THE LAW COMMISSION
(LAW COM. No. 198)

# THE WATER RESOURCES BILL
# THE WATER INDUSTRY BILL
# THE STATUTORY WATER COMPANIES BILL
# THE LAND DRAINAGE BILL
# THE WATER CONSOLIDATION (CONSEQUENTIAL PROVISIONS) BILL

REPORT ON THE CONSOLIDATION OF
THE LEGISLATION RELATING
TO WATER

*Presented to Parliament by the*
*Lord High Chancellor*
*by Command of Her Majesty*
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## REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO WATER

*To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain.*

The Bills which are the subject of this Report consolidate the legislation relating to water resources, the water industry, statutory water companies and flood defence and land drainage. In order to produce a satisfactory consolidation it is necessary to make the recommendations which are set out in the Appendix to this Report.

The Department of the Environment, the Ministry of Agriculture, Fisheries and Food, the Welsh Office and the Department of Health, the National Rivers Authority and the Office of Water Services, the Association of County Councils, the Association of District Councils, the Association of London Authorities, the Association of Metropolitan Authorities, the London Boroughs Association and the Association of Drainage Authorities and the Water Companies Association and the Water Services Association have been consulted in connection with the consolidation and do not object to any of the recommendations.

PETER GIBSON, *Chairman, Law Commission*

April 1991



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## APPENDIX

## RECOMMENDATIONS

*Section 17(9) of the Public Health Act 1936*

1. Section 17(9) of the Public Health Act 1936 originally made provision for the case where a local authority (which did not include a county council) made a vesting declaration with respect to a sewer or sewage disposal works of another local authority or of a county council. As a result of section 14(2) of the Water Act 1973, the references to a local authority became references to a water authority and, as a result of Schedule 8 to the Water Act 1989, these are now references to a sewerage undertaker. Accordingly, the subsection now applies to a vesting declaration with respect to a sewer or sewage disposal works of another sewerage undertaker or of a county council. It seems clear from the original mention of a county council that the provision was intended to apply wherever the sewer or works belonged to a local government authority and that it should have continued to apply after 1973 in relation to declarations where the sewer or works belong to a local authority other than a county council.

We recommend that section 17(9) of the 1936 Act, as amended, is consolidated as if it applied to a declaration with respect to any sewer or sewage disposal works vested in another sewerage undertaker, a local authority or a county council.

Effect is given to this Recommendation in clause 103(5) of the Water Industry Bill.

*Section 7 of the Public Health (Drainage of Trade Premises) Act 1937*

2. Section 2 of the Public Health (Drainage of Trade Premises) Act 1937, as amended by Schedules 8 and 27 to the Water Act 1989, makes it an offence, in subsection (5)(a), to discharge trade effluent into a public sewer "without such consent as is necessary for the purposes of" that Act. Consents are given under section 2 of that Act by the sewerage undertaker in question, subject to the control of the Secretary of State under Schedule 9 to the 1989 Act in the case of trade effluent prescribed by regulations under section 74 of that Act. Section 7 of the 1937 Act authorises a sewerage undertaker to enter into and carry into effect an agreement for the reception and disposal by the sewerage undertaker of trade effluent. Schedule 9 to the 1989 Act makes provision in relation to agreements under section 7 of the 1937 Act corresponding to that made in relation to consents. In practice, consents under section 2 of the 1937 Act and agreements under section 7 are treated as alternative ways of authorising the discharge of trade effluent into public sewers and, although agreements do not need to be confined to discharges into public sewers, where they do authorise such discharges, no separate consent is sought.

We accept that there is very little risk, in practice, that a person acting under the authority of an agreement but without "a consent" under section 2 could be successfully prosecuted for an offence under section 2(5) of the 1937 Act. However, a doubt might arise about whether the proper analysis of an agreement authorising a discharge is that it incorporates a consent under section 2 or that it provides a separate authorisation dispensing with the need for a consent. The former analysis would give rise to problems. For example, an agreement would have to be severed so that the provisions of Schedule 9 to the 1989 Act about consents could be applied to so much of it as comprised a consent and the provisions of that Schedule about agreements would be applied to the rest. In addition, it might be argued that an agreement could be varied under section 60 of the Public Health Act 1961, as amended by Schedules 8 and 27 to the Water Act 1989. We are satisfied that no such power of variation was ever intended.

We recommend that it is made clear in the consolidation that an agreement under section 7 of the 1937 Act authorising the discharge of trade effluent into a public sewer provides a defence to the offence under section 2(5)(a) of that Act but that, in doing so, it does not constitute a consent under that Act.

Effect is given to this Recommendation in clauses 118(5) and 129(3) of the Water Industry Bill.

