

# HOUSE OF LORDS

## Secondary Legislation Scrutiny Committee

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4th Report of Session 2012-13

### **Public Bodies Orders:**

**Draft Public Bodies (Abolition of Environmental Protection Advisory Committees) Order 2012**

**Draft Public Bodies (Abolition of Regional and Local Fisheries Advisory Committees) Order 2012**

### Correspondence:

**Draft British Waterways Board (Transfer of Functions) Order 2012**

**Draft Inland Waterways Advisory Council (Abolition) Order 2012**

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**Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2012**

Plus Information Paragraphs on 4 Instruments

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*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.

*Members*

Lord Bichard	Lord Methuen
Baroness Eaton	Rt Hon. Baroness Morris of Yardley
Lord Eames	Lord Norton of Louth
Rt Hon. Lord Goodlad ( <i>Chairman</i> )	Lord Plant of Highfield
Baroness Hamwee	Rt Hon. Lord Scott of Foscote
Lord Hart of Chilton	

*Registered interests*

Information about interests of Committee Members can be found in Appendix 3.

*Publications*

The Committee's Reports are published on the internet at [www.parliament.uk/seclegpublications](http://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](mailto: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.

# Fourth Report

## PUBLIC BODIES ORDERS

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### **A. Draft Public Bodies (Abolition of Environmental Protection Advisory Committees) Order 2012**

#### **Draft Public Bodies (Abolition of Regional and Local Fisheries Advisory Committees) Order 2012**

##### *Introduction*

1. The draft Public Bodies (Abolition of Regional and Local Fisheries Advisory Committees) Order 2012 (“the draft RaLFACs Order”) was laid on 21 May under section 11 of the Public Bodies Act 2011 (“the 2011 Act”); the draft Public Bodies (Abolition of Environmental Protection Advisory Committees) Order 2012 (“the draft REPACs Order”) was laid on the same day also under section 11 of the 2011 Act. Both draft Orders were laid by the Department for Environment, Food and Rural Affairs (Defra) with an Explanatory Document (ED). Copies of the consultation responses have also been provided.
2. The draft RaLFACs Order abolishes the Regional and Local Fisheries Advisory Committees in England; the draft REPACs Order abolishes the Regional Environment Protection Advisory Committees in England.

##### *Overview of the proposal*

3. Regional and Local Fisheries Advisory Committees (“RaLFACs”) are independent advisory non-departmental public bodies established by section 13 of the Environment Act 1995 (“the 1995 Act”) to provide advice to the Environment Agency (“the Agency”), Government and others on matters considered appropriate and relevant to fisheries. Regional Environment Protection Advisory Committees (“REPACs”) are independent advisory non-departmental public bodies established by section 12 of the 1995 Act, to provide advice to the Agency, Government and others on matters considered appropriate and relevant to environment protection.
4. The proposals on RaLFACs and REPACs were announced by the Government in October 2010; following public consultation, the Government decided that these arm’s-length committees should be abolished “to establish more flexible non-statutory engagement arrangements at a more local level”. The Government acknowledge the committees’ valuable contribution to the work of the Agency through the provision of advice on environment protection, maintaining, improving and developing fisheries as well as recreation, navigation and conservation issues. However, the Government consider that the regional statutory basis for the committees makes for inflexibility and inefficiency, and that the non-statutory approach which is proposed in future, for “community and civil society engagement” in both advice and delivery, would be more flexible and would better meet current needs and policy objectives.

*Role of the Committee*

5. This Committee's role, as set out in its Terms of Reference, is to "report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)". A key aspect of this role is the Committee's power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60 day period from the date of laying.

*Consultation*

6. Defra carried out a consultation covering the proposed abolition of both RaLFACs and REPACs, between November 2011 and January 2012. 44 responses were received:
  - 13 supported abolition of both sets of committees;
  - a further two responses supported abolition of RaLFACs only;
  - seven responses opposed abolition of both sets of committees;
  - a further 17 responses opposed abolition of RaLFACs only;
  - five other responses did not fall into either the "for" or "against" categories

*Tests in the Public Bodies Act 2011: assessment of the proposals*

7. A Minister may only make an order under sections 1 to 5 of the 2011 Act if he considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b) effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers (section 8 of the 2011 Act).

*Efficiency*

8. The Government consider the regional remits of these committees, as set out in the 1995 Act, create a degree of inefficiency and inflexibility, which would be remedied by providing instead for a non-statutory approach to involving "civil society and local communities" (ED paras. 7.12 to 7.17).

*Effectiveness*

9. The Government state that key to the Agency's successful performance of its responsibilities is "effective local stakeholder engagement and partnership". They consider that a non-statutory structure would "have the flexibility to evolve and better address local priorities and would facilitate the engagement of civil society and local communities and partners in delivery". They say that abolition of the committees would free resources for re-investment to achieve these ends (ED paras. 7.18 and 7.19).

