HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

27th Report of Session 2012-13

Draft Financial Services Act 2012 (Misleading Statements and Impressions) Order 2013

Draft Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2013

Draft Police and Fire Reform (Scotland) Act 2012 (Consequential Provisions and Modifications) Order 2013

Also includes 6 Information Paragraphs on 11 Instruments

Ordered to be printed 12 February 2013 and published 14 February 2013

Published by the Authority of the House of Lords

London: The Stationery Office Limited

£price

HL Paper 116

Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(3) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Registered interests

Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Twenty-Seventh Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

A. Draft Financial Services Act 2012 (Misleading Statements and Impressions) Order 2013

Draft Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2013

Date laid: 28 January 2013
Parliamentary Procedure: affirmative

Summary: The draft Orders implement some of the recommendations made by the review into the setting and usage of LIBOR, carried out by Mr Martin Wheatley and published in September 2012. The first Order brings the activity of banks in providing information in relation to LIBOR within the scope of statutory regulation by the new Financial Conduct Authority; the second Order creates a criminal offence for the making of false or misleading statements and impressions relating to "relevant benchmarks", and specifies LIBOR as such a benchmark.

We draw these instruments to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

1. HM Treasury (HMT) has laid these draft Orders, to come into force substantively in April 2013. It has also provided accompanying Explanatory Memorandums (EM) and impact assessments (IA).

LIBOR manipulation: the Wheatley Review

2. LIBOR (the London Inter-Bank Offered Rate) refers to a series of interest rate benchmarks. It is estimated that, at any time, LIBOR serves as a reference in at least $300 trillion-worth of financial contracts, both retail and wholesale, globally. In June 2012, it was revealed that LIBOR had been subject to repeated attempts at manipulation; on 27 June 2012, the Financial Services Authority (FSA) fined Barclays Bank Plc £59.5m for misconduct relating to LIBOR.[1] On 19 December 2012, the FSA levied a fine of £160m on UBS AG for significant failings in relation to LIBOR,[2] and on 6 February 2013, the FSA fined the Royal Bank of Scotland plc £87.5m for misconduct relating to LIBOR.[3]

3. The Government asked Mr Martin Wheatley to conduct a review into the setting and usage of LIBOR; the review's findings and recommendations were published in September 2012.[4] It identified a number of failings in the process of determining LIBOR, which had been administered by the British Bankers Association (BBA) and self-regulated by the BBA and the

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[1] See: http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml

[2] See: http://www.fsa.gov.uk/library/communication/pr/2012/116.shtml

[3] See: http://www.fsa.gov.uk/library/communication/pr/2013/011.shtml

[4] See: http://www.hm-treasury.gov.uk/wheatley_review.htm

contributing banks: conflicts of interest presented by self-regulation had facilitated misconduct.

The Orders

4. In the EM accompanying the first of these Orders, HMT states that a key recommendation of the Wheatley Review was that the activity of banks in providing information to LIBOR, as well as the administration and governance of LIBOR, should be brought within the scope of statutory regulation by the new Financial Conduct Authority (FCA).[5] HMT explains that this is achieved by the creation of two new regulated activities in this Order, specifically: (i) providing information in relation to, and; (ii) the administering of, a specified benchmark. The only benchmarks currently specified for these activities are LIBOR.

5. HMT states that the Wheatley Review also recommended that a specific criminal offence be created for the making of false or misleading statements and impressions relating to benchmarks, alongside other market-led reforms, and that the second of these Orders implements that recommendation.

6. In the IA accompanying the Orders, HMT states of the Wheatley Review recommendations that the "reforms fall into three broad areas: (a) expanding the regulatory perimeter, (b) criminal sanctions for attempted LIBOR manipulation, and (c) a power of compulsion." The Orders make provision in relation to the areas at (a) and (b) in this list. As regards (c), through the Financial Services Act 2012, HMT has now amended the Financial Services and Markets Act 2000 so as to enable the FCA to compel banks to provide information in relation to LIBOR. In the IA, HMT states that the power "would only be used by the regulator if absolutely necessary, and consideration will be given to any necessary safeguards to ensure that this does not impose an undue burden on contributing banks".