*Section 9(2) of the Public Health (Drainage of Trade Premises) Act 1937 and section 63(6) and (7) of the Public Health Act 1961*

3. Section 9(2) of the Public Health (Drainage of Trade Premises) Act 1937 and section 63(6) and (7) of the Public Health Act 1961 each makes provision imposing requirements as to the provision of information. The provision is clearly made to facilitate the implementation of the transitional provisions made by section 4 of the 1937 Act and section 63(2) of the 1961 Act respectively. The transitional provisions are spent, but, although the original need for the information has disappeared, it would still, in theory, be possible for the provisions to be operated.

We recommend that the information provisions are repealed as no longer of practical utility and are not reproduced in the consolidation.

Effect is given to this Recommendation in Schedule 3 to the Water Consolidation (Consequential Provisions) Bill.

*Application of Schedule 7 to the Water Resources Act 1963 for the purposes of section 25 of that Act*

4. Section 25(5) to (8) of the Water Resources Act 1963 applies the provisions of Schedule 7 to that Act with modifications. This form of application produces a provision of considerable complexity and it would be desirable if the Schedule, as applied, could be set out in the consolidation. However a couple of infelicities in the way the application operates have to be eliminated before this can be done.

Schedule 7 operates on the basis that a draft statement is submitted to the Secretary of State under section 19(1) of the 1963 Act, as amended by section 127 of the Water Act 1989. (Before the 1989 Act draft statements fell to be submitted under section 19(3)). By the modification in section 25(5)(a), the references to a draft statement in Schedule 7 become references to a draft order under section 25, but the only equivalent of section 19(1) imposing an obligation on anyone to submit a draft order is confined to the case mentioned in section 25(7). In the other section 25 cases the 1963 Act provides for the making of an application, rather than for the submission of a draft order; and, at least in theory, an application could be made without a draft order being submitted.

Paragraph 4(c) of Schedule 7 requires notice to be served on persons consulted in pursuance of section 19(4)(b) and is not modified under section 25. As no one is consulted *in pursuance of section 19* in a section 25 case, paragraph 4(c) seems to be redundant in such a case, although we think that Parliament's likely intention was that persons who would have been consulted in a section 19 case should be notified under paragraph 4 in a section 25 case.

We recommend that Schedule 7 to the 1963 Act is consolidated in relation to section 25 of that Act so that every order is initiated by an application accompanied by a draft order; we also recommend that paragraph 4(c) of Schedule 7 is consolidated in relation to a section 25 case in accordance with what we think was Parliament's likely intention.

Effect is given to these Recommendations in paragraph 1(1) and (4)(d) of Schedule 6 to the Water Resources Bill.

*Paragraph 31 of Schedule 3 to the Salmon and Freshwater Fisheries Act 1975*

5. Paragraph 31 of Schedule 3 to the Salmon and Freshwater Fisheries Act 1975 contains a saving for powers of a local authority to discharge sewage. The sewerage and sewage disposal functions of local authorities were transferred to water authorities by the Water Act 1973 and those functions were transferred to sewerage undertakers by the Water Act 1989. Local authorities continue to act in relation to sewage disposal but generally (see clause 97 of the Water Industry Bill) only under arrangements with sewerage undertakers. It seems to us that the provision reproduced in paragraph 31 should have been amended in consequence of the 1973 Act so as to save the powers of sewerage undertakers, rather than those of local authorities.

We recommend that paragraph 31 of Schedule 3 to the 1975 Act is reproduced with a saving for the powers of sewerage undertakers to discharge sewage.

Effect is given to this Recommendation in paragraph 7(2) of Schedule 25 to the Water Resources Bill.

*Consultation under section 4 of the Land Drainage Act 1976*

6. Section 4 of the Land Drainage Act 1976, as amended by paragraphs 1 and 2 of Schedule 15 and Schedule 27 to the Water Act 1989, provides for the procedure to be followed when a local flood defence scheme is made and, in subsection (3), requires consultation with the council of any county or district any part of whose area will fall within the area to which the scheme is proposed to relate. There is no provision for consultation with a London authority where the area includes a part of London. We are satisfied that this omission can be explained by reference to the provisions originally contained in paragraph 3(1) of Schedule 5 to the 1976 Act; before their repeal these effectively excluded the possibility of what was then known as a local land drainage scheme applying to a part of London. A local flood defence scheme could now be made for an area incorporating a part of the area of a London borough or of the City.

We recommend that section 4(3) of the 1976 Act is consolidated with an additional requirement to consult a London borough council or the Common Council of the City of London where a local flood defence scheme is proposed for a relevant part of London.