*Economy*

10. Abolition of RaLFACs will yield savings of around £225,388 per year; abolition of REPACs will yield savings of around £192,831 per year. In both cases, most of the savings will result from ceasing to pay the salaries of the Chairmen of the committees. The Government say that there will be no

overall economic savings from the abolition, since the savings made from abolishing the committees will be re-invested into supporting the engagement models of the future approaches (ED paras. 7.20 to 7.22).

### *Accountability*

11. The ED states that a key reason for proposing the abolition of the committees is “to encourage wider collective responsibility and more direct local scrutiny and accountability from customers and communities into the Environment Agency on how environmental priorities are delivered”. The committees are to be replaced with more flexible arrangements for each of the Agency’s operating regions. “These regional models themselves will not be subject to formal monitoring or evaluation and as they will be different in each locality ... [but they will] be underpinned by the consistent high-level principles detailed in the consultation”. Defra will review progress with the Agency against the high-level principles within two years of the new engagement principles taking effect (paras. 7.23 to 7.26).

### *Safeguards*

12. Section 8(2) of the 2011 Act requires that a Minister may make an order only if the Minister considers that (a) the order does not remove any necessary protection and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.
13. In confirming that the Minister considers that these safeguards are met, the ED states that the statutory functions of RaLFACs and REPACs as advisory bodies have no impact on personal protections, rights or freedoms. The 1995 Act places a duty on the Agency to consult any of the advisory committees on proposals that relate to the Agency carrying out its functions in the relevant regions in relation to maintaining, improving and developing certain fisheries, as well as matters that relate to recreation, conservation or navigation. Abolition of RaLFACs and REPACs would have no impact on these consultation procedures, since the proposed future engagement arrangements aim to enable the Agency to consult a wider group of stakeholders than the committees’ current membership remit (paras. 7.27 to 7.30).

### *Conclusion*

14. We understand that the Government’s proposal to abolish the RaLFACs and REPACs results from its view that engagement by the Agency with local stakeholders is hampered by the statutory regional structure prescribed by the 1995 Act; and that such engagement would be more effective through a non-statutory structure that could more easily evolve to address local priorities better.
15. The ED explains that, in order to underpin innovative and effective methods of such engagement, the Agency has developed a number of high-level principles (set out in Annex D of the ED) in discussion with the existing committees as well as local and national stakeholder groups. Regional models for the Agency’s future engagement with stakeholders will be “fluid [and] flexible”, different in each locality, and not subject to formal monitoring or evaluation. The ED states that these models will be underpinned by the

- high-level principles; and that Defra will review progress with the Agency against these principles within two years of the new engagement principles taking effect, if the RaLFACs and REPACs are abolished (paragraph 7.17).
16. Underlying the Government's approach is the view that, in the context of involving interested parties in the work of the Agency, prescription is bad and flexibility is good. We note that, if approved, the Orders will remove a statutory obligation on the Agency to carry out consultation. We would have welcomed a recognition in the ED that prescription, notably statutory provision, can have the merit of greater transparency, since the requirement and method for such involvement is set out in legislation. By the same token, "fluidity and flexibility" can make it more difficult for a third party to understand an organisation's approach to stakeholder engagement, in the absence of a standard set of arrangements. The Government's statement that the new arrangements will not be subject to formal monitoring or evaluation is surprising; while this may be more convenient for the Government and the Agency itself, this is likely to offer little reassurance to third parties that the intended benefits of abolishing the RaLFACs and REPACs are being secured.
  17. The information provided about the consultation process notes the concerns that have been voiced about the Government's proposals. The ED acknowledges that "there were more responses to the consultation from the North West than any other geographic region and the responses from the North West tended to be more opposed to abolition, especially with regards to RaLFACs" (paragraph 8.8). The summary of the consultation published on Defra's website<sup>1</sup> shows that there were 17 responses from the North West, all of them apparently opposed to abolition of the committees. The ED states that the main reason for this was "that respondents were not assured that the 'voice' of current RaLFAC stakeholders which the Committees represent will be effectively 'heard' through the groups currently proposed in the regional engagement models" (*ibid*).
  18. The ED also states that, in reaching the decision to go ahead with the abolition of the RaLFACs and REPACs, the Government took into account what are termed "the very low number of responses to the consultation [44] ... [and] the polarisation of responses to the consultation from the North West" (paragraph 8.17). We note that the Government regard a low level of response nationally as implicit acceptance of their proposals, and a high level of critical response regionally as no obstacle to proceeding with their intentions. We comment that future consultation exercises may attract even fewer responses if potential respondents conclude that their criticisms will have no impact.
  19. We are content to clear the Draft Public Bodies (Abolition of Regional and Local Fisheries Advisory Committees) Order 2012, and the Draft Public Bodies (Abolition of Environmental Protection Advisory Committees) Order 2012, within the 40 day affirmative procedure. However, **we recommend that the Government re-consider the need for formal monitoring and evaluation of the successor arrangements which are put in place to enable interested parties to be engaged in the delivery of the Environment Agency's objectives; and that, without delay after abolition of the Regional and Local Fisheries Advisory Committees**

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<sup>1</sup> <http://www.defra.gov.uk/consult/files/epac-rlfac-response-summary.pdf>

