

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

13th Report of Session 2012-13

**Public Bodies Order:
Draft Public Bodies (Water
Supply and Water Quality Fees)
Order 2012**

**Statutory Instruments:
Draft Scotland Act 1998
(Modification of Schedule 5)
Order 2013**

Plus 4 Information Paragraphs on 6 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 the Appendix.

Publications

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

Information and Contacts

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

Statutory instruments

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

Thirteenth Report

PUBLIC BODIES ORDER

A. Draft Public Bodies (Water Supply and Water Quality Fees) Order 2012

Introduction

1. The draft Public Bodies (Water Supply and Water Quality Fees) Order 2012 (“the draft Order”) has been laid by the Department for Environment, Food and Rural Affairs (Defra) under section 4 of the Public Bodies Act 2011 (“the 2011 Act”), with an Explanatory Document (ED) and impact assessment (IA).
2. The purpose of the draft Order is to enable the Drinking Water Inspectorate (DWI) to recover from relevant water suppliers the cost of regulatory work undertaken in relation to the quality of drinking water supplies in England and some parts of Wales, by way of a fee-charging regime.

Overview of the proposal

3. The DWI is the regulator for drinking water quality and safety; it was formed in 1990 to provide independent assurance that water supplies in England and Wales are safe and drinking water quality is acceptable to consumers. It is not a free-standing body, but sits within Defra (and is entirely funded by that Department), in the form of the Chief Inspector of Drinking Water (and inspectors) appointed under the Water Industry Act 1991 (“the 1991 Act”) by the Secretary of State and the Welsh Ministers.
4. The work of DWI can be divided into two areas: regulatory activity, and providing technical advice to policy-formulation. The fee-charging powers proposed in the draft Order would not apply to the latter. The DWI’s regulatory functions relate to its statutory role in ensuring that relevant water suppliers meet their statutory requirements, and in the discharge of the statutory duties of the Secretary of State and Welsh Government, as set out in the 1991 Act. They include the following:
 - technical audits involving the inspection and assessment of relevant water suppliers’ water supply arrangements;
 - checking compliance with statutory requirements, and legal instruments;
 - technical evaluation of relevant water suppliers’ water quality data;
 - investigation of water quality events, incidents and other matters; and
 - investigation of consumer complaints relating to drinking water quality as notified by members of the public, local authorities or businesses.
5. The draft Order would enable the DWI to recover the cost of its regulatory activities directly from relevant water suppliers. In the ED, the Department states that the overall rationale for charging is that, if an industry undertakes an activity that causes (or could cause) an adverse effect on others (such as pollution or risk to public health) which requires regulation, it should face the regulatory cost. The role of the water supply industry in supplying safe

water supplies is regarded as a fundamental part of public health management. Introducing a charging scheme will bring DWI into line with other water regulators such as Ofwat and the Environment Agency.

Role of the Committee

6. 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(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)". A key aspect of this role is the Committee's power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60-day period from the date of laying. The Committee may also take oral or written evidence, to aid its consideration of the orders.

Consultation

7. Defra has carried out two consultation exercises relevant to the draft Order:
 - the first, between April and July 2009, related to provisions in the draft Flood and Water Management Bill ("the draft Flood Bill"). Defra received 642 responses: the main respondents were stakeholders such as water suppliers, local authorities, NGOs, and others. However, of these 642, only 50 related to the proposals for a DWI charging scheme, and for charges to be proportionate to the regulatory burden represented by individual water companies. A majority of these 50 responses agreed with the proposals. The ED explains that the DWI provisions were subsequently removed from the draft Flood Bill and later included in the Public Bodies Bill;
 - the second, over 6 weeks between October and December 2011, related specifically to the proposals for a DWI charging scheme. The Government took the view that, since there had already been the first consultation on the principle of charging, further consultation would be aimed at key stakeholders. The second consultation was published on the Defra and DWI websites, and was e-mailed directly to 33 key stakeholders in the water industry. 21 responses were received: 20 respondents supported the proposal for charging in principle, and the approach proposed.

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

8. 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

9. The Government state that, under the new scheme, the charges made will directly reflect the work of inspectors in carrying out checks, audits and investigations, with the larger or least efficient water suppliers attracting higher charges than the smaller or most efficient water suppliers. This transparency will encourage water suppliers to adopt more efficient

arrangements for monitoring and managing drinking water quality (para. 7.14 of ED).

Effectiveness

10. Defra states that each water supplier is required to monitor the quality of drinking water and make these test results available to DWI, and to provide a summary of the test results to consumers and other stakeholders. The number of tests carried out by each water supplier is directly proportionate to the risk to public health. The work of inspectors in scrutinising the results is therefore directly related to the effectiveness of each supplier in carrying out the monitoring and taking action to secure that water quality is satisfactory at all times (para. 7.15 of ED).

