



Environment and Rural Development Committee

19th Meeting, 2004

Thursday 9 September 2004

The Committee will meet at 10.00 am in Committee Room 1.

1. **Item in private:** The Committee will consider whether to take item 6 in private.
2. **Declaration of interests:** The new member of the Committee will be invited to declare any relevant interests.
3. **Choice of Deputy Convener:** The Committee will choose a new Deputy Convener.
4. **Water Services etc. (Scotland) Bill:** The Committee will take 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.

5. **Subordinate legislation:** The Committee will consider the following negative instruments—

the Waste Management Licensing Amendment (Scotland) Regulations 2004, (SSI 2004/275); and

the Environmental Protection (Restriction on Use of Lead Shot) (Scotland) Regulations 2004, (SSI 2004/289).

6. **Research into Sustainable Development:** The Committee will consider a draft report.

Tracey Hawe
Clerk to the Committee
Direct Tel: 0131-348-5221

The following papers are attached:

<p><u>Agenda Item 3</u></p> <p>A paper from the Clerk is attached</p>	<p>ERD/S2/04/19/3a</p>
<p><u>Agenda Item 4</u></p> <p>Submission from Dr John Sawkins</p> <p>Submission from Ian Jones</p> <p>Submission from Chartered Institution of Water and Environmental Management</p> <p>Submission from Scottish Council for Development and Industry</p> <p>Submission from Federation of Small Businesses in Scotland</p> <p>Submission from Forum of Private Business, Scotland</p> <p>Submission from Diageo</p> <p>Submission from BP Grangemouth</p> <p>Submission from Ciba Speciality Chemicals</p> <p>Briefing paper from SPICe (<i>for members only</i>)</p> <p>Briefing paper from SPICe on the Water Services etc. (Scotland) Bill</p> <p>Letter from the Minister for Environment and Rural Development on equalities issues in relation to the Bill</p>	<p>ERD/S2/04/19/4a</p> <p>ERD/S2/04/19/4b</p> <p>ERD/S2/04/19/4c</p> <p>ERD/S2/04/19/4d</p> <p>ERD/S2/04/19/4e</p> <p>ERD/S2/04/19/4f</p> <p>ERD/S2/04/19/4g</p> <p>ERD/S2/04/19/4h</p> <p>ERD/S2/04/19/4i</p> <p>ERD/S2/04/19/4j</p> <p>ERD/S2/04/19/4k</p> <p>ERD/S2/04/19/4l</p>
<p><u>Agenda Item 5</u></p> <p>The Waste Management Licensing Amendment (Scotland) Regulations 2004, (SSI 2004/275);</p> <p>Extract from the Subordinate Legislation Committee's 29th Report</p> <p>Letter from the Minister for Environment and Rural Development in relation to the Waste Management Licensing Amendment (Scotland) Regulations 2004, (SSI 2004/275)</p> <p>The Environmental Protection (Restriction on Use of Lead Shot) (Scotland) Regulations 2004, (SSI 2004/289).</p>	<p>ERD/S2/04/19/5a</p> <p>ERD/S2/04/19/5b</p> <p>ERD/S2/04/19/5c</p> <p>ERD/S2/04/19/5d</p>

<p>Extract from the Subordinate Legislation Committee's 30th Report</p> <p>Letter from the Minister for Environment and Rural Development in relation to the Environmental Protection (Restriction of Lead Shot) (Scotland) Regulations 2004 (SSI 2004/289)</p>	<p>ERD/S2/04/19/5e</p> <p>ERD/S2/04/19/5f</p>
<p><u>Agenda Item 6</u></p> <p>Paper from Clerk (<i>for members only</i>)</p> <p>Draft Research Report into Sustainable Development (<i>for members only</i>)</p>	<p>ERD/S2/04/19/6a</p> <p>ERD/S2/04/19/6b</p>

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

CHOICE OF DEPUTY CONVENER

Introduction

This paper is designed to inform Members of the procedure for choosing a Deputy Convener at the first Committee meeting of the 2004/05 Parliamentary year.

