

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

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35th Report of Session 2012-13

**Public Bodies Orders:  
Draft Public Bodies (Merger of the  
Gambling Commission and the  
National Lottery Commission) Order  
2013**

**Correction of Government Response:  
Draft Public Bodies (Abolition of Administrative Justice  
and Tribunals Council) Order 2013**

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Also includes 10 Information Paragraphs on 13 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 6.

*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.

# Thirty-Fifth Report

## PUBLIC BODIES ORDERS

### **A. Draft Public Bodies (Merger of the Gambling Commission and the National Lottery Commission) Order 2013**

#### *Introduction*

1. The draft Public Bodies (Merger of the Gambling Commission and the National Lottery Commission) Order 2013 (“the Order”) was laid on 25 March under section 2 of the Public Bodies Act 2011 (“the 2011 Act”). The Order was laid by the Department for Culture, Media and Sport (DCMS) with an Explanatory Document (ED) and an Impact Assessment (IA).

#### *Overview of the proposal*

2. The Government is proposing to merge the National Lottery Commission into the Gambling Commission.

#### *The National Lottery Commission*

3. The National Lottery Commission (NLC), a Non-Departmental Public Body, was established in 1993 by the National Lottery etc. Act 1993 and is responsible in the United Kingdom for licensing and regulating the National Lottery. The NLC is funded through the Consolidated Fund, which is reimbursed by the National Lottery Distribution Fund, net of any fees paid by the National Lottery operator (currently Camelot). With the Secretary of State, its overriding statutory duties are to exercise its functions in a manner it considers will secure that:
  - (a) the National Lottery is run, and every lottery that forms a part of it is promoted, with all due propriety; and
  - (b) the interests of every participant in the lottery are protected.
4. Subject to these duties, the Secretary of State and the NLC are required, in exercising their functions, to ensure that the net proceeds of the National Lottery are as great as possible.
5. The NLC is also responsible for choosing and licensing an operator under whatever conditions it deems appropriate, licensing games, vetting the operator and its suppliers, researching into players and protecting the National Lottery brand. It has access to the operator’s systems and records and performs checks on a broad range of the operator’s activities.
6. The Secretary of State may issue Directions to the NLC under section 11 of the 1993 Act with which the NLC must comply. There are currently 13 Directions which relate to: types of lottery; limits on ticket price; unclaimed prizes; mandatory conditions in licences; financial penalties; performance standards; raising public awareness; and Olympic Lottery proceeds (ED paras 7.1-7.4).

*The Gambling Commission*

7. The Gambling Commission (GC) was set up under the Gambling Act 2005 (“the 2005 Act”) to regulate commercial gambling in Great Britain and became fully operational on 1 September 2007. It is a Non-Departmental Public Body sponsored by DCMS and is, in practice, entirely funded through licence fees paid by gambling operators, with contingency provision for the Secretary of State to provide funding in the event of a shortfall in fee income.
8. The GC regulates arcade operators, bookmakers, gaming machine and gambling software providers, nearly 700 bingo clubs, around 150 casinos and nearly 500 lottery operators.
9. As well as providing advice to Government and local government on gambling and its regulation, the GC has a statutory duty to permit gambling in so far as is reasonably consistent with the licensing objectives:
  - (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime;
  - (b) ensuring that gambling is conducted in a fair and open way; and
  - (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.
10. The GC issues operating licences to organisations and individuals who provide facilities for gambling, and personal licences to certain individuals working within the industry. The GC also imposes licence conditions and publishes codes of practice setting out the manner in which facilities for gambling should be provided. The Secretary of State can impose licence conditions and make regulations prescribing the parameters within which the GC operates.
11. The 2005 Act gives the GC legal powers to deal with licensed operators who do not comply with licence or other requirements, for example, by imposing financial penalties, or suspending or revoking a licence. The GC also has powers under the 2005 Act to investigate and prosecute illegal gambling, and to initiate criminal proceedings in relation to cheating.
12. The GC is the primary advisory body to local and national Government on gambling including the incidence of gambling and the manner in which gambling is carried out (ED paras 7.5-7.10).

*DCMS’s argument for merger*

13. The Government announced planned reforms to public bodies on 14 October 2010, updating the proposals in March 2011, with a view to increasing transparency and accountability, cutting out duplication of activity, and discontinuing activities which were no longer needed. The Government argue that merging the GC and the NLC will help achieve these aims while preserving the appropriate and effective regulation of gambling and the National Lottery. The Government also argue that merger will deliver other organisational benefits, such as making evidence-based regulation easier to achieve and create synergies in understanding game and technological developments (ED 7.11).
14. Certain steps such as the co-location of the two organisations have already generated considerable savings. The Order represents the formal phase of the

merger and is expected to generate a further net saving of about £33,000 a year. The overall effect is intended to streamline the process by using administrators for a wider range of duties within the same policy area.

*Role of the Secondary Legislation Scrutiny Committee*

15. The 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(2) 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 requires the Government to have regard to any recommendations made by the Committee during a 60-day period from the date of laying. The Committee may also take evidence to aid its consideration of the orders.

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

16. 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*

17. The Government state that the merger will reduce unnecessary bureaucracy, overheads and management layers. The merger will create a single Board and reduce the total number of Commissioners from 15 to 10. Executive functions (such as Finance, Legal and Communications) will become fully integrated, building on the shared service arrangement that has existed from January 2012 when the bodies co-located (ED para 7.22i).

*Effectiveness*

18. The Government believe that the merged body will be better able to advise on gambling and National Lottery matters, in particular on regulatory issues which are common to both such as underage or excessive play. With increased use of internet-based instant play lottery games, the distinction between some aspects of lotteries and other types of gambling is becoming less clear cut. DCMS states that a single entity would be better placed to delineate the boundary between the two, commission appropriate research across the sectors, and look at demarcation issues 'in the round' when advising Ministers. The Department also expects organisational benefits through improved opportunities to develop staff, widen their skills and encourage the cross-fertilization of ideas and best practices (ED para 7.22ii).

*Economy*

19. The Government estimate a net saving of £330,000 over a ten-year period from the merger, which is additional to the estimated £1 million a year saving already derived from the co-location of premises and shared services. The estimate includes the offset of transitional costs estimated at £850,000 (for redundancies, creating a merged IT system and stakeholder engagement in the merger). Some of the consultation responses also anticipate small

administrative savings to their own costs from the merger (ED para 7.22iii and the IA).

#### *Accountability*

20. DCMS states that the merger does not weaken the existing accountability arrangements: the merged body will still need to produce a report and accounts annually to be laid before Parliament, with an annual report on National Lottery matters also laid before the Scottish Parliament. The new body will still be required to comply with the National Lottery Directions set by the Secretary of State and have a clear complaints process (ED para 7.22iv).

#### *Safeguards*

21. Section 8(2) of the 2011 Act provides that a Minister may make a merger order under section 2 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.
22. The Minister considers that the conditions in section 8(2) of the 2011 Act are satisfied. The draft Order transfers the NLC's functions, property, rights and liabilities to the GC, providing for continuity of the NLC's work and the preservation of any associated rights and responsibilities. In particular, the duties of both GC and the NLC to ensure that those engaging in gambling and the National Lottery are protected will continue to apply to the merged body. Amendments made to legislation as a result of the merger will not reduce the present levels of public protection (ED para 7.23).

#### *Statutory Consultation*

23. The Government have carried out a consultation in accordance with section 10 of the Act: a public consultation seeking views on the proposed merger was launched on 31 July 2012 and closed on 23 October. A total of 11 responses were received; of these, eight were content for the bodies to merge, and three were against. The Government believe that the low response indicates that few have concerns about the proposed changes (ED section 9).
24. Several of the business respondents thought the merger should be an opportunity to revisit the current system of regulation and reduce costs, but this goes beyond the powers of the 2011 Act.
25. Several bodies involved with lotteries questioned whether the NLC's duty to maximise returns to good causes should be transferred to the merged body, because they were worried that this duty would be extended to all lotteries. During the passage of the 2011 Act, the Government made clear that the requirement to maximise returns to good causes would only relate to the National Lottery functions of the merged body. Again this is a separate policy issue beyond the scope of the 2011 Act.

#### *Potential conflicts of interest*

26. Paragraph 7.19 of the ED mentions potential conflicts of interest arising from the merger, stating:

“The Government made clear during the passage of the Public Bodies Bill that it will be important for the merged body to be able to demonstrate its continuing impartiality, and that the governance arrangements of the merged organisation should ensure the effective management of any risk (or perceived risk) of conflicts of interest in dealing with individual cases. It was decided that it was neither necessary nor desirable to set those governance arrangements out in statute.”

27. The responses to consultation broadly agreed with the non-statutory approach but nonetheless expressed a number of concerns about where such conflicts of interest might arise. Several bodies, including the British Red Cross, were worried that other lotteries might be treated less favourably in competition with the National Lottery, given the merged organisation’s statutory duty to maximise the proceeds from the National Lottery. The Institute of Licensing drew attention to the recent judicial review of whether it was lawful to set up the national Health Lottery in competition with the National Lottery. The NCL/Camelot and the GC were on opposing sides of the case, and the Institute wondered how this would work with both sides under the same regulator, commenting that the proposal to set up separate teams and “firewalls” would seem to act against the stated intention of making cost savings from synergies.
28. The Bingo Association raised the issue of the different treatment of the NLC. Unlike other gambling firms, it is not required to contribute 0.85% of its gross gaming yield to the Responsible Gambling Fund to promote research and treatment for problem gambling. Also the National Lottery can advertise in a way that is prohibited to the rest of industry by promoting “life-changing” prizes.
29. When asked, the DCMS stated:

“There should be no difficulty or risk of perceived bias, provided apparently conflicting considerations are handled in line with normal good management practice and within the appropriate legislative framework. The Gambling Commission already has to take regulatory decisions and provide advice to DCMS on matters which affect different and competing sectors of the gambling industry, including different segments of the lottery industry (for example, when providing advice on lottery stakes and prizes).