Effect is given to this Recommendation in clause 12(3) of the Water Resources Bill, which must be read with the definition of "local authority" in clause 221(1) of that Bill.

*Rules under section 7(3) of the Land Drainage Act 1976*

7. Section 7(3) of the Land Drainage Act 1976 provides a power for the Minister to make rules about the procedure for elections to an internal drainage board. No provision is made for how this power is to be exercised but, in practice, it has been exercised as if it were covered by section 95 of the 1976 Act, which provides for regulations (rather than rules) to be made for the purpose of carrying the Act into effect. Accordingly, it has been assumed that section 109(1) and (2) of the 1976 Act (regulations to be contained in statutory instruments subject to the negative resolution procedure) applies to the election rules (see, for example the Land Drainage (Election of Internal Drainage Boards) Regulations 1977 - SI 1977/366).

We recommend that section 7(3) of the 1976 Act is consolidated in a way that makes it clear that the election rules should be contained in regulations subject to the

provisions of section 109(1) and (2) of the 1976 Act.

Effect is given to this Recommendation in paragraph 1 of Schedule 1 to the Land Drainage Bill, which must be read with clause 65 of that Bill.

*Determinations under section 8(2) of the Land Drainage Act 1976*

8. Section 8(2) of the Land Drainage Act 1976 provides for questions under certain provisions about whether any work, or proposed work, relates to a main river to be referred to one of the Ministers for decision. An analysis of this provision reveals that, as a result of section 8(1), it applies to all the provisions of the 1976 Act which have effect, or are limited, by reference to work relating to main rivers, except those that deal with local authority powers. Thus section 8(2) is not applied to section 98(7) of the 1976 Act. There does not seem to us to be any justification for not having the procedure in section 8(2) apply in the case of the limitation imposed by section 98(7). The question whether works or proposed works relate to a main river is primarily a question of demarcation between the National Rivers Authority and another body with drainage functions; and, for the purposes of resolving such a dispute, we think that it should not matter whether the other body is an internal drainage board or a local authority. It seems likely that the inapplicability of section 8(2) to section 98 was the result of an oversight.

We recommend that section 8(2) of the Land Drainage Act 1976 is consolidated so as to apply to any question arising under a provision deriving from that Act, including those with respect to the functions of local authorities.

Effect is given to this Recommendation in clause 73 of the Land Drainage Bill.

*Section 28 of the Land Drainage Act 1976*

9. Section 28 of the Land Drainage Act 1976 prohibits a person from carrying out certain works without the consent of the National Rivers Authority or the relevant internal drainage board. Subsections (4) to (8) reproduce some relatively antique provisions providing an *ad hoc* summary remedy for contraventions of the main prohibition. These provisions create at least one serious problem for the consolidation. Because they are a curious mixture of civil and criminal procedures, it is not possible to say with certainty whether the fine which can be imposed under section 28(6) is one to which the increase of criminal penalties in the Criminal Justice Act 1982 applies. The substance of the provisions in subsections (4) to (8) is, however, very similar to the remedies provided by section 34(4) and (5) of the Land Drainage Act 1976 for contravention of a byelaw. Those provisions are simpler, however, because they clearly rely on the creation of criminal offences and, by not mixing civil and criminal concepts, do not need to set out so much of the incidental procedure.

We recommend that in the consolidation of section 28 of the Land Drainage Act 1976, provisions corresponding to section 34(4) and (5) of that Act replace the provisions in section 28(4) to (8).

Effect is given to this Recommendation in clause 24 of the Land Drainage Bill.

*Paragraph 8 of Schedule 2 to the Land Drainage Act 1976*

10. Paragraph 8 of Schedule 2 to the Land Drainage Act 1976 confers power by Ministerial order to authorise the payment of an allowance to the chairman of an internal drainage board to cover expenses. Section 109(1) of that Act provides, with certain exceptions, for orders under the Act to be made by statutory instrument. Orders

under paragraph 8 of Schedule 2 are not included amongst the exceptions. Having regard to the nature of orders under paragraph 8, it seems to us highly unlikely that it was ever intended that they should be made by statutory instrument and, accordingly, we think that their omission from the exceptions in section 109(1) was the result of an oversight.

We recommend that paragraph 8 of Schedule 2 to the Land Drainage Act 1976 is consolidated without requiring orders under that paragraph to be made by statutory instrument.

Effect is given to this Recommendation in paragraph 1 of Schedule 2 to the Land Drainage Bill.