Impact on Business and Public Sector

7. In the EM to the first Order, HMT states that the impact on business is restricted to a subset of 23 large financial firms which provide information in relation to LIBOR, and to the firm or firms which administer LIBOR; that the costs arising from requirements imposed by the FCA on the former are estimated at £44m (one-off) and £5.8m (annual); and that the administrator of LIBOR is estimated to face one-off costs of £1.9m, and annual costs of £300,000. HMT estimates that the impact on the public sector through increased costs of supervision by the FCA will be around £400,000 per annum; this will be met through fee payments by the relevant authorised firms. In HMT's view, expanding the regulatory perimeter through this Order will provide "a LIBOR framework that is significantly less vulnerable to attempted manipulation and subject to much stronger governance and regulatory oversight", and this will in turn raise LIBOR's credibility and integrity among authorities, market participants and the public.

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[5] The FCA will be the successor to the Financial Services Authority, and will be responsible for conduct of business regulation for all regulated financial firms.

B. Draft Police and Fire Reform (Scotland) Act 2012 (Consequential Provisions and Modifications) Order 2013

Date laid: 22 January 2013
Parliamentary Procedure: affirmative

Summary: Following the enactment of the Police and Fire Reform (Scotland) Act 2012, this Order contains provisions which are necessary in order to amend existing UK legislation to refer to the newly created Police Service of Scotland, Scottish Police Authority and Scottish Fire and Rescue Service. The Committee was concerned to receive more information about the consideration which the Government gave to replicating in this Order provisions on the offence of causing disaffection amongst the members of a relevant police force, which were previously contained in the Police (Scotland) Act 1967.

We draw this instrument to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

8. The Scotland Office has laid this draft Order, which contains provisions that are necessary as a result of the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act"), notably to amend references in existing UK legislation to refer to the newly created Police Service of Scotland, Scottish Police Authority and Scottish Fire and Rescue Service. It has also provided an Explanatory Memorandum (EM).

9. In the EM, the Scotland Office states that the 2012 Act, which received Royal Assent in August 2012, created a single constabulary called the Police Service of Scotland, to be maintained by the Authority: this replaced the eight police forces, two unitary police authorities, six joint police boards and two national police organisations which hitherto operated in Scotland. The 2012 Act largely repealed the Police (Scotland) Act 1967 ("the 1967 Act") and replaced it with a new statutory framework for policing.

10. Article 9 of the Order is entitled "Causing disaffection", and contains the following provisions:

> "9.—(1) It is an offence—
>
> (a) to cause disaffection amongst the members of a relevant police force; or
>
> (b) to induce a member of a relevant police force to withhold services."

11. We sought greater clarity about the intended effect of Article 9(1)(a). We were concerned about the potential width of this offence, and about the possibility that it could prevent any individual from expressing legitimate concerns. We wanted to establish that the Government had properly considered whether it was appropriate to replicate provisions from the 1967 Act in an Order laid more than four decades later.

12. We are publishing the Government's response to our questions in Appendix 1. We note the Government's statement that causing disaffection is not the same as expressing views or concerns, and that any frank discussion where ideas and opinions are being put forward for debate would not fall within the scope of article 9. In the response, however, the Government also state that "should it be clear that an individual is not interested in an exchange of ideas but is rather attempting to persuade members of any relevant force that it is

not right to do their job effectively by means of causing disaffection with the objective of causing any form of disruption, then the offence specified in article 9 could be considered."