The key challenge the DCMS has identified in relation to the merger relates to investment decisions related to the National Lottery. Under current arrangements, Gambling Commission staff are clearly not directly involved in the investment decisions taken by licensed gambling operators. As such, it does not matter if staff have sight of commercially sensitive information on investments or developments being considered by competing businesses.

It would however deter such competing businesses from providing commercially sensitive information to the regulator if they thought it might be used by those directly involved in considering potentially rival investment proposals related to the National Lottery. Equally the National Lottery operator needs to be confident that its commercially sensitive information would not be divulged to rivals. It is however important that the merged organisation retains both streams of

information for wider purposes such as monitoring the overall lottery market or considering consumer protection issues. The merged organisation will therefore ensure that commercially sensitive information in relation to the National Lottery's rivals is kept confidential from those dealing with the National Lottery investment decisions and of course all information held by the merged organisation is properly protected and kept securely and not divulged to those outside the Commission, except to comply with any statutory requirements."

30. The Committee notes that the Department has identified these problems and plans to take action on them but it would be more transparent and reassuring to the industry and to Parliament if more concrete proposals were published before the merger is made. **The Committee recommends that, before any debate on the Order takes place, DCMS should publish guidance on how impartiality will be maintained and how the potential conflicts of interest identified by consultees will be handled in the new merged regulator.**

#### *Conclusion*

31. In its ED the Government present a convincing argument that the overall effect of the merger of the NLC with the GC will result in administrative benefits and create economies of scale by using administrators for a wider range of duties. Although the economies realised are comparatively small, the improvements to efficiency may be greater and the degree of accountability will remain unchanged. **However, there is uncertainty in the industry about the effect of the merger and how potential conflicts of interest will be handled. We recommend that the Minister clarify these matters before the debate on the Order is held.**
32. With this proviso, we conclude that on balance the Government have demonstrated that the draft Order serves the purpose of improving the exercise of public functions and is in compliance with the tests set out in the 2011 Act. We note that the Commons' Culture Media and Sport Select Committee wishes to consider the matter of conflict of interest in more detail and has triggered the 60-day affirmative procedure.

#### **B. Correction of Government Response: Draft Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013**

33. This Committee originally reported on this Order in its 25th Report, invoking the enhanced 60-day procedure because of uncertainties about the way the instrument would operate. Amongst other comments, we recommended that the Ministry of Justice (MOJ) should publish a mapping exercise, clearly stating how all the organisations currently under the Administrative Justice and Tribunals Council (AJTC) would be handled after its abolition. The Minister responded on 26 February providing the information, which was published in our 32<sup>nd</sup> Report, on which we commented that eight small tribunals, listed under the heading "Miscellaneous", seemed to be left in a vacuum. Based on this document we suggested that the House consider whether the provisions of the Public Bodies Act 2011 might not be satisfied because the succession arrangements were not yet fully decided.

34. The Minister has now written again to apologise that the information sent was incorrect and the void in the column next to the eight tribunals was a formatting error (letter published in Appendix 1). Those tribunals would be subject to the same process of review and potential incorporation into Her Majesty's Courts and Tribunal Service as all the others listed. Although that clears up one issue, it does not answer the question underlying our previous reports about which tribunals currently under the AJTC would, following review, fall outside the successor arrangements. Although the Minister's letter of 15 April says that it is her intention that there will be minimal disruption to the oversight of tribunals following the abolition of the AJTC, it refers obliquely to the "governance strand" in the Annex of the Strategic Work Programme. **The Committee is disappointed with the continual opacity of the MOJ's responses and has, therefore, invited the Minister to attend the Committee as soon after the beginning of the next Session as possible in order explain the matter in more detail.**

## 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. Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013 (SI 2013/630)**

*Date laid: 18 March*

*Parliamentary Procedure: negative*

*Summary: Most of these Regulations are consequential on the Welfare Reform Act 2012. However, the instrument also makes a number of more substantive changes to both primary and secondary legislation, which were not discussed during the passage of the Act. In particular, regulation 70 amends the Social Security (Credits) Regulations 1975 to provide that a person entitled to Universal Credit will only be credited with a Class 3 National Insurance contribution. Regulation 7 prepares for the phasing out of the term “lone parent” from social security legislation once migration to Universal Credit is complete. Consequential provisions include measures that set out how Universal Credit is taken into account in the calculation of the disabled facilities grant and the calculation of Child Support Maintenance.*

**These Regulations are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House.**

35. These Regulations are laid by the Department for Work and Pensions (DWP) under provisions of several Acts as amended by the Welfare Reform Act 2012 (“the 2012 Act”) and are accompanied by an Explanatory Memorandum (EM). Supplementary information from the DWP is published at Appendix 2.
36. Most of these regulations are consequential, to ensure that DWP and other legislation is correctly cross-referenced to Universal Credit and other benefits amended by the 2012 Act. However, the instrument also makes a number of more substantive changes to both primary and secondary legislation, some of which were not discussed during the passage of the Act.
37. In particular, regulation 70 amends the Social Security (Credits) Regulations 1975 to provide that a person entitled to Universal Credit will only be credited with a Class 3 National Insurance contribution. (Class 1 credits count towards entitlement to all contributory benefits. Class 3 credits only count towards entitlement to the basic State Pension and bereavement benefits.) DWP states that this policy strengthens the link between those contributory benefits and work, between paying into the system and receiving support. As the supplementary material in Appendix 2 makes clear, this proposal was not subject to discussion during the passage of the 2012 Act and **we therefore draw it to the special attention of the House as it gives rise to issues of public policy likely to be of interest to the House.**
38. Other key changes include:
  - Section 8 of the Employment Act 1989 provides a definition of “lone parent” for current benefits, Universal Credit legislation does not use this term. Regulation 7 amends the 1989 Act to replicate the existing definition without a social security cross-reference, so that once migration

to Universal Credit is complete all definitions of “lone parent” will be removed from social security legislation.

- Regulations 13 and 57 amend the Housing Grants, Construction and Regeneration Act 1996 which provides a disabled facilities grant, so that disabled people in receipt of Universal Credit will not be expected to contribute towards the costs of any necessary adaptations to their homes.
- Further amendments set out how Universal Credit payments are to be treated in the calculation of Child Support Maintenance.
- A number of changes also respond to comments made by the Joint Committee on Statutory Instruments to clarify terms, for example what is a “course” of study or how hardship payments are to be calculated.

## OTHER INSTRUMENTS OF INTEREST

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### ***Draft Cash Ratio Deposits (Value Bands and Ratios) Order 2013 and the Bank of England (Call Notice) (Benchmark Rate of Interest) Order 2013 (SI 2013/721)***

39. Under the cash ratio deposit (CRD) scheme, institutions place non-interest bearing deposits at the Bank of England (“the Bank”). The Bank invests these deposits and the income earned is used to fund the costs of its monetary policy and financial stability operations, which benefit sterling deposit takers. The CRD scheme was placed on a statutory footing in the Bank of England Act 1998, and reviewed in 2003 and 2008. In 2008, the Government made a commitment to conduct a further formal review at the latest in five years’ time.
40. HM Treasury (HMT) has laid these instruments, and explained that the 2013 review found that the CRD scheme resulted in a shortfall of funding for the Bank’s policy functions over the period 2008-13. The total cost of the Bank’s monetary policy and financial stability functions over that period is expected to be £603m, higher than the £563m projected in the 2008 review. HMT states that the increase is attributable to the Bank taking on new responsibilities and introducing new facilities to support the financial system during that time. The CRD scheme is expected to yield total income of £523m, lower than the £575m forecast. HMT explains that the drop in income arises largely because the average investment yield expected to be achieved by the Bank on CRD deposits over the period from March 2008 to February 2013 is 4.25%, compared to an estimate of 5.0%.
41. Against the background of this review, the draft Cash Ratio Deposits (Value Bands and Ratios) Order 2013 changes the CRD rate – which is the percentage of eligible liabilities that eligible financial institutions are required to deposit under CRD scheme - from 0.11% to 0.18%. The CRD threshold – which is the minimum value of deposits that an institution must hold to be eligible for the scheme - is changed from £500m to £600m. The Bank of England (Call Notice) (Benchmark Rate of Interest) Order 2013 changes the benchmark rate of interest that eligible institutions are required to pay if they do not deposit the appropriate amount as specified by the Bank.