*Restrictions on disclosure of information*

11. Subsection (1) of section 174 of the Water Act 1989 made provision restricting the disclosure of information obtained "by virtue of the provisions of" that Act. Exceptions allowing the disclosure of information were made by paragraphs (a), (b) and (j) of subsection (2) of that section by reference, respectively, to "functions by virtue of" that Act, to "duties imposed by or under" that Act and to civil proceedings brought "under or by virtue of" that Act or "arbitrations under" that Act.

The consolidation Bills bring together all the major provisions of the 1989 Act together with other legislation. The vast majority of the other legislation is legislation which was amended by the 1989 Act, at least to the extent of making modifications of references to the water authorities or of Ministerial functions (see, for example, paragraph 1(3) of Schedule 13 and paragraph 1(2) of Schedule 15). The only provisions reproduced in the consolidation whose present effect cannot be said to depend, to some extent, on something in the 1989 Act are the provisions of the Land Drainage Act 1976 which do not relate to the National Rivers Authority.

It is clear that the references to the 1989 Act in section 174(1) and (2) of that Act are capable of being construed as references to provisions of other Acts which are amended by the 1989 Act; but it is not practicable, with any certainty, to identify all the provisions of other Acts which would be taken to be referred to. A very large number of provisions might result in someone obtaining information or confer functions or duties or might give rise to civil proceedings. In many cases the extent to which this effect depends on a provision of the 1989 Act is open to argument. It follows that consolidation of section 174 is impossible unless the references to the 1989 Act in that section can be clarified. The potential width of the references suggests that Parliament intended to apply the section generally in relation to the functions with which that Act dealt, and to a large extent the section does do this. It is clear that Parliament was not seeking to confine the section to particular cases and that all the principal cases to which the section needed to apply were in the 1989 Act.

We recommend that section 174 of the 1989 Act is consolidated, with the one exception explained in the next paragraph, as if the references, in subsections (1) and (2)(a), (b) and (j), to the 1989 Act were references to every enactment which is either consolidated in the Bills or left in the 1989 Act.

It seems to us that information obtained by virtue of provisions deriving from provisions of the Land Drainage Act 1976 which were not materially amended by the 1989 Act could, without anomaly, be exempted from the principal prohibition imposed by section 174(1). As such an exemption avoids the extension of a criminal offence, we recommend that the reference in section 174(1) is consolidated accordingly.

However, it would not, in our view, be practicable or sensible in relation to the exceptions set out in section 174(2)(a) and (j) by reference to Ministerial functions and civil proceedings, to exclude the possibility of a defence where the functions or proceedings are under provisions deriving from the Land Drainage Act 1976 but not relating to the National Rivers Authority. It would be anomalous if information obtained, for example, by the National Rivers Authority in exercise of powers originally conferred by the 1989 Act, were not capable of being used for closely related purposes in proceedings under the 1976 Act.

In addition, the exclusion in subsection (2)(a) of section 174 of the 1989 Act refers to the functions of local authorities and, by virtue of the definition in section 189(1) of that Act, that reference excludes "county councils". However, functions are conferred on county councils by provisions consolidated from the 1989 Act in the Water Resources Bill and we think it likely that the failure of section 174 to mention county councils in relation to these provisions was the result of an oversight.

We also recommend that subsection (2)(a) of section 174 of the 1989 Act is consolidated as if the reference to local authorities included a reference to county councils

Effect is given to our Recommendations in relation to section 174 of the 1989 Act in clause 204 of the Water Resources Bill, clause 206 of the Water Industry Bill and clause 70 of the Land Drainage Bill, which must be read with the definition of "local authority" in section 221 of the Water Resources Bill, and also in the amendment of section 174, and the amendments of corresponding provisions of comparable enactments, in Schedule 1 to the Water Consolidation (Consequential Provisions) Bill.

*Provision of false information*

12. Section 175 of the Water Act 1989 created offences of providing false information in furnishing information or making an application under or for the purposes of that Act. It has proved practicable to identify the provisions consolidated in the Water Resources Bill in relation to which section 175 has effect. It is not practicable to do the same in relation to the provisions consolidated in the Water Industry Bill, which (as well as provisions from the 1989 Act) also reproduces provisions from the Public Health Act 1936, the Water Act 1945 and the Water (Fluoridation) Act 1985.

In relation to the 1936 Act, there is an argument for saying that section 175 does apply for the most important case, namely, the provisions of the 1936 Act about vesting declarations in relation to sewers and sewage disposal works. The effect of a vesting declaration is set out in section 153(3) of the 1989 Act; and, accordingly, anything done for the purposes of a provision whose effect is set out in that section could be said to be done "for the purposes of" that section.

