should be only “on a question of law” and that the courts should have the appropriate power to review the legality of decisions that are made in that regard without necessarily having to go back to look at all the merits of the application or to consider technical matters that a court of law would not wish to drift into if it were not required to do so. Amendments 7 to 10 and 15 are intended to achieve some clarification and to give the courts an appropriate degree of scrutiny in relation to licensing decisions that are taken by the water industry commission.

Amendment 14 is a drafting amendment and will make no substantive difference; it simply tidies up the language a little bit.

Amendment 16 will give Scottish Water a right to appeal against a decision by the commission to grant consent to the transfer of a retail licence. Again, that makes consistent the provision that applies between the initial granting of a licence and the transfer of a licence from one body to another. We intend to ensure that Scottish Water has the same rights of appeal as the applicant if it is not happy with the commission’s decision. However, the amendments will ensure that such appeals are on questions of law only. The other amendments in the group are consequential to that purpose.

I move amendment 7.

Amendment 7 agreed to.

Amendments 8 to 10 moved—[Lewis Macdonald]—and agreed to.

The Convener: Group 6 is on sustainable development. Amendment 11, in the name of the minister, is grouped with amendments 23 and 25.

Lewis Macdonald: Perhaps we are back in more interesting territory for committee members. The intention is to make additional provision to ensure that the principle of sustainable development is fully embedded in the new regulatory framework that will be established by the bill. There was some debate on that in the committee at an earlier stage, and we are keen to confirm that sustainable development should guide the work of all those who are involved. I hope that our amendments will achieve that to the satisfaction of the committee.

The framework that is established in the bill will ensure that the water industry commission must
take full account of the existing duty on Scottish Water regarding sustainable development. In our amendments, we wanted to provide further reassurance of that and some explicit application of that to retailers in the bill. Amendments 23 and 25 require the two policy documents that will guide the commission in determining Scottish Water’s charges to have regard to Scottish Water’s sustainable development duty in relation to new section 29D of the 2002 act and new section 56A of the 2002 act. For example, in setting Scottish Water’s investment objectives, ministers will also have regard to the contribution that reduced water usage could make to sustainable development. That is a good example of how the requirement on ministers will apply.

Amendment 11 addresses the new issue of ensuring that licensed providers that are established under the bill should also make a contribution to sustainable development. It places that requirement on Scottish Water’s retail subsidiary and on other retail providers. We believe that retail providers have a valuable role to play in the promotion of the efficient use of water by their customers, and we want to ensure that they play that role. Amendment 11 provides powers to enable ministers to issue guidance on the contribution that licensed providers should make to sustainable development, which is equivalent to the provision in section 51 of the 2002 act that enables us to issue sustainable development guidance to Scottish Water. The water industry commission is required to have regard to that guidance in setting licence conditions, which will ensure that those are binding requirements on licensed providers.

Taken together, the amendments provide the effective mechanism that we want to ensure that sustainable development is at the heart of the bill, as it is at the heart of our approach in general.

I move amendment 11.

Mr Ruskell: I welcome the Executive’s three amendments on sustainable development, which reflect the concerns that have been expressed in the debate that we have had in the committee. I believe and hope that amendment 11 will create a level playing field for the new retail entrants and Scottish Water, but I seek some clarification in that regard. Subparagraph (1) in amendment 11 talks about

“How water services and sewerage services providers might ... reasonably contribute to the achievement of sustainable development.”

Does that mean the same as what is stated in section 51(1) of the Water Industry (Scotland) Act 2002—that

“Scottish Water must, in exercising its functions, act in the way best calculated to contribute to the achievement of sustainable development”?

Do

“reasonably contribute to the achievement of sustainable development”

and

“act in the way best calculated to contribute to the achievement of sustainable development”

mean the same thing? I am trying to clarify whether there is a genuine level playing field in the duty that will be placed on the new retail entrants and on Scottish Water.

The Convener: I, too, would like to add one or two comments. Mark Ruskell is right. We explored this issue in some depth at stage 1. We need to get some clarification from the minister and think about how the provision would work in practice across the industry. When we visited Wales recently, we explored the issue with the water company there, Dwr Cymru. It was interesting to get a slightly different take on the issue and to see a slightly different set-up regarding sustainable development. I am pleased that amendment 11 has been lodged as it clarifies the bill’s aim, and I hope that the minister will be able to give Mark Ruskell the reassurance that he seeks about the interpretation of the wording.

I was pleased to see that, in the covering letter to the bill, which Ross Finnie wrote to us before stage 2, water conservation was picked up as an issue that you expect both Scottish Water and new retail entrants to think about in the provision of services. That angle on sustainable development will be a major issue in the future.

I am pleased about your general response on water conservation and sustainable development and I am particularly pleased to see a detailed amendment that I hope will clarify matters both for Scottish Water and all potential future entrants to the market.

No other members want to ask questions, so I invite the minister to respond to Mark Ruskell and me.

10:45

Lewis Macdonald: I am happy to do so and to confirm that the intention is to achieve a consistent regime across the board. Section 51 of the 2002 act and amendment 11 set out clear requirements for Scottish Water and retailers to take action to contribute to the achievement of sustainable development. The two provisions are worded slightly differently and the committee might well take the view that the duty on Scottish Water is a little more emphatic than is the requirement on retail providers to “reasonably contribute” to
sustainable development. That is because Scottish Water is the fundamental service provider and is responsible for the networks, the infrastructure, the water treatment and so on. Therefore its duty is clear and must apply across the range of its functions. Retail bodies do not have quite the same degree of influence on sustainable development, so the law will require them to make whatever contribution is reasonable for them as retail providers. That is in recognition of the fact that the direct impact of a retailer is less than that of the network provider.

In practice, both section 51 of the 2002 act and amendment 11 provide for guidance to be issued by ministers. We expect that the ministerial guidance that is issued to Scottish Water and the guidance that is issued to retailers will at least be consistent and, in many cases, will be identical when identical functions are being delivered. Amendment 11 will allow clear guidance to be issued by ministers to place requirements both on retailers through the licence conditions and, as at present, on Scottish Water, to deliver sustainable development in the range of policy decisions that are made.

Amendment 11 agreed to.

The Convener: Group 7 is on licences and procedures for transfers. Amendment 12, in the name of the minister, is grouped with amendment 13.

Lewis Macdonald: Amendment 13 relates to instances in which a licence might be transferred between one operator and another. The amendment will ensure that the procedure for transferring a retail licence to another holder is consistent with the process for applying for such a licence in the first place. It does that by applying the procedures in paragraph 1 of schedule 2 in relation to original licence applications to transfer applications in paragraph 3, replacing specific provison for transfer applications. It also provides that

“Any applicant for consent to a transfer of a licence who knowingly or recklessly makes a statement, in connection with the application for consent, that is false or misleading in a material particular is guilty of an offence”

and for the penalties to apply on conviction. That is consistent with the existing provision in paragraph 1. The intention behind amendment 13 is simply to achieve consistency. Amendment 12 is consequential to amendment 13.

I move amendment 12.

Nora Radcliffe: I have a point about semantics. I presume that “knowingly” and “recklessly” are both included so that if someone takes a flier at not knowing, they are still caught by the law.

Lewis Macdonald: Yes. That is a general legal provision to cover someone acting in a criminal manner knowing it to be criminal, or acting recklessly regardless of whether they know it is criminal. Both would attract punishment in the same way.

Amendment 12 agreed to.

Amendments 13 to 18 moved—[Lewis Macdonald]—and agreed to.

Schedule 2, as amended, agreed to.

The Convener: That completes day 1 of stage 2 consideration of the bill. Given the number of amendments that were lodged for today and the progress that we have made, which I have to say has been efficient, I suggest that the target for day 2 should be to complete stage 2 consideration. I have not received any indication that colleagues have hundreds of amendments waiting to be lodged. We should be able to work through stage 2 in an orderly manner next week. We intend to complete consideration of all the remaining sections and schedules. If we do not, we will still be able to have day 3 of stage 2 before Christmas. If members have amendments to the rest of the bill, they must lodge them by 2pm on Monday 13 December so that we can consider them on the Wednesday morning. I thank the deputy minister and his officials for coming along and providing clarification, which has helped us to get through business efficiently this morning.

We expect the Minister for Environment and Rural Development, who is currently in Cabinet, at 11.30. I suggest that we move on and take item 6, on climate change, which we agreed to take in private. Any members of the public and press who want to be here for our discussion on fisheries with the minister should come back at 11.30. We might need to take a seriously long comfort break, but that way, everybody knows what we are doing.

10:51

Meeting continued in private.
The Bill will be considered in the following order—

<table>
<thead>
<tr>
<th>Section</th>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2 to 11</td>
<td>2</td>
</tr>
<tr>
<td>12 to 18</td>
<td>3</td>
</tr>
<tr>
<td>19 to 23</td>
<td>4</td>
</tr>
<tr>
<td>24 and 25</td>
<td>5</td>
</tr>
<tr>
<td>26 to 30</td>
<td>Long Title</td>
</tr>
</tbody>
</table>

Amendments marked * are new (including manuscript amendments) or have been altered.

**Section 12**

**Lewis Macdonald**

37 In section 12, page 8, line 12, leave out subsection (1) and insert—

<(1) Scottish Water must, in accordance with any requirements made under subsection (1A), secure the establishment of a business undertaking for the purposes of this section.

(1A) The Scottish Ministers may require Scottish Water to—

(a) take such steps for the purposes of or in connection with—

(i) the establishment and development of the undertaking; and
(ii) Scottish Water’s interest in the undertaking,

as the Scottish Ministers may specify; and

(b) take the steps, or any particular steps, by such date as they may specify.

(1B) It is, subject to the approval of the Scottish Ministers, for Scottish Water to determine whether the undertaking is—

(a) to be—

(i) a subsidiary (to be construed in accordance with section 736 of the Companies Act 1985 (c.6)) of Scottish Water;
(ii) a company (within the meaning of that Act) formed by Scottish Water (on its own or with others); or
(iii) a partnership; or

(b) to be established through such other arrangements as Scottish Water considers it appropriate to make.>

**Lewis Macdonald**

38 In section 12, page 8, line 16, leave out <subsidiary> and insert <undertaking>
Lewis Macdonald

39 In section 12, page 8, line 20, leave out <subsidiary> and insert <undertaking>

Lewis Macdonald

40 In section 12, page 8, line 21, at end insert—

<(3A) The Scottish Ministers may by order provide that paragraphs 1 and 2 of schedule 2 have effect—

(a) as regards an initial application by the undertaking for a licence; and

(b) following such an application, as regards the granting of the licence and the incorporation in it of conditions,

with or subject to such modifications as the order may specify.>

Lewis Macdonald

41 In section 12, page 8, line 22, leave out <subsidiary> and insert <undertaking>

Lewis Macdonald

42 In section 12, page 8, line 25, leave out <When the subsidiary> and insert <After the undertaking>

Lewis Macdonald

43 In section 12, page 8, line 32, leave out <subsidiary> and insert <undertaking>

After section 12

Lewis Macdonald

44 After section 12, insert—

<Financing, borrowing and guarantees

(1) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may, with the consent of Scottish Water, make grants to the business undertaking established under section 12(1) of such amounts as the Scottish Ministers may determine.

(2) In such circumstances as the Scottish Ministers may by order specify, the undertaking—

(a) may, with the consent of Scottish Water, borrow from the Scottish Ministers (and they may lend to it) sums of such amounts as the Scottish Ministers may determine;

(b) may not (except as described in subsection (4)(b)) borrow money from any other person.

(3) In any financial year, the net amount of sums borrowed under subsection (2)(a) must not exceed the amount specified for that year for the purposes of this subsection in a Budget Act.

(4) In subsection (3), “net amount” means the amount of sums borrowed in the financial year less—>
(a) any repayments made during that year, otherwise than by way of interest, in respect of sums borrowed in that or any other year; and

(b) any sums borrowed, with the consent of Scottish Water, by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure over sums otherwise available to meet that expenditure.

(5) Any loans made under subsection (2)(a) are to be repaid to the Scottish Ministers at such times and by such methods, and interest on the loans is to be paid to them at such times and at such rates, as they may from time to time specify.

(6) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may guarantee, in such manner as they consider appropriate, the discharge of any financial obligation in connection with any sums borrowed as described in subsection (4)(b).

(7) Immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before the Parliament.

(8) Where any sums are paid out in fulfilment of a guarantee under subsection (6), the undertaking must make to the Scottish Ministers, at such times and in such manner as they may from time to time specify—

(a) payments of such amounts as they may so specify in or towards repayment of those sums; and

(b) payments of interest, at such rate as they may so specify, on the amount outstanding for the time being in respect of those sums.

(9) Any—

(a) grants under subsection (1) may be made;

(b) loans under subsection (2)(a) may be made; and

(c) guarantees under subsection (6) may be given,

subject to such conditions as the Scottish Ministers consider it appropriate to impose.

Section 13

Lewis Macdonald

45 In section 13, page 8, line 34, leave out from beginning to <subsidiary> in line 35 and insert <Scottish Water must, following a requirement made by the Scottish Ministers to do so, transfer such of its staff to the employment of the business undertaking established under section 12(1)>.

Lewis Macdonald

46 In section 13, page 9, line 2, leave out <subsidiary> and insert <undertaking>.

Lewis Macdonald

47 In section 13, page 9, line 4, leave out <subsidiary> and insert <undertaking>.

Lewis Macdonald

48 In section 13, page 9, line 7, leave out <subsidiary> and insert <undertaking>.
In section 13, page 9, line 10, leave out <subsidiary> and insert <undertaking>

In section 13, page 9, line 16, leave out from beginning to <subsidiary> in line 17 and insert <Scottish Water must, following a requirement made by the Scottish Ministers to do so, transfer such of its property (including rights) and liabilities to the undertaking>

In section 13, page 9, line 23, leave out <subsidiary> and insert <undertaking>

In section 13, page 9, line 26, leave out <subsidiary> and insert <undertaking>

In section 13, page 9, line 28, leave out <subsidiary> and insert <undertaking>

Section 14

In section 14, page 10, line 13, leave out <may be superseded by a new duty under that subsection> and insert—

<(  ) ceases if the provision or (as the case may be) disposal is discontinued under section (Continuation and discontinuation of sewerage services); and
(  ) may be superseded by a new duty under subsection (5)>}

Section 15

In section 15, page 10, line 30, leave out <16(5)> and insert <16>

In section 15, page 10, line 35, leave out <that continuation of that duty> and insert <the continuation under subsection (1) of a duty to supply water>

In section 15, page 11, line 1, leave out subsection (4)

Section 16

In section 16, page 12, line 5, leave out <provided that> and insert <if>
Lewis Macdonald

59 In section 16, page 12, leave out lines 11 and 12 and insert—

<(  ) any other premises for any purpose,
is not adversely affected by the discontinuation.>

**Section 17**

Lewis Macdonald

19 In section 17, page 12, line 39, after <Panels> insert <(representing the Panels as a whole)>

Lewis Macdonald

20 In section 17, page 12, line 39, after <Panels;> insert—

<(  ) the Drinking Water Quality Regulator for Scotland;>

**After section 17**

Lewis Macdonald

60 After section 17, insert—

<Continuation and discontinuation of sewerage services>

(1) Where sewerage is provided to, or sewage is disposed of from, premises by Scottish Water under subsection (5) of section 14, Scottish Water is to continue providing sewerage to, 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 related request under subsection (4) of that section in respect of the premises) have come to an end.

(2) Subsection (1) does not apply in relation to any trade effluent services.

(3) Where—

(a) trade effluent services are provided to premises by Scottish Water under subsection (5) of section 14; and

(b) the arrangements for the provision of the services (made between the occupier of the premises and the sewerage services provider who made the related request under subsection (4) of that section in respect of the premises) have come to an end—

(i) by reason of the revocation or suspension of the licence held by the provider; or

(ii) for any other reason (except where the services are discontinued under subsection (10)),

the duty of Scottish Water under subsection (5) of section 14 to provide trade effluent services to the premises continues for the period mentioned in subsection (4).

(4) The period is 2 months, or such shorter period as Scottish Water with the Commission’s consent determines, from the date on which the arrangements mentioned in subsection (3)(b) came to an end.
But the continuation under subsection (3) of a duty to provide trade effluent services ceases if—
(a) it is superseded by a new duty under subsection (5) of section 14; or
(b) the occupier of the premises notifies Scottish Water that the trade effluent services are not required.

A sewerage services provider may request Scottish Water to discontinue any trade effluent services provided to premises under subsection (5) of section 14.

At least 14 days before making a request under subsection (6), 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 Commission.

The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.

An occupier of premises who has been served with a notice under subsection (7) may, within 10 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.

Where a request is made under subsection (6), Scottish Water is to discontinue the trade effluent services provided under section 14(5) to the premises if the conditions mentioned in subsection (11) are satisfied.

The conditions are that—
(a) any provision of sewerage to, or disposal of sewage from—
   (i) the premises for a purpose otherwise than in respect of trade effluent; or
   (ii) any other premises for any purpose,
   is not adversely affected by the discontinuation; and
(b) there is no likely risk to public health arising in consequence of the discontinuation.

Any reasonable costs incurred by Scottish Water in effecting a discontinuation under this section are to be met by the sewerage services provider who made the request under subsection (6) for the discontinuation.

If there is a dispute between a sewerage services provider and Scottish Water as to reasonable costs incurred in effecting a discontinuation under this section, Scottish Water is to refer the matter to the Commission for determination; and the determination of the Commission in the matter is final.

This section is without prejudice to any provision in Part II of the 1968 Act relating to trade effluent services.

In this section, “trade effluent services” means the provision of sewerage, or disposal of sewage, in respect of trade effluent.

In subsection (15), “trade effluent” is to be construed in accordance with section 59(1) (interpretation) of the 1968 Act.>
Section 18

Lewis Macdonald
21 In section 18, page 14, line 21, leave out <and Scottish Water> and insert—
   
   <( ) Scottish Water, and
   ( ) the Convener of the Water Customer Consultation Panels
   (representing the Panels as a whole)>

Lewis Macdonald
22 In section 18, page 15, line 3, leave out <issued> and insert <given>

Lewis Macdonald
61 In section 18, page 15, line 15, after <resources> insert <reasonably>

Lewis Macdonald
23 In section 18, page 15, line 40, at end insert—
   
   <( ) In preparing a statement under subsection (1), the Scottish Ministers must have
   regard to Scottish Water’s duty under section 51(1).>

Lewis Macdonald
24 In section 18, page 16, line 2, leave out <and> and insert—
   
   <( ) the Convener of the Water Customer Consultation Panels (representing
   the Panels as a whole), and
   ( )>

Lewis Macdonald
62 In section 18, page 16, line 9, after <reduces> insert <or increases>

Lewis Macdonald
63 In section 18, page 16, line 22, after <lower> insert <or (as the case may be) higher>

Lewis Macdonald
64 In section 18, page 17, line 4, after <resources> insert <reasonably>

Schedule 3

Lewis Macdonald
65 In schedule 3, page 41, line 31, leave out <made>

Lewis Macdonald
66 In schedule 3, page 42, line 1, at end insert—
For the purposes of sub-paragraph (1)—
(a) an agreement between Scottish Water and another person includes an agreement
with the other person to which Scottish Water has become party in consequence of
a transfer, by virtue of any enactment or contractual arrangements, of obligations
to Scottish Water; and
(b) an agreement which makes provision as to the charges to be paid for services
provided by Scottish Water does not include an agreement by virtue of which
there is an obligation to which section 47 of the 1980 Act applies.

Section 19

Lewis Macdonald

25 In section 19, page 19, line 19, at end insert—

<( ) In formulating objectives of a type referred to in subsection (1) for inclusion in
directions under section 56, the Scottish Ministers must have regard to Scottish
Water’s duty under section 51(1).>

Lewis Macdonald

26 In section 19, page 19, line 19, at end insert—

<( ) Before giving directions under section 56 which set objectives of a type
referred to in subsection (1), the Scottish Ministers must consult the Convener
of the Water Customer Consultation Panels (representing the Panels as a
whole) on the objectives.>

After section 19

Lewis Macdonald

67 After section 19, insert—

<Qualification of duty to provide services

(1) In section 1 (duty of Scottish Water to provide for sewerage) of the 1968 Act, after
subsection (6) there is added—

“(7) The duties imposed by subsections (1) and (2) above shall not require Scottish
Water to do anything which is prejudicial to its compliance with—
(a) any directions given to it under section 56 of the Water Industry
(Scotland) Act 2002 (asp 3) so far as setting objectives of a type referred
to in section 56A of that Act, or
(b) a statement of policy issued under section 29D of that Act.”.

(2) In section 6 (duty of Scottish Water to provide water supply) of the 1980 Act, after
subsection (4) there is added—

“(5) The duties imposed by subsections (1), (2) and (4) shall not require Scottish
Water to do anything which is prejudicial to its compliance with—
(a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 (asp 3) so far as setting objectives of a type referred to in section 56A of that Act, or

(b) a statement of policy issued under section 29D of that Act.”

Lewis Macdonald

After section 19, insert—

<<Sewage nuisance: code of practice

Sewage nuisance: code of practice

(1) The Scottish Ministers may make an order containing a code of practice (referred to in this section and section (Monitoring and enforcement) as a “sewerage code”) for the purposes of assessing, controlling and minimising sewerage nuisance.

(2) In this section and section (Monitoring and enforcement), “sewerage nuisance” means—

(a) smells and discharges;

(b) insects; or

(c) any other thing,

emanating from, or present at, any part of the public sewerage system so as to be prejudicial to health (that is to say, injurious, or likely to cause injury, to health) or a nuisance.

(3) A sewerage code may, in particular, set out—

(a) guidance as to the best practicable means of assessing, controlling and minimising sewerage nuisance; and

(b) circumstances in which—

(i) Scottish Water; or

(ii) any other person to whom the code applies,

is to be regarded for the purposes of this section and section (Monitoring and enforcement) as complying, or (as the case may be) not complying, with the code.

(4) In subsection (3)(a), “best practicable means” is to be construed by reference to the following provisions—

(a) “practicable” means reasonably practicable having particular regard to—

(i) local conditions and circumstances;

(ii) the current state of technical knowledge; and

(iii) financial implications; and

(b) “means” includes—

(i) the design, installation, maintenance and manner and periods of operation of plant and machinery; and

(ii) the design, construction and maintenance of buildings and other structures.

(5) A sewerage code is to apply to—

(a) Scottish Water in respect of its core functions relating to the provision of sewerage and the disposal of sewage; and
(b) any other person to the extent that the person is acting on Scottish Water’s behalf, or under its authority, in that respect.

(6) Scottish Water and any other person to whom a sewerage code applies must comply with the code.

(7) The Scottish Ministers and every local authority must publicise any sewerage code.

(8) Before making an order under subsection (1), the Scottish Ministers must consult—
(a) Scottish Water;
(b) every local authority; and
(c) such other persons as they consider appropriate, about the proposed sewerage code.

(9) For the purposes of subsection (5), the provision of sewerage and the disposal of sewage does not include such provision or disposal through any part of the public sewerage system which is regulated by a permit under the Pollution Prevention and Control (Scotland) Regulations 2000 (S.S.I. 2000/323).

(10) Subsection (9) is subject to any direction made by the Scottish Ministers by virtue of any enactment in relation to the application of a sewerage code to any such part of the public sewerage system.

Lewis Macdonald

69 After section 19, insert—

<Monitoring and enforcement

(1) Each local authority must—
(a) monitor compliance in its area with any sewerage code; and
(b) where a complaint of sewerage nuisance is made to it by a person living in its area, investigate the complaint.

(2) Where a local authority is satisfied that Scottish Water or another person to whom a sewerage code applies is—
(a) not complying with; or
(b) likely not to comply with,
the code in a material regard, the authority must serve a notice (an “enforcement notice”) on Scottish Water or (as the case may be) that other person.

(3) An enforcement notice—
(a) may require—
(i) the execution of such works; and
(ii) the taking of such other steps,
as are necessary for securing compliance with a sewerage code in any particular respects; and
(b) must specify the date by which the requirements of the notice, or any particular requirements of it, are to be fulfilled.

(4) If a person, without reasonable excuse, contravenes an enforcement notice, the person is guilty of an offence and liable on summary conviction to a fine not exceeding £40,000.
(5) Where an enforcement notice is contravened, the local authority may (whether or not proceedings have been taken for an offence) take any action it considers necessary for the purposes of securing that the requirements of the notice are fulfilled.

(6) Any expenses reasonably incurred by a local authority in taking action under subsection (5) may be recovered by the authority from the person on whom the enforcement notice was served.

(7) The functions of a local authority under sections 79 to 81 of the Environmental Protection Act 1990 (c.43) in respect of statutory nuisance (within the meaning of Part III of that Act) do not apply in relation to any nuisance which constitutes a sewerage nuisance.

(8) This section and section (Sewerage nuisance: code of practice) are without prejudice to section 82 of the Environmental Protection Act 1990.

(9) In this section and section (Sewerage nuisance: code of practice), “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39).

Section 20

Lewis Macdonald

27 In section 20, page 19, line 30, after <are> insert <(or are to be)>

Lewis Macdonald

28 In section 20, page 19, line 33, after <are> insert <(or are to be)>

Schedule 5

Lewis Macdonald

29 In schedule 5, page 46, leave out line 10

Lewis Macdonald

30 In schedule 5, page 46, leave out lines 20 to 25

Lewis Macdonald

31 In schedule 5, page 46, line 26, leave out from <after> to end of line 31 and insert <in subsection (6)—

( ) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both”; and

( ) in paragraph (b), for the words “it conducts its relations with its customers or potential or former customers” there is substituted “Scottish Water conducts its relations with those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”.

11
Lewis Macdonald
32 In schedule 5, page 46, line 31, at end insert—

<( ) In section 5 (annual reports by, and information from, the Commissioner), in subsection (2)—

(a) in paragraph (a), for the words “to such representations, reports and recommendations as are mentioned in section 2(5)” there is substituted “to—

(i) any representations made to it by a Customer Panel, and
(ii) any recommendations made to it under section 2(4)”; and

(b) in paragraph (b), the word “, report” is repealed.>

Lewis Macdonald
33 In schedule 5, page 46, leave out lines 33 to 38 and insert—

<( ) in subsection (1)—

(i) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both”; and

(ii) in paragraph (b), for the words “its customers or potential or former customers” there is substituted “those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”; and

( ) subsection (2) is repealed.>

Lewis Macdonald
70 In schedule 5, page 47, line 5, at end insert—

<( ) In section 57 (information and reports) of that Act, in subsection (7)—

(a) the words from “any” to the end become paragraph (a); and

(b) after that paragraph there is inserted “, and

(b) the extent to which Scottish Water has, during that period, complied with any requirements made under section 12(1A) or 13(1) or (5) of the Water Services etc. (Scotland) Act 2004 (asp 00).”.,>
Lewis Macdonald

35 In schedule 5, page 47, line 20, leave out <paragraph 106 of schedule 1 (Scottish public authorities)> and insert <schedule 1 (Scottish public authorities)—

(a) after paragraph 62A there is inserted—

“62B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 106>

Section 27

Lewis Macdonald

71 In section 27, page 24, line 10, after <9(5)> insert <, 12(3A), (Financing, borrowing and guarantees)(1), (2) or (6)>.

Lewis Macdonald

72 In section 27, page 24, line 10, after <16(3)> insert <, (Continuation and discontinuation of sewerage services)(8)>.

Lewis Macdonald

73 In section 27, page 24, line 10, after <16(3)> insert <, (Sewerage nuisance: code of practice)(1)>.

Lewis Macdonald

36 In section 27, page 24, line 12, leave out <, (4) or (7)> and insert <or (4)>.
Water Services etc. (Scotland) Bill

Groupings of Amendments for Stage 2 (Day 2)

Scottish Water’s business undertaking: establishment
37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 70

Scottish Water’s business undertaking: financing, borrowing and guarantees
44, 71

Scottish Water’s duties: continuation and discontinuation of water and sewerage services
54, 55, 56, 57, 58, 59, 60, 72

Disconnections code: consultation
20

Charges
22, 61, 62, 63, 64,

Charges: pre-existing agreements
65, 66

Scottish Water’s duty to provide services: qualification
67

Sewerage nuisance
68, 69, 73

Note: the following amendments have already been debated—

With 1 – 19, 21, 24, 26, 29, 30, 31, 32, 33, 34, 35
With 5 – 27, 28
With 6 – 36
With 11 – 23, 25
Present:

Sarah Boyack (Convener)  Rob Gibson
Karen Gillon             Alex Johnstone
Richard Lochhead        Maureen Macmillan
Mr Alasdair Morrison    Nora Radcliffe
Mr Mark Ruskell (Deputy Convener)

Also present: Susan Deacon

**Water Services etc. (Scotland) Bill:** The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 19, 20, 60, 21, 22, 61, 23, 24, 62, 63, 64, 65, 66, 67, 68, 69, 27, 28, 29, 30, 31, 32, 33, 70, 34, 35, 71, 72, 73 and 36.

Sections 21, 22, 23, schedule 4, and sections 24, 25, 26, 28, 29 and 30, and the long title were agreed to without amendment.

Sections 12, 13, 14, 15, 16, 17 and 18, schedule 3, sections 19 and 20, schedule 5, and section 27 were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
Scottish Parliament  
Environment and Rural Development Committee  
Wednesday 15 December 2004

[THE CONVENER opened the meeting at 10:24]

Water Services etc (Scotland) Bill: Stage 2

The Convener (Sarah Boyack): I welcome members of the press and the public, as well as pretty much the entire bill team—so I am told—for the Water Services etc (Scotland) Bill and the Deputy Minister for Environment and Rural Development, Lewis Macdonald.

This is our second day of stage 2 consideration of the Water Services etc (Scotland) Bill. If members have no relevant interests to declare, I ask them to check that they have with them copies of the bill as introduced, the second marshalled list of amendments and the groupings of amendments. The clerks have spare sets of everything if members need them.

As with previous stage 2 consideration, I will call the amendments in strict order from the marshalled list. It is my intention to complete consideration of stage 2 today—at the moment, I do not think that there is anything that might throw us off course.

Section 12—Water and sewerage services subsidiary

The Convener: The first group of amendments is on the establishment of Scottish Water's business undertaking. Amendment 37, in the name of the minister, is grouped with amendments 38 to 43, 45 to 53 and 70.

The Deputy Minister for Environment and Rural Development (Lewis Macdonald): All the amendments in the group relate to the retail undertaking that Scottish Water will be required to establish under section 12 of the bill to allow it to take part in the licensed retail provision of services to non-domestic customers. We want Scottish Water to have flexibility in the way in which it establishes its own retail undertaking to ensure that it has the best chance of success.

As the bill is phrased, Scottish Water may choose to establish a subsidiary. Amendment 37 provides that Scottish Water is not tied to the subsidiary model, but free to create a subsidiary or a partnership or to make some other arrangements to put the undertaking in place. Under section 25 of the Water Industry (Scotland) Act 2002, Scottish Water already has powers to use all the structures that amendment 37 envisages, so the amendment simply makes the bill's provision for the retail provider consistent with the previous legislation on Scottish Water as a whole. Of course, whichever model Scottish Water chooses to use to establish its retail provider will be subject to ministerial approval. Amendment 37 also provides flexibility for the arrangements for, and the timing of, the setting up of the undertaking, by allowing ministers to require certain steps to be taken at certain times rather than requiring that everything be done at once.

Amendment 40 is slightly different. I referred to it last week, when the committee agreed under amendment 6 to the removal of ministers' general power to alter the licence application procedure that is set out in schedule 2. As I promised last week, amendment 40 provides that ministers may instead make an order to modify the procedure in respect of only the first application for a licence by Scottish Water's retail undertaking. The amendment makes it more specific that that power relates to the initial application. It is appropriate to streamline the process in that way because Scottish Water retail might be licensed in advance of any other retailer entering the market and will take on functions that are currently delivered by Scottish Water. We have narrowed the definition of the power to respond to concerns, which the Subordinate Legislation Committee raised, that the provision should be precise and specific about its purpose in the bill.

Amendments 45 and 50 are simply drafting refinements to two subsections of the bill and restate in slightly stronger terms provisions that are in the bill already. They are intended to place beyond doubt Scottish Water's duty to comply with the requirements that ministers place on it under subsections (1) and (5) of section 13 in regard to the transfer of staff, property and liabilities to Scottish Water retail. Amendment 70 is also connected to that and requires Scottish Water to include in its annual report details of steps that are taken to comply with any such requirements. Together, amendments 45, 50 and 70 ensure that ministers must give Scottish Water and its staff clarity on the actions that are required of them once arrangements for the retail undertaking have been agreed.

Amendments 38, 39, 41 to 43, 46 to 49 and 51 to 53 are consequential amendments that replace the term “subsidiary” with “undertaking” to reflect the change made by amendment 37. I seek the committee's support for all the amendments in the group.

I move amendment 37.
Amendment 37 agreed to.
Amendments 38 to 43 moved—[Lewis Macdonald]—and agreed to.

Section 12, as amended, agreed to.

After section 12

The Convener: Group 2 is on Scottish Water’s business undertaking and covers financing, borrowing and guarantees. Amendment 44, in the name of the minister, is grouped with amendment 71.

10:30

Lewis Macdonald: Amendment 44 relates to the funding of Scottish Water’s retail undertaking. The amendment is designed to provide flexibility to allow Scottish Water’s retail undertaking to receive funding directly from ministers—if appropriate—by grant, by loan or by a guarantee of a financial obligation such as an overdraft. That flexibility will allow ministers to decide which funding mechanisms are the most appropriate in the light of their approval of the exact form that the retail undertaking will take.

The amendment provides that the mechanisms are available subject to an order-making power for ministers. That will provide additional control and parliamentary scrutiny.

The financial provisions that are being put in place are similar to those that exist for Scottish Water under the Water Industry (Scotland) Act 2002, to ensure accountability to Parliament for public money used in regard to Scottish Water—in this case Scottish Water retail—and to ensure the repayment of the sums with interest.

Amendment 71 is consequential to amendments 40 and 44. It provides that orders under the appropriate sections will be subject to the negative parliamentary procedure.

I move amendment 44.

Alex Johnstone (North East Scotland) (Con): Amendment 44 provides ministers with the right to advance money to Scottish Water retail. Will there be a requirement under the bill to ensure that such an advance gives them no commercial advantage over any other retailer?

Lewis Macdonald: Yes. The bill establishes a level playing field. That is not affected by the provisions that are proposed in the amendment.

Amendment 44 agreed to.

Section 13—Transfer of staff etc to the subsidiary

Amendments 45 to 53 moved—[Lewis Macdonald]—and agreed to.

Section 14—Scottish Water to provide certain services

The Convener: Group 3 covers Scottish Water’s duties as regards the continuation and discontinuation of water and sewerage services. Amendment 54, in the name of the minister, is grouped with amendments 55 to 60 and 72.

Lewis Macdonald: The amendments relate to trade effluent within the context of sewerage services. The bill currently provides for certain circumstances in which Scottish Water might cease to provide water services, but for obvious public health reasons there is no general provision to allow the discontinuation of sewerage services. However, there is clearly a distinction between trade effluent and other types of sewage. The amendments relate to trade effluent. As I say, the exclusion of sewerage services is due to public health considerations.

Amendments 54 and 60 make provision for trade effluent services to be treated in the same way as water services. In other words, they can be discontinued under certain circumstances. However, whatever the circumstances, any such discontinuation is conditional on there being no risk to public health. That remains firmly the case in the provisions that are proposed in the amendments and the provision of other sewerage services to those premises or any other premises must not be affected.

Amendment 60 also makes it clear that the provision is without prejudice to the main statutory provisions in the Sewerage (Scotland) Act 1968, which govern trade effluent consents and agreements.

The other amendments in the group are consequential amendments or drafting refinements that support amendments 54 and 60.

I move amendment 54.

Amendment 54 agreed to.

Section 14, as amended, agreed to.

Section 15—Continuation of provision of services

Amendments 55 to 57 moved—[Lewis Macdonald]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Discontinuation of supply of water

Amendments 58 and 59 moved—[Lewis Macdonald]—and agreed to.

Section 16, as amended, agreed to.
Section 17—Disconnections code

Amendment 19 moved—[Lewis Macdonald]—
and agreed to.

The Convener: Group 4 is on consultation on
the disconnections code. Amendment 20, in
the name of the minister, is in the group on its own.

Lewis Macdonald: Amendment 20 will add
the drinking water quality regulator for Scotland to the
list of statutory consultees that the water industry
commission will consult on the disconnections
code under section 17.

I move amendment 20.

Amendment 20 agreed to.

Section 17, as amended, agreed to.

After section 17

Amendment 60 moved—[Lewis Macdonald]—
and agreed to.

Section 18—Scottish Water’s charges for water
and sewerage services

Amendment 21 moved—[Lewis Macdonald]—
and agreed to.

The Convener: Group 5 is on charges.

Amendment 22, in the name of the minister, is
grouped with amendments 61 to 64.

Lewis Macdonald: The amendments will make
small changes to the charge determination
procedures and respond to several issues that
Scottish Water has raised with us. They will
ensure that, in calculating Scottish Water’s income
for the purposes of producing a charge
determination, the water industry commission
takes into account only resources that are
reasonably available to Scottish Water.

Amendments 62 and 63 provide for departures
from charges schemes for higher or lower charges
than those that are specified in the relevant
scheme. They will give the commission scope to
consent to a higher charge when a customer
requires water that is treated to an enhanced
standard, which increases the cost to Scottish
Water. The amendments will ensure that the bill
does not prevent Scottish Water from working in
partnership with customers to meet requirements
that are beyond even the high standards that
apply across the board.

Amendment 22 will make a drafting refinement
to section 18.

I move amendment 22.

The Convener: Amendment 61 contains the
term “reasonably”. How will that be interpreted?
Why is reasonableness an issue?

Lewis Macdonald: The intention is that the
determination of charges should be based on the
resources that are actually available for the
purpose. We do not want to run a risk, although
we regard it as remote, so it is appropriate to
provide a legal safeguard. Without a test of
reasonableness, in theory, a customer might
challenge Scottish Water on the basis that it
owned property that it ought to sell and lease
back, because that way it would have a bit more
money from another source and could therefore
keep its charges down. We recognise that there
are things that it is reasonable for Scottish Water
do to on a long-term basis and we would expect
the interpretation of “reasonableness” to reflect
that.

The Convener: Thank you for that.

Amendment 22 agreed to.

Amendments 61, 23, 24, 62, 63 and 64 moved—
[Lewis Macdonald]—and agreed to.

Section 18, as amended, agreed to.

Schedule 3

Certain pre-existing agreements as to charges

The Convener: Group 6 is on charges and pre-
existing agreements. Amendment 65, in the name
of the minister, is grouped with amendment 66.

Lewis Macdonald: Amendments 65 and 66
refer to pre-existing agreements or “relevant
agreements”, as they are described in the bill—
special arrangements between Scottish Water and
a number of generally large commercial
customers, which reflect their use of water and
exist prior to the bill coming into force. The
amendments intend to make it clear that the
provision that allows those agreements to run their
course should apply not only to agreements
entered into by Scottish Water per se but to
agreements entered into by predecessor bodies,
whether the water authorities that existed
immediately before the creation of Scottish Water
or other water providers in the past that have
made agreements with customers. We wanted to
ensure that there was clarity that all the existing
agreements were protected in the same way,
regardless of which authority had entered into
them. That is the essence of the amendments.

I move amendment 65.

Amendment 65 agreed to.

Amendment 66 moved—[Lewis Macdonald]—
and agreed to.

Schedule 3, as amended, agreed to.
Section 19—Scottish Water’s functions: powers of the Scottish Ministers

Amendments 25 and 26 moved—[Lewis Macdonald]—and agreed to.

Section 19, as amended, agreed to.

After section 19

The Convener: Group 7 is on qualification of Scottish Water’s duties to provide services. Amendment 67, in the name of the minister, is in the group on its own.

Lewis Macdonald: Amendment 67 clarifies the relationship between Scottish Water’s duties under existing legislation and the duties placed on it under the bill. One of the strengths of the bill is that it clarifies the roles and responsibilities of key players in the industry. It provides for ministers to set down a clear policy framework detailing what we expect from Scottish Water when it is carrying out its core functions and how we wish different customer groups to contribute to the cost of that through charges. It gives the water industry commission the task of making the calculations required to translate that into a scheme of charges. That is set out in section 18, which amends and inserts new provisions into the Water Industry (Scotland) Act 2002.

Amendment 67 is designed to support that framework by ensuring that the strategic direction set by ministers is reflected in Scottish Water’s key statutory duties. It therefore ensures that the duties under the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980—to provide water and sewerage and to make connections to the public network—are to be exercised without prejudice to compliance with ministers’ policy requirements.

As members will know, Scottish Water faces competing demands for its services and amendment 67 makes it clear that the strategic direction for its activities should be set by ministers according to the framework that is laid out in the bill, not by Scottish Water or customers. Of course, the framework is intended not to be inflexible but to establish a system that ensures that ministers accountable to Parliament set the priorities and that financial priorities should reflect their strategic direction.

I move amendment 67.

Amendment 67 agreed to.

10:45

The Convener: Group 8 is on sewerage nuisance. Amendment 68, in the name of the minister, is grouped with amendments 69 and 73.

Lewis Macdonald: This group of amendments responds to points that committee members and other MSPs have raised. The amendments insert provisions enabling us to issue codes of practice on sewerage nuisance that local authorities will be required to enforce.

I know that the committee has discussed odour from sewage treatment works and other parts of the public sewerage system and that it has discussed two petitions on the matter and the draft code of practice that the Executive has published. The amendments seek to address the concern that the code of practice should be placed on a statutory footing.

Amendment 68 gives ministers the power to make an order containing a code of practice on sewerage nuisance, which will set out the best practicable means of assessing, controlling and minimising such nuisance and the circumstances in which compliance or non-compliance with the code would be assessed. Although the headline issue is odour from sewage treatment works, other sources of nuisance, such as insects, might arise from time to time. As a result, we have framed the powers and the definition of “sewerage nuisance” more widely to ensure that they cover more than odour. That said, the issue of odour is at the heart of the policy.

Once issued, a sewerage code would apply to Scottish Water in the exercise of its core functions with regard to sewerage and to any person acting on its behalf or under its authority, such as the operator of a sewage treatment works used by Scottish Water as the public sewerage provider. There is an express requirement on all those persons, including other operators, to comply with the code. Ministers will also be required to consult on the code and will, along with local authorities, be required to publicise it.

It might seem technical, but I should explain that subsection (9) of the new section that amendment 68 seeks to insert exempts from the requirements of a code the parts of the public sewerage system that are regulated by the Scottish Environment Protection Agency through the permit regime under the Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/323). I should point out that that provision refers only to a single, very large sewage works that is currently regulated under the PPC regime. The fact that those works will still be covered by that regime is an exception to the wider picture. Ministers will retain their existing statutory powers to direct SEPA to apply the sewerage code to the parts of the public sewerage system that it regulates. In other words, we will leave in place the PPC regime that will govern those particular works, but will have the power to direct SEPA to implement the code.

Amendment 69 sets out the monitoring and enforcement provisions for sewerage codes. It is
important that any code that is put on a statutory footing has force and power. Local authorities will be required to monitor compliance, to investigate complaints of sewerage nuisance and to serve an enforcement notice if they are satisfied that there is or is likely to be material non-compliance with the code. That enforcement notice can set out the steps that must be taken to secure compliance with the code and the timescales for taking those steps. Contravention of an enforcement notice will be an offence and councils will be given powers to pursue that, as well as powers to undertake work to secure compliance with an enforcement notice. If a council undertakes such work, it will be able to recover its costs, if required.

Finally, the amendments provide for parliamentary scrutiny of the code by requiring it to be made through an order that is subject to the negative procedure.

The package offers a coherent basis for constructive and considered action. We will work in partnership with Scottish Water and local councils to resolve issues when they arise. I urge members to support the amendments.

I move amendment 68.

The Convener: More than half the committee members want to say something on the group, which is not surprising, given that sewerage nuisance was one of the big issues at stage 1 and that we have received a lot of petitions on the issue from members of the public.

Karen Gillon (Clydesdale) (Lab): Amendments 68 and 69 are probably a significant step forward on an issue that the committee has been pursuing. I have a couple of practical questions. Subsection (4) of the new section that is proposed in amendment 68 states that the term “practicable” refers to, among other matters, “financial implications”. What does that mean? I assume that Scottish Water will not be allowed to use such implications as an excuse for not carrying out necessary works.

Subsection (4)(b) of that proposed new section states that the term “means” refers to

“the design, installation, maintenance and manner and periods of operation of plant and machinery”.

The minister will be aware that Scottish Water plans a number of new developments. I assume that Scottish Water will be expected to ensure that, when it builds new sewage works, it takes account as far as possible of smell nuisance.

Finally, what practical difference will amendments 68 and 69 make to the people who have petitioned us on the subject?

Lewis Macdonald: I think that “practicable”—

The Convener: Hang on, minister. I will let you back in when the other members who wish to speak have done so. I imagine that you will want to respond to all the questions and comments.

The next speaker will be Susan Deacon, who is not a committee member but has been with us on numerous occasions to give her constituents’ views on the issue.

Susan Deacon (Edinburgh East and Musselburgh) (Lab): When I arrived at the committee this morning, one of my colleagues greeted me with the comment, “If it’s Susan, it must be sewage.” I hope that the Executive’s amendments 68 and 69 on the subject will allow me to move on. I am pleased that the amendments have been produced in response to the committee’s concerns, as well as mine and those of other MSPs. However, I would like to clarify a number of aspects.

Subsection (1) of the new section that is proposed in amendment 68 uses the term “may”. The amendment will give ministers the power to introduce a code, but will the minister give a commitment that he intends to produce a code, subject, obviously, to the completion of the consultation process that is under way?

Subsection (3) of that proposed new section also uses the word “may” in relation to the provisions in the code. Will the minister clarify the use of the term “may”, because it seems that, given the rather broad nature of the provisions that are laid out in subsection (3), they would almost certainly be contained in any code, irrespective of the outcome of the consultation?

Subsections (3) and (5) of the proposed new section lay out to whom the code will apply. Will the minister confirm that the phrase “any other person” will include those whom Scottish Water contracts or subcontracts to operate waste water treatment works on its behalf, including those who are contracted under the terms of a private finance initiative contract?

Karen Gillon has asked the question that I had about financial provisions. In relation to subsection (9) of the new section, will the minister clarify which large sewage works he was referring to in the context of exemption?

I have a couple of questions about amendment 69. Should I ask them now?

The Convener: Yes, because amendment 69 is in the same group as amendment 68.

Susan Deacon: On local authority monitoring and enforcement, can the minister clarify how the provisions that amendment 69 contains will alter the existing powers and practices of local authorities as set out in the Environmental Protection Act 1990? For example, how will the enforcement procedure for issuing abatement notices be affected? How does he envisage that
the Executive will work with local authorities to ensure that monitoring and enforcement are effective? I accept that that goes beyond the scope of amendment 69.

Richard Lochhead (North East Scotland) (SNP): I am sure that many communities—not least the community in Aberdeen, which is the minister’s home city, where there is an on-going dispute about the Nigg plant at Torry—will welcome the minister’s amendments, especially amendment 68, which will ensure that the code is embedded in statute.

I have three quick questions. The Nigg plant experience has taught me that PFI arrangements mean that it is highly complex to identify exactly who is responsible for preventing sewerage nuisance. Amendment 68 says that the code will apply to Scottish Water and other appropriate persons. How easy will it be to identify who is responsible? I have sat around a table with the three organisations involved in running the Nigg plant and it has not been that easy to identify where responsibility lies.

Amendment 69 says that a contravention of the code will lead

“to a fine not exceeding £40,000.”

Where did that figure come from? Why has a figure of £40,000 been used rather than one of £100,000 or whatever? Has the minister considered placing an obligation on plants that contravene the code to pay compensation to the local communities that have suffered for a long time as a result of their failures?