Choice of Deputy Convener

On 4 June 2003, the Parliament agreed to motion SM2-107 which resolved that members of the Scottish Green Party are eligible to be chosen as the Deputy Convener of the Environment and Rural Development Committee. The Convener will, following the declaration of interests by then new Scottish Green Party member, invite the nomination of a member of that party for the deputy convenueership. There is no requirement for the nomination to be submitted in advance of the meeting or to be seconded.

Committee Office

September 2004

**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 1989¹.
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.
4. **Alternative Perceptions of Water and Sewerage Services.**
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 use for luxury appliances such as swimming pools, jet hoses etc – implying an economic or commercial model.

¹ Known as OFWAT.

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)².
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 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

² According to the Principles of the Better Regulation Task Force (2000), good regulation should be: proportionate, accountable, consistent, transparent and targeted.

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 duty³ 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,

³ Under the Water Industry (Scotland) Act 2002.

“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

Better Regulation Task Force (2000) Principles of Good Regulation, Cabinet Office, London.

Helm, D. (2003) Memorandum submitted to House of Commons Environment, Food and Rural Affairs Committee, Water Pricing, First Report 2003-2004, HC121, The Stationery Office.

Sawkins, J.W. (2001) The Development of Competition in the English and Welsh Water and Sewerage Industry, Fiscal Studies, vol 22, no 2, pp 189-215.

Scottish Parliament (2004) Finance Committee, 2nd Report, 2004 (Session 2) Report on Scottish Water, Publ: Scottish Parliament, Edinburgh.

**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**

(RESPONSE TO SE CONSULTATION ON THE PROPOSED PROVISIONS IN THE
DRAFT WATER SERVICES (SCOTLAND) BILL)

The Scottish Council for Development and Industry (SCDI) has previously submitted responses to “Managing Change in the Water Industry” in September 2000 and to the consultation, “The Water Services Bill: The Executive’s Proposals in June 2001. SCDI follows those submissions by commenting on the above document.

Thresholds

The consultation on the draft Bill asks, “Should the Bill include provisions for transitional thresholds, and if 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 2000 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 retail 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"¹. 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"² developments in England in relation to common carriage.

¹ Scottish Executive, Draft Water Services (Scotland) Bill - Report on Consultation, p3

² *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.

**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.

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 demonstrates 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.

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August 2004

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.

I am copying this letter to the Clerk to the Environment and Rural Development Committee,
Tracey Hawe.

ROSS FINNIE

Water Services (Scotland) Bill: Equal Opportunities Questions

1. What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

1.1 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.

1.2 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.

1.3 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.

1.4 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.

1.5 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.

1.6 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.

2. Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?

2.1 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.

2.2 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.

2.3 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.

2.4 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.

3. Has the full range of options and their differential impacts on all equality groups been presented?

3.1 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.

4. 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?

4.1 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.

4.2 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.

4.3 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.

5. How have the policy makers demonstrated they have mainstreamed equality?

5.1 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.

6. How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?

6.1 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).

**Subordinate Legislation Committee
Extract of 29th Report, 2004**

The Committee reports to the Parliament as follows—

1. At its meeting on 22nd June the Committee determined that it did not need to draw the attention of the Parliament to the instruments listed in the Annexe to this report on any of the grounds within its remit.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Environment and Rural Development SSI 2004/275

Instruments subject to annulment

The Waste Management Licensing Amendment (Scotland) Regulations 2004 (**SSI 2004/275**)

Introduction

1. The Committee asked the Executive for comments on two points on these Regulations.

Question 1

2. The Committee observed that this instrument is the 17th amendment to the principal Regulations. The Committee asked the Executive what, if any, plans there are for consolidation and remaking on a Scottish-only basis especially as the commercial data bases now reflect changes made by each constituent part of Great Britain, which makes the Regulations particularly difficult to understand.
3. The Executive confirms that it is in the process of reconsidering not only the form of the Regulations but also their substance and that it hopes that a consultation on codification of the measures comprised in the Regulations will be held during 2005. The Executive's reply is reproduced at Appendix 5.