Furthermore, an offence corresponding to, but not identical with, the offence in section 175 was created by section 45 of the Water Act 1945 in relation to the provisions of that Act. That 1945 Act offence carries the possibility of imprisonment. It is not possible, because of the nature of the provisions reproduced from the 1945 Act in the Water Industry Bill, to be certain to what extent section 45 is relevant in relation to them. It would not, in our view, be either practicable or sensible to retain the distinction between the 1945 Act offence and the 1989 Act offence in the Water Industry Bill.

There seems to us to be no justification for exempting any provision of the Water Industry Bill from the offence in section 175 of the 1989 Act.

We recommend that an offence corresponding to section 175 of the Water Act 1989 is applied in relation to every provision consolidated in the Water Industry Bill.

Effect is given to this Recommendation in clause 207 of the Water Industry Bill.

*Criminal liability of directors etc.*

13. Section 177 of the Water Act 1989 contains what is now the common form provision in relation to the liability of directors etc. for the criminal offences of bodies corporate. It applies to any offence "under" that Act. Section 118(3) and (4) of the Water Resources Act 1963 contained an earlier version of the common form provision which confined the provisions about bodies governed by their members specifically to nationalised industries. The consolidation Bills also consolidate offences from other Acts which omitted the common form provision.

The common form provision is a statutory clarification of the law relating to aiding and abetting a criminal offence committed by a body corporate. It does not impose a criminal liability that is incapable of arising apart from the provision. There are, in our view, no sound reasons for maintaining the distinction between the two versions of the common form provision in relation to different offences in the same Act. Nor do we think that it is justifiable to exclude the application of the common form provision in relation to any of the offences consolidated in the two main Bills, the Water Resources Bill and the Water Industry Bill, but deriving from Acts which did not contain such a provision. An attempt to apply different provisions about directors to different offences under the consolidation Acts according to the different derivation of the provisions would give rise to arbitrary and anomalous distinctions.

We recommend that provision corresponding to section 177 of the 1989 Act is applied to all the offences consolidated in the Water Resources Bill and the Water Industry Bill.

Effect is given to this Recommendation in clause 217 of the Water Resources Bill and clause 210 of the Water Industry Bill.

*Service of notices and other documents*

14. Section 187 of the Water Act 1989 contains provisions with respect to the service of notices etc. by virtue of that Act. The references to notices served "by virtue of" the 1989 Act is at least capable of being construed as including a reference to notices served under enactments amended by the 1989 Act. The amended enactments include enactments contained in the Water Act 1945, the Water Resources Act 1963 and the Land Drainage Act 1976, each of which contained its own provisions for the service of notices etc. (viz. section 56 of the 1945 Act, section 120 of the 1963 Act and section 108 of the 1976 Act). Section 187 and the other provisions about service are all framed differently but all take the form of authorising particular methods of service, rather than requiring service in a particular way. Accordingly none of them necessarily excludes other methods of service.

It would be quite impracticable, having regard to the overlapping effect of section 187 of the 1989 Act, to identify the different provisions of the consolidation to which the different provisions about service should apply.

A comparison of the four provisions shows that the principal effect of relying exclusively on the 1989 Act rules is to introduce new, but in our view, acceptable methods of service where section 187 does not overlap (for example service by post as well as by recorded delivery) and to eliminate differences which do not seem to us to be material in identifying the place for service or in specifying the circumstances in which

service can be effected by fixing the document to the land in question. The only provision not contained in section 187 which seems to us to be worth retaining is the provision in section 120(4) of the 1963 Act which applies the rules about service where a person's identity cannot be ascertained to lessees.

We recommend that provision corresponding to section 187 of the 1989 Act is applied to all the provisions reproduced in the consolidation but with the addition of a reference to lessees so that service on lessees in a manner corresponding to that authorised by section 120(4) of the 1963 Act is authorised in all cases.

Effect is given to this Recommendation in clause 220 of the Water Resources Bill, clause 216 of the Water Industry Bill and clause 71 of the Land Drainage Bill.

*Definition of "damage"*

15. Section 189(1) of the Water Act 1989 defined "damage", in relation to an individual, as including personal injury and death. Section 6 of the Water Act 1981, which is consolidated in clause 208 of the Water Resources Bill and clause 209 of the Water Industry Bill, explained, in subsection (7)(b), that for the purposes of that section "injury", in relation to a person, includes any disease or any impairment of physical or mental condition. It seems to us unlikely that Parliament intended personal injury in the 1989 Act to have a narrower meaning than injury in section 6 of the 1981 Act.

We recommend that the definition of "damage" from the 1989 Act is consolidated with the extra clarifying words from section 6(7) of the 1981 Act.

Effect is given to this Recommendation in clause 221(1) of the Water Resources Bill and clause 219(1) of the Water Industry Bill.