Mr Mark Ruskell (Mid Scotland and Fife) (Green): I welcome the minister’s approach to sewerage nuisance, which is an issue that has concerned many members and communities for a long time. If the minister had not inserted a code of practice in the bill, we might have had to wait a long time for another legislative vehicle to come along that would allow us to implement a statutory code.

I do not have much to add to that. I had some requests for clarifications that were similar to those that Karen Gillon made. I would like to hear what the minister has to say about them.

Maureen Macmillan (Highlands and Islands) (Lab): I will follow up Karen Gillon’s remarks. Subsection (4)(a)(ii) of the new section that amendment 68 seeks to insert refers to

“the current state of technical knowledge”.

Can the minister assure us that there will be active research into what is available so that we do not just rely on what has always been used? Not just in Scotland, but in other countries quite a lot of work is probably being done on dealing with odour from sewage works and other places. I am a great listener to the radio as I drive up the road and I have become a dustbin of useless information. I heard a discussion about the use of chemical sprays for piggeries; I thought that the same technique could easily be transferred to sewage works. I seek assurances that every avenue of technical knowledge will be investigated.

The Convener: Have you finished?

Maureen Macmillan: That is it.

Nora Radcliffe (Gordon) (LD): I will be even briefer. I just want to put on record how welcome it is that odour nuisance is being seriously tackled.

The Convener: The whole committee shares that sentiment. The reason why we have flown through our consideration of the amendments today is that, in effect, the minister has done what we wanted him to do.

Members have asked several technical questions and requested clarification on a number of points. I invite the minister to work his way through them. Members might have brief supplemnetaries.

Lewis Macdonald: I will take the questions broadly in order, although one or two were similar, so I might jump back and forth.

Karen Gillon asked about the term “practicable”. In a sense, there is a parallel with the discussion that we had a few minutes ago about reasonable charge setting. Practicable means what can actually be done. No matter how much power is devolved to the Scottish Parliament, we cannot stop sewage producing an odour. The question is how we manage and control the system in the best possible way.

We will ensure that we have explored every technical avenue, as Maureen Macmillan asked. The word “practicable” is meant to reflect that we will use every means that can be deployed to manage the problem. Clearly, we also want to learn lessons from elsewhere about how to do that.

Karen Gillon also asked about means. Again, we expect new plant to be built in the light of the introduction of the code. The design of the plant and machinery should reflect the requirements of the code. The code will also apply to existing plant. We expect local authorities to work with Scottish Water and others to ensure that existing plant is brought up to the standards set in the code as quickly as practicable.

Susan Deacon, who has campaigned on the issue for some time, asked a pertinent question about whether we will introduce a code. The
The answer is yes. We intend that the code should be in force by April 2006, which will allow time for the consultation process to take place. However, if the committee agrees to the amendments, Scottish Water and others will be aware as of today that the code is coming into force and we will expect them to take that into account in any of their decisions.

The code will apply to subcontractors and other contractors whether they are at Nigg bay in Aberdeen or elsewhere. I do not think that the local authorities will have any difficulty in establishing on whom to serve a notice should that be required. The legal position will be very clear. Scottish Water has an overall responsibility and other operators will be acting on its behalf.

Daldowie is the plant that currently operates under the PPC regime. That will continue. Daldowie is largely a sludge treatment plant, which is why it is regulated slightly differently.

The amendments will extend the powers of local authority enforcement officers to cover sewerage nuisance. Those powers do not exist at the moment, but, as subsection (8) of the new section proposed by amendment 69 makes clear, the new powers will operate

"without prejudice to section 82 of the Environmental Protection Act 1990."

In other words, the powers of local authorities to deal with nuisance continue, but they are reinforced and extended.

The fine levels are not arbitrary; they are consistent with the existing statutory nuisance regime. They are therefore parallel to other such fines.

I repeat that the new sections will operate without prejudice to section 82 of the Environmental Protection Act 1990. Subsection (7) of the new section proposed by amendment 69 dis-applies certain provisions and replaces them with the new enforcement powers. My official, Barry McCaffrey, drew that to my attention in case I misled the committee.

I think that that answers all the technical questions. On community compensation, the power to seek compensation currently exists and will not be changed. Of course, the aim is to minimise nuisance. As I said at the outset, there is nothing that any Government can do to stop sewage producing an odour, but the aim is to create a regulatory regime that minimises the effects as far as is practically possible.

Amendment 68 agreed to.

Amendment 69 moved—[Lewis Macdonald]—and agreed to.

Section 20—Meaning of “eligible premises”

Amendments 27 and 28 moved—[Lewis Macdonald]—and agreed to.

Section 20, as amended, agreed to.

Sections 21 to 23 agreed to.

Schedule 4 agreed to.

Sections 24 and 25 agreed to.

Schedule 5

Amendments to enactments

Amendments 29 to 33, 70, 34 and 35 moved—[Lewis Macdonald]—and agreed to.

Schedule 5, as amended, agreed to.

Section 26 agreed to.

Section 27—Orders and regulations

Amendments 71 to 73 and 36 moved—[Lewis Macdonald]—and agreed to.

Section 27, as amended, agreed to.

Sections 28 to 30 agreed to.

Long title agreed to.

The Convener: I am delighted—as I am sure members are—that that completes stage 2 consideration of the bill, which will now be reprinted as amended. The new version should be available tomorrow—which is impressively swift—from the document supply centre. If any member wishes to lodge a stage 3 amendment, they may do so with the committee clerks. There will be a notice to that effect in tomorrow’s Business Bulletin. The deadline for lodging amendments will be announced as soon as the exact timetable for stage 3 is known.

I thank the minister and all his officials for helping the committee through today’s proceedings and for their previous help. I also thank colleagues. A lot of detailed scrutiny took place before stage 2—people who read the Official Report should know that a lot of work was done before today, which let us fly through the agenda item. I hope that those who have submitted petitions will read the Official Report of today’s meeting and will be happy with the position that we have reached.

There will be a short suspension to allow the minister and his officials to leave.

11:09

Meeting suspended.
CONTENTS

Part 1

Water Industry Commission and Customer Panels

1 Water Industry Commission for Scotland
2 Dissolution of office of Commissioner
3A Customer Panels

Part 2

Provision of Water and Sewerage Services

Offences

4 Public water supply system: offences
5 Public sewerage system: offences

Licensing of services provided to eligible premises

6 Licence authorisation
7 Granting of licence
8 Compliance with licences
9 Commission’s power to obtain information and charge fees
10 Participation of licensed providers
11 Licences and compliance: further provision

Scottish Water: water and sewerage services undertaking

12 Water and sewerage services undertaking
12A Financing, borrowing and guarantees
13 Transfer of staff etc. to the undertaking

Scottish Water: services via licensed providers

14 Scottish Water to provide services
15 Continuation of water services
16 Discontinuation of water services
17 Disconnections code
17A Continuation and discontinuation of sewerage services

Scottish Water: charges and functions

18 Scottish Water’s charges for water and sewerage services
19 Scottish Water’s functions: powers of the Scottish Ministers
3 Determinations relating to provision of services
19A Qualification of duty to provide services

*Sewerage nuisance: code of practice*

19B Sewerage nuisance: code of practice
19C Monitoring and enforcement

*Definitions for Part*

20 Meaning of “eligible premises”
21 Meaning of “public water supply system”
22 Meaning of “public sewerage system”

**PART 3**

COAL MINE WATER POLLUTION

23 Control of water from coal mines

**PART 4**

MISCELLANEOUS AND GENERAL

*Miscellaneous*

24 Offences by bodies corporate and partnerships
25 Amendments to enactments
26 Ancillary provision

*General*

27 Orders and regulations
28 Interpretation
29 Crown application
30 Short title and commencement

Schedule 1—Water Industry Commission for Scotland
Schedule 2—Licences and compliance: further provision
Schedule 3—Certain pre-existing agreements as to charges
Schedule 4—Powers of entry under the Coal Industry Act 1994
Schedule 5—Amendments to enactments
An Act of the Scottish Parliament to establish the Water Industry Commission for Scotland; to create offences in relation to the unauthorised use of the public water and sewerage systems; to provide for licensing the provision of certain water and sewerage services; to amend the system for fixing charges for services provided by Scottish Water; to make provision as to Scottish Water’s functions; to make provision in relation to coal mine water pollution; and for connected purposes.

PART 1

WATER INDUSTRY COMMISSION AND CUSTOMER PANELS

1 Water Industry Commission for Scotland

(1) For section 1 (Water Industry Commissioner for Scotland) of the 2002 Act there is substituted—

“1 Water Industry Commission for Scotland

(1) There is established a body to be known as the Water Industry Commission for Scotland (referred to in this Act as “the Commission”).

(2) The Commission has the general function of promoting the interests of persons (taken as a whole) whose premises—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both, or

(b) might reasonably become connected to either or both of those systems, relating to the provision to them of water and sewerage services.

(3) The Scottish Ministers may, after consulting the Commission, give the Commission directions of a general or specific character as to the financial management or administration of the Commission; and the Commission must comply with any such directions.

(4) Schedule A1 makes further provision about the Commission.”.
(2) In section 4 (power of the Commissioner to require information) of that Act, for subsection (2) there is substituted—

“(2) Subsection (1) does not authorise the Commission to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

(3) Where Scottish Water considers that it is entitled to withhold information from the Commission—

(a) because it is not reasonably sought, or

(b) by virtue of subsection (2),

it must intimate that fact to the Commission in writing.”.

(3) In section 5 (annual reports by the Commissioner etc.) of that Act, at the end there is added—

“(4) The Scottish Ministers must lay before the Parliament a copy of each report submitted to them under subsection (1)(a).”.

(4) Schedule 1 inserts schedule A1 into that Act.

2 Dissolution of office of Commissioner

The office of Water Industry Commissioner for Scotland is dissolved on such date as the Scottish Ministers may by order appoint.

3A Customer Panels

(1) In section 2 (Water Customer Consultation Panels) of the 2002 Act, for subsections (3) to (5) there is substituted—

“(3) Each Customer Panel is, in relation to the provision of services by Scottish Water in the exercise of its core functions, to have the general function of representing the views and interests of persons whose premises are in the Panel’s area and—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both, or

(b) might reasonably become connected to either or both of those systems.

(4) A Customer Panel—

(a) must publish reports on any matter it considers relevant to the interests of those persons in relation to such provision,

(b) may make recommendations to the Commission as to the promotion of the interests of those persons in relation to such provision, either generally or in relation to any specific matter,

(c) may make recommendations, on any matter it considers relevant to the interests of those persons to—

(i) the Scottish Ministers,

(ii) the Drinking Water Quality Regulator for Scotland, and

(iii) the Scottish Environment Protection Agency,
Part 1—Water Industry Commission and Customer Panels

in connection with such of their functions as are exercisable in relation to such provision, and

(d) may make recommendations to Scottish Water on any matter it considers relevant to the interests of those persons in relation to such provision.

5 (5) Scottish Water must have regard to—

(a) any representations made to it by a Customer Panel, and
(b) any recommendations made to it under subsection (4).

(5A) Any other persons to whom—

(a) any representations are made by a Customer Panel, or
(b) any recommendations are made under subsection (4),

must, in exercising functions in relation to Scottish Water, have regard to the representations or (as the case may be) recommendations.

(5B) A Customer Panel—

(a) must publish a summary of any representations it makes under subsection (3) and of any recommendations it makes under subsection (4), and
(b) may do so by including the summary in a report.

(5C) Any persons to whom recommendations are made under subsection (4) must, within 6 months of receipt, publish a summary of their responses to the recommendations.

(5D) Two or more Customer Panels may exercise their functions under subsection (4) and (5B) jointly.”.

(2) In section 3 (functions of the Commissioner) of that Act, subsections (1) to (5) are repealed.

(3) After section 6 (funding of the Commissioner) of that Act there is added—

“6A Convener of Customer Panels to investigate complaints

(1) The Convener of the Water Customer Consultation Panels (referred to in this Part as the “Convener”) must investigate any complaint made to the Convener, a Customer Panel or the Commission as respects any of Scottish Water’s core functions by any person whose premises—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both, or
(b) have been, or might reasonably become, connected to either or both of those systems.

(2) Where any such complaint is made to a Customer Panel or the Commission, the Panel or (as the case may be) the Commission must refer the complaint to the Convener.

(3) The Convener need not investigate a complaint under subsection (1) if—

(a) the complainer has not pursued the matter with Scottish Water, or
(b) it appears to the Convener that the complaint is vexatious or frivolous.
(4) The Convener may, on behalf of the complainer in a complaint investigated under subsection (1), make representations to Scottish Water about any matter—

(a) to which the complaint relates, or

(b) which appears to the Convener to be relevant to the subject matter of the complaint.

(5) Where the Convener investigates a complaint referred under subsection (2), the Convener must send to the Panel or (as the case may be) the Commission a report of the investigation.

(6) Where the Convener decides not to investigate such a complaint, the Convener must send to the Panel or (as the case may be) the Commission a statement of the reasons for not investigating the complaint.

(7) Scottish Water must, on being requested to do so by the Convener, provide the Convener with such information held by it as the Convener may reasonably seek in the exercise of the Convener’s functions relating to complaints under subsection (1).

(8) Where Scottish Water and the Convener cannot agree as to whether information is sought reasonably, either of them may refer the matter to the Scottish Ministers, whose decision is final.

6B Annual reports and information regarding Customer Panels

(1) The Convener must—

(a) as soon as practicable after the end of each financial year, submit to the Scottish Ministers, and publish, a report on the exercise of—

(i) the Customer Panels’ functions during that year, and

(ii) the Convener’s functions under section 6A, and

(b) provide the Scottish Ministers with such information regarding the exercise of those functions as they may require.

(2) The Scottish Ministers must lay before the Parliament a copy of each report submitted to them under subsection (1)(a).

6C Co-operation between the Commission and Customer Panels

(1) The Commission and the Convener (as appropriate, representing the Customer Panels as a whole) must together make arrangements with a view to securing—

(a) co-operation and the exchange of information—

(i) between the Commission and Customer Panels,

(ii) between the Commission and the Convener, and

(b) the consistent treatment of matters which affect—

(i) both the Commission and Customer Panels,

(ii) both the Commission and the Convener.

(2) The Commission and the Convener—

(a) must set out the arrangements in a memorandum,

(b) must keep the arrangements under review, and
PART 2

PROVISION OF WATER AND SEWERAGE SERVICES

Offences

4 Public water supply system: offences

(1) Any person who introduces water into the public water supply system is guilty of an offence.

(2) Any person 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 who makes arrangements for or in relation to the supply of water to the premises of another person through the public water supply system is guilty of an offence.

(4) Subsections (1) to (3) do not apply to—

(a) Scottish Water; or
(b) another person if (and to the extent that) the person is acting on behalf of Scottish Water or under its authority.

(5) Subsections (2) and (3) do not apply to a person if (and to the extent that) the person is supplying water with the help of services provided by Scottish Water as described in section 30 of the 2002 Act.

(6) Subsection (3) does not apply to a water services provider where the provider is acting as authorised by the water services licence held by the provider.

(7) The Scottish Ministers may by regulations—

(a) specify other 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 such other person or to such category of person; and
(ii) to such extent and subject to such conditions,

as may be specified in the regulations.

(8) The Scottish Ministers are to consult—

(a) Scottish Water;
(b) the Commission; and
(c) such other persons as they consider appropriate,

on any regulations they propose to make under subsection (7).

(8A) It is competent to make regulations under subsection (7) only if the effect of the regulations would not be prejudicial to the exercise of Scottish Water’s core functions as respects the supply of water.

(9) 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
Water Services etc. (Scotland) Bill
Part 2—Provision of water and sewerage services

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both.

(10) 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.

(11) Any contract or other agreement which involves a contravention of subsection (1), (2) or (3) is unenforceable.

5 Public sewerage system: offences

(1) Any person who draws sewage from the public sewerage system is guilty of an offence.

(2) Any person who uses the public sewerage system for the disposal of sewage from the premises of another person is guilty of an offence.

(3) Any person 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 is guilty of an offence.

(4) Subsections (1) to (3) do not apply to—
(a) Scottish Water; or
(b) another person if (and to the extent that) the person is acting on behalf of Scottish Water or under its authority.

(5) Subsections (2) and (3) do not apply to a person if (and to the extent that) the person is providing sewerage, or disposing of sewage, with the help of services provided by Scottish Water as described in section 30 of the 2002 Act.

(6) Subsection (3) does not apply to a sewerage services provider where the provider is acting as authorised by the sewerage services licence held by the provider.

(7) The Scottish Ministers may by regulations—
(a) specify other 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 such other person or to such category of person; and
(ii) to such extent and subject to such conditions,
as may be specified in the regulations.

(8) The Scottish Ministers are to consult—
(a) Scottish Water;
(b) the Commission; and
(c) such other persons as they consider appropriate,
on any regulations they propose to make under subsection (7).

(8A) It is competent to make regulations under subsection (7) only if the effect of the regulations would not be prejudicial to the exercise of Scottish Water’s core functions as respects the provision of sewerage and disposal of sewage.

(9) 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.

(10) 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.

(11) Any contract or other agreement which involves a contravention of subsection (1), (2) or (3) is unenforceable.

(12) In this Part, “sewage” is to be construed in accordance with section 59(1) (interpretation) of the 1968 Act.

**License authorisation**

(1) The Commission may, subject to section 7 and paragraphs 1 and 2 of schedule 2, grant a licence authorising a person—

(a) to—

(i) make arrangements with the occupier of any eligible premises for or in relation to the supply of water to the premises through the public water supply system; and

(ii) fix, demand and recover charges for or in relation to the supply of water to any premises in respect of which the person has made such arrangements; and

(b) 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 paragraph (a).

(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 Commission may, subject to section 7 and paragraphs 1 and 2 of schedule 2, grant a licence authorising a person—

(a) to—

(i) make arrangements with the occupier of any eligible premises for or in relation to 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 or in relation to the provision of sewerage to, and disposal of sewage from, any premises in respect of which the person has made such arrangements; and

(b) 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 paragraph (a).

(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”.

**Licensing of services provided to eligible premises**
(5) The references in subsections (1) and (3) to the occupier of premises are, if the premises are unoccupied, to be construed as references to the owner of the premises.

7

Granting of licence

(1) The Commission 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 Commission 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 Commission may issue guidance (either generally or in a particular case or category 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 Commission 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 Commission 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 Commission is to—

- (a) monitor compliance with the terms and conditions of water services licences and sewerage services licences; and
- (b) take such steps as it considers are necessary for the purposes of ensuring that the terms and conditions of such licences are complied with.

(2) The Commission 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 Commission may issue guidance (either generally or in a particular case or category 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 Commission 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 Commission’s power to obtain information and charge fees

(1) Water services providers and sewerage services providers must provide the Commission with such information (including information in the form of a document) as it reasonably requires in the exercise of its functions.

(2) Subsection (1) does not authorise the Commission 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 Commission 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 Commission 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 Participation of licensed providers

(1) The Commission is (so far as is consistent with the exercise of its function under section 1(2) of the 2002 Act) to exercise its functions relating to water services and sewerage services licences for the purposes of securing the participation—
   (a) in an orderly manner; and
   (b) in a manner that is not detrimental to the exercise of Scottish Water’s core functions,

of water services and sewerage services providers in the provision of water and sewerage services.

(2) The Commission may give directions of a specific or general character to—
   (a) Scottish Water; or
   (b) any—
      (i) water services or sewerage services provider; or
      (ii) person in whose favour it intends to grant a water services or sewerage services licence,

as to steps to be taken for the purposes mentioned in subsection (1).

(3) Directions under subsection (2) may, in particular, relate to the provision or exchange of information about customers of water services or sewerage service providers.

(4) Before giving directions under subsection (2), the Commission must consult any person to whom the directions are to be given.

(5) Any person to whom directions are given under subsection (2) must comply with the directions.
11 Licences and compliance: further provision
Schedule 2 makes further provision regarding licences and compliance with licences.

Scottish Water: water and sewerage services undertaking

12 Water and sewerage services undertaking

(1) Scottish Water must, in accordance with any requirements made under subsection (1A), secure the establishment of a business undertaking for the purposes of this section.

(1A) The Scottish Ministers may require Scottish Water to—

(a) take such steps for the purposes of or in connection with—

(i) the establishment and development of the undertaking; and

(ii) Scottish Water’s interest in the undertaking,

as the Scottish Ministers may specify; and

(b) take the steps, or any particular steps, by such date as they may specify.

(1B) It is, subject to the approval of the Scottish Ministers, for Scottish Water to determine whether the undertaking is—

(a) to be—

(i) a subsidiary (to be construed in accordance with section 736 of the Companies Act 1985 (c.6)) of Scottish Water;

(ii) a company (within the meaning of that Act) formed by Scottish Water (on its own or with others); or

(iii) a partnership; or

(b) to be established through such other arrangements as Scottish Water considers it appropriate to make.

(2) The functions of the undertaking are—

(a) to become a water services provider and a sewerage services provider; and

(b) thereafter, to perform the activities authorised by the water services and sewerage services licences held by it.

(3) Accordingly, the undertaking must (as soon as reasonably practicable after it is established) apply for a water services licence and a sewerage services licence.

(3A) The Scottish Ministers may by order provide that paragraphs 1 and 2 of schedule 2 have effect—

(a) as regards an initial application by the undertaking for a licence; and

(b) following such an application, as regards the granting of the licence and the incorporation in it of conditions,

with or subject to such modifications as the order may specify.

(4) The undertaking may engage in any activity which it considers is not inconsistent with the performance of the activities authorised by the water services and sewerage services licences held by it.
(5) After the undertaking is established, Scottish Water must not treat it any more or less favourably than it treats—

(a) in relation to services as respects the supply of water, other water services providers; and

(b) in relation to services as respects the provision of sewerage and the disposal of sewage, other sewerage services providers.

(6) Any reference in any enactment to Scottish Water is to be construed as not including the undertaking.

12A Financing, borrowing and guarantees

(1) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may, with the consent of Scottish Water, make grants to the business undertaking established under section 12(1) of such amounts as the Scottish Ministers may determine.

(2) In such circumstances as the Scottish Ministers may by order specify, the undertaking—

(a) may, with the consent of Scottish Water, borrow from the Scottish Ministers (and they may lend to it) sums of such amounts as the Scottish Ministers may determine;

(b) may not (except as described in subsection (4)(b)) borrow money from any other person.

(3) In any financial year, the net amount of sums borrowed under subsection (2)(a) must not exceed the amount specified for that year for the purposes of this subsection in a Budget Act.

(4) In subsection (3), “net amount” means the amount of sums borrowed in the financial year less—

(a) any repayments made during that year, otherwise than by way of interest, in respect of sums borrowed in that or any other year; and

(b) any sums borrowed, with the consent of Scottish Water, by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure over sums otherwise available to meet that expenditure.

(5) Any loans made under subsection (2)(a) are to be repaid to the Scottish Ministers at such times and by such methods, and interest on the loans is to be paid to them at such times and at such rates, as they may from time to time specify.

(6) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may guarantee, in such manner as they consider appropriate, the discharge of any financial obligation in connection with any sums borrowed as described in subsection (4)(b).

(7) Immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before the Parliament.

(8) Where any sums are paid out in fulfilment of a guarantee under subsection (6), the undertaking must make to the Scottish Ministers, at such times and in such manner as they may from time to time specify—

(a) payments of such amounts as they may so specify in or towards repayment of those sums; and
(b) payments of interest, at such rate as they may so specify, on the amount outstanding for the time being in respect of those sums.

(9) Any—
(a) grants under subsection (1) may be made;
(b) loans under subsection (2)(a) may be made; and
(c) guarantees under subsection (6) may be given,
subject to such conditions as the Scottish Ministers consider it appropriate to impose.

13 Transfer of staff etc. to the undertaking

(1) Scottish Water must, following a requirement made by the Scottish Ministers to do so, transfer such of its staff to the employment of the business undertaking established under section 12(1) as are necessary for the purposes of or in connection with the matters mentioned in subsection (7).

(2) The contract of employment of a person transferred by virtue of subsection (1)—
(a) is not terminated by the transfer; and
(b) has effect from the date of transfer as if originally made between the person and the undertaking.

(3) Without prejudice to subsection (2), where a person is transferred to the employment of the undertaking by virtue of subsection (1)—
(a) all the rights, powers, duties and liabilities of Scottish Water under or in connection with the person’s contract of employment are transferred to the undertaking on the date of transfer; and
(b) anything done before that date by or in relation to Scottish Water in respect of the person or that contract is to be treated from that date as having been done by or in relation to the undertaking.

(4) Subsections (1) to (3) do not affect any right of any person to terminate the person’s contract of employment if the terms and conditions of employment are changed substantially to the detriment of the person; but such a change is not to be taken to have occurred by reason only that the identity of the person’s employer changes by virtue of those subsections.

(5) Scottish Water must, following a requirement made by the Scottish Ministers to do so, transfer such of its property (including rights) and liabilities to the undertaking as are necessary for the purposes of or in connection with the matters mentioned in subsection (7).

(6) A transfer by virtue of subsection (5)—
(a) has effect in relation to any property and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or prohibit the transfer of the property or liabilities; and
(b) has the effect of vesting in the undertaking any property or liabilities to which it applies.

(7) For the purpose of subsections (1) and (5), those matters are—
(a) applications by the undertaking for water services and sewerage services licences; and
(b) the performance by the undertaking of its activities.

Scottish Water: services via licensed providers

14 Scottish Water to provide services

(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, so far as is consistent with the exercise of its core functions as respects the supply of water, 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 15(1)); or

(ii) the supply is discontinued under section 16; 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, so far as is consistent with the exercise of its core functions as respects the provision of sewerage and disposal of sewage, 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)—

(a) ceases if the provision or (as the case may be) disposal is discontinued under section 17A; and

(b) may be superseded by a new duty under subsection (5).

(7) Where no agreement as is mentioned in subsection (2) or (5) is reached, the Commission, 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.

15 Continuation of water services

(1) Where—

(a) water is supplied to premises by Scottish Water under subsection (2) of section 14; and
(b) the arrangements for the supply of water (made between the occupier of the premises and the water services provider who made the related request under subsection (1) of that section in respect of the premises) have come to an end—

(i) by reason of 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 16),

the duty of Scottish Water under subsection (2) of section 14 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 the continuation under subsection (1) of a duty to supply water ceases if—

(a) it is superseded by a new duty under subsection (2) of section 14; or

(b) the occupier of the premises notifies Scottish Water that the supply of water is not required.

(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 14 of the Water Services etc. (Scotland) Act 2004 (asp 00) but—

(a) the arrangements for the supply (made between the occupier of the premises and the water services provider who made the related 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 16(5) 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 Commission for Scotland to review that decision.

(2C) In a review under subsection (2B), the Commission may, having regard to any representations made to it 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 Commission in the review shall be final.”.
16 Discontinuation of water services

(1) A water services provider may request Scottish Water to discontinue a supply of water to premises made under subsection (2) of section 14.

(2) At least 14 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 Commission.

(3) The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.

(4) An occupier of premises who has been served with a notice under subsection (2) may, within 10 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.

(5) Where a request is made under subsection (1), Scottish Water is to discontinue the supply of water made under section 14(2) to the premises if the conditions mentioned in subsection (6) are satisfied.

(6) The conditions are that—
   (a) the provisions of the code made under section 17 are complied with; and
   (b) any supply of water to—
      (i) the premises for domestic purposes; or
      (ii) any other premises for any purpose,
   is not adversely affected by the discontinuation.

(7) In subsection (6)(b)(i), 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.

(8) Any reasonable costs incurred by Scottish Water in effecting a discontinuation under this section are to be met by the water services provider who made the request under subsection (1) for the discontinuation.

(9) If there is a dispute between a water services provider and Scottish Water as to reasonable costs incurred in effecting a discontinuation under this section, Scottish Water is to refer the matter to the Commission for determination; and the determination of the Commission in the matter is final.

17 Disconnections code

(1) For the purposes of subsection (6)(a) of section 16, the Commission must make a code (a “disconnections code”) which contains further provision about discontinuations of supplies of water to premises under that section.

(2) In particular, a disconnections code may specify—
   (a) circumstances in which requests under subsection (1) of section 16 may (or may not) be made; and
(b) conditions (in addition to the condition mentioned in subsection (6)(b) of that section) which are to be satisfied before Scottish Water is required under subsection (5) of that section to discontinue a supply of water to premises.

(3) A disconnections code may—

(a) make different provision for different cases or types of case;

(b) revoke or amend a previous code.

(4) In making a disconnections code, the Commission must consult—

(a) Scottish Water;

(b) every water services provider and sewerage services provider;

(c) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole);

(d) the Drinking Water Quality Regulator for Scotland; and

(e) such other persons as the Commission considers appropriate.

(5) When a disconnections code is made, the Commission must—

(a) make arrangements for allowing any person to obtain a copy of the code on payment of such reasonable fee (if any) as the Commission may determine; and

(b) publicise those arrangements and publish the code.

17A Continuation and discontinuation of sewerage services

(1) Where sewerage is provided to, or sewage is disposed of from, premises by Scottish Water under subsection (5) of section 14, Scottish Water is to continue providing sewerage to, 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 related request under subsection (4) of that section in respect of the premises) have come to an end.

(2) Subsection (1) does not apply in relation to any trade effluent services.

(3) Where—

(a) trade effluent services are provided to premises by Scottish Water under subsection (5) of section 14; and

(b) the arrangements for the provision of the services (made between the occupier of the premises and the sewerage services provider who made the related request under subsection (4) of that section in respect of the premises) have come to an end—

(i) by reason of the revocation or suspension of the licence held by the provider; or

(ii) for any other reason (except where the services are discontinued under subsection (10)),

the duty of Scottish Water under subsection (5) of section 14 to provide trade effluent services to the premises continues for the period mentioned in subsection (4).

(4) The period is 2 months, or such shorter period as Scottish Water with the Commission’s consent determines, from the date on which the arrangements mentioned in subsection (3)(b) came to an end.
Part 2—Provision of water and sewerage services

(5) But the continuation under subsection (3) of a duty to provide trade effluent services ceases if—
   (a) it is superseded by a new duty under subsection (5) of section 14; or
   (b) the occupier of the premises notifies Scottish Water that the trade effluent services are not required.

(6) A sewerage services provider may request Scottish Water to discontinue any trade effluent services provided to premises under subsection (5) of section 14.

(7) At least 14 days before making a request under subsection (6), 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 Commission.

(8) The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.

(9) An occupier of premises who has been served with a notice under subsection (7) may, within 10 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.

(10) Where a request is made under subsection (6), Scottish Water is to discontinue the trade effluent services provided under section 14(5) to the premises if the conditions mentioned in subsection (11) are satisfied.

(11) The conditions are that—
   (a) any provision of sewerage to, or disposal of sewage from—
      (i) the premises for a purpose otherwise than in respect of trade effluent; or
      (ii) any other premises for any purpose,
      is not adversely affected by the discontinuation; and
   (b) there is no likely risk to public health arising in consequence of the discontinuation.

(12) Any reasonable costs incurred by Scottish Water in effecting a discontinuation under this section are to be met by the sewerage services provider who made the request under subsection (6) for the discontinuation.

(13) If there is a dispute between a sewerage services provider and Scottish Water as to reasonable costs incurred in effecting a discontinuation under this section, Scottish Water is to refer the matter to the Commission for determination; and the determination of the Commission in the matter is final.

(14) This section is without prejudice to any provision in Part II of the 1968 Act relating to trade effluent services.

(15) In this section, “trade effluent services” means the provision of sewerage, or disposal of sewage, in respect of trade effluent.

(16) In subsection (15), “trade effluent” is to be construed in accordance with section 59(1) (interpretation) of the 1968 Act.
Scottish Water: charges and functions

18 Scottish Water’s charges for water and sewerage services

(1) For section 29 (charges for goods and services) of the 2002 Act there is substituted—

“29 Charges for goods and services

(1) Scottish Water may—

(a) demand and recover charges for any services provided by it in the exercise of its core functions, and

(b) fix, demand and recover charges for any goods supplied or services provided in exercise of its other functions.

(2) Scottish Water is to exercise the power conferred by subsection (1)(a) in accordance with—

(a) a charges scheme, or

(b) a departure from a charges scheme approved under section 29E.

(3) The power conferred by subsection (1)(b) is exercisable by or in accordance with an agreement with the person to be charged.

(4) Subsections (1) to (3) are subject to sections 9A and 47 of the 1980 Act (which provide for no charge for water in certain circumstances).

29A Charges schemes

(1) Scottish Water must make a scheme (referred to in this Act as a “charges scheme”) which fixes the charges to be paid for services provided by Scottish Water in the exercise of its core functions.

(2) A charges scheme must be made by reference to a determination made under section 29B.

(3) In particular, the scheme must not fix in any case a charge exceeding any maximum charge applying to the case by virtue of the determination.

(4) A charges scheme may make provision with respect to the times and methods of payment of the charges fixed by the scheme.

(5) The Scottish Ministers and the Commission must provide Scottish Water with such information as it reasonably requires for the purposes of making a charges scheme.

(6) Scottish Water must send a charges scheme to the Commission for approval by such date as the Scottish Ministers may direct.

(7) The Commission may approve a charges scheme with or without modifications.

(8) If the Commission approves a charges scheme with modifications, it must give its reasons for doing so.

(9) When a charges scheme is approved by the Commission, Scottish Water must—

(a) make arrangements for allowing any person to—

(i) inspect the scheme at any reasonable time,
(ii) obtain a copy of the scheme or part of it on payment of such reasonable fee (if any) as Scottish Water may determine, and

(b) publicise those arrangements and publish a summary of the scheme.

(10) Following approval of a charges scheme by the Commission, the scheme comes into effect on such date as is specified in the scheme.

29B Determination of maximum charges

(1) The Commission must—

(a) determine in writing maximum amounts of charges by reference to which a charges scheme is to be made, and

(b) send the determination to Scottish Water by such time as the Scottish Ministers may specify.

(2) Maximum amounts determined under subsection (1)(a) apply in relation to such period as the Scottish Ministers may specify.

(3) A determination made under subsection (1)(a) may make different provision for different cases or categories of case.

(4) Before making a determination under subsection (1)(a), the Commission—

(a) must send a draft determination to—

(i) the Scottish Ministers,

(ii) Scottish Water, and

(iii) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole),

(b) must—

(i) publish the draft determination, and

(ii) invite (by way of advertisement or otherwise) representations as regards the draft determination by such time as the Commission may specify, and

(c) must have regard to any representations made to the Commission by virtue of paragraph (a) or (b).

(5) The Scottish Ministers and Scottish Water must provide the Commission with such information as it reasonably requires for the purposes of making a determination under subsection (1)(a).

29C Exercise of functions regarding charges

(1) Scottish Water must exercise its functions under sections 29A and 29F for the purposes of ensuring that subsections (3) and (4) are complied with.

(2) The Commission must—

(a) exercise its functions under sections 29A, 29B and 29F for the purposes of ensuring that subsections (3) and (4) are complied with,

(b) exercise its functions under section 29E for the purposes of ensuring that subsection (4) is complied with, and

(c) in exercising its functions under those sections, have regard to—
(i) any guidance issued to Scottish Water by the Scottish Ministers, and

(ii) any directions given to Scottish Water under section 44 or 56, so far as relevant in relation to charges schemes.

(3) This subsection is complied with if (so far as is consistent with compliance with subsection (4)) a charges scheme gives effect to any statement issued under section 29D.

(4) This subsection is complied with if (so far as is consistent with compliance with section 41(1)) Scottish Water’s receipts from the aggregate of—

(a) its income from charges for services provided in the exercise of its core functions, and

(b) the amount of—

(i) any grants paid to it under subsection (1) of section 42,

(ii) money it may borrow under subsection (3) of that section, and

(iii) any other resources reasonably available to it, for the purposes of the exercise of those functions, is not less than sufficient to meet the expenditure required for the effective exercise of those functions.

29D Statements regarding charges

(1) The Scottish Ministers must—

(a) in respect of a period specified under section 29B(2), and

(b) by reference to such economic or other factors as they consider relevant, issue to Scottish Water and the Commission a statement of policy regarding charges under a charges scheme.

(2) A statement under subsection (1) is to include provision with respect to harmonisation of charges (that is to say, provision with a view to ensuring that a charges scheme does not fix different charges for similar services provided to persons of a similar category).

(3) A statement under subsection (1) may (so far as is consistent with the provision described in subsection (2)) include provision with respect to—

(a) the funding of particular services by charges for services as a whole,

(b) the proportion of the amount of income requiring to be raised by charges fixed by a charges scheme to be contributed by each category of person to whom Scottish Water provides services,

(c) the fixing of levels of charges by reference to—

(i) different categories of person to whom Scottish Water provides services, or

(ii) liability for council tax under Part II (Council tax: Scotland) of the Local Government Finance Act 1992 (c.14), and

(d) such other matters as the Scottish Ministers think fit.
(3A) In preparing a statement under subsection (1), the Scottish Ministers must have regard to Scottish Water’s duty under section 51(1).

(4) Before issuing a statement under subsection (1), the Scottish Ministers must consult—

(a) the Commission,

(b) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole), and

(c) Scottish Water.

29E Departure from certain charges

(1) Scottish Water may, in any particular case, apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid for services provided to a water services or sewerage services provider.

(2) The Commission may consent to a departure from a charges scheme only if satisfied that—

(a) a customer of the provider has taken action which reduces or increases the costs incurred by Scottish Water in providing the services to the provider, and

(b) the departure is otherwise justified in the circumstances of the case.

(3) Where the Commission consents to a departure, it may do so subject to such reasonable conditions as it considers are appropriate in the case.

(4) Where the Commission withholds its consent to a departure, it must give its reasons for doing so.

(5) The Commission is to make provision in writing which specifies—

(a) the procedure to be followed for the purposes of determining applications made under subsection (1), and

(b) any matters to be taken into account and the criteria to be applied in—

(i) determining whether a departure from a charges scheme is justified, and

(ii) the fixing, by Scottish Water, of lower or (as the case may be) higher charges to be paid for the services in question where it is determined that a departure is justified.

(6) The Commission may from time to time revise the provision.

(7) In preparing or revising the provision, the Commission must consult—

(a) the Scottish Ministers and Scottish Water, and

(b) such other persons as it thinks fit,

as to the procedure to be followed in considering applications made under subsection (1).

(8) The Commission must send a copy of the provision to—

(a) the Scottish Ministers,

(b) Scottish Water, and

(c) every water services and sewerage services provider.
Scottish Water must publish details of every departure from a charges scheme.

**29F Review of determinations and charges**

(1) This subsection applies where, since the making of a determination under section 29B(1)(a), there has been or is likely to be material change to—

(a) Scottish Water’s income from charges for services provided in the exercise of its core functions,

(b) the amount of—

(i) any grants paid to it under subsection (1) of section 42,

(ii) money it may borrow under subsection (3) of that section, or

(iii) any other resources reasonably available to it,

for the purposes of the exercise of those functions, or

(c) the expenditure required for the effective exercise of those functions.

(2) Where subsection (1) applies, Scottish Water—

(a) may of its own accord,

(b) must, if the Commission requests it to do so,

send to the Commission proposals for revising the maximum amounts of charges determined under section 29B(1)(a).

(3) The Commission—

(a) must, after receipt of the proposals, review those amounts, and

(b) may revise those amounts to such extent as it thinks fit.

(4) In reviewing those amounts, the Commission must take into account all matters affecting the resources available to Scottish Water for the purposes of the exercise of its core functions.

(5) Before revising those amounts, the Commission must—

(a) intimate to the Scottish Ministers that revision of those amounts is under consideration,

(b) invite (by way of advertisement or otherwise) representations as regards revision of those amounts by such time as the Commission may specify, and

(c) have regard to any representations made to the Commission by virtue of paragraph (a) or (b).

(6) The Commission must give its reasons for deciding whether or not to revise those amounts.

(7) Where the Commission revises those amounts, it must send to Scottish Water written notice which specifies the revised amounts.

(8) Scottish Water—

(a) may, after receipt of the notice, revise any charges fixed by the charges scheme by reference to the revised amounts specified in the notice, and

(b) if it does so, must send written notice of the revised charges to the Commission for approval.
(9) The Commission may approve any revised charges with or without modifications.

(10) If the Commission approves any revised charges with modifications, it must give its reasons for doing so.

(11) When revised charges are approved by the Commission, Scottish Water must publish a summary of the revised charges and the date from which they have effect.

(12) The date from which the revised charges have effect is to be determined by the Commission.

29G Effective exercise of core functions

For the purposes of sections 29C(4) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if (in discharging its statutory duties and contractual obligations relating to the exercise of those functions) it makes such use of its resources that, year on year, it—

(a) achieves the objectives contained in any directions given by reference to section 56A, and

(b) does so at the lowest reasonable overall cost.”.

(2) In section 30 (maximum charges for services provided with help of Scottish Water) of that Act—

(a) in subsection (1), for the words “The Scottish Ministers may by order” there is substituted “A charges scheme must also”; 

(b) in subsection (3), for the words “An order under this section” there is substituted “In relation to maximum charges fixed by virtue of subsection (1), the charges scheme”; and

(c) in subsection (4)—

(i) for the words “an order under this section” there is substituted “, by virtue of subsection (1), a charges scheme”; and

(ii) for the word “order” in the second place where it appears there is substituted “scheme”.

(3) Sections 31 to 34 of that Act (which make provision for and in connection with the making of charges schemes by Scottish Water) are repealed.

(4) In section 35 (liability of occupiers etc. for charges) of that Act, after subsection (9) there is added—

“(10) This section does not apply to or in relation to any services provided by Scottish Water under section 14 of the Water Services etc. (Scotland) Act 2004 (asp 00) except where the provision of the service is continued under section 15(1) or of that Act.”.

(5) After that section of that Act there is inserted—

“35A Charges for services arranged by licensed providers

(1) Supplies of water provided to any premises by Scottish Water under subsection (2) of section 14 of the Water Services etc. (Scotland) Act 2004 (asp 00) are to be treated, for the purposes of sections 29 to 29F, as services provided solely to
the water services provider who made the related 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 to 29F, as services provided solely to the sewerage services provider who made the related request under subsection (4) of that section in respect of the premises.

(3) But—

(a) where the supplies of water provided to the premises are continued under subsection (1) of section 15 of that Act, subsection (1) does not apply,

(b) where the provision of sewerage to, or disposal of sewerage from, the premises is continued under subsection of that section, subsection (2) does not apply.”.

(6) Schedule 3 makes provision in relation to certain pre-existing agreements as to charges.

19 Scottish Water’s functions: powers of the Scottish Ministers

After section 56 (directions) of the 2002 Act there is inserted—

“56A Directions may set objectives

(1) In particular, directions under section 56 may in respect of a period specified under section 29B(2) set objectives as to—

(a) the standard of the services to be provided in the exercise of Scottish Water’s core functions, and

(b) the time by which—

(i) a particular standard of any of those services is to be attained,

(ii) any particular work required for or in connection with the provision of those services is (in part or whole) to be commenced or completed.

(2) Different objectives may be set for different cases or categories of case.

(3) In formulating objectives of a type referred to in subsection (1) for inclusion in directions under section 56, the Scottish Ministers must have regard to Scottish Water’s duty under section 51(1).

(4) Before giving directions under section 56 which set objectives of a type referred to in subsection (1), the Scottish Ministers must consult the Convener of the Water Customer Consultation Panels (representing the Panels as a whole) on the objectives.

56B Supplementary functions

(1) The Scottish Ministers may by order confer on Scottish Water such additional or supplementary functions relating to the provision of water and sewerage services by Scottish Water as the Scottish Ministers consider appropriate so to confer.

(2) The Scottish Ministers are to consult Scottish Water and the Commission on any order they propose to make under subsection (1).”.
3 Determinations relating to provision of services

(1) In section 1 (duty of Scottish Water to provide for sewerage) of the 1968 Act—

(a) in subsection (4)—

(i) for the words “Secretary of State” there is substituted “Water Industry Commission for Scotland”; and

(ii) for the word “his” there is substituted “its”; and

(b) after that subsection there is inserted—

“(4A) The Commission—

(a) shall prepare a statement which specifies the procedure to be followed for the purposes of its determining questions under subsection (4) above, and

(b) may from time to time revise the statement.

(4B) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(4C) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”.

(c) subsection (5) is repealed; and

(d) in subsection (6), for the words “subsections (3C) and (5)” there is substituted “subsection (3C)”.

(2) In section 6 (duty of Scottish Water to provide water supply) of the 1980 Act—

(a) in subsection (3)—

(i) for the words “Secretary of State” there is substituted “Water Industry Commission for Scotland”; and

(ii) for the word “his” there is substituted “its”; and

(b) after that subsection there is inserted—

“(3A) The Commission—

(a) shall prepare a statement which specifies the procedure to be followed for the purposes of its determining questions under subsection (3), and

(b) may from time to time revise the statement.

(3B) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(3C) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”.

19A Qualification of duty to provide services

(1) In section 1 (duty of Scottish Water to provide for sewerage) of the 1968 Act, after subsection (6) there is added—

“(7) The duties imposed by subsections (1) and (2) above shall not require Scottish Water to do anything which is prejudicial to its compliance with—
(a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 (asp 3) so far as setting objectives of a type referred to in section 56A of that Act, or

(b) a statement of policy issued under section 29D of that Act.”.

(2) In section 6 (duty of Scottish Water to provide water supply) of the 1980 Act, after subsection (4) there is added—

“(5) The duties imposed by subsections (1), (2) and (4) shall not require Scottish Water to do anything which is prejudicial to its compliance with—

(a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 (asp 3) so far as setting objectives of a type referred to in section 56A of that Act, or

(b) a statement of policy issued under section 29D of that Act.”.

Sewerage nuisance: code of practice

19B Sewerage nuisance: code of practice

(1) The Scottish Ministers may make an order containing a code of practice (referred to in this section and section 19C as a “sewerage code”) for the purposes of assessing, controlling and minimising sewerage nuisance.

(2) In this section and section 19C, “sewerage nuisance” means—

(a) smells and discharges;

(b) insects; or

(c) any other thing,

emanating from, or present at, any part of the public sewerage system so as to be prejudicial to health (that is to say, injurious, or likely to cause injury, to health) or a nuisance.

(3) A sewerage code may, in particular, set out—

(a) guidance as to the best practicable means of assessing, controlling and minimising sewerage nuisance; and

(b) circumstances in which—

(i) Scottish Water; or

(ii) any other person to whom the code applies,

is to be regarded for the purposes of this section and section 19C as complying, or (as the case may be) not complying, with the code.

(4) In subsection (3)(a), “best practicable means” is to be construed by reference to the following provisions—

(a) “practicable” means reasonably practicable having particular regard to—

(i) local conditions and circumstances;

(ii) the current state of technical knowledge; and

(iii) financial implications; and

(b) “means” includes—
(5) A sewerage code is to apply to—

(a) Scottish Water in respect of its core functions relating to the provision of sewerage and the disposal of sewage; and

(b) any other person to the extent that the person is acting on Scottish Water’s behalf, or under its authority, in that respect.

(6) Scottish Water and any other person to whom a sewerage code applies must comply with the code.

(7) The Scottish Ministers and every local authority must publicise any sewerage code.

(8) Before making an order under subsection (1), the Scottish Ministers must consult—

(a) Scottish Water;

(b) every local authority; and

(c) such other persons as they consider appropriate,

about the proposed sewerage code.

(9) For the purposes of subsection (5), the provision of sewerage and the disposal of sewage does not include such provision or disposal through any part of the public sewerage system which is regulated by a permit under the Pollution Prevention and Control (Scotland) Regulations 2000 (S.S.I. 2000/323).

(10) Subsection (9) is subject to any direction made by the Scottish Ministers by virtue of any enactment in relation to the application of a sewerage code to any such part of the public sewerage system.

19C Monitoring and enforcement

(1) Each local authority must—

(a) monitor compliance in its area with any sewerage code; and

(b) where a complaint of sewerage nuisance is made to it by a person living in its area, investigate the complaint.