**and Regional Environmental Protection Advisory Committees, Government and the Environment Agency put in place, and publicise, regular meetings with key regional stakeholders to strengthen the process of monitoring and evaluation.**

**B. British Waterways Board (Transfer of Functions) Order 2012  
Inland Waterways Advisory Council (Abolition) Order 2012**

20. In the Committee's 1st Report of the current session (HL Paper 5), we reported on two draft public bodies orders relating to British Waterways. We took oral evidence on the draft orders on 24 April 2012 from Mr Richard Benyon, MP, Parliamentary Under-Secretary of State at the Department for Environment, Food and Rural Affairs, and from Mr Robin Evans, Chief Executive of the British Waterways Board and published the transcript of that oral evidence on our website. Following publication of our Report, we received a letter from Mr Ralph Freeman, commenting on the oral evidence, and we invited Mr Benyon to respond to points made in that letter. We have now received Mr Benyon's reply. We are publishing this correspondence (see Appendix 1), and we now regard the correspondence as closed.

## INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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**The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the grounds specified.**

### C. Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2012 (SI 2012/1309)

*Date laid: 21 May*  
*Parliamentary Procedure: negative*

*Summary: The Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2012 come into force on 18 June 2012. They implement the higher education reforms which affect the repayment of income-contingent student loans issued to new students in September 2012 or later. Additionally, they contain some changes which will apply to the existing income-contingent repayment system.*

**This instrument is drawn 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.**

21. Provision was included in statutory instruments (“SIs”) made in 2010 to allow publicly funded higher education institutions (“HEIs”) to charge up to £6,000, or up to £9,000 where an HEI has an access plan approved by the Director of Fair Access, to new full-time students starting a qualifying course on or after 1 September 2012. The SIs concerned - the Higher Education (Basic Amount) (England) Regulations 2010 (SI 2010/3021) and Higher Education (Higher Amount) (England) Regulations 2010 (SI 2010/3020) - were made in December 2010, and will come into force on 1 September 2012. SI 2010/3021 was drawn to the special attention of the House by the Committee<sup>2</sup> on the ground that the Regulations gave rise to issues of public policy likely to be of interest to the House.
22. The Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2012 amends earlier Regulations<sup>3</sup> which govern the repayment of income-contingent student loans. The 2012 Regulations introduce changes resulting from the Higher Education White Paper of June 2011<sup>4</sup> to the repayment system for new borrowers entering higher education for the first time from September 2012, and also some changes for borrowers under the current repayment system.
23. In its Explanatory Memorandum, the Department for Business, Innovation and Skills (BIS) sets out the main changes to repayment arrangements on student loans for students starting courses on or after 1 September 2012. These are listed below, with information about comparable arrangements for students currently receiving loans:
  - *under the new arrangements*, new students starting a higher education course from September 2012 onwards will be charged interest at RPI (Retail Price Index) +3% whilst studying. This rate will apply until the

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<sup>2</sup> 14th Report of Session 2010-11; 9 December 2010

<sup>3</sup> The Education (Student Loans) (Repayment) Regulations 2009 (SI 2009/470)

<sup>4</sup> <http://c561635.r35.cf2.rackcdn.com/11-944-WP-students-at-heart.pdf>

borrower is liable to make repayments. *Under the existing system*, interest is linked to the RPI, and the interest rate is set for each academic year from 1 September to 31 August, based on the RPI for the year to the preceding March. However, the rate must not be more than 1% higher than the highest of base rates of a specified group of banks (this is referred to as “the low interest cap”; currently the rate of interest being charged is 1.5%);

- *under the new arrangements*, once a borrower has reached the Repayment Due Date, the rate of interest charged will depend upon the borrower’s income. Borrowers earning £21,000 or less will be charged a rate equivalent to RPI. Interest will then be charged on a sliding scale up to £41,000 where the interest rate will be RPI +3%. *Under the existing system*, the current threshold is £15,795. Repayments are due at a rate of 9% of income above the respective thresholds under both the new and existing arrangements;
  - *under the new arrangements*, the £21,000 and £41,000 thresholds for borrowers will be calculated so as to reflect relative purchasing powers, so that variable interest can be applied to borrowers who reside overseas on a consistent basis. World Bank data will determine the relevant threshold for each country. The Student Loans Company (“SLC”) will establish a 12-month repayment schedule with both repayments and interest based on predicted income;
  - HMRC will not collect repayments *under the new system* before April 2016, though borrowers are free to make payments direct to the SLC. Some borrowers who are on short courses or who leave their course early would ordinarily be due to start repayments before that date. Those borrowers will be charged interest at RPI +3% until the April after they leave their course; RPI only from that date until April 2016; and the appropriate rate of variable interest from April 2016;
  - *under the new arrangements*, borrowers who lose touch with the SLC will be charged interest at the rate of RPI +3%. This rate will be charged until they get in touch with SLC and have provided the relevant information. Once SLC has the required information, the appropriate income-dependent interest rate will apply. This will apply to all new borrowers and will include those who move overseas straight after graduation without advising the SLC;
  - *under the new arrangements*, the outstanding balance of a loan will be cancelled 30 years after the Repayment Due Date. *Under the existing system*, for students who commenced studies in September 2006 or later, the outstanding balance of a loan will be cancelled 25 years after the Repayment Due Date; for student loans before that date, the loan is written off when the borrower reaches the age of 65. Under both the new and existing arrangements, the loan will also be cancelled if the borrower dies or the borrower receives a disability related benefit and, because of the disability, is permanently unfit for work.
24. BIS states that the new repayment system, applicable to new students who commence their studies in September 2012 or later, is designed to be “sustainable, affordable and progressive”; that repayments will be income-contingent, ensuring that repayments match ability to pay; and that, by raising the repayment threshold to £21,000 and introducing a progressive