Economy

11. Defra says that the DWI is currently funded entirely by Defra; its costs of operation fall to the taxpayer; and allowing the DWI to charge the industry for its regulatory work will result in a saving to the taxpayer of around £1.9m per year. Under the proposed charging scheme, the relevant water suppliers may be able to pass the costs on to customers; if all costs were included in water bills then this would increase the average annual water bill by around 15 pence (para. 7.16 of ED). We have subsequently been advised by Defra officials that the figure of 15 pence appears to be an over-estimate. While the £1.9m was apparently spread across the number of unmetered households in England and Wales (13.9m in 2009-10) providing an estimated increase in water bills of 14p (described as around 15p in the IA and ED), the estimate should in fact have been based on unmetered and metered households (22.2m in 2009/10) which produces an estimate of 9p or 10p per annum.

Accountability

12. Defra states that the Chief Inspector is appointed by ministers and is directly accountable to ministers for the exercise of various functions relating to drinking water quality set out in the 1991 Act. Accountability is achieved through publication of an annual drinking water quality report together with other reports on water quality incidents, etc. The introduction of a charging scheme will provide new information about the cost of drinking water regulation and compliance with EU reporting requirements (para. 7.17).

Safeguards

13. Section 8(2) of the 2011 Act requires that a Minister may make an order only if the Minister considers that (a) the order does not remove any necessary protection and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. Defra states that, as regards the draft Order, the Minister considers that these conditions are met.

Conclusion

14. The Committee notes the rationale which Defra has given for charging (see paragraph 5 above), and accepts that this rationale underpins the case for the draft Order on grounds of efficiency, and accountability, set out in the ED.

15. We are not, however, clear that the statement in the ED about effectiveness applies with any greater force to the proposed charging scheme than to current arrangements. We have no reason to think that, under current arrangements, the DWI is less than effective in its work of scrutinising tests of the quality of drinking water.
16. We are also not immediately persuaded that the ED has demonstrated that the draft Order will promote economy in the delivery of the DWI's regulatory functions. It appears that the cost of this work is projected to remain constant after the recovery of the costs is transferred from the tax-payer to water suppliers and, ultimately, consumers.
17. **We recommend that the Government give a clearer explanation of the ways in which they expect the draft Public Bodies (Water Supply and Water Quality Fees) Order 2012 to promote effectiveness and economy in the delivery of the DWI's regulatory functions. Notwithstanding the need for such clarification, we consider that, on balance, the Government have demonstrated that the draft Order serves the purpose of improving the exercise of public functions in the 2011 Act in line with the considerations contained in it, and we are content to clear it within the 40-day affirmative procedure.**

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

Draft Scotland Act 1998 (Modification of Schedule 5) Order 2013

Date laid: 22 October

Parliamentary Procedure: affirmative

Summary: The draft Order amends Schedule 5 to the Scotland Act 1998 to devolve power to the Scottish Parliament to legislate for an independence referendum provided that certain requirements are met. These requirements relate to the date by which a poll can be held and the ballot paper to be used at an independence referendum. The draft Order also applies existing provisions relating to referendum campaign broadcasts and referendum mail-shots to an independence referendum.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

18. In the Explanatory Memorandum (EM) to this draft Order, the Scotland Office states that the United Kingdom Government and the Scottish Government have agreed to work together to ensure that a referendum on Scottish independence can take place. The Governments agree that the referendum should have a clear legal base; should be legislated for by the Scottish Parliament; should be conducted so as to command the confidence of Parliaments, Governments and people; and should deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.
19. Schedule 5 to the Scotland Act 1998 (“the 1998 Act”) lists the matters that are reserved to the UK Parliament: these include aspects of the constitution including the Union of the Kingdoms of Scotland and England. Section 29 of the 1998 Act provides that a provision of an Act of the Scottish Parliament is outwith the competence of the Scottish Parliament, and so not law, if it relates to reserved matters. The UK Government considers that an Act of the Scottish Parliament that made provision for an independence referendum would relate to the Union of the Kingdoms of Scotland and England and so would be outwith the competence of the Scottish Parliament.
20. The draft Order under section 30 of the 1998 Act amends Part 1 of Schedule 5 of that Act to make an exception to the reservation, so that an independence referendum that meets certain requirements will not be a reserved matter. This will mean that it will be within the competence of the Scottish Parliament to legislate for an independence referendum that meets certain requirements. These requirements are explained in the EM, in which the Scotland Office refers to the parameters for the legislation, namely that there must be a single ballot paper that offers a choice of two responses; that the referendum poll cannot be held on the same day as any other referendum provided for by the Scottish Parliament; and that the referendum must be held no later than 31 December 2014.