OTHER INSTRUMENTS OF INTEREST

Draft Financial Services Act 2012 (Consequential Amendments) Order 2013 and 5 associated instruments

13. In our 26th Report, we drew to the House's attention three statutory instruments[6] specifying important details of the new framework for financial regulation under the Financial Services Act 2012 ("the 2012 Act"). These included aspects of the relationship between the newly established Financial Policy Committee (FPC), Prudential Regulation Authority (PRA), and Financial Conduct Authority (FCA: the successor to the Financial Services Authority (FSA)). HM Treasury (HMT) has laid six further instruments serving to implement the new framework.

14. The **draft Uncertificated Securities (Amendment) Regulations 2013** transfer responsibility for the approval and regulation of operators of securities settlement systems from HMT (who had delegated the responsibility to the FSA) to the Bank of England.

15. The **draft Financial Services and Markets Act 2000 (Threshold Conditions) Order 2013**, in setting out the threshold conditions that financial services firms must meet to become authorised under the Financial Services and Markets Act 2000 ("the 2000 Act"), specifies which of these conditions fall within the responsibility of either the PRA or the FCA. The threshold conditions[7] are the minimum requirements that firms need to meet in order to become authorised.

16. The **draft Financial Services Act 2012 (Mutual Societies) Order 2013** allocates the FSA's existing responsibilities for the regulation of mutual societies between the PRA and the FCA. In the Explanatory Memorandum, HMT states that, as well as replacing references in statute to the FSA with references to the FCA or the PRA, the Order inserts co-ordination mechanisms between the new regulators similar to those in the 2012 Act, to allow for a consistent and effective approach under the new system of dual regulation.

17. As for the **draft Financial Services Act 2012 (Consequential Amendments) Order 2013**, HMT states that a number of changes to other pieces of legislation are required as a consequence of the regulatory reforms introduced by the 2012 Act; and that, while most of these were included in Schedule 18 of that Act, a small number of amendments required further consideration during the passage of the Bill and are being made through this instrument.

18. In explaining the purpose of the **Financial Services Act 2012 (Transitional Provisions) (Rules and Miscellaneous Provisions) Order 2013** (SI 2013/161), HMT states that some functions will need to be carried out by the FCA, the PRA and the Bank of England before the relevant provisions of the 2012 Act are fully commenced. For example, rules that will come into force need to be made, and published, in advance of that

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6 Draft Bank of England Act 1998 (Macro-prudential Measures) Order 2013; draft Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013; and draft Financial Services and Markets Act 2000 (Financial Services Compensation Scheme) Order 2013.

7 The threshold conditions are set out in Schedule 6 to the 2000 Act.

date so that persons subject to the new regulatory regime can prepare appropriately.

19. Finally, as regards the **Financial Services and Markets Act 2000 (Prescribed Financial Institutions) Order 2013** (SI 2013/165), HMT explains that the 2012 Act strengthens the regulatory framework by providing that the regulators can take action in relation to a parent undertaking, which is itself not regulated, but which controls and exerts influence over an authorised person.[8] The Order prescribes the financial institutions which will be subject to these powers exercisable in relation to parent undertakings.

Draft Legal Deposit Libraries (Non-Print Works) Regulations 2013

20. Under the current legal deposit regime every printed work that is published in the UK is deposited with the British Library and, on request, with five other legal deposit libraries. These Regulations extend that regime so that it also covers works published in a medium other than print, that includes work published on line (such as content from the internet, an e-book or an electronic journal) or work published off line (that is, published in a physical form other than print such as a CD-ROM, DVD-ROM or microfilm). The object of the Regulations is to ensure that the UK's intellectual record and published heritage is preserved as an archive for research purposes, and may also reduce the costs of legal deposit to publishers overall.