rate of interest, there will be a greater protection to the lowest graduate earners.

25. BIS has also provided an Equality Impact Assessment (“EIA”) which serves to analyse the effects on equality of the Regulations. There is a good deal of information in the EIA, but it may be of interest to highlight two statements contained in the section entitled “Summary of analysis and impact”. On a general note, the EIA states that “Current evidence points to diminishing inequalities in HE, indeed, higher representation from previously under-represented groups in some circumstances” (paragraph 5). On the particular impact of the student loan arrangements that will apply from September 2012, however, the EIA states the following:

“The only evidence available to us at this stage regarding the new system is the latest 2012 UCAS application data. The figures for April show that while the total number of applicants in 2012 is down on 2011 by -7.7%, the fall is smaller for females compared to males (-7.1% vs -8.6%). UCAS published an analysis of application rates for POLAR<sup>5</sup> groups in January 2012 which showed that application rates from the two least affluent categories have remained broadly the same as last year, with rates for the more affluent categories reducing more significantly.” (paragraph 6)

BIS comments that these data provide only a limited insight into the potential impact of the student funding reforms, and that the actual impacts may emerge more slowly.

#### **D. Draft Data Protection (Processing of Sensitive Personal Data) Order 2012**

*Date laid: 14 May*

*Parliamentary Procedure: affirmative*

26. In our third report of this Session (HL Paper 11) we drew attention to this instrument expressing disappointment that its title fails make clear its connection to the Hillsborough Independent Panel and the provision of information for the purpose of investigations into the incident; recording our view that the title should be changed; and raising a wider concern that the titles of statutory instruments should be clear and transparent. The Ministry of Justice has responded explaining why in this instance it feels unable to change the title of the draft Order (see Appendix 2). We accept the explanation in this particular case, but the response did not address our wider concern about clarity and transparency: we are not entirely persuaded that transparency should be dependent on putting the right key words in a particular search engine. **The House may wish to take this point up with the Minister in the debate.**

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<sup>5</sup> POLAR classification is used as a measure of disadvantage. It defines geographical areas according to their participation rates for young entrants to higher education.

## OTHER INSTRUMENTS OF INTEREST

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### ***Draft Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012***

27. This the fourth Order on the path to setting up a new local TV framework for the United Kingdom. To facilitate bidding for local stations the instrument will remove, in relation to local TV broadcasters only, the obligation to source 10% of qualifying programme content from independent producers. Separately, it encourages independent producers to participate in the bidding process by amending the definition of “independent” set out in article 3(4) of the Broadcasting (Independent Productions) Order 1991<sup>6</sup> so that any bidder’s production content will count towards the 10% quota. Article 3(4)(b) of the 1991 Order currently stipulates that a producer cannot be “independent” if it holds more than a 25% shareholding in a broadcaster. This Order removes the 25% shareholding cap but only for shareholdings in local television broadcasters. Removing the cap in this way enables independent producers to choose to bid for and hold a local TV broadcast licence without losing their independent status at the national and regional level.

### ***Draft Further Education Institutions and 16 to 19 Academies (Specification and Disposal of Articles) Regulations 2012***

28. The Education Act 2011 extended the range of items which may be searched for without a student’s consent, to include any article which has been, or could be, used to commit an offence or to cause personal injury or damage to property. It is intended to commence these extended powers on 1 April 2012. In the Explanatory Memorandum (“EM”) to these draft Regulations, BIS states that it wishes to ensure parity of treatment with their peers in other educational institutions for college students under the age of 18. It is therefore mirroring the Department for Education’s policy for schools in adding tobacco products, fireworks and pornographic images to the list of prohibited items for which students can be searched without consent.
29. In the EM, BIS comments that, since students aged 18 and over may lawfully possess tobacco products, fireworks and pornography and, (with the exception of tobacco) they are not in themselves necessarily harmful, the Department’s view is that to search an adult student for these items would not justify interfering with their right to private and family life. This view underlies BIS’ decision that the draft Regulations should provide that these are not prohibited items in respect of adult students, and that only students aged under 18 may be searched for these items; and we recognise that it may be controversial.