### ***Draft Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 and the Draft Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013***

42. These instruments are being made following a Court of Appeal judgment which held that the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 are incompatible with Article 8 of the European Convention on Human Rights because they allow employers to ask about, and take into account, all spent convictions and cautions on a blanket basis.<sup>1</sup> The Court found the legislation to be disproportionate because even historic and minor convictions and cautions (which may not be relevant to

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<sup>1</sup> R(T) v Chief Constable of Greater Manchester and Others [2013] EWCA Civ 25.

the position being applied for) must be disclosed and may be taken into account. The **Draft Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2013**, laid by the Ministry of Justice, introduces provisions into the Exceptions Order so that some spent convictions and cautions do not have to be disclosed and cannot be taken into account in employment decisions. In addition, non-recordable service offences are removed from the Exceptions Order so that, once spent, they need not be disclosed. To maintain public protection, the amendment lists offences which must always be disclosed such as serious violent and sexual offences and offences of specific relevance for posts concerned with safeguarding children and vulnerable adults. No conviction resulting in a custodial sentence will be excepted. The Committee received a submission from Unlock, a charity supporting ex-offenders, which broadly supports the instrument but draws attention to one or two points of detail. The Ministry of Justice has responded that the Order is drafted to be entirely consistent with primary legislation. (Both submissions are published on the Committee's website). **The Draft Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order 2013**, which is being laid simultaneously by the Home Office, amends the definition of "relevant matter" in the Police Act 1997 to reflect these changes. The Order sets out what is to be disclosed by the Disclosure and Barring Service in response to an application for a criminal record certificate or an enhanced criminal record certificate.

***Draft Reservoirs Act 1975 (Exemptions, Appeals and Inspections) (England) Regulations 2013***

43. In the Explanatory Memorandum accompanying these draft Regulations, the Department for Environment, Food and Rural Affairs (Defra) sets out the background to maintaining public safety in relation to reservoirs. Defra refers to the Reservoirs Act 1975 ("the 1975 Act"): the policy objective of that Act is to ensure public safety by requiring undertakers of large raised reservoirs ("LRRs") to have those reservoirs supervised and inspected by a qualified civil engineer. The Department explains that, during the floods of 2007, the failure of Ulley Reservoir was averted only by emergency action; that Sir Michael Pitt carried out a review of the 2007 flood event and included in his report ("the Pitt report")<sup>2</sup> recommendations for improvements to reservoir safety legislation; and that these were addressed through amendments to the 1975 Act made by the Flood and Water Management Act 2010 ("the 2010 Act").<sup>3</sup>
44. Defra states that the 1975 Act applies to all LRRs, but that, in line with the recommendation of a risk-based approach in the Pitt report, the Government intend to regulate fully only those LRRs thought likely to endanger human life in the event of uncontrolled release of water. Such LRRs will be designated as "high-risk reservoirs" by the Environment Agency in England, using a methodology which will be publicly available when the relevant amendments to the 1975 Act come into force: we understand that this is likely to be in June 2013.

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<sup>2</sup>"The Pitt Review: Lessons learned from the 2007 floods" see:

[http://webarchive.nationalarchives.gov.uk/20100407162256/http://archive.cabinetoffice.gov.uk/pittreview/hepittreview/final\\_report.html](http://webarchive.nationalarchives.gov.uk/20100407162256/http://archive.cabinetoffice.gov.uk/pittreview/hepittreview/final_report.html)

<sup>3</sup> In Schedule 4 to the 2010 Act.

45. As regards these Regulations, Defra has used powers inserted into the 1975 Act by the 2010 Act to allow for specific exemptions from the 1975 Act (for example for canals); to set out appeal rights against the designation of a LRR as “high-risk”; to specify the timing of inspections (mostly in line with previous requirements); and to provide for appeal rights against a requirement to appoint an engineer or to carry out the recommendation of an engineer.

***National Institute for Health and Care Excellence (Constitution And Functions) and the Health And Social Care Information Centre (Functions) Regulations 2013 (SI 2013/259)***

46. The Committee originally considered this instrument at its meeting of 5 March and had a number of concerns about how the instrument would operate, in part due to a defective Explanatory Memorandum. Although a letter from Earl Howe, Parliamentary Under-Secretary of State for Quality at the Department of Health, resolved most of the issues, the Committee was not persuaded by the following comments on liability in relation to NICE’s commercial activities.

“The Committee also asked what NICE’s contingency plans would be for payment if a suit for negligence was brought against it in relation to any advice it had given. I understand from the Institute that, as well as carrying out a risk assessment before entering into an international contract, it includes a disclaimer in all its contracts relating to the work of NICE International that limits its liabilities to timely delivery of its products/ service to the specified standard. The Institute expressly disclaims all liability, direct or indirect, for any loss or damage suffered by any person or persons arising out of or in connection with any use of or reliance on the advice it provides through NICE International. I expect these practices to be continued by NICE in its new statutory form from 1 April.”

47. The Committee was of the view that a simple contractual disclaimer was not sufficient protection against liability for negligence and requested more information. The Department offered the following response:

“We have consulted NICE. NICE considers that its exposure to the risk of financial penalties in its international work is small because of the nature of the work involved and because its contractual obligations are almost all with third party institutional funders, such as the World Bank operating under UN Regulations and the UK Government. NICE seeks the advice of its lawyers in relation to the relevant UN Regulations or contractual arrangements, to ensure that it is adequately protected against liability. No claims have been made against NICE’s predecessor body in respect of its advisory services work so far.

Nevertheless, NICE acknowledges that some risk inevitably exists and will take legal and other professional advice on whether, taking into consideration HM Treasury’s guidance in *Managing Public Money*, there are any circumstances in which carrying commercial insurance might be justified and if so, where that insurance might be best obtained. NICE will involve its Audit and Risk Committee in this work and will extend its considerations to all its fee for service work.”

The Committee is satisfied that this is a more robust approach.

***Crime and Disorder Act 1998 (Youth Conditional Cautions: Financial Penalties) Order 2013 (SI 2013/608)***

48. The Order sets out the descriptions of offences, for which a financial penalty condition may be attached, under section 66C(1) of the Crime and Disorder Act 1998, to a youth conditional caution given under section 66A of that Act. It also sets the maximum amount of the financial penalty that may be specified and provides for differing levels of penalty for offenders aged 10-14 or 14-18. The consultation paper *Breaking the Cycle: effective punishment, rehabilitation and sentencing of offenders*, published on 7 December 2010, invited comments on whether punitive conditional cautions should continue. Many respondents were against the proposal. The Government have decided to continue with them in a revised form on the basis that punitive financial penalty conditions enable youth conditional cautions to be used in cases where there are no appropriate rehabilitative or reparative conditions or where these alone do not provide a proportionate response to the offending.

***Fines, Council Tax and Community Charges (Deductions from Universal Credit and Other Benefits) Regulations 2013 (SI 2013/612)***

49. This instrument amends legislation which allows deductions to be made from certain benefits in order to recover fines and compensation orders, arrears of council tax and community charges. It details the amounts that can be deducted from Universal Credit and contributory Jobseeker's Allowance and Employment and Support Allowance and makes provision for when certain other benefits will be abolished. The instrument aligns with the provisions set out in Schedule 6 to the Claims and Payments Regulations 2013<sup>4</sup> in respect of the hierarchy of deductions and limits set to ensure that the total amount deducted from the claimant's Universal Credit award will not exceed 40% of the claimant's Universal Credit Standard Allowance. Regulation 5 also provides that a deduction for a fine (or compensation order) can only be made if at least one penny will be left in payment after the deduction has been taken. This is to ensure the claimant can maintain any eligibility for passported benefits such as free school meals or free prescriptions.

***Housing (Right to Buy) (Limit on Discount) (England) Order 2013 (SI 2013/677)***

50. The Right to Buy ("RTB") scheme was introduced in 1980 and gives qualifying social tenants the opportunity to buy their rented home at a discount. To qualify for the RTB, tenants must have spent at least five years as public sector tenants. Once eligible, the discount rates for houses are 35% of the property's value, plus 1% for each year beyond the qualifying period, up to a maximum of 60%. The discount on flats ranges from 50%, plus 2% for each year beyond the qualifying period, up to a maximum of 70%. The maximum discount which a tenant can receive is limited by secondary legislation.
51. In 2012, the Government brought an earlier instrument<sup>5</sup> into force which introduced a maximum national discount of £75,000 across England,

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<sup>4</sup> Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment And Support Allowance (Claims And Payments) Regulations 2013 (SI 2013/380).

<sup>5</sup> The Housing (Right to Buy) (Limits on Discount) Order 2012: SI 2012/734.

replacing the previous lower regional discounts. The Department for Communities and Local Government (DCLG) has laid this Order which, in relation to dwelling-houses within the area of a London authority, provides that the maximum discount that a person may receive is now £100,000.<sup>6</sup> The Order does not however change the maximum discount figure (of £75,000) applicable in other areas of England.

52. In the accompanying Explanatory Memorandum, DCLG states that the level of house prices in London has meant that, despite the increased discount under the 2012 Order, some qualifying tenants in these areas are still finding it difficult to take up their RTB. DCLG adds that the new discount of £100,000 will allow a greater number of these tenants to meet their aspirations for home ownership.
53. We put questions to the Department about consultation carried out in relation to this policy: why the higher figure for a maximum discount in London was not implemented by the 2012 Order; the financial impact of the latest change; and the overall impact of the policy. The Department's answers are set out in Appendix 3. We note DCLG's statement that analysis at the time of the consultation in 2011-12 indicated that the financial impact on local authorities would be minimal, and that there is no evidence that the further change to the discount in London will alter this position. **We look to Government to monitor the actual impact, against the possibility that it may prove more significant than anticipated.**

***National Health Service (Primary Dental Services) (Miscellaneous Amendments to Charges) Regulations 2013 (SI 2013/711)***

54. In the Committee's 33<sup>rd</sup> Report of this session, we drew attention to defects in the **National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013 (SI 2013/364)**. Those defects have now been addressed. A revised Explanatory Memorandum (EM) has been laid, giving better information about the proposed extension of the pilot schemes to test proposals for revised dental contracts. The Department of Health has also laid these amending Regulations (SI 2013/711) to make clear that a charge under the new Band 1A provision can only be made when one of the treatments listed in (e-g) of Schedule 3 to the original Regulations is included (that is the application of fluoride varnishes, scale and polish, or root surface debridement). The revised EM to SI 2013/364 also provides a clearer rationale of the policy objective behind the new Band 1A charge. **Whilst we welcome the Department's resolution of the defect in the original Regulations, we remain concerned that the internal checking systems within the Department failed, on this occasion, to prevent sub-standard Regulations being laid before the House.**

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<sup>6</sup> The Order revokes SI 2012/734 in so far as it applies to dwelling-houses situated in the areas of London authorities.