Report 1

4. The Committee readily appreciates that this is, as the Executive states in its response, a technically difficult and complex area of law and that, as a result, consolidation will not be an easy task and will take some time. **The Committee welcomes the assurance that work is in hand on this exercise and draws the attention of the lead committee and the Parliament to the Executive's response as providing the information requested.**

Question 2

5. The Committee again questioned the absence of a Transposition Note to assist the Parliament and its Committees in understanding the Regulations.

6. The Executive repeated that it is not the Executive's policy to prepare such a note on each transposition but that it will bear the Committee's comments carefully in mind for a future measure of this kind.

Report 2

7. The Executive's response is not unexpected. However, the Committee has never understood the Executive's continuing reluctance to produce Transposition Notes with instruments implementing Community obligations. The Committee again observes that such Notes have been required of UK Departments by Westminster for at least the last four years and, indeed, were often provided voluntarily as a matter of course for some time before that. Furthermore, they are surely useful to Departments themselves in ensuring that EC legislation is properly implemented.

8. The Committee therefore reports the instrument to the lead committee and the Parliament on the grounds that it was not accompanied by a Transposition Note.

Appendix 5

THE WASTE MANAGEMENT LICENSING AMENDMENT (SCOTLAND) REGULATIONS 2004 (SSI 2004/275)

In its letter of 15 June to Catherine Hodgson the Committee asked the Executive for an explanation of the following matters:

1. The Committee observes that this instrument is the 17th amendment to the principal Regulations. The Committee asks the Executive what if any plans there are for consolidation and remaking on a Scottish only basis especially as the commercial data bases now reflect changes made by each constituent part of Great Britain, which makes the Regulations particularly difficult to understand.
2. The Committee also notes that there was no Transposition Note to assist in understanding the Regulations.

The Scottish Executive responds as follows:

1. The Department is already in the course of considering its approach to these Regulations for the future. It recognises the need to reconsider not only the form of the Regulations but also their substance. As the Committee will appreciate this is a technically difficult area which will require careful thought. It is currently hoped that a consultation on codification of the measures comprised in the Regulations will be held during 2005. It will be necessary for these Regulations to be amended again in the meantime, however, in order to meet Community obligations.
2. The Department notes the Committee's comments and regrets any inconvenience which the absence of a transposition note may have caused. As the Committee is aware it is not the Executive's policy to prepare such a note on each transposition but the Department will bear the Committee's comments carefully in mind for a future measure of this kind.

Scottish Executive Environment and Rural Affairs Department

17 June 2004

**Subordinate Legislation Committee
Extract of 30th Report, 2004**

The Committee reports to the Parliament as follows—

1. At its meeting on 29th June the Committee determined that it did not need to draw the attention of the Parliament to the instruments listed in the Annexe to this report on any of the grounds within its remit.
2. The report is addressed to the following committee as the lead committee for the instrument specified:

Environment and Rural Development SSI 2004/289

Instruments subject to annulment

The Environmental Protection (Restriction on Use of Lead Shot) Scotland Regulations 2004 (**SSI 2004/289**)

Introduction

1. The Committee referred a large number of points on these Regulations including serious matters of *vires* to the Executive for comment. The Committee considered the Executive's response in detail but agreed that it fails properly to address any of the Committee's points and suggests an insufficiently careful attitude to enabling powers that is a matter of some concern to the Committee. This is particularly so as the issues arising are not simply technical detail but important matters of civil liberties.

Question 1

2. The Executive was asked to confirm whether notice of the making of the Regulations was published in the London Gazette as well as in the Edinburgh Gazette as appeared to the Committee to be required by subsection (6)(b) of the enabling power (section 140 of the Environmental Protection Act 1990).

3. The Executive indicated that notice of the Regulations was published only in the Edinburgh Gazette. The Executive is of the view that the first "and" in section 140(6)(b) of the Environmental Protection Act 1990 ("the 1990 Act") is disjunctive and that the duty imposed on Scottish Ministers by that provision is to be interpreted as requiring publication of a notice in the Edinburgh Gazette where the Regulations extend to Scotland only. The Executive's reply is attached as an Appendix to this extract from the Committee's report.

