COUNTRY REPORT: UNITED KINGDOM
Reflections on Scotland's New Water Resources Bill

SARAH HENDRY*

Recent Developments

Scotland is one of four national jurisdictions within the United Kingdom (UK), with its own legal system, court structure and private law regime (since the *Treaty and Act of Union* (1707)). In 1999, a "devolved" Scottish Parliament was established under the *Scotland Act* (1998), with responsibility for *inter alia* property law, the environment and water, and implementation of relevant EU directives. Certain matters including taxation and competition were however reserved to the Westminster (UK) Parliament. The new Parliament provided an excellent opportunity to address many neglected areas of domestic law, and it very quickly showed its interest in water, with a wide-ranging inquiry (*Scottish Parliament Transport and Environment Committee Report* No.9 of 2001) followed by a suite of legislative reforms that are discussed below. Currently, Parliament is considering the *Water Resources Bill*[1] (2012), which if enacted will comprise both a high level policy initiative and a series of specific measures to better manage the resource. This Country Report will examine the *Water Resources Bill* and its surrounding policy agenda in the context of the reforms already enacted in the last 10 years.

The Legislative Context

As noted, since devolution Scotland has enacted a succession of water acts. The *Water Industry (Scotland) Act* (2002) established Scottish Water (SW) as a single national public corporation for the supply of drinking water and waste-water services, replacing three regional authorities. The *Water Environment and Water Services (Scotland) Act* (2003) transposed the *EU Water Framework Directive* (2000/60/EC, (*WFD*)) established a process for river basin management and enabled new water use regulations. The *Water Services (Scotland) Act* (2005) established the economic regulator for SW and introduced some

* Lecturer, IHP-HELP Centre for Water Law, Policy and Science, University of Dundee, Scotland. Email: s.m.hendry@dundee.ac.uk.

[1] The *Water Resources (Scotland) Bill* No.15 2012 and all associated documentation are available at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/52620.aspx.

limited competition in the commercial sector for retail services. Amongst the many secondary rules enacted, the most important have been the *Water Environment (Controlled Activities) (Scotland) Regulations* (now SSI 2011/209) that brought in new integrated water use licences, covering abstractions, discharges, dams and river works. Some of these rules (especially comprehensive abstraction controls) were required by the *WFD* but in addition, the opportunity was taken to reform, update and consolidate much pre-existing legislation. In addition we might note the introduction of a series of technical directions, applicable to the regulator, which define and implement "good" water quality under the *WFD*. These establish conditions, limits and values for all the elements of the *WFD* system for ecological quality – flow, morphological alterations, chemical and physic-chemical standards, as well as the biological assessment at the core of ecological quality. The attainment of good status is a major preoccupation for most EU member states in terms of water management currently, and Scotland has been consistently proactive, transposing the *WFD* many months in advance of the deadline, and setting very ambitious goals for the second and third river basin management plans, whereby 97% of water bodies should be at "good" status by 2027. So it is perhaps surprising that the Scottish Government, and Parliament, are still inclined to enact more legislation relating to water, and this certainly provides evidence of political commitment and engagement with a water agenda.

The "Hydro Nation" and the Water Resources Bill

The high-level policy initiative currently being promoted by the Scottish Government is known as the "Hydro Nation" (Scottish Government (2010),[2] (2012)[3]). The Government has consulted twice around this concept, designed to maximise the uses and benefits of the water resource in Scotland. Principally, the Hydro Nation looks at how Scotland could best use water resources to contribute to the Government's policy goals, including sustainable economic development and the climate/carbon agenda, and how Scotland could assist other countries in the governance and management of their water resources and water services. In order to take this initiative forward, the *Water Resources Bill* proposes *inter alia* a new duty on Ministers to "develop the value" of the water resource, and new powers and duties on the public water services provider, Scottish Water, to supplement this. In addition the Bill includes provision on a number of areas - maintenance for septic tanks, management of priority substances, catchment protection and others – which will contribute to the better management of the resource and amend the existing law.

[2] Scottish Government, *Building a Hydro Nation* (2010), available at www.scotland.gov.uk.
[3] Scottish Government, *Scotland the Hydro Nation: Prospectus and Proposals for Legislation* (2012), available at www.scotland.gov.uk.

Scotland's Water and Scottish Water

Scotland is a water rich nation. With a population of just over 5 million and population density of 57/km^2, Scotland has approximately 100,000 km of rivers, 150 lochs with a surface area of over 1km and nearly 12,000 km of coastline. Annual rainfall averages 1431 mm/annum and exploitable surface water resources are equivalent to 16,000m^2 per person per year, well in excess of the European average of 4600m^2. Although the population distribution and coastal variations may mean water shortages in some areas at some times, Scotland is blessed with an abundant resource.