***European Communities (Recognition of Professional Qualifications) (Amendment) Regulations 2013 (SI 2013/732)***

55. These Regulations, laid by the Department for Business, Innovation and Skills, amend a 2007 instrument.<sup>7</sup> The effect of the amendment is to make provision for an aptitude test, as an alternative option to an adaptation period of training, for nurses responsible for general care and midwives coming to the UK from another Member State, in order for them to acquire rights of practice here. EEA migrants wishing to practise in the UK as such nurses and midwives must register with the Nursing and Midwifery Council (NMC). As the impact assessment accompanying the Regulations explains, adaptation periods typically last for up to nine months, during which theory and practice training is offered. The adaptation period must be tailored to meet any shortfalls in the migrant's competencies identified by the NMC.
56. The NMC has offered an aptitude test<sup>8</sup> as an alternative to an adaptation period for children's nurses since 2011. The test, which is designed to assess theoretical and practical knowledge against the standards of entry to the NMC register, consists of four separate assessments, including a clinical scenario simulation. The migrant's training or experience determines how many of the assessments are taken. We understand from the NMC that the majority of the 15 applicants who have taken the aptitude test for children's nurses since 2011 have failed; and that experience of that test, and of the necessary rigour of assessment, will inform the aptitude test for nurses responsible for general care and midwives.

***Recovery of Costs Insurance Premiums in Criminal Negligence Proceedings (No. 2) Regulations 2013 (SI 2013/739)***

57. These Regulations revoke and replace the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (SI 2013/92) in consequence of defects identified by the Joint Committee on Statutory Instruments. In his *Review of Civil Litigation Costs*, Lord Justice Jackson argued that the current regime, including After the Event (ATE) insurance, had led to excessive costs in civil litigation, with risk-free litigation for claimants and additional costs, including the ATE premium, being paid by defendants. His recommendation that the recoverability of such fees from the losing defendant should be abolished in all civil litigation was implemented by section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, an exception is made for clinical negligence cases, where ATE insurance premiums covering the cost of expert reports determining liability and causation only will still be recoverable. This is because expert reports are often necessary to establish whether there is a case for bringing proceedings, but can be expensive.
58. The Committee was concerned that the new provisions would encourage insurers to adapt their policies to overload recoverable premiums. When asked about this point, the Ministry of Justice responded that, although previous practice might have differed, "as a matter of law and good practice,

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<sup>7</sup> SI 2007/2781: European Communities (Recognition of Professional Qualifications) Regulations 2007.

<sup>8</sup> See: <http://www.nmc-uk.org/Registration/Joining-the-register/Trained-in-the-EU-or-EEA/Adaptation-and-aptitude-test/>

ATE insurers will now have to make clear what proportion of the premium relates to the cost of insuring against the risk of incurring the costs of obtaining an expert report. This will add transparency. We do not consider it likely that that ATE insurance providers will attempt to overload the premium in respect of such reports. As a disbursement, the court has discretion not only as to whether a costs order should make provision for the payment of such insurance premiums, but also as to how much should be paid. An obviously excessive premium is likely to be the subject of challenge, particularly given the fact that defendants in such cases are likely to be larger organisations with a clear understanding of how the market operates.” We note the information but will be interested to see how the matter turns out. Moreover, we think it poor practice to frame law in a way that will add to the work of the courts.

## **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**

Cash Ratio Deposits (Value Bands and Ratios) Order 2013

Collective Investment in Transferable Securities  
(Contractual Scheme) Regulations 2013

Industrial Training Levy (Engineering Construction  
Industry Training Board) Order 2013

Local Transport Act 2008 (Traffic Commissioners)  
(Consequential Amendments) Order 2013

Police Act 1997 (Criminal Record Certificates: Relevant  
Matters) (Amendment) (England and Wales) Order 2013

Rehabilitation of Offenders Act 1974 (Exceptions) Order  
1975 (Amendment) (England and Wales) Regulations  
2013

Reservoirs Act 1975 (Exemptions, Appeals and  
Inspections) (England) Regulations 2013

### **Instruments subject to annulment**

SI 2013/486 Operation of Air Services in the Community (Pricing etc.)  
Regulations 2013

SI 2013/537 Transfer of Functions (Chequers and Dorneywood  
Estates) Order 2013

SI 2013/591 Armed Forces and Reserve Forces Compensation Scheme  
(Consequential Provisions: Subordinate Legislation) Order  
2013

SI 2013/608 Crime and Disorder Act 1998 (Youth Conditional  
Cautions: Financial Penalties) Order 2013

SI 2013/612 Fines, Council Tax and Community Charges (Deductions  
from Universal Credit and Other Benefits) Regulations  
2013

SI 2013/613 Crime and Disorder Act 1998 (Youth Conditional  
Cautions: Code of Practice) Order 2013

SI 2013/615 Criminal Justice Act 2003 (Conditional Cautions:  
Financial Penalties) Order 2013

SI 2013/618 Limited Liability Partnerships (Application of Companies  
Act 2006) (Amendment) Regulations 2013

SI 2013/624 Misuse of Drugs (Designation) (Amendment No. 2)  
(England, Wales and Scotland) Order 2013

SI 2013/625 Misuse of Drugs (Amendment No. 2) (England, Wales and  
Scotland) Regulations 2013

- SI 2013/626 Personal Independence Payment (Consequential Amendments) Regulations 2013
- SI 2013/627 Pension Protection Fund, Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2013
- SI 2013/629 Regional Strategy for the East Midlands (Revocation) Order 2013
- SI 2013/635 Regional Strategy for the North East (Revocation) Order 2013
- SI 2013/642 Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) (No. 2) Order 2013
- SI 2013/645 Health and Safety (Sharp Instruments in Healthcare) Regulations 2013
- SI 2013/647 Health Education England (Establishment and Constitution) Amendment Order 2013
- SI 2013/650 Free School Lunches and Milk (Universal Credit) (England) Order 2013
- SI 2013/657 Hydrocarbon Oil Duties (Reliefs for Electricity Generation) (Amendments for Carbon Price Support) Regulations 2013
- SI 2013/665 Housing Benefit (Amendment) Regulations 2013
- SI 2013/666 Rent Officers (Housing Benefit Functions) Amendment Order 2013
- SI 2013/677 Housing (Right to Buy) (Limit on Discount) (England) Order 2013
- SI 2013/694 Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2013
- SI 2013/703 Firefighters' Pension Scheme (Amendment) (England) Order 2013
- SI 2013/704 Firefighters' Pension Scheme (England) (Amendment) Order 2013
- SI 2013/707 Personal Injuries (Civilians) Scheme (Amendment) Order 2013
- SI 2013/711 National Health Service (Primary Dental Services) (Miscellaneous Amendments to Charges) Regulations 2013
- SI 2013/718 Social Security (Contributions) (Amendment) Regulations 2013
- SI 2013/721 Bank of England (Call Notice) (Benchmark Rate of Interest) Order 2013
- SI 2013/732 European Communities (Recognition of Professional Qualifications) (Amendment) Regulations 2013
- SI 2013/734 Civil Proceedings Fees (Amendment) Order 2013

- SI 2013/739 Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013
- SI 2013/746 Guardian's Allowance Up-rating Regulations 2013
- SI 2013/753 Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2013
- SI 2013/754 Legal Aid (Financial Resources and Payment for Services) (Legal Persons) (Amendment) Regulations 2013
- SI 2013/803 Universal Credit (Miscellaneous Amendments) Regulations 2013

## **APPENDIX 1: CORRECTION OF GOVERNMENT RESPONSE: PUBLIC BODIES (ABOLITION OF THE ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL) ORDER 2013**

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**Letter from Helen Grant MP, Under Secretary of State for Justice, to Lord Goodlad, Chair of the Secondary Legislation Scrutiny Committee**

I wrote to you on the 26<sup>th</sup> February to provide further evidence in support of the draft Public Bodies Order to abolish the Administrative Justice and Tribunals Council (AJTC). I am pleased to read that the Committee found this evidence helpful and considered it to provide a more persuasive case for abolition.

I note your concern that oversight arrangements for a very limited proportion of tribunals may not be in place at the point of abolition. I think I should clarify firstly that, although the Administrative Justice and Tribunals Strategic Work Programme is a three-year programme, the governance work strand within this programme is due to deliver in April 2013 (confirmed in its Action Plan at annex A). Whilst I do not intend to fully confirm these arrangements before Parliament has reached a decision on the draft Order, my intention is that there will be minimal disruption to the oversight of tribunals in this category following the proposed abolition of the AJTC.

I should also clarify that, due to a formatting error, plans for future oversight appear to be absent for a small number of ‘miscellaneous’ tribunals listed in the map that I provided. The table should have shown these tribunals to be subject to the same arrangements as the other categories of tribunal in that section. I can fully understand why the committee concluded that the future was blank for these tribunals but I can assure you that it is not. I attach a revised table to correct this error. *[Not printed]*

**Helen Grant MP**

**15 April 2013**

## APPENDIX 2: UNIVERSAL CREDIT (CONSEQUENTIAL, SUPPLEMENTARY, INCIDENTAL AND MISCELLANEOUS PROVISIONS) REGULATIONS 2013: FURTHER INFORMATION

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### Further information from DWP

On behalf of the Secondary Legislation Scrutiny Committee, you asked for a short explanation of the policy rationale for two changes within the Universal Credit Consequential Regulations (S.I. 2013/630) and information on where each was discussed in the Lords during the passage of the Welfare Reform Bill.