Report 1

4. The Committee cannot agree that the first "and" in section 140(6)(b) is disjunctive. In the Committee's view, the word "and", in the context in which it appears, clearly requires publication in both Gazettes whether or not the Regulations apply to Scotland only. Section 140(6)(b) can be contrasted with a similar provision in section 6(2) of the Plant Health Act 1967 where the "and" is clearly disjunctive.

5. It also seems to the Committee that, in the case of regulations under section 140 of the 1990 Act, there may well be good policy reasons for publishing in both Gazettes even if the extent of the provisions is territorially limited.

6. As the purpose of the notice is to invite representations on the proposals for the Regulations this is not a minor point. If the notice has not been published as required, then it appears to the Committee that the Regulations contain a potentially fatal flaw due to failure to follow the required statutory procedure. The Committee reports the instrument to the lead committee and the Parliament on the grounds that there is a doubt as to whether they are *intra vires* on this ground.

Question 2

7. The Committee asked the Executive to explain what power authorises the conferral of powers and duties on the police under regulations 5 and 6. The enabling power does not appear to permit provision of this nature to be made in the Regulations. The Committee acknowledges that subsection (3)(c) of section 140 provides that the Regulations may confer powers corresponding to those conferred by section 108 of the Environment Act 1995 on “persons authorised for any purpose of the regulations by the Scottish Ministers or any local or other authority”. However, the power seems to be silent on conferring powers on the police. The powers are to be conferred on authorised persons.

8. The Executive considers that section 140(3)(c) of the 1990 Act allows Ministers to authorise constables to exercise powers as specified in the Regulations and in particular those set out in regulations 5 and 6. The effect of regulation 5 is to directly authorise constables in relation to those functions. Although the expression “authorise” is not used it is clear that that is the effect of the provision.

Report 2

9. The Committee cannot accept the Executive’s argument. The Committee reads the enabling power not as saying that the Regulations may themselves authorise persons to carry out certain functions but that the Regulations may confer powers on the Scottish Ministers or any local or other authority to authorise persons to carry out certain functions. That such persons must be other than the police is evidenced by the provisions of section 108(4)(b)(i) of the Environment Act 1995, attracted to section 140 of the 1990 Act by section 140(3)(b), which specifically provide that an authorised person can be accompanied by a constable for certain purposes.

10. The Committee also notes that the Regulations make no provision in respect of failure to comply with any requirements under regulation 5. This appears to be on the premise that the general offence provisions in the Police (Scotland) Act 1967 etc. in relation to obstruction would apply. Subsection (10) of the enabling power imposes limits on the penalties that can be imposed for breach of the Regulations. Although the Regulations do not themselves directly impose penalties for breach of regulation 5, it could be argued that they do so by implication.

11. It is thought that the sanctions imposed under the 1967 Act do not exceed the limits provided for in the parent Act. However, it is not unknown for actions

preventing the police from carrying out their duties, such as running away, to be charged as attempt to pervert the course of justice, which is a common law crime for which the maximum penalty is life imprisonment.

12. Accordingly, by conferring powers on the police and thereby arguably attracting common law penalties, as no other specific sanctions are provided, the Regulations appear to the Committee to be of doubtful *vires* for this reason also.

13. Whilst it is true that it is not uncommon for some statutes to confer specific enforcement powers on the police, the Committee can see nothing in the enabling Act for the present Regulations that confers authority for such provision to be included in these Regulations.

14. Accordingly, there is no doubt in the Committee's mind that, in purporting to confer enforcement powers on the police, the Regulations fail to respect the enabling power and to that extent there are serious doubts as to whether they are *intra vires*. The Committee therefore reports the Regulations to the lead committee on that ground.

15. The Committee observes that the police do, in any event, have general powers of enforcement including powers of search and entry both at common law and statute (e.g. the Police (Scotland) Act 1967) as part of their general functions of investigating and preventing crime. While the powers purported to be conferred by the Regulations may give additional powers in this respect to the police, their normal powers subsist irrespective of the Regulations.