Water contributes to the Scottish economy in many different ways, including forming part of the natural resources that support tourism; as a key input to fisheries, whisky and other agricultural and food produce; and as a source of hydro power. Furthermore, in Scotland, there is a single public sector provider for almost all water and sewerage services, Scottish Water, set up in 2002. Scottish Water is a public corporation but regulated using a similar model to the (fully divested) English water and sewerage companies, and has its efficiency and effectiveness benchmarked against those providers. It has made significant improvements in efficiency and customer service in the 10 years of its existence and is in the upper quartile of performance across the UK, as measured by the economic regulator the Water Industry Commission for Scotland (WICS). Our experience has been that in terms of service delivery and achieving social and environmental goals, it is the regulation, not the ownership of the assets, which is important.

Scottish Water is seen as a key player in the Hydro Nation agenda, and as contributing in a number of different ways. One is as a model of governance in the water services sector; another is its role in the Scottish Government's climate change and carbon agenda.

Critical Analysis of the Hydro Nation and the Water Resources Bill 2012

Scottish Water and Governance

Scottish Water offers one example of a successful model of governance for water services in the public sector. Most water services are, and will continue to be, provided by the public sector, with a mix of private sector participation as appropriate to the jurisdiction; the major concessions of the 1990s will be less common and therefore it will be helpful to identify good practice examples of public sector delivery. In the "privatising" years of market liberalisation

and the Washington consensus, there was much focus on the economic regulation of private sector participants, rather neglecting the needs of the public sector. Because England and Wales pursued the route of full divestiture of water services (*Water Act* (1989)) and set up a complex model for economic regulation for the new water and sewerage companies, it was later possible to adopt a similar model of price control in Scotland. These price controls are set by the WICS within policy objectives and principles of charging set by the Ministers, and enforceable against Scottish Water under the *Water Services (Scotland) Act* (2005). The policy objectives and principles include both social and environmental goals as well as the necessary service standards (drinking water quality, pressure, etc., and including customer service), taking a holistic approach and ensuring that all these requirements should be met at a price that is affordable to the poorest. The Government considers, and this author would agree, that there is something of interest here to others, who may also be seeking a better way of regulating the public sector. This is not to say that every aspect of Scottish Water's governance arrangements would be appropriate to another jurisdiction; for example, a single national public corporation is unlikely to be feasible in a country with a large population. But it is very helpful to have an example of a public sector provider that is working well and meeting all the policy goals. Scottish Water itself has established a subsidiary, Scottish Water International, to assist with outreach work in this regard and there have been some new innovations in governance arrangements. Most recently, we have seen the establishment of the Customer Forum, on which this author sits; a new body which will work with the WICS, Consumer Focus Scotland (which has an advocacy role in water services under the 2005 Act) and Scottish Water to better reflect customer priorities around the discretionary elements of Scottish Water's investment programme (ie, those which are not driven by environmental law or other mandatory drivers).

"Developing the Value" of the Water Resource

Insofar as the "Hydro Nation" has been given legislative expression, this centres on the duty to develop the value of the resource. This duty is placed on Ministers, and has not been without criticism, especially as there is a definition of "value" in this regard which specifies (only) that value may have "*economic and other benefit*". It has been suggested in responses to the Government consultations and in evidence to the Parliamentary Committee, that any such development duty should be counterbalanced by (at minimum) specifying that "environmental and social" benefits are part of defining "value". Alternative suggestions included enacting a duty to take an ecosystems approach, or giving statutory recognition to the inherent value of water for its own sake. It remains to be seen whether the Parliament will consider any of these changes, as the Bill is still at its first stage. The issue

has been complicated by earlier suggestions by Ministers and civil servants that the Government is considering the bulk sale of water to England, as one way of realising value – despite the technical, environmental and political reasons that would tend to militate against such a proposal. Indeed the Bill includes a whole new regime for bulk abstractions (in addition to the controls that already exist) that had not been consulted upon and has also attracted some critical comment.

In addition, Scottish Water has new functions in this regard; a specific new power to assist in that development, along with a duty to develop the value of its own assets and expertise, and a duty to promote the use of its assets for the generation of renewable energy. Both of these duties are qualified to the extent that they are not inconsistent with the exercise of Scottish Water's core functions (ie the provision of water and sewerage services to most of the population). In themselves these seem unobjectionable, as any entity would surely wish to maximise their assets and expertise; again though the precise meaning and intent comes back to what is meant by developing value in this context. The Government's view is that this will comprise of all the activities set out in the two Hydro Nation consultations, to be expanded on and followed through over the next couple of years – industrial innovation, knowledge transfer (from industry and of a governance agenda), further development of academic expertise, and an international development element, taken forward through new as well as existing institutions.

The Water Resources Bill – Parts 4 -7

The remaining Parts of the Bill are more technical and perhaps less exciting, but certainly important and useful, and protective of the water environment.

