

**EXPLANATORY MEMORANDUM TO THE
WATER SERVICES ETC. (SCOTLAND) ACT 2005 (CONSEQUENTIAL
PROVISIONS AND MODIFICATIONS) ORDER 2005**

2005 No.

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. It contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 This Order makes provisions and modifications as a consequence of the Water Services etc. (Scotland) Act 2005 (asp 3) (“the 2005 Act”). Specifically it provides a right for Scottish Water to require the Water Industry Commission for Scotland (“WIC”) to refer its determination of Scottish Water’s charges under section 29B, or a revised determination or decision not to revise those charges under section 29F, of the Water Industry (Scotland) Act 2002 (asp 3) (“the 2002 Act”) to the Competition Commission. The Order also provides for a right of reference for water or sewerage services providers and Scottish Water against the conditions of a licence granted by the WIC under Part 2 of, and Schedule 2 to, the 2005 Act, or against any modification of those conditions.

2.2 The Order also makes modifications to primary and secondary legislation to insert references to the WIC, the Convener of the Water Customer Consultation Panels, and any member of those Panels.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998 (“the 1998 Act”). The order is, by virtue of Schedule 7 to that Act, subject to affirmative resolution procedure in both Houses of the UK Parliament. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament.

3.2 In this case, it is expedient as a consequence of the 2005 Act to provide a right of reference to the Competition Commission for certain Scottish water and sewerage matters. It is also necessary, as a consequence of the 2005 Act, to make references in primary and secondary legislation to the WIC, and to insert new references to the Convener of the Water Customer Consultation Panels and any member of those Panels, as a result of the new functions conferred on them under the 2005 Act. These provisions would have been outside the legislative competence of the Scottish Parliament and could not therefore have been included in the 2005 Act.

4. Legislative Background

4.1 The office of the Water Industry Commissioner was established by the Water Industry Act 1999, and its functions were restated in the 2002 Act which established Scottish Water. The 2005 Act abolishes that office, creating the WIC which takes on the functions of the former Water Industry Commissioner. The 2005 Act establishes a new licensing regime for

water and sewerage services, and gives the WIC powers to regulate it, including fixing licence conditions. The 2005 Act also revises provisions in the 2002 Act for setting Scottish Water's charges, replacing them with provisions which require the WIC to determine Scottish Water's charges on the basis of policy objectives on charging and investment set by the Scottish Ministers.

4.2 Article 3 of the Order enables Scottish Water and licensed water and sewerage services providers to require the WIC to refer a licence condition, or a modification of a licence condition, or a charge determination, revised charge determination or a decision not to revise a charge determination, to the Competition Commission. On a reference in relation to a licence, the Competition Commission is required to consider whether the matter referred operates, or could be expected to operate, against the public interest and, if so, whether that impact could be remedied. On a reference in relation to a determination, the Competition Commission is required to consider whether a different determination or revised determination should be substituted for that of the WIC's, and to so consider in accordance with specified provisions of the 2002 Act. Article 4 of the Order prescribes the time limit in which the Competition Commission is required to make its report on a reference.

4.3 Article 5 provides for the powers of the Competition Commission in considering a reference, including applying relevant provisions of the Enterprise Act 2002, modified as appropriate, in respect of powers of investigation, and obtaining information. Article 6 requires the Competition Commission to consult on its provisional findings, before issuing its report on the reference under article 3. Under article 7, where the Competition Commission concludes that a different determination or revised determination should be substituted for that of the WIC, it is to set out the modifications by which that could be achieved. Article 7 also provides for notification and publication of the Competition Commission's report, including provision to secure the excision of sensitive matters from the report. Article 8 requires the WIC to make modifications to licence conditions or, as the case maybe, a charge determination or revised determination, having regard to the Competition Commission's report, and for the WIC to give notice of its intended modifications to the Competition Commission. Articles 9 and 10 enable the Competition Commission to veto the modifications proposed by the WIC and replace the WIC's proposed modifications, either in whole or in part, with its own modifications.