*Definitions of "conservancy authority", "harbour authority" and "navigation authority"*

16. These three expressions are used throughout the consolidated enactments and almost invariably in conjunction. However, in the consolidated enactments, they attract different definitions. This does not affect the provisions consolidated in the Water Industry Bill, which all derive from the Water Act 1989 or, in the case of clause 164, from the Water Act 1945. In section 15 of the 1945 Act, which is reproduced in clause 164 of the Water Industry Bill, the only one of the expressions which is used is "navigation authority" and that expression is defined in the 1945 Act in a way which does not differ, in any material respect, from the definition in the 1989 Act.

On the other hand, the provisions consolidated in the Land Drainage Bill and the Water Resources Bill contain provisions from the 1989 Act and the Land Drainage Act 1976 and, in the case of the Water Resources Bill, from the Water Resources Act 1963 as well. Each of these Acts has definitions of the expressions which differ in minor respects.

In the 1989 Act and the 1963 Act the definitions of "conservancy authority" and "harbour authority" are identical in all material respects except in so far as they each exclude from the definition anything which is a navigation authority. The definitions of a "navigation authority" are different in each Act.

The 1976 Act definitions of "conservancy authority" and "harbour authority" attract definitions from the Merchant Shipping Act 1894. The definition of a conservancy authority in the 1894 Act is identical to the definitions in the 1989 and 1963 Acts, except that there is no express exclusion of navigation authorities and, instead of an

exclusion of "harbour authorities" in the definition of conservancy authority, there is only an exclusion of harbours. This last difference does not seem to us to be important in the context of the use to which the defined expressions are put. However, the definition of "harbour authority" in the 1976 Act is quite different from the definition applied by the 1963 and 1989 Acts and the difference must, we think, be preserved for the purposes of provisions which apply specifically to harbour authorities.

The minor differences between the definitions of "navigation authority" in the 1963 and 1989 Acts are as follows. The 1963 Act makes a person a navigation authority if he has "a *duty or* power imposed or conferred by or under an enactment to *manage or maintain* a canal, whether navigable or not, or to *manage or maintain* an inland navigation, other than a canal, whether natural or artificial, and whether tidal or not". The 1989 Act defines a navigation authority as a person who has "powers under any enactment to *work, maintain, conserve, improve or control* any canal or other inland navigation, navigable river, estuary, *harbour or dock*". The definition of "navigation authority" in the 1976 Act is the same in all material respects as the definition in the 1963 Act except that there is no mention of duties and "work" is used instead of "manage".

It seems to us that the express mention of duties in the 1963 Act definition of "navigation authority" cannot reflect an intention to catch bodies in addition to those caught by the 1989 Act definition. It is highly unlikely that an authority exists whose functions are confined to duties unsupported by other powers; and, if it did, it is equally unlikely, in the light of the fact that every duty implies a power to perform it, that the absence of express powers would result in its being held to fall outside a definition that referred only to powers. Accordingly, the addition of a reference to duties in the 1989 Act definition could, without any change of meaning, enable the definitions to be harmonised. It also seems to us that the differences between the verbs used in relation to inland navigations etc. should be disregarded for practical purposes. Each definition is clearly an attempt to be comprehensive in relation to the waters mentioned and would, in our view, be so construed. On analysis, therefore, the principal difference is that harbours and docks are included in the 1989 Act definition but not in the 1963 Act definition or the 1976 Act definition. It is not clear to what extent the reference to navigable rivers and estuaries in the 1989 Act adds to the reference to inland navigations; but it is clear that, in so far as the 1989 Act definition of "navigation authority" is wider than the earlier definitions, it is only because it includes authorities which under the earlier legislation were classified as conservancy authorities or harbour authorities.

In practice the differences between the main definitions are largely immaterial because it is in only limited respects outside the 1989 Act that different provision is made for navigation authorities from the provision made for conservancy authorities and harbour authorities. This is in the 1963 Act, in sections 82 and 91 and in Schedule 10, where by virtue of paragraph 7 of Schedule 3 to the Secretary of State for Transport Order 1976 (S.I. 1976/1775) different Secretaries of State exercise functions according to whether a navigation authority (on the one hand) or a conservancy authority or harbour authority (on the other) is concerned. We are satisfied that this distinction could be satisfactorily maintained by the administrative measures that normally operate where functions are conferred on an unnamed Secretary of State.