Question 3

16. The Committee asked the Executive to explain what power authorises regulation 5(1)(a) as there seems to be nothing in section 108 that would authorise powers to stop and search to be provided for under the Regulations.

17. The Executive considers that section 140(3)(c), which allows conferral of powers "corresponding to" those set out in section 108 of the Environment Act 1995 ("the 1995 Act"), is sufficiently broad in nature to permit the conferral of powers to stop and search persons in investigating any suspected offence set out in regulation 7.

18. The Executive admits that section 108 appears to be drafted principally with the search of premises in mind. However, the offence in these Regulations relates to use of lead shot by an individual. It therefore appears to the Executive appropriate in the context of these Regulations to provide corresponding powers to search an individual since it is in relation to the individual that evidence will be found in that context. In addition, the Executive refers the Committee to the supplemental power in section 140(3)(d), which would also enable conferral of such functions.

Report 3

19. The Committee finds this response very surprising. In its view, a power to stop and search cannot be considered as in any way "corresponding to" a search of premises. Moreover, the Executive appears to admit that the scope of the enabling powers is insufficient for the policy intention but has nevertheless drafted the Regulations to meet that intention.

20. The Committee does not accept that section 140(3)(d), which provides in the usual way that regulations can include such other incidental supplemental and transitional provisions as the Ministers consider appropriate, would in any way confer sufficient authority for regulations to confer the functions in question. Case law is quite clear that the powers conferred by such a power are very limited and certainly would not extend to making provision of the type contained in regulations 5 and 6 which amount, in effect, to rewriting the provisions of the parent Act.

21. No doubt in policy terms it might be considered more attractive in the context of these Regulations to provide for a power to stop and search. However, it is the Committee's clear view that this does not appear to be allowed by the enabling Act. As the Executive itself admits, the powers provided for in the Act are concerned with searches of premises. In the Committee's view, the Regulations must therefore be restricted to searches of premises however administratively inconvenient that may be.

22. A power to stop and search is not in any way a minor point of detail but both controversial and a severe impingement on civil liberties. For this reason, the decision of the Executive to make legislation to this effect despite the apparently acknowledged lack of *vires* causes the Committee serious concern.

23. It is therefore the Committee's view that not only are these provisions of very doubtful *vires* but they may also breach Convention rights and in particular Article 8 of the ECHR (the right to privacy). Powers of search do not automatically breach Article 8, provided the conditions in Article 8.2 are fulfilled. One such condition is that the exercise of the right must be "in accordance with the law". **If, as the Committee believes, these provisions are *ultra vires* then they are *ipso facto* not in accordance with the law and the Regulations may therefore also be incompatible with Convention Rights and thus raise a devolution issue.**

24. The Committee therefore draws the Regulations to the attention of the lead committee and the Parliament on these grounds also.

25. The Committee observes that neither the English nor the Welsh Regulations (SI 1999/2170 and SI 2002/1730 respectively) which were made for purposes similar to these Regulations include provisions similar to regulations 5 and 6. By contrast, they adhere closely to the powers conferred by the 1990 Act as read with section 108 and Schedule 18 to the 1995 Act. This undermines any arguments based on proportionality that might be advanced by the Executive and adds further weight to the view that the Regulations breach Article 8 ECHR (by failing to meet the "necessary in a democratic society" test in Article 8.2). If a power to stop and search was not considered to be appropriate elsewhere in the UK, it is not clear to the Committee how can it be said to be necessary in Scotland.

26. The Committee further observes that the consequences of the failure to draft within the limits of the enabling power could have serious practical consequences. Not only is it possible that the admissibility of any evidence gathered as a result of any search would be called into question but any persons exercising the powers might lay themselves open to legal action based on breach of Article 8 of the ECHR.

Question 4

27. The Committee asked the Executive to explain why the Regulations do not reflect all the provisions of Schedule 18 to the Environmental Protection Act 1990 which are attracted by section 108 of that Act. The Committee asked the Executive for comment on how this may affect the *vires* of the provisions of regulation 5 other than paragraph (1)(a).