(2) Where a local authority is satisfied that Scottish Water or another person to whom a sewerage code applies is—

(a) not complying with; or

(b) likely not to comply with,

the code in a material regard, the authority must serve a notice (an “enforcement notice”) on Scottish Water or (as the case may be) that other person.

(3) An enforcement notice—

(a) may require—

(i) the execution of such works; and

(ii) the taking of such other steps,
as are necessary for securing compliance with a sewerage code in any particular respects; and

(b) must specify the date by which the requirements of the notice, or any particular requirements of it, are to be fulfilled.

(4) If a person, without reasonable excuse, contravenes an enforcement notice, the person is guilty of an offence and liable on summary conviction to a fine not exceeding £40,000.

(5) Where an enforcement notice is contravened, the local authority may (whether or not proceedings have been taken for an offence) take any action it considers necessary for the purposes of securing that the requirements of the notice are fulfilled.

(6) Any expenses reasonably incurred by a local authority in taking action under subsection (5) may be recovered by the authority from the person on whom the enforcement notice was served.

(7) The functions of a local authority under sections 79 to 81 of the Environmental Protection Act 1990 (c.43) in respect of statutory nuisance (within the meaning of Part III of that Act) do not apply in relation to any nuisance which constitutes a sewerage nuisance.

(8) This section and section 19B are without prejudice to section 82 of the Environmental Protection Act 1990.

(9) In this section and section 19B, “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39).

Definitions for Part

20 Meaning of “eligible premises”

(1) In this Part, “eligible premises” means—

(a) in relation to the supply of water, premises which are (or are to be) connected to the public water supply system; and

(b) in relation to the provision of sewerage or the disposal of sewage, premises which are (or are to be) 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) except the residential part of part residential subjects within the meaning of that Part of that Act.

(3) The Scottish Ministers may by order modify subsection (2) so as to vary the meaning of “dwelling”.

21 Meaning of “public water supply system”

(1) In this Part, 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 a person acting on its behalf or under its authority) in connection with 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.

22 Meaning of “public sewerage system”

(1) In this Part, 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 a person acting on its behalf or under its authority) in connection with 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 3

COAL MINE WATER POLLUTION

23 Control of water from coal mines

(1) After section 4C of the Coal Industry Act 1994 (c.21) there is inserted—

“4D Power of the Authority with respect to coal mine water discharge: Scotland

(1) The Authority may take such action as it considers appropriate (if any) for the purpose of preventing, or mitigating the effect of, the discharge of water from a coal mine into or on to any land or into the water environment.

(2) In this section and sections 4E and 4F below—

(a) “the water environment” has the meaning given by section 3 of the Water Environment and Water Services (Scotland) Act 2003 (asp 3); and

(b) references to coal mines are to coal mines vested in the Authority.

4E Coal mine water discharge: powers of entry in Scotland

(1) If the Authority is of the opinion that a discharge of water from a coal mine into or on to any land or into the water environment has caused, is causing or is likely to cause—

(a) serious pollution of the environment; or

(b) danger to life or health,

the Authority may, for any purpose specified in subsection (2) below, in writing authorise a person to exercise (in accordance with the terms of the authorisation) any of the powers specified in subsection (3) below.

(2) The purposes are—
(a) to determine the extent of the pollution or of the danger, or the likelihood of serious pollution or such danger;

(b) to determine whether (and if so how) the Authority should exercise its power under section 4D above;

(c) to take action under that section.

(3) The powers are—

(a) to enter—

(i) in an emergency, at any time (and, if need be, using reasonable force); or

(ii) in any other case, at any reasonable time,

any premises which the authorised person has reason to believe it is necessary for him to enter;

(b) to use a vehicle or boat to do so;

(c) to make such examination and investigation as may in any circumstances be necessary;

(d) to take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under paragraph (c) above;

(e) to take samples, or cause samples to be taken, of any articles or substances found in or on any premises which he has power to enter, and of the air or water or land in, on, or in the vicinity of, the premises;

(f) to require any person to give him such facilities and assistance with respect to any matters or things within that person’s control or in relation to which that person has responsibilities as are necessary to enable the authorised person to exercise any of the powers conferred on him by virtue of this section.

(4) The powers which are conferred in relation to any land by this section include power, for the purposes mentioned in subsection (2) above—

(a) to carry out experimental borings or other works on those premises; and

(b) to install, keep or maintain monitoring and other apparatus there.

(5) Where subsection (6) below applies, any entry to premises by virtue of this section shall (except in an emergency) be effected only—

(a) after the expiry of at least seven days’ notice of the proposed entry given to a person who appears to the authorised person to be in occupation of the premises in question; and

(b) either—

(i) with the consent of a person who is in occupation of those premises; or

(ii) under the authority of a warrant granted under paragraph 2 of Schedule 1C to this Act.

(6) This subsection applies where it is proposed to—

(a) enter any premises used for residential purposes; or
(b) take heavy equipment on to any premises which are to be entered.

(7) Where an authorised person proposes to enter any premises and—

(a) entry has been refused and he reasonably believes that the use of force may be necessary to effect entry; or

(b) he reasonably believes that entry is likely to be refused and that the use of force may be necessary to effect entry,

any entry to those premises by virtue of this section shall (except in an emergency) be effected only under the authority of a warrant granted under paragraph 2 of Schedule 1C to this Act.

(8) In this section—

“premises” includes any land, vehicle or vessel, and any plant which is designed to move or be moved (whether or not on roads);

“emergency” means a case in which it appears to the authorised person in question—

(a) that there is an immediate risk of serious pollution of the environment; or

(b) that circumstances exist which are an immediate danger to life or health,

and that immediate entry to any premises is necessary to verify the existence of that risk or those circumstances or to ascertain the cause of that risk or those circumstances or to effect a remedy.

(9) Schedule 1C to this Act makes further provision regarding powers of entry.

4F Coal mine discharge: compulsory acquisition of land in Scotland

(1) The Authority may, with the authorisation of the Scottish Ministers, acquire any land anywhere in Scotland compulsorily if the Authority is of the opinion that—

(a) the acquisition is for the purpose of preventing, or mitigating the effect of, a discharge of water from a coal mine; and

(b) the discharge has caused, is causing or is likely to cause—

(i) serious pollution of the water environment; or

(ii) danger to life or health.

(2) The power to acquire land under subsection (1) above includes power to acquire a servitude or other right in or over land by the creation of a new right.

(3) The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) applies in relation to an acquisition under subsection (1) above as if—

(a) this section were contained in an Act in force immediately before the commencement of that Act; and

(b) references in that Act to a local authority were references to the Authority.”.

(2) In section 66 (Crown application) of that Act, after subsection (5) there is added—
“(6) The references in subsection (5) above to a Government department shall, for the purposes of the application of this section to sections 4D to 4F of, and Schedule 1C to, this Act, be treated as including the holder of an office in the Scottish Administration which is not a ministerial office.”.

(3) In section 68 (extent, etc.) of that Act, after subsection (7) there is inserted—

“(7A) Sections 4D to 4F of, and Schedule 1C to, this Act extend to Scotland only.”.

(4) Schedule 4 inserts Schedule 1C into that Act.

PART 4
MISCELLANEOUS AND GENERAL

Miscellaneous

24 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.

25 Amendments to enactments

Schedule 5 amends enactments for the purposes of and in consequence of this Act.

26 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.

General

27 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 2, 7(2), 9(5), 12(3A), 12A(1), (2) or (6), 16(3), 17A(8), 19B(1) or 20(3); and

(b) subject to subsection (4)(a), section 26; or
(c) paragraph 1(1) or (4) or 11(1) or (2)(g) of schedule 2, is subject to annulment in pursuance of a resolution of the Parliament.

(4) A statutory instrument containing—
(a) an order under section 26 which amends an Act; or
(b) regulations under section 4(7) or 5(7),
is not made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

28 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 Commission” means the Water Industry Commission 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.

29 Crown application
This Act binds the Crown.

30 Short title and commencement
(1) This Act may be cited as the Water Services etc. (Scotland) Act 2004.
(2) The provisions of this Act, except sections 26 to 29 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 1
(introduced by section 1)

WATER INDUSTRY COMMISSION FOR SCOTLAND

Before schedule 1 (the Commissioner and Customer Panels) to the 2002 Act there is inserted—

“SCHEDULE A1
(introduced by section 1(4))

WATER INDUSTRY COMMISSION FOR SCOTLAND

Status

1 (1) The Commission is a body corporate.

(2) The Commission—

(a) is not a servant or agent of the Crown,

(b) has no status, immunity or privilege of the Crown,

and its property is not to be regarded as property of, or held on behalf of, the Crown.

Membership

2 The Commission is to consist of the following members—

(a) not fewer than 3, nor more than 5, ordinary members, and

(b) the person holding the post of chief executive.

Tenure and removal from office

3 (1) Each ordinary member—

(a) is to be appointed by the Scottish Ministers for such period as is specified in the appointment,

(b) may, by written notice to the Scottish Ministers, resign as a member,

(c) in other respects, holds and vacates office on such terms and conditions as the Scottish Ministers may determine, and

(d) after ceasing to hold office is eligible for reappointment as a member.

(2) The Scottish Ministers may remove an ordinary member from office and the Commission may, with the approval of the Scottish Ministers, remove the member who is the chief executive from office if satisfied that—

(a) the member’s estate has been sequestrated or the member has been adjudged bankrupt, has made an arrangement with creditors or has granted a trust deed for creditors or a composition contract, or

(b) the member—

(i) is incapacitated by physical or mental illness,
Water Services etc. (Scotland) Bill

Schedule 1—Water Industry Commission for Scotland

(ii) has been absent from meetings of the Commission for a period longer than 3 consecutive months without the permission of the Commission, or

(iii) is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member.

Disqualification

4 A person is disqualified from appointment, and from holding office, as a member of the Commission if that person is a member of—

(a) the House of Lords,

(b) the House of Commons,

(c) the Scottish Parliament, or

(d) the European Parliament.

Chairing

5 (1) The Scottish Ministers—

(a) must appoint one of the ordinary members to chair meetings of the Commission, and

(b) may, after consulting that member, appoint another ordinary member to act as deputy to that member.

(2) The member appointed to chair the meetings and any member appointed to act as deputy to that member hold and vacate office as such in accordance with the terms of their appointments.

(3) A member so appointed may, by written notice to the Scottish Ministers, resign from office as such.

(4) A member so appointed vacates office on ceasing to be a member of the Commission.

(5) Where a member—

(a) is appointed to chair meetings or to act as deputy to the member so appointed, or

(b) ceases to hold office as such,

the Scottish Ministers may vary the terms of the member’s appointment so as to alter the date on which office as a member is to be vacated.

Remuneration, allowances and pensions

6 (1) The Commission must pay to each ordinary member such remuneration as the Scottish Ministers may determine.

(2) The Commission must pay to each ordinary member and the chief executive such allowances as the Scottish Ministers may determine in respect of expenses properly incurred in the performance of their duties as a member.
(3) Where a person ceases to be an ordinary member otherwise than on the expiry of that person’s term of appointment, the Scottish Ministers may, if they think there are special circumstances, direct the Commission to pay to the person such amount of compensation as they may determine.

(4) The Scottish Ministers may direct the Commission to pay——

(a) such pension, allowance or gratuity to, or in respect of, any person who is or has been an ordinary member,

(b) such contribution or other payment towards provision for such pension, allowance or gratuity,

as they consider appropriate.

Chief executive

7 (1) The Commission is to employ a chief executive.

(2) The Scottish Ministers are to appoint the first chief executive of the Commission on such terms and conditions as the Scottish Ministers may determine.

(3) Before making the appointment of the first chief executive, the Scottish Ministers must consult the member of the Commission appointed, or to be appointed, to chair the meetings of the Commission (if there is a person holding, or as the case may be designated to hold, that office).

(4) The Commission may, with the approval of the Scottish Ministers, make subsequent appointments to the post of chief executive on such terms and conditions as it may with the approval of the Scottish Ministers determine.

(5) The chief executive is to be appointed from amongst persons who appear——

(a) as regards the first appointment, to the Scottish Ministers, and

(b) thereafter, to the Commission,

to have knowledge, skills or experience relevant to the functions of the Commission.

(6) The Commission may, with the approval of the Scottish Ministers——

(a) vary any terms and conditions of a person’s appointment to the post of chief executive, or

(b) terminate a person’s appointment to the post of chief executive if the Commission is satisfied that the person is not adequately discharging the functions of that post.

Staff

8 (1) All staff employed (immediately before the coming into force of this sub-paragraph) by the Water Industry Commissioner for Scotland are transferred to the employment of the Commission.

(2) The contract of employment of a person transferred by virtue of sub-paragraph (1)——

(a) is not terminated by the transfer, and
(b) has effect from the date of transfer as if originally made between the person and the Commission.

(3) Without prejudice to sub-paragraph (2), where a person becomes a member of staff of the Commission under sub-paragraph (1)—

(a) all the rights, powers, duties and liabilities of the Water Industry Commissioner for Scotland under or in connection with that person’s contract of employment are by virtue of this sub-paragraph transferred to the Commission on the date of transfer, and

(b) anything done before that date by or in relation to the Water Industry Commissioner for Scotland in respect of that contract of employment or that person is to be treated from that date as having been done by, or in relation to, the Commission.

(4) Sub-paragraphs (1) to (3) do not prejudice the right of any person to terminate that person’s contract of employment if the terms and conditions of employment are changed substantially to the detriment of the person; but such a change is not to be taken to have occurred by reason only that the identity of that person’s employer changes by virtue of those sub-paragraphs.

(5) The Commission may, with the consent of the Scottish Ministers as to numbers, terms and conditions, appoint such other employees as it considers appropriate.

(6) The Commission must, as regards such of its employees as it may with the approval of the Scottish Ministers determine, make such arrangements as it considers appropriate for providing, to or in respect of those employees, pensions, allowances or gratuities.

(7) Such arrangements—

(a) may include the establishment and administration, by the Commission or otherwise, of one or more pension schemes, and

(b) must, in any case, be approved by the Scottish Ministers.

(8) The reference in sub-paragraph (6) to the provision of pensions, allowances or gratuities includes a reference to their provision by way of compensation for loss of office or employment or loss or diminution of emoluments.

Transfer of property and liabilities

9 (1) All property (including rights) and liabilities, subsisting immediately before the coming into force of this paragraph, of the Water Industry Commissioner for Scotland are transferred to the Commission.

(2) Sub-paragraph (1) has effect in relation to any property and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or prohibit the transfer of the property or liabilities.

Committees

10 (1) The Commission may establish committees for or in connection with the exercise of such of its functions as it may determine.

(2) Any committee established under this paragraph must be chaired by a person who is an ordinary member of the Commission.
(3) Employees of the Commission who are not members of the Commission may be appointed to be members of any committee established by it.

**Delegation of powers**

11 (1) Anything authorised or required under any enactment to be done by the Commission may be done by any of its committees which, or by any of its members or employees who, are authorised (whether generally or specifically) by it for the purpose.

(2) Nothing in sub-paragraph (1) prevents the Commission from doing anything that a committee, member or employee has been authorised or required to do.

**Proceedings**

12 (1) The Commission may regulate its own procedure (including any quorum) and that of any of its committees.

(2) The validity of any proceedings or actings of the Commission is not affected by—

(a) any vacancy among its members, or

(b) any defect in the appointment of a member.

**General powers**

13 (1) The Commission may do anything which appears necessary or expedient for the purpose of, or in connection with, the exercise of its functions including, in particular—

(a) entering into contracts; and

(b) acquiring and disposing of property.

(2) But the Commission may not acquire or dispose of land without the consent of the Scottish Ministers.

**Accounts**

14 The Commission must—

(a) prepare, for each financial year, in accordance with directions given by the Scottish Ministers, an account of the Commission’s income and expenditure, and

(b) send the account, by such time as the Scottish Ministers may direct, to the Auditor General for Scotland for auditing.”.
SCHEDULE 2
(introduced by section 11)

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 Commission 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 Commission with such further information (including information in the form of a document) as it reasonably requires in order to determine the application.

(3) Sub-paragraph (2) does not authorise the Commission 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 Commission with respect to the application; and

(b) contain such other particulars, as the Scottish Ministers may so prescribe.

(5) Where the Commission proposes to refuse an application, the Commission is to give the applicant notice—

(a) of that fact (together with its reasons for proposing to refuse the application); and

(b) specifying the date by which the applicant may make representations to the Commission with respect to the proposed refusal.

(6) The Commission 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).

(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 on a question of law.

(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 on a question of law; 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 Commission’s decision to refuse the application or (as the case may be) grant the licence; 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 Commission to be necessary or expedient for the purposes of or in connection with the activities authorised by the licence.

(2) The Commission 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 standard conditions may, in particular—

(a) include standard conditions that are to apply to—

(i) all licences; and

(ii) a particular type of licence; and

(b) make provision for—

(i) the standard conditions (or any of them) not to apply to a particular licence or type of licence in such circumstances; and

(ii) the coming into effect and suspension of the standard conditions (or any of them) in such manner and in such circumstances, as may be specified in the standard conditions.

(4) The Commission is to—

(a) consult the Scottish Ministers on proposals for standard conditions; and

(b) publish the standard conditions.

(5) The Commission—

(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 it considers is necessary or expedient as a consequence of any modification of the standard conditions.

(6) Before making any modification under sub-paragraph (5)(b), the Commission 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 Commission.

(8) The Commission is to have regard to any representations made by virtue of sub-paragraph (7)(b).

(9) Where the Commission modifies the standard conditions, the Commission is to publish them as modified.

(10) The Commission may, in granting a particular licence, exclude or modify any of the standard conditions to such extent as it 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 Commission considers appropriate.

(13) The Commission may modify any condition of a particular licence if it considers that the modification is necessary or expedient 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 a question of law.
(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 a question of law.

(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.

Conditions: sustainable development

2A(1) The Scottish Ministers may issue to the Commission guidance as to how water services and sewerage services providers might, by the manner in which they perform the activities authorised by their licences, reasonably contribute to the achievement of sustainable development.

(2) In exercising its functions under paragraph 2, the Commission is to have regard to any guidance issued under sub-paragraph (1).

Transfer of licence

3 (1) Any water services licence or sewerage services licence may, subject to sub-paragraphs (2) to (4A), 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 Commission consents to the transfer.

(3) The Commission 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 Commission 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.

(4A) In relation to a transfer—

(a) an application for consent is to be made by the transferee; and

(b) sub-paragraphs (1) to (6) of paragraph 1 apply as regards an application for consent as they apply as regards an application for a licence.
(4B) Any applicant for consent to a transfer of a licence who knowingly or recklessly makes a statement, in connection with the application for consent, that is false or misleading in a material particular is guilty of an offence.

(4C) A person who is guilty of an offence under sub-paragraph (4B) is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on indictment, to a fine.

(8) The Commission 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 it considers it appropriate to make.

(9) As soon as practicable after deciding whether to consent to a transfer, the Commission is to intimate its decision to—

(a) the transferor and the transferee; and

(b) Scottish Water.

(10) Where the Commission withholds consent to the transfer, the transferee may, within 14 days of the date on which the decision to do so was intimated to the transferee under sub-paragraph (9)(a), appeal to the Court of Session against the decision on a question of law.

(10A) Where the Commission consents to the transfer, Scottish Water may, within 14 days of the date on which the decision to do so was intimated to Scottish Water under sub-paragraph (9)(b), appeal to the Court of Session against the decision on a question of law.

(11) In an appeal under sub-paragraph (10) or (10A), the Court may quash or confirm the Commission’s decision to withhold consent to the transfer or (as the case may be) to 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 Commission and any person authorised by the Commission 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 or in relation to the supply of water or 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 Commission 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 Commission (or a person authorised by the Commission) 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 Commission (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 Commission 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.

Powers of entry etc.: further provision

5 (1) 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.

(2) 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.

(3) Where a person exercises the power mentioned in paragraph 4(2)(a), the Commission 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 sub-paragraph (2), except in so far as the loss or damage is attributable to the fault of the person who sustained it.

(4) 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.
(5) Any person who—
   (a) intentionally obstructs a person acting in the exercise of any power conferred by paragraph 4(1) and (2); or
   (b) refuses or fails, without reasonable excuse, to comply with a requirement made under paragraph 4(5),
is guilty of an offence.

(6) A person who is guilty of an offence under sub-paragraph (4) or (5) is liable—
   (a) on summary conviction, to a fine not exceeding the statutory maximum; or
   (b) on conviction on indictment, to a fine.

Warrants

6 (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 Commission (and any person authorised by the Commission 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.

Enforcement notices

7 (1) If it appears to the Commission (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 Commission may serve on the provider a notice (in this paragraph and paragraphs 8, 9 and 11 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 Commission’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 Commission requires the provider 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 Commission must consult—

(a) Scottish Water; and

(b) such other persons as the Commission considers appropriate.

(6) Before serving an enforcement notice on a provider under sub-paragraph (1), the Commission is to—

(a) serve a copy of the proposed notice on the provider; and

(b) specify a period (which is to be 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 Commission about the proposed notice.

(7) The Commission—

(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 Commission must send a copy of an enforcement notice to—

(a) the Scottish Ministers; and

(b) Scottish Water.
Schedule 2—Licences and compliance: further provision

(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 Commission 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 Commission’s power to issue a further such notice.

Enforcement notices: offences

8 (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 7; 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 7—

(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

9 (1) A water services licence or sewerage services licence may be revoked in accordance with this paragraph.

(2) If it appears to the Commission 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 7; 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 7—

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

(3) If—

(a) it appears to the Commission 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 Commission considers that the provider would fail to comply with the terms of an enforcement notice pertaining to that contravention,

the Commission 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 Commission 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 Commission 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 Commission may, following a request made to the Commission 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 Commission 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 Commission considers to be relevant.

(7) A notice of revocation must specify—

(a) the reasons why it is served; and

(b) the date (which must be no earlier 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.
Schedule 2—Licences and compliance: further provision

(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 Commission 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

(1) Where it appears to the Commission that a water services provider or a sewerage services provider has contravened a term or condition of the licence held by the provider, the Commission may impose on the provider a financial penalty of such amount as it considers reasonable in the circumstances of the case.

(2) The Commission—

(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;

(c) in preparing the statement (and any revised statement), is to consult such persons as it considers appropriate; and

(d) is to publish the statement (and any revised statement) in such manner as it considers appropriate.

(3) Before imposing a penalty under sub-paragraph (1), the Commission is to serve on the provider a notice of its intention to impose the penalty; and the notice must specify the date by which the provider may make representations to the Commission with respect to the penalty.

(4) In imposing a penalty under sub-paragraph (1), the Commission 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 Commission—
(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 Commission by virtue of this paragraph must be paid into the Scottish Consolidated Fund.

Register of licences

11 (1) The Commission 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 each water services provider and sewerage services provider;

(b) record the terms and conditions of each water services licence and sewerage services 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 7;

(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 9—

(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 10—

(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.

SCHEDULE 3
(introduced by section 18(6))

CERTAIN PRE-EXISTING AGREEMENTS AS TO CHARGES

1 (1) In this schedule, a “relevant agreement” is an agreement—
Schedule 3—Certain pre-existing agreements as to charges

(a) between Scottish Water and another person (a “relevant customer”) in respect of eligible premises (within the meaning of Part 2)—

(i) by virtue of any of the provisions referred to in sub-paragraph (2) or otherwise; and

(ii) which makes provision as to the charges to be paid (other than under a charges scheme) by the relevant customer for services provided by Scottish Water in the exercise of its core functions; and

(b) extant on the coming into force of this schedule.

(1A) For the purposes of sub-paragraph (1)—

(a) an agreement between Scottish Water and another person includes an agreement with the other person to which Scottish Water has become party in consequence of a transfer, by virtue of any enactment or contractual arrangements, of obligations to Scottish Water; and

(b) an agreement which makes provision as to the charges to be paid for services provided by Scottish Water does not include an agreement by virtue of which there is an obligation to which section 47 of the 1980 Act applies.

(2) For the purposes of sub-paragraph (1)(a)(i), the provisions are—

(a) sections 29(2)(b) and (4) and 31(6) of the 2002 Act (as they had effect immediately before their repeal by this Act);

(b) section 29(3)(j) of the 1968 Act (as it had effect immediately before its repeal by this Act).

(1) Scottish Water must, within one month of the coming into force of this schedule, send to the Commission written details of every relevant agreement.

(2) The Commission must, following receipt of those details, in each case—

(a) assess the charges payable under the relevant agreement (the “relevant charges”) during any period to which a charges scheme applies; and

(b) having regard to—

(i) any costs which reasonably require to be met from the charges fixed in accordance with sub-paragraph (6)(b); and

(ii) such other matters as the Commission considers appropriate,

determine, for the purposes of sub-paragraph (6)(a), an amount less than the relevant charges.

(3) The Commission must, in each case—

(a) give the relevant customer written notice of the assessment and determination under sub-paragraph (2); and

(b) send a copy of the notice to—

(i) Scottish Water; and

(ii) every water services and sewerage services provider,

by such date as the Scottish Ministers may direct.

(4) The Commission must publish details of every determination under sub-paragraph (2)(b).
(5) This sub-paragraph applies in any case where a water or sewerage services provider makes arrangements for the provision of any services to which relevant charges apply and is accordingly entitled to demand and recover charges from a relevant customer for that provision.

(6) Where sub-paragraph (5) applies—
   (a) Scottish Water may, in relation to that provision, demand and recover from the provider charges which must not exceed the amount determined under sub-paragraph (2)(b); and
   (b) the charges which the provider may, in relation to that provision, demand and recover from the relevant customer concerned must not exceed the amount of the relevant charges.

(7) Any financial disadvantage to Scottish Water arising as a consequence of differences between—
   (a) the amounts determined under sub-paragraph (2)(b); and
   (b) the charges which would be recoverable by Scottish Water under a charges scheme in relation to the services to which the determinations apply,
is to be borne by Scottish Water.

(8) Scottish Water is—
   (a) in any case where sub-paragraph (5) does not for the time being apply; or
   (b) in any case where that sub-paragraph ceases to apply,
to demand and recover relevant charges from the relevant customer for services provided by it to the customer.

SCHEDULE 4
(introduced by section 23(4))

POWERS OF ENTRY UNDER THE COAL INDUSTRY ACT 1994

After Schedule 1B to the Coal Industry Act 1994 (c.21) there is inserted—

“SCHEDULE 1C
SUPPLEMENTAL PROVISIONS WITH RESPECT TO POWERS OF ENTRY: SCOTLAND

Exercise of powers of entry etc.

1 (1) A person entitled to enter premises by virtue of the power mentioned in section 4E(3)(a) of this Act—
(a) may take on to the premises such other persons (including, if the person reasonably believes he is likely to be obstructed, a constable) and such equipment or materials 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.

A person who enters premises in the exercise of a power conferred by virtue of section 4E of this Act must leave the premises as effectually secured against trespassers as the person found them.

Where a person exercises a power conferred by virtue of section 4E(3)(a) or (4) of this Act, the Authority is to make full compensation to any person who has sustained loss or damage by reason of—

(a) the exercise of that power; or

(b) the carrying out of, or failure to carry out, the duty imposed by sub-paragraph (2) above,

except in so far as the loss or damage is attributable to the fault of the person who sustained it.

Any dispute as to a person’s entitlement to compensation under sub-paragraph (3) above, or as to the amount of any such compensation, shall be referred to the arbitration of a single arbiter, appointed—

(a) by agreement between the Authority and the person who claims to have sustained the loss or damage; or

(b) in default of agreement, by the Scottish Ministers.

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 a power conferred by virtue of section 4E of this Act is guilty of an offence.

A person who is guilty of an offence under sub-paragraph (5) above is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment, to a fine.

In this schedule, “premises” has the meaning given by section 4E(8) of this Act.

Warrants

(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 section 4E(3) or (4) of this Act; and

(b) at least one of the conditions mentioned in sub-paragraph (2) below is fulfilled in relation to the premises,

the sheriff or justice may grant a warrant authorising the Authority (and any person authorised by the Authority 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 and the case is one of urgency.

(3) In a case where subsections (5) and (6) of section 4E of this Act apply, a sheriff or justice shall 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) above is fulfilled unless the sheriff or justice is also satisfied that notice required by subsection (5)(a) of that section has been given and that the period of that notice has expired.

(4) A warrant granted under this paragraph continues in force until the purposes for which the warrant is issued have been fulfilled.”.

SCHEDULE 5
(introduced by section 25)
AMENDMENTS TO ENACTMENTS

Sewerage (Scotland) Act 1968 (c.47)
1 In section 29 (which makes provision relating to consent to discharge of trade effluent) of the 1968 Act, paragraph (j) of subsection (3) is repealed.

House of Commons Disqualification Act 1975 (c.24)
2 In the House of Commons Disqualification Act 1975, in Part III of Schedule 1 (disqualifying offices), the entry relating to the Water Industry Commissioner for Scotland is repealed.

Race Relations Act 1976 (c.74)
3 In the Race Relations Act 1976, in Part II of Schedule 1A (bodies and other persons subject to general statutory duty), the entry relating to the Water Industry Commissioner for Scotland is repealed.

Water (Fluoridation) Act 1985 (c.63)
4 In the Water (Fluoridation) Act 1985, in subsections (2)(b)(i) and (3) of section 4 (publicity and consultation), for the word “Commissioner” in each place where it occurs there is substituted “Commission”.

Public Finance and Accountability (Scotland) Act 2000 (asp 1)
5 In the Public Finance and Accountability (Scotland) Act 2000, in subsection (7) of section 23 (economy, efficiency and effectiveness examinations), for the word “Commissioner” there is substituted “Commission”.

638
Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

6 In the Ethical Standards in Public Life etc. (Scotland) Act 2000—

(a) in section 19 (action on finding of contravention)—

(i) in subsection (4), the words from “and” in the second place where it occurs to the end are repealed; and

(ii) in subsection (5), paragraph (c) and the word “; or” immediately preceding it are repealed;

(b) sections 25 and 26 (which make special provision for the Water Industry Commissioner for Scotland) are repealed;

(c) in section 30 (modification of enactments etc.), the words “or the Water Industry Commissioner for Scotland” are repealed;

(d) in schedule 1 (the Standards Commission for Scotland), in paragraph 3, the words “or the Water Industry Commissioner for Scotland” are repealed; and

(e) in schedule 3 (devolved public bodies), after the entry relating to the State Hospitals Board for Scotland, there is inserted—

“The Water Industry Commission for Scotland”.

Water Industry (Scotland) Act 2002 (asp 3)

7 (1) In each of the following provisions of the 2002 Act, for the words “Commissioner” and “Commissioner’s” wherever occurring there is substituted “Commission” and “Commission’s” respectively—

section 3;
section 4(1);
section 5(1) to (3);
section 6;
section 11(1)(a);
section 26(1) to (4) and (7);
section 27;
section 57(6)(a); and
in schedule 1, paragraphs 6(4), 7 and 8.

(3) In section 3 (functions of the Commissioner) of that Act, in subsection (6)—

(a) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both”; and

(b) in paragraph (b), for the words “it conducts its relations with its customers or potential or former customers” there is substituted “Scottish Water conducts its relations with those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”.

Water Services etc. (Scotland) Bill 55
Schedule 5—Amendments to enactments
(3A) In section 5 (annual reports by, and information from, the Commissioner), in subsection
(2)—
(a) in paragraph (a), for the words “to such representations, reports and recommendations as are mentioned in section 2(5)” there is substituted “to—
(i) any representations made to it by a Customer Panel, and
(ii) any recommendations made to it under section 2(4)”; and
(b) in paragraph (b), the word “, report” is repealed.

(4) In section 26 (customer standards codes) of that Act—
(a) in subsection (1)—
(i) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both”; and
(ii) in paragraph (b), for the words “its customers or potential or former customers” there is substituted “those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”; and
(b) subsection (2) is repealed.

(5) Section 40 (reduced charges) of that Act is repealed.

(6) In section 49 (interests of customers) of that Act, for the words “who is a customer or potential customer of Scottish Water” there is substituted “whose premises are connected to, or might reasonably become connected to, the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2004 (asp 00)) or both;”.

(6A) In section 57 (information and reports) of that Act, in subsection (7)—
(a) the words from “any” to the end become paragraph (a); and
(b) after that paragraph there is inserted “, and
(b) the extent to which Scottish Water has, during that period, complied with any requirements made under section 12(1A) or 13(1) or (5) of the Water Services etc. (Scotland) Act 2004 (asp 00).”.

(7) In section 68 (orders and regulations) of that Act—
(a) in subsection (4) after the words “41(5)” there is inserted “, 56B”; and
(b) in subsection (6), after the words “41(5)” there is inserted “or 56B”.

(8) In section 70 (interpretation) of that Act, in subsection (1)—
(a) in the definition of “charges scheme”, for the words “31(1)” there is substituted “29A(1)”; and
(b) for the definition of “the Commissioner” there is substituted—
“the Commission” means the Water Industry Commission for Scotland established under section 1(1) of this Act,”.

(9) Part 1 (the Commissioner) of schedule 1 to that Act is repealed.
Schedule 5—Amendments to enactments

Scottish Public Services Ombudsman Act 2002 (asp 11)

8 In the Scottish Public Services Ombudsman Act 2002, in schedule 2 (listed authorities)—

(a) after paragraph 21A there is inserted—

“21B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 55, for the word “Commissioner” there is substituted “Commission”.

Freedom of Information (Scotland) Act 2002 (asp 13)

9 In the Freedom of Information (Scotland) Act 2002, in schedule 1 (Scottish public authorities)—

(a) after paragraph 62A there is inserted—

“62B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 106, for the word “Commissioner” there is substituted “Commission”.

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

10 In the Public Appointments and Public Bodies etc. (Scotland) Act 2003, in schedule 2 (specified authorities)—

(a) the entry relating to the Water Industry Commissioner for Scotland is repealed; and

(b) after the entry relating to the Scottish Tourist Board there is inserted—

“Water Industry Commission for Scotland”.

Water Services etc. (Scotland) Bill
Water Services etc. (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to establish the Water Industry Commission for Scotland; to create offences in relation to the unauthorised use of the public water and sewerage systems; to provide for licensing the provision of certain water and sewerage services; to amend the system for fixing charges for services provided by Scottish Water; to make provision as to Scottish Water’s functions; to make provision in relation to coal mine water pollution; and for connected purposes.

Introduced by: Ross Finnie
On: 11 June 2004
Supported by: Allan Wilson
Bill type: Executive Bill
WATER SERVICES ETC. (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these are revised Explanatory Notes to accompany the Water Services etc. (Scotland) Bill, as amended at Stage 2.

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The main provisions of the Bill are as follows:

- Part 1 – replaces the Water Industry Commissioner (the Commissioner) with a body corporate, the Water Industry Commission (the Commission), with a view to improving the transparency, accountability and consistency of regulation in the water industry. It also amends the functions of the Water Customer Consultation Panels and the Convener of those Panels to strengthen customer representation in the water industry.

- Part 2 – makes a series of provisions regarding water and sewerage services:
  - prohibits common carriage (where Scottish Water would use its water mains to carry water treated by a competitor and its sewers to carry wastewater from a competitor’s customers to that competitor’s treatment works) in the water or sewerage systems, and prohibits retail competition for households (sections 4 and 5);
  - establishes a licensing regime for retail competition for non-household premises only, managed by the Water Industry Commission (sections 6 to 11);
  - enables Ministers to require Scottish Water to establish an undertaking for the purposes of applying for a licence under the Bill (sections 12, 12A and 13);
  - provides for arrangements between Scottish Water and a licensed water or sewerage services provider to supply water or sewerage services, or, as the
case may be, to discontinue a water supply or trade effluent services, and the procedure to be followed in the latter cases (sections 14 to 17A);

- provides new arrangements for determining Scottish Water’s charges, under which the Water Industry Commission will determine charge limits based on objectives set by Ministers, and Scottish Water will propose charges schemes within these limits (sections 18 and 19);

- enables Ministers to issue Codes of Practice on sewerage nuisance and introduces monitoring and enforcement provisions to ensure compliance with such Codes (sections 19B and 19C); and

- sets out definitions of “eligible premises” for the purposes of retail competition, and of “public water supply system” and “public sewerage system” (sections 20 to 22).

- Part 3 – makes provision for coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution (section 23).

- Part 4 – makes miscellaneous and general provision, including in relation to the offences created under the Bill and the procedure for exercising the order and regulation making powers provided under the Bill (sections 24 to 30).

**COMMENTARY ON SECTIONS**

**PART 1: WATER INDUSTRY COMMISSION AND CUSTOMER PANELS**

**Section 1: Water Industry Commission for Scotland**

5. Section 1 establishes a corporate body, the Water Industry Commission for Scotland, to take on the functions of the Water Industry Commissioner.

6. Subsection (1) of section 1 replaces section 1 of the Water Industry (Scotland) Act 2002 (“the 2002 Act”) with a new section 1 establishing the Water Industry Commission for Scotland. Subsection (2) of the new section 1 of the 2002 Act gives the Commission the general function of promoting the interests of persons whose premises are connected or might reasonably become connected to the public water supply and/or sewerage system (as defined in sections 21 and 22 of the Bill respectively). This ensures that the Commission will promote the interests of both Scottish Water’s direct customers, and the customers of licensed providers of retail services. It is a duty to promote the interest of customers as a whole which might be relevant, for example, where the interests of different categories of customers conflicted.

7. Subsection (3) of the new section 1 of the 2002 Act gives Scottish Ministers power to direct the Commission with regard to the financial management or administration of the Commission, having first consulted it. This ensures that the Commission is accountable to Ministers for these matters, while at the same time functioning independently with regard to its technical functions of calculating Scottish Water’s required revenue, and charge determination and the other substantive functions conferred on it by or under the Bill. Subsection (4) introduces Schedule A1 which makes detailed provision as to the appointment of the Commission and as to the Commission's staff, status and accounts and its procedures for carrying out its functions. This Schedule is inserted into the 2002 Act by Schedule 1 to the Bill.
8. Subsection (2) of section 1 replaces section 4(2) of the 2002 Act (power of the Commissioner to require information), with the effect that the Commission may not require Scottish Water to disclose anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session. This enables Scottish Water to treat as confidential legally privileged information. Subsection (2) also adds a new subsection (3) to section 4 of the 2002 Act, which requires Scottish Water to inform the Commission in writing if it considers that it is entitled to withhold information which the Commission has requested. This removes Ministers from having a role in resolving conflicts between the Commission and Scottish Water as to whether the information requested by the Commission is reasonable.

9. Subsection (3) of section 1 adds a new subsection (4) to section 5 of the 2002 Act (annual reports by, and information from, the Commissioner), requiring Scottish Ministers to lay before Parliament a copy of the Commission’s annual report, detailing the Commission’s functions during that financial year.

Section 2: Dissolution of office of Commissioner

10. Section 2 provides for Scottish Ministers to specify an appointed day to dissolve the office of the Water Industry Commissioner for Scotland, given that it is replaced by the Water Industry Commission for Scotland, as described above.

Section 3A: Customer Panels


12. Subsection (1) replaces sections 2(3) to (5) of the 2002 Act, which made provision in relation to the functions of a Customer Panel, including its duty to publish reports, and in relation to the duty of the Water Industry Commissioner to have regard to representations, recommendations or reports made by a Customer Panel, with new subsections (3) to (5D).

13. New subsection 2(3) of the 2002 Act provides that the general function of the Customer Panels is to represent the views and interests of those whose premises are connected to the public water supply and sewerage systems, or might reasonably become connected to those systems.

14. New subsection 2(4) to the 2002 Act places a duty on Customer Panels to publish reports on matters relevant to the interests of the persons they represent, and gives them the power to make recommendations to the Water Industry Commission, the Scottish Ministers, the Drinking Water Quality Regulator, the Scottish Environment Protection Agency and Scottish Water:

   (a) Recommendations to the Water Industry Commission can be made as to the promotion of the interests of those represented by the Customer Panels, whether generally or specifically;
   (b) Recommendations to the Scottish Ministers, the Drinking Water Quality Regulator or the Scottish Environment Protection Agency can be made on any matters
considered relevant to those interests, in connection with such functions of those bodies as are exercisable in relation to Scottish Water’s exercise of core functions (as defined in section 70(2) of the 2002 Act to mean its statutory functions as the public water supplier and provider of sewerage); and

(c) Recommendations to Scottish Water can be made on any matter considered relevant to those interests in relation to Scottish Water’s exercise of core functions.

15. New subsection (5) provides that Scottish Water must have regard to any representations or recommendations made to it by a Customer Panel. New subsection (5A) makes equivalent provision as regards other persons to whom a Customer Panel makes representations or recommendations.

16. New subsection (5B) requires the Customer Panel to publish a summary of any representations and recommendations made by it, as referred to in subsections (4) to (5A). This may be complied with through including such a summary in a report.

17. New subsection (5C) provides that any person who receives recommendations under new subsection (4) must respond to the recommendations within 6 months, and publish a summary of their responses.

18. New subsection (5D) enables Customer Panels to jointly exercise their functions in publishing reports and making recommendations or representations.

19. Section 3A(2) of the Bill repeals section 3(1) to (5) of the 2002 Act (the Water Industry Commissioner’s complaints investigation function) in consequence of the amendments made in section 3A(3) (paragraph 21 below).

20. Section 3A(3) inserts a new section 6A into the 2002 Act to confer on the Convener of the Customer Panels (“the Convener”) duties to investigate complaints about Scottish Water’s exercise of its core functions.

21. New section 6A(1) of the 2002 Act places a duty on the Convener to investigate complaints in respect of Scottish Water’s exercise of its core functions from any person whose premises are connected to, or have been, or might reasonably become, connected to the public water or sewerage systems (as defined in sections 21 and 22 of the Bill). Section 6A(2) provides that if such a complaint is received by a Customer Panel or the Water Industry Commission, they must refer it to the Convener. Section 6A(3) provides that the Convener need not investigate a complaint which has not already been pursued with Scottish Water, or which the Convener considers vexatious or frivolous. Section 6A(4) enables the Convener to make representations about complaints to Scottish Water. Sections 6A(5) and (6) require the Convener to report to the Water Industry Commission or a Customer Panel about the outcome of any investigations made about a complaint, or give reasons for any decision not to investigate a complaint. Section 6A(7) requires Scottish Water to respond to reasonable requests for information from the Convener in connection with the Convener’s complaints investigation function. If Scottish Water and the Convener disagree on whether a request for information is reasonable, section 6A(8) provides that the disagreement may be referred to Scottish Ministers to decide the matter, and the latter’s decision is final.
22. New section 6B to the 2002 Act requires the Convener to submit to the Scottish Ministers and to publish an annual report, on the exercise of functions by both the Customer Panels and the Convener (under section 6A), as soon as practicable after the end of each financial year. The Convener is also required to provide the Scottish Ministers with any information they require as regards the exercise of those functions. The Scottish Ministers are required to lay a copy of the annual report before Parliament.

23. New section 6C of the 2002 Act requires the Water Industry Commission and the Convener of the Customer Panels to make arrangements for co-operation and the exchange information between the Commission and the Panels and between the Commission and the Convener; and for the consistent treatment of matters which affect both the Commission and the Panels, or both the Commission and the Convener. These arrangements are to be set out in a memorandum, which they are to send to the Scottish Ministers. The memorandum is to be kept under review, and any revised memorandum must also be sent to Ministers.

PART 2: PROVISION OF WATER AND SEWERAGE SERVICES

Offences

Section 4: Public water supply system: offences

24. Section 4 prohibits any person from introducing water into the public water supply system (as defined by section 21 of the Bill) or using the public water supply system to carry water to the premises of another person. It also prohibits making arrangements for or in relation to the supply of water to the premises of another person, except as authorised by a licence. To achieve this, subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).

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

26. Subsection (3) prohibits the making of any arrangements for or in relation to the supply of water through the public water supply system to the premises of customers connected to that system.

27. Subsection (4) exempts Scottish Water or someone acting on its behalf or under its authority from the offences introduced in the preceding subsections, allowing them to introduce water to the public water supply system, use the system for the purpose of supplying water and make arrangements in connection with supplying water.

28. Subsection (5), by way of an exemption from the offences at subsections (2) and (3), allows a person supplying water with the help of services provided by Scottish Water as described at section 30 of the 2002 Act, to use the public water supply system to supply water to premises connected to the system and to make arrangements to supply water to the premises of another person.
29. Subsection (6) provides that licensed providers of water or sewerage services are not caught by the prohibition at subsection (3). (Section 6 of the Bill establishes a system for licensing "water services providers" and "sewerage services providers").

30. Subsections (7) and (8) allow Ministers to specify in regulations other circumstances where the prohibitions in subsections (1), (2) and (3) will not apply. These give Ministers powers, which could be used if, for example, it emerged in practice that the prohibitions were catching activities which Ministers did not intend to prohibit. Ministers are required to consult on any regulations that they propose to make under subsection (7), and section 27 provides for these regulations to be subject to affirmative procedure in the Parliament. Subsection (8A) qualifies the power to make regulations under subsection (7) by providing that it can only be exercised where the effect of any such regulations is not prejudicial to the exercise of Scottish Water’s core functions regarding the supply of water.

31. Subsections (9) and (10) set out the penalties for anyone committing an offence under this section, setting greater penalties for offences under subsection (1), which prohibits introducing water into the public water supply system: up to two years in prison, an unlimited fine, or both (subsection (9)). Subsection (10) specifies penalties for anyone guilty of the offences at subsections (2) and (3) of using the public water supply system to supply customers, or arranging for a supply to be made, of up to an unlimited fine. In both cases there is provision for treating offences in two ways, summary conviction (i.e. where convicted by a Sheriff sitting without a jury), where lesser maximum penalties apply, or conviction on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court). The statutory maximum fine referred to in subsection (10)(a) is currently £5,000. Subsection (11) provides that any agreement in breach of the prohibitions is unenforceable.

Section 5: Public sewerage system: offences

32. Section 5 makes provisions prohibiting common carriage and other activities for or in relation to the public sewerage system that parallel those at section 4 in relation to the public water supply system. Subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).

33. Subsections (1) to (3) prohibit common carriage on the public sewerage system (as defined by section 22 of the Bill). They also prohibit the making of arrangements for or in relation to the provision of sewerage to, or the disposal of sewage from the premises of another person, except as authorised by a licence.

34. Subsections (4) to (6) set out the circumstances in which the prohibitions in subsections (1) to (3) do not apply. Subsections (7) and (8) provide for Ministers to make regulations specifying other circumstances in which the prohibitions will not apply. Section 27 provides for these regulations to be subject to affirmative procedure in the Parliament. Subsection (8A) qualifies the power to make regulations by providing that it can only be exercised where the effect of any such regulations is not prejudicial to the exercise of Scottish Water’s core functions regarding the provision of sewerage and disposal of sewage. Subsections (9) and (10) provide for the same range of penalties in respect of the prohibitions concerning the provision of sewerage services as are available at section 4(9) and (10) in respect of water supply services. Subsection (11) provides that any agreement in breach of the prohibitions is unenforceable.
Licensing of services provided to eligible premises

Section 6: Licence authorisation

35. Section 6 provides for the Commission to grant licences which authorise licence holders to provide services to the occupiers of eligible premises (as defined in section 20). The Commission's powers to grant licences are subject to the provisions at section 7, as regards the Commission granting licences, and at paragraphs 1 and 2 of schedule 2 to the Bill, which makes detailed provision for applications for licences and licence conditions.

36. Subsections (1) and (2) and subsections (3) and (4) respectively empower the Commission to grant a “water services licence” and a "sewerage services licence". These licences will authorise their holders (the "water services providers" and "sewerage services providers") to arrange for the supply of water, or the provision of sewerage services, as the case may be, to the occupiers of eligible premises. Subsection (5) provides that where premises are unoccupied, references to occupiers in this section are to be read as referring to the owner of the premises. Eligible premises are defined in section 20 as premises other than domestic dwellings. These subsections also set out that providers can fix, demand and recover charges for the water or sewerage services they provide.