Scottish Water has new powers to manage catchments upstream, to improve raw water quality and reduce downstream treatment. These include powers of entry, monitoring and inspection and will be in addition to the monitoring carried out by the environmental regulator, the Scottish Environment Protection Agency (SEPA). One of the benefits of having a vertically integrated water services provider, who carries out all functions from abstraction of the bulk supply, through treatment and distribution, removal of waste water and its treatment and discharge back into the water environment, is that the service provider has a real engagement with the water cycle and can play a major role in catchment management; there is increasing evidence of global good practice in such initiatives (such as the New York Catskills). It will be important to have good coordination between SW's activities here and the existing monitoring and other catchment work carried out by SEPA, especially as

Scotland has recently introduced new regulations controlling diffuse rural pollution; it is of course necessary to avoid incentivising land managers to do things that they should already be required to do by law. Our Centre's evidence to the Parliamentary Committee suggested that there should be a duty to work in partnership around catchment management, and also a general duty in relation to educating water users (not just applicable to the catchment protection provisions).

There are also new provisions relating to sewers and their contents. If enacted, it will be possible to require industrial operators to eliminate or diminish "priority substances" before they are discharged as trade effluent. This is good in principle, as it will reduce the costs of treatment and the need to make special provision for specific difficult substances. It looks ahead to the review of the *Priority Substances Directive* (2008/105/EEC, Annex X to the WFD and COM (2011) 876). It does leave open the possibility that if operators install their own pre-treatment then revenue to SW from trade effluents will fall, and it does not address the possibility that some priority substances may emanate from private houses or other sources of domestic sewage. Two of the substances affected by proposed revisions to the *Priority Substances Directive* are contained in ibuprofen and in the contraceptive pill; unfortunately these are substances (and purposes) unlikely to respond to an education campaign and impractical for prohibition. There are also new offences and penalties for the passage of fats, grease and oils into sewers, mainly affecting trade premises (although there is a general offence applying to all users of the system). There will always be difficulties around identifying the precise source of damaging substances in sewers, and this is another area where more emphasis on water education by SW might be desirable.

There is also much needed new provision for the maintenance of commonly owned private sewage treatment works (generally, septic tanks). It enables any one owner (or more than one, of course, but any one is empowered) to carry out the works and then recover the costs from the others. Notice must be given in writing, with certain specified information, and the recipient has 28 days to apply for a review to the Sheriff; the notice lasts for 12 months. Liability to pay, and the right to enforce, are personal and do not lapse when the property is sold. In the policy memorandum, it is stated that a more comprehensive scheme, such as empowering SW to taking over such works, is not acceptable as it would interfere with property rights. It seems likely that cost is a bigger factor here; most owners of a malfunctioning common septic tank would probably be delighted if the public authority took it over. If there is resistance from a large proportion of owners, then much will depend on one person being willing to do the administration, outlay the cost and then go to court to recover payment, so it is only a partial solution. It will though be very effective for the most common

situation, where one part-owner is unwilling to participate, and therefore the others will need to pay (only) a proportion of that one share of the cost.

Finally, the Bill includes some new provisions on deemed contracts for commercial supply (where supply is provided but no agreement is in place) and a new regime for water shortage orders, tying into rules on emergency abstractions.

Conclusions and Future Research Agendas

In conclusion, the *Water Resources Bill* makes some useful changes to the current rules for managing water resources. In terms of future policy agendas however, it is the "Hydro Nation" part that is of most interest. This brings together work in water, international development and climate change/carbon management and it is excellent news for those working in water that the Government here has chosen to focus on water as a way of working across these policy areas. It is hoped that there will be opportunities in terms of governance agendas as well as export of expertise and technology that will raise Scotland's profile in terms of water management. Scotland has expertise, and potential models for others, both in governance of resources and in the delivery of water services. The latter has been discussed above in terms of effective delivery in the public sector. In water resources and catchment management, from a standing start in implementing the WFD we have been proactive; as well as the statutory system we have (for example) two UNESCO IHP HELP basins, in the Tweed and the Dee, which have been commended for their governance arrangements; Scottish Water's new powers for catchment protection will be a useful part of this. We would very much like to see the Parliament adopt our suggestion of giving legislative expression to taking an ecosystems approach. Evidence from other witnesses to the Parliamentary Committee also supported this – an ecosystems approach is found in the Government's new land use strategy and if placed in law could be of real interest to many jurisdictions. A new body is being established, the Hydro Nation Forum, to provide high level oversight of the policy agenda; there is a new Centre of Research Expertise in Water (CREW) and proposals for an innovation park to support technological developments. We bear in mind that there is an active supply chain in the private sector supporting water services in Scotland and their interest in the Hydro Nation is increasing as the agenda becomes better known. There will be both doctoral and post-doctoral opportunities funded by the Government next year and there will be water projects in a new Climate Justice Fund for development work. Overall then, these are exciting times to be working in water in Scotland.