#### 1. *The removal of the definition of “lone parent”*

Section 8(4)(b) of the Employment Act 1989 defines “lone parent”. It does so by reference to social security legislation which was repealed many years ago. The definition of “lone parent” therefore needs to be amended. The Regulations make that amendment by replacing the reference to the repealed social security legislation with a new definition of “lone parent”. This new definition is the same as the definition of “lone parent” in section 2D(9)(b) of the Social Security Administration Act 1992.

The amendment introduces the new definition of “lone parent” as described above rather than inserting a cross-reference to section 2D(9)(b) of the Social Security Administration Act 1992. The advantage of this is that if the definition of “lone parent” in that Act is repealed in the future, no further amendment would be needed to the Employment Act 1989.

The regulation does not therefore remove any definition of “lone parent”. It merely replaces an outdated definition of “lone parent” with an updated definition of “lone parent”. If future secondary legislation removes definitions of “lone parent”, the Committee will of course have the opportunity to consider it.

The amendment was not included in the Bill so was not subject to discussion in either House during passage of the Bill. The Regulations were subject to the negative procedure and so were not debated before they were made. An Explanatory Memorandum accompanied the Regulations when they were laid before Parliament.

#### 2. *The change from Class 1 to Class 3 credits*

The rationale underpinning National Insurance Credits policy in Universal Credit is threefold: to simplify the complex crediting arrangements currently in place for legacy benefits; to strengthen the link between paid contributions work and entitlement to working-age contributory benefits; and to widen access to the basic state pension by extending crediting arrangement to more working-age claimants.

Claimants currently in receipt of the legacy benefits being replaced by Universal Credit receive a range of different National Insurance (NI) credits, or in some cases no credits at all. For example: claimants in receipt of income-related JSA and ESA receive a class 1 credit, whilst most Working Tax Credit claimants receive a class 3 credit. Income Support, Housing Benefit and Child Tax Credits claimants are not generally awarded credits, although some may receive a credit if they have certain premiums or through another benefit, for example Child Benefit.

UC claimants will therefore receive a single class of NI credit - class 3 credits - which count towards entitlement to the basic state pension and bereavement

benefits. This represents a significant simplification over the range of contributions currently credited under the legacy benefit system. In a joint claim both members of the couple will receive a class 3 credit. These changes will therefore extend crediting arrangements to claimants who would not have been credited under the current benefit system, for example: Housing Benefit claimants or non-working partners of people in low-paid jobs. This is a step towards realising the Government's objective of a more comprehensive State Pension coverage.

Claimants in receipt of a contributory working-age benefit (and certain other benefits) will continue to receive class 1 credits which also count towards working-age contributory benefit entitlement. This will strengthen the link between making paid contributions through work and entitlement to working age contributory benefits. If a UC claimant is also in receipt of a contributory benefit, they will have the class 1 credit applied to their NI record.

We will continue to protect the Additional State Pension rights of people who are unable to make paid contributions through work, who are sick, disabled or carers, by crediting an 'earnings factor' to UC claimants who receive the limited capability for work (LCW), limited capability for work-related activity (LCWRA), or carer element of the award. In a joint claim only the claimant in receipt of one of these elements will have the earnings factor applied to their NI record. It is a short-term measure as it will not be required under the proposals for a single-tier pension – however in the meantime it ensures that disabled people and carers do not face real cash reductions in their Additional State Pension.

Finally, unlike with certain labour market sanctions in Job Seekers Allowance, NI contributions will continue to be credited for the duration of a sanction where entitlement to Universal Credit continues to subsist. This is a simplification measure to allow more effective administration of Universal Credit, and there is little evidence to suggest that the cessation of credits acts as a deterrent measure to enforce work-search related requirements.

The amendment was not included in the Bill so was not subject to discussion in either House during passage of the Bill. The Regulations were subject to the negative procedure and so were not subject to Parliamentary debate before they were made. The Department wrote to the Social Security Advisory Committee in the summer of 2012 informing them of these changes. An Explanatory Memorandum accompanied the Regulations when they were laid before Parliament. Lord Freud sent a letter about this and a number of other amendments to Lord McKenzie, following the debates on the Universal Credit Regulations.

**10 April 2013**

### APPENDIX 3: HOUSING (RIGHT TO BUY) (LIMIT ON DISCOUNT) (ENGLAND) ORDER 2013 (SI 2013/677)

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#### Information from Department for Communities and Local Government

*Q1: As to consultation on the latest change, you simply refer back to the 2011-12 exercise. Why was that consultation process so short?*

A1: The proposals were changes to an existing programme and had been trailed in advance by the Government in the Housing Strategy. The consultation period of six weeks was considered sufficient to allow interested parties the opportunity to respond to the proposals.

*Q2: What points were made in the 2011-12 exercise in relation to an appropriate discount in London? If the “relevant considerations” have not changed since that consultation process, why are you making the change now, and not last year?*

A2: As detailed in the consultation document, the average discount received by tenants in London was 13% compared to an average discount of 25% across England. The increase in the discount to £75,000 more than quadrupled the discount then applicable in London but, while initial analysis indicated that this would be sufficient to allow eligible tenants to take up the Right to Buy, responses to the consultation raised concern that £75,000 would be insufficient in London and made representations for the discount to be greater. Ministers at the time preferred the option of a flat national discount rate to help simplify and reinvigorate Right to Buy.

In line with their commitment to keep the scheme under review, the Government has increased the discount in London to reflect the fact that property prices are higher and are continuing to rise, unlike most other parts of England.

*Q3: What is the financial impact likely to be on local authorities and registered providers?*

A3: The Impact Assessment identified three possible areas of impact on housing associations that sell properties under the scheme:

- i) the cost of one-for-one replacement
- ii) the cost of administering sales
- iii) the possible impact upon the business due to loss of assets.

Analysis at the time and responses to the consultation indicated that the impacts would be minimal, and there is no evidence that the further change to the discount in London will alter this position.

Receipts from additional local authority sales are recycled back into funding replacement homes for affordable rent. (See the final question for more detail). Local authorities in London are likely to be required to process more Right to Buy applications with implications for additional administrative costs. A flat allowance to cover these costs has been introduced which will adequately compensate London Boroughs for the increased administration costs which may result from the new discount.

*Q4: What is the financial impact likely to be on the housing market in London?*

A4: The Right to Buy market makes up a very small proportion of the housing market (approximately 0.04% in 2012-13) and so changes resulting from this policy will have a marginal impact on the market as a whole. The effect on house prices will be limited because the Right to Buy properties that are sold would not

otherwise have been on the market and so there is no additional excess demand. Furthermore, the one-for-one replacement policy ensures that there is an increase in supply to help ease market pressures.

*Q5: What success has there been since the Housing (Right to Buy) (Limits on Discount) Order 2012 took effect in ensuring “that the receipts on every additional home sold under the Right to Buy are used to fund replacement, on a one-for-one basis, with a new home for affordable rent”?*

A5: Local authorities who wish to provide replacement homes have to sign an agreement with this Department allowing them to retain relevant Right to Buy receipts for this purpose. To date, 157 of the 167 eligible local authorities have signed an agreement. Where the local authority does not sign an agreement, the receipts are pooled and distributed by the Homes and Communities Agency or, in London, the Greater London Authority, for the provision of affordable housing.

For the first three quarters of the financial year 2012/13, local authorities have retained £210m for investment in replacement homes, and 384 dwellings have been started or acquired. Local Authorities have three years in which to spend the receipts and as such it is too early to make an assessment of the impact of the policy.

**27 March 2013**

#### APPENDIX 4: REMARKS MADE IN DEBATE ON THE JOBSEEKERS (BACK TO WORK SCHEMES) BILL

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##### Letter from Lord Goodlad, Chair of the Secondary Legislation Scrutiny Committee, to Lord Freud, Minister for Welfare Reform

At its meeting yesterday, the Secondary Legislation Scrutiny Committee discussed the remarks that you made during the debate on this Bill with reference to the role of our reports (HL debates, 21 March 2013, col 731). I am writing to relay these concerns.

You said that in our report of 5 May 2011 on the Jobseekers Allowance (Employment, Skills and Enterprise Scheme) Regulations (SI 2011/917 “the ESE Regulations”), the Merits Committee, as we then were, did not suggest that the Regulations went beyond the primary powers. I would like to take this opportunity to clarify the extent of our remit: such a comment would be outside our terms of reference, assessment of the legality of the drafting is the province of the Joint Committee on Statutory Instruments.