### ***Health Education England Regulations 2012(SI 2012/1290)***

30. The Health and Social Care Act 2012 envisages a greater separation between the Department of Health and the NHS. These Regulations, with SI 2012/1273<sup>7</sup>, establish Health Education England to be responsible for carrying out the Secretary of State’s functions for securing an effective system

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<sup>6</sup> SI 1991/1408

<sup>7</sup> Health Education England (Establishment and Constitution) Order 2012

for the education and training of the public health workforce. Regulation 8(2) provides that if the chair is suspended (under regulation 6), the appointment of the vice-chair automatically ceases to have effect. Although under regulation 8(3) the Secretary of State may re-appoint that person as vice-chair or appoint another non-officer member to the position, the process, which we understand to be common practice, does have the potential to cast doubt on the reputation of the vice-chair which may be unjustified.

***Non-Domestic Rating (Waterways) (England) Regulations 2012 (SI 2012/1291)***

31. We have previously reported<sup>8</sup> on the Draft British Waterways Board (Transfer of Functions) Order 2012, laid under section 5(1) of the Public Bodies Act 2011 (“the 2011 Act”), with the purpose of transferring the British Waterways Board’s (“BW”) statutory functions in England and Wales to the Canal and River Trust (“CRT”). At the same time as that order is made, a transfer scheme will be made under the 2011 Act, transferring certain property, rights and liabilities of BW to CRT.
32. BW’s canal and river network in England is currently assessed for business rates as a single hereditament on the central rating list. Once these assets are transferred to CRT, they would fall to be assessed individually on local rating lists if no other action were taken. In order to retain a single rating assessment for the operational land of CRT, these Regulations create a new single local list hereditament deemed to be located in the area of Birmingham City Council, so that it will appear on the Birmingham Rating List.

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<sup>8</sup> 1st Report of Session 2012-13, HL Paper 5

## **INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE**

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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**

Armed Forces Act (Continuation) Order 2012

Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012

Further Education Institutions and 16 to 19 Academies (Specification and Disposal of Articles) Regulations 2012

### **Instruments subject to annulment**

SI 2012/1273 Health Education England (Establishment and Constitution) Order 2012

SI 2012/1290 Health Education England Regulations 2012

SI 2012/1291 Non-Domestic Rating (Waterways) (England) Regulations 2012

SI 2012/1292 Central Rating List (England) (Amendment) Regulations 2012

SI 2012/1310 Misuse of Drugs (Designation) (Amendment No. 2) (England, Wales and Scotland) Order 2012

SI 2012/1311 Misuse of Drugs (Amendment No. 3) (England, Wales and Scotland) Regulations 2012

SI 2012/1313 Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012

SI 2012/1324 Local Authorities (Capital Finance and Accounting) (England) (Amendment) (No. 3) Regulations 2012

SI 2012/1343 Criminal Defence Service (Funding) (Amendment No. 2) Order 2012

SI 2012/1344 Prosecution of Offences (Custody Time Limits) (Amendment) Regulations 2012

SI 2012/1345 Crime and Disorder Act 1998 (Service of Prosecution Evidence) (Amendment) Regulations 2012

SI 2012/1363 Tribunal Procedure (Amendment No. 2) Rules 2012

SI 2012/1399 National Health Service (Pharmaceutical Services) Amendment Regulations 2012

SI 2012/1404 Road Vehicles (Construction and Use) (Amendment) Regulations 2012

SI 2012/1431 Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2012

**APPENDIX 1: BRITISH WATERWAYS (TRANSFER OF FUNCTIONS)  
ORDER 2012 AND INLAND WATERWAYS ADVISORY COUNCIL  
(ABOLITION) ORDER 2012: CORRESPONDENCE**

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**Letter from Mr Ralph Freeman to Lord Goodlad**

Dear Lord Goodlad,

I have just read through the transcript of the meeting you had with senior official of British Waterways and in the near future, of CART.

I was appalled at some of the replies from, in particular, Robin Evans, which are clearly designed to mislead your good selves and in no way represent what is happening or what has happened on our canal system over the last 5 years.

I am in a position to observe events first hand having lived on a narrowboat on the canals of The Midlands for the last 10 years.

All I ask is for a few moments of your time to read a few of the many points your recent meeting raised.

From the Transcript:-

Q17

“I am still puzzled as to what the difference is between what the charity is going to be doing and what British Waterways has been doing. The relevance of that worry is that the satisfaction of the efficiency, effectiveness, economy and securing appropriate accountability requirements of the Act becomes a little difficult to follow.”

That is the question many of us in the boating fraternity have been wondering. Indeed with all the same board members in BW transferring to CART, many boaters regard the changes as merely ‘re-branding’.

I was interested to see in writing BW cannot ‘Trade’. However it does trade. It has BWML it’s marina subsidiary and it has entered into a number of speculative ventures, pub chain (Waterside Pub Partnership) and Gloucester Quays shopping development spring to mind. Both collapsed with the loss of millions of pounds of taxpayers money, money that should have been spent on dredging and other maintenance tasks, but was diverted into speculative ventures. These Ventures I suggest are outside the remit of British Waterways and CART too for that matter?

Robin Evans and his staff have a long record of ‘playing Monopoly’ (badly) with funds that should have gone on maintenance. For individual instances of this look at the web site [www.narrowboatworld.com](http://www.narrowboatworld.com) for specific examples and the amount of monies wasted.