4.4 Article 11 introduces the Schedule to the Order. Paragraphs 1 and 2 of Part 1 of the Schedule make provision to amend the House of Commons Disqualification Act 1975 and the Race Relations Act 1976, to insert references to the WIC. Paragraph 3 seeks to amend Paragraph 19A of Schedule 7 to the Competition Act 1998, to extend the definition of "special reference group" in paragraph 19A(9) to the group constituted for the purposes of article 3 of the Order. Paragraph 4 seeks to amend the Utilities Act 2000 to provide that one of the purposes for appointing specialist members of the Competition Commission under that Act is the purpose of the Commission's functions under article 3 or 9 of the Order, and to require the Competition Commission to appoint one or more of the specialist members so appointed to the panel which considers a reference under article 3 or 9.

4.5 Part 2 of the Schedule seeks to amend the Public Interest Disclosure (Prescribed Persons) Order 1999 to add a reference to the WIC and the Convener of the Water Customer Consultation Panels, and any member of those Panels.

5. Extent

This instrument has UK extent other than articles 2 to 10 which extend to Scotland only and the modifications in the Schedule have the same extent as the provision they are modifying.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 are compatible with the Convention rights.

7. Policy background

7.1 The main purpose of the 2005 Act is to strengthen the economic regulation of the water industry in Scotland. It does so by giving the economic regulator, the WIC, a power to determine Scottish Water's charges, rather than simply advising the Scottish Ministers on these. The Government has agreed with the Scottish Executive that it is necessary as a counterbalance to these powers to make the WIC accountable to the Competition Commission, given the Competition Commission's economic expertise and role in overseeing other UK utility regulation. The Order does this by giving Scottish Water a right to refer the WIC's determinations to the Competition Commission to ask whether the Competition Commission, acting in accordance with the duties on the WIC under the 2002 Act, would have reached a different determination or, as the case may be, revised determination, and what modifications should, therefore, be made to the determination or revised determination. Given that matters relating to the Competition Commission are reserved, this policy can only be delivered through an Order made by the UK Parliament.

7.2 The 2005 Act also reforms the role of the economic regulator by replacing the individual regulator, the Water Industry Commissioner, with a Commission, to strengthen this role and increase transparency and accountability. This requires consequential amendments to be made to insert references to the WIC in UK legislation.

7.3 In addition to strengthening the regulation of the industry, Part 2 of the 2005 Act makes provision to establish a licensing regime, introducing retail competition for water and sewerage services for non-domestic customers in Scotland, for example, in the billing and collection of charges. The licensing regime will be administered by the WIC. Again, it is considered necessary to secure the accountability of the WIC's role by providing for a right of referral in the public interest for licensed water and sewerage services providers to the Competition Commission against water and sewerage licence conditions, and any modification of such conditions. This reflects equivalent provision in sections 12 and 17K to 17Q of the Water Industry Act 1991 (as inserted by paragraph 2 of Schedule 4 to the Water Act 2003), which provides for an analogous right of referral against decisions of the Water Services Regulatory Authority (for England and Wales).

7.4 The Order has been prepared in consultation with the Scottish Executive, Competition Commission, Department for Trade and Industry, Department for Environment, Food and Rural Affairs, the WIC and Scottish Water. Each Government Department or body is content with the provisions described at paragraph 4.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it does not impact on business, charities or voluntary bodies. A Regulatory Impact Assessment on the Bill for the 2005 Act was published in June 2004 and can be found on the Scottish Executive website at <http://www.scotland.gov.uk/Topics/Business-Industry/support/15242/19298>.

8.2 The impact of this Order on the public sector will be limited to strengthening the economic regulation of the water industry in Scotland provided for under the 2002 Act and the 2005 Act.

9. Contact

Glenn Preston at the Scotland Office, e-mail: Glenn.Preston@scotland.gsi.gov.uk, can answer any queries regarding the instrument.

Scotland Office, Department for Constitutional Affairs
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