28. The Executive states in response that section 140(3)(c) allows the conferral of functions “corresponding to” those in section 108 of the 1995 Act. The Executive does not consider that this power requires the application of section 108 as it stands, but rather that it permits the application of the same or similar powers, depending on the purpose of the Regulations being made. In this case the powers given to constables have been tailored to the limited circumstances of the use being prohibited. In so doing, corresponding provisions have been provided for only those parts of section 108 and Schedule 18 as are required to provide proper enforcement of the prohibition in the Regulations.

Report 4

29. The Committee refers to its comments above on point 3 which are equally relevant to this point. It is true that not all the provisions of Schedule 18 are relevant to the exercise of powers (other than stop and search) appropriate to the purpose of these Regulations. However, the majority of them do appear to be applicable (for example paragraph 2 regarding applications for warrants to search premises). It seems to the Committee instructive that both the English and Welsh have included most of the provisions of Schedule 18 in their Regulations.

30. **It therefore appears to the Committee that, in so far as the present Regulations do not follow this example, there is a doubt as to whether they are *intra vires* on this ground also and the Committee so reports.**

Question 5

31. The Executive was asked to explain the purpose of regulation 5(6).

32. According to the Executive the purpose of regulation 5(6) is to clarify that when the powers specified in regulation 5(5) are exercised in pursuance of a warrant they must be exercised in a manner and to an extent which conforms to the terms of the warrant.

Report 5

33. It appears to the Committee that regulation 5(6) simply states the obvious. **As the provision seems to serve no purpose the Regulations are defectively drafted for that reason. The Committee therefore reports them on that ground.**

Question 6

34. The Committee asked the Executive to explain the purpose of regulation 8(3). Section 221 of the Criminal Procedure (Scotland) Act 1995 applies as a matter of course (see section 143(2) of that Act) and does not seem to need to be attracted by the Regulations. The Committee also asked the Executive for comment on the *vires*

for the regulation, given that it refers to powers conferred on the police by or under regulation 5.

35. The Executive accepts that the reference in regulation 8(3) to section 221 of the Criminal Procedure (Scotland) Act 1995 is not strictly necessary. It is provided to assist the reader and to make it clear that section 221 of the 1995 Act applies to these regulations. This approach has been used in other enactments such as section 47(3) of the Nature Conservation (Scotland) Act 2004. The Executive considers that this is a supplemental provision permitted by section 140(3)(d) of the 1990 Act.

Report 6

36. The Committee makes no comment on the drafting of the Nature Conservation (Scotland) Act 2004 except to observe that in its view, the purpose of section 47(3) of that Act is not as clear as it could be.

37. The Committee is aware that section 221 has been attracted in some primary legislation but for a specific purpose as, for example, in section 14(2)(h) of the Proceeds of Crime (Scotland) Act 1995 which applied provisions relating to recovery of fines for the purposes of recovery of sums due under confiscation orders. There does not seem to be any such purpose here.

38. Furthermore, it appears to the Committee that, in so far as the provision appears to apply the provisions of an Act of Parliament that makes horizontal provision in relation to the payment of fines by corporations and the like, there is a doubt as to whether it is *intra vires*. Again it does not seem to the Committee that the powers conferred by section 140(3)(b) of the enabling Act would be sufficient for such a purpose in the context of these Regulations. Fortunately, in this case as the provision is effectively meaningless for the reasons given below the question of *vires* is technical only.

39. It may be that the drafter wished to provide that fines payable by bodies corporate and other associations as such should be recovered by civil diligence. There is, however, no need for the Regulations to make such provision (even if it were competent) as section 143(2) of the Criminal Procedure (Scotland) Act 1995 already contains such a provision. Section 221 simply provides the procedure for recovery by civil diligence and, as the Executive accepts, would apply automatically.

40. Indeed, the wording of regulation 8(3) seems to the Committee doubly misleading in that it seems to suggest that authority to recover fines by civil diligence is conferred by section 221 when, as mentioned above, this is not the case. Section 221 prescribes the procedure. It does not authorise recovery by civil diligence. **The Committee therefore reports the Regulations on the grounds of defective drafting for the above reason.**

Question 7

41. The Committee asked the Executive to explain on what basis it is considered that the reference to the Ramsar Convention will cover amendments of that Convention from time to time as stated in the second paragraph of the Explanatory Note.