An indication of Robin Evans attitude to maintenance is given by his reply to Question 20:-

Robin Evans: The condition of the assets deteriorates a bit and then levels off but is stable.

This is manifestly not true as any home owner will testify. Water penetration into brickwork leads to frost damage, which leads to further water penetration etc. So quite the opposite is true.

A lack of timely maintenance causes decay which speeds up with time. Indeed it took 3 serious canal breaches in 13 months to convince BW that maintenance was

not 'optional' and its inspection procedures, after the sacking of Lengthsmen, were inadequate. These very expensive breaches may well have been avoided with timely maintenance.

#### Committees

As I stated at the beginning I have lived on a narrowboat for 10 years now and like many others have no representation on the new CART committees.

Despite boaters providing over £30million of income to BW/CART they were allocated only 5 places on the main committee of 35. Even worse the elections allowed organisations such as the IWA to use their mailing lists of members to generate letters instructing their members to vote for individuals with positions on the IWA main board. The net result is all the 5 positions were filled with senior IWA officials! Robin Evans must have known of this but allowed it to take place. Such is the disgust at this 'manipulation' the new charity has been nicknamed CARTIWA by the boating community.

Result:- I AND MANY LIKE ME HAVE NO VOICE.

#### FOI

I suggest the main reason Robin Evans is so supportive of the change of operating status is an attempt to escape the reaches of the FOI act and allow him and fellow board members free reign to 'play Monopoly' with funds that should be spent maintaining the waterways, without boaters having any means to monitor this 'off the radar' activity.

The amount of money spent on dredging has been minimal over recent years such that stretches of canal are now difficult to navigate. The question is where has that money gone? Perhaps the National Audit Office ought to take interest in BW's recent activities before the handover takes place?

I apologise for the verbosity, but feel strongly that you are being deliberately misled by members of the BW main board. They obviously set their own interests above that of the canals and as such are not fit to run CART.

**Ralph Freeman Bsc(Hons)**

**20 May 2012**

**Letter from Lord Goodlad to Richard Benyon MP, Parliamentary Under-Secretary of State at DEFRA**

On 24 April 2012, my committee took evidence from you, and from Mr Robin Evans, Chief Executive of British Waterways (BW), Mr Nigel Johnson, Legal Director, BW, and Mr John Kittmer, Deputy Director for Inland Waterways, Defra. We have published the transcript of that evidence on our website.

On 20 May 2012, Mr R Freeman wrote to me, to offer comments on the evidence and, in particular, on statements made by Mr Evans. I enclose a copy of that letter.

The committee has not taken a view on these comments. However, it has agreed that I should send a copy of Mr Freeman's letter to you, and ask if you wish to respond to me on any of the points raised.

**Lord Goodlad**

**23 May 2012**

## Letter from Richard Benyon MP to Lord Goodlad

Dear Lord Goodlad

### **Draft British Waterways Board (Transfer of Functions) Order 2012 – oral evidence**

Thank you for your letter of 23 May which contained a letter from Mr R. Freeman to the Secondary Legislation Scrutiny Committee. I am grateful for the opportunity to respond to Mr Freeman's questions and will answer them in order.

Mr Freeman comments on Lord Scott's question about the difference between the work of the charity and of the public corporation, and the satisfaction of the efficiency, effectiveness, economy and accountability tests of the Public Bodies Act. These matters were covered extensively in the oral hearing and in our written submissions to the Committee. I am pleased that the Committee has accepted our arguments on this point. Certainly, I do not accept that the move to the charity sector is simply one of 're-branding'. It will, for example, benefit the many and varied users of the waterways through the improved accountability of waterways' management, which will be achieved through CRT's governance structures. These include:

- The Waterways Partnerships, which will have an advisory capacity in relation to the charity's sub-national Waterways Management Units (e.g. on business planning and budgeting);
- The Board of Trustees who will be generally accountable to the Council (in respect of the Government funding they will, of course, be accountable to Defra); and
- The Council, which has the power to approve, remove and hold to account the Board of Trustees as well as act as a national forum for all interested parties.

In addition, the charity has given Government a firm commitment that each Waterways Partnership will produce a localism strategy, so that the charity grows the deepest roots in its local communities. Over time, the governance model of the charity will fundamentally alter the nature of the relationship between the users of the waterways and their management.

### **British Waterways Trading Operations**

In his observations on BW's trading operations, Mr Freeman has selectively quoted what Mr Evans said. Mr Evans did not say that 'British Waterways cannot "trade"', he said, 'As a public corporation, we have some freedom but we do not have the freedom to trade and to go out and generate income as we will as a charity.' As a public corporation British Waterways can trade, but their trade activities are restricted to transactions which are adjacent to a waterway they manage, and they cannot directly borrow money from the market. As a charity, the Canal & River Trust will be able to form a trading company that will not have any such restrictions. The charity will be able to borrow against its assets and, of course, it will be able to fundraise.