In addition, the application of the 1989 Act definition of a "navigation authority" to all the provisions of the consolidation deriving from the 1976 Act would extend the powers under sections 23, 27 and 39(1)(c) of the 1976 Act (see clauses 111 and 165(5) of the Water Resources Bill and clauses 19, 35 and 64(1)(c) of the Land Drainage Bill) to persons who are navigation authorities in respect of harbours and docks. However, as the powers are limited by reference to the functions of drainage bodies, are confined (in the

case of the powers in section 23) to the making of agreements and are confined (in the case of section 27) to "canals rivers and navigable waters", it seems to us that such an extension has no significant application and that there cannot be any serious objection to it.

It is particularly difficult, if not impossible, to reproduce the minor differences between the different definitions of "navigation authority" and "conservancy authority" in the case of the overlapping protective provisions re-enacted from the 1976 Act and the 1989 Act in Schedule 22 to the Water Resources Bill. Furthermore, it seems highly unlikely that Parliament intended provisions which are so similar in all other respects to have different effects by virtue of minor differences in the definitions. Any attempt to retain the existing distinctions would, in our view, give rise to a serious risk that a quite unjustified importance would be attached to a difference between definitions which was not intended to have any significance.

We recommend that the 1989 Act definitions of "navigation authority" and "conservancy authority" should apply (subject to the addition of an express reference to duties) to all the provisions consolidated in the Water Resources Bill and the Land Drainage Bill and that the functions of the named Secretaries of State under sections 82 and 91 of, and Schedule 10 to, the 1963 Act should be vested in the unnamed Secretary of State, without of course any change to the functions of the Minister of Agriculture, Fisheries and Food by virtue of section 82(9) of the 1963 Act, as amended by paragraph 23(2) of Schedule 13 to the 1989 Act.

Effect is given to this Recommendation in clauses 120 and 221 of the Water Resources Bill and in Schedule 2 to that Bill and in clause 72 of the Land Drainage Bill.

*Definition of "railway company"*

17. The provisions of both the Public Health Act 1936 and section 160 of, and paragraphs 3 and 8 of Schedule 19 to, the Water Act 1989 contain protection, in relation to various powers conferred under those Acts, for persons authorised to construct, work or carry on a railway. The provisions in the 1936 Act include section 333, which in relation to that Act corresponds to section 160 of the 1989 Act and, because of the width of section 160 overlaps with it. In the case of the 1989 Act the protection is expressed to be conferred on persons whose authorisation is conferred "by" an enactment (see section 160(3)(h) and paragraph 3(6) of Schedule 19). Although, on its own, this is not incapable of being taken to include a person whose authorisation derives from the exercise of a power to make an order under an enactment, the definition may be contrasted with the definition of "railway company" in section 343(1) of the 1936 Act which, by virtue of the definition of "statutory undertakers" and "statutory order", expressly includes a person whose authorisation derives from an "order, rule or regulation made under any enactment".

It seems unlikely that Parliament was intending in the 1989 Act to exclude any railway undertakers who are afforded protection under the provisions left in the 1936 Act from protection under the 1989 Act. The distinction between the two definitions is, of course, quite irrelevant to the vast majority of cases. Furthermore, it would be wrong to allow the potentially wide construction of the 1989 Act definition to be prejudiced by allowing it to stand unaltered in the same Act as the 1936 Act definition.

In addition, it needs to be noted that section 112 of the Land Drainage Act 1976 (which, in this respect, is superseded in relation to the NRA by section 160 of the 1989 Act) refers to a railway company without defining that expression. We are satisfied that section 112 is not intended to give protection to any companies which would not fall within the definition in the 1936 Act and is not intended to exclude any company which

does fall within that definition.

We recommend that section 160 of the 1989 Act and Schedule 19 to that Act are consolidated, together in relation to the NRA with section 112 of the 1976 Act, so that the protection they afford expressly extends to a person authorised by any order, rule or regulation made *under* an enactment to construct, work or carry on a railway.

Effect is given to this Recommendation in clause 163(4) of the Water Resources Bill and in paragraph 6 of Schedule 22 to that Bill and in clause 219(1) of the Water Industry Bill.

*Definition of "owner"*

18. In relation to any premises the definitions of "owner" in section 189(1) of the Water Act 1989 and in section 343(1) of the Public Health Act 1936 are for practical purposes the same. Each definition identifies as the owner of the premises the person who is for the time being receiving the rackrent of the premises, whether on his own account or as agent or trustee for another person, or who would receive the rackrent if the premises were let at a rackrent. However the 1936 Act contains a definition of a rackrent by reference to the amount of the rent. It may be doubted whether the definition was ever of much practical relevance to the definition of owner, although, in theory, a person who fell outside the first limb of the definition of owner by virtue of the definition of rackrent need not always be the person who would be identified as the owner by the second limb.