42. The Executive accepts that the Explanatory Note is not well expressed on this point. The reference to the Ramsar Convention at regulation 2 is not intended to include any future amendments to that Convention but rather to refer to those amendments which are specified in footnote (c) on page 1 of the Regulations. The Executive will amend the Explanatory Note before publication to reflect that position.

Report 7

43. **The Committee reports the Regulations on the grounds of defective drafting of the Explanatory Note acknowledged by the Executive.** As the Executive Note is not part of the instrument it can be amended without the need for a new SSI.

Question 8

44. The Committee asked the Executive why the reference in regulation 2 to the Ramsar Convention does not include the words “as amended” as section 20(2) of the Interpretation Act 1978 extends only to domestic legislation and not to international instruments (or for that matter to EC legislation).

45. The Executive agrees that it may have been clearer to add the words “as amended” to the definition of the Ramsar Convention in the body of the Regulations. However, it takes the view that the footnote to that definition makes it clear that the intention is to refer to the Convention as amended at the time the Regulations were made.

Report 8

46. The Committee notes that, as indicated above, it is accepted legislative practice in statutory instruments to add the words “as amended” where relevant in the text of instruments that refer to instruments other than domestic legislation. **In so far as the Regulations do not follow this practice they fail to comply with proper legislative practice and the Committee reports them on that ground.**

Question 9

47. The Committee asked the Executive why the Explanatory Note does not indicate where a copy of the Ramsar Convention can be obtained. The Executive agrees that it may have been helpful to include in the Explanatory Note an indication as to where a copy of the Convention can be obtained. Again, the Executive undertakes to ensure that the Explanatory Note is amended before publication to correct this omission. The Executive intends to issue guidance on the Regulations, which will include information as to where a copy of the Convention may be obtained.

Report 9

48. Again, the guidance on the drafting of statutory instruments states that an indication should be given in the Explanatory Note or in a footnote of where copies of documents referred to in the instrument can be obtained. **Accordingly, the Committee reports the Regulations on the grounds that they fail to comply with proper legislative practice in this respect also.**

29th June 2004

Appendix

THE ENVIRONMENTAL PROTECTION (RESTRICTION ON USE OF LEAD SHOT) SCOTLAND REGULATIONS 2004 (SSI 2004/289) (“the Regulations”)

In its letter of 22nd June the Committee asked the Executive for an explanation of the following matters -

- “1. The Committee asks the Executive to confirm whether notice of the making of the Regulations was published in the London Gazette as well as in the Edinburgh Gazette as required by subsection (6)(b) of the enabling power.
2. The Committee asks the Executive to explain what power authorises the conferral of powers and duties on the police under regulations 5 and 6. The enabling power does not appear to permit provision of this nature to be made in the Regulations. The Committee acknowledges that subsection (3)(c) provides that the regulations may confer powers corresponding to those conferred by section 108 of the Environment Act 1995 on persons authorised for any purpose of the regulations by the Scottish Ministers or any local or other authority. However, the power seems to be silent on conferring powers on the police. The powers are to be conferred on authorised persons.
3. The Committee asks the Executive to explain what power authorises regulation 5(1)(a) as there seems to be nothing in section 108 that would authorise powers to stop and search to be provided for under the regulations.
4. The Committee asks the Executive to explain why the Regulations do not reflect all the provisions of Schedule 18 to the Environmental Protection Act 1990 which are attracted by section 108 of that Act. The Committee asks the Executive for comment on how this may affect the vires of the provisions of regulation 5 other than paragraph (1)(a).
5. The Committee asks the Executive to explain the purpose of regulation 5(6)
6. The Committee ask the Executive to explain the purpose of regulation 8(3). Section 221 of the 1995 Act applies as a matter of course and does not seem to need to be attracted by the Regulations. The Committee also asks the Executive for comment on the vires for the regulation given that it refers to powers conferred on the police by or under regulation 5.
7. The Committee asks the Executive to explain on what basis it is considered that the reference to the Ramsar Convention will cover amendments of that Convention from time to time as stated in the second paragraph of the Explanatory Note.