The Committee was also concerned by the inference that its silence on any matter should be taken for consent. We frequently see instruments that offend on so many fronts that we have to be selective in our comments, limiting them to the most severe of infringements. The ESE Regulations were a case in point as our 29th Report of 2010-12 concluded:

“Because the original Explanatory Memorandum was deficient in providing Parliament with the information it needs for scrutiny, we have had to put an unprecedented number of direct questions and call on a range of sources to jigsaw together an outline of how the Scheme might operate, although gaps remain and a number of the areas are still unclear... **We draw the attention of the House to DWP’s failure to provide an adequate level of information in its Explanatory Memorandum which inhibits the House’s ability to exercise its scrutiny function.**”

In this instance we made it clear that we had insufficient information to be firm in any conclusion about these Regulations. The Bill also refers to the Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations (SI 2011/688) which received an equally critical assessment in our 27th Report of Session 2010-12:

“Given that the sanction on the individual claimant for failing in any element of the Mandatory Work Activity Scheme to which they are referred is the loss of 3 months’ benefit, the content and operation of the Scheme should be much more clearly set out. The degree of flexibility and discretion built into the arrangements causes the Committee to question how it can be delivered with any degree of consistency...**The Committee considers it unacceptable that the House has been given insufficient information to understand the policy objective of the scheme; to determine how the scheme will work; and effectively to assess whether the outcome will help claimants to improve their prospects of obtaining employment.**”

Interpreting either of these comments as approval of the regulations or policy is plainly untenable.

Finally, as we understand it, the Government is putting forward this Bill because of a Court of Appeal judgement in the case of *Reilly and Wilson v DWP* which quashed the ESE Regulations because:

- they failed to describe the schemes to which the regulations apply in sufficient detail, as required by the primary legislation; and
- letters sent to claimants when they were mandated to an ESE Scheme did not comply with the regulations.

The extracts from our reports cited above make it clear that we shared the courts' concern that both sets of regulations had insufficient detail about the proposed schemes. You may recall that we also took oral evidence from Mr Grayling on this subject, because of the gravity of those concerns.

It should also be noted that the proposed content of the letters to be sent to claimants did not form part of the Regulations laid before the House and so were outside the Committee's terms of reference.

**27 March 2013**

### Response from Lord Freud to Lord Goodlad

I was surprised by your letter given what I actually said in the House (HL debates, 21 March 2013, col 731):

“The Merits of Statutory Instruments Committee, as it was then called, published a report that covered the ESE regulations on 5 May 2011. The Merits Committee had a number of concerns, including the quality of the Explanatory Memorandum. To go off on a tangent, I want to acknowledge that there was a period when we were not servicing the Merits Committee adequately, and I have taken steps since then to improve that position. The Merits Committee had concerns, but the possibility that the ESE regulations were unlawful was not one of them. The committee drew attention to the fact that the regulations,

“interpret the Act very broadly so that future changes to the Scheme could be made administratively without any reference to Parliament”.

However, it did not go on to suggest that they went beyond the primary powers.”

As far as I am concerned this accurately portrays the concerns that the then Merits Committee had and which you repeated to me in this letter. As you can see I clearly stated to the house that the then Merits Committee ‘*had a number of concerns*’, and directly quoted the Committee’s report. I acknowledged that the Explanatory Memorandum was not of sufficient quality and that I have taken steps to improve Memorandum of other social security regulations that go before your Committee.

I was merely stating a fact that the Merit Committee’s report did not suggest that the regulations went beyond the primary powers. I did not suggest to the House that the Merit Committee ‘*supported*’ the regulations or the policy underpinning them.

My intention was simply to point out to the House that in no element of the parliamentary oversight of regulations did any body suggest that the regulations

were unlawful. I accept that it is not within the remit of the committee to make any decision on the lawfulness of regulations in terms of vires and you may have noted that I did also refer to the Joint Committee on Statutory Instruments (JCSI) in this context.

Specifically, at Second Reading I said (HL debates, 21 March 2013, col 731):

“The Joint Committee on Statutory Instruments also considered the ESE regulations at its meeting on 15 June 2011... the committee did not raise even the possibility that the ESE regulations were unlawful.”

Nevertheless the fact is that neither committee commented or, in the case of the JCSI, made any decision as to whether the ESE regulations were vires so I hope you will accept that what I said was not wrong or misleading.

I hope this letter clarifies the concerns that the Committee has over my remarks.

**10 April 2013**

## APPENDIX 5: THE WORK OF THE COMMITTEE IN SESSION 2012-13

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### *Introduction*

1. It has become our practice, in our last Committee report of a session, to take a moment to reflect on the highs and lows of the Statutory Instruments (SIs) that we have considered during the session and to identify any trends in the material presented to us for scrutiny. Paragraphs 20 to 23 set out the statistics of our activities for the session, including the number of instruments that we have scrutinised, and how often and on what basis we have reported instruments to the House.

### *A changing dynamic?*

2. The Fixed-term Parliaments Act 2011 changed the established rhythm of the Parliamentary year, switching the start and finish of the session from October/November to May. Given the unusually short session prior to the 2010 General Election and the unusually long one (23 months) following it, this has been the first “standard length” session for some time. We have yet to see whether the flow of instruments over the session has settled back into a predictable pattern: to a certain extent we hope that it has not, because we received over 17% of the session’s total workload in March 2013 (see Chart 1 below).
3. A major part of this late surge consisted of the SIs needed to implement three major Acts from last year – on Welfare Reform, Legal Aid and Health and Social Care. However, far too many of these instruments were laid very close to their self-imposed 1 April deadline. Many of these instruments were significant and controversial, and as a result the Committee, and the House, had to make major efforts to give them proper scrutiny. **We remind Departments of the need to plan implementing legislation properly, and to allow in their plan some flexibility for delays when the House sees a need to examine the proposals more closely.**

### *The quality of supporting information*

4. We also observed signs of strain in the Departments producing these instruments, apparent in the significant decline in the quality of the supporting information towards the end of the session. Although some of the material provided by the Department of Health towards the end of the year was frankly sloppy,<sup>9</sup> that Department at least had the excuse of implementing an Act. A number of other Departments could not offer that mitigation: the Department of Transport, for example, laid an instrument in February that failed to provide either the final Impact Assessment or the analysis of consultation when they laid the instrument with a substandard Explanatory Memorandum.<sup>10</sup> The Department for Education laid a set of Regulations in the same month which gave such a partial account of

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<sup>9</sup> For example National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013 (SI 2013/364) in our [33rd Report](#) (HL Paper 153)

<sup>10</sup> Rights of Passengers in Bus and Coach Transport (Exemptions) Regulations 2013 (SI 2013/228) in our [28th Report](#) (HL Paper 123)

consultation responses that we took the issue up with the Minister concerned.<sup>11</sup>

5. We have a concern that some Departmental officials do not always seem to understand the constitutional separation between the legislature and the executive. The role of the House of Lords is to review and revise legislation, not to endorse Government policy without further thought. The task the House has given to this Committee is to scrutinise all the secondary legislation laid before it and, if we are to do so effectively, we need appropriate information. Increasingly, towards the end of the session, we found the need to obtain supplementary information from Departments and to include this in our reports, in order to enable the House to understand fully the intended effect of instruments. This is material that should be included in Explanatory Memoranda and available to all readers: **for this reason we put Departments on notice that in the next session we will be requiring all inadequate Explanatory Memoranda to be revised and re-laid.**
6. We also noted, with some concern, an over-interpretation of the Committee's role creeping into the House. In the debate on the Jobseekers (Back to Work Schemes) Bill, Lord Freud, Parliamentary Under-Secretary of State for Welfare Reform at the Department of Work and Pensions (DWP), defended the quashed Regulations<sup>12</sup> by stating that although this Committee "had concerns, the possibility that the ESE Regulations<sup>13</sup> were unlawful was not one of them."<sup>14</sup> It is a misunderstanding of the remit of the Committee in that he suggests that the Committee (like the Joint Committee on Statutory Instruments) is responsible for scrutinising the *vires* of delegated legislation. It is not. Lord Freud's remarks, in treating an absence of comment by the Committee as evidence of approval, assume that the Committee has a greater capacity than it actually has. Given the deadlines to which we work and the resources available to us, treating silence as confirmation of approval would set the bar impossibly high. It is because of the pace of the Committee's work that often we point out that something is unclear and leave it to the House press for further detail rather than actively stating that it is right or wrong (see correspondence at Appendix 4).

#### *Significant SIs this session*

7. As well as the changes to Legal Aid provision, the restructuring of the NHS and the implementation of Universal Credit following on from recent Acts, there have been some significant policy changes in session 2012-13 effected through existing powers in secondary legislation. These include changes to the Green Deal (5th Report), the Criminal Injuries Compensation Scheme (8th Report) and changes to standard redundancy terms (26th Report).
8. We have also noted the increased role the courts have played in seeking to clarify the functioning of legislation. The *Alvi* judgment required significant changes to Statements of Immigration Rules (See our 6th, 9th, 10th and

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<sup>11</sup> Teachers' Pensions (Amendment) Regulations 2013 (SI 2013/275) in our 32nd Report (HL Paper 146); correspondence in our 34th Report (HL Paper 156).

<sup>12</sup> See background in our [28th Report](#) (HL Paper 123).

<sup>13</sup> Jobseekers Allowance (Employment, Skills and Enterprise Scheme) Regulations (SI 2011/917). See our [29th Report](#) of Session 2010-12 (HL Paper 137).

<sup>14</sup> HL Deb, 21 March 2013, col 731 and repeated at col 753.