Section 7: Granting of licence

37. Section 7 specifies the grounds on which the Commission can grant a water services or sewerage services licence and the procedure to be followed.

38. Subsection (1) requires the Commission to be satisfied that an applicant has the ability to perform adequately the activities authorised by a licence, before granting the licence. Subsection (2) requires the Commission, in assessing an applicant’s ability to perform those activities, to have particular regard to an applicant's knowledge, experience, expertise, financial acumen and business viability, and to any other factors specified by the Scottish Ministers in an order. Section 27 provides for orders under subsection (2) to be subject to negative procedure in the Parliament. In the interests of transparency, subsection (3) empowers the Commission to issue guidance setting out the factors it will consider when assessing an applicant’s ability under subsection (2).

39. Subsection (4) requires a licence to be in writing. It provides for it to be in force as set out in the licence unless it has been revoked or suspended. Subsection (5) requires the Commission to notify the applicant and Scottish Water of a decision to refuse a licence application. And where the Commission has granted a licence application, subsection (6) provides for the Commission to send a copy of the licence to the applicant and Scottish Water.

Section 8: Compliance with licences

40. Section 8 places a duty on the Commission to monitor compliance with the terms and conditions of licences and to take any action necessary to ensure compliance. To carry out this duty, the section confers two powers on the Commission: subsection (2) enables the Commission to give directions to service providers which providers are obliged to comply with; and subsection (3) empowers the Commission to issue guidance in relation to compliance with the terms and conditions of a licence. In addition, subsection (4) requires Scottish Water to inform the Commission if it appears a licence condition is being or has been breached.
Section 9: Commission’s power to obtain information and charge fees

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

42. Subsection (1) places a duty on service providers to comply with requests for information by the Commission, provided the request is reasonable for the Commission to make in the exercise of its functions. Subsection (2) provides that service providers need not provide the Commission with information that they would not be required to disclose on grounds of confidentiality in proceedings in the Court of Session (such as legally privileged information).

43. Subsection (3) provides that it is an offence for a service provider to fail to provide information required by the Commission without a reasonable excuse. Subsection (4) specifies that the penalties for this offence, depending on the type of conviction, are a fine not exceeding the statutory maximum, currently set at £5,000, on summary conviction (i.e. where convicted by a Sheriff sitting without a jury), or an unlimited fine if convicted on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court).

44. Subsection (5) gives the Commission the general power to charge fees in relation to licences, for example, in relation to applications for a licence. It gives Ministers the power to set out in an order the detailed basis on which, and the matters in respect of which, the Commission is to charge fees, and section 27 provides for these regulations to be subject to negative procedure in the Parliament.

Section 10: Participation of licensed providers

45. Section 10 gives the Commission powers to take such steps as it considers necessary to ensure that the opening up of the market for licensed water and sewerage services under Part 2 of the Bill happens in an orderly manner, and with minimum disruption to Scottish Water and its customers.

46. Subsection (1) gives the Commission a duty to exercise its functions in such a way as to secure that water and sewerage services providers participate in the provision of services pursuant to a licence in an orderly manner and in a way that is not detrimental to the exercise of Scottish Water’s core functions. To enable it to do this, the Commission is given powers under subsection (2) to direct Scottish Water or a licensed water or sewerage services provider, including a potential licensed provider, to take such steps as are required to ensure their participation achieves the aims in subsection (1). Subsection (4) requires proposed directions to be consulted upon with the intended recipient(s). Subsection (5) requires that the recipient(s) of directions under subsection (2) must comply with these.

47. In particular, it is envisaged that the Commission may use its power under this section to require licensed providers to use a central mechanism (one which the Commission would have identified as optimum) to facilitate the exchange of information required when a customer switches to another licensed provider. Subsection (3) specifically provides for directions to relate to this matter.
Section 11: Licences and compliance: further provision

48. Section 11 introduces schedule 2 which makes more detailed provisions on licences and compliance.

Scottish Water: water and sewerage services undertaking

Section 12: Water and sewerage services undertaking

49. Section 12 enables the Scottish Ministers to require Scottish Water to separate its retail functions from its wholesale functions, by creating a separate business undertaking. In this way it will be possible for this retail arm to be treated in the same way as any other service provider, under the licensing regime and by Scottish Water.

50. Subsection (1) provides that Scottish Water must comply with a requirement made on it to secure the establishment of a business undertaking. Subsection (1A) provides that the Scottish Ministers may require Scottish Water to take such steps as Ministers specify for the purposes of, or in connection with, the establishment and development of, or Scottish Water’s interest in, the undertaking; and to take these steps, or any particular steps, by such date as Ministers specify. Subsection (1B) provides that it is for Scottish Water to determine, subject to Scottish Ministers’ approval, whether the undertaking will be a subsidiary, company, or partnership, or be established through such other arrangements as it considers appropriate.

51. Subsection (2) provides that the functions of the undertaking established under subsection (1) are to apply for a water services licence and a sewerage services licence, and thereafter to carry out the functions authorised by those licences. Subsection (3) requires the undertaking to apply to become a water services and sewerage services provider as soon as reasonably practicable after it is established.

52. Subsection (3A) confers an order-making power on the Scottish Ministers to prescribe that paragraphs 1 and 2 of Schedule 2 to the Bill, which make provision for licence applications and licence conditions, have effect subject to such modifications as are specified in the order, in relation to the first application for a licence made by the undertaking established under section 12. Section 27(3)(a) of the Bill provides that an order under this subsection is subject to negative procedure in the Parliament.

53. Subsection (4) allows the new undertaking to engage in any activity which it considers is not inconsistent with its activities as a water and sewerage services provider. The intention here is to ensure that the undertaking has the same freedom as any other licensed provider to offer its customers services in addition to those provided pursuant to its licence.

54. Subsection (5) requires Scottish Water to treat the new undertaking in the same way as it treats any other licensed water or sewerage services provider.

55. Subsection (6) confirms that references to Scottish Water in any enactment will henceforth be understood not to include the new undertaking established by this section, to ensure that responsibility for all Scottish Water’s statutory functions apply to Scottish Water as the public (wholesale) water supplier and sewerage provider in exercise of its core functions.
Section 12A: Financing, borrowing and guarantees

56. Section 12A makes provision in relation to the funding of the undertaking established under section 12, and confers order-making powers on the Scottish Ministers to prescribe circumstances in which grants may be made to the undertaking, sums may be lent to it, and financial obligations may be guaranteed in respect of it. Section 27(3)(a) of the Bill provides that the order-making powers in subsections (1), (2) and (6) of section 12A are subject to negative procedure in the Parliament.

57. Subsections (1) and (2) make provision for the Scottish Ministers to make grants to the undertaking, and for the undertaking to borrow from the Scottish Ministers and not (subject to the exception in subsection (4)(b)) from any other person. In each case, the circumstances in which this may occur and the amounts of any grant or loan will be specified in an order, and will be subject to the consent of Scottish Water.

58. Subsection (3) provides that in any financial year, the net amount (as defined in subsection (4)) of sums borrowed from the Scottish Ministers by the undertaking must not exceed the amount specified for that year in a Budget Act.

59. Subsection (5) provides that any loans made by the Scottish Ministers under subsection (2)(a) to the undertaking are to be repaid at such times and by such methods, as Ministers may from time to time specify; and Ministers can also specify the times and rates at which interest on such loans is to be paid.

60. Subsection (6) provides for an order-making power for Scottish Ministers to specify the circumstances in which they may guarantee a financial obligation entered into by the undertaking under subsection (4)(b), such as an overdraft or similar temporary borrowing arrangement. Subsection (7) provides that, immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before Parliament. Subsection (8) provides that where any sums are paid out in fulfilment of a guarantee, the undertaking must repay to Ministers such amounts (with interest), as Ministers may specify.

61. Subsection (9) provides that any grants or loans made, or guarantees given to the undertaking under section 12A are to be subject to such conditions as Ministers consider it appropriate to impose.

Section 13: Transfer of staff etc. to the undertaking

62. Section 13 provides for the transfer of staff, property and liabilities from Scottish Water to the new undertaking established under section 12 for the purposes that the undertaking is established to perform. It makes provision for the protection of the terms and conditions of employment of staff who are transferred to the undertaking.

63. Subsection (1) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer staff to the new undertaking for the purposes of it applying for water services and sewerage services licences and enabling the undertaking to carry out its activities as a licensed provider (these purposes are specified in subsection (7)).
64. Subsection (2) provides that the contract of employment of any staff transferred under subsection (1) will not be terminated by the transfer, but will continue as if originally made between the person and the undertaking.

65. Subsection (3) provides that when staff are transferred to the undertaking, the undertaking will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer will continue to have effect after the transfer.

66. Subsection (4) states that the transfer under these provisions does not affect any person’s right to terminate their contract of employment if their terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that that the identity of the person’s employer has changed does not in itself constitute such a change.

67. Subsection (5) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer such property (including rights) and liabilities to the undertaking as necessary for the purposes specified in subsection (7). Subsection (6) provides for the transfer of property and liabilities to have effect despite any provision which might otherwise prevent the transfer, and that the property and liabilities which are transferred are vested in the undertaking.

Scottish Water: services via licensed providers

Section 14: Scottish Water to provide services

68. The Bill provides for water and sewerage services providers to assume responsibility for providing services to customers in the following way. Firstly, the provider applies for a licence from the Commission. Secondly, and assuming that a licence is granted, the provider makes arrangements with the occupier of eligible premises to provide them with licensed services. Thirdly, the provider agrees specific terms and conditions by which Scottish Water will provide a wholesale supply of water or, as the case may be, sewerage services in respect of the premises provided with such services. Section 14 makes provision for this third step.

69. Subsection (1) enables a water services provider, once it has made arrangements with the occupier of eligible premises (as defined in section 20 of the Bill) for the supply of water to those premises, to request Scottish Water to supply water to the premises through the public water supply system (as defined in section 21 of the Bill). Subsection (2) places a duty on Scottish Water to comply with this request subject to agreeing terms and conditions with the provider, and subject to the carrying out of the request being consistent with the exercise of Scottish Water’s core functions (as defined in section 70(2) of the Water Industry (Scotland) Act 2002). This is to ensure that these new duties on Scottish Water are subject to its wider statutory responsibilities as the public supplier of water.

70. Subsection (3)(a) provides for Scottish Water’s duty to supply water under subsection (2) to cease if the arrangements between a provider and the occupier of eligible premises have come to an end. However, this is subject to section 15(1) of the Bill which provides that Scottish Water must continue to serve the premises for two months after the arrangement has come to an end, unless it has come to an end under the disconnection provisions in section 16(5). However, subsection (3)(b) provides that Scottish Water’s duty to supply water under subsection (2) may
be superseded by a new duty, such as, for example, when another licensed provider assumes responsibility for the provision of water services to the premises.

71. Subsections (4) to (6) make equivalent provision to subsections (1) to (3) as respects Scottish Water’s duty to provide sewerage services to premises as agreed by the sewerage services provider. However, unlike Scottish Water’s duties under subsections (1) to (3) in relation to the water supply, there is no general provision for sewerage services to be disconnected: a duty to provide sewerage services can only be superseded by a new duty, under subsection (5). Trade effluent services may, however, be discontinued by virtue of section 17A of the Bill (see paragraphs 86 to 90 below).

72. Where Scottish Water and a water or sewerage services provider cannot come to an agreement under subsections (2) or (5), on the terms and conditions whereby Scottish Water provides the water supply or sewerage services, subsection (7) provides for the Commission to determine the terms and conditions of the supply that Scottish Water is to make to the provider and for these to have effect as if they had been agreed between those parties.

Section 15: Continuation of water services

73. Section 15 makes provision in relation to Scottish Water’s duty to provide water services, when the arrangements between a licensed water services provider and the occupier of eligible premises have come to an end.

74. Subsection (1) provides that where the arrangements between the occupier of an eligible premises (as defined in section 20 of the Bill) and a water services provider have come to an end, such as, for example, on revocation of a licence, Scottish Water has a continuing duty to supply water to the premises for the period specified in subsection (2). The only exception to this is where the supply is discontinued at the request of a provider under section 16 of the Bill where alternative arrangements apply. This is to enable the customers of licensed providers to have a continued supply of water while they seek to secure services from an alternative licensed provider if their arrangement with their existing provider comes to an end for any other reason than those provided in the disconnection code under section 16. In most cases it is anticipated that a customer will be able to make arrangements with a new provider prior to the arrangements with their previous provider having come to an end.

75. Subsection (2) specifies the period for which Scottish Water must continue to supply water, after arrangements between the occupier of premises and a provider have come to an end, as two months or such longer period as Scottish Water agrees to.

76. Subsection (3) provides that the continuing duty to supply under subsection (1), that is to say, in the absence of an agreement between the occupier and a provider, ceases where a new arrangement has been made between a licensed provider and the occupier of eligible premises under section 14(2) of the Bill, or where the occupier of those premises notifies Scottish Water that a supply of water is no longer required.

77. Subsection (5) amends section 9 of the Water (Scotland) Act 1980, by inserting new subsections (2A) to (2C). Section 9(1) of the 1980 Act requires Scottish Water to supply water on reasonable terms and conditions where requested for non-domestic purposes. The new
section 9(2A) qualifies the section 9(1) duty so that Scottish Water is not required to make such a supply where arrangements between a licensed provider and the occupier of eligible premises under section 14(2) of the Bill have come to an end, where it believes there is no reasonable prospect of recovering charges from a customer. The requirement to supply water for non-domestic purposes can only come to an end if the arrangements between a licensed provider and a customer have ended because of non-payment of charges (section 9(2A)(a) of the 1980 Act), or the supply of water to a premises has been discontinued at the request of the provider (under section 16(5) of the Bill) because of non-payment of charges (section 9(2A)(b) of the 1980 Act).

The intention of this provision is to ensure that, where a customer is unable to find a water service provider, for example, because of a track record of not paying bills, that Scottish Water should not be required to provide a supply of water to that customer. The new section 9(2B) of the 1980 Act provides that where Scottish Water refuses to provide such a supply, the occupier of the premises has a right to have this reviewed by the Water Industry Commission which, in terms of the new section 9(2C) of the 1980 Act, can either confirm the decision to refuse or direct Scottish Water to give a supply, and its decision is final.

Section 16: Discontinuation of water services

78. Section 16 enables water services providers to request (under subsection (1)) that Scottish Water discontinue the supply of water to a premises provided by Scottish Water under an agreement with the provider as established by section 14(2) of the Bill. This provision will allow a water services provider, subject to compliance with the provisions of the disconnection code provided for under section 17, to request the disconnection of a customer, for example, when the customer has not complied with their contract to the provider by not paying their charges.

79. Subsection (2) requires a provider to serve a notice on: the occupier of the premises, Scottish Water, and the Commission, at least 14 days before requesting disconnection intimating its intention to seek disconnection. Subsection (3) gives Ministers the power to specify by order the form the notice will take and its content, and under section 27 an order under this subsection is subject to negative procedure in the Parliament.

80. Subsection (4) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.

81. Subsection (5) requires Scottish Water to discontinue a supply of water as requested if the conditions set out in subsection (6) are satisfied. Accordingly, the disconnection code, provided under section 17 of the Bill must have been complied with, and the disconnection requested must not adversely affect any supply of water to the premises for domestic purposes, or the supply of water, to any other premises for any purpose. Subsection (7) provides that a supply of water for domestic purposes is defined in accordance with section 7 of the Water (Scotland) Act 1980 (which includes a supply for drinking, washing, cooking, central heating and sanitary purposes).

82. Subsection (8) provides that the water services provider who requested the disconnection should pay any reasonable costs incurred by Scottish Water in carrying out the disconnection. Subsection (9) provides that in the case of any dispute as to reasonable costs in this regard the Commission will determine this and its decision is final.
Section 17: Disconnections code

83. This section makes provision for a disconnection code to be drawn up by the Commission.

84. Subsection (2) provides that a disconnection code may specify circumstances in which requests to Scottish Water to disconnect a premises under section 16 of the Bill may or may not be made; and any other conditions which must be satisfied before the disconnection actually takes place (over and above those mentioned in section 16(6)(b) of the Bill). The intention behind the code is to ensure that disconnection is only carried out where the circumstances genuinely demand it, and where it will not adversely affect any customers other than the one in respect of whom the disconnection is to be carried out. The code may make different provision for different cases and can be amended or revoked (subsection (3)).

85. Subsection (4) ensures that the Commission, in devising the code, will consult: Scottish Water, all water and sewerage services providers, the Convener of the Water Customer Consultation Panels, (on behalf of the Panels), the Drinking Water Quality Regulator for Scotland (appointed by virtue of section 7 of the 2002 Act), and such others as it thinks appropriate. Subsection (5) provides that the Commission must publish the code and publicise arrangements for making a copy of it available to any person who wishes to obtain it.

Section 17A: Continuation and discontinuation of sewerage services

86. Section 17A makes provision in relation to Scottish Water’s duty to provide sewerage or dispose of sewage when the arrangements between a licensed sewerage services provider and occupier of eligible premises have come to an end. Specific provision is made in relation to “trade effluent services” (as defined in subsection (15)), to permit such services to be discontinued under particular circumstances.

87. Subsection (1) places a duty on Scottish Water to continue providing sewerage, or disposing of sewage from eligible premises (as defined in section 20 of the Bill), even if the arrangements between the occupier of the premises and the sewerage services provider have come to an end. However, in contrast to the duty in section 15 as regards the continuing provision of a water supply, no time limit is put on this duty. However, by virtue of subsection (2), the duty does not apply to trade effluent services.

88. Subsection (3) provides that where arrangements between a sewerage services provider and the customer have come to an end, such as, for example, on revocation or suspension of a sewerage provider’s licence, Scottish Water has a continuing duty to provide trade effluent services for the period specified in subsection (4) (namely, for 2 months or such shorter period as Scottish Water, with the Water Industry Commission’s consent, determines).

89. However, subsection (5) provides that Scottish Water’s duty under subsection (3) ceases where a new arrangement has been made between a sewerage services provider and the occupier of eligible premises under section 14(5) of the Bill, or if the occupier of the premises notifies Scottish Water that trade effluent services are no longer required.

90. Subsection (6) enables a sewerage services provider to request that Scottish Water discontinue any trade effluent services provided to premises under section 14(5) of the Bill. The
procedures for this are set out in subsections (7) to (13). Under subsection (7), at least 14 days before making such a request, the provider must serve a notice of its intention to do so on: the occupier of the premises, Scottish Water, and the Commission. Subsection (8) gives Ministers the power to specify by order the form and content of such a notice, and under section 27(3)(a) of the Bill, such an order is subject to negative procedure in the Parliament.

91. Subsection (9) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.

92. Under subsection (10), if the request proceeds, Scottish Water must discontinue the trade effluent services, provided that the conditions set out in subsection (11) are satisfied, namely, that other arrangements for the provision of sewerage or the disposal of sewage in respect of those or other premises is not adversely affected by the discontinuation, and there is no likely risk to public health as a result of the discontinuation.

93. Subsection (12) provides that the sewerage services provider who requested the discontinuation should pay any reasonable costs incurred by Scottish Water in carrying out the discontinuation (which, in the event of a dispute, must be determined by the Commission - see subsection (13)).

94. Subsection (14) provides that section 17A is expressly without prejudice to the existing statutory provisions governing the provision of trade effluent services, as set out in Part II of the Sewerage (Scotland) Act 1968. Part II of that Act makes provision generally for the granting or continuation of consents by Scottish Water in respect of discharges of trade effluent from premises, or for agreements in relation to such discharges. Those consents or agreements can be subject to appropriate conditions, which may include provision as regards their discontinuance in certain circumstances.

95. Subsection (15) defines trade effluent services for the purpose of section 17A, in accordance with section 59(1) of the 1968 Act, which provides that ““trade effluent” means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade to industry carried on at trade premises, including trade waste waters or waters heated in the course of any trade to industry and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises”.

Scottish Water: charges and functions

Section 18: Scottish Water’s charges for water and sewerage services

96. Section 18 alters the basis for determining Scottish Water’s charges as provided in the Water Industry (Scotland) Act 2002 (“the 2002 Act”). Under the new provisions, Ministers will set objectives for charges, and the Commission will determine charge limits and approve charges schemes. This section substitutes a new section 29, and inserts new sections 29A to 29G into the 2002 Act; amends section 30 thereof; and repeals sections 31 to 34 thereof. It also amends section 35 of the 2002 Act and inserts a new section 35A into it.
Subsection (1): the new section 29 of the 2002 Act: Charges for goods and services

97. Subsection (1) inserts new sections 29 to 29G into the 2002 Act. The new section 29 provides for Scottish Water to charge for goods and services. In contrast to the broad general power in the existing section 29(1) of the 2002 Act, the new section 29(1) makes a distinction between the power to demand and recover charges for services which are part of Scottish Water’s core functions as defined in section 70(2) of the 2002 Act (new subsection 29(1)(a)), and goods or services provided in pursuit of Scottish Water’s other functions (new subsection 29(1)(b)).

98. The new section 29(2) of the 2002 Act provides that Scottish Water is to demand and recover charges for services it provides as part of its core functions either according to a charges scheme made under the new section 29A of the 2002 Act or under an approved departure from a charges scheme under the new section 29E of the 2002 Act.

99. The new section 29(3) of the 2002 Act provides that fixing, demanding and recovering charges for non-core functions is exercisable by or in accordance with an agreement with the person to be charged.

100. The new section 29(4) of the 2002 Act makes exemptions from the general charging powers in sections 29(1) to (3) in respect of water supplied under the circumstances set out in:

- section 9A of the Water (Scotland) Act 1980, which ensures that no charge can be made for supplies of water for certain fire-fighting purposes; and
- section 47 of that Act, which continues any arrangements in force before 16th May 1949 under which no charge was made for supplies of water.

Subsection (1): the new section 29A of the 2002 Act: Charges schemes

101. The new section 29A to the 2002 Act, also inserted by subsection (1) of section 18 of the Bill, sets out the procedure for making, approving and publishing charges schemes. Subsection (1) of the new section 29A provides for Scottish Water to make a scheme, defined as a charges scheme, setting out what it proposes to charge for each of the services it provides as part of its core functions. Subsections (2) and (3) of the new section 29A provide that a charges scheme must comply with a charge determination made by the Water Industry Commission under the new section 29B to the 2002 Act, and in particular that no charge within the scheme may exceed the relevant maximum charge set out in the determination.

102. Subsection (4) of the new section 29A provides that a charges scheme can specify times and methods of payment for charges.

103. Subsection (5) of the new section 29A provides that where Scottish Water reasonably requests information from Scottish Ministers and the Commission for the purposes of making a charges scheme they must provide that information.

104. Subsection (6) of the new section 29A gives the Scottish Ministers the power to direct when Scottish Water should send the charges scheme they have drawn up to the Commission for its approval. This is connected to Ministers’ power to set the charge determination period under...
the new subsection 29B(2) of the 2002 Act. The charge determination period will be divided into one or more periods for a charges scheme to apply to and this provision will allow Ministers to set a date sufficiently in advance of the intended start of a new charges scheme period for the scheme to be approved by the Commission and published by Scottish Water.

105. Subsections (7) and (8) of the new section 29A provide that the Commission may approve a charges scheme as submitted by Scottish Water with or with modifications. Where the Commission modifies the charges scheme, it is to set out its reasons for doing so.

106. Subsection (9) of the new section 29A provides for Scottish Water to publish a summary of the charges scheme approved by the Commission. It must also make arrangements for anyone to inspect or obtain a copy of the full charges scheme, and publicise these arrangements.

**Subsection (1): the new section 29B of the 2002 Act: Determination of maximum charges**

107. The new section 29B of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, requires the Commission to determine maximum charges within which Scottish Water will make a charges schemes for approval under the new section 29A of the 2002 Act. It also provides for the period of a determination to be set by Ministers and for the Commission to consult on a draft determination.

108. Subsection (1) of the new section 29B provides that the Commission must determine maximum charge limits which will be the basis for a charges scheme made by Scottish Water under the new section 29A(1), and for Ministers to specify the date by which the determination must be sent to Scottish Water.

109. Subsection (2) of the new section 29B provides for Scottish Ministers to set the period that a charge determination by the Commission will apply for. This might cover the period of one or several charges schemes.

110. Subsection (3) of the new section 29B provides that a charge determination by the Commission can set different maximum charges for different cases or categories of case. This will allow the Commission to provide different charge limits for different types of customers of Scottish Water, including customers in particular circumstances and for different services. The Commission will do this to reflect the different services Scottish Water provides to its customers, and in accordance with Scottish Ministers’ statement under the new section 29D of the 2002 Act.

111. Subsection (4) of the new section 29B sets out the procedure for the Commission to consult on the basis of a draft determination. In advance of making a determination under this section, the Commission is required to send a draft determination to Scottish Ministers, Scottish Water and the Convener of the Water Customer Consultation Panels (representing the Panels as a whole) and to publish it with a view to receiving representations about it, which the Commission must have regard to.

112. Subsection (5) of the new section 29B provides that Scottish Ministers and Scottish Water are required to comply with reasonable requests for information made by the Commission in exercise of its determination function under this section.
Subsection (1): the new section 29C of the 2002 Act: Exercise of functions regarding charges

113. The new section 29C of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, sets out what should be taken into account by:

- Scottish Water, in making a charges scheme under section 29A or revising any charges fixed by the scheme under section 29F; and
- the Commission, in approving charges schemes under section 29A, determining maximum charges under section 29B, authorising departures from those schemes under section 29E and reviewing its determinations under section 29F.

114. Subsection (1) of the new section 29C provides that Scottish Water, in proposing a charges scheme under section 29A or any revision under section 29F, must comply with subsections (3) and (4) of this section. These provide that Scottish Water must comply with the statement of policy regarding charges as issued by Ministers under the new section 29D, and ensure that its income (whether from charges or other available resources) is not less than sufficient to match the expenditure required to enable the effective exercise of its core functions (the latter as defined in section 29G).

115. Subsection (2) of the new section 29C specifies how the Commission must exercise its functions under the new sections 29A, 29B, 29E and 29F. In relation to sections 29A, 29B and 29F, the Commission must, like Scottish Water, comply with sections 29C(3) and 29C(4) (as discussed in the previous paragraph). In approving departures from charges schemes under section 29E, the Commission should ensure that Scottish Water’s income is sufficient to match the expenditure required to enable the effective exercise of its core functions (again as defined in section 29G). The Commission must also have regard to any relevant Ministerial guidance issued to Scottish Water or directions given to it, either under the general direction-making power in section 56 of the 2002 Act, or in relation to payment and investment under section 44 of that Act. This will ensure that the Commission takes account of all relevant obligations or duties or instructions which have a bearing on how Scottish Water discharges its core functions (as defined in section 70(2) of the 2002 Act), in calculating the income or expenditure charge determinations or schemes should provide for.

116. Subsection (4) of the new section 29C provides a formula for balancing Scottish Water’s income and expenditure (from various resources) which charge determinations and revisions thereof (under section 29F) and charges schemes must take account of. This must be read in light of the duty on Scottish Water under section 41(1) of the 2002 Act to ensure that, taking one year with another, its income is not less than sufficient to meet its expenditure. It defines Scottish Water’s income as the sum of its income from its charges for services and the amount of financial resources reasonably available to it such as, for example, grants paid to it by Ministers under section 42(1) of the 2002 Act and borrowing authorised by Ministers under section 42(3) of that Act. In effect, it requires that Scottish Water’s income in respect of its core functions should not be less than sufficient to meet the expenditure, in both capital and operating costs, required to enable it to effectively perform those functions.

Subsection (1): the new section 29D of the 2002 Act: Statements regarding charges

117. The new section 29D of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for Ministers to issue a statement of policy regarding charges,
This document relates to the Water Services etc. (Scotland) Bill, as amended at Stage 2
(SP Bill 23A)

which must be taken into account by the Commission in its determination of maximum charges under the new section 29B and by Scottish Water and the Commission respectively in making and approving charges schemes under the new section 29A.

118. Subsection (1) provides that for each charge determination provided under section 29B(2), the Scottish Ministers must provide Scottish Water and the Commission with a statement of policy on charges for a given period (as determined under section 29B(2)). This statement is to be prepared with reference to economic as well as other relevant factors.

119. Subsection (2) provides that Ministers’ statement on charges policy should include provision regarding charge harmonisation, and defines that as provision that seeks to ensure that charges under a charges scheme are the same for similar services provided to people in similar categories.

120. Subsection (3) specifies other provisions that Scottish Ministers may include in their statement on charges policy, which must be consistent with the overriding principle of harmonisation as set out in subsection (2). This includes provision regarding: particular services that should be funded through a charge for combined services (subsection (3)(a)); the proportion of Scottish Water’s charge income which different categories of customer should contribute (subsection (3)(b)); fixing the level of charge for specific categories of customer, or by reference to a customer’s liability for council tax (subsection (3)(c)); and for it to cover such other matters as Ministers think fit (subsection (3)(d)). This will allow Ministers to require continuation of the current link for household customers between their council tax band and their water and sewerage charges. It also provides a mechanism for prescribing reduced charges for certain groups of customers, which will replace the current provision under section 40 of the 2002 Act for Ministers to make regulations reducing charges for customers meeting specific conditions, for example, those in receipt of council tax benefit.

121. Subsection (3A) provides that in preparing a statement under this section, Scottish Ministers must have regard to Scottish Water’s duty under section 51(1) of the 2002 Act, when exercising its functions, to act in the way best calculated to contribute to the achievement of sustainable development.

122. Subsection (4) states that Scottish Ministers must consult the Commission, the Convener of the Customer Consultation Panels (representing the Panels as a whole) and Scottish Water before issuing a policy statement on charges under this section.

Subsection (1): the new section 29E of the 2002 Act: Departure from certain charges

123. The new section 29E of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for departures from a charges scheme to be made in respect of charges paid by a water services or sewerage services provider. The section also specifies the narrow circumstances in which these departures from the set charges scheme may be permitted.

124. Subsection (1) of the new section 29E allows Scottish Water to apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid by a water services or sewerage services provider.
125. Subsection (2) of the new section 29E provides that the Commission may consent to such a departure only where satisfied that a customer of the provider in respect of which Scottish Water has made the request has taken specific action which demonstrably reduces or increases the costs incurred by Scottish Water in providing services to the provider. The subsection also provides that the departure must be otherwise justified in the circumstances of the case.

126. Subsection (3) to new section 29E provides that where the Commission agrees to a departure, it may do so subject to such reasonable conditions as it considers appropriate.

127. Subsection (4) to new section 29E stipulates that where the Commission does not agree to a departure it must give its reasons for doing so.

128. Subsection (5) to new section 29E provides that the Commission must specify in writing the procedure it will follow in deciding whether to agree to requests for departures made under subsection (1). In addition it must specify matters which will be taken into account and criteria which will be used in determining whether a departure from a charges scheme is justified; and, where the Commission determines that a departure is justified, matters to be taken into account and criteria to be used by Scottish Water in setting lower, or as the case may be, higher, charges. Subsection (6) provides that the Commission may revise this provision.

129. Subsection (7) to new section 29E provides that, in making provision under subsection (5) for the procedure to be followed in determining requests for departures, the Commission must consult Scottish Ministers, Scottish Water and such other persons as it thinks fit.

130. Subsection (8) provides that the Commission must send a copy of the provision made under subsection (5) to Scottish Ministers, Scottish Water and every water services and sewerage services provider. And subsection (9) requires Scottish Water to publish details of every departure from a charges scheme.

Subsection (1): the new section 29F of the 2002 Act: Review of determinations and charges

131. The new section 29F of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for the Commission’s determination of charges made under section 29B to be reviewed and amended prior to the date set (under section 29B(2)) for the next determination to be made. Subsection (1) of the new section 29F provides that a review of a determination under section 29B(1)(a) is only to be sought where there has been or is likely to be a material change to Scottish Water’s income from charges, grants, borrowing, or the other resources reasonably available to it; or to the expenditure required by Scottish Water for the effective exercise of its core functions (as defined in section 29G).

132. Subsection (2) of the new section 29F provides that, where subsection (1) applies, Scottish Water may, or must if the Commission requests it to, send the Commission proposals for revising the maximum amounts determined for charges under section 29B(1)(a).

133. Subsection (3) of the new section 29F provides that the Commission, on receipt of such a proposal, must review the maximum amounts in force, and may revise them to such extent as it thinks fit.
134. Subsection (4) of the new section 29F provides that in reviewing the amounts, the Commission must take into account all matters affecting the resources available to Scottish Water and the expenditure required to carry out its core functions.

135. Subsection (5) of the new section 29F provides that the Commission, before revising the amounts, must inform Scottish Ministers that review of these is under consideration; invite representations regarding the revision of the amounts; and have regard to any representations made to it.

136. Subsection (6) of the new section 29F provides that the Commission must give reasons for its decision as to whether or not to revise the amounts.

137. Subsection (7) of the new section 29F requires the Commission to send Scottish Water a written notice of any revised amounts set.

138. Subsection (8) of the new section 29F provides that Scottish Water may revise any charges fixed by the charges scheme in accordance with the revised amounts and that where it does so it must send written notice of the revised charges to the Commission for approval. Subsection (9) provides that the Commission may approve any revised charges with or without modifications. Subsection (10) provides that if the Commission approves any revised charges with modifications, it must give its reasons for doing so.

139. Subsection (11) provides that once revised charges have been approved by the Commission, Scottish Water must publish a summary of the revised charges and the date from which the revised charges have effect. Subsection (12) provides that the date for this purpose will be determined by the Commission.

Subsection (1): the new section 29G of the 2002 Act: Effective exercise of core functions

140. The new section 29G of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides that, for the purposes of sections 29C(4) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if it makes such use of its resources that, year on year, it achieves its objectives, as set out in Ministerial directions under sections 56 and 56A at the lowest reasonable overall cost. Section 29C(4) provides that Scottish Water’s income should not be less than sufficient to allow it to carry out its core functions. A definition of the effective exercise of Scottish Water’s core functions is needed in relation to section 29F(1) because the expenditure required in relation to this is one factor where a material change may trigger a section 29F review of the Commission’s determination and charges.

Subsection (2): Scottish Water’s charges for water and sewerage services

141. Subsection (2) of section 18 makes amendments to section 30 of the 2002 Act which currently gives the Scottish Ministers the power by order to set maximum charges that may be recovered by a person other than Scottish Water for supplying water or providing sewerage services with the help of Scottish Water to others who are not the direct customers of Scottish Water. For example, the owner of a caravan site may be the direct customer of Scottish Water, and might in turn charge individual caravan owners for Scottish Water’s services subject to any relevant maxima. The amendments provide that in future the maximum charges for these services, or the method of calculating them, will be set out in Scottish Water’s charges scheme.
under the new section 29A of the 2002 Act (see above) and consequently will be subject to approval by the Commission.

Subsection (3): Repeal of sections 31 to 34 of the 2002 Act

142. Subsection (3) of section 18 repeals sections 31 to 34 of the 2002 Act, which make provision for the Water Industry Commissioner to provide advice on charges and for charges schemes to be proposed, approved and published. These arrangements are all superseded by new sections 29 to 29G of the 2002 Act, as inserted by subsection (1) of section 18.

Subsections (4) and (5): Liability of occupiers etc. for charges

143. Subsection (4) of section 18 amends section 35 of the 2002 Act which sets out the liability of the occupiers of premises to pay Scottish Water for water or sewerage services. The amendment disapplies the section in respect of services provided under section 14(2) of the Bill, i.e. services to persons eligible to be served by a water or sewerage services provider; unless their supply has been continued under section 15(1) or (4). This provides that only occupiers of eligible premises whose service is continued by Scottish Water under the supplier of last resort provisions in section 15 are liable to Scottish Water directly for their water charges. For all other occupiers of eligible premises whose services are arranged by a licensed provider, the latter will instead be liable to Scottish Water for charges under the new section 35A.

144. Subsection (5) of section 18 inserts a new section 35A into the 2002 Act. This new section provides that water and sewerage services provided by Scottish Water to eligible premises by a licensed provider, as provided in section 14 of the Bill, are to be considered as services provided solely by Scottish Water to the licensed provider for the purposes of charge schemes and determinations under the new sections 29 to 29G of the 2002 Act (as inserted by section 18(1) of the Bill) (see, in particular, section 35A(1) and (2) which make provision for water and sewerage services respectively). Section 35A(3), however, disapplies section 35A(1) and (2) where water or sewerage services continue to be provided directly to the occupiers of those premises under section 15 of the Bill. In that case, occupiers will be directly liable to Scottish Water for charges as set out in a charges scheme under the new section 29A of the 2002 Act.

Section 19: Scottish Water’s functions: powers of the Scottish Ministers

145. Section 19 inserts sections 56A and 56B into the 2002 Act. Section 56 of the 2002 Act gives the Scottish Ministers powers to direct Scottish Water as regards the exercise of their functions. Subsection (1) of the new section 56A enables any directions issued under section 56 to, in particular, set objectives regarding the standard of services to be provided by Scottish Water in the exercise of its functions; or the timescales within which Scottish Water is to achieve a particular standard of service in exercising its functions, or to commence or complete a particular piece of work. The directions will apply by reference to the period of a charge determination specified under the new section 29B(2) of the 2002 Act. Subsection (2) states that different objectives may be set for different cases or categories of case.

146. Subsection (3) of the new section 56A requires Scottish Ministers, in formulating objectives of a type referred to in subsection (1), to have regard to Scottish Water’s duty under section 51(1) of the 2002 Act, in exercising its functions, to act in the way best calculated to contribute to the achievement of sustainable development.
147. Subsection (4) of the new section 56A of the 2002 Act requires Scottish Ministers, before giving directions under section 56 of a type referred to in subsection (1), to consult the Convener of the Customer Consultation Panels on the objectives. The Convener, in being consulted under this section, represents the Panels as a whole.

148. The new section 56B gives Ministers powers, after consulting the Commission and Scottish Water, to make orders conferring additional functions on Scottish Water as regards the provision of water and sewerage services. Paragraph 7(7) of schedule 5 to the Bill amends section 68 of the 2002 Act to provide that regulations under new section 56B will be subject to affirmative procedure in the Parliament.

Section 3: Determinations relating to provision of services

149. Section 3 relates to regulations to be made under the Sewerage (Scotland) Act 1968 (“the 1968 Act”) and the Water (Scotland) Act 1980 (“the 1980 Act”) as amended by the Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”). These allow the Scottish Ministers to make regulations dealing with the issue of reasonable cost, the cost which Scottish Water is required to bear in making a new connection to the public water supply or sewerage system. The regulations will define how the balance of costs between Scottish Water and developers will be calculated. In effect, these amendments mean that the Commission is to be responsible for deciding any disputes about reasonable costs rather than Ministers.

150. Subsection (1)(a) amends subsection (4) of section 1 of the 1968 Act to give the Commission, rather than Ministers, powers to determine disputes arising over the determination of reasonable cost of a sewerage connection as defined in regulations. Subsection (1)(b) inserts provisions into the 1968 Act to require the Commission to define its procedures for determining disputes, and to consult Scottish Water and others as it considers appropriate on these procedures.

151. Subsection (2) makes equivalent provision in relation to connection to the public water networks through amendments to the 1980 Act.

Section 19A: Qualification of duty to provide services

152. Section 19A qualifies Scottish Water’s duties to provide public sewers and a supply of wholesome water for domestic purposes, and to allow connections to the public water and sewerage network, where practicable at a reasonable cost, as set out respectively in section 1 of the Sewerage (Scotland) Act 1968 and section 6 of the Water (Scotland) Act 1980.

153. Subsection (1) inserts a new subsection (7) into section 1 of the 1968 Act to provide that the duties imposed by sections 1(1) and (2) of that Act shall not require Scottish Water to do anything which is prejudicial to its compliance with (a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 so far as setting objectives of a type referred to in section 56A of that Act (inserted by section 19 of the Bill); or (b) a statement of policy issued under section 29D of the 2002 Act (inserted by section 18 of the Bill).

154. Subsection (2) of section 19A makes equivalent qualifications in respect of Scottish Water’s duties under sections 6(1), (2) and (4) of the 1980 Act.
Sewerage nuisance: Code of Practice

Section 19B: Sewerage nuisance: code of practice

155. Section 19B gives the Scottish Ministers powers to issue a code of practice on the assessment, control and minimisation of sewerage nuisance.

156. Subsection (1) of section 19B gives the Scottish Ministers the power to make an order containing a code of practice on the assessment, control or minimisation of sewerage nuisance. This is referred to as a “sewerage code”.

157. Subsection (2) defines “sewerage nuisance” as any smells or discharges, insects or any other thing emanating from any part of the public sewerage system so as to be prejudicial to health or a nuisance. “Public sewerage system” is defined in section 22(1) of the Act.

158. Subsection (3) provides that a sewerage code may include guidance on the best practicable means of assessing, controlling and minimising sewerage nuisance, and may set out the circumstances in which a person to whom a sewerage code applies could be regarded as complying or not complying with that code.

159. Subsection (4) contains provisions concerning the interpretation of “best practicable means” for the purposes of subsection (3)(a).

160. Subsection (5) provides that a sewerage code will apply to Scottish Water in respect of its core functions relating to the provision of sewerage and the disposal of sewage and to any other person acting on Scottish Water’s behalf or under its authority in respect of those functions.

161. Subsection (6) requires Scottish Water and any other person to whom the code applies, to comply with that code.

162. Subsection (7) requires the Scottish Ministers and local authorities to publicise a sewerage code.

163. Subsection (8) requires the Scottish Ministers, in advance of making an order containing a sewerage code, to consult Scottish Water, local authorities and any other appropriate persons, on the proposed sewerage code.

164. Subsection (9) exempts from the requirements of sections 19B and 19C, those parts of the public sewerage system which are regulated by a permit issued by the Scottish Environment Protection Agency ("SEPA") under the Pollution Prevention and Control (Scotland) Regulations 2000, such as, for example, certain sewage treatment works. However, subsection (10) reserves the powers of Ministers under other legislation, to make a direction concerning the application of a sewerage code to any part of the public sewerage system. This would, for example, enable Ministers to give directions to SEPA to have regard to the requirements of any sewerage code when granting permits under the 2000 Regulations.
Section 19C: Monitoring and enforcement

165. Section 19C contains monitoring and enforcement provisions relating to sewerage codes.

166. Subsection (1) requires a local authority to monitor compliance with a sewerage code, and to investigate complaints of sewerage nuisance made by persons living in its area.

167. Subsection (2) requires a local authority to serve a notice (referred to as an “enforcement notice”) on Scottish Water or any other person to whom a sewerage code applies, where satisfied that there is or is likely to be material non-compliance with a sewerage code.

168. Subsection (3) provides that the enforcement notice may set out the works or steps required to comply with a sewerage code and must specify the date by which these requirements are to be fulfilled.

169. Subsection (4) provides that it is an offence without reasonable excuse to contravene an enforcement notice, and provides for a fine of up to £40,000 on summary conviction.

170. Subsections (5) and (6) enables a local authority itself, in the event of non-compliance with an enforcement notice, to undertake works to secure compliance with that notice, and to recover the costs of so doing from the person upon whom the notice was served.

171. Subsection (7) disapplies the statutory nuisance functions of a local authority under sections 79 to 81 of the Environmental Protection Act 1990, so that only the Bill’s provisions apply as regards sewerage nuisance (and not the monitoring and enforcement functions under those sections of the 1990 Act so far as relevant in relation to sewerage nuisance). This will ensure that the monitoring and enforcement procedures set out in section 19C apply to sewerage nuisance in future. However, the operation of section 82 of the 1990 Act is expressly preserved so that the abatement procedure under that section, by which individuals may bring summary proceedings regarding a statutory nuisance, continues to apply so far as relevant in relation to sewerage nuisance.

Definitions for Part

Section 20: Meaning of “eligible premises”

172. Section 20 defines “eligible premises” for the purposes of Part 2 of the Bill. This is required to define which customers licensed providers may make arrangements to supply water or sewerage services to. Where a customer meets this definition a licensed provider can supply services to them without contravening the general prohibitions in sections 4(3) and 5(3) of the Bill.

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

174. Subsection (2) defines “dwelling” by reference to the definition given to it for council tax purposes under the Local Government Finance Act 1992 (i.e. premises in respect of which
council tax is payable). The main purpose of this provision is to ensure that licensed providers cannot make arrangements to provide services to households. However, certain places which are dwellings under the 1992 Act, are not to be classed as a dwelling for the purposes of this Bill, namely “the residential part of part residential subjects within the meaning of that Part of that Act”. This means that premises which are technically residential but which form part of a building whose main purpose is to function as a business, e.g. a care home, are not caught by the definition of “dwelling”; they will therefore fall within the definition of “eligible premises” and be able to receive water and sewerage services from a licensed provider notwithstanding that, for council tax purposes, certain parts of those subjects may be classed as a dwelling.

175. Subsection (3) gives Ministers the power by order to amend the definition of a “dwelling” for the purposes of the Bill. This power could be used, for example, in the event of any changes made for council tax purposes to the definition of dwelling, to ensure that premises used primarily as dwellings are always excluded from the category of "eligible" premises. Section 27 provides for these regulations to be subject to negative procedure in the Parliament.

Section 21: Meaning of “public water supply system”

176. A water services licence will authorise a provider to arrange for a supply of water to be made to any eligible premises through the public water supply system. Section 21 defines what constitutes the public water supply system for the purposes of Part 2 of the Bill.

177. 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 (or a person acting on its behalf or under its authority, such as a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of the public water supply. (Scottish Water’s core functions are defined at section 70(2) of the Water Industry (Scotland) Act 2002 and for all practical purposes the definition includes all activities involved in providing statutory public water and sewerage services.)

Section 22: Meaning of “public sewerage system”

178. 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 through the public sewerage system. Section 22 provides a definition of the public sewerage system for the purposes of Part 2 of the Bill.

179. Subsection (1) defines the public sewerage system as all sewers, drains, sustainable urban drainage systems (SUDS), sewage treatment works or other similar infrastructure vested in Scottish Water or used by Scottish Water (or a person acting on its behalf or under its authority, such a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of statutory public sewerage services.

PART 3: COAL MINE WATER POLLUTION

Section 23: Control of water from coal mines

180. Subsection (1) of section 23 of the Bill inserts new sections 4D to 4F and a new Schedule 1C into the Coal Industry Act 1994 (“the 1994 Act”). These new sections provide the terms and
conditions of powers allowing the Coal Authority ("the Authority") to act to prevent or mitigate pollution, and to gain access and, if need be, to compulsorily acquire land in order to deal with coal mine water pollution in Scotland. The new provision is set out as a power, rather than a duty in any particular case, in order to enable the Authority to decide what action, if any, would be appropriate, depending on the circumstances.

181. The new section 4D of the 1994 Act makes provision for the Authority to take action to prevent or mitigate pollution of the water environment caused by discharges of water from coal mines which are vested in the Authority. This provides a statutory basis for the Authority's remediation work beyond its existing powers and general duties in Part 1 of the 1994 Act.

182. The new section 4E of the 1994 Act defines the powers that are given to the Authority to enter premises (within the meaning of section 4E(8), which includes land) for the purpose of investigating or dealing with water discharging from coal mines. The new Schedule 1C to the 1994 Act (as set out in Schedule 4 to the Bill) sets out additional provisions on the administrative and operational procedures concerning these powers of entry. Before invoking these powers, the Authority would usually seek to reach agreement with the relevant owners of the land. These provisions therefore only concern situations where the Authority is unable to gain entry by agreement.

183. Subsections (1) and (2) of new section 4E sets out the reasons why the Authority would need to have access to premises (in exercise of its powers under subsection (3)). These are to carry out work to determine the extent, or the likelihood, of any pollution or danger, and to take any remedial action required under section 4D, where coal mine water has caused, or is causing, or is likely to cause either serious pollution of the environment or a danger to life or health. While actual ownership of the mine remains with the Authority, Part II of the 1994 Act provides for the leasing of coalmining operations; this new provision therefore makes provision to enable another person, such as a licensee or a specialist, to undertake the required investigative works on behalf of the Authority.