### **Commercial Performance**

Mr Freeman has asserted that British Waterways have a "long record of playing monopoly (badly) with funds that should be spent on maintenance", which I cannot accept. Some commercial projects have not been successful, but BW's overall commercial performance has been exemplary. They have a long-standing

record of outperforming market benchmarks and using the revenue from their investments to provide for the maintenance of the inland waterways.

Mr Freeman specifically mentions Gloucester Quays and the Waterside Pub Partnership, two joint venture investments by British Waterways. At Gloucester Quays, a designer factory outlet centre, British Waterways were caught up in the economic circumstances arising from the economic crash of 2008. Following a long period of planning, the development was commissioned in early 2007 at the height of the property boom but opened in May 2009 when the financial crisis was in full swing. This resulted in low occupancy and lower than anticipated footfall. The loss on the venture was absorbed by British Waterways' capital expenditure account.

The Waterside Pub Partnership went into receivership in April 2011. As BW was a 50% partner in Partnership, this had no impact on British Waterways' expenditure on the inland waterways, as their original investment of £2.6m was written off in 2008/9. In March 2011, British Waterways bought ten of the top performing pubs in the partnership for £9m and this acquisition will generate a further £675,000 per annum of income for their waterways, a 7.5% return on investment.

In both of these Joint Ventures BW's private sector partners were selected as experts in their respective industries; the partners took the larger share of the commercial risk.

British Waterways runs a diverse investment portfolio to ensure the spread of risk and although not immune to the economic climate this has helped to mitigate the effects of the recession. The value of their commercial portfolio is now at £460m, which is only 8% below its value in March 2007 – prior to the onset of the credit crunch and wider economic recession. They have outperformed the wider UK property market which is still some 30% below 2007 values. British Waterways' commercial property portfolio has not been immune to the economic situation in the UK but it has performed well, with some significant ground rents at Wood Wharf and Paddington providing particular stability.

### **Use of Funding Maintenance of the Network for Commercial Activities**

I reject Mr Freeman's assertion that 'BW has a long record of playing monopoly...with funds that should have gone on maintenance'. British Waterways have always kept a very clear distinction between revenue – which it uses to pay for the operation and maintenance of the network – and commercial capital, which it invests in commercial activity to create revenue. British Waterways do not use money which has been received as Grant or through licence fees to subsidise their commercial activities. Nor do they spend the commercial capital (except on **very rare** occasions and on the basis that the capital will be replenished) on maintenance and repairs, because that would, over time, remove a large revenue source.

The fact that we are able to transfer a commercial portfolio of £460m from BW to CRT is a sign of BW's success – across the economic cycle – in managing its commercial interests. Within CRT, the commercial portfolio will continue to provide a long-term income for the maintenance of the waterways. Under the arrangements agreed between Defra and CRT, CRT's investment strategy for the transferred commercial assets will be subject to monitoring by a specially appointed 'Protector', so that the capital continues to provide a good return that can be invested in waterways.

### **Asset Condition**

Under Q20, Mr Freeman has taken what Mr Evans said out of its context. Mr Evans was not talking about the impact of investing or not investing in individual assets, but about the impact of particular levels of grant on the overall state of the principal assets (which is measured, as a proxy, by the number of 'D' and 'E' assets (i.e. those assets in the worst two conditions) as a proportion of the overall principal assets).

The proportion of assets in D and E grade is affected both by the overall level of income available for waterways management (from various sources such as licence fees, utilities contracts, income derived from capital, and Government grant) and by decisions about the allocation of the available income (e.g. as between asset repair, dredging activities, vegetation management, etc.). As our impact assessment demonstrates (see figure 4 on p. 31), under the CRT's projected levels of income (which includes, but is not limited to, income derived from the Government's 15-year funding agreement) the condition of the principal assets is expected to worsen slightly in the first years of the charity's existence (owing to restricted income during the current economic downturn), but to level off thereafter and to remain at a stable position throughout the period of the funding agreement. The proportion of D and E assets is forecast never to rise above 22% of the total; this is a much more stable and satisfactory state of affairs than has been the case over the recent history of the waterways.

Mr Freeman refers to recent breaches. Three breaches did indeed occur within 13 months of each other about two years ago on the Monmouthshire and Brecon, the Caldon and the Staffordshire and Worcestershire canals. Breaches have been a feature of the network from the day they were built; however, they have become much less frequent in recent years. The canal network is inspected every month, with some low risk lengths inspected every three months, and British Waterways' inspection procedures are more professional and more accurate since they replaced lengthsmen with dedicated inspectors. These practices will continue under the Canal & River Trust.

### **Council Elections**

I do not accept that boaters have 'no voice' on the CRT Council. Defra and the then Transitional Trustees of the CRT reached agreement on the composition of the Council after extensive consultation of our stakeholders. It was agreed at an early stage that the Council should be populated with members from the many and diverse stakeholder groups who have an interest in our Inland Waterways. It was clear from the consultation that we had to strike an appropriate balance between the overall size of the Council (too large a body would not be effective) and the broad range of groups that wanted to be represented on it. In the event, we settled on 35 representative members, drawn from the different communities that use or benefit from the Waterways, including boaters, boating companies, canoeists, walkers, cyclists, heritage, environmental and community groups etc. as well as employees of CRT and representation from Chairs of Waterways Partnerships. Fair representation was prioritised for the first composition of the Council.