23rd Reports) and the judgment in *Reilly and Wilson* placed a major question mark over the DWP's mandatory work schemes with Jobseeker's Allowance (see our 28th Report). **Both of these cases examined the relationship between legislation and guidance, and we will be monitoring this carefully in the next session.**

#### *Consultation*

9. The Committee has always considered the analysis of consultation as one of the most important pieces of information provided in support of any policy proposal. For more than a decade the accepted standard has been that public consultation should be conducted for 12 weeks unless a reasonable explanation can be offered why a shorter period is appropriate. Sampling exercises we conducted during the 2010-12 session found that although not all consultations were for the standard 12 weeks they were generally proportionate to the scale of change being made. Only about 7% were considered inadequate and this was often due to poor explanation of the process in the Explanatory Memorandum rather than poor practice.
10. We therefore found little justification for the Government's changes, announced in its *Consultation Principles* on 17 July 2012,<sup>15</sup> which aimed to move Departments away from customarily scheduling consultation over a 12-week period, and to make it '*digital by default*'. Our inquiry into the subject triggered a widespread response, as our 22nd Report explained,<sup>16</sup> and most of it was concerned about the potential damage that the change would make to the quality of legislation. The Government response, both in correspondence<sup>17</sup> and in the subsequent debate,<sup>18</sup> was disappointing. Our concern has only been aggravated by the number of abbreviated consultations that we have observed recently and which we will continue to draw to the attention of the House. For example, we reported on an instrument dealing with inter-authority recoupment of the cost of educational provision, in relation to which the Department for Education had consulted for only three weeks over a half-term break, and taken forward despite significant criticism from the consultation respondents.<sup>19</sup> The Government have stated that they will review the outcome of the changes to consultation policy, using the evidence from our inquiry as a resource, and will make recommendations in July for implementation in the autumn. **The Committee will be observing developments closely and may return to the subject in the next session.**

#### *Public submissions to the Committee*

11. One of the main reasons for the Committee's insistence that all of the Department's supporting documentation should be available online on the date of laying an SI is to ensure that the public have an opportunity to raise issues with the Committee or their MP within the deadlines that constrain the scrutiny process.

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<sup>15</sup> 3 See: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

<sup>16</sup> The Government's new approach to consultation: "Work in Progress" 22nd Report (HL Paper 100).

<sup>17</sup> Published in our 29th report (HL Paper 124).

<sup>18</sup> HL Debates, 11 March 2013, cols GC25-50.

<sup>19</sup> Inter-authority Recoupment (England) Regulations 2013 (SI 2013/492): in our 34th Report (HL Paper 156).

12. Until recently, we have generally received two or three representations on particularly controversial instruments. Such representations may be posted on our website and reflected in our report balanced by a response from the relevant Government Department. This provides the House with a rounded picture of the issues in dispute. However, towards the end of the session, we received an overwhelming number of messages in relation to the NHS procurement regulations (SIs 2013/257 and 500).<sup>20</sup> The Committee appreciates a concise well-argued submission, particularly with any examples that illustrate how the legislation will operate in the real world, but receiving 1,600 copies of the same short message does not add any value, and may inhibit our ability to receive other views and opinions on that instrument or indeed another. **We therefore ask organisations to note this and that one clearly stated submission from an organisation carries all the weight needed.**

*Public Bodies Orders*

13. The Committee has a relatively new function of scrutinising draft Orders laid under the Public Bodies Act 2011. We have received 14 of them this session. This is rather fewer than we had anticipated as our report on our first year of this type of scrutiny reflects.<sup>21</sup>
14. These Orders require a different style of scrutiny. As well as our normal consideration of whether the policy is likely to achieve its objective, the 2011 Act contains a number of statutory provisions that any Order must satisfy. Several of the assessments we have made this session have found Departments taking rather cursory approaches to these tests and in one case simply choosing to ignore considerations of economy altogether.<sup>22</sup> In such cases, the Committee has seen no option but to trigger the 60-day enhanced affirmative procedure. The House put specific tests in the primary legislation because it felt they were necessary, and this Committee will therefore always highlight where an Order does not appear to be fully compliant, so that the House can give it proper consideration.
15. A key failing in the material we have seen is a lack of transparency. The Explanatory Documents have tended to provide insufficient evidence to support the Department's assertions that the tests have been met: in consequence, we have had to seek quite a lot of additional information. The Orders on the abolition of the Child Maintenance and Enforcement Commission and the Railway Heritage Committee were rare exceptions to this rule.<sup>23</sup>
16. The Committee has also been concerned about the loss of transparency to public scrutiny: in merging a number of bodies or taking the functions back into the Department, there can be a loss of information as annual reports are no longer published. In order to validate whether the change brought about

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<sup>20</sup> See our [30th](#) and [33rd](#) Reports (HL Papers 136 and 153) with the evidence published in the sidebar on our publications page.

<sup>21</sup> 19th Report (HL Paper 90). See also the Government response in our 29th Report (HL Paper 124).

<sup>22</sup> Draft Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013, [24th Report](#) (HL Paper 107).

<sup>23</sup> Draft Public Bodies (Child Maintenance and Enforcement Commission: Abolition and Transfer of Functions) Order 2012, [1st Report](#) (HL Paper 5) see also the Draft Public Bodies (Abolition of the Railway Heritage Committee) Order 2013, [15th Report](#) (HL Paper 66).

by the Order has indeed improved efficiency, effectiveness and economy in the way the Department has asserted, there needs to be some way for an external observer to see the effects that the change has brought in the accounts or annual report of the receiving institution. This is a point we have had to pursue with a number of Departments, Ministry of Justice and the Department for Environment, Food and Rural Affairs for example.<sup>24</sup>

17. We also requested cumulative information on the savings actually made as a result of Public Bodies Orders. This was provided in the Government Response to our report. This remains an area of interest and we are likely to request updated information at the end of the second year.
18. We expect to consider more of these draft Orders in the next session and hope that Departments have learned that the process of submission to Parliament is not just simple administration and the ticking of boxes. The Committee expects the Explanatory Document to present a robust case on how the statutory tests have been met, supported by evidence and a clear indication that the real-world effects of the change have been fully taken into account.

#### *Transparency*

19. On the theme of transparency we would also remind Departments about the need to title their instruments clearly. A Public Bodies Order should always have that phrase in the title, to distinguish it from an SI and to signal that it is subject to a different scrutiny process. Clarity should also be applied to the titles of SIs where a significant element may otherwise be overlooked. For example, we drew the Draft Data Protection (Processing of Sensitive Personal Data) Order 2012 to the special attention of the House<sup>25</sup> because the title of legislation did not make clear its connection with the investigation of the Hillsborough disaster. We also remind Departments to define the terms they use clearly in Explanatory Memoranda. We needed to enquire further to find out what was meant by terms such as “dominant airport” or “amenable mortality” or the specialised meaning given to simple words in specific legislation, for example what DWP mean by “a non-dependant or that Defra legislation on “cattle” also applies to bison and buffalo.

#### *Statistical section*

20. We met 31 times in session 2012-13 and published 35 reports on a total of 893 instruments (176 affirmatives, 70 negatives, and 14 Public Bodies Orders). We drew 31 affirmatives and 30 negatives to the special attention of the House: a reporting rate of 18% for affirmatives and 4% for negative instruments. We held 2 oral evidence sessions, and have published a significant number of written submissions from members of the public which have greatly broadened our understanding of the impact of the SIs.
21. Using our terms of reference (set out in full on the inside cover of all our reports), we have drawn 61 instruments (that is, just under 7% of the total

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<sup>24</sup> Draft Public Bodies (Abolition of Her Majesty’s Inspectorate of Courts Administration and the Public Guardian Board) Order 2012, [2nd Report](#) (HL Paper 7), and Draft Public Bodies (Abolition of Environmental Protection Advisory Committees) Order 2012 or Draft Public Bodies (Abolition of Regional and Local Fisheries Advisory Committees) Order 2012 [4th Report](#) (HL Paper 14 )

<sup>25</sup> [3rd Report](#) (HL Paper 11 )

number considered) to the special attention of the House in this session as follows:

- 46 instruments (75%) on the ground of political importance or public policy interest;
  - 8 (13%) on the ground of imperfectly achieving its policy objective;
  - 6 (10%) on the ground of public policy interest and imperfectly achieving its policy objective ;
  - None on the ground of being inappropriate in view of changed circumstances since the enactment of the parent Act; and
  - 1 (2%) on the ground of inappropriately implementing European Union legislation.
22. In deciding which instruments to draw to the special attention of the House, we have continued to limit our reports to those on which we believe the House may wish to take action. In order to alert Members to other instruments which appear to be of interest, are topical or follow an unusual process, we have continued to include in our reports short information paragraphs on instruments. In the current session, we included 171 such paragraphs (covering 230 (26%) of the total instruments), compared to 286 last session (covering 25% of the total instruments) (see Chart 4).

#### *Charts*

23. The charts on the following pages cover the period from May 2012 to the end of April 2013:
- Chart 1 sets out the number of instruments laid by month
  - Chart 2 sets out the number of instruments laid by year for the last seven years
  - Chart 3 sets out the number of instruments reported on and the ground for reporting
  - Chart 4 sets out the number of short paragraphs on other instruments of interest compared with the last 2 sessions

These charts refer only to affirmative and negative instruments laid before the House of Lords.

