

# Appendix 5:

## The legislative framework

This appendix sets out a number of key statutory provisions that impact on the economic regulation of Scottish Water. The complete Acts are available from HMSO – see <http://www.hmso.gov.uk>.

### The former regime

#### The Water Industry (Scotland) Act 2002

Section 1 of the Water Industry (Scotland) Act 2002 states:

##### 1 Water Industry Commissioner for Scotland

- (1) There is to continue to be a Water Industry Commissioner for Scotland (referred to in this Act as the "Commissioner").
- (2) The Commissioner has the general function of promoting the interests of customers of Scottish Water in relation to the provision of services by it in the exercise of its core functions.
- (3) The Scottish Ministers may, after consulting the Commissioner, give the Commissioner directions of a general or specific character as to the exercise of the Commissioner's functions; and the Commissioner must comply with any such direction.
- (4) Part 1 of schedule 1 makes further provision about the Commissioner.

Section 3 of the Water Industry (Scotland) Act 2002, states:

##### 3 Functions of the Commissioner

- (1) The Commissioner must investigate any complaint made to the Commissioner or a Customer Panel by a current, potential or former customer of Scottish Water as respects any of its core functions.
- (2) A Customer Panel must refer to the Commissioner any such complaint which is made to it.
- (3) The Commissioner need not investigate a complaint under subsection (1) if-
  - (a) the complainer has not pursued the complaint

- with Scottish Water, or
- (b) it appears to the Commissioner that the complaint is vexatious or frivolous.

- (4) The Commissioner 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 Commissioner to be relevant to the subject matter of the complaint.
- (5) Where the Commissioner investigates a complaint referred by a Customer Panel under subsection (2), or decides not to investigate such a complaint, the Commissioner must send to the Panel a report of the investigation or, as the case may be, a statement of the reasons for not investigating the complaint.
- (6) The Commissioner is to advise the Scottish Ministers on any matter which appears to the Commissioner or to them to relate to-
  - (a) the standard of service provided by Scottish Water to its customers, or
  - (b) the manner in which it conducts its relations with its customers or potential or former customers, in the exercise of its core functions.
- (7) The Commissioner has power to do anything which is calculated to facilitate, or is incidental or conducive to, the exercise of the Commissioner's functions.

Section 33 of the Water Industry (Scotland) Act 2002 replaced the now repeated provisions of Section 13 of the 1999 Act, substituting references to the three authorities with references to Scottish Water:

##### 33 Commissioner's advice on charges

- (1) The Commissioner must, when required by the Scottish Ministers, advise them on the matters to be taken into, or left out of, account by Scottish Water in fixing charges in charges schemes.
- (2) The advice is to apply in relation to charges schemes made during such period as the Scottish Ministers may specify (in this section referred to

- as "the period of the advice").
- (3) In preparing his advice the Commissioner shall have regard to-
- (a) the economy, efficiency and effectiveness with which Scottish Water is using its resources in exercising its core functions,
  - (b) the likely cost to Scottish Water, for the period of the advice, of exercising the functions specified in subsection (4),
  - (c) the likely resources, other than income from charges for goods and services, available to Scottish Water for the period of the advice,
  - (d) any guidance issued to Scottish Water by Scottish Ministers, and
  - (e) any directions given under section 44 or 56.
- (4) The functions referred to in subsection (3)(b) are the core functions of Scottish Water so far as consisting of:
- (a) complying with any duty to which it is subject by virtue of any enactment,
  - (b) complying with any such duty to which it will, or is likely to, become subject during the period of the advice,
  - (c) providing services to its customers at the same standard, and protection of the environment at the same level, as those at the time when the advice is given, or at such other standard or level as the Scottish Ministers may specify, and
  - (d) extending, in accordance with requirements made by the Scottish Ministers, the provision of public sewers and supplies of water to premises or areas not in receipt of such provision.
- (5) The Scottish Ministers must, within 3 months of receiving from the Commissioner advice under subsection (1):
- (a) accept the advice, with or without modifications, or
  - (b) reject the advice and substitute their own advice for it.
- (6) Where the Scottish Ministers accept the Commissioner's advice with modifications or reject it, they must give reasons for doing so.
- (7) The Commissioner must publish advice as

accepted, modified or substituted under subsection (5), together with any reasons given under subsection (6).

## The current regime

### The Water Services etc. (Scotland) Act 2005

The 2005 Act introduced a new regulatory scheme including the modification and repeal of certain provisions of the 2002 Act. Key provisions (which are came into force in July 2005), include the following:

#### Part 1 of the Act states:

#### 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 3)) 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 Dissolution of office of Commissioner

The office of Water Industry Commissioner for Scotland dissolved on 30 June 2005.

Section 21 of the Act substitutes the following for section 29 of Water Industry (Scotland) Act 2002:

### 21 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 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 (4) and (5) are complied with.
- (2) The Commission must-
  - (a) exercise its functions under sections 29A, 29B and 29F for the purposes of ensuring that subsections (4) and (5) are complied with,
  - (b) exercise its functions under section 29E for the purposes of ensuring that subsection (5) 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) 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.

- (4) This subsection is complied with if (so far as is consistent with compliance with subsection (5)) a charges scheme gives effect to any statement issued under section 29D.
- (5) 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.
- (4) In preparing a statement under subsection (1), the Scottish Ministers must have regard to Scottish Water's duty under section 51(1).
- (5) 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).
- (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(5) 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.

Section 22 of the Act inserts a new Section 56A into the 2002 Act.

### **22 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."