184. Subsections (3) and (4) of new section 4E set out the extent of the powers of entry and the purposes for which they might be used in order to allow a broad spectrum of investigative and remedial work, including the power to carry out experimental borings. As read with paragraph 1 of Schedule 1C, the powers enable the Authority to take others onto the premises, for example, engineering experts, and any necessary equipment, for use in tracing the source of leaks.

185. In an emergency (as defined in new section 4E(8) to cover cases where there is an immediate risk of serious pollution of the environment or immediate danger to life or health), the provisions of new section 4E(3) permit the Authority to enter premises at any time and, if need be, by force.

186. Subsections (5), (6) and (7) of new section 4E require the Authority either to give at least seven days' notice before entering a premises (in cases other than an emergency), or to obtain a warrant granted under the terms of paragraph 2 of Schedule 1C (where the occupier of the premises does not consent to the entry). Whilst the immediacy of the threat to the water environment may not be such that it could be described as an "emergency", there may still nevertheless be a need to exercise the powers of entry under the authority of a warrant to deal
with potentially significant pollution of the water environment. For example, where the Authority had identified the need for a new monitoring point but could not gain the agreement of the landowner to install the monitoring equipment or subsequently to take measurements. In order to establish clearly the evidential basis which underpins the issue of a warrant, the new Schedule 1C sets out the required evidence which must be adduced in writing before a warrant may be issued. These include circumstances where the Authority requires access urgently and the occupier is absent. However, this would rarely be necessary, for example, where the Authority needed to work quickly and the occupier was uncontactable for an extended period.

187. The new section 4F of the 1994 Act enables the Authority to compulsorily acquire land in Scotland. This new provision is in addition to section 5(2) of the 1994 Act which enables the Authority to acquire land by agreement for the purposes of carrying out its general functions under that Act.

188. Subsections (1) and (2) of new section 4F enable the Authority, if authorised by the Scottish Ministers, to acquire land compulsorily for the purpose of preventing or mitigating the effects of a mine water discharge which has caused, is causing or is likely to cause serious pollution of the water environment or danger to life or health. The Authority is also able, where necessary, to acquire a right of servitude in or over land to ensure access to the land for the purpose of carrying out its works.

189. Subsection (3) of new section 4F applies the requirements of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to compulsory acquisitions under new section 4F. Wherever the 1947 Act refers to ‘a local authority’, it will apply as if it were a reference to the Coal Authority. The provisions of the 1947 Act enable Scottish Ministers to confirm an Order with or without modifications in the absence of any outstanding objections, failing which a public local inquiry must be held. Additionally, following confirmation of an Order, the Authority is required to notify it in the prescribed form. These new powers will not affect the requirements, in section 5(7) of the 1994 Act, for the Authority to obtain the agreement of Treasury and the Secretary of State for Trade and Industry before acquiring any land.

190. Subsection (2) of section 23 of the Bill inserts a new subsection (6) into section 66 of the 1994 Act, so that the provisions apply to land held by non-ministerial office holders in the Scottish Administration as well as other government departments.

191. Subsection (3) of section 23 of the Bill amends the 1994 Act to provide that the provisions inserted by the Bill apply to Scotland only.

PART 4: MISCELLANEOUS AND GENERAL

Miscellaneous

Section 24: Offences by bodies corporate and partnerships

192. Section 24 provides that officers of companies and other corporations and members of partnerships can be held personally liable, in certain circumstances, for offences under the Bill that their companies or partnerships commit.
Section 25: Amendments to enactments

193. Section 25 introduces schedule 5, which makes consequential amendments to enactments as a result of this Bill.

Section 26: Ancillary provision

194. Section 26 enables Ministers to make orders for incidental, supplemental, consequential, transitional, transitory or saving provisions where they consider that these are necessary or expedient for the purposes of or in consequence of the Bill. The parliamentary procedure for making these orders is defined under section 27: where an order is used to amend primary legislation, affirmative procedure is prescribed; otherwise an order would be subject to negative procedure.

General

Section 27: Orders and regulations

195. Section 27(1) provides that the powers to make orders and regulations that the Bill confers on the Scottish Ministers are exercisable by statutory instrument. Subsection (2) provides that in exercising such powers, Ministers can make such incidental, consequential, transitional or saving provisions as considered necessary or expedient and can make different provision for different circumstances.

196. Subsections (3) and (4) set out the parliamentary procedure which the various statutory instruments that are capable of being made under the powers in the Bill are subject to.

197. Subsection (3) provides that some statutory instruments are subject to negative procedure or annulment. Subsection (4), however, specifies affirmative procedure for some statutory instruments, whereby 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.

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

- Section 2: an order to dissolve the Water Industry Commissioner for Scotland.
- Section 7(2): an order to specify any other factors beyond those at sections 7(2)(a) and 7(2)(b) that the Commission 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 Commission, under the powers conferred by section 9, may charge applicants for a licence.
- Section 12(3A): an order to modify paragraphs 1 and 2 of schedule 2, which govern procedures for the application for a water or sewerage services licence and the conditions of the licence, in relation to the first application for such a licence by the undertaking established by Scottish Water under section 12.
Section 12A(1): an order to specify circumstances in which Scottish Ministers may make grants to the undertaking established under section 12.

Section 12A(2): an order to specify circumstances in which the undertaking established under section 12 may borrow from Scottish Ministers and the circumstances in which it may not borrow money from any other person.

Section 12A(6): an order to specify circumstances in which Scottish Ministers may guarantee the discharge of any financial obligation in connection with sums borrowed by the undertaking under section 12A(4)(b).

Section 16(3): an order prescribing the form and content of the notice that a water services provider must issue under section 16(3), prior to requesting that Scottish Water discontinue the supply of water to premises.

Section 17A(8): an order prescribing the form and content of a notice that a sewerage services provider must issue, prior to requesting that Scottish Water discontinue provision of trade effluent services to premises.

Section 19B(1): an order containing a code of practice for the purposes of assessing, controlling and minimising sewerage nuisance.

Section 20(3): an order to vary the meaning of “dwelling” for the purposes of the Bill’s definition of “eligible premises” at section 20.

Section 26: an order to make further provision for the purposes of the Bill (where this does not amend primary legislation).

Paragraph 1(1) of Schedule 2: an order prescribing the form and content of an application for a water services or sewerage services licence.

Paragraph 1(4) of Schedule 2: an order prescribing the timescales and content of the notice that an applicant for a licence must publish.

Paragraph 11(1) of Schedule 2: an order specifying the manner in which the Commission must maintain a register of water and sewerage services licences.

Paragraph 11(2)(g) of Schedule 2: an order specifying any additional information, beyond that at sections 10(2)(a) to 10(2)(f), to be included in the Commission’s register of water and sewerage services licences.

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

- Section 26: an order to make further provision for the purposes of the Bill (where this amends primary legislation).
- Section 4(7): regulations which specify circumstances in which the prohibition on common carriage on the public water networks at section 4(1); on using the public water networks to supply services at section 4(2); or on providing services on the public water networks without a licence at section 4(3), do not apply.
- Section 5(7): regulations which specify the circumstances in which the prohibition: on common carriage on the public sewerage networks at 5(1); on using the public sewerage networks to supply services at section 5(2); or on providing services on the public sewerage networks without a licence at section 5(3), do not apply.
Section 28: Interpretation
200. Section 28(1) specifies the meaning to be placed upon the abbreviated references to legislation in the Bill. Subsection (2) provides that the definition of Scottish Water's core functions given at section 70(2) of the 2002 Act is to apply for the purpose of the Bill.

Section 29: Crown application
201. Section 29 provides that the provisions in the Bill bind the Crown.

Section 30: Short title and commencement
202. Section 30 (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.

SCHEDULE 1: WATER INDUSTRY COMMISSION FOR SCOTLAND
203. Schedule 1 is introduced by section 1(4) of the Bill and inserts a new schedule A1 into the 2002 Act.

Schedule A1: Water Industry Commission for Scotland

Paragraph 1: Status
204. Paragraph 1 provides that the Commission is a body corporate. Sub-paragraph (2) provides that the Commission does not form part of the Crown.

Paragraph 2: Membership
205. Paragraph 2 provides that the Commission is to be made up of 3-5 ordinary members and a chief executive. This means that the majority of the membership of the Commission will be non-executive. Paragraph 5 provides that a person is to be appointed to chair the Commission from amongst the ordinary members.

Paragraph 3: Tenure and removal from office
206. Paragraph 3 provides for the appointment and vacation of office for Commission members. Members are to be appointed by the Scottish Ministers, who will also determine their terms and conditions. Sub-paragraph (2) provides that Ministers may remove ordinary members from office; and that the Commission may remove the chief executive from office with the approval of Ministers. Removal from office under this paragraph of members or the chief executive may only happen under certain circumstances, specified as bankruptcy, incapacity by physical or mental illness, prolonged absence from Commission meetings without permission, or otherwise being unable, or unfit to discharge the functions of a member or unsuitable to continue as a member.

Paragraph 4: Disqualification
207. Paragraph 4 disqualifies members of the House of Lords, the House of Commons, the Scottish Parliament or the European Parliament from being appointed as members of the Commission.
Paragraph 5: Chairing

208. This paragraph requires the Scottish Ministers to appoint a person to chair the Commission from among its ordinary members. Sub-paragraph (3) provides that this person may resign by giving written notice to Ministers. Sub-paragraph (4) states that they cease to chair the Commission on ceasing to be a member of the Commission.

Paragraph 6: Remuneration, allowances and pensions

209. Sub-paragraph (1) provides for Scottish Ministers to determine the remuneration to be paid to ordinary members of the Commission, and sub-paragraph (2) provides further for them to determine allowances in respect of expenses to be paid to ordinary members and to the chief executive.

210. Sub-paragraph (3) provides that Scottish Ministers may, under special circumstances, direct the Commission to pay compensation to an ordinary member who has ceased to hold the office otherwise than on the expiry of the terms of their appointment. Sub-paragraph (4) provides that Scottish Ministers may direct the Commission to pay pensions, allowances or gratuities, or contributions to these, to ordinary members as Ministers consider appropriate.

Paragraph 7: Chief executive

211. Paragraph 7 requires the Commission to employ a chief executive and makes provision regarding their appointment and employment.

212. Sub-paragraph (2) provides that Scottish Ministers will appoint the first chief executive of the Commission and determine the appointee’s terms and conditions. Sub-paragraph (3) ensures that before they do this, Scottish Ministers will consult the chairman or prospective chairman of the Commission, if that person has been identified.

213. Sub-paragraph (4) provides that the Commission will appoint subsequent chief executives on such terms and conditions as they determine, subject to the approval of Ministers.

214. Sub-paragraph (5) requires that the chief executive has knowledge, skills or experience relevant to the functions of the Commission.

215. Sub-paragraph (6) enables the Commission, with the approval of Ministers, to vary the terms and conditions of the chief executive or to terminate such an appointment where satisfied that the chief executive is not adequately discharging the functions of that post.

Paragraph 8: Staff

216. Sub-paragraph (1) provides that all the staff of the Water Industry Commissioner for Scotland will transfer to the Commission once it is established.

217. Sub-paragraph (2) provides for the contract of employment of any staff transferred under sub-paragraph (1) not to be terminated by the transfer, but to continue as if originally made between the member of staff and the Commission.
218. Sub-paragraph (3) provides that when staff are transferred to the Commission, the Commission will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer continues to have effect after the transfer.

219. Sub-paragraph (4) states that the transfer under these provisions does not affect any person’s right to terminate their contract of employment if the terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that that the identity of the person’s employer has changed is not in itself to constitute such a change.

220. Sub-paragraphs (5), (6) and (7) provide that the Commission may employ other staff, and determine their terms and conditions and the arrangements for pensions, allowances or gratuities. Ministers must approve all such recruitment and arrangements. Sub-paragraph (8) provides that reference to provision of pensions includes provision by way of compensation for loss of office or employment.

Paragraph 9: Transfer of property and liabilities

221. Paragraph 9(1) provides that all property (including rights) and liabilities of the Water Industry Commissioner will transfer to the Commission. Sub-paragraph (2) provides that sub-paragraph (1) will have effect despite any provision which might otherwise prevent the transfer of such property and liabilities.

Paragraph 10: Committees

222. Paragraph 10 provides for the Commission to establish committees for or in connection with any of its functions. These must be chaired by an ordinary member of the Commission (sub-paragraph (2)), and may include employees of the Commission who are not members of the Commission (sub-paragraph (3)), as well as the chief executive.

Paragraph 11: Delegation of powers

223. Paragraph 11 enables any function of the Commission to be delegated to any of its authorised committees; but that this authorisation does not prevent the Commission itself from doing anything it has authorised a committee to do.

Paragraph 12: Proceedings

224. Paragraph 12 states that the Commission may determine its own procedures, and that any vacancy among its members or defect in the appointment of a member does not affect the validity of its proceedings.

Paragraph 13: General powers

225. Paragraph 13(1) provides that the Commission may enter into contracts and acquire or dispose of property, if this is necessary or expedient in the exercise of its functions; but the Scottish Ministers’ consent is required where land is acquired or disposed of (sub-paragraph (2)).
Paragraph 14: Accounts

226. Paragraph 14 provides that the Commission will prepare accounts for each financial year, and send these to the Auditor General, in accordance with directions from Scottish Ministers. By virtue of this provision the Commission is also subject to provision under the Public Finance and Accountability (Scotland) Act 2000 giving the Auditor General powers to audit and examine any part of the Commission’s expenditure.

SCHEDULE 2: LICENCES AND COMPLIANCE: FURTHER PROVISION

227. Schedule 2 is introduced by section 11.

Paragraph 1: Application for licence

228. Paragraph 1 provides an order-making power for the Scottish Ministers to make provision in respect of applications for a water or sewerage services licence under the Bill. The paragraph sets out detailed provisions about the Commission's functions in considering applications from those seeking licences, and about the requirements to be placed on applicants.

229. Sub-paragraph (1) requires the form for applications to the Commission under this paragraph to be prescribed by Ministers. Sub-paragraph (2) requires applicants to provide the Commission with any other information reasonably required to enable consideration of the application unless that is legally privileged information (sub-paragraph (3)).

230. 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 Commission about the application. The timing of this notice and the procedures on representation contained in it are to comply with requirements prescribed by Ministers in an order.

231. Sub-paragraph (5) requires the Commission 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 Commission is required to have regard to any representations made by the applicant and other interested parties.

232. 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 up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or where convicted by a jury, an unlimited fine.

233. Sub-paragraph (10) gives applicants who are refused a licence the right to appeal against that refusal to the Court of Session, on a question of law. Sub-paragraph (11) gives Scottish Water a right of appeal on a question of law, 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

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

235. 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 Commission judges to be necessary. Sub-paragraph (2) requires the Commission to specify what the standard conditions are to be within 9 months of the sub-paragraph coming into force. For example, this will allow the Commission to use part of the 9 month period to consult publicly on draft conditions.

236. Sub-paragraph (3) provides for the matters to be covered by the standard conditions. It is anticipated 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 Commission 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.

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

238. Sub-paragraphs (5) to (11) provide for the Commission 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 Commission is not required to obtain the agreement of each licence holder to whatever change is being made.

239. Sub-paragraph (5) places a duty on the Commission to review the standard conditions from time to time and gives it the power to modify them and also, in consequence of so doing, to make any other modifications to licence conditions which it considers necessary or expedient. The frequency with which this type of review is required will depend on experience gained of the system in operation. Sub-paragraph (6) requires that the Commission, before making any modification to a standard condition or a consequential amendment to a licence condition, should notify the licence holders affected by any proposed modification, Scottish Water and Ministers; and should publish this notification. Sub-paragraph (7) requires that the notice explains the Commission's reasons for proposing modifications and specifies the timescale within which representations about them can be made to it. Sub-paragraph (8) requires the Commission to have regard to any representations made about the proposed modification. Sub-paragraph (9) requires the Commission to publish any modifications that are made to the standard conditions.

240. Sub-paragraph (10) empowers the Commission 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 Commission is minded to grant a licence on this basis, that the Commission should follow the procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6) to (8).
241. In the interests of flexibility, sub-paragraph (12) gives the Commission 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 it considers appropriate.

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

243. Sub-paragraphs (15) and (16) empower a water or sewerage services provider to appeal to the Court of Session against the inclusion or modification respectively of a condition in a licence, on a question of law. Sub-paragraph (17) provides that the decision of the Court in the appeal is final.

Paragraph 2A: Conditions: sustainable development

244. Sub-paragraph (1) of paragraph 2A provides that Scottish Ministers may issue guidance to the Water Industry Commission on how licensed water and sewerage services providers might, in performing the activities authorised by their licences, reasonably contribute to the achievement of sustainable development. Sub-paragraph (2) requires the Commission to have regard to such guidance when setting licence conditions for providers under paragraph 2 of Schedule 2 to the Bill. Such conditions will, in line with all other licence conditions, be binding on providers.

Paragraph 3: Transfer of licence

245. Paragraph 3 establishes the basis on which a water or sewerage services provider can transfer a licence to another person.

246. 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 Commission.

247. Sub-paragraphs (3) and (4) empower the Commission to consent to a transfer, but only where 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 Commission must take into account the factors that would normally be considered when granting the licence under section 7 of the Bill.

248. Sub-paragraph (4A) requires a transferee to submit an application to the Commission for consent to the transfer and provides for a similar application procedure for the transfer of a water or sewerage services licence to that which applies to licence applications under paragraph 1(1) to (6) of Schedule 2 to the Bill.
249. Sub-paragraph (4B) makes it an offence to knowingly or recklessly make a false statement in connection with a transfer application (similar to paragraph 1(8) of Schedule 2) whilst sub-paragraph (4C) prescribes the penalties for such an offence (similar to paragraph 1(9) of that Schedule).

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

251. Sub-paragraph (10) permits prospective transferees to appeal to the Court of Session on a question of law against a decision by the Commissioner to withhold consent to a transfer.

252. Sub-paragraph (10A) permits Scottish Water to appeal to the Court of Session, on a question of law, against the granting of consent to transfer a water or sewerage services licence, in the same way that Scottish Water may appeal against the granting of the original licence under paragraph 1(11) of Schedule 2.

253. Sub-paragraph (11) provides that the decision of the Court of Session in an appeal under sub-paragraphs (10) or (10A) shall be final.

254. Sub-paragraph (12) ensures that any attempt to assign a water or sewerage services licence will be a transfer for the purposes of paragraph 3 of Schedule 2 to the Bill.

Paragraph 4: Powers of entry etc.

255. Paragraph 4 provides for the Commission to have powers of entry to premises so as to enable it to discharge its duty, under section 8 of the Bill, to monitor and ensure compliance with licence conditions. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, to exercise the powers specified in sub-paragraph (2).

256. Sub-paragraph (2)(a) enables the Commission and its 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 Commission considers necessary to give effect to its monitoring and compliance duties. The exercise of the powers of entry is qualified by sub-paragraph (3). Thus whereas the Commission, or anyone authorised by the Commission, 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 Commission is satisfied that gaining access to premises in the first and second categories only would not be sufficient to enable it to discharge its monitoring and compliance duties. In practice, this would mean that the Commission could seek entry to premises in the third category only where it had grounds for believing that it 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 Commission'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.

257. Sub-paragraph (5) requires that the Commission 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.

Paragraph 5: Powers of entry etc.: further provision

258. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, 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 paragraph 6. 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 (2) requires those entering premises to leave them in a condition no less secure than that in which they found them.

259. Sub-paragraphs (3) to (5) provide protection for those whose premises are entered under paragraph 4(2). Sub-paragraph (3) places a duty on the Commission 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 (4) makes it an offence for anyone to disclose any commercially sensitive information obtained as a result of exercising the power of entry. Sub-paragraph (5) provides that anyone obstructing the Commission, or failing to provide assistance to the Commission, in the exercise of the powers at this paragraph is guilty of an offence. The penalties for these offences are set out in sub-paragraph (6) and are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

Paragraph 6: Warrants

260. Paragraph 6 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.

261. 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 Commission, or those authorised by it, 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 Commission 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.
262. 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.

**Paragraph 7: Enforcement notices**

263. Paragraph 7 gives the Commission power to issue enforcement notices and describes the process to be followed in issuing these notices.

264. Sub-paragraph (1) gives the Commission 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 Commission can do so only where it appears to it that the provider is not taking appropriate steps to remedy the contravention or prevent it from recurring. Any enforcement notice that the Commission 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).

265. Sub-paragraphs (5) and (6) specify the steps that the Commission must take before issuing an enforcement notice, including 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 Commission to have regard to any representations made to it by the provider about an enforcement notice. Sub-paragraph (8) requires copies of enforcement notices to be sent to Ministers and Scottish Water.

266. 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 as considered necessary and provides that the sheriff’s decision is final in such cases.

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

**Paragraph 8: Enforcement notices: offences**

268. Paragraph 8 sets out the sanctions for a water or sewerage services provider, who having been served with an enforcement notice, fail 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 up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

**Paragraph 9: Revocation of licences**

269. Paragraph 9 gives the Commission the power to revoke a water or sewerage services licence under certain circumstances.

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

271. Sub-paragraph (4) allows the Commission to revoke a licence if it 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 Commission must have regard to the factors mentioned in section 7(2) of the Bill and to other matters specified under that subsection. Finally, sub-paragraph (5) allows the Commission to revoke a licence if requested to do so by a provider.

272. Sub-paragraph (6) provides that before revoking a licence the Commission 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.

273. 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 provides that the decision of the sheriff is final.

274. Sub-paragraph (10) requires the Commission 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 10: Penalties for contravention of licence**

275. Paragraph 10 gives the Commission the power to impose financial penalties on water or sewerage services providers if they contravene the terms and conditions of their licence. The Commission is required to prepare and publish a policy with respect to the imposition of penalties.

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

277. Sub-paragraph (3) requires the Commission to notify a provider of its intention to impose a penalty. Sub-paragraph (4) requires the Commission 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 Commission 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 is considered necessary and provides that the sheriff’s decision in such cases is final.

278. Sub-paragraph (7) ensures that the Commission will be able to recover any penalties that it 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 11: Register of licences**

279. Paragraph 11 requires the Commission 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.

280. Sub-paragraph (1) empowers the Scottish Ministers to prescribe, by order, the manner of
the register, which the Commission 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.

**SCHEDULE 3: CERTAIN PRE-EXISTING AGREEMENTS AS TO CHARGES**

281. Schedule 3, introduced by section 18(6) of the Bill, makes provision to preserve the
charging arrangements which apply where, before the coming into force of this schedule,
Scottish Water have used existing statutory powers to enter into “relevant agreements” with non-
household customers for charging (other than through a charges scheme) for services provided
under those agreements. Once the Bill is enacted, Scottish Water will no longer have the power
to enter into such agreements for charging for services provided to customers in exercise of core
functions, and any charges will be determined instead according to a charges scheme (under the
new section 29A of the 2002 Act) or an authorised departure from a charges scheme (under the
new section 29E of the 2002 Act).

**Paragraph 1**

282. Paragraph 1 defines a “relevant agreement” and a “relevant customer” for the purpose of
schedule 3. These are agreements between Scottish Water and another person in respect of
“eligible premises” (as defined in section 20 of the Bill) which have been entered into before the
coming into force of this schedule by virtue of the statutory powers set out in sub-paragraph (2)
or otherwise and which make provision for the relevant customer to pay charges for services
provided under those agreements other than by reference to a charges scheme.

283. Sub-paragraph (1A) further specifies that, for the purposes of sub-paragraph (1), an
agreement between Scottish Water and another person includes an agreement to which Scottish
Water has become party in consequence of a transfer of obligations, by virtue of any enactment
or contractual arrangements, which includes, for example, obligations which have been entered
into by Scottish Water’s statutory predecessors and which have subsequently transferred to
Scottish Water. However, it will not include those agreements to which section 47 of the Water
(Scotland) Act 1980 applies. Section 47 of the 1980 Act makes provision to preserve certain
agreements made between Scottish Water’s statutory predecessors prior to 1949 and their
customers, regarding the provision of water supplies free of charge or on other favourable terms,
in return for the granting of, for example, way leaves to lay infrastructure.
Paragraph 2

284. Paragraph 2 sets out the arrangements for relevant agreements to be identified and considered by the Commission, in order to assess the relevant charges to be paid by customers under those agreements and to determine the charges which any licensed provider, in respect of such customers, should pay to Scottish Water for services provided under those agreements.

285. Sub-paragraph (1) requires Scottish Water to send details of relevant agreements to the Commission within one month of the schedule coming into force. Sub-paragraph (2) provides for the Commission to assess, in respect of each agreement sent, the relevant charges which the relevant customer is still entitled to pay under the agreement, and based on this and the costs which any water and sewerage services provider will incur where it provides services to that customer under the agreement and any other matter the Commission considers appropriate, to determine the charges which a provider should pay to Scottish Water (as read with sub-paragraph (6)(a)).

286. Sub-paragraph (3) requires the Commission to give each relevant customer written notice of its assessment of the relevant charges payable under the agreement and the amount which Scottish Water will be able to recover from a provider in respect of the customer. This notice is also to be sent to Scottish Water and every water and sewerage services provider, by such date as the Scottish Ministers may direct.

287. Sub-paragraph (5) sets out the circumstances in which the charging arrangements at sub-paragraph (6) apply. In the case where a relevant customer is served by a water and sewerage services provider, Scottish Water can recover any charges determined under sub-paragraph (2)(b) from the provider and the provider in turn can charge the relevant customer no more than the amount set out in the relevant agreement.

288. Sub-paragraph (7) provides that Scottish Water should bear the cost of any shortfall between the charges determined under sub-paragraph (2)(b) and any charges determined under a charges scheme.

289. Sub-paragraph (8) provides that where a relevant customer is not or has ceased to be served by a water and sewerage services provider for any reason, Scottish Water should demand and recover directly from the relevant customer no more than the relevant charge as set out in the relevant agreement as assessed under sub-paragraph (2)(a).

Paragraph 3

290. Paragraph 3 makes provision in relation to the status of relevant agreements under this schedule and the application of charges schemes to them. Sub-paragraph (1) disapplies a charges scheme in relation to any services covered by relevant charges determined under this schedule unless the agreement concerned has expired or has been terminated. Sub-paragraph (2) clarifies that a relevant agreement is not to expire or terminate simply as a result of the change of a water and sewerage services provider in respect of a relevant customer.

291. Sub-paragraph (3) provides that a relevant agreement cannot be renewed on its expiry or termination or extended at any time.
SCHEDULE 4: POWERS OF ENTRY UNDER THE COAL INDUSTRY ACT 1994

292. Schedule 4 is introduced by section 23(4) and inserts Schedule 1C to the Coal Industry Act 1994. Commentary on the provisions of Schedule 1C is to be found within the commentary on the provisions of section 23 of the Bill. The Schedule makes further provision in relation to these amendments.

SCHEDULE 5: AMENDMENTS TO ENACTMENTS

293. Schedule 5 is introduced by section 25 of the Bill. The Schedule makes amendments to other enactments which are required in consequence of provisions made under this Bill.

Paragraph 1: Sewerage (Scotland) Act 1968 (c.47)

294. Paragraph 1 repeals section 29(3)(j) of the Sewerage (Scotland) Act 1968 – that provisions allows Scottish Water to set charges in relation to the disposal of trade effluent into sewers. Under the new arrangements introduced by the Bill, all such charges will be set by reference to the charges scheme made under section 29A.

Paragraph 2: House of Commons Disqualification Act 1975 (c.24)

295. Paragraph 2 repeals the section of Part III of Schedule 1 of the House of Commons Disqualification Act 1975 which relates to the Water Industry Commissioner. This specifies offices the holders of which are disqualified from being a member of the House of Commons. Since the Water Industry Commissioner is replaced by the Water Industry Commission under the Bill, the reference to the Water Industry Commissioner needs to be removed.

Paragraph 3: Race Relations Act 1976 (c.74)

296. Paragraph 3 repeals the section of Part II of Schedule 1A of the Race Relations Act 1976 which relates to the Water Industry Commissioner. This Part specifies offices the holders of which are subject to the general statutory duty to eliminate unlawful racial discrimination and promote equality of opportunity in the carrying out of their functions. As above, the reference to the Water Industry Commissioner needs to be removed.

Paragraph 4: Water (Fluoridation) Act 1985 (c.63)

297. Paragraph 4 replaces references in the Water (Fluoridation) Act 1985 to the Commissioner with references to the Commission.

Paragraph 5: Public Finance and Accountability (Scotland) Act 2000 (asp 1)

298. Paragraph 5 replaces references in the Public Finance and Accountability (Scotland) Act 2000 to the Commissioner, with references to the Commission.

Paragraph 6: Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

299. Paragraph 6(a) to (d) repeals all references to the Water Industry Commissioner in the Ethical Standards in Public Life etc. (Scotland) Act 2000. Sub-paragraph (e) replaces these references by adding the Water Industry Commission established by the Bill to the list of
This document relates to the Water Services etc. (Scotland) Bill, as amended at Stage 2
(SP Bill 23A)

devolved public bodies. This provides that the Commission and its members will be subject to that Act and required to draw up and comply with a code of conduct under the Act.

Paragraph 7: Water Industry (Scotland) Act 2002 (asp 3)

300. Paragraph 7 amends the Water Industry (Scotland) Act 2002 in consequence of the provisions of the Bill. Sub-paragraph (1) replaces references to the Commissioner with references to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.

301. Sub-paragraph (3) amends section 3(6) of the 2002 Act (Functions of the Commissioner) and replaces references to customers there with references to persons whose premises are connected to, or might reasonably become connected to, the public water supply or sewerage systems. This ensures that, in its duty to advise Ministers on the standard of service Scottish Water provides and the manner in which it conducts relations with “customers”, the Water Industry Commission will represent those persons.

302. Sub-paragraph (3A) amends section 5 (Annual reports by, and information from, the Commissioner) of the 2002 Act in relation the content of the Commission’s annual report, to require the report to contain a summary of any action taken by the Commission in response to representations and recommendations made by the Customer Panels under the amended section 2 of the 2002 Act (as introduced by section 3A(1) of the Bill).

303. Sub-paragraph (4) replaces references to Scottish Water’s “customers” in section 26 (Customer standards code) of the 2002 Act, with reference to persons whose premises are connected to, or might reasonably become connected to, the public water supply or sewerage systems. This ensures that Scottish Water’s customer standards code will apply in relation to services provided to such persons. It also repeals subsection (2) of section 26 of that Act, which provided that a customer standards code had to be submitted to the Commissioner no later than the date on which Scottish Water first sent a charges scheme to the Commissioner. This is in consequence of the repeal of section 32 of the 2002 Act by section 18(3) of the Bill (and its replacement with new provisions as regards the determination of Scottish Water’s charges).

304. Sub-paragraph (5) repeals section 40 of the Act (Reduced charges), which allowed Ministers to provide by regulations that certain people should pay Scottish Water reduced charges. In future provision for reduced charges will be given effect through Ministers’ statement under the new section 29D which Scottish Water will take account of in making charges schemes under the new section 29A.

305. Sub-paragraph (6) replaces wording in section 49 of the 2002 Act to ensure that the Scottish Ministers and Scottish Water are obliged to carry out their functions with regard to the interests of all end users of the public water and sewerage systems. The intention of this amendment is to exclude licensed retailers from the scope of this customer interest duty. Although the licensed retailers will be customers of Scottish Water and will receive wholesale services from them, the high level customer interest duty placed on Ministers and Scottish Water is to be exercised with regard to direct (i.e. domestic) customers of Scottish Water, and customers of the licensed providers, but not the licensed providers themselves.
306. Sub-paragraph (6A) amends section 57(7) of the 2002 Act (Information and reports) to require Scottish Water to include in its annual report, information on the extent to which it has complied with requirements made under sections 12(1A), 13(1) or (5) of the Bill.

307. Sub-paragraph (7) adds the new section 56B to the orders and regulations which are excluded from those orders and regulations to be subject to negative procedure in the Scottish Parliament; and includes section 56B with the sections under which orders and regulations may be made subject to affirmative procedure.

308. Sub-paragraph (8) amends section 70 of the Act (Interpretation) to the effect that “charges scheme” has the meaning given to it under the new section 29A(1) and substitutes a definition of the Water Industry Commission for that of the Water Industry Commissioner.

309. Sub-paragraph (9) repeals Part I of Schedule 1 (The Commissioner) of the Act, since the Water Industry Commissioner is replaced by the Water Industry Commission under the Bill.

Paragraph 8: Scottish Public Services Ombudsman Act 2002 (asp 11)

310. Paragraph 8 inserts the Convener of the Water Customer Consultation Panels into Schedule 2 (Listed authorities) to the Scottish Public Services Ombudsman Act 2002, to ensure that the Convener’s activities come under the scrutiny of the Ombudsman. It also replaces the reference in that Act to the Commissioner with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part 1 of the Bill.


311. Paragraph 9 inserts the Convener of the Water Customer Consultation Panels into Schedule 1 (Scottish public authorities) to the Freedom of Information (Scotland) Act 2002, to ensure that the Convener is subject to the requirements of that Act. It also replaces the reference in that Act to the Commissioner with a reference to the Commission, again since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part 1 of the Bill.

Paragraph 10: Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

312. Paragraph 10 repeals the entry relating to the Commissioner in Schedule 2 of the Act, and replaces it with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.
SUPPLEMENTARY FINANCIAL MEMORANDUM

INTRODUCTION

1. As required under Rule 9.7.8B of the Parliament’s Standing Orders, this supplementary Financial Memorandum provides information on the financial implications of additions to the Water Services etc. (Scotland) Bill during Stage 2 consideration. In addition, it reports on changes to estimates given in the Financial Memorandum published on Introduction.

PART 1 – WATER CUSTOMER CONSULTATION PANELS (SECTION 3A)

Costs on the Scottish Administration

2. There are no cost implications for the Scottish Administration.

Costs on local authorities

3. There are no cost implications for local authorities.

Costs on other bodies, individuals and businesses

4. Section 3A of the Bill makes several significant enhancements to the statutory role of the Water Customer Consultation Panels. The Customer Panels are funded by the Water Industry Commissioner and will be funded in future by the Water Industry Commission, who is required under the Water Industry (Scotland) Act 2002 to remunerate the Convener, Deputy Convener and ordinary Panel members, and to supply the Convener and each Customer Panel with such property, staff and services they require, as approved by Scottish Ministers. The Commission will continue to provide this funding through its levy on Scottish Water, as approved by Ministers. This means that all water customers share the costs of the representation provided by the Customer Panels, and Scottish Ministers through approving their budget are responsible for ensuring that this provides good value for money.

5. The additional resources required by the Customer Panels to carry out their new functions are largely staff resources to support their new statutory functions. These will be offset by a small reduction in costs to the Water Industry Commission in respect of the complaints handling function which is transferred from the Commission to the Convener of the Customer Panels.

6. Following preliminary discussion with the Convener of the Panels, the resources required have been estimated at 3 extra members of staff, at a cost of around £80,000 per annum, bringing the staff complement in the Convener’s office up to 6, and a total staff budget of around £152,000 per annum. However this is an initial estimate, and the Executive considers it important both to allow the Convener and the Panels further time to consider this estimate, and,
once they have taken on their new functions and gained experience in delivering these, to allow their resources to be reviewed.

PART 2 – SCOTTISH WATER: WATER AND SEWERAGE SERVICES UNDERTAKING

Costs on the Scottish Administration

7. Section 12A provides new powers, in addition to those already available to Ministers to fund Scottish Water and its subsidiaries under the Water Industry (Scotland) Act 2002, to directly fund the retail undertaking established under section 12. Our best estimates of the costs involved in establishing retail competition are set out in the original Financial Memorandum and section 12A does not alter these. Instead it simply provides a basis for alternative funding methods, direct from Scottish Ministers, which may prove more transparent in terms of scrutinising the retail undertaking’s funding and relationship with Scottish Water. If the powers are used, Ministers will have to ensure that any assistance to the retail undertaking is compliant with any applicable EU State Aids rules. Whether the powers are used and to what extent will depend on proposals put forward by Scottish Water when the long term position of the retail undertaking is more clear. In relation to any borrowing under the new section 12A(2)(a), this must not in any event exceed the amount specified in the relevant Budget Act.

Costs on local authorities

8. There are no cost implications for local authorities.

Costs on other bodies, individuals and businesses

9. Costs to Scottish Water of establishing a retail undertaking are set out in the original Financial Memorandum, and section 12A does not alter these.

PART 2 – SEWERAGE NUISANCE: CODE OF PRACTICE (SECTIONS 19B AND 19C)

Costs on the Scottish Administration

10. It is estimated that consultancy costs of around £30,000 will be incurred by the Scottish Executive in 2005-06 to produce the draft and finalised statutory code of practice and provide other advice in connection with sewerage nuisance.

Costs on local authorities

11. In relation to local authorities, the only difference between the previous legislation under the Environmental Protection Act 1990 and the proposed statutory code is the additional duty on local authorities to assess compliance with the code, rather than simply carrying out an inspection as now. It is difficult to estimate the costs to local authorities as the main determinant of this can be expected to be the duty to assess compliance, and the frequency with which this is required is still being considered in work on the draft voluntary code. Our current projection is that inspection of compliance might be required at works which serve a population of more than 250. There are around 500 such works, and assuming a single compliance inspection per annum, at a cost of £100 in officials’ time, an estimate of £50,000 costs might be estimated. Costs will
also arise in relation to investigating complaints but we would not expect these to exceed the costs incurred currently in enforcing Part III of the Environmental Protection Act 1990.

**Costs on other bodies, individuals and businesses**

12. It is not possible to estimate the costs of complying with a code of practice under new sections 19B and 19C of the Bill at this stage, because these are dependent on the terms of the code of practice, of which a draft is still to be consulted on, and the objectives for Scottish Water that will be set by Ministers under the Quality and Standards 3 process for investment in the period 2006-2014. Section 18 of the Bill requires Scottish Water to be funded to deliver the objectives set by Ministers under new section 56A of the Water Industry (Scotland) Act 2002, as inserted by section 19 of the Bill. It is likely that these objectives will include action to address sewerage nuisance but the costs that arise in this way will depend on the objective set by Ministers. Costs to Scottish Water and its PFI operators to comply with the proposed statutory code are currently being considered as part of the Quality and Standards 3 process for determining Scottish Water’s investment objectives over the period 2006-2014.

13. These objectives will be announced shortly, and these will set parameters for the likely work required to comply with a code of practice under section 19B. However until the statutory code is finalised following consultation and guidance on ‘best practicable means’ and technical standards are completed, it is not possible to provide a meaningful estimate of the overall costs that will be incurred.
Present:

Mr Adam Ingram  Dr Sylvia Jackson (Convener)
Christine May  Stewart Stevenson (Substitute)
Murray Tosh

Apologies were received from Gordon Jackson, Mr Stewart Maxwell and Mike Pringle.

Delegated powers scrutiny: The Committee agreed to raise points with the Executive on the delegated powers provisions in the following Bill—

Water Services etc. (Scotland) Bill at Stage 2.
Water Services etc (Scotland) Bill: Stage 2

The Convener: We now move on to the Water Services etc (Scotland) Bill, as amended at stage 2. You will recall that there were a number of
areas about which we had quite considerable reservations. We reported them to the relevant committee, which also had concerns. Considerable changes have been made as a result, you will be glad to hear. The first of those changes affects sections 4(7) and 5(7). The Executive added new subsection (8A) to section 4 at stage 2. As explained in the subordinate legislation memorandum, that new subsection qualifies the regulation-making powers that are provided for at sections 4(7) and 5(7), to address the issues that we and the lead committee raised at stage 1. Are members happy with that?

Members indicated agreement.

The Convener: The second change is the introduction of section 12(3A), on the undertaking of water and sewerage services. The Executive indicated in its response to the committee’s stage 1 report that it was considering ways of addressing our concerns. The new subsection can be seen to fulfil that undertaking and our legal advisers certainly seem happy with it. Is that agreed?

Members indicated agreement.

The Convener: Subsections (1), (2) and (6) of new section 12A concern financing, borrowing and guarantees. The Executive cites flexibility as the principal justification for the delegated powers in that instance. It considers that the scrutiny that is available under the negative procedure, together with the additional safeguards in subsections (3) and (7), provides sufficient control over the exercise of power. However, there could be an argument as to whether the power under section 12A—particularly as it concerns financial matters—should be affirmative or not. On balance, our legal advice is that the current position is okay. Do members agree?

Members indicated agreement.

The Convener: We shall leave that as it is. We now move on to section 17A(8), on continuation and discontinuation of sewerage services. New section 17A provides for the circumstances in which trade effluent services may be continued or discontinued. The power is similar to the power in section 16(3), regarding the notice of discontinuance of water services. Are members happy with that change?

Members indicated agreement.

The Convener: We move on to subsection (1) of new section 19B, which seeks to give Scottish ministers the power to make an order that contains a code of practice on the assessment, control and minimisation of sewage nuisance. If I remember correctly, our legal advice is that no points of substance arise on this matter and that we should simply draw the Executive’s attention to certain drafting points through an informal letter. Are members agreed?

Members indicated agreement.

The Convener: We move on to section 20(3). Members will recall that we raised a point about the definition of “dwelling”. However, of all the points that we brought to the Executive’s attention, it was the one that we were least worried about. Our legal advice suggests that the Executive’s approach is okay and that the point is perhaps not worth pursuing, but I want to ensure that members agree with that course of action. Are members agreed?

Members indicated agreement.

Murray Tosh: It shows what reasonable people we are.

The Convener: As ever.
Subordinate Legislation Committee

4th Report, 2005 (Session 2)

Water Services etc. (Scotland) Bill at Stage 2
Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

   (a) any-

      (i) subordinate legislation laid before the Parliament;

      (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

   and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

   (c) general questions relating to powers to make subordinate legislation; and

   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

   *(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Dr Sylvia Jackson (Convener)
Mr Adam Ingram
Gordon Jackson (Deputy Convener)
Mr Stewart Maxwell
Christine May
Mike Pringle
Murray Tosh
Committee Clerking Team:

Clerk to the Committee
Ruth Cooper

Assistant Clerk
Bruce Adamson

Support Manager
Catherine Fergusson
Subordinate Legislation Committee

4th Report, 2005 (Session 2)

Water Services etc. (Scotland) Bill at stage 2

The Committee reports to the Parliament as follows—

Introduction

1. At its meeting on 1 February 2005, the Committee considered the inserted or substantially amended delegated powers provisions in the Water Services etc. (Scotland) Bill as amended at stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.

2. Under Rule 9.7.10, the Executive provided a subordinate legislation memorandum to the Committee, which is published at Annex A to this report.

Section 4(7) Public water supply system: offences
Section 5(7) Public sewerage system: offences

3. Sections 4(7) and 5(7) allow Scottish Ministers to make regulations specifying circumstances where prohibitions on common carriage on water and sewerage systems do not apply. The Committee considered these to be wide powers and during its stage 1 consideration was concerned at the possible consequences of this delegation in the bill.

4. At stage 2 the Executive added a new subsection 8(A) to both sections 4 and 5 of the bill. These new subsections state that it is only competent to use the power to make regulations if the effect would not be prejudicial to the exercise of Scottish Water’s core functions. The Committee considered that this qualification of the regulation-making powers answered its concerns and is content with the current delegated power as amended.

Section 12(3A) Water and sewerage services undertaking

5. This subsection replaces paragraph 1(7) of schedule 2 of the bill as introduced, which the Committee considered to be very general in its powers to provide exceptions from the licence provisions. This new provision confers an
order-making power on Scottish Ministers, to be used in narrow circumstances, to enable modification of the licence application procedure provided for in paragraphs 1 and 2 of Schedule 2. The Committee considers that this amendment, in reducing the scope of the exceptions, addresses the concerns it raised at stage 1.

Section 12A(1), (2) and (6)  Financing, borrowing and guarantees

6. These subsections confer on 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.

7. The Executive stated in its subordinate legislation memorandum that it considers that the negative procedure chosen provides sufficient Parliamentary scrutiny and drew attention to the additional safeguards in subsections (3) and (7). Subsection (3) disallows any borrowing over the amount specified for that year in a Budget Act. Under subsection (7), Ministers must lay any statement of guarantee made under subsection (6) before Parliament. The Committee was content with the delegation of these powers and considered that the negative procedure chosen is appropriate.

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

8. Section 17A provides for the circumstances in which trade effluent services may be continued or discontinued by Scottish Water. The Committee was content with the delegation of this power and satisfied that the provision should be subject to negative procedure, as proposed.

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

9. This section gives Scottish Ministers the power to make an Order containing a code of practice on the assessment, control and minimisation of sewerage nuisance. The Committee was content with the delegation of this power and satisfied that the Order containing the code should be subject to negative procedure, as proposed.
Annex A

Water Services etc. (Scotland) Bill as amended as stage 2
Memorandum to the Subordinate Legislation Committee

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

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

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
[25 January 2005]
FINANCE COMMITTEE

EXTRACT FROM THE MINUTES

5th Meeting, 2005 (Session 2)

Tuesday 8 February, 2005

Present:

Ms Wendy Alexander  Mr Andrew Arbuckle
Mr Ted Brocklebank  Jim Mather
Mr Frank McAveety  Des McNulty (Convener)
Alasdair Morgan (Deputy Convener)  Dr Elaine Murray
John Swinburne

Water Services etc (Scotland) Bill: The Committee took evidence on the Supplementary Financial Memorandum from—

Clare Morley, Water Service etc (Scotland) Bill Team Leader, Andrew Scott, Head of Water Division and David Wallace, Air, Climate and Engineering Division, Scottish Executive.

The Committee agreed that it did not wish to raise any issues regarding the Supplementary Financial Memorandum during the Stage 3 debate.
On resuming—

**Water Services etc (Scotland) Bill: Supplementary Financial Memorandum**

**The Convener:** The final item on our agenda is consideration of a supplementary financial memorandum to the Water Services etc (Scotland) Bill. Members will recall that we agreed at our meeting on 25 January that when a supplementary financial memorandum is produced prior to stage 3 of a bill, we will try to take evidence from officials if possible and that if we have concerns, we will then nominate one committee member to raise them during the stage 3 debate. The stage 3 debate on the Water Services etc (Scotland) Bill is tomorrow, so this is our opportunity to quiz the witnesses.

I welcome to the committee Clare Morley, the bill team leader, and Andrew Scott, the head of the water division. David Wallace will not now be joining us and instead we shall have Duncan McNab from the air, climate and engineering division.

Members have a copy of the supplementary financial memorandum and revised explanatory notes. We also have copies of two letters from the Minister for Environment and Rural Development. I draw members’ attention to the fact that the supplementary financial memorandum that was circulated to members is slightly different from the one that was published. The final version makes no reference to the scoping study and instead includes commentary on section 12A. Members have a copy of that paragraph in front of them; it was circulated at the start of the meeting.

I shall give the officials an opportunity to make an opening statement if they wish to do so, before we proceed to questions.

**Andrew Scott (Scottish Executive Environment and Rural Affairs Department):** We are happy to go straight to questions.

**Dr Murray:** There was a bit of concern among committee members about the difference between Scottish Water’s consultants’ estimates of the costs and the estimates of the water industry commissioner for Scotland. The explanation given concerns the simplicity of the model and suggests that the consultants may have been using a model that was more complex than was appropriate. Does the explanation that has been given also explain why Scottish Water’s projected on-going costs were about £5 million to £8 million higher than those in the financial memorandum?
Andrew Scott: Very largely, yes. If an organisation has a larger and more complex information technology system and it lasts five years, it has to depreciate larger amounts of money over the period in each year.

Dr Murray: I noticed that one of the water industry commissioner's proposals was that if the IT system was not completely automated, that would result in a considerable saving. I was slightly surprised by that. I would have assumed that a completely automated system would, over a period of time, be rather less expensive than one that required input by human beings, who have to be paid.

Andrew Scott: It might be counterintuitive. I understand that the reason for that—which has been discussed between the commissioner, IBM and Scottish Water—is that even highly automated systems require substantial manual interventions, because records are often poorly kept. Having an elaborate computer system is not the saving that it would appear, especially in a small market of the type that we are licensing.