8. The Committee asks the Executive why the reference in regulation 2 to the Ramsar Convention does not include the words “as amended” as section 20(2) of the Interpretation Act 1978 extends only to domestic legislation and not to international instruments (or for that matter to EC legislation);

9. The Committee asks the Executive why the Explanatory Note does not indicate where a copy of the Ramsar Convention can be obtained.”

The Scottish Executive responds as follows:

1. Notice of the Regulations was published only in the Edinburgh Gazette. The Executive is of the view that the first “and” in section 140(6)(b) of the Environmental Protection Act 1990 (“the 1990 Act”) is disjunctive and that the duty imposed on Scottish Ministers by that provision is to be interpreted as requiring publication of a notice in the Edinburgh Gazette where the Regulations extend to Scotland only.

2. The Executive considers that section 140(3)(c) of the 1990 Act allows Ministers to authorise constables to exercise powers as specified in the Regulations and in particular those set out in regulations 5 and 6. The effect of regulation 5 is to directly authorise constables in relation to those functions. Although the expression “authorise” is not used it is clear that that is the effect of the provision.

3. The Executive considers that section 140(3)(c), which allows conferral of powers “corresponding to” those set out in section 108 of the Environment Act 1995 (“the 1995 Act”), is sufficiently broad in nature to permit the conferral of powers to stop and search persons in investigating any suspected offence set out in regulation 7. Section 108 appears to be drafted principally with the search of premises in mind. However, the offence in these regulations relates to use of lead shot by an individual. It therefore appears to the Executive appropriate in the context of these regulations to provide corresponding powers to search an individual since it is in relation to the individual that evidence will be found in that context. In addition, the Executive refers the Committee to the supplemental power in section 140(3)(d), which would also enable conferral of such functions.

4. Section 140(3)(c) allows the conferral of functions “corresponding to” those in section 108 of the 1995 Act. The Executive does not consider that this power requires the application of section 108 as it stands, but rather that it permits the application of the same or similar powers, depending on the purpose of the Regulations being made. In this case the powers given to constables have been tailored to the limited circumstances of the use being prohibited. In so doing, corresponding provisions have been provided for only those parts of section 108 and Schedule 18 as are required to provide proper enforcement of the prohibition in the Regulations.

5. The purpose of regulation 5(6) is to clarify that when the powers specified in regulation 5(5) are exercised in pursuance of a warrant they must be exercised in a manner and to an extent which conforms to the terms of the warrant.

6. Whilst the Executive accepts that the reference in regulation 8(3) to section 221 of the Criminal Procedure (Scotland) Act 1995 is not strictly necessary, it is provided to assist the reader and to make it clear that section 221 of the 1995 Act applies to these regulations. This approach has been used in other enactments such as section 47(3) of the Nature Conservation (Scotland) Act 2004. The Executive consider that this is a supplemental provision permitted by section 140(3)(d) of the 1990 Act.

7. The Executive accepts that the Explanatory Note is not well expressed on this point. The reference to the Ramsar Convention at regulation 2 is not intended to include any future amendments to that Convention but rather to refer to those amendments which are specified in footnote (c) on page 1 of the Regulations. The Executive will amend the Explanatory Note before publication to reflect that position.

8. The Executive agrees that it may have been clearer to add the words “as amended” to the definition of the Ramsar Convention in the body of the Regulations. However, it takes the view that the footnote to that definition makes it clear that the intention is to refer to the Convention as amended at the time the Regulations were made.

9. The Executive agrees that it may have been helpful to include in the Explanatory Note an indication as to where a copy of the Ramsar Convention can be obtained. Again the Executive will ensure that the Explanatory Note is amended before publication to correct this omission. The Committee may also wish to note that the Executive will issue guidance on the Regulations, which will include information as to where a copy of the Convention may be obtained.

Scottish Executive Environment and Rural Affairs Department

24th June 2004