Draft Representation of the People (Election Expenses Exclusion) Order 2013

21. This Order relates to a pilot scheme set up to offset any additional expenses for a disabled candidate that an able-bodied rival in an election would not incur. Grants are only available for elections in England and do not include elections for European positions. Applications are subject to a £20,000 per year limit, and the total of the Access to Elected Office Fund is £2.3m. The pilot covers the period July 2012 – June 2014 but this Order, belatedly, provides for the calculation of permitted election expenses under the Representation of the People Act to exclude sums paid out to a disabled candidate from this Fund. Grants aim only to mitigate any additional costs that the disabled candidate might have so that they can campaign on a level basis with a non-disabled candidate. The Electoral Commission has expressed some concerns that the scope for the Fund administrator to make grant allocations is currently wider than intended and the Fund and the Electoral Commission are in close consultation to clarify the provisions further.

Statement of Changes in Immigration Rules (HC 943)

22. This Statement was brought in in 24 hours to curtail abuse of the Tier 1(Entrepreneur) entry system. This emergency instrument tightens checking procedures on the existing entry requirements and provides for them to be followed up after six months. In the Minister's written statement on 30 January[9] he stated that the Entrepreneur changes were introduced in April 2011 but this loophole only began to be seriously exploited after the rules for

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[8] The 2012 Act does so by inserting Part 12A into the 2000 Act.

[9] HL Official Report, 30 January 2013, col WS111-2

other migration routes were tightened. The Explanatory Memorandum explains that HC 760, laid on 22 November, acted from 13 December to prevent students from switching into the Entrepreneur route unless they have £50,000 funding from a specified source. This was followed by a spike of applications which leads the Home Office to believe that the funds were being re-cycled and artificial businesses being created to exploit the Tier 1 provisions. The Home Office is therefore making changes to check that the application is "genuine" and that will allow officials curtail the leave if the required funds cease to be available. The issue demonstrates the need for vigilance and an awareness of how changes to one entry route may impact on another.

Waste and Emissions Trading Act 2003 (Amendment etc.) Regulations 2013 (SI 2013/141)

23. These Regulations have been laid by the Department for Environment, Food and Rural Affairs (Defra), with an Explanatory Memorandum and impact assessment.

24. The EU Landfill Directive (1999/31/EC) set targets for Member States to reduce the amount of biodegradable municipal waste sent to landfill. For the UK these targets are to reduce the amount of biodegradable municipal waste sent to landfill to 75% of the total amount produced in 1995 by 2010; to 50% of the 1995 total by 2013; and to 35% of the 1995 total by 2020. England has met the 2010 target, and is making good progress towards meeting the 2013 and 2020 targets.

25. The targets were transposed by the Waste and Emissions Trading Act 2003, which also provided the basis for landfill allowance trading schemes across the UK. The Landfill Allowance Trading Scheme (LATS) was set up in 2005 in England as the primary driver for meeting the English share of the UK's landfill diversion targets. It is a cap-and-trade scheme dealing with the biodegradable waste that is land-filled by local authorities.

26. The Regulations bring the LATS in England to an end at the close of the 2012-13 scheme year. Defra states that, while the LATS kick-started efforts to divert waste, it now has less impact than the rising level of landfill tax, which has become the more significant driver for local authorities to reduce the waste sent to landfill.

Town and Country Planning (Modification and Discharge of Planning Obligations) (Amendment) (England) Regulations 2013

27. In the Explanatory Memorandum to these Regulations, the Department for Communities and Local Government (DCLG) states that, under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"), developers can enter into a binding agreement in relation to land in which they have an interest, and that these are known as "section 106 agreements" (or "planning obligations"). DCLG describes the purpose of section 106 agreements as being to make development acceptable in planning terms. The 1990 Act provides that a formal application may be made to the local planning authority to amend a planning obligation, and that such an application can be made only after the expiry of a prescribed period. There is currently no period prescribed under the 1990 Act, so a default period of five years from when the obligation was entered into applies.