Chart 1 - Number of instruments laid by month in session 2012-13

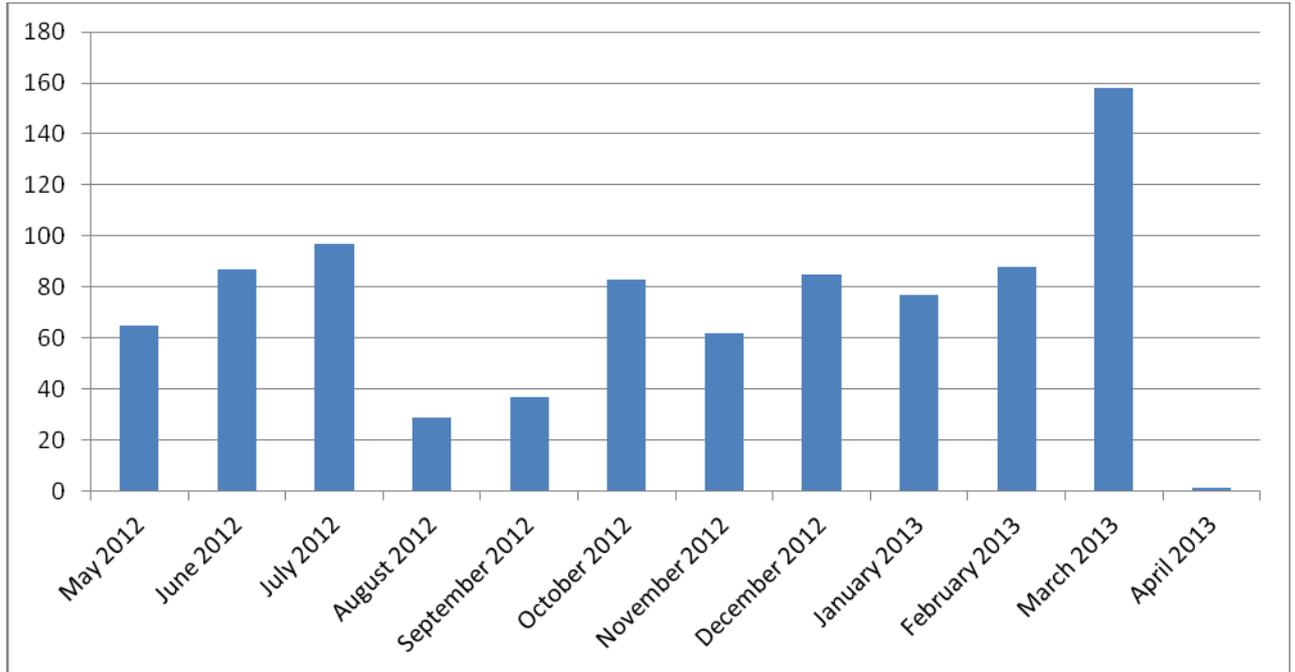


Chart 2 – Number of instruments laid each calendar year since 2005

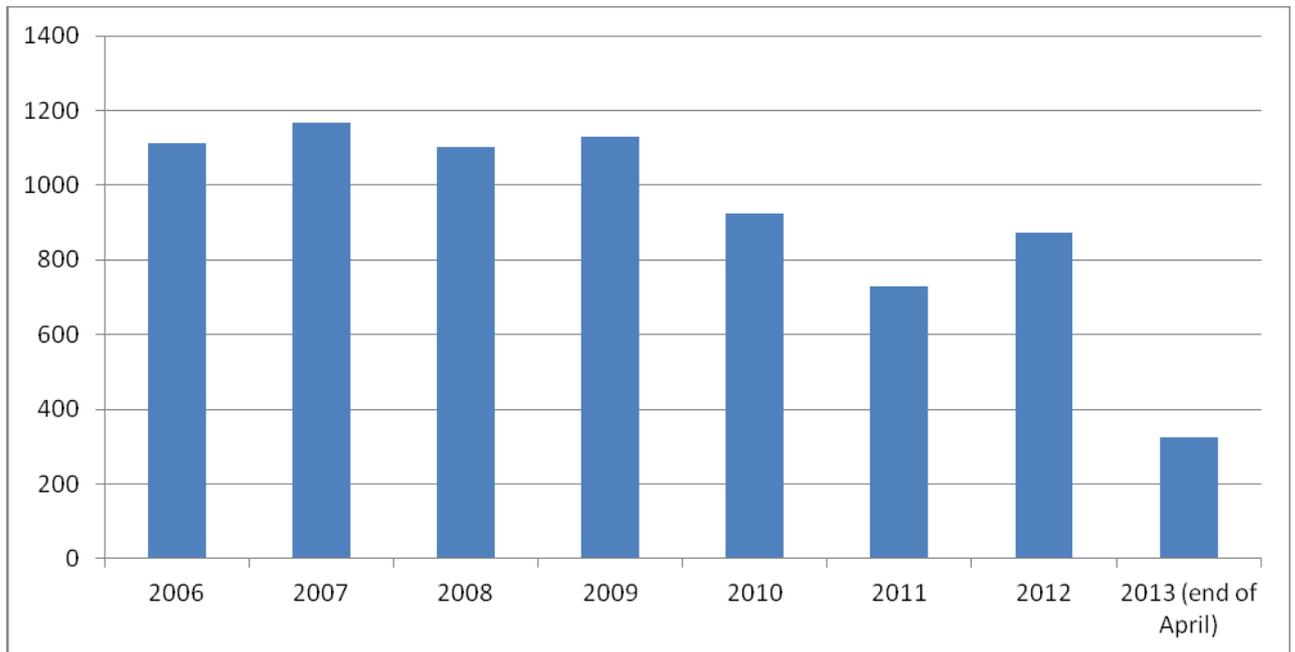


Chart 3 – Number of instruments reported on and the ground for reporting

<b>DEPARTMENT</b>	<b>TOTAL</b>	<b>Reported Negative</b>	<b>Reported Affirmative</b>	<b>a</b>	<b>b</b>	<b>c</b>	<b>d</b>	<b>a&amp;d</b>
Cabinet Office	18	0	0	0	0	0	0	0
DCLG	94	6	2	8	0	0	0	0
DCMS	22	0	1	0	0	0	0	1
DEFRA	53	1	0	0	0	0	1	0
BIS	67	2	1	2	0	0	1	0
DECC	41	1	5	6	0	0	0	0
DWP*	86	5	10	15	0	0	0	0
Education	49	2	0	0	0	0	0	1
FCO/DfID	4	0	0	0	0	0	0	0
Health**	85	4	0	0	0	0	3	1
Home Office	111	4	3	4	0	0	3	0
H of Commons	0	0	0	0	0	0	0	0
Defence	9	0	0	0	0	0	0	0
Justice	104	0	2	2	0	0	0	0
NI Office	1	0	0	0	0	0	0	0
Privy Council	1	0	0	0	0	0	0	0
Scotland	10	0	2	2	0	0	0	0
Transport	45	1	0	0	0	1	0	0
HMRC	7	0	0	0	0	0	0	0
Treasury	81	3	5	6	0	0	0	2
Wales	2	0	0	0	0	0	0	0
Attorney General	3	1	0	1	0	0	0	0
<b>TOTAL</b>	<b>893</b>	<b>31</b>	<b>30</b>	<b>46</b>	<b>0</b>	<b>1</b>	<b>8</b>	<b>6</b>

\* Includes Health and Safety Executive

\*\* Includes Food Standards Agency

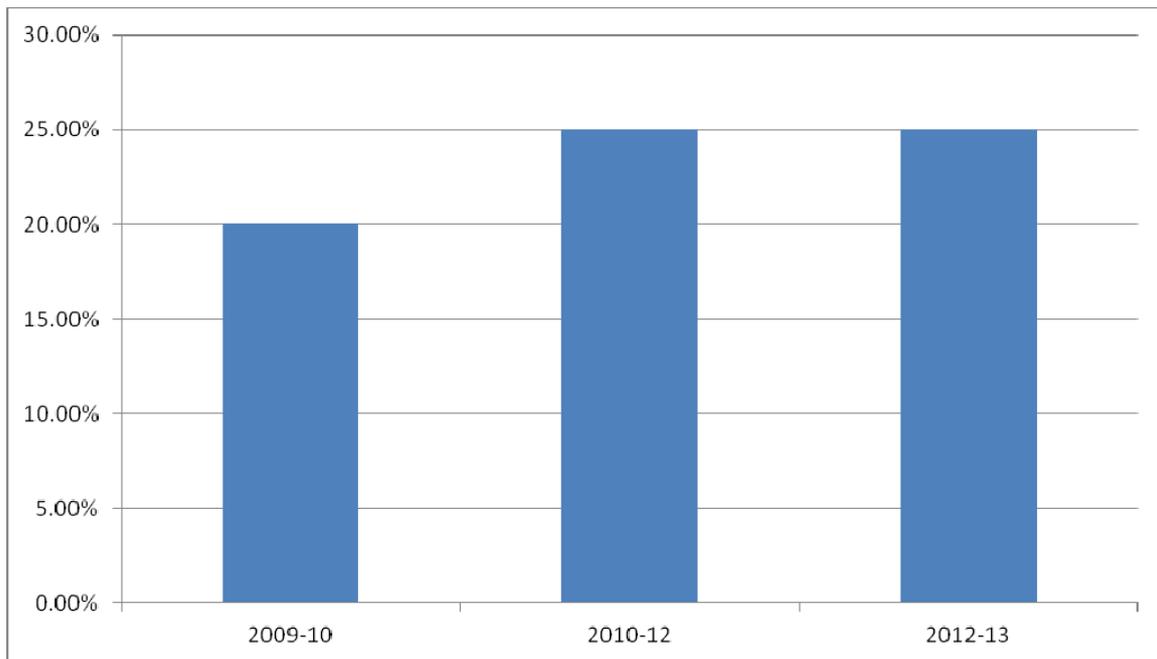
a = Reported on ground of political importance or public policy interest

b = Reported as inappropriate in view of changed circumstances since the enactment of the parent act

c = Reported as inappropriately implementing EU legislation

d = Reported on ground that it may imperfectly achieve its policy objectives

Chart 4 – Number of short paragraphs on other instruments of interest compared with the last two sessions



## APPENDIX 6: 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 23 April 2013 Members declared no interests.

### *Attendance:*

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