The Convener: One of the issues that were raised previously was staff consultation, or the lack of staff consultation, on some of the changes and particularly on the transfer of terms and conditions. The minister sent us a letter in October, but it did not deal with that specific point. Can you give us any further information about that?

Clare Morley (Scottish Executive Environment and Rural Affairs Department): One of the amendments that the minister has lodged for debate tomorrow includes provision for the transfer to be more flexible than in the bill as introduced, to allow a partial or staged transfer. That is all of a piece with his commitment to ensuring that the transfer is as smooth as possible. If Scottish Water proposed a minimal separation in the first instance, that would be entirely possible.

The Convener: Would you expect all those changes to be the subject of extensive consultation with the relevant trade unions and employees across the board?

Andrew Scott: In the first instance, that would be a matter for Scottish Water to handle, but it has extensive mechanisms for doing that through its company councils.

The Convener: I have a technical question about the supplementary financial memorandum's estimate of costs relating to sewerage nuisance. Would you say something further about the figure of £50,000 per annum that is identified, because it is not entirely clear to what it refers?

Duncan McNab (Scottish Executive Environment and Rural Affairs Department): Obviously, the burden on local authorities is based on estimates at the moment and the figures will be examined further in the regulatory impact assessment that will go out for consultation with the draft statutory code later on. The figure was arrived at in negotiations with Scottish Water and consultants working on the perceived costs. It was based on the total number of sewage works in Scotland, which according to Scottish Water is 1,857, of which 1,368 are for population equivalents below 250, being mainly septic tanks. One aspect of the statutory code is that local authorities, in checking compliance, will probably require an annual inspection of those sewage works and we felt that that would not be required for such small works, so we have based the figure only on the medium and large works, of which there are fewer than 500. Based on an estimate of £100 for two or three hours of officials' time, we came up with the initial estimate of £50,000 for all local authorities.

The Convener: How would that be distributed among different local authorities? Sewage works are obviously not distributed exactly in line with population.

Duncan McNab: That would be subject to the regulatory impact assessment included with the consultation, so no decisions have been made—or can be made—at this stage. We are looking at the very first estimates of the costs. However, we stress that the costs are relatively minimal rather than an additional burden on local authorities. In a sense, nothing will change from the existing regime under the Environmental Protection Act 1990 statutory nuisance provisions, which places a duty on local authorities to inspect waste water treatment works.

The Convener: Do you have a timescale for the finalisation of the code of practice?

Duncan McNab: Yes. We propose to have it ready for implementation by April 2006.

Jim Mather: To return to the automated central market systems, I am a bit concerned that we might fall between two stools: the system that IBM and Scottish Water advocate—which in itself may well have a Rolls-Royce version and a simpler version, given the disparity between the figures of £5.2 million and £10 million—and the simpler switch engine that the water industry commissioner advocates. Is there an example of a solid, proven system, perhaps not from an exactly parallel industry sector, but in which we could have a greater degree of confidence and which could be slotted in and implemented with a higher possibility that it would work well from the outset?

Andrew Scott: I do not think that a ready-made
analogue exists. We met Scottish Water, the commissioner and the consultants to establish the exact nature and size of the market. We considered carefully the analogues that IBM used, which generally came from large-scale market openings elsewhere. We have established a degree of agreement that the commissioner’s original proposals will be broadly adequate for the time being. If more elaborate solutions are proposed, they will generally be proposed by new entrants into the market, after making a judgment about commercial risk. Costs are not being imposed on new entrants; if there are additional costs, it will be because a new entrant thinks that there is an advantage in bearing them.

Jim Mather: “Risk” is the key word. Clearly, the cost is material, but the implications of a malfunction are much more material—billing systems might be impeded, delayed or damaged. The extra money ought to be used to try to convince us that the system that is put in place is exceedingly robust, which is the key criterion.

Andrew Scott: Many of the systems are already in place because Scottish Water bills its non-domestic customers.

Clare Morley: The cost of the IBM proposal of £5.2 million to £10 million is based not on a simple and a more complex system but on a central figure of about £7 million with margins of risk set lower and higher. However, both figures are for an expensive automated system that involves complex requirements that we think are unnecessary, such as volume allocation and profiling. If we take the cost of those factors out of the top and bottom of the range, we can have confidence in the lower figures.

Mr Broicklebank: How many staff does the convener of the water customer consultation panels employ at present? According to the estimates, the convener will require three additional members of staff.

Clare Morley: At present, the convener has a budget for three staff but employs only two. We assume an increase to a complement of six.

Mr Broicklebank: So there will be six staff in total.

Andrew Scott: The convener has yet to submit a final corporate plan to ministers for approval. That is the working assumption, but it is yet to be finalised.

Mr Broicklebank: Is it correct that the total staff budget for the panels is £152,000? When divided by six, that does not seem like a lot.

Clare Morley: The estimate is based on six staff. If the number of staff changed, the figure would change. At present, there is £72,000 for three staff.

Mr Broicklebank: So you will spend another £80,000. What is the timescale for recruiting the three additional people?

Andrew Scott: Again, that is a matter for the convener. He will make a proposal in his corporate plan, but he has not yet come to a view on that. We will ensure that there is an orderly transfer of the complaints function from one body to the other. That is to the fore in our concerns.

12:15

The Convener: We have a slight difficulty this week because the minister is making a statement on Scottish Water’s objectives on Thursday afternoon and we are debating the Water Services etc (Scotland) Bill tomorrow. The costs that are likely to arise in relation to sewage nuisance will be influenced by the minister’s objectives in that regard. In so far as you can comment, and without necessarily anticipating the minister’s statement, could you give us the background to thinking on sewage nuisance?

I suppose that the background in my area and those of Susan Deacon and other members who have large sewerage plants in their constituencies is that the standards that were originally set by the water industry regulator were for a minimum level of containment, or for a lower level of containment than that desired by the local population. Is it possible that there will be greater flexibility in relation to better smell containment in particular? How would that work in relation to this part of the bill?

Andrew Scott: I can answer that in general terms and Duncan McNab can deal with the specifics. If and when the statutory code comes along, it will place extensive additional obligations on Scottish Water. Those will have to be funded by means of the strategic review. It will then be for ministers to decide whether the obligations that are associated with sewerage nuisance are additional to all the other obligations that they have placed on Scottish Water or whether they want to substitute the sewage nuisance obligations for other obligations on Scottish Water such as those to do with other aspects of customer service, drinking water quality or capital maintenance. There will be a resource quantum associated with implementing the new statutory code and ministers will have to decide whether that is additional or in substitution for something else. There will be mechanisms in place around the strategic review to make sure that that happens.

That is the first part of the answer to your question. Duncan McNab can elaborate on what the specific standards might be.
Duncan McNab: As you say, convener, the timing is a little delicate because the statement is being made on Thursday. What is included in the quality and standards announcement will be subject to ministerial approval.

On standards, we put a draft voluntary code of practice out to consultation and that included definitions of best practicable means and best practice for local authorities. Responses to that consultation are being considered at the moment with a view to producing a finalised version and publishing it this spring. That will include some form of standards.

It is very difficult to quantify one standard that will be acceptable to the whole industry because of the different nature of different works. In our extensive work to produce the draft voluntary code, we have found that it is almost impossible to come up with one standard. We will probably advocate best practicable means based on locally specific standards rather than one national standard of odour minimisation. We will bring together the expertise and knowledge gained from preparing the voluntary code and from the consultations that are taking place in England and Wales to prepare the statutory code, which will be subject to public consultation later this year with a view to publication ready for implementation next April.

I am not able to talk about any specific standards, but we are looking to minimise odour at all the key sites to a standard that is acceptable to those who are living in the vicinity, and to use the best available technologies to minimise and eradicate odour. In the past, ministers have stated that it is impossible to eradicate odour completely, so we cannot make false or unrealistic claims, but the idea is to minimise odour as much as possible and that will benefit the general public.

The Convener: There are two dimensions to that. One is to do with the physical containment of odour using sheds or extracting mechanisms and the other is to do with working practices in sewerage works. It is an issue that comes to me fairly frequently and I suspect that there will be a number of other members in that position. Perhaps it is unfortunate that objectives are apparently being set after we have dealt with the bill, but we might be able to make representations about that elsewhere.

As there are no other questions, I thank our witnesses for coming. As the bill is entering its final stage this week, I ask members whether there are any particular representations that they want the committee to make or whether they are happy to note the evidence that we have received. Members seem to be content with that.

Members indicated agreement.
Water Services etc. (Scotland) Bill

I am happy to provide additional information on financial issues which arose during your Committee’s Stage 1 consideration of the Water Services etc. (Scotland) Bill. I have also supplied a revised Financial Memorandum to the Parliament to take account of the financial implications of the amendments to the Bill at Stage 2.

We have been giving further consideration to the difference between the costs estimated in the Financial Memorandum and those suggested in research carried out for Scottish Water to implement the licensing regime set out in the Bill.

The market envisaged in the Bill and planned by the Water Industry Commissioner is well-defined and relatively simple. There is no scope for the market to increase in number of products: it is limited to retail of water services and sewerage services (including surface drainage and trade effluent), nor in number of customers, given the statutory prohibitions on common carriage and on retail competition for domestic customers.

Consistent with this, the Executive’s general approach to market mechanisms has been based on a desire for a simple and cost effective solution, and the Water Industry Commissioner has based his modelling on this approach. We have now received more information on the model used by IBM Consulting in their work for Scottish Water, which drew instead on their experience in other deregulated utility markets, and assumed a greater number of activities and degree of complexity in market design, infrastructure and processes than we believe is required. This consideration does not allow us to reach a single set of definitive costs but we have gained a clear understanding of the differences between the estimates reached by the Water Industry Commissioner and by IBM and concluded that the differences were not due to underestimation by the Water Industry Commissioner but reflect the simple model of retail competition proposed in the Bill and cost effective solutions that are appropriate to that market.

In resolving the differences in the projected costs, of particular significance was the £10.8-18.4 million costs estimated by IBM/Scottish Water of establishing a competitive regime and market mechanisms. This included £2.5-3.5 million on market design and developing industry codes and agreements which is work which the Water Industry Commissioner has already commenced and expects to be concluded using the £2.5m identified in the Financial Memorandum for general administrative functions of the Water Industry Commission. And IBM/Scottish Water had allowed £5.2-10.0 million for automated central market systems, based on requirements including profiling of customers and complex volume allocations. The Water Industry Commissioner proposes that an IT based system which is not completely automated could be used, a considerable saving permitted by the small size of the market (150,000 customers) and that profiling and volume allocation will not be required in a simple market with fixed wholesale water costs. These decisions remove very significant costs and reduce the difference in the two estimates considerably, to around the Commissioner’s original estimate that a switch engine would cost around £2.5m. A simpler system without many of the complex operations assumed in the IBM model would have a consequent reduction on the projected ongoing operational costs, another area where estimates varied widely.
In conclusion, a complex market of a scale to justify automated systems, and taking into account lessons from other industries where markets have grown from their original parameters would lead to greater cost estimates. But we have taken clear statutory provision to ensure that the market has well defined limits and can be operated in as simple a way as possible, where further costs are only incurred when these can be justified by the benefits they bring. Unless unforeseen reasons were to require a much more complex and automated system, the costs set out by the Water Industry Commissioner in the Financial Memorandum appear to be appropriate forecasts in advance of consultation on the final market shape and knowledge of if or how competition will develop.

One further piece of work on these costs has been completed since Stage 1: a scoping study by Shepherd & Wedderburn, legal consultants, on the legal work required by the Water Industry Commission to establish the licensing regime. This was published on 4 November 2004 and is available at www.watercommissioner.co.uk. It scopes the legal costs, estimated in the Financial Memorandum as £1.5 million, at £1.6 to £2.0 million. Some of this increase will be absorbed by reduced expenditure by the Commission on general administrative work, now reduced from £2.5 million to £2.3 million.

I am copying this letter to the Convener of the Finance Committee, and would be happy to provide any further information that either of your Committees require.

Ross Finnie MSP
Dear Des,

Water Industry

When I gave evidence to your Committee on 28th September, I promised to answer some outstanding queries for which I did not have the information immediately to hand.

You asked about the Parliamentary process for starting Q&SIII projects. Ministers will decide on Q&S III following the current consultation. Once the investment level priorities have been set and the Water Industry Commissioner has advised on / or determined charges, then it will be clear what levels of borrowing are required by Scottish Water. Parliament will need to approve these borrowing levels as part of the annual budget process.

Mr Purvis asked whether we would publish reports from SW on the capital programme. Progress with the capital programme is published in the annual report and interim (half yearly) accounts of Scottish Water, the annual report of Scottish Water Solutions, and in the Investment and Asset Management report by the Water Industry Commissioner. The Executive also receives regular updates from Scottish Water on progress with investment and programme expenditure, but these would not be generally published. In addition to this, I also regularly meet with the Non Executive Directors of Scottish Water (most recently on 28th September 2004) to review Scottish Water’s progress in delivering its capital programme.

Yours sincerely,

Ross Finnie MSP

Minister for Environment & Rural Development

Scottish Executive

Pentland House
47 Robb’s Loan
Edinburgh EH14 1TY

Telephone: 0131-556 8400
scottish.ministers@scotland.gov.uk
http://www.scotland.gov.uk

Des McNulty MSP
Convener of Finance Committee
Room 2.1
Committee Chambers
George IV Bridge
Edinburgh
EH9 9SP

25 October 2004
Mr McNulty asked how many staff would be affected by the retail proposals in the Bill. The number of staff that will be affected by the creation of a separate retail subsidiary cannot be clearly determined until the scope of the potential retail business has been defined further (e.g. whether all or only some call centre functions in relation to non-domestic customers be included in retail). Work is ongoing, commissioned by the WIC, to clarify this. However, I can reassure you that, as set out in Part 2, Section 13 (3), any staff transferred to the employment of the retail subsidiary, will be transferred with the same rights of employment.
After section 8

Lewis Macdonald

1 After section 8, insert—

Fees relating to licences

(1) The Commission may, for the purpose mentioned in subsection (2), make a scheme (a “fees scheme”) which specifies—

(a) the matters relating to water services and sewerage licences in respect of which fees are payable; and

(b) the amounts of fees payable (and, as appropriate, the persons by whom they are payable) in respect of each of those matters.

(2) The purpose is securing that the fees payable in accordance with the scheme are sufficient to meet the costs incurred by the Commission in exercising its functions relating to water services and sewerage services licences.

(3) A fees scheme may, in particular—

(a) impose on licence-holders fees by way of annual levies; and

(b) specify fees by reference to maximum amounts.

(4) A fees scheme may make provision with respect to the times and methods of payment of the fees specified by the scheme.

(5) A fees scheme may—

(a) make different provision for different cases or types of case;

(b) revoke or amend a previous scheme.

(6) The Commission must—

(a) send any fees scheme to the Scottish Ministers for approval; and

(b) publish a summary of the scheme (and, in doing so, invite representations for the purposes of subsection (7)).

(7) The Scottish Ministers—

(a) must have regard to any representations about a fees scheme which are made to them within 4 weeks of publication of the summary of it under subsection (6)(b); and
(b) may approve a fees scheme with or without modifications.

(8) If the Scottish Ministers approve a fees scheme with modifications, they must give their reasons for doing so.

(9) When a fees scheme has been approved under subsection (7), the Commission—

(a) must—

(i) make arrangements for allowing any person to obtain a copy of the scheme on payment of such reasonable fee (if any) as the Commission may determine; and

(ii) publicise those arrangements and publish the scheme; and

(b) may charge and recover fees in accordance with the scheme.

Section 9

Lewis Macdonald

2 In section 9, page 9, line 16, leave out subsection (5)

Section 10

Lewis Macdonald

3 In section 10, page 9, line 35, after <to> insert—

<(a) any costs attributable to the participation of water services and sewerage services providers in the provision of water and sewerage services; and

(b)>}

Section 12A

Lewis Macdonald

4 In section 12A, page 11, line 19, at end insert <apart from Scottish Water.>

Lewis Macdonald

5 In section 12A, page 12, line 2, at end insert—

<(8A) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may, with the consent of Scottish Water, subscribe for share or loan capital of the undertaking.>

Lewis Macdonald

6 In section 12A, page 12, line 6, at end insert <; and

( ) subscriptions for share or loan capital under subsection (8A) may be made;>
Section 13

Lewis Macdonald

7 In section 13, page 12, line 33, at end insert—

<(  ) A transfer by virtue of subsection (5) may be—

(a) to such extent; and

(b) subject to such conditions,

as Scottish Water may, with the consent of the Scottish Ministers, determine.>

Section 18

Lewis Macdonald

8 In section 18, page 18, line 13, leave out <approved> and insert <for which consent has been given>

Lewis Macdonald

9 In section 18, page 20, line 4, at end insert—

<(  ) The Scottish Ministers must—

(a) provide the Commission with such information as it may require for the purpose of subsection (2)(c); and

(b) in particular, send to the Commission copies of any guidance and directions referred to in that subsection when issued or given.>

Lewis Macdonald

10 In section 18, page 21, line 15, leave out <taken action> and insert <done, or has agreed to, something>

Section 19B

Lewis Macdonald

11 In section 19B, page 27, line 19, leave out <under the Pollution Prevention and Control (Scotland) Regulations 2000 (S.S.I. 2000/323)> and insert <granted by virtue of regulations made under section 2 of the Pollution Prevention and Control Act 1999 (c.24)>

Section 19C

Lewis Macdonald

12 In section 19C, page 28, line 4, at end insert—

<(3A) A person on whom an enforcement notice has been served may, by summary application made within 21 days of the date of service of the notice, appeal to the sheriff against the notice; and the notice is of no effect until the appeal is withdrawn or finally determined.

(3B) In an appeal under subsection (3A), the sheriff may make such order as the sheriff thinks fit; and the decision of the sheriff in the appeal is final.>
Lewis Macdonald

13 In section 19C, page 28, line 6, at end insert—

<( ) Where an enforcement notice is contravened, the local authority may (whether or not proceedings have been taken for an offence under subsection (4)) take proceedings in the sheriff court for the purposes of securing that the requirements of the notice are fulfilled.>

Lewis Macdonald

14 In section 19C, page 28, line 8, after <offence> insert <under subsection (4)>

Lewis Macdonald

15 In section 19C, page 28, line 8, leave out from second <for> to end of line 9 and insert <in fulfilment of the requirements of the notice.>

Lewis Macdonald

16 In section 19C, page 28, line 17, after <82> insert <(summary proceedings by persons aggrieved by statutory nuisance)>

Section 20

Alex Johnstone

19 In section 20, page 28, leave out lines 28 to 33

Section 27

Lewis Macdonald

*21 In section 27, page 32, line 35, leave out <9(5),>

Lewis Macdonald

17 In section 27, page 32, line 35, leave out <or (6)> and insert <, (6) or (8A)>

Alex Johnstone

20 In section 27, page 32, line 35, leave out <, 19B(1) or 20(3)> and insert <or 19B(1)>

Schedule 2

Lewis Macdonald

18 In schedule 2, page 49, line 2, after second <of> insert <service of>
Supplement to the Marshalled List of Amendments selected for Stage 3

The following amendments were lodged as manuscript amendments under Rule 9.10.6. The Presiding Officer has agreed under that Rule that these amendments may be moved at the meeting of the Parliament on 9 February 2005. Amendments 22 and 23 will be debated with the other amendments in Group 3, and will be called immediately after amendment 10 (on page 3 of the Marshalled List).

Section 18

Lewis Macdonald

22  In section 18, page 23, line 37, after <or> insert <17A(1) or (3)>

Lewis Macdonald

23  In section 18, page 24, line 12, leave out <of that section> and insert <(1) or (3) of section 17A of that Act>
Groupings of Amendments for Stage 3

Note: The time limits indicated are those set out in a timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Licensing of services provided to eligible premises
1, 2, 3, 21, 18

Group 2: Scottish Water: business undertaking
4, 5, 6, 7, 17

Group 3: Charges scheme
8, 9, 10, 22, 23

Group 4: Sewerage nuisance: code of practice
11, 12, 13, 14, 15, 16

Debate to end no later than 20 minutes after proceedings begin

Group 5: Meaning of “eligible premises”
19, 20

Debate to end no later than 40 minutes after proceedings begin
Business Motion: Ms Margaret Curran, on behalf of the Parliamentary Bureau moved S2M-2401—That the Parliament agrees that, during Stage 3 of the Water Services etc. (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time-limits indicated (each time-limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

Groups 1 to 4 – 20 minutes
Group 5 – 40 minutes

The motion was agreed to.

Water Services etc. (Scotland) Bill – Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 2, 3, 8, 9, 10, 22, 23, 11, 12, 13, 14, 15, 16, 21, 17 and 18.

The following amendments were agreed to (by division)—

4 (For 81, Against 2, Abstentions 0)
5, 6 and 7 (For 86, Against 3, Abstentions 0)

The following amendments were disagreed to (by division)—

19 (For 6, Against 89, Abstentions 0)

Amendment 20 was not moved.

Water Services etc. (Scotland) Bill – Stage 3: The Minister for Environment and Rural Development (Ross Finnie) moved S2M-2349—That the Parliament agrees that the Water Services etc. (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 93, Against 21, Abstentions 0).
Water Services etc (Scotland)
Bill: Stage 3

The Deputy Presiding Officer: The next item of business is stage 3 consideration of the Water Services etc (Scotland) Bill. Members should note that two manuscript amendments have been lodged today and have been accepted under rule 9.10.6. Those amendments are set out in the supplement to the marshalled list, which has been placed on members’ desks, and will be debated with the other amendments in group 3.

For the first part of the stage 3 proceedings, members should have the bill as amended at stage 2; the marshalled list containing all the amendments selected for debate; the supplemental list that I have already referred to; and the groupings. The normal rules for division timings will apply.

After section 8

The Deputy Presiding Officer: Group 1 is on the licensing of services provided to eligible premises. Amendment 1, in the name of the minister, is grouped with amendments 2, 3, 21 and 18.

The Deputy Minister for Environment and Rural Development (Lewis Macdonald): A key aim of the Water Services etc (Scotland) Bill is to establish a licensing regime to regulate retail competition for business customers that will be managed by the water industry commission. Our policy is that the costs to the commission of administering the licensing regime should be recovered from licence holders. That will be achieved by, for example, charging application fees to cover the work of assessing licence applications.

Section 9(5) provides that ministers will specify such fees in an order. Amendments 2 and 21 seek to remove the provision and a reference to it in section 27 and instead, through amendment 1, we seek to provide that the commission should produce the fees scheme to be approved by ministers. That will mean greater flexibility to ensure that a greater range of different fees can be levied; to allow for variable fees where appropriate; and, subject to consultation and ministerial approval, to ensure that fees can be tailored to meet the costs of the commission’s licensing function and do not fall on all water and sewerage customers or the taxpayer.

Section 10 requires the commission to secure the participation of water and sewerage providers in licensing in an orderly manner and in a way that
is not detrimental to the exercise of Scottish Water's core functions. Amendment 3 seeks to add to the direction-making powers in that regard to put beyond doubt that the commission may use its powers to require licensed providers to meet the costs of developing a mechanism or switch engine for handling customer information between licensed providers.

I move amendment 1.

Amendment 1 agreed to.

Section 9—Commission's power to obtain information and charge fees

Amendment 2 moved—[Lewis Macdonald]—and agreed to.

Section 10—Participation of licensed providers

Amendment 3 moved—[Lewis Macdonald]—and agreed to.

Section 12A—Financing, borrowing and guarantees

The Deputy Presiding Officer: Group 2 is on Scottish Water's business undertaking. Amendment 4, in the name of the minister, is grouped with amendments 5 to 7 and 17.

The Minister for Environment and Rural Development (Ross Finnie): This group of amendments seeks to affect the provisions of the bill that relate to the retail undertaking to be established by Scottish Water. Amendment 4 seeks to qualify the order-making power at section 12A(2)(b), under which ministers may prohibit the undertaking from borrowing from "any other person", to provide that that would not be used to prohibit borrowing from Scottish Water itself. For example, an undertaking that is a subsidiary of Scottish Water should be allowed to borrow from its parent company in the same way that any other subsidiary of Scottish Water can.

Amendment 5 seeks to provide ministers with an additional funding mechanism in relation to the undertaking. With this amendment, ministers would have not only the ability to make grants, lend or guarantee borrowing but the power to specify the circumstances in which they can provide equity for the undertaking. That would add to the other funding options available under section 12A. This provision is important, because in some circumstances equity might be the most appropriate form of funding to make available. It is certainly the one that is most closely aligned with public expenditure guidelines. For example, investing equity could place less of a burden on an undertaking than a loan, because ministers could choose to permit dividends to be deferred or reinvested.

Final decisions on how the undertaking will be financed will be taken in light of Scottish Water's detailed proposals on the form that the undertaking will take.

Amendment 6 provides that any equity that is made available to the undertaking may be subject to conditions.

Amendment 7 relates to the transfer that would separate Scottish Water's retail undertaking from Scottish Water. The amendment enables Scottish Water, subject to the consent of Scottish ministers, to transfer property to such an extent and subject to such conditions as it may determine. That flexibility will ensure that a division that makes sense both for Scottish Water and for the retail undertaking can be made. For example, it will allow certain pieces of property to be shared or transferred and partially leased back. Again, the detail of the arrangements will depend on Scottish Water's proposals for the undertaking and will be subject to ministers' consent. The amendment provides flexibility that will help to ensure that retail separation does not require an absolute big bang approach but can be managed in a way that makes sense for Scottish Water and customers.

Amendment 17 provides that an order under section 12A(8A) relating to provision of equity funding to the retail undertaking would be subject to negative parliamentary procedure. I urge members to support the amendments.

I move amendment 4.

The Deputy Presiding Officer: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Balhance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ferguson, Patricia (Glascow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
<table>
<thead>
<tr>
<th>Member</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wilson, Allan (Cunninghame North) (Lab)</td>
</tr>
<tr>
<td>Whitefield, Karen (Airdrie and Shotts) (Lab)</td>
</tr>
<tr>
<td>White, Ms Sandra (Glasgow) (SNP)</td>
</tr>
<tr>
<td>Welsh, Mr Andrew (Angus) (SNP)</td>
</tr>
<tr>
<td>Wallace, Mr Jim (East Kilbride) (Lab)</td>
</tr>
<tr>
<td>Swinney, Mr John (North Tayside) (SNP)</td>
</tr>
<tr>
<td>Curran, Frances (West of Scotland) (SSP)</td>
</tr>
<tr>
<td>Stone, Mr Jamie (Glasgow) (LD)</td>
</tr>
<tr>
<td>Stevenson, Stewart (Banff and Buchan) (SNP)</td>
</tr>
<tr>
<td>Smith, Mr Jim (Caithness, Sutherland and Easter Ross) (LD)</td>
</tr>
<tr>
<td>Swinburne, John (Central Scotland) (SSCUP)</td>
</tr>
<tr>
<td>Swithen, John (Central Scotland) (SSCUP)</td>
</tr>
<tr>
<td>Wallace, Mr Jim (Orkney) (LD)</td>
</tr>
<tr>
<td>Welsh, Mr Andrew (Angus) (SNP)</td>
</tr>
<tr>
<td>White, Ms Sandra (Glascow) (SNP)</td>
</tr>
<tr>
<td>Wilson, Allan (Cunninghame North) (Lab)</td>
</tr>
</tbody>
</table>

**The Deputy Presiding Officer**: The result of the division is: For 81, Against 2, Abstentions 0.

**Amendment 4 agreed to.**

**Amendments 5 to 7 moved—[Ross Finnie.]**
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatle, Cathy (Falkirk East) (Lab)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephenson, Nicola (Aberdeen South) (LD)
Swinburne, John (Central Scotland) (SSCUP)
Swinney, Mr John (North Tayside) (SNP)
Wallace, Mr Jim (Orkney) (LD)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

AGAINST
Curran, Frances (West of Scotland) (SSP)
Fox, Colin (Lothians) (SSP)
Kane, Rosie (Glasgow) (SSP)

The Deputy Presiding Officer: The result of the division is: For 86, Against 3, Abstentions 0.

Amendments 5 and 6 agreed to.

Section 13—Transfer of staff etc to the undertaking
Amendment 7 agreed to.

Section 18—Scottish Water’s charges for water and sewerage services

14:45

The Deputy Presiding Officer: We come now to the third group of amendments, on the charges scheme. Amendment 8 is grouped with amendments 9, 10, 22 and 23. I remind members that amendments 22 and 23 are manuscript amendments that were lodged today.

Lewis Macdonald: The amendments in this group make minor changes to section 18 of the bill, which amends the Water Industry (Scotland) Act 2002, on Scottish Water’s charges. Amendment 9 requires ministers to send to the office of the water industry commission for Scotland a copy of any guidance or directions issued or given to Scottish Water. That ensures that the commission is aware of all ministerial requirements on Scottish Water, which it is required to take into account in exercising its various functions in relation to Scottish Water’s charges.

Amendment 10 amends new section 29E of the 2002 act to clarify that the commission can consent to a departure from a charges scheme where a customer has done, or has agreed to, something that reduces or increases the cost of providing services. For example, a customer who takes untreated raw water from Scottish Water may continue to be eligible for a reduced charge under the departure provisions of the bill, although, strictly speaking, they have not taken an action to reduce the charge of serving them. As with all departures, the commission would have to be satisfied that the departure was justified in the circumstances of the case.

Amendment 8 is a minor drafting refinement. Amendments 22 and 23 are also relatively minor and consequential, but they were lodged late due to an oversight. I am grateful to the Presiding Officer for allowing them to be lodged as manuscript amendments. They are required in the light of amendments made at stage 2, which inserted new section 17A relating to Scottish Water’s duty as a supplier of last resort to continue providing sewerage services directly to customers where arrangements between a licensed provider and a customer have come to an end. The amendments ensure that, where the continuity-of-supply arrangements operate, the occupier of the premises will be liable directly to Scottish Water for any charges made for the provision of those services.

I move amendment 8.

Amendment 8 agreed to.

Amendments 9, 10, 22 and 23 moved—[Lewis Macdonald]—and agreed to.

Section 19B—Sewerage nuisance: code of practice

The Deputy Presiding Officer: We come now to the fourth group of amendments. Amendment 11 is grouped with amendments 12 to 16.

Ross Finnie: Amendments 11 to 16 affect sections 19B and 19C, which were inserted at stage 2 to address sewerage nuisance, a matter that has exercised a number of MSPs. George Lyon has raised the matter in relation to Inverary, and Susan Deacon has raised concerns relating to her constituency, and I gather that some members of the Leith Links residents association are present in the public gallery to ensure that this part of the bill is duly passed.

A key part of the provisions is the power for local authorities to serve an enforcement notice where there is a material non-compliance with the sewerage code. However, given the potential financial consequence of steps required to comply with an enforcement notice and the risk of criminal proceedings resulting from a notice, amendment
12 makes provision for a right of appeal to the sheriff court. That would allow Scottish Water or any other person upon whom an enforcement notice is served to appeal against the notice, in line with existing rights of appeal against abatement notices served by local authorities in respect of statutory nuisances under part 3 of the Environmental Protection Act 1990.

Amendment 13 provides local authorities with additional powers to secure compliance with a sewerage code when an enforcement notice is contravened. It provides local authorities with a further mechanism to secure compliance with the sewerage code by taking the matter to the sheriff court to ensure that the requirements of the notice are fulfilled. Again, that is similar to the power that is available under section 81(5) of the 1990 act.

Amendment 11 and amendments 14 to 16 are minor drafting refinements. I commend all the amendments to the Parliament.

I move amendment 11.

Christine May (Central Fife) (Lab): I support amendment 11. I am grateful to the minister and to the members of the Environment and Rural Development Committee for all that they have done. My constituents in Levenmouth, who have been subjected to nuisance—as have people in other constituencies—are also grateful.

The Deputy Presiding Officer: No one else has asked to speak on this group of amendments, and I do not think that the minister will need to respond to that—although I am giving you the option, minister, if you wish.

Ross Finnie: That is quite all right.

Amendment 11 agreed to.

Amendments 12 to 16 moved—[Ross Finnie]—and agreed to.

Section 20—Meaning of “eligible premises”

The Deputy Presiding Officer: We come now to group 5 on the marshalled list, on the meaning of “eligible premises”. Amendment 19, in the name of Alex Johnstone, is grouped with amendment 20.

Alex Johnstone (North East Scotland) (Con): Interestingly enough, this whole bill has passed through its amendment stages—stage 2 and now stage 3—with very little conflict being expressed. In fact, the only point with which the Conservatives have taken issue is to do with the nature of the bill and the way in which it seeks to limit competition and co-operation and to maximise ministerial control.

At stage 2, I did not seek to amend the bill. I took the opportunity of speaking to ministers at that time to say that I would seek, where possible, to lodge amendments at stage 3 to bring out my main points. I took advice from the clerks on the issue of common carriage—which I had hoped to raise—and was told that it was unlikely that I could do so without running up against the rules on inadmissibility of wrecking amendments. I will therefore deal with that issue when I speak to the motion that the bill be passed.

However, I was advised that it would be possible to proceed with amendments to do with the extent of retail competition. I therefore lodged amendment 19, the intention of which is to remove the restriction on retail competition. As currently worded, the bill suggests that only non-domestic buyers will be able to take advantage of retail competition. Amendment 19 would extend that opportunity to the domestic sector.

I believe fundamentally that competition has worked successfully in the utilities marketplace for the supply of gas and electricity and could ultimately be made to work successfully for the benefit of customers in the water sector too. I admit, however, that radical changes to procedure would be required to make that effective.

I also believe that major benefits could be achieved through introducing this kind of retail competition in the domestic sector. Not the least of those advantages would be the opportunity to ensure—that after proper arrangements have been put in place—that those who actually use water in the domestic sector take responsibility for the amount of water that they use, because they would have to pay for the amount of water that they use. As currently worded, the bill will prevent such opportunities from arising in future, so I will be glad to move amendment 19.

Amendment 20 is consequential on amendment 19. I will move it only if, by some miracle, amendment 19 is agreed to.

I move amendment 19.

Rob Gibson (Highlands and Islands) (SNP): Given the rational nature of the debate in the Environment and Rural Development Committee, and the way in which we moved forward in a united fashion, amendment 19 can be seen as nothing other than a wrecking amendment. It goes against the spirit of what the people of Scotland would want in the public delivery of their water supply.

One has only to look at our train services to see that a utility with fixed plant is the kind of organisation that will not work if competition is introduced. I am quite sure that all other members will agree that we should see off amendment 19 straight away. It is interesting to note that even Mr Johnstone’s colleagues have not bothered to come to the chamber to listen to his nonsense.
essential that we ensure that the services that are than they can afford to pay. Consequently, it is they receive; sometimes they are paying more to Scottish Water’s domestic customers. We believe that that protection is essential if we are to deliver social inclusion.

It is inevitable that retail competition for domestic customers would undermine the link between what customers pay for water and sewerage services and the value of the property in which they live. It would threaten the principle that people who live in properties in the same council tax band are liable for the same water and sewerage charges, wherever in Scotland they live and whatever their needs as consumers. It would also threaten the role of local authorities in billing domestic customers and, in doing so, would undermine ministers’ ability to set discounts from charges for certain classes of customer. At present, we set such discounts for single adult households.

Councils collect water and sewerage charges on the basis of information that they already hold. That information allows them to deliver discounts; only councils can administer those discounts directly. To protect that ability to provide discounts, we have specifically designed the bill to exclude competition for domestic households. Of course the benefits of discounts and of property-related charges are not felt equally by every customer, but without the participation of all customers, competitor companies could cherry pick those customers who were not receiving a discount and those who were in higher tax bands, thus leaving everyone else to pay more. That is directly contrary to the bill’s purpose.

We believe that water and sewerage services are essential to the health of every person in Scotland. A key purpose of the bill as endorsed by the Parliament at stage 1 is to ensure that those services should remain as affordable as possible for all customers. Amendments 19 and 20 are directly contrary to that aim and I urge members to reject them.

Alex Johnstone: I understand much of what the minister had to say, especially his point about the need to provide services on a socially inclusive basis. However, throughout huge areas of Scotland, it is easy to find people who believe that they are paying over the odds for the services that they receive; sometimes they are paying more than they can afford to pay. Consequently, it is essential that we ensure that the services that are provided and the charges that are levied reflect each other in some way.
The Deputy Presiding Officer: There will be a division.

FOR
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Johnstone, Alex (North East Scotland) (Con)
Monteilh, Mr Brian (Mid Scotland and Fife) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)

AGAINST
Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Frances (West of Scotland) (SSP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillan, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kane, Rosie (Glasgow) (SSP)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (North East Scotland) (SNP)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
May, Christine (Central Fife) (Lab)
McCawley, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Swinney, Mr John (North Tayside) (SNP)
Wallace, Mr Jim (Orkney) (LD)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 6, Against 89, Abstentions 0.

Amendment 19 disagreed to.

Section 27—Orders and regulations

Amendments 21 and 17 moved—[Lewis Macdonald]—and agreed to.

Amendment 20 not moved.

Schedule 2

Licences and Compliance: Further Provision

Amendment 18 moved—[Lewis Macdonald]—and agreed to.

The Deputy Presiding Officer: That concludes our consideration of amendments.
Water Services etc (Scotland) Bill

The Deputy Presiding Officer (Murray Tosh): The next item of business is a debate on motion S2M-2349, in the name of Ross Finnie, that the Water Services etc (Scotland) Bill be passed.

15:03

The Minister for Environment and Rural Development (Ross Finnie): For the purposes of rule 9.11 of the standing orders, I advise the Parliament that Her Majesty, having been informed of the purport of the Water Services etc (Scotland) Bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill.

This is an important week for the water industry in Scotland. Later this afternoon, my colleague Lewis Macdonald will set out our objectives for the industry and the principles by which the cost of those objectives will be distributed between customers. Also today, Parliament has the opportunity to put in place the coherent legislative framework that will underpin those objectives. The provisions in the bill will ensure that the industry enjoys stability in which to carry out what we ask it to do. The provisions will also deliver a robust regulatory regime that can secure those objectives with maximum efficiency.

By replacing the current individual economic regulator with a water industry commission, the bill strengthens the regulation of the industry, introduces more accountability and transparency and ensures that the appropriate expertise is brought to bear in regulatory decisions. Using its new powers of charge determination, the commission will decide how much it will cost Scottish Water to efficiently deliver all that we ask of it in today’s statement. It is certainly appropriate that an expert body should be responsible for that calculation, which is central to the functioning of the industry. Equally important is that we as a Parliament and politicians take responsibility for deciding the principles of charging customers. The bill will ensure that that role remains firmly with ministers and the Parliament.

In addition to the strong regulation introduced by the bill, its provisions will protect public health, the environment and vulnerable households. With such fundamentally important priorities at stake, I am pleased that those provisions have remained largely unchanged since they were debated at stage 1. The bill still ring fences Scottish Water’s core functions of providing water and sewerage services to all customers on the public networks, and prohibits anyone else from doing so. That safeguards public health and the environment, and provides certainty for Scottish Water to concentrate on delivery.

Stability is also the aim of the licensing regime that is set out in the bill. It will ensure that, if retail competition in the non-domestic sector develops, it will be strictly regulated. Amendments were made to the bill at stage 2 to ensure that the transition to competing in that small part of the market is as smooth as possible for Scottish Water. The bill now provides greater flexibility for Scottish Water to choose an appropriate model for its retail undertaking, subject to ministers’ approval, and for a wide range of funding mechanisms to be available. That will help to give Scottish Water’s retail undertaking the best possible chance of success.

At stage 2, important changes were made to the bill to improve customer representation in the industry. Those changes will ensure that water customer consultation panels will be involved in the process by which customer charges are set, by requiring the panels to be consulted on key issues for the industry. The panels also gain stronger powers to address reports to any of the key players in the industry—to Scottish Water itself, to Scottish Water’s regulators or to ministers. In addition, following constructive debate at the Environment and Rural Development Committee at stage 1, the bill was amended to give the convener of the panels responsibility for handling customer complaints.

I am pleased to announce that in future the water customer consultation panels will be known as waterwatch Scotland, which I hope members will agree is somewhat snappier and more recognisable than the original title. We believe that it will help customers to clearly identify where they can take issues relating to the water industry, and will help the panels and their convener to become a one-stop shop for all customers’ concerns in relation to their water services.

Mr John Swinney (North Tayside) (SNP): Can the minister assure Parliament that, notwithstanding the complaint mechanism that he outlined—I welcome the reforms that have been made—accountability and responsibility for the management and direction of the water industry will remain firmly in the hands of ministers, and that the power of ministerial direction to Scottish Water and other organisations within the industry will reflect the wider priorities of the Scottish Executive and what Parliament expects ministers to deliver in those areas?

Ross Finnie: I am happy to give John Swinney that assurance. The point he raises is exactly what the bill is about. We have created an almost unique structure within Scottish Water in terms of publicly owned companies, whereby ministers of Parliament clearly set the strategic direction that
Our water supplies will be delivered publicly, but... the Scottish Water is to follow, consonant with the overarching policies of Parliament and the Executive. However, we leave the management and board of Scottish Water to deliver. In the public interest—because Scottish Water is a publicly owned body, and therefore not effectively subject to overall competition—we have the water industry commission. On behalf of customers—they domestic or non-domestic—it will seek to ensure that Scottish Water performs to standards that would be recognised within a competition framework elsewhere. The ability of Parliament to ensure that the framework is suitable for delivering the future of Scottish Water as the publicly owned provider of water services in Scotland. It will provide a strong regulatory framework that will allow Scottish Water to deliver ministers’ requirements efficiently, in the interests of customers. It gives customers a central place in the industry, ensures that their voice is heard at all levels, and proposes a firm solution to the problem of odour from treatment works, which the affected communities will welcome. The bill takes us forward again in improving the delivery of water services in Scotland.

I raised earlier the question of being given powers to develop a statutory code for the control of sewage nuisance, which I know will be welcomed by many.

The Water Services etc (Scotland) Bill will ensure stability for the future of Scottish Water as the publicly owned provider of water services in Scotland. It will provide a strong regulatory framework that will allow Scottish Water to deliver ministers’ requirements efficiently, in the interests of customers. It gives customers a central place in the industry, ensures that their voice is heard at all levels, and proposes a firm solution to the problem of odour from treatment works, which the affected communities will welcome. The bill takes us forward again in improving the delivery of water services in Scotland.

I move,

That the Parliament agrees that the Water Services etc. (Scotland) Bill be passed.

15:10

Rob Gibson (Highlands and Islands) (SNP): The Scottish National Party welcomes the fact that our water supplies will be delivered publicly, but we believe that much of the bill has to do with competition legislation and ensuring that we do not have to open the Scottish water industry to full competition, which the SNP has opposed for many years.

We are glad that the Executive has not gone for full competition, but the well-known needs of domestic and non-domestic customers must be met and many of them will have to be met in quality and standards III, about which we expect to hear more later. The bill is only a limited way to ensure that the framework is suitable for delivering those needs. We are delighted that there will be no common carriage and that the public water delivery system will be maintained.

We welcome the statutory code on odour nuisance. We acknowledge the petition on water treatment plants that Susan Deacon shepherded, and pay tribute to the Public Petitions Committee and the Environment and Rural Development Committee for the work that they did on getting that valuable code, which was not contemplated at the outset, inserted into the bill. Although that is excellent, the bill cannot deal directly with development constraints, which require considerable investment, and we look forward to the introduction of the means to address that issue in due course.

We are also pleased that the customers champion—the WCCP—will have a snappy title. I attempted to get the idea of a snappy title accepted at stage 2. The combined brain power of the civil service has clearly thought that waterwatch Scotland is such a title, and that is to be welcomed.

The powers to control coal mine water discharge have been uncontroversial, but are essential for many communities in the coal mining areas of Scotland, and we welcome the inclusion of those powers in the bill.

We wish the water industry commission well. We believe that the public will have more confidence in its deliberations and that it will be a more transparent means of regulating Scottish Water’s enterprises.

We are happy to welcome the bill, despite its limitations, and give it fair passage to becoming an act.

15:13

Alex Johnstone (North East Scotland) (Con): There is much that the Conservative party can welcome in the bill. In setting up the water industry commission, part 1 in particular goes some way towards alleviating the pressures that we experience not only from water buyers, but from individuals who are concerned about how charges have been regulated across the board. By putting in place a system that will allow those people to be properly heard and represented, we have gone some way towards ensuring that some of the anomalies that we have suffered in the past can at least be addressed, if not eliminated. Therefore, I welcome part 1 of the bill.

Part 3 of the bill is also largely uncontested. Having questioned a number of interested parties on it during the Environment and Rural Development Committee’s stage 1 inquiry, I am satisfied that part 3 is in the bill for the right reasons and I am happy to support its inclusion.

However, the Conservative party continues to have serious problems with the ideas behind part 2. As has been said, part 2 has the effect of concentrating power in ministers’ hands and, as a result, our water industry is likely to remain policy led, not, as is necessary in many areas of Scotland, demand led. During the committee
stages and again today, the minister talked many
times about the necessity for the industry to mimic
the benefits that can be achieved through
competition in a marketplace. However, he has
never given me an adequate explanation of why
the solution to the problem is not to deliver real
competition.

The water policy as set out under part 2 of the
bill is designed to retain the procedures by which
water charging equates to a system of taxation
throughout Scotland. It relies heavily on how water
is charged, so that one individual cross-subsidises
another. If we are to use water services provision
as a system of taxation, which is without doubt
what we are doing, there will inevitably be conflicts
between those who use far more water than they
are willing to pay for and those who pay for far
more water than they ever use.

The opportunity to address such issues in part 2,
even to a limited extent, has been avoided for
largely ideological reasons and therefore the
Conservatives cannot accept it. To a lesser
extent—although this is equally important in
particular areas—the bill leaves those at Scottish
Water as the de facto planning masters in large
areas of Scotland. By keeping power and funding
in the hands of the minister, the opportunity to
tackle many of Scotland’s problems has been
missed. Development is now seriously constrained
as a result of the shortage of water and water
services provision, which must be solved by other
means.

The view that has been expressed on common
carriage at every stage—for some inexplicable
reason—has been that public is good and private
is bad. Whether services are in public or private
ownership does not directly affect the ability to
ensure that water is clean and hygienic. The
implicit assumption that private companies cannot
live up to such standards is something that many
people in industry—even beyond the water
industry—will be offended by.

There are positive aspects to the bill, including
provisions to deal with the odour given off by water
treatment works. Although we welcome the
inclusion of those provisions, we cannot accept
the political implications of part 2.

Sarah Boyack (Edinburgh Central) (Lab): I am
pleased to support the bill, particularly as I am
following Alex Johnstone. He said that the bill is
political. It is indeed political, and we are very
proud of that—we think that the bill does the right
thing. Labour members are clear that we need a
stable framework for investment for the water
industry in Scotland, both to tackle the backlog
and to set out a new framework for the future.

We need to maintain safety, to ensure that
human health is a core principle for Scottish Water
and to be confident that public health standards
are met, regardless of where people live. We are
also clear that it must be possible to retain social
justice principles in the system. There are issues
around affordability, which we debated at length in
committee. That is why people need the
framework and the protection offered by the bill. I
am delighted that we have reached this stage, and
I am not at all surprised that scrutiny of the bill has
been relatively straightforward. I am sure that this
will be a brief debate, as only the Tories stand out
against the consensus. It is right that we pass the
bill today.

The Environment and Rural Development
Committee had much discussion about the bill at
stage 2 and we welcomed the Deputy Minister for
Environment and Rural Development’s
contribution and his ability to engage with the
issues that we raised with him. On every occasion,
we got the right answer—we cannot always say
that, judging from some of the difficult debates that
we have held in the chamber in the past.

The provision of water services is vital to us all,
and the regulation of that needed to be
modernised. The minister focused on how
complaints are properly dealt with, which is vital
to the bill, and I hope that the clarity that the bill will
bring in that regard will help domestic and private
Scottish Water customers. It is important that we
now have a clear framework.