28. DCLG states that, because of concern at the high level of stalled development, the Government are encouraging earlier renegotiation of section 106 agreements where they have an impact on viability. These Regulations are intended to support this aim. They amend the relevant period after which applications to vary section 106 agreements can be made, and make provision so that this cannot have the effect of delaying an application that could otherwise be made under the existing legislation. The Department explains that this measure is complemented by Government-supported mediation of section 106 agreements, and by measures in the Growth and Infrastructure Bill to allow an appeal against the affordable housing elements of planning obligations.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to affirmative approval

Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2013

Electronic Commerce Directive (Trafficking People for Exploitation) Regulations 2013

Financial Services Act 2012 (Consequential Amendments) Order 2013

Financial Services Act 2012 (Mutual Societies) Order 2013

Financial Services and Markets Act 2000 (Threshold Conditions) Order 2013

Global Green Growth Institute (Legal Capacities) Order 2013

Guaranteed Minimum Pensions Increase Order 2013

Legal Deposit Libraries (Non-Print Works) Regulations 2013

Representation of the People (Election Expenses Exclusion) Order 2013

Social Security Benefits Up-rating Order 2013

Social Security (Contributions) (Limits and Thresholds) (Amendment) Regulations 2013

Social Security (Contributions) (Re-rating) Order 2013

Uncertificated Securities (Amendment) Regulations 2013

Instruments subject to annulment

HC 943	Statement of Changes in Immigration Rules
SI 2013/117	Regional Strategy for Yorkshire and Humber (Partial Revocation) Order 2013
SI 2013/132	NHS Bodies (Transfer of Trust Property) Order 2013
SI 2013/141	Waste and Emissions Trading Act 2003 (Amendment etc.) Regulations 2013
SI 2013/147	Town and Country Planning (Modification and Discharge of Planning Obligations) (Amendment) (England) Regulations 2013
SI 2013/161	Financial Services Act 2012 (Transitional Provisions) (Rules and Miscellaneous Provisions) Order 2013
SI 2013/162	Financial Restrictions (Iran) (Revocation) Order 2013

SI 2013/163	Iran (European Union Financial Sanctions) (Amendment) Regulations 2013
SI 2013/164	Belarus (Asset-Freezing) Regulations 2013
SI 2013/165	Financial Services and Markets Act 2000 (Prescribed Financial Institutions) Order 2013
SI 2013/174	Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) (Amendment) Regulations 2013

APPENDIX 1: DRAFT POLICE AND FIRE REFORM (SCOTLAND) ACT 2012 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2013

Information from the Scotland Office

Q: As regards the draft Order, the Committee considered that, while 9(1)(b) could be understood to be directed towards trade union activity, it was less clear at what activity 9(1)(a) - "causing disaffection" - was directed, and what would have to be done for someone to be charged under this provision: could it even relate, for example, to a chat in a pub?

A: The UK Government thanks the Committee for raising this question. Before turning to the legal aspects of the meaning of "causing disaffection", it is worth noting that it is a matter for the Lord Advocate in his capacity as independent head of the system of criminal prosecution in Scotland to consider in any given factual circumstance whether particular conduct arising would be such as to merit raising criminal proceedings and, among other things, such consideration involves weighing of the public interest in raising proceedings. Factors such as whether the alleged behaviour was isolated, trivial or spontaneous are likely to be relevant to weighing that public interest. Thereafter it would be for the courts to consider whether the offence was founded in relation to the particular conduct libelled.

We are not aware of any prosecution having been raised in relation to the provision contained in s.42 of the Police (Scotland) Act 1967 to date and there is no reported case. There also does not appear to be any reported case involving the equivalent offences which apply to other police forces. That alone would seem to imply that the sort of conduct which the Committee appears to be concerned about has not hitherto given rise to a criminal prosecution.

As regards the legal meaning of disaffection, in paragraphs 27 to 32 of Lord Justice Pill's judgment in the Court of Appeal case of Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400 the meaning of disaffection is discussed by reference to the sources available, including by reference to the judgment in Burns v Ransley [1949] 79 CLR 101 and the Oxford English Dictionary ("OED"). The OED defines disaffection by reference to it being an absence of or alienation from affection and, more specifically, discontentment with authority or an employer.