During the public consultation, it was clear that many stakeholders wanted as many members of the Council as possible to be directly elected by their 'constituencies'. For this reason, the then CRT Transitional Trustees, with Defra support, settled on introducing the principle of direct elections from the outset, with the aim of eventually achieving direct elections for 50% of the Council members. For three constituencies a database was already available, which meant that boaters and business boating constituencies and British Waterways'

employees had direct elections earlier this year. Indeed, a range of candidates stood for election to the Council and the successful Council members were elected by their constituencies. The elections were freely and fairly conducted under the auspices of Electoral Reform Services. The process for nominating the other members of the Council was overseen by an Appointments Committee with an independent Chair.

### **Freedom of Information Act**

I can confirm that, subject to parliamentary consent, the Government intends to apply the Freedom of Information Act (FOIA) to the Canal & River Trust, in respect of all those statutory functions it will inherit from British Waterways through the proposed Transfer Order. This provision has been included in the draft Order which your Committee has considered (see Schedule 3, para. 15).

The Government settled on this delimited application of the FOIA to CRT following public consultation, the results of which are summarised in our Explanatory Document (para.8.22-8.24) and on p.4-6 of the Government's 'Summary of responses to the supplementary consultation on the Transfer Order "A New Era for the Waterways", 12th September – 24th October 2011', published in December 2011. The Government is not proposing to apply FOIA to all the activities of the Canal & River Trust because a balance has to be struck. The Canal & River Trust is an independent charity, though one that will be carrying out important statutory functions. The formula we have proposed means that the public will continue to be able to make FOIA requests in respect of the statutory functions transferring from British Waterways to CRT. However, accountability for the Canal & River Trust's broader charitable purposes and activities (such as its fund-raising) should be left to its own governance and transparency arrangements – as is the case for any other charitable body.

### **Dredging**

Dredging is currently an operational matter for British Waterways and it applies risk-based prioritisation to its dredging and wider maintenance activities. The Government requires British Waterways to operate and maintain waterways to standards that reflect their use and prospects of use. While in the future such matters will be for CRT to decide (in line with the overall income available to the charity), we expect that 'use and prospects of use' will also underpin CRT's approach to dredging.

I hope that these answers reassure you and your committee in regard to the points raised by Mr Freeman.

**Richard Benyon MP**

**28 May 2012**

## APPENDIX 2: DRAFT DATA PROTECTION (PROCESSING OF SENSITIVE PERSONAL DATA) ORDER 2012: SUPPLEMENTARY INFORMATION

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### Further information from the Ministry of Justice

We are grateful for the chance to comment on the Committee's 3rd Report of Session 2012-13, in particular its recommendation on the naming of the draft Data Protection (Processing of Sensitive Personal Data) Order 2012. The current naming of the Order is technically permissible, as recognised by both this Committee and the Joint Committee on Statutory Instruments and we note that some previous Schedule 3 Orders have not contained details of the conditions set out in them.

To have accepted this recommendation would have meant that the Order would have had to be withdrawn, relaid and gone through the scrutiny process of both Committees again. That might have pushed approval for the draft Order (if this was forthcoming) beyond the Summer Recess and could have had an impact on the delivery of the Hillsborough Independent Panel's findings.

We appreciate the intention behind the transparency concerns raised by the Committee, including whether or not the Order could be located on an internet search engine. It is possible to locate the Order online successfully using the words "Hillsborough statutory instrument" and "Hillsborough secondary legislation" in a well-known search engine. The draft Order comes up as the first and second results in these searches, with links to the legislation.gov website.

The Ministry of Justice also contacted the local Liverpool press when the draft Order was laid (and, again, an internet search for "Hillsborough data protection" reveals a story from the Liverpool Daily Post dated 15 May 2012<sup>9</sup>). Lord McNally also wrote to the Opposition Justice spokesperson Andy Slaughter MP, copying in interested MPs. And importantly, the families have been informed of the reasons for this Order.

We are therefore pursuing the draft Data Protection (Processing of Sensitive Personal Data) Order 2012 with its current title.

**Ministry of Justice**

**11 June 2012**

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<sup>9</sup> <http://www.liverpooldailypost.co.uk/sport/liverpool-fc/liverpool-fc-news/2012/05/15/data-protection-laws-to-be-changed-to-assist-hillsborough-independent-panel-to-find-the-truth-99623-30968685/>

### APPENDIX 3: INTERESTS AND ATTENDANCE

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://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 June 2012 Members declared the following interests:

***Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2012 (SI 2012/1309)***

Lord Hart of Chilton as Chancellor, University of Greenwich.

Baroness Morris of Yardley as Chair of Strategy Board, Institute of Effective Education, University of York.

Lord Plant of Highfield as Professor of Jurisprudence and Philosophy, and Fellow, King's College, London.

***Attendance:***

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