As consumers, we expect that, if we have a
problem with the facilities that are provided to us,
we will know to whom to complain, that our
complaints will be dealt with effectively and
properly and, crucially, that they will monitored.
The new title of waterwatch Scotland, which the
minister established today, is welcome. It is
straightforward and easy to understand. I hope
that, once the bill is passed, there will be publicity
that people can relate to and follow.

It is important that people complain first to
Scottish Water, but the new framework will give
them a backstop of somebody else to take on
board their concerns. Scottish Water already
monitors its own complaints process, but the third-
party approach is important in raising standards.
We spent a great deal of time debating that in
depth in the committee and I am glad to say that,
in effect, we all supported the minister’s proposals.

The other big thing that the bill does, which was
subject to amendment at stage 2, is address
sewage odour. We know that that is not an easy
problem to fix. My colleague Susan Deacon will
speak on that at length, but she is not the only
member who has had problems reported to her.
We received a series of petitions from areas
throughout Scotland where sewage odour is a
The bill allows those debating it at stage 3. Benches support the bill fully and we are glad to be doing so.

The other important aspect of the bill is that it gives us a stable platform for future investment. I hope that the minister’s statement later this afternoon will highlight future opportunities, but we need to ensure that the industry is stable for the future. The challenge is to make the whole system work in all our interests. The bill is vital to Scotland’s future in terms of our economic prosperity, social justice and ensuring that we set high environmental standards.

The biggest element of our water bills is the fixed costs, which are determined largely by the investment programme, which in turn should be determined as a public resource for us all. That investment programme should be determined after consultation between ministers, local authorities and the businesses that are able to deliver for Scotland’s economic future.

The bill will give us the framework. What we need next is the minister’s statement. Without the bill we would not have the proper framework for investment that I hope the Executive will set out clearly in the statement. We on the Labour benches support the bill fully and we are glad to be debating it at stage 3.

The Deputy Presiding Officer: Three members wish to speak in the open debate. I call Mark Ruskell, to be followed by Frances Curran and Susan Deacon.

15:22

Mr Mark Ruskell (Mid Scotland and Fife) (Green): The Scottish Green Party will support the bill. I found the process of scrutinising it constructive and I am pleased to see the Executive’s response to the committee’s concerns and to the public petitions on odour nuisance. When the three elements of people, Parliament and Executive are responsive to one another, the Scottish Parliament is definitely working at its best.

Ultimately, the Executive has had to strike a difficult balance between the pressures to privatise public services as a result of the Competition Act 1998 and to keep them fully under the control of those whom they serve. Despite being uneasy about any form of water privatisation, including even the billing component of the sale of water to businesses in Scotland, the Green party acknowledges that the bill will provide a backstop to prevent further privatisation. To play fast and loose with the bill by blocking any element of competition, however small, could have led to multinational companies determining the structure of the Scottish water industry through the courts, rather than having the Parliament remain in control.

I welcome the Executive’s response to particular concerns voiced by me and by other members of the Environment and Rural Development Committee that Scottish Water’s sustainable development duty was not being fully reflected in the role of the water industry commission and the new entrants to the billing service. I was pleased that the Executive lodged amendments at stage 2 that provided welcome joined-up thinking on the issue.

As we have heard, the bill has been a useful vehicle to deal with the responsibilities relating to coal mine pollution as well as odour nuisance from sewage works. I am an ex-resident of Susan Deacon’s constituency and my role as an MSP covers Fife, so I know about the sheer frustration of the local petitioners about the issue and about the lack of an enforceable code of conduct. The opportunity that the bill provides to address odour nuisance might not have come around again for quite a long time. It is important that we have been able to use the bill as a vehicle to get the issue tackled.

The delivery of water services in Scotland is about striking a crucial balance between the economy, the environment and social justice. Those three drivers need to be at the heart of the development of our water services. I am content that the bill offers a structure to enable that balance to be struck and controlled by the Parliament.

15:24

Frances Curran (West of Scotland) (SSP): The Scottish Socialist Party will oppose the bill. That might not come as much of a surprise, because we are committed to the public ownership and sale of water.

What is the bill about and why on earth is it before the Parliament? The real reason is that water is already privatised in England and Wales and there is huge pressure internationally—and particularly through the European Union—to force water into the private hands of international water companies, which I hope that the Scottish Executive will resist. What is happening is that the sharks of the international and multinational water companies are circling around Scottish Water, which is not yet fully privatised.

Christine May (Central Fife) (Lab): It is not privatised at all.

Frances Curran: The bill allows those companies to take a private sector bite out of
Scottish Water. We oppose the bill because it represents the thin end of the wedge. Further, that would not be the first such bite, because private companies have already been nibbling away.

Christine May: Will the member take an intervention?

Frances Curran: I have only four minutes; I might give way later.

Through private finance initiative projects, private companies have already been nibbling away at our water provision and are set to profit from the investment that Scottish Water is making in the new infrastructure. It does not matter what the Labour members say, once this bill is passed, private companies—the licensing of which will have cost us, according to the Finance Committee, between £10 million and £18 million—will be selling water in Scotland to make a profit. That is the outcome of the bill. The point is not who those companies are selling to. The Executive might have held to the line that only business customers, not domestic customers, will be in the loop, but that is just the beginning of the road to privatisation.

We do not need the bill. The Executive should have considered international models of public ownership and chosen one that allows the workers in the industry or the people of Scotland to invest in the infrastructure and retain public ownership of Scottish Water.

Christine May: Could Frances Curran explain exactly which sections of the bill the socialists believe would give the private sector the capacity to take over in the way that she describes?

Frances Curran: The private sector will be given the opportunity to sell water privately on the market in Scotland. That is the outcome of the bill. The Executive is patting itself on the back because it backed off from common carriage, but I think that I can hold my breath until that position is reversed.

Alex Johnstone: Hear, hear.

Frances Curran: And the Tories are in favour of that.

The bill allows private companies to be licensed to sell water in the Scottish market. That is the direction that the Executive is taking. The only alternative is a public ownership model in which the people of Scotland own Scottish Water. Members are either in favour of selling the rain to international capital for it to profit from, or they are not. Scotland needs a public model and the bill makes a mockery of the Strathclyde referendum.

We want public ownership, public control and public regulation of the water industry in Scotland.

15:28

Susan Deacon (Edinburgh East and Musselburgh) (Lab): I reassure the Presiding Officer and my colleagues that, contrary to what Sarah Boyack said earlier, I do not plan to speak “at length.” I know that I would not be allowed to do that. However, I make no apology for speaking with some pleasure and a sense of achievement—not personal achievement but the achievement of this Parliament and many communities—at this bill being before us today. I am particularly pleased that section 19B of the bill exists and that, after the vote today, the law of Scotland will have provision for a code of conduct on sewerage nuisance—in other words, we will be able to do something about the dreadful smells from sewage works that have for a long time brought suffering to many communities across Scotland.

Marilyn Livingstone (Kirkcaldy) (Lab): Will Susan Deacon join me in thanking the many constituents in my constituency and across Scotland who brought this issue—known in my area as the Pathhead pong—to the Public Petitions Committee? I would like to acknowledge the way in which the Public Petitions Committee enabled communities to take the issue forward.

Susan Deacon: I happily join Marilyn Livingstone and other colleagues in congratulating the many people throughout Scotland who have brought the matter to our attention. Indeed, I want to focus on people whom I would like to thank.

First and foremost, I thank my constituents. Almost three years ago, residents of Leith links brought a petition before the Parliament. With absolute tenacity and considerable imagination, they have ensured that I and many politicians here have heard at first hand how their community has been affected by the Seafield stench. However, I recognise that we are not alone—Marilyn Livingstone and Christine May mentioned that. The Pathhead pong and the Methil ming—to name only two other examples—came to light during the petitions process. One reason why there is such a sense of achievement in the Parliament today is that the bill provides another example of a change to our law that can be traced back to a petition that was brought to the Parliament’s Public Petitions Committee. No such mechanism is available in any other part of the parliamentary process in the United Kingdom. I thank the convener of the Public Petitions Committee, Michael McMahon, and his predecessor, John McAllion, as well as all that committee’s past and present members for taking the matter seriously.

I pay tribute to the Environment and Rural Development Committee, and particularly to its convener, Sarah Boyack. That committee has again shown that our committee process can create a vehicle for voices to be heard and that a
matter that might initially seem to be a local one can, in fact, be of national concern and require national action.

I pay tribute to ministers and thank them for acting on the matter. That has taken rather longer than I would have liked, but we are there and I am absolutely delighted. In particular, I pay tribute to Allan Wilson, who has moved on from his previous role, but who worked constructively with the committee and with me, publicly and behind the scenes, to make progress.

I also pay tribute to Scottish Water, which I have hounded as much as anyone on this and on many other issues. I recognise its efforts in seeking practical solutions and in making progress on the regulatory regime and the debate surrounding that regime. Scottish Water has achieved a huge amount in developing our water and sewerage infrastructure in recent years.

I am pleased that odour will be taken more seriously in future. The Parliament’s role is to listen to people and to act directly as a result of their experiences and concerns. Today has produced a practical example of our doing so. I thank the Parliament for giving me the chance to underscore those points.

15:33

Nora Radcliffe (Gordon) (LD): I am much happier with the bill than are the Tories or the socialists, so I will probably not need four minutes.

The bill is the third in a series of bills that have sought to implement the water framework directive and to reform Scotland’s water industry through setting up Scottish Water and the framework within which it works. The bill has revisited and will fine tune some earlier arrangements; it will give clear powers to Scottish ministers to set Scottish Water’s objectives and the principles that it is to apply in setting charges, and it will replace the single commissioner with a commission. It will also enhance and rename the customer panels and improve the complaints procedure by re-routing second-line complaints to the office of the convener of waterwatch.

The main purpose of the bill is to enable Scottish Water to meet the requirements of competition law while keeping faith with the people of Scotland who want to retain Scottish Water as a publicly owned body that can apply the principles that Sarah Boyack and Mark Ruskell outlined. The inclusion of measures to deal with odour nuisance is a welcome addition to the bill. Those measures are the long-awaited successful outcome of a campaign that was spearheaded by Susan Deacon. As we have heard, the measures will benefit communities throughout Scotland.

The bill has had a smooth passage. All parties have engaged in constructive dialogue and the Executive has been willing to take on board the committee’s recommendations.

It gives me great pleasure to support the motion to pass the bill.

The Deputy Presiding Officer (Trish Godman): Before I call the minister to speak, I thank Alex Johnstone and Rob Gibson, who have declined to speak again in the debate, which means that we will catch up our time. I call the minister to speak—I have probably caught him on the hop.

15:35

The Deputy Minister for Environment and Rural Development (Lewis Macdonald): It is very kind of colleagues on the front benches of other parties to give me the opportunity to speak even sooner than I had anticipated.

It has been a good debate—short and to the point—and I thank members sincerely for the contributions that they have made today and during earlier stages. With my colleagues, I am especially grateful to the members of the Environment and Rural Development Committee for their thorough and helpful consideration of the bill at stage 1 and for their support for the amendments that we lodged at stage 2 in response to their stage 1 report. As we have heard, those amendments have produced benefits both in boosting the powers of waterwatch Scotland and in providing a statutory basis for action to deal with odour and other sewerage nuisance. I also thank the Finance Committee and the Subordinate Legislation Committee, which carefully and constructively considered the bill. The role of the Public Petitions Committee has already been mentioned.

The process was strengthened by all those who took part in the consultations on the bill and who submitted evidence to the committees. Whether they represented consumer groups or businesses, local authorities or regulatory experts, they all contributed to the bill. Some of that input came from those who run our water industry day in, day out. Those include Scottish Water, the water industry commissioner for Scotland and other regulators, and the convener and members of the water customer consultation panels, which are soon—happily, as we have heard—to be known as waterwatch Scotland. I thank all those who have been involved behind the scenes in drafting the bill and in supporting the parliamentary process, and I thank the Presiding Officer for accepting manuscript amendments late in the day.

As has been said, the bill’s passage through Parliament has been remarkably smooth. That
may have surprised some commentators, but it reflects the broad consensus that exists—in spite of the dissent at the ideological margins—around our policy in support of the water industry. It is important to remember what we are seeking to do. The bill protects Scottish Water and public sector delivery of water and sewerage services and provides a measured response to the Competition Act 1998. It sets out clearly that the carriage and delivery of water and sewerage services will continue to be the responsibility of Scottish Water. That protects public health not because, as Alex Johnstone suggested, we think that the private sector is reckless in such matters, but because there is a self-evident and defensible case for saying that water and sewerage services are most safely and surely delivered by a single public sector provider.

The bill sets out just as clearly that household customers will continue to buy their water only from Scottish Water. It provides a licensed, orderly and managed way to introduce competition for retail sale of water to businesses, but it also provides the stability and certainty that Scottish Water needs to continue to deliver its vital services in the years ahead. The SSP talked about multinational water industry sharks “nibbling away”, and about European Union pressure to privatise Scotland’s water. Frances Curran wants Scottish ministers to resist that pressure to privatise. I assure Parliament that, if we ever get pressure to privatise from that direction, we will resist it; however, no such pressure exists. In the meantime, the SSP will have to go fishing for sharks somewhere else.

We have a broad consensus around the proposal for Scottish Water to continue as a public sector water and sewerage services deliverer. The changes that the bill makes to strengthen the regulatory framework and to set a transparent and accountable system for determining Scottish Water’s objectives and charges have been welcomed. As Sarah Boyack said, the bill sets the scene for the statement that I will make later this afternoon on Scottish Water’s investments and the principles of charging. Those objectives will determine what Scottish Water delivers; it is important that that delivery is affordable to customers.

John Swinburne (Central Scotland) (SSCUP): If the Executive can make concessions to small businesses by restricting cost increases to 2 per cent, is not it time that it considered restricting cost increases for senior citizens at least to the rate by which their pensions increase, which is the rate of increase of the cost of living?

Lewis Macdonald: Although the bill sets the context for the statement that I will make later this afternoon, I know that members will not expect me to anticipate that statement. I am sure that John Swinburne will make a point of being here to listen to what I have to say on those matters at that time.

Scottish Water was created three years ago in response to the need to bring greater economic efficiencies to bear on our water industry. Since it was established, it has reduced its operating costs by more than £1 million for every week that it has been in existence. That is clear evidence of the capacity of the public sector to deliver efficiency. The framework that is provided in the bill will continue to provide the economic rigour that will ensure that Scottish Water continues to deliver the efficiency its customers deserve. I commend that framework and urge members to support the motion.
Decision Time

17:01

The Presiding Officer (Mr George Reid):
There are eight questions to be put as a result of today's business. The first question is, that motion S2M-2349, in the name of Ross Finnie, on the Water Services etc (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR
Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baillie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Baker, Richard (North East Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothian) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (North East Scotland) (SNP)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
The result of the division is: For 93, Against 21, Abstentions 0.

Motion agreed to.

That the Parliament agrees that the Water Services etc. (Scotland) Bill be passed.
CONTENTS

PART 1
WATER INDUSTRY COMMISSION AND CUSTOMER PANELS

1 Water Industry Commission for Scotland
2 Dissolution of office of Commissioner
3A Customer Panels

PART 2
PROVISION OF WATER AND SEWERAGE SERVICES

Offences
4 Public water supply system: offences
5 Public sewerage system: offences

Licensing of services to eligible premises
6 Licence authorisation
7 Granting of licences
8 Compliance with licences
8A Fees relating to licences
9 Licensed providers to give information
10 Participation of licensed providers
11 Licences and compliance: further provision

Scottish Water: water and sewerage services undertaking
12 Water and sewerage services undertaking
12A Financing, borrowing and guarantees
13 Transfer of staff etc. to the undertaking

Scottish Water: services via licensed providers
14 Scottish Water to provide services
15 Continuation of water services
16 Discontinuation of water services
17 Disconnections code
17A Continuation and discontinuation of sewerage services

Scottish Water: charges and functions
18 Scottish Water’s charges for water and sewerage services
19 Scottish Water’s functions: powers of the Scottish Ministers
3 Determinations relating to provision of services
19A Qualification of duty to provide services

Sewerage nuisance: code of practice
19B Sewerage nuisance: code of practice
19C Monitoring and enforcement

Definitions for Part
20 Meaning of “eligible premises”
21 Meaning of “public water supply system”
22 Meaning of “public sewerage system”

PART 3
COAL MINE WATER POLLUTION
23 Control of water from coal mines

PART 4
MISCELLANEOUS AND GENERAL

Miscellaneous
24 Offences by bodies corporate and partnerships
25 Amendments to enactments
26 Ancillary provision

General
27 Orders and regulations
28 Interpretation
29 Crown application
30 Short title and commencement

Schedule 1—Water Industry Commission for Scotland
Schedule 2—Licences and compliance: further provision
Schedule 3—Certain pre-existing agreements as to charges
Schedule 4—Powers of entry under the Coal Industry Act 1994
Schedule 5—Amendments to enactments
Amendments to the Bill since the previous version are indicated by sideling in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Water Services etc. (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to establish the Water Industry Commission for Scotland; to create offences in relation to the unauthorised use of the public water and sewerage systems; to provide for licensing the provision of certain water and sewerage services; to amend the system for fixing charges for services provided by Scottish Water; to make provision as to Scottish Water’s functions; to make provision in relation to coal mine water pollution; and for connected purposes.

PART 1

WATER INDUSTRY COMMISSION AND CUSTOMER PANELS

1 Water Industry Commission for Scotland

(1) For section 1 (Water Industry Commissioner for Scotland) of the 2002 Act there is substituted—

“1 Water Industry Commission for Scotland

(1) There is established a body to be known as the Water Industry Commission for Scotland (referred to in this Act as “the Commission”).

(2) The Commission has the general function of promoting the interests of persons (taken as a whole) whose premises—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2005 (asp 00)) or both, or

(b) might reasonably become connected to either or both of those systems, relating to the provision to them of water and sewerage services.

(3) The Scottish Ministers may, after consulting the Commission, give the Commission directions of a general or specific character as to the financial management or administration of the Commission; and the Commission must comply with any such directions.

(4) Schedule A1 makes further provision about the Commission.”.

(2) In section 4 (power of the Commissioner to require information) of that Act, for subsection (2) there is substituted—

SP Bill 23B
Session 2 (2005)
“(2) Subsection (1) does not authorise the Commission to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

(3) Where Scottish Water considers that it is entitled to withhold information from the Commission—
   (a) because it is not reasonably sought, or
   (b) by virtue of subsection (2),
   it must intimate that fact to the Commission in writing.”.

(3) In section 5 (annual reports by the Commissioner etc.) of that Act, at the end there is added—

“(4) The Scottish Ministers must lay before the Parliament a copy of each report submitted to them under subsection (1)(a).”.

(4) Schedule 1 inserts schedule A1 into that Act.

2 Dissolution of office of Commissioner

The office of Water Industry Commissioner for Scotland is dissolved on such date as the Scottish Ministers may by order appoint.

3A Customer Panels

(1) In section 2 (Water Customer Consultation Panels) of the 2002 Act, for subsections (3) to (5) there is substituted—

“(3) Each Customer Panel is, in relation to the provision of services by Scottish Water in the exercise of its core functions, to have the general function of representing the views and interests of persons whose premises are in the Panel’s area and—
   (a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2005 (asp 00)) or both, or
   (b) might reasonably become connected to either or both of those systems.

(4) A Customer Panel—
   (a) must publish reports on any matter it considers relevant to the interests of those persons in relation to such provision,
   (b) may make recommendations to the Commission as to the promotion of the interests of those persons in relation to such provision, either generally or in relation to any specific matter,
   (c) may make recommendations, on any matter it considers relevant to the interests of those persons to—
      (i) the Scottish Ministers,
      (ii) the Drinking Water Quality Regulator for Scotland, and
      (iii) the Scottish Environment Protection Agency,
in connection with such of their functions as are exercisable in relation to such provision, and
(d) may make recommendations to Scottish Water on any matter it considers relevant to the interests of those persons in relation to such provision.

(5) Scottish Water must have regard to—

(a) any representations made to it by a Customer Panel, and

(b) any recommendations made to it under subsection (4).

(5A) Any other persons to whom—

(a) any representations are made by a Customer Panel, or

(b) any recommendations are made under subsection (4),

must, in exercising functions in relation to Scottish Water, have regard to the representations or (as the case may be) recommendations.

(5B) A Customer Panel—

(a) must publish a summary of any representations it makes under subsection (3) and of any recommendations it makes under subsection (4), and

(b) may do so by including the summary in a report.

(5C) Any persons to whom recommendations are made under subsection (4) must, within 6 months of receipt, publish a summary of their responses to the recommendations.

(5D) Two or more Customer Panels may exercise their functions under subsection (4) and (5B) jointly.”.

(2) In section 3 (functions of the Commissioner) of that Act, subsections (1) to (5) are repealed.

(3) After section 6 (funding of the Commissioner) of that Act there is added—

“6A \textbf{Convener of Customer Panels to investigate complaints}

(1) The Convener of the Water Customer Consultation Panels (referred to in this Part as the “Convener”) must investigate any complaint made to the Convener, a Customer Panel or the Commission as respects any of Scottish Water’s core functions by any person whose premises—

(a) are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2005 (asp 00)) or both, or

(b) have been, or might reasonably become, connected to either or both of those systems.

(2) Where any such complaint is made to a Customer Panel or the Commission, the Panel or (as the case may be) the Commission must refer the complaint to the Convener.

(3) The Convener need not investigate a complaint under subsection (1) if—

(a) the complainer has not pursued the matter with Scottish Water, or

(b) it appears to the Convener that the complaint is vexatious or frivolous.

(4) The Convener may, on behalf of the complainer in a complaint investigated under subsection (1), make representations to Scottish Water about any matter—
(a) to which the complaint relates, or
(b) which appears to the Convener to be relevant to the subject matter of the complaint.

(5) Where the Convener investigates a complaint referred under subsection (2), the Convener must send to the Panel or (as the case may be) the Commission a report of the investigation.

(6) Where the Convener decides not to investigate such a complaint, the Convener must send to the Panel or (as the case may be) the Commission a statement of the reasons for not investigating the complaint.

(7) Scottish Water must, on being requested to do so by the Convener, provide the Convener with such information held by it as the Convener may reasonably seek in the exercise of the Convener’s functions relating to complaints under subsection (1).

(8) Where Scottish Water and the Convener cannot agree as to whether information is sought reasonably, either of them may refer the matter to the Scottish Ministers, whose decision is final.

6B Annual reports and information regarding Customer Panels

(1) The Convener must—
(a) as soon as practicable after the end of each financial year, submit to the Scottish Ministers, and publish, a report on the exercise of—
(i) the Customer Panels’ functions during that year, and
(ii) the Convener’s functions under section 6A, and
(b) provide the Scottish Ministers with such information regarding the exercise of those functions as they may require.

(2) The Scottish Ministers must lay before the Parliament a copy of each report submitted to them under subsection (1)(a).

6C Co-operation between the Commission and Customer Panels

(1) The Commission and the Convener (as appropriate, representing the Customer Panels as a whole) must together make arrangements with a view to securing—
(a) co-operation and the exchange of information—
(i) between the Commission and Customer Panels,
(ii) between the Commission and the Convener, and
(b) the consistent treatment of matters which affect—
(i) both the Commission and Customer Panels,
(ii) both the Commission and the Convener.

(2) The Commission and the Convener—
(a) must set out the arrangements in a memorandum,
(b) must keep the arrangements under review, and
(c) may from time to time revise the arrangements.

(3) A copy of the memorandum, and of any revised memorandum, must be sent jointly by the Commission and the Convener to the Scottish Ministers.”. 
PART 2
PROVISION OF WATER AND SEWERAGE SERVICES

Offences

4 Public water supply system: offences

5 (1) Any person who introduces water into the public water supply system is guilty of an offence.

(2) Any person 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 who makes arrangements for or in relation to the supply of water to the premises of another person through the public water supply system is guilty of an offence.

(4) Subsections (1) to (3) do not apply to—
   (a) Scottish Water; or
   (b) another person if (and to the extent that) the person is acting on behalf of Scottish Water or under its authority.

(5) Subsections (2) and (3) do not apply to a person if (and to the extent that) the person is supplying water with the help of services provided by Scottish Water as described in section 30 of the 2002 Act.

(6) Subsection (3) does not apply to a water services provider where the provider is acting as authorised by the water services licence held by the provider.

(7) The Scottish Ministers may by regulations—
   (a) specify other 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 such other person or to such category of person; and
      (ii) to such extent and subject to such conditions,
      as may be specified in the regulations.

(8) The Scottish Ministers are to consult—
   (a) Scottish Water;
   (b) the Commission; and
   (c) such other persons as they consider appropriate,
   on any regulations they propose to make under subsection (7).

(8A) It is competent to make regulations under subsection (7) only if the effect of the regulations would not be prejudicial to the exercise of Scottish Water’s core functions as respects the supply of water.

(9) 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.

(10) 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.

(11) Any contract or other agreement which involves a contravention of subsection (1), (2) or (3) is unenforceable.

5 **Public sewerage system: offences**

(1) Any person who draws sewage from the public sewerage system is guilty of an offence.

(2) Any person who uses the public sewerage system for the disposal of sewage from the premises of another person is guilty of an offence.

(3) Any person 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 is guilty of an offence.

(4) Subsections (1) to (3) do not apply to—
(a) Scottish Water; or
(b) another person if (and to the extent that) the person is acting on behalf of Scottish Water or under its authority.

(5) Subsections (2) and (3) do not apply to a person if (and to the extent that) the person is providing sewerage, or disposing of sewage, with the help of services provided by Scottish Water as described in section 30 of the 2002 Act.

(6) Subsection (3) does not apply to a sewerage services provider where the provider is acting as authorised by the sewerage services licence held by the provider.

(7) The Scottish Ministers may by regulations—
(a) specify other 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 such other person or to such category of person; and
(ii) to such extent and subject to such conditions,

as may be specified in the regulations.

(8) The Scottish Ministers are to consult—
(a) Scottish Water;
(b) the Commission; and
(c) such other persons as they consider appropriate,
on any regulations they propose to make under subsection (7).

(8A) It is competent to make regulations under subsection (7) only if the effect of the regulations would not be prejudicial to the exercise of Scottish Water’s core functions as respects the provision of sewerage and disposal of sewage.

(9) 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.
(10) 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.

(11) Any contract or other agreement which involves a contravention of subsection (1), (2) or
      (3) is unenforceable.

(12) In this Part, “sewage” is to be construed in accordance with section 59(1) (interpretation) of the 1968 Act.

**Licensing of services to eligible premises**

6 **Licence authorisation**

10 (1) The Commission may, subject to section 7 and paragraphs 1 and 2 of schedule 2, grant a licence authorising a person—
   (a) to—
      (i) make arrangements with the occupier of any eligible premises for or in relation to the supply of water to the premises through the public water supply system; and
      (ii) fix, demand and recover charges for or in relation to the supply of water to any premises in respect of which the person has made such arrangements; and
   (b) 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 paragraph (a).

15 (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”.

20 (3) The Commission may, subject to section 7 and paragraphs 1 and 2 of schedule 2, grant a licence authorising a person—
   (a) to—
      (i) make arrangements with the occupier of any eligible premises for or in relation to 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 or in relation to the provision of sewerage to, and disposal of sewage from, any premises in respect of which the person has made such arrangements; and
   (b) 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 paragraph (a).

25 (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”.

30 (5) The references in subsections (1) and (3) to the occupier of premises are, if the premises are unoccupied, to be construed as references to the owner of the premises.
Granting of licences

(1) The Commission 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 Commission 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 Commission may issue guidance (either generally or in a particular case or category 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 Commission 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 Commission is to send a copy of the licence to—

(a) the person to whom it is granted; and

(b) Scottish Water.

Compliance with licences

(1) The Commission is to—

(a) monitor compliance with the terms and conditions of water services licences and sewerage services licences; and

(b) take such steps as it considers are necessary for the purposes of ensuring that the terms and conditions of such licences are complied with.

(2) The Commission 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 Commission may issue guidance (either generally or in a particular case or category 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 Commission 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.
8A Fees relating to licences

(1) The Commission may, for the purpose mentioned in subsection (2), make a scheme (a "fees scheme") which specifies—

(a) the matters relating to water services and sewerage licences in respect of which fees are payable; and

(b) the amounts of fees payable (and, as appropriate, the persons by whom they are payable) in respect of each of those matters.

(2) The purpose is securing that the fees payable in accordance with the scheme are sufficient to meet the costs incurred by the Commission in exercising its functions relating to water services and sewerage services licences.

(3) A fees scheme may, in particular—

(a) impose on licence-holders fees by way of annual levies; and

(b) specify fees by reference to maximum amounts.

(4) A fees scheme may make provision with respect to the times and methods of payment of the fees specified by the scheme.

(5) A fees scheme may—

(a) make different provision for different cases or types of case;

(b) revoke or amend a previous scheme.

(6) The Commission must—

(a) send any fees scheme to the Scottish Ministers for approval; and

(b) publish a summary of the scheme (and, in doing so, invite representations for the purposes of subsection (7)).

(7) The Scottish Ministers—

(a) must have regard to any representations about a fees scheme which are made to them within 4 weeks of publication of the summary of it under subsection (6)(b); and

(b) may approve a fees scheme with or without modifications.

(8) If the Scottish Ministers approve a fees scheme with modifications, they must give their reasons for doing so.

(9) When a fees scheme has been approved under subsection (7), the Commission—

(a) must—

(i) make arrangements for allowing any person to obtain a copy of the scheme on payment of such reasonable fee (if any) as the Commission may determine; and

(ii) publicise those arrangements and publish the scheme; and

(b) may charge and recover fees in accordance with the scheme.

9 Licensed providers to give information

(1) Water services providers and sewerage services providers must provide the Commission with such information (including information in the form of a document) as it reasonably requires in the exercise of its functions.
(2) Subsection (1) does not authorise the Commission 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 Commission 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.

10 Participation of licensed providers

(1) The Commission is (so far as is consistent with the exercise of its function under section 1(2) of the 2002 Act) to exercise its functions relating to water services and sewerage services licences for the purposes of securing the participation—
   (a) in an orderly manner; and
   (b) in a manner that is not detrimental to the exercise of Scottish Water’s core functions,

of water services and sewerage services providers in the provision of water and sewerage services.

(2) The Commission may give directions of a specific or general character to—
   (a) Scottish Water; or
   (b) any—
      (i) water services or sewerage services provider; or
      (ii) person in whose favour it intends to grant a water services or sewerage services licence,

as to steps to be taken for the purposes mentioned in subsection (1).

(3) Directions under subsection (2) may, in particular, relate to—
   (a) any costs attributable to the participation of water services and sewerage services providers in the provision of water and sewerage services; and
   (b) the provision or exchange of information about customers of water services or sewerage service providers.

(4) Before giving directions under subsection (2), the Commission must consult any person to whom the directions are to be given.

(5) Any person to whom directions are given under subsection (2) must comply with the directions.

11 Licences and compliance: further provision

Schedule 2 makes further provision regarding licences and compliance with licences.
Scottish Water: water and sewerage services undertaking

12 Water and sewerage services undertaking

(1) Scottish Water must, in accordance with any requirements made under subsection (1A), secure the establishment of a business undertaking for the purposes of this section.

(1A) The Scottish Ministers may require Scottish Water to—

(a) take such steps for the purposes of or in connection with—

(i) the establishment and development of the undertaking; and

(ii) Scottish Water’s interest in the undertaking,

as the Scottish Ministers may specify; and

(b) take the steps, or any particular steps, by such date as they may specify.

(1B) It is, subject to the approval of the Scottish Ministers, for Scottish Water to determine whether the undertaking is—

(a) to be—

(i) a subsidiary (to be construed in accordance with section 736 of the Companies Act 1985 (c.6)) of Scottish Water;

(ii) a company (within the meaning of that Act) formed by Scottish Water (on its own or with others); or

(iii) a partnership; or

(b) to be established through such other arrangements as Scottish Water considers it appropriate to make.

(2) The functions of the undertaking are—

(a) to become a water services provider and a sewerage services provider; and

(b) thereafter, to perform the activities authorised by the water services and sewerage services licences held by it.

(3) Accordingly, the undertaking must (as soon as reasonably practicable after it is established) apply for a water services licence and a sewerage services licence.

(3A) The Scottish Ministers may by order provide that paragraphs 1 and 2 of schedule 2 have effect—

(a) as regards an initial application by the undertaking for a licence; and

(b) following such an application, as regards the granting of the licence and the incorporation in it of conditions, with or subject to such modifications as the order may specify.

(4) The undertaking may engage in any activity which it considers is not inconsistent with the performance of the activities authorised by the water services and sewerage services licences held by it.

(5) After the undertaking is established, Scottish Water must not treat it any more or less favourably than it treats—

(a) in relation to services as respects the supply of water, other water services providers; and
(b) in relation to services as respects the provision of sewerage and the disposal of sewage, other sewerage services providers.

(6) Any reference in any enactment to Scottish Water is to be construed as not including the undertaking.

12A **Financing, borrowing and guarantees**

(1) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may, with the consent of Scottish Water, make grants to the business undertaking established under section 12(1) of such amounts as the Scottish Ministers may determine.

(2) In such circumstances as the Scottish Ministers may by order specify, the undertaking—

(a) may, with the consent of Scottish Water, borrow from the Scottish Ministers (and they may lend to it) sums of such amounts as the Scottish Ministers may determine;

(b) may not (except as described in subsection (4)(b)) borrow money from any other person apart from Scottish Water.

(3) In any financial year, the net amount of sums borrowed under subsection (2)(a) must not exceed the amount specified for that year for the purposes of this subsection in a Budget Act.

(4) In subsection (3), “net amount” means the amount of sums borrowed in the financial year less—

(a) any repayments made during that year, otherwise than by way of interest, in respect of sums borrowed in that or any other year; and

(b) any sums borrowed, with the consent of Scottish Water, by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure over sums otherwise available to meet that expenditure.

(5) Any loans made under subsection (2)(a) are to be repaid to the Scottish Ministers at such times and by such methods, and interest on the loans is to be paid to them at such times and at such rates, as they may from time to time specify.

(6) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may guarantee, in such manner as they consider appropriate, the discharge of any financial obligation in connection with any sums borrowed as described in subsection (4)(b).

(7) Immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before the Parliament.

(8) Where any sums are paid out in fulfilment of a guarantee under subsection (6), the undertaking must make to the Scottish Ministers, at such times and in such manner as they may from time to time specify—

(a) payments of such amounts as they may so specify in or towards repayment of those sums; and

(b) payments of interest, at such rate as they may so specify, on the amount outstanding for the time being in respect of those sums.
(8A) In such circumstances as the Scottish Ministers may by order specify, the Scottish Ministers may, with the consent of Scottish Water, subscribe for share or loan capital of the undertaking.

(9) Any—

(a) grants under subsection (1) may be made;
(b) loans under subsection (2)(a) may be made;
(c) guarantees under subsection (6) may be given; and
(d) subscriptions for share or loan capital under subsection (8A) may be made,

subject to such conditions as the Scottish Ministers consider it appropriate to impose.

13 Transfer of staff etc. to the undertaking

(1) Scottish Water must, following a requirement made by the Scottish Ministers to do so, transfer such of its staff to the employment of the business undertaking established under section 12(1) as are necessary for the purposes of or in connection with the matters mentioned in subsection (7).

(2) The contract of employment of a person transferred by virtue of subsection (1)—

(a) is not terminated by the transfer; and
(b) has effect from the date of transfer as if originally made between the person and the undertaking.

(3) Without prejudice to subsection (2), where a person is transferred to the employment of the undertaking by virtue of subsection (1)—

(a) all the rights, powers, duties and liabilities of Scottish Water under or in connection with the person’s contract of employment are transferred to the undertaking on the date of transfer; and
(b) anything done before that date by or in relation to Scottish Water in respect of the person or that contract is to be treated from that date as having been done by or in relation to the undertaking.

(4) Subsections (1) to (3) do not affect any right of any person to terminate the person’s contract of employment if the terms and conditions of employment are changed substantially to the detriment of the person; but such a change is not to be taken to have occurred by reason only that the identity of the person’s employer changes by virtue of those subsections.

(5) Scottish Water must, following a requirement made by the Scottish Ministers to do so, transfer such of its property (including rights) and liabilities to the undertaking as are necessary for the purposes of or in connection with the matters mentioned in subsection (7).

(5A) A transfer by virtue of subsection (5) may be—

(a) to such extent; and
(b) subject to such conditions,

as Scottish Water may, with the consent of the Scottish Ministers, determine.

(6) A transfer by virtue of subsection (5)—
(a) has effect in relation to any property and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or prohibit the transfer of the property or liabilities; and

(b) has the effect of vesting in the undertaking any property or liabilities to which it applies.

(7) For the purpose of subsections (1) and (5), those matters are—

(a) applications by the undertaking for water services and sewerage services licences; and

(b) the performance by the undertaking of its activities.

Scottish Water: services via licensed providers

14 Scottish Water to provide services

(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, so far as is consistent with the exercise of its core functions as respects the supply of water, 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 15(1)); or

(ii) the supply is discontinued under section 16; 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, so far as is consistent with the exercise of its core functions as respects the provision of sewerage and disposal of sewage, 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)—

(a) ceases if the provision or (as the case may be) disposal is discontinued under section 17A; and

(b) may be superseded by a new duty under subsection (5).
(7) Where no agreement as is mentioned in subsection (2) or (5) is reached, the Commission, 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.

15 Continuation of water services

(1) Where—

(a) water is supplied to premises by Scottish Water under subsection (2) of section 14; and

(b) the arrangements for the supply of water (made between the occupier of the premises and the water services provider who made the related request under subsection (1) of that section in respect of the premises) have come to an end—

(i) by reason of 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 16),

the duty of Scottish Water under subsection (2) of section 14 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 the continuation under subsection (1) of a duty to supply water ceases if—

(a) it is superseded by a new duty under subsection (2) of section 14; or

(b) the occupier of the premises notifies Scottish Water that the supply of water is not required.

(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 14 of the Water Services etc. (Scotland) Act 2005 (asp 00) but—

(a) the arrangements for the supply (made between the occupier of the premises and the water services provider who made the related 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 16(5) 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 Commission for Scotland to review that decision.
(2C) In a review under subsection (2B), the Commission may, having regard to any representations made to it 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 Commission in the review shall be final.”.

16 Discontinuation of water services

(1) A water services provider may request Scottish Water to discontinue a supply of water to premises made under subsection (2) of section 14.

(2) At least 14 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 Commission.

(3) The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.

(4) An occupier of premises who has been served with a notice under subsection (2) may, within 10 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.

(5) Where a request is made under subsection (1), Scottish Water is to discontinue the supply of water made under section 14(2) to the premises if the conditions mentioned in subsection (6) are satisfied.

(6) The conditions are that—

(a) the provisions of the code made under section 17 are complied with; and

(b) any supply of water to—

(i) the premises for domestic purposes; or

(ii) any other premises for any purpose,

is not adversely affected by the discontinuation.

(7) In subsection (6)(b)(i), 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.

(8) Any reasonable costs incurred by Scottish Water in effecting a discontinuation under this section are to be met by the water services provider who made the request under subsection (1) for the discontinuation.

(9) If there is a dispute between a water services provider and Scottish Water as to reasonable costs incurred in effecting a discontinuation under this section, Scottish Water is to refer the matter to the Commission for determination; and the determination of the Commission in the matter is final.
**17 Disconnections code**

(1) For the purposes of subsection (6)(a) of section 16, the Commission must make a code (a “disconnections code”) which contains further provision about discontinuations of supplies of water to premises under that section.

(2) In particular, a disconnections code may specify—

(a) circumstances in which requests under subsection (1) of section 16 may (or may not) be made; and

(b) conditions (in addition to the condition mentioned in subsection (6)(b) of that section) which are to be satisfied before Scottish Water is required under subsection (5) of that section to discontinue a supply of water to premises.

(3) A disconnections code may—

(a) make different provision for different cases or types of case;

(b) revoke or amend a previous code.

(4) In making a disconnections code, the Commission must consult—

(a) Scottish Water;

(b) every water services provider and sewerage services provider;

(c) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole);

(c) the Drinking Water Quality Regulator for Scotland; and

(d) such other persons as the Commission considers appropriate.

(5) When a disconnections code is made, the Commission must—

(a) make arrangements for allowing any person to obtain a copy of the code on payment of such reasonable fee (if any) as the Commission may determine; and

(b) publicise those arrangements and publish the code.

**17A Continuation and discontinuation of sewerage services**

(1) Where sewerage is provided to, or sewage is disposed of from, premises by Scottish Water under subsection (5) of section 14, Scottish Water is to continue providing sewerage to, 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 related request under subsection (4) of that section in respect of the premises) have come to an end.

(2) Subsection (1) does not apply in relation to any trade effluent services.

(3) Where—

(a) trade effluent services are provided to premises by Scottish Water under subsection (5) of section 14; and

(b) the arrangements for the provision of the services (made between the occupier of the premises and the sewerage services provider who made the related request under subsection (4) of that section in respect of the premises) have come to an end—

(i) by reason of the revocation or suspension of the licence held by the provider; or
(ii) for any other reason (except where the services are discontinued under subsection (10)),

the duty of Scottish Water under subsection (5) of section 14 to provide trade effluent services to the premises continues for the period mentioned in subsection (4).

(4) The period is 2 months, or such shorter period as Scottish Water with the Commission’s consent determines, from the date on which the arrangements mentioned in subsection (3)(b) came to an end.

(5) But the continuation under subsection (3) of a duty to provide trade effluent services ceases if—

(a) it is superseded by a new duty under subsection (5) of section 14; or

(b) the occupier of the premises notifies Scottish Water that the trade effluent services are not required.

(6) A sewerage services provider may request Scottish Water to discontinue any trade effluent services provided to premises under subsection (5) of section 14.

(7) At least 14 days before making a request under subsection (6), 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 Commission.

(8) The notice must be in such form and contain such particulars as the Scottish Ministers may by order prescribe.

(9) An occupier of premises who has been served with a notice under subsection (7) may, within 10 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.

(10) Where a request is made under subsection (6), Scottish Water is to discontinue the trade effluent services provided under section 14(5) to the premises if the conditions mentioned in subsection (11) are satisfied.

(11) The conditions are that—

(a) any provision of sewerage to, or disposal of sewage from—

(i) the premises for a purpose otherwise than in respect of trade effluent; or

(ii) any other premises for any purpose,

is not adversely affected by the discontinuation; and

(b) there is no likely risk to public health arising in consequence of the discontinuation.

(12) Any reasonable costs incurred by Scottish Water in effecting a discontinuation under this section are to be met by the sewerage services provider who made the request under subsection (6) for the discontinuation.

(13) If there is a dispute between a sewerage services provider and Scottish Water as to reasonable costs incurred in effecting a discontinuation under this section, Scottish Water is to refer the matter to the Commission for determination; and the determination of the Commission in the matter is final.
Part 2— Provision of water and sewerage services

(14) This section is without prejudice to any provision in Part II of the 1968 Act relating to trade effluent services.

(15) In this section, “trade effluent services” means the provision of sewerage, or disposal of sewage, in respect of trade effluent.

(16) In subsection (15), “trade effluent” is to be construed in accordance with section 59(1) (interpretation) of the 1968 Act.

Scottish Water: charges and functions

18 Scottish Water’s charges for water and sewerage services

(1) For section 29 (charges for goods and services) of the 2002 Act there is substituted—

"Charges for goods and services"

(1) Scottish Water may—

(a) demand and recover charges for any services provided by it in the exercise of its core functions, and

(b) fix, demand and recover charges for any goods supplied or services provided in exercise of its other functions.

(2) Scottish Water is to exercise the power conferred by subsection (1)(a) in accordance with—

(a) a charges scheme, or

(b) a departure from a charges scheme for which consent has been given under section 29E.

(3) The power conferred by subsection (1)(b) is exercisable by or in accordance with an agreement with the person to be charged.

(4) Subsections (1) to (3) are subject to sections 9A and 47 of the 1980 Act (which provide for no charge for water in certain circumstances).

29A Charges schemes

(1) Scottish Water must make a scheme (referred to in this Act as a “charges scheme”) which fixes the charges to be paid for services provided by Scottish Water in the exercise of its core functions.

(2) A charges scheme must be made by reference to a determination made under section 29B.

(3) In particular, the scheme must not fix in any case a charge exceeding any maximum charge applying to the case by virtue of the determination.

(4) A charges scheme may make provision with respect to the times and methods of payment of the charges fixed by the scheme.

(5) The Scottish Ministers and the Commission must provide Scottish Water with such information as it reasonably requires for the purposes of making a charges scheme.

(6) Scottish Water must send a charges scheme to the Commission for approval by such date as the Scottish Ministers may direct.

(7) The Commission may approve a charges scheme with or without modifications.
(8) If the Commission approves a charges scheme with modifications, it must give its reasons for doing so.

(9) When a charges scheme is approved by the Commission, Scottish Water must—

(a) make arrangements for allowing any person to—

   (i) inspect the scheme at any reasonable time,

   (ii) obtain a copy of the scheme or part of it on payment of such reasonable fee (if any) as Scottish Water may determine, and

(b) publicise those arrangements and publish a summary of the scheme.

(10) Following approval of a charges scheme by the Commission, the scheme comes into effect on such date as is specified in the scheme.

29B Determination of maximum charges

(1) The Commission must—

(a) determine in writing maximum amounts of charges by reference to which a charges scheme is to be made, and

(b) send the determination to Scottish Water by such time as the Scottish Ministers may specify.

(2) Maximum amounts determined under subsection (1)(a) apply in relation to such period as the Scottish Ministers may specify.

(3) A determination made under subsection (1)(a) may make different provision for different cases or categories of case.

(4) Before making a determination under subsection (1)(a), the Commission—

(a) must send a draft determination to—

   (i) the Scottish Ministers,

   (ii) Scottish Water, and

   (iii) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole),

(b) must—

   (i) publish the draft determination, and

   (ii) invite (by way of advertisement or otherwise) representations as regards the draft determination by such time as the Commission may specify, and

   (c) must have regard to any representations made to the Commission by virtue of paragraph (a) or (b).

(5) The Scottish Ministers and Scottish Water must provide the Commission with such information as it reasonably requires for the purposes of making a determination under subsection (1)(a).

29C Exercise of functions regarding charges

(1) Scottish Water must exercise its functions under sections 29A and 29F for the purposes of ensuring that subsections (3) and (4) are complied with.

(2) The Commission must—
(a) exercise its functions under sections 29A, 29B and 29F for the purposes of ensuring that subsections (3) and (4) are complied with,

(b) exercise its functions under section 29E for the purposes of ensuring that subsection (4) is complied with, and

(c) in exercising its functions under those sections, have regard to—

(i) any guidance issued to Scottish Water by the Scottish Ministers, and

(ii) any directions given to Scottish Water under section 44 or 56, so far as relevant in relation to charges schemes.

(2A) The Scottish Ministers must—

(a) provide the Commission with such information as it may require for the purpose of subsection (2)(c); and

(b) in particular, send to the Commission copies of any guidance and directions referred to in that subsection when issued or given.

(3) This subsection is complied with if (so far as is consistent with compliance with subsection (4)) a charges scheme gives effect to any statement issued under section 29D.

(4) This subsection is complied with if (so far as is consistent with compliance with section 41(1)) Scottish Water’s receipts from the aggregate of—

(a) its income from charges for services provided in the exercise of its core functions, and

(b) the amount of—

(i) any grants paid to it under subsection (1) of section 42,

(ii) money it may borrow under subsection (3) of that section, and

(iii) any other resources reasonably available to it, for the purposes of the exercise of those functions,

is not less than sufficient to meet the expenditure required for the effective exercise of those functions.

29D Statements regarding charges

(1) The Scottish Ministers must—

(a) in respect of a period specified under section 29B(2), and

(b) by reference to such economic or other factors as they consider relevant, issue to Scottish Water and the Commission a statement of policy regarding charges under a charges scheme.