For the UK Government's part, we would therefore not expect a court would convict a person just because he or she was innocently "blowing off steam" after a shift, not least because it would require to be shown that that then caused actual disaffection. While the Committee offers the example of a chat in a pub, its modern day equivalent could easily be posting on social media but what is important is that disaffection has been caused; the methods for causing that are, plainly, varied. However, if a person deliberately engaged in conduct that caused disaffection within the police and such disaffection could be evidenced then we would certainly regard the offence as having been committed. Police constables hold public office and are expected to be aware of the impact of their behaviour on service discipline and standards.

Scotland Office

31 January 2013

Q: The Committee remains concerned about the potential width of the offence, and about the possibility that the offence provided for could serve to prevent any individual in society (not just police constables) from expressing legitimate concerns. The Committee took the view that apparently automatic replication of provisions in an Act from 1967 was not sufficient, and that the Government should give fresh thought to whether so wide a provision was still justified.

The Committee also commented that the phrase "the particular conduct libelled" is unusual, and wanted clarification of what "libelled" meant in this context, and whether it was a correct usage.

A: The UK Government welcomes the opportunity to respond to the Committee's concerns. We propose to respond, first, on the justification for the offence in general and, second, on the scope of the offence.

Justification for the offence of causing disaffection in general

In relation to the first point, the UK Government assures the Committee that full and robust consideration was given to the need for the offence and its scope. The drafting of article 9 of the draft Order bears similarity to the original offence in section 42 of the Police (Scotland) Act 1967; but that reflects that it was considered that the wording provided in article 9 fulfilled the current policy intention.

As brief background, police constables are a particular category of Crown servant. For example – and in common with all police forces in the UK, including the specialist forces (the Ministry of Defence Police (MDP), Civil Nuclear Constabulary (CNC) and British Transport Police (BTP)) - police constables are required to swear an oath as to the manner in which they will perform their functions and are prevented from being members of trade unions and taking strike action.

These features reflect the critical role of the police in maintaining public order and safety at all times. The police are a unique public service in terms of the breadth of their law enforcement and public safety functions. Any significant disruption to policing would potentially cause significant harm. The police represent the communities that they serve and are recruited from all sections of society. Although they are carefully vetted and standards of personal integrity are high, they are not immune from subversion. In our view the offence continues to serve a valuable purpose both as a deterrent and as means of dealing with any such subversion that might occur.

Offences parallel to that proposed in article 9 of the draft Order exist in relation to all UK police forces and the specialist forces. For example, section 91 of the Police Act 1996 contains an equivalent offence for England and Wales. Section 6 of the Ministry of Defence Police act 1987 provides the same offence in relation to the MDP throughout the UK. The continued need for this offence is shown by the fact that section 42 of the 1967 Act has been amended over time to ensure it reflects the changing needs of society. The UK Government believe that the offence proposed addresses the needs of present day society.

Home Office have confirmed that there is no intention of removing the offence in England and Wales, and it is our understanding that its repeal is not being contemplated in Northern Ireland either. They are considered to be essential to the proper operation of policing and not just preferable. It is also desirable that the position should be consistent across the UK.

Disaffection could manifest itself in a number of ways which may fall short of officers withholding services but which could be equally detrimental to the effectiveness of policing. The CNC has a specialist role to protect licensed nuclear sites which are not used wholly or mainly for defence purposes and for safeguarding nuclear material in Great Britain and elsewhere. The consequences of causing disaffection or inducing members of the CNC to withhold their services, would, if successful, be extremely serious because it could leave nuclear sites exposed.

Given the absence of the right to strike, police constables have limited means of expressing grievances regarding work related matters. In this context, causing disaffection is such a potentially serious issue.

We are not aware of prosecutions under section 42 of the 1967 Act or indeed the parallel offences applicable to the other police forces. However, that does not mean such offences serve no purpose. They have a powerful impact in deterring behaviour which would undermine effectiveness of police forces.

