

WATER SERVICES ETC. (SCOTLAND) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 2: Licences and Compliance: Further Provision

233. [Schedule 2](#) is introduced by section 12.

Paragraph 1: Application for licence

234. [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 Act. 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.
235. 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)).
236. 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.
237. 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.
238. Sub-paragraph (7) makes it an offence for an applicant to provide false or misleading information in an application for a licence. Sub-paragraph (8) 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.
239. Sub-paragraph (9) 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 (10) gives Scottish Water a right of appeal on a question of law, to the Court of Session against a licence being granted. Sub-paragraph (11) establishes the decisions which the Court of Session can make in these cases, and provides that these are final.

Paragraph 2: Conditions of licence

240. **Paragraph 2** makes provisions about the conditions that are to attach to water services licences and sewerage services licences.
241. 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 or expedient. 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.
242. 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.
243. 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.
244. 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.
245. 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.
246. 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).
247. 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.
248. 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).

249. 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 3: Conditions: sustainable development

250. Sub-paragraph (1) of paragraph 3 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 Act. Such conditions will, in line with all other licence conditions, be binding on providers.

Paragraph 4: Transfer of licence

251. **Paragraph 4** establishes the basis on which a water or sewerage services provider can transfer a licence to another person.
252. Sub-paragraph (1) allows in principle for a licence to be transferred from a 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.
253. 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 Act.
254. Sub-paragraph (5) 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 Act.
255. Sub-paragraph (6) makes it an offence to knowingly or recklessly make a false statement in connection with a transfer application (similar to paragraph 1(7) of schedule 2) whilst sub-paragraph (7) prescribes the penalties for such an offence (similar to paragraph 1(8) of that schedule).
256. 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.
257. Sub-paragraph (10) permits prospective transferees to appeal to the Court of Session on a question of law against a decision by the Commission to withhold consent to a transfer.
258. Sub-paragraph (11) 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(10) of schedule 2.

259. Sub-paragraph (12) provides that the decision of the Court of Session in an appeal under sub-paragraphs (10) or (11) shall be final.
260. Sub-paragraph (13) ensures that any attempt to assign a water or sewerage services licence will be a transfer for the purposes of paragraph 4 of schedule 2 to the Act.

Paragraph 5: Powers of entry etc.

261. **Paragraph 5** provides for the Commission to have powers of entry to premises so as to enable it to discharge its duty, under section 8(1) of the Act, 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).
262. 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.
263. 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 6: Powers of entry etc.: further provision

264. 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 7. 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.
265. Sub-paragraphs (3) to (4) provide protection for those whose premises are entered under paragraph 5(2)(a). 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 without reasonable excuse 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 7: Warrants

266. **Paragraph 7** 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 5.
267. 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 5(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.
268. 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 8: Enforcement notices

269. **Paragraph 8** gives the Commission power to issue enforcement notices and describes the process to be followed in issuing these notices.
270. 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).
271. 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.
272. 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.
273. 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 9: Enforcement notices: offences

274. **Paragraph 9** sets out the sanctions for a water or sewerage services provider, who having been served with an enforcement notice, fails to satisfy the requirements of the

notice. Sub-paragraphs (1) and (2) specify that such a failure is an offence and that where a failure recurs subsequently, that too is an offence. Sub-paragraph (3) specifies that the penalties for anyone guilty of these offences are 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 10: Revocation of licences

275. **Paragraph 10** gives the Commission the power to revoke a water or sewerage services licence under certain circumstances.
276. 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.
277. 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 Act 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.
278. Sub-paragraph (6) provides that before revoking a licence the Commission must consider the terms and condition of the licence, the provider's responsibilities to its 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.
279. 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. Sub-paragraph (9) empowers the sheriff to make any order in respect of such an appeal and provides that the decision of the sheriff is final.
280. 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 11: Penalties for contravention of licence

281. **Paragraph 11** 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.
282. 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.
283. 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 under sub-paragraph (2) 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.

284. 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 12: Register of licences

285. **Paragraph 12** 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.
286. 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.