(2) A statement under subsection (1) is to include provision with respect to harmonisation of charges (that is to say, provision with a view to ensuring that a charges scheme does not fix different charges for similar services provided to persons of a similar category).

(3) A statement under subsection (1) may (so far as is consistent with the provision described in subsection (2)) include provision with respect to—

(a) the funding of particular services by charges for services as a whole,
(b) the proportion of the amount of income requiring to be raised by charges fixed by a charges scheme to be contributed by each category of person to whom Scottish Water provides services,

(c) the fixing of levels of charges by reference to—
   (i) different categories of person to whom Scottish Water provides services, or
   (ii) liability for council tax under Part II (Council tax: Scotland) of the Local Government Finance Act 1992 (c.14), and

(d) such other matters as the Scottish Ministers think fit.

(3A) In preparing a statement under subsection (1), the Scottish Ministers must have regard to Scottish Water’s duty under section 51(1).

(4) Before issuing a statement under subsection (1), the Scottish Ministers must consult—
   (a) the Commission,
   (b) the Convener of the Water Customer Consultation Panels (representing the Panels as a whole), and
   (c) Scottish Water.

29E Departure from certain charges

(1) Scottish Water may, in any particular case, apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid for services provided to a water services or sewerage services provider.

(2) The Commission may consent to a departure from a charges scheme only if satisfied that—
   (a) a customer of the provider has done, or has agreed to, something which reduces or increases the costs incurred by Scottish Water in providing the services to the provider, and
   (b) the departure is otherwise justified in the circumstances of the case.

(3) Where the Commission consents to a departure, it may do so subject to such reasonable conditions as it considers are appropriate in the case.

(4) Where the Commission withholds its consent to a departure, it must give its reasons for doing so.

(5) The Commission is to make provision in writing which specifies—
   (a) the procedure to be followed for the purposes of determining applications made under subsection (1), and
   (b) any matters to be taken into account and the criteria to be applied in—
      (i) determining whether a departure from a charges scheme is justified, and
      (ii) the fixing, by Scottish Water, of lower or (as the case may be) higher charges to be paid for the services in question where it is determined that a departure is justified.

(6) The Commission may from time to time revise the provision.

(7) In preparing or revising the provision, the Commission must consult—
(a) the Scottish Ministers and Scottish Water, and
(b) such other persons as it thinks fit,
as to the procedure to be followed in considering applications made under
subsection (1).

5

(8) The Commission must send a copy of the provision to—

(a) the Scottish Ministers,
(b) Scottish Water, and
(c) every water services and sewerage services provider.

(9) Scottish Water must publish details of every departure from a charges scheme.

29F Review of determinations and charges

(1) This subsection applies where, since the making of a determination under
section 29B(1)(a), there has been or is likely to be material change to—

(a) Scottish Water’s income from charges for services provided in the
exercise of its core functions,

(b) the amount of—

(i) any grants paid to it under subsection (1) of section 42,
(ii) money it may borrow under subsection (3) of that section, or
(iii) any other resources reasonably available to it,
for the purposes of the exercise of those functions, or

(c) the expenditure required for the effective exercise of those functions.

(2) Where subsection (1) applies, Scottish Water—

(a) may of its own accord,
(b) must, if the Commission requests it to do so,

send to the Commission proposals for revising the maximum amounts of
charges determined under section 29B(1)(a).

(3) The Commission—

(a) must, after receipt of the proposals, review those amounts, and
(b) may revise those amounts to such extent as it thinks fit.

(4) In reviewing those amounts, the Commission must take into account all matters
affecting the resources available to Scottish Water for the purposes of the
exercise of its core functions.

(5) Before revising those amounts, the Commission must—

(a) intimate to the Scottish Ministers that revision of those amounts is under
consideration,
(b) invite (by way of advertisement or otherwise) representations as regards
revision of those amounts by such time as the Commission may specify, and
(c) have regard to any representations made to the Commission by virtue of
paragraph (a) or (b).
(6) The Commission must give its reasons for deciding whether or not to revise those amounts.

(7) Where the Commission revises those amounts, it must send to Scottish Water written notice which specifies the revised amounts.

(8) Scottish Water—

(a) may, after receipt of the notice, revise any charges fixed by the charges scheme by reference to the revised amounts specified in the notice, and

(b) if it does so, must send written notice of the revised charges to the Commission for approval.

(9) The Commission may approve any revised charges with or without modifications.

(10) If the Commission approves any revised charges with modifications, it must give its reasons for doing so.

(11) When revised charges are approved by the Commission, Scottish Water must publish a summary of the revised charges and the date from which they have effect.

(12) The date from which the revised charges have effect is to be determined by the Commission.

29G Effective exercise of core functions

For the purposes of sections 29C(4) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if (in discharging its statutory duties and contractual obligations relating to the exercise of those functions) it makes such use of its resources that, year on year, it—

(a) achieves the objectives contained in any directions given by reference to section 56A, and

(b) does so at the lowest reasonable overall cost.”.

(2) In section 30 (maximum charges for services provided with help of Scottish Water) of that Act—

(a) in subsection (1), for the words “The Scottish Ministers may by order” there is substituted “A charges scheme must also”;

(b) in subsection (3), for the words “An order under this section” there is substituted “In relation to maximum charges fixed by virtue of subsection (1), the charges scheme”; and

(c) in subsection (4)—

(i) for the words “an order under this section” there is substituted “, by virtue of subsection (1), a charges scheme”; and

(ii) for the word “order” in the second place where it appears there is substituted “scheme”.

(3) Sections 31 to 34 of that Act (which make provision for and in connection with the making of charges schemes by Scottish Water) are repealed.

(4) In section 35 (liability of occupiers etc. for charges) of that Act, after subsection (9) there is added—
“(10) This section does not apply to or in relation to any services provided by Scottish Water under section 14 of the Water Services etc. (Scotland) Act 2005 (asp 00) except where the provision of the service is continued under section 15(1) or 17A(1) or (3) of that Act.”.

(5) After that section of that Act there is inserted—

“35A Charges for services arranged by licensed providers

(1) Supplies of water provided to any premises by Scottish Water under subsection (2) of section 14 of the Water Services etc. (Scotland) Act 2005 (asp 00) are to be treated, for the purposes of sections 29 to 29F, as services provided solely to the water services provider who made the related 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 to 29F, as services provided solely to the sewerage services provider who made the related request under subsection (4) of that section in respect of the premises.

(3) But—

(a) where the supplies of water provided to the premises are continued under subsection (1) of section 15 of that Act, subsection (1) does not apply,

(b) where the provision of sewerage to, or disposal of sewerage from, the premises is continued under subsection (1) or (3) of section 17A of that Act, subsection (2) does not apply.”.

(6) Schedule 3 makes provision in relation to certain pre-existing agreements as to charges.

19 Scottish Water’s functions: powers of the Scottish Ministers

After section 56 (directions) of the 2002 Act there is inserted—

“56A Directions may set objectives

(1) In particular, directions under section 56 may in respect of a period specified under section 29B(2) set objectives as to—

(a) the standard of the services to be provided in the exercise of Scottish Water’s core functions, and

(b) the time by which—

(i) a particular standard of any of those services is to be attained,

(ii) any particular work required for or in connection with the provision of those services is (in part or whole) to be commenced or completed.

(2) Different objectives may be set for different cases or categories of case.

(3) In formulating objectives of a type referred to in subsection (1) for inclusion in directions under section 56, the Scottish Ministers must have regard to Scottish Water’s duty under section 51(1).
(4) Before giving directions under section 56 which set objectives of a type referred to in subsection (1), the Scottish Ministers must consult the Convener of the Water Customer Consultation Panels (representing the Panels as a whole) on the objectives.

56B Supplementary functions

(1) The Scottish Ministers may by order confer on Scottish Water such additional or supplementary functions relating to the provision of water and sewerage services by Scottish Water as the Scottish Ministers consider appropriate so to confer.

(2) The Scottish Ministers are to consult Scottish Water and the Commission on any order they propose to make under subsection (1).”.

3 Determinations relating to provision of services

(1) In section 1 (duty of Scottish Water to provide for sewerage) of the 1968 Act—

(a) in subsection (4)—

(i) for the words “Secretary of State” there is substituted “Water Industry Commission for Scotland”; and

(ii) for the word “his” there is substituted “its”;

(b) after that subsection there is inserted—

“(4A) The Commission—

(a) shall prepare a statement which specifies the procedure to be followed for the purposes of its determining questions under subsection (4) above, and

(b) may from time to time revise the statement.

(4B) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(4C) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”;

(c) subsection (5) is repealed; and

(d) in subsection (6), for the words “subsections (3C) and (5)” there is substituted “subsection (3C)”.

(2) In section 6 (duty of Scottish Water to provide water supply) of the 1980 Act—

(a) in subsection (3)—

(i) for the words “Secretary of State” there is substituted “Water Industry Commission for Scotland”; and

(ii) for the word “his” there is substituted “its”; and

(b) after that subsection there is inserted—

“(3A) The Commission—

(a) shall prepare a statement which specifies the procedure to be followed for the purposes of its determining questions under subsection (3), and

(b) may from time to time revise the statement.

(3) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(4) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”;
(b) may from time to time revise the statement.

(3B) In preparing or revising the statement, the Commission shall consult Scottish Water and such other persons as it considers appropriate.

(3C) The Commission shall, on payment of such reasonable fee (if any) as the Commission may determine, send a copy of the statement to any person who requests it.”.

19A Qualification of duty to provide services

(1) In section 1 (duty of Scottish Water to provide for sewerage) of the 1968 Act, after subsection (6) there is added—

“(7) The duties imposed by subsections (1) and (2) above shall not require Scottish Water to do anything which is prejudicial to its compliance with—

(a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 (asp 3) so far as setting objectives of a type referred to in section 56A of that Act, or

(b) a statement of policy issued under section 29D of that Act.”.

(2) In section 6 (duty of Scottish Water to provide water supply) of the 1980 Act, after subsection (4) there is added—

“(5) The duties imposed by subsections (1), (2) and (4) shall not require Scottish Water to do anything which is prejudicial to its compliance with—

(a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 (asp 3) so far as setting objectives of a type referred to in section 56A of that Act, or

(b) a statement of policy issued under section 29D of that Act.”.

19B Sewerage nuisance: code of practice

(1) The Scottish Ministers may make an order containing a code of practice (referred to in this section and section 19C as a “sewerage code”) for the purposes of assessing, controlling and minimising sewerage nuisance.

(2) In this section and section 19C, “sewerage nuisance” means—

(a) smells and discharges;

(b) insects; or

(c) any other thing,

emanating from, or present at, any part of the public sewerage system so as to be prejudicial to health (that is to say, injurious, or likely to cause injury, to health) or a nuisance.

(3) A sewerage code may, in particular, set out—

(a) guidance as to the best practicable means of assessing, controlling and minimising sewerage nuisance; and

(b) circumstances in which—

(i) Scottish Water; or
(ii) any other person to whom the code applies, is to be regarded for the purposes of this section and section 19C as complying, or (as the case may be) not complying, with the code.

(4) In subsection (3)(a), “best practicable means” is to be construed by reference to the following provisions—

(a) “practicable” means reasonably practicable having particular regard to—

(i) local conditions and circumstances;

(ii) the current state of technical knowledge; and

(iii) financial implications; and

(b) “means” includes—

(i) the design, installation, maintenance and manner and periods of operation of plant and machinery; and

(ii) the design, construction and maintenance of buildings and other structures.

(5) A sewerage code is to apply to—

(a) Scottish Water in respect of its core functions relating to the provision of sewerage and the disposal of sewage; and

(b) any other person to the extent that the person is acting on Scottish Water’s behalf, or under its authority, in that respect.

(6) Scottish Water and any other person to whom a sewerage code applies must comply with the code.

(7) The Scottish Ministers and every local authority must publicise any sewerage code.

(8) Before making an order under subsection (1), the Scottish Ministers must consult—

(a) Scottish Water;

(b) every local authority; and

(c) such other persons as they consider appropriate, about the proposed sewerage code.

(9) For the purposes of subsection (5), the provision of sewerage and the disposal of sewage does not include such provision or disposal through any part of the public sewerage system which is regulated by a permit granted by virtue of regulations made under section 2 of the Pollution Prevention and Control Act 1999 (c.24).

(10) Subsection (9) is subject to any direction made by the Scottish Ministers by virtue of any enactment in relation to the application of a sewerage code to any such part of the public sewerage system.

19C Monitoring and enforcement

(1) Each local authority must—

(a) monitor compliance in its area with any sewerage code; and

(b) where a complaint of sewerage nuisance is made to it by a person living in its area, investigate the complaint.
Part 2—Provision of water and sewerage services

(2) Where a local authority is satisfied that Scottish Water or another person to whom a sewerage code applies is—
   (a) not complying with; or
   (b) likely not to comply with,

the code in a material regard, the authority must serve a notice (an “enforcement notice”) on Scottish Water or (as the case may be) that other person.

(3) An enforcement notice—
   (a) may require—
      (i) the execution of such works; and
      (ii) the taking of such other steps,

as are necessary for securing compliance with a sewerage code in any particular respects; and

(b) must specify the date by which the requirements of the notice, or any particular requirements of it, are to be fulfilled.

(3A) A person on whom an enforcement notice has been served may, by summary application made within 21 days of the date of service of the notice, appeal to the sheriff against the notice; and the notice is of no effect until the appeal is withdrawn or finally determined.

(3B) In an appeal under subsection (3A), the sheriff may make such order as the sheriff thinks fit; and the decision of the sheriff in the appeal is final.

(4) If a person, without reasonable excuse, contravenes an enforcement notice, the person is guilty of an offence and liable on summary conviction to a fine not exceeding £40,000.

(4A) Where an enforcement notice is contravened, the local authority may (whether or not proceedings have been taken for an offence under subsection (4)) take proceedings in the sheriff court for the purposes of securing that the requirements of the notice are fulfilled.

(5) Where an enforcement notice is contravened, the local authority may (whether or not proceedings have been taken for an offence under subsection (4)) take any action it considers necessary in fulfilment of the requirements of the notice.

(6) Any expenses reasonably incurred by a local authority in taking action under subsection (5) may be recovered by the authority from the person on whom the enforcement notice was served.

(7) The functions of a local authority under sections 79 to 81 of the Environmental Protection Act 1990 (c.43) in respect of statutory nuisance (within the meaning of Part III of that Act) do not apply in relation to any nuisance which constitutes a sewerage nuisance.

(8) This section and section 19B are without prejudice to section 82 (summary proceedings by persons aggrieved by statutory nuisance) of the Environmental Protection Act 1990.

(9) In this section and section 19B, “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39).
Definitions for Part

20 Meaning of “eligible premises”

(1) In this Part, “eligible premises” means—

(a) in relation to the supply of water, premises which are (or are to be) connected to the public water supply system; and

(b) in relation to the provision of sewerage or the disposal of sewage, premises which are (or are to be) 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) except the residential part of part residential subjects within the meaning of that Part of that Act.

(3) The Scottish Ministers may by order modify subsection (2) so as to vary the meaning of “dwelling”.

21 Meaning of “public water supply system”

(1) In this Part, 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 a person acting on its behalf or under its authority) in connection with 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.

22 Meaning of “public sewerage system”

(1) In this Part, 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 a person acting on its behalf or under its authority) in connection with 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 3
COAL MINE WATER POLLUTION

23 Control of water from coal mines

(1) After section 4C of the Coal Industry Act 1994 (c.21) there is inserted—

"4D Power of the Authority with respect to coal mine water discharge: Scotland

(1) The Authority may take such action as it considers appropriate (if any) for the purpose of preventing, or mitigating the effect of, the discharge of water from a coal mine into or on to any land or into the water environment.

(2) In this section and sections 4E and 4F below—

(a) “the water environment” has the meaning given by section 3 of the Water Environment and Water Services (Scotland) Act 2003 (asp 3); and

(b) references to coal mines are to coal mines vested in the Authority.

4E Coal mine water discharge: powers of entry in Scotland

(1) If the Authority is of the opinion that a discharge of water from a coal mine into or on to any land or into the water environment has caused, is causing or is likely to cause—

(a) serious pollution of the environment; or

(b) danger to life or health,

the Authority may, for any purpose specified in subsection (2) below, in writing authorise a person to exercise (in accordance with the terms of the authorisation) any of the powers specified in subsection (3) below.

(2) The purposes are—

(a) to determine the extent of the pollution or of the danger, or the likelihood of serious pollution or such danger;

(b) to determine whether (and if so how) the Authority should exercise its power under section 4D above;

(c) to take action under that section.

(3) The powers are—

(a) to enter—

(i) in an emergency, at any time (and, if need be, using reasonable force); or

(ii) in any other case, at any reasonable time,

any premises which the authorised person has reason to believe it is necessary for him to enter;

(b) to use a vehicle or boat to do so;

(c) to make such examination and investigation as may in any circumstances be necessary;
(d) to take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under paragraph (c) above;

(e) to take samples, or cause samples to be taken, of any articles or substances found in or on any premises which he has power to enter, and of the air or water or land in, on, or in the vicinity of, the premises;

(f) to require any person to give him such facilities and assistance with respect to any matters or things within that person’s control or in relation to which that person has responsibilities as are necessary to enable the authorised person to exercise any of the powers conferred on him by virtue of this section.

(4) The powers which are conferred in relation to any land by this section include power, for the purposes mentioned in subsection (2) above—

(a) to carry out experimental borings or other works on those premises; and

(b) to install, keep or maintain monitoring and other apparatus there.

(5) Where subsection (6) below applies, any entry to premises by virtue of this section shall (except in an emergency) be effected only—

(a) after the expiry of at least seven days’ notice of the proposed entry given to a person who appears to the authorised person to be in occupation of the premises in question; and

(b) either—

(i) with the consent of a person who is in occupation of those premises; or

(ii) under the authority of a warrant granted under paragraph 2 of Schedule 1C to this Act.

(6) This subsection applies where it is proposed to—

(a) enter any premises used for residential purposes; or

(b) take heavy equipment on to any premises which are to be entered.

(7) Where an authorised person proposes to enter any premises and—

(a) entry has been refused and he reasonably believes that the use of force may be necessary to effect entry; or

(b) he reasonably believes that entry is likely to be refused and that the use of force may be necessary to effect entry,

any entry to those premises by virtue of this section shall (except in an emergency) be effected only under the authority of a warrant granted under paragraph 2 of Schedule 1C to this Act.

(8) In this section—

“premises” includes any land, vehicle or vessel, and any plant which is designed to move or be moved (whether or not on roads);

“emergency” means a case in which it appears to the authorised person in question—
(a) that there is an immediate risk of serious pollution of the environment; or

(b) that circumstances exist which are an immediate danger to life or health,

and that immediate entry to any premises is necessary to verify the existence of that risk or those circumstances or to ascertain the cause of that risk or those circumstances or to effect a remedy.

(9) Schedule 1C to this Act makes further provision regarding powers of entry.

4F Coal mine discharge: compulsory acquisition of land in Scotland

(1) The Authority may, with the authorisation of the Scottish Ministers, acquire any land anywhere in Scotland compulsorily if the Authority is of the opinion that—

(a) the acquisition is for the purpose of preventing, or mitigating the effect of, a discharge of water from a coal mine; and

(b) the discharge has caused, is causing or is likely to cause—

(i) serious pollution of the water environment; or

(ii) danger to life or health.

(2) The power to acquire land under subsection (1) above includes power to acquire a servitude or other right in or over land by the creation of a new right.

(3) The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) applies in relation to an acquisition under subsection (1) above as if—

(a) this section were contained in an Act in force immediately before the commencement of that Act; and

(b) references in that Act to a local authority were references to the Authority.”.

(2) In section 66 (Crown application) of that Act, after subsection (5) there is added—

“(6) The references in subsection (5) above to a Government department shall, for the purposes of the application of this section to sections 4D to 4F of, and Schedule 1C to, this Act, be treated as including the holder of an office in the Scottish Administration which is not a ministerial office.”.

(3) In section 68 (extent, etc.) of that Act, after subsection (7) there is inserted—

“(7A) Sections 4D to 4F of, and Schedule 1C to, this Act extend to Scotland only.”.

(4) Schedule 4 inserts Schedule 1C into that Act.
PART 4
MISCELLANEOUS AND GENERAL

Miscellaneous

24 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.

25 Amendments to enactments

Schedule 5 amends enactments for the purposes of and in consequence of this Act.

26 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.

General

27 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 2, 7(2), 12(3A), 12A(1), (2), (6) or (8A), 16(3), 17A(8), 19B(1) or 20(3); or

(b) subject to subsection (4)(a), section 26; or

(c) paragraph 1(1) or (4) or 11(1) or (2)(g) of schedule 2,

is subject to annulment in pursuance of a resolution of the Parliament.

(4) A statutory instrument containing—

(a) an order under section 26 which amends an Act; or

(b) regulations under section 4(7) or 5(7),

is not made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.
28 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 Commission” means the Water Industry Commission 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.

29 Crown application

This Act binds the Crown.

30 Short title and commencement

(1) This Act may be cited as the Water Services etc. (Scotland) Act 2005.

(2) The provisions of this Act, except sections 26 to 29 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 1
(introduced by section 1)

WATER INDUSTRY COMMISSION FOR SCOTLAND

Before schedule 1 (the Commissioner and Customer Panels) to the 2002 Act there is inserted—

“SCHEDULE A1
(introduced by section 1(4))

WATER INDUSTRY COMMISSION FOR SCOTLAND

Status

1 (1) The Commission is a body corporate.

(2) The Commission—
(a) is not a servant or agent of the Crown,
(b) has no status, immunity or privilege of the Crown,
and its property is not to be regarded as property of, or held on behalf of, the Crown.

Membership

2 The Commission is to consist of the following members—
(a) not fewer than 3, nor more than 5, ordinary members, and
(b) the person holding the post of chief executive.

Tenure and removal from office

3 (1) Each ordinary member—
(a) is to be appointed by the Scottish Ministers for such period as is specified in the appointment,
(b) may, by written notice to the Scottish Ministers, resign as a member,
(c) in other respects, holds and vacates office on such terms and conditions as the Scottish Ministers may determine, and
(d) after ceasing to hold office is eligible for reappointment as a member.

(2) The Scottish Ministers may remove an ordinary member from office and the Commission may, with the approval of the Scottish Ministers, remove the member who is the chief executive from office if satisfied that—
(a) the member’s estate has been sequestrated or the member has been adjudged bankrupt, has made an arrangement with creditors or has granted a trust deed for creditors or a composition contract, or
(b) the member—
(i) is incapacitated by physical or mental illness,
Schedule 1—Water Industry Commission for Scotland

(ii) has been absent from meetings of the Commission for a period longer than 3 consecutive months without the permission of the Commission, or

(iii) is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member.

Disqualification

4 A person is disqualified from appointment, and from holding office, as a member of the Commission if that person is a member of—

(a) the House of Lords,

(b) the House of Commons,

(c) the Scottish Parliament, or

(d) the European Parliament.

Chairing

5 (1) The Scottish Ministers—

(a) must appoint one of the ordinary members to chair meetings of the Commission, and

(b) may, after consulting that member, appoint another ordinary member to act as deputy to that member.

(2) The member appointed to chair the meetings and any member appointed to act as deputy to that member shall hold and vacate office as such in accordance with the terms of their appointments.

(3) A member so appointed may, by written notice to the Scottish Ministers, resign from office as such.

(4) A member so appointed vacates office on ceasing to be a member of the Commission.

(5) Where a member—

(a) is appointed to chair meetings or to act as deputy to the member so appointed, or

(b) ceases to hold office as such,

the Scottish Ministers may vary the terms of the member’s appointment so as to alter the date on which office as a member is to be vacated.

Remuneration, allowances and pensions

6 (1) The Commission must pay to each ordinary member such remuneration as the Scottish Ministers may determine.

(2) The Commission must pay to each ordinary member and the chief executive such allowances as the Scottish Ministers may determine in respect of expenses properly incurred in the performance of their duties as a member.
(3) Where a person ceases to be an ordinary member otherwise than on the expiry of that person’s term of appointment, the Scottish Ministers may, if they think there are special circumstances, direct the Commission to pay to the person such amount of compensation as they may determine.

(4) The Scottish Ministers may direct the Commission to pay—

(a) such pension, allowance or gratuity to, or in respect of, any person who is or has been an ordinary member,

(b) such contribution or other payment towards provision for such pension, allowance or gratuity,

as they consider appropriate.

Chief executive

7 (1) The Commission is to employ a chief executive.

(2) The Scottish Ministers are to appoint the first chief executive of the Commission on such terms and conditions as the Scottish Ministers may determine.

(3) Before making the appointment of the first chief executive, the Scottish Ministers must consult the member of the Commission appointed, or to be appointed, to chair the meetings of the Commission (if there is a person holding, or as the case may be designated to hold, that office).

(4) The Commission may, with the approval of the Scottish Ministers, make subsequent appointments to the post of chief executive on such terms and conditions as it may with the approval of the Scottish Ministers determine.

(5) The chief executive is to be appointed from amongst persons who appear—

(a) as regards the first appointment, to the Scottish Ministers, and

(b) thereafter, to the Commission,

to have knowledge, skills or experience relevant to the functions of the Commission.

(6) The Commission may, with the approval of the Scottish Ministers—

(a) vary any terms and conditions of a person’s appointment to the post of chief executive, or

(b) terminate a person’s appointment to the post of chief executive if the Commission is satisfied that the person is not adequately discharging the functions of that post.

Staff

8 (1) All staff employed, immediately before the coming into force of this sub-paragraph, by the Water Industry Commissioner for Scotland are transferred to the employment of the Commission.

(2) The contract of employment of a person transferred by virtue of sub-paragraph (1)—

(a) is not terminated by the transfer, and
(b) has effect from the date of transfer as if originally made between the person and the Commission.

(3) Without prejudice to sub-paragraph (2), where a person becomes a member of staff of the Commission under sub-paragraph (1)—

(a) all the rights, powers, duties and liabilities of the Water Industry Commissioner for Scotland under or in connection with that person’s contract of employment are by virtue of this sub-paragraph transferred to the Commission on the date of transfer, and

(b) anything done before that date by or in relation to the Water Industry Commissioner for Scotland in respect of that contract of employment or that person is to be treated from that date as having been done by, or in relation to, the Commission.

(4) Sub-paragraphs (1) to (3) do not prejudice the right of any person to terminate that person’s contract of employment if the terms and conditions of employment are changed substantially to the detriment of the person; but such a change is not to be taken to have occurred by reason only that the identity of that person’s employer changes by virtue of those sub-paragraphs.

(5) The Commission may, with the consent of the Scottish Ministers as to numbers, terms and conditions, appoint such other employees as it considers appropriate.

(6) The Commission must, as regards such of its employees as it may with the approval of the Scottish Ministers determine, make such arrangements as it considers appropriate for providing, to or in respect of those employees, pensions, allowances or gratuities.

(7) Such arrangements—

(a) may include the establishment and administration, by the Commission or otherwise, of one or more pension schemes, and

(b) must, in any case, be approved by the Scottish Ministers.

(8) The reference in sub-paragraph (6) to the provision of pensions, allowances or gratuities includes a reference to their provision by way of compensation for loss of office or employment or loss or diminution of emoluments.

Transfer of property and liabilities

9 (1) All property (including rights) and liabilities, subsisting immediately before the coming into force of this paragraph, of the Water Industry Commissioner for Scotland are transferred to the Commission.

(2) Sub-paragraph (1) has effect in relation to any property and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or prohibit the transfer of the property or liabilities.

Committees

10 (1) The Commission may establish committees for or in connection with the exercise of such of its functions as it may determine.

(2) Any committee established under this paragraph must be chaired by a person who is an ordinary member of the Commission.
(3) Employees of the Commission who are not members of the Commission may be appointed to be members of any committee established by it.

**Delegation of powers**

11 (1) Anything authorised or required under any enactment to be done by the Commission may be done by any of its committees which, or by any of its members or employees who, are authorised (whether generally or specifically) by it for the purpose.

(2) Nothing in sub-paragraph (1) prevents the Commission from doing anything that a committee, member or employee has been authorised or required to do.

**Proceedings**

12 (1) The Commission may regulate its own procedure (including any quorum) and that of any of its committees.

(2) The validity of any proceedings or actings of the Commission is not affected by—

(a) any vacancy among its members, or

(b) any defect in the appointment of a member.

**General powers**

13 (1) The Commission may do anything which appears necessary or expedient for the purpose of, or in connection with, the exercise of its functions including, in particular—

(a) entering into contracts; and

(b) acquiring and disposing of property.

(2) But the Commission may not acquire or dispose of land without the consent of the Scottish Ministers.

**Accounts**

14 The Commission must—

(a) prepare, for each financial year, in accordance with directions given by the Scottish Ministers, an account of the Commission’s income and expenditure, and

(a) send the account, by such time as the Scottish Ministers may direct, to the Auditor General for Scotland for auditing.”.
Application for licence

1 (1) An application for a water services licence or a sewerage services licence is to be made to the Commission 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 Commission with such further information (including information in the form of a document) as it reasonably requires in order to determine the application.

3 Sub-paragraph (2) does not authorise the Commission 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 Commission with respect to the application; and
(b) contain such other particulars, as the Scottish Ministers may so prescribe.

5 Where the Commission proposes to refuse an application, the Commission is to give the applicant notice—
(a) of that fact (together with its reasons for proposing to refuse the application); and
(b) specifying the date by which the applicant may make representations to the Commission with respect to the proposed refusal.

6 The Commission 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).

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 on a question of law.

(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 on a question of law; 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 Commission’s decision to refuse the application or (as the case may be) grant the licence; 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 Commission to be necessary or expedient for the purposes of or in connection with the activities authorised by the licence.

(2) The Commission 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 standard conditions may, in particular—

(a) include standard conditions that are to apply to—

(i) all licences; and
(ii) a particular type of licence; and

(b) make provision for—

(i) the standard conditions (or any of them) not to apply to a particular licence or type of licence in such circumstances; and
(ii) the coming into effect and suspension of the standard conditions (or any of them) in such manner and in such circumstances, as may be specified in the standard conditions.

(4) The Commission is to—

(a) consult the Scottish Ministers on proposals for standard conditions; and
(b) publish the standard conditions.

(5) The Commission—

(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 it considers is necessary or expedient as a consequence of any modification of the standard conditions.

(6) Before making any modification under sub-paragraph (5)(b), the Commission 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 Commission.

(8) The Commission is to have regard to any representations made by virtue of sub-paragraph (7)(b).

(9) Where the Commission modifies the standard conditions, the Commission is to publish them as modified.

(10) The Commission may, in granting a particular licence, exclude or modify any of the standard conditions to such extent as it 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 Commission considers appropriate.

(13) The Commission may modify any condition of a particular licence if it considers that the modification is necessary or expedient 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 a question of law.
(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 a question of law.

(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.

Conditions: sustainable development

2A(1) The Scottish Ministers may issue to the Commission guidance as to how water services and sewerage services providers might, by the manner in which they perform the activities authorised by their licences, reasonably contribute to the achievement of sustainable development.

(2) In exercising its functions under paragraph 2, the Commission is to have regard to any guidance issued under sub-paragraph (1).

Transfer of licence

3 (1) Any water services licence or sewerage services licence may, subject to sub-paragraphs (2) to (4A), 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 Commission consents to the transfer.

(3) The Commission 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 Commission 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.

(4A) In relation to a transfer—

(a) an application for consent is to be made by the transferee; and

(b) sub-paragraphs (1) to (6) of paragraph 1 apply as regards an application for consent as they apply as regards an application for a licence.
(4B) Any applicant for consent to a transfer of a licence who knowingly or recklessly makes a statement, in connection with the application for consent, that is false or misleading in a material particular is guilty of an offence.

(4C) A person who is guilty of an offence under sub-paragraph (4B) is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on indictment, to a fine.

(8) The Commission 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 it considers it appropriate to make.

(9) As soon as practicable after deciding whether to consent to a transfer, the Commission is to intimate its decision to—

(a) the transferor and the transferee; and

(b) Scottish Water.

(10) Where the Commission withholds consent to the transfer, the transferee may, within 14 days of the date on which the decision to do so was intimated to the transferee under sub-paragraph (9)(a), appeal to the Court of Session against the decision on a question of law.

(10A) Where the Commission consents to the transfer, Scottish Water may, within 14 days of the date on which the decision to do so was intimated to Scottish Water under sub-paragraph (9)(b), appeal to the Court of Session against the decision on a question of law.

(11) In an appeal under sub-paragraph (10) or (10A), the Court may quash or confirm the Commission’s decision to withhold consent to the transfer or (as the case may be) to 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 Commission and any person authorised by the Commission 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 or in relation to the supply of water or 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 Commission 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 Commission (or a person authorised by the Commission) 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 Commission (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 Commission 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.

Powers of entry etc.: further provision

(1) 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.

(2) 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.

(3) Where a person exercises the power mentioned in paragraph 4(2)(a), the Commission 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 sub-paragraph (2), except in so far as the loss or damage is attributable to the fault of the person who sustained it.

(4) 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.
(5) Any person who—
    (a) intentionally obstructs a person acting in the exercise of any power conferred by paragraph 4(1) and (2); or
    (b) refuses or fails, without reasonable excuse, to comply with a requirement made under paragraph 4(5),

is guilty of an offence.

(6) A person who is guilty of an offence under sub-paragraph (4) or (5) is liable—
    (a) on summary conviction, to a fine not exceeding the statutory maximum; or
    (b) on conviction on indictment, to a fine.

Warrants

6 (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 Commission (and any person authorised by the Commission 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.

Enforcement notices

7 (1) If it appears to the Commission (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 Commission may serve on the provider a notice (in this paragraph and paragraphs 8, 9 and 11 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 Commission’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 Commission requires the provider 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 Commission must consult—

(a) Scottish Water; and

(b) such other persons as the Commission considers appropriate.

(6) Before serving an enforcement notice on a provider under sub-paragraph (1), the Commission is to—

(a) serve a copy of the proposed notice on the provider; and

(b) specify a period (which is to be 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 Commission about the proposed notice.

(7) The Commission—

(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 Commission 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 Commission 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 Commission’s power to issue a further such notice.

Enforcement notices: offences

8 (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 7; 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 7—
      (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

9 (1) A water services licence or sewerage services licence may be revoked in accordance with this paragraph.

(2) If it appears to the Commission 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 7; 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 7—

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

(3) If—

(a) it appears to the Commission 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 Commission considers that the provider would fail to comply with the terms of an enforcement notice pertaining to that contravention,

the Commission 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 Commission 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 Commission 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 Commission may, following a request made to the Commission 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 Commission 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 Commission considers to be relevant.

(7) A notice of revocation must specify—

(a) the reasons why it is served; and

(b) the date (which must be no earlier 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 service 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 Commission 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**

(1) Where it appears to the Commission that a water services provider or a sewerage services provider has contravened a term or condition of the licence held by the provider, the Commission may impose on the provider a financial penalty of such amount as it considers reasonable in the circumstances of the case.

(2) The Commission—

(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;

(c) in preparing the statement (and any revised statement), is to consult such persons as it considers appropriate; and

(d) is to publish the statement (and any revised statement) in such manner as it considers appropriate.

(3) Before imposing a penalty under sub-paragraph (1), the Commission is to serve on the provider a notice of its intention to impose the penalty; and the notice must specify the date by which the provider may make representations to the Commission with respect to the penalty.

(4) In imposing a penalty under sub-paragraph (1), the Commission 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 Commission—
(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 Commission by virtue of this paragraph must be paid into the Scottish Consolidated Fund.

Register of licences

11 (1) The Commission 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 each water services provider and sewerage services provider;

(b) record the terms and conditions of each water services licence and sewerage services 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 7;

(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 9—

(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 10—

(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.

SCHEDULE 3
(introduced by section 18(6))

CERTAIN PRE-EXISTING AGREEMENTS AS TO CHARGES

1 (1) In this schedule, a “relevant agreement” is an agreement—
(a) between Scottish Water and another person (a “relevant customer”) in respect of eligible premises (within the meaning of Part 2)—

(i) by virtue of any of the provisions referred to in sub-paragraph (2) or otherwise; and

(ii) which makes provision as to the charges to be paid (other than under a charges scheme) by the relevant customer for services provided by Scottish Water in the exercise of its core functions; and

(b) extant on the coming into force of this schedule.

(1A) For the purposes of sub-paragraph (1)—

(a) an agreement between Scottish Water and another person includes an agreement with the other person to which Scottish Water has become party in consequence of a transfer, by virtue of any enactment or contractual arrangements, of obligations to Scottish Water; and

(b) an agreement which makes provision as to the charges to be paid for services provided by Scottish Water does not include an agreement by virtue of which there is an obligation to which section 47 of the 1980 Act applies.

(2) For the purposes of sub-paragraph (1)(a)(i), the provisions are—

(a) sections 29(2)(b) and (4) and 31(6) of the 2002 Act (as they had effect immediately before their repeal by this Act);

(b) section 29(3)(j) of the 1968 Act (as it had effect immediately before its repeal by this Act).

(1) Scottish Water must, within one month of the coming into force of this schedule, send to the Commission written details of every relevant agreement.

(2) The Commission must, following receipt of those details, in each case—

(a) assess the charges payable under the relevant agreement (the “relevant charges”) during any period to which a charges scheme applies; and

(b) having regard to—

(i) any costs which reasonably require to be met from the charges fixed in accordance with sub-paragraph (6)(b); and

(ii) such other matters as the Commission considers appropriate,

determine, for the purposes of sub-paragraph (6)(a), an amount less than the relevant charges.

(3) The Commission must, in each case—

(a) give the relevant customer written notice of the assessment and determination under sub-paragraph (2); and

(b) send a copy of the notice to—

(i) Scottish Water; and

(ii) every water services and sewerage services provider,

by such date as the Scottish Ministers may direct.

(4) The Commission must publish details of every determination under sub-paragraph (2)(b).
(5) This sub-paragraph applies in any case where a water or sewerage services provider makes arrangements for the provision of any services to which relevant charges apply and is accordingly entitled to demand and recover charges from a relevant customer for that provision.

(6) Where sub-paragraph (5) applies—

(a) Scottish Water may, in relation to that provision, demand and recover from the provider charges which must not exceed the amount determined under sub-paragraph (2)(b); and

(b) the charges which the provider may, in relation to that provision, demand and recover from the relevant customer concerned must not exceed the amount of the relevant charges.

(7) Any financial disadvantage to Scottish Water arising as a consequence of differences between—

(a) the amounts determined under sub-paragraph (2)(b); and

(b) the charges which would be recoverable by Scottish Water under a charges scheme in relation to the services to which the determinations apply,

is to be borne by Scottish Water.

(8) Scottish Water is—

(a) in any case where sub-paragraph (5) does not for the time being apply; or

(b) in any case where that sub-paragraph ceases to apply,

to demand and recover relevant charges from the relevant customer for services provided by it to the customer.

1 (1) A charges scheme does not apply in relation to any services to which relevant charges apply except where the relevant agreement concerned expires or is terminated.

2 (2) For the purposes of sub-paragraph (1), the making of arrangements by a water services or sewerage services provider for the provision of any services to which relevant charges apply does not of itself cause the relevant agreement concerned to expire or terminate.

3 (3) A relevant agreement may not be renewed on its expiry or termination, nor may its term be extended at any time.

SCHEDULE 4
(introduced by section 23(4))

POWERS OF ENTRY UNDER THE COAL INDUSTRY ACT 1994

After Schedule 1B to the Coal Industry Act 1994 (c.21) there is inserted—

“SCHEDULE 1C

SUPPLEMENTAL PROVISIONS WITH RESPECT TO POWERS OF ENTRY: SCOTLAND

Exercise of powers of entry etc.

1 (1) A person entitled to enter premises by virtue of the power mentioned in section 4E(3)(a) of this Act—
(a) may take on to the premises such other persons (including, if the person reasonably believes he is likely to be obstructed, a constable) and such equipment or materials 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.

(2) A person who enters premises in the exercise of a power conferred by virtue of section 4E of this Act must leave the premises as effectually secured against trespassers as the person found them.

(3) Where a person exercises a power conferred by virtue of section 4E(3)(a) or (4) of this Act, the Authority is to make full compensation to any person who has sustained loss or damage by reason of—

(a) the exercise of that power; or

(b) the carrying out of, or failure to carry out, the duty imposed by sub-paragraph (2) above,

except in so far as the loss or damage is attributable to the fault of the person who sustained it.

(4) Any dispute as to a person’s entitlement to compensation under sub-paragraph (3) above, or as to the amount of any such compensation, shall be referred to the arbitration of a single arbiter, appointed—

(a) by agreement between the Authority and the person who claims to have sustained the loss or damage; or

(b) in default of agreement, by the Scottish Ministers.

(5) 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 a power conferred by virtue of section 4E of this Act is guilty of an offence.

(6) A person who is guilty of an offence under sub-paragraph (5) above is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment, to a fine.

(7) In this schedule, “premises” has the meaning given by section 4E(8) of this Act.

Warrants

2 (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 section 4E(3) or (4) of this Act; and

(b) at least one of the conditions mentioned in sub-paragraph (2) below is fulfilled in relation to the premises,

the sheriff or justice may grant a warrant authorising the Authority (and any person authorised by the Authority 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 and the case is one of urgency.

(3) In a case where subsections (5) and (6) of section 4E of this Act apply, a sheriff or justice shall 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) above is fulfilled unless the sheriff or justice is also satisfied that notice required by subsection (5)(a) of that section has been given and that the period of that notice has expired.

(4) A warrant granted under this paragraph continues in force until the purposes for which the warrant is issued have been fulfilled.”.

SCHEDULE 5
(introduced by section 25)
AMENDMENTS TO ENACTMENTS

Sewerage (Scotland) Act 1968 (c.47)
1 In section 29 (which makes provision relating to consent to discharge of trade effluent) of the 1968 Act, paragraph (j) of subsection (3) is repealed.

House of Commons Disqualification Act 1975 (c.24)
2 In the House of Commons Disqualification Act 1975, in Part III of Schedule 1 (disqualifying offices), the entry relating to the Water Industry Commissioner for Scotland is repealed.

Race Relations Act 1976 (c.74)
3 In the Race Relations Act 1976, in Part II of Schedule 1A (bodies and other persons subject to general statutory duty), the entry relating to the Water Industry Commissioner for Scotland is repealed.

Water (Fluoridation) Act 1985 (c.63)
4 In the Water (Fluoridation) Act 1985, in subsections (2)(b)(i) and (3) of section 4 (publicity and consultation), for the word “Commissioner” in each place where it occurs there is substituted “Commission”.

Public Finance and Accountability (Scotland) Act 2000 (asp 1)
5 In the Public Finance and Accountability (Scotland) Act 2000, in subsection (7) of section 23 (economy, efficiency and effectiveness examinations), for the word “Commissioner” there is substituted “Commission”.

Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

6 In the Ethical Standards in Public Life etc. (Scotland) Act 2000—

(a) in section 19 (action on finding of contravention)—

(i) in subsection (4), the words from “and” in the second place where it occurs to the end are repealed; and

(ii) in subsection (5), paragraph (c) and the word “; or” immediately preceding it are repealed;

(b) sections 25 and 26 (which make special provision for the Water Industry Commissioner for Scotland) are repealed;

(c) in section 30 (modification of enactments etc.), the words “or the Water Industry Commissioner for Scotland” are repealed;

(d) in schedule 1 (the Standards Commission for Scotland), in paragraph 3, the words “or the Water Industry Commissioner for Scotland” are repealed; and

(e) in schedule 3 (devolved public bodies), after the entry relating to the State Hospitals Board for Scotland, there is inserted—

“The Water Industry Commission for Scotland”.

Water Industry (Scotland) Act 2002 (asp 3)

7 (1) In each of the following provisions of the 2002 Act, for the words “Commissioner” and “Commissioner’s” wherever occurring there is substituted “Commission” and “Commission’s” respectively—

section 3;

section 4(1);

section 5(1) to (3);

section 6;

section 11(1)(a);

section 26(1) to (4) and (7);

section 27;

section 57(6)(a); and

in schedule 1, paragraphs 6(4), 7 and 8.

(3) In section 3 (functions of the Commissioner) of that Act, in subsection (6)—

(a) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2005 (asp 00)) or both”; and

(b) in paragraph (b), for the words “it conducts its relations with its customers or potential or former customers” there is substituted “Scottish Water conducts its relations with those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”.
(3A) In section 5 (annual reports by, and information from, the Commissioner), in subsection (2)—

(a) in paragraph (a), for the words “to such representations, reports and recommendations as are mentioned in section 2(5)” there is substituted “to—

(i) any representations made to it by a Customer Panel, and

(ii) any recommendations made to it under section 2(4)”; and

(b) in paragraph (b), the word “, report” is repealed.

(4) In section 26 (customer standards codes) of that Act—

(a) in subsection (1)—

(i) in paragraph (a), for the words “its customers” there is substituted “persons whose premises are connected to the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2005 (asp 00)) or both”; and

(ii) in paragraph (b), for the words “its customers or potential or former customers” there is substituted “those persons or persons whose premises have been, or might reasonably become, connected to either or both of those systems”; and

(b) subsection (2) is repealed.

(5) Section 40 (reduced charges) of that Act is repealed.

(6) In section 49 (interests of customers) of that Act, for the words “who is a customer or potential customer of Scottish Water” there is substituted “whose premises are connected to, or might reasonably become connected to, the public water supply system or the public sewerage system (within the meaning of Part 2 of the Water Services etc. (Scotland) Act 2005 (asp 00)) or both;”.

(6A) In section 57 (information and reports) of that Act, in subsection (7)—

(a) the words from “any” to the end become paragraph (a); and

(b) after that paragraph there is inserted “, and

(b) the extent to which Scottish Water has, during that period, complied with any requirements made under section 12(1A) or 13(1) or (5) of the Water Services etc. (Scotland) Act 2005 (asp 00).”.

(7) In section 68 (orders and regulations) of that Act—

(a) in subsection (4) after the words “41(5)” there is inserted “, 56B”; and

(b) in subsection (6), after the words “41(5)” there is inserted “or 56B”.

(8) In section 70 (interpretation) of that Act, in subsection (1)—

(a) in the definition of “charges scheme”, for the words “31(1)” there is substituted “29A(1)”;

(b) for the definition of “the Commissioner” there is substituted—

“the Commission” means the Water Industry Commission for Scotland established under section 1(1) of this Act,”.

(9) Part 1 (the Commissioner) of schedule 1 to that Act is repealed.
Scottish Public Services Ombudsman Act 2002 (asp 11)

8 In the Scottish Public Services Ombudsman Act 2002, in schedule 2 (listed authorities)—

(a) after paragraph 21A there is inserted—

“21B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 55, for the word “Commissioner” there is substituted “Commission”.

Freedom of Information (Scotland) Act 2002 (asp 13)

9 In the Freedom of Information (Scotland) Act 2002, in schedule 1 (Scottish public authorities)—

(a) after paragraph 62A there is inserted—

“62B The Convener of the Water Customer Consultation Panels (appointed under paragraph 5(1) of schedule 1 to the Water Industry (Scotland) Act 2002 (asp 3)) and those Panels.”; and

(b) in paragraph 106, for the word “Commissioner” there is substituted “Commission”.

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

10 In the Public Appointments and Public Bodies etc. (Scotland) Act 2003, in schedule 2 (specified authorities)—

(a) the entry relating to the Water Industry Commissioner for Scotland is repealed; and

(b) after the entry relating to the Scottish Tourist Board there is inserted—

“Water Industry Commission for Scotland”.
Water Services etc. (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to establish the Water Industry Commission for Scotland; to create offences in relation to the unauthorised use of the public water and sewerage systems; to provide for licensing the provision of certain water and sewerage services; to amend the system for fixing charges for services provided by Scottish Water; to make provision as to Scottish Water’s functions; to make provision in relation to coal mine water pollution; and for connected purposes.

Introduced by: Ross Finnie
On: 11 June 2004
Supported by: Allan Wilson
Bill type: Executive Bill