If the offence did not exist in relation to the new Police Service of Scotland, this would put PSS in an anomalous position in comparison with the other UK and specialist police forces. This article also extended the offence to cover disaffection of the specialist police forces in Scotland. Without article 9, there would not only be a gap in Scotland but a difference of treatment of the specialist forces north and south of the border. It would cast doubt on the offence in relation to the other police forces.

Scope of offence

There is no direct judicial consideration of the meaning of "disaffection" as used in the context of the section 42 of the 1967 Act or the parallel offences. However guidance can be drawn from a decision of the Court of Appeal in the context of the decision to deprive an individual of British citizenship. Under the relevant legislation, such citizenship could be deprived if the person had shown himself to be "disloyal or disaffected" toward the Crown. That decision concluded that "disaffected" …

"requires an attitude of mind towards an entity to which allegiance is owed, or at least to which the person belongs or is attached."

Further -

"to be disaffected is to be estranged in affection toward an entity to which one owes allegiance to with which one has at least a relationship."

The decision also comments on section 91 of the Police Act 1996, and observed that the use of "disaffection" in that provision is based on the existence of the relationship of an individual with a state organisation.

Accordingly, the UK Government consider that "disaffection" in the context of article 9 of the draft Order would require there to be a relationship between the person accused of the offence and the Police Service of Scotland (PSS).

The proposed offence is not drafted so as to restrict those who may commit it to only police constables as other categories of person may also have a relationship or connection with the PSS. To do so would unnecessarily restrict the scope of the offence and potentially create a technical loophole.

We do not consider that a person unconnected to the PSS raising legitimate concerns relating to the police would be caught by the offence. Nor do we consider

that a person connected with the PSS who raises legitimate concerns would be caught - because legitimate concerns would not constitute an absence of affection to the force with which the person is connected.

We also refer to our previous response to the Committee, in particular the discretion of the Lord Advocate in weighing when a prosecution would be in the public interest.

The UK Government does not consider that an individual would be likely to be charged under the offence set out in article 9 for merely expressing an opinion. The UK Government would only expect a prosecution to follow where there was a real and serious attempt to cause disaffection.

It is not the intention of this instrument to interfere with a person's ability to express legitimate concerns. It is the intention to provide a means of addressing an act of causing intentional disaffection, that is to say disaffection being caused by individuals which could lead to a breakdown in public order. Causing disaffection is not the same as expressing views or concerns. Any frank discussion or conversation where ideas and opinions are being put forward for debate would not fall within the scope of article 9. However, should it be clear that an individual is not interested in an exchange of ideas but is rather attempting to persuade members of any relevant force that it is not right to do their job effectively by means of causing disaffection with the objective of causing any form of disruption then the offence specified in article 9 could be considered. The primary purpose of any of the relevant forces specified in article 9 is to protect society. Any attempt to undermine this, and thus put the safety of the populace at risk, needs to be addressed.

"Conduct libelled"

The term "libel" or "libelled" is one of Scots law. It is used in Scottish criminal procedure legislation and practice to refer to the description of the conduct constituting the alleged offence where it appears in the formal document initiating the prosecution. Its meaning in this context is distinct from any meaning connected to defamation. We apologise for any confusion which our original response caused. As an illustration:

"Where, at any time after the jury has been sworn to serve in a trial, the accused intimates to the court that he is prepared to tender a plea of guilty as libelled, or such other plea as the Crown is prepared to accept, in respect of any offence charged in the indictment, the judge shall accept the plea tendered and shall convict the accused accordingly."

We hope the Committee agrees that the UK Government has given considerable thought to the drafting of this article and that there remains a need for this offence.

Scotland Office

7 February 2013

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 12 February 2013 Members declared no interests.

Attendance:

The meeting was attended by Lord Bichard, Lord Eames, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Lord Norton of Louth, Lord Plant of Highfield, and Lord Scott of Foscote.