We think that it would complicate the law quite unnecessarily to retain such minor difference as there is, as a result of the definition of rackrent, between the definition of owner for the purposes of the provisions of the Water Industry Bill deriving from the 1989 Act and the definition for the purposes of the provisions of that Bill deriving from the 1936 Act.

We recommend that the definition of "owner" from the 1936 Act is consolidated without any accompanying definition of rackrent.

Effect is given to this Recommendation in clause 219(1) of the Water Industry Bill.

*Definition of "street"*

19. Provisions using the expression "street" are consolidated in the Water Industry Bill from the Public Health Act 1936 and from the Water Act 1989. Each of these Acts defines the expression "street" in a slightly different way. The principal differences are that the 1936 Act definition, in section 343(1) of that Act, is not an exhaustive definition and that the 1989 Act definition (which, in section 189(1), applies the definition in the Public Utilities Street Works Act 1950) expressly includes land laid out as a street. The current New Roads and Street Works Bill will replace the reference to the 1950 Act in section 189(1) of the Water Act 1989 with a reference to that Bill but this is not of practical importance in relation to the differences between the meaning of "street" in the 1936 and 1989 Acts.

In our view the differences between the definitions are so minor that it would be more likely to be misleading than anything else to perpetuate them. We are unable to identify any significant change of the law that would result from applying the 1989 Act definition to the 1936 Act provisions, (ie clauses 107(6) and 115(1) of the Water Industry Bill), although there is clearly a theoretical change, at least in the case of the provisions reproduced in clause 115.

We recommend that the 1989 Act definition of "street" is applied to all the provisions reproduced in the Water Industry Bill.

Effect is given to this Recommendation in clause 219(1) of that Bill.

*Expenses that may be recovered*

20. Section 189(7) of the Water Act 1989 contains provision which clarifies the provisions of that Act with respect to the recovery of the expenses of any works. It declares that the expenses that may be recovered include a reasonable amount in respect of establishment charges or overheads. Section 189(7) applies for the purposes of any provision of that Act "by or under which power is or may be conferred on any person" to recover the expenses of doing anything. It is therefore at least arguable that the provision applies, on its terms, to powers which are not conferred directly by the 1989 Act but which (though originally conferred by other enactments) have effect, for example, as powers of the NRA or a water or sewerage undertaker under a provision of the 1989 Act.

A number of powers which are to be consolidated in the Water Resources Bill and the Water Industry Bill and do not derive directly from the 1989 Act have been identified as powers to which section 189(7) would be capable of applying (see clauses 107(4) and 109(2) of the Water Industry Bill and clause 109(4) of the Water Resources Bill). Other powers are less clearly capable of being caught (see eg clause 112(6) of the Water Industry Bill and clause 61(1) of the Water Resources Bill). In the case of these powers a change of the law could be effected either by applying section 189(7) to them or by not applying it. An express exclusion of section 189(7) would remove any argument that its effect is inherent at the moment.

It is clear however that Parliament's intention in enacting section 189(7) was to apply it to all the principal powers to recover expenses under water legislation; it is these powers which are set out in the 1989 Act.

We recommend that a provision corresponding to section 189(7) of the 1989 Act is consolidated generally in relation to all the provisions reproduced in either the Water Resources Bill or the Water Industry Bill.

Effect is given to this Recommendation in clause 221(5) of the Water Resources Bill and in clause 219(6) of the Water Industry Bill.

*Definition of "domestic purposes" for purposes of section 21 of the Water Act 1945*

21. Section 21 of the Water Act 1945 makes it an offence to pollute water which is likely to be used for human consumption "or domestic purposes". What constitutes "domestic purposes" is not defined for the purposes of section 21 but Schedule 3 to the 1945 Act did define a supply for domestic purposes for the purposes of that Schedule. This definition is similar to a definition of domestic purposes which applies for the purposes of the Water Act 1989 (see sections 189(2) and (3)) and, accordingly, to every other reference to domestic purposes in the legislation being consolidated. The principal difference between the definitions is that the provision of water for central heating purposes is included in the definition of domestic purposes for the purposes of the 1989 Act. In practice, of course, it is unlikely that particular water could be identified as appropriated to a supply for central heating purposes and not for other domestic purposes. There seems to us to be no good reason for ensuring that the 1989 Act definition should not apply to the provision deriving from section 21, and it is clearly impossible to reproduce section 21 in the context of the definition in Schedule 3 to the

1945 Act, which for other purposes was repealed in 1989.

We recommend that section 21 of the Water Act 1945 is consolidated with its reference to the use of water for domestic purposes capable of attracting the definition of domestic purposes in section 189(2) and (3) of the Water Act 1989.

Effect is given to this Recommendation in clause 72 of the Water Industry Bill, which must be read with clause 218 of that Bill.

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