21. The draft Order also applies provisions (in the Political Parties, Elections and Referendums Act 2000) relating to referendum campaign broadcasts and free mail-shots, that would otherwise be outside of the Scottish Parliament's competence, to an independence referendum.
22. In the EM, the Scotland Office states that, between 10 January and 9 March 2012, the UK Government carried out a consultation on Scotland's constitutional future which sought views on how to facilitate a legal, fair and decisive referendum on whether Scotland should leave the UK. The consultation received 2,857 responses. 75% of those who expressed a view on the question supported a single question in the referendum; 70% felt the referendum should be sooner rather than later; 86% wanted the Electoral Commission to have a role in overseeing the referendum; 71% thought those resident in Scotland should be able to vote; 72% wanted to the Scottish Parliament to be given the power to legislate for a referendum on independence and of those who wanted the Scottish Parliament to be given the power, 63% thought this should be done through a section 30 Order.
23. The UK Government published a summary of responses on 4 April 2012.¹ As well as the information set out above, the summary acknowledged that the Scottish Government had proposed extending eligibility to vote to 16- and 17-year olds. While the consultation document did not seek views on this issue, the summary explained that just under a third of respondents expressed views on it: 44% of them supported extending the franchise to 16- and 17-year olds, while 47% opposed such an extension.
24. In the EM, the Scotland Office refers to a memorandum of agreement² published alongside the draft Order, setting out the agreement reached between the two Governments on the wider referendum rules and regulation that will be set out in the legislation to be introduced by the Scottish Government in the Scottish Parliament. That memorandum has been placed in the Library of the House.

¹ See: www.official-documents.gov.uk/document/cm83/8326/8326.pdf

² See: www.number10.gov.uk/wp.../10/Agreement-final-for-signing.pdf

OTHER INSTRUMENTS OF INTEREST

Draft Disabled People's Right to Control (Pilot Scheme) (England) (Amendment) Regulations 2012

25. Under Part 2 of the Welfare Reform Act 2009 the purpose of the Right to Control is to enable disabled people aged 18 or over to exercise greater choice in the way certain services³ are provided to or for them by central government and by local authorities: for example, according to their personal preference, a disabled person could choose whether to buy an electric wheelchair or to widen the doorways in their house; or a person with mental health problems could choose to do an anger management course or to join a gym as he finds that exercise helps him manage his depression. A previous instrument⁴ set up a two-year pilot which is due to come to an end on 13 December 2012. Although over 34,000 disabled people have experienced the Right to Control, the results of the interim evaluation of the pilot⁵, published in February 2012, concluded that insufficient numbers of people had so far used the scheme to enable firm, evidence-based decisions to be made about the future of Right to Control. Examples of good practice were identified, as well as some areas for further work. The current instrument proposes to extend the Right to Control pilot for a further twelve months to enable the collection of more robust data.

Police Appeals Tribunals Rules 2012 (SI 2012/2630)

Police (Performance) Regulations 2012 (SI 2012/2631)

Police (Conduct) Regulations 2012 (SI 2012/2632)

26. In 2008, following the outcome of the *Taylor Review of Police Disciplinary Arrangements*,⁶ three instruments set out new procedures governing police disciplinary matters:
- the Police (Conduct) Regulations 2008 established procedures for taking action in respect of misconduct by police officers and special constables;
 - the Police (Performance) Regulations 2008 established procedures for dealing with issues of unsatisfactory performance and attendance on the part of police officers (apart from senior officers) and special constables; and
 - the Police Appeals Tribunals Rules 2008⁷ provided for appeals against the findings and specific outcomes from both the Conduct and Performance Regulations.
27. These three 2012 instruments revise and consolidate the 2008 Rules and Regulations in the light of the Police Reform and Social Responsibility Act 2011. Amongst other things they reflect the revised governance structure in England and Wales that replaces police authorities with directly-elected

³ The Right to Control funding streams which may contribute to an individual's 'budget' are: employment programmes Access to Work and Work Choice, discretionary housing-related support, Disabled Facilities Grants, financial or other assistance from the Independent Living Fund and community care services.

⁴ Disabled People's Right To Control (Pilot Scheme) (England) Regulations 2010 (SI 2010/2862)

⁵ <http://odi.dwp.gov.uk/docs/wor/rte/rte-process-evaluation.pdf>

⁶ <http://press.homeoffice.gov.uk/documents/police-disciplinaryarrangements/report.pdf?view=Binary>

⁷ SIs 2008/2862, 2863 & 2864 as amended

Police and Crime Commissioners. In addition the Chief Officer of Police will have the power to appoint and dismiss the senior officers above the rank of Chief Superintendent which was previously the responsibility of the police authority. A number of minor corrections and procedural amendments are also made.

Motor Vehicles (Tests) (Amendment) (No. 2) Regulations (SI 2012/2652)

28. As a deregulatory measure, this instrument exempts vehicles manufactured before 1 January 1960 from the requirement for a mandatory annual roadworthiness test (“MOT test”). There are approximately 162,000 pre-1960 vehicles registered with the DVLA. The Government believes many historic vehicles are driven very few miles each year and are considerably less likely to be involved in accidents. The exemption does not apply to any substantially altered vehicles. All exempt vehicles will still be required to have insurance in the normal way. The Committee noted that the Impact Assessment acknowledges that there may be an increase in accidents and collisions as a result of mechanical failure missed in the absence of a regular MOT test.

Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) (England) (Revocation) Order 2012 (SI 2012/2658)

29. The Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) (England) Order 1991 (SI 1991/6) imposed emergency restrictions on the movement of sheep from designated areas of Cumbria that were affected by radioactive contamination deposited on the land following the Chernobyl nuclear accident in 1986. By January 2011, there were only 327 farms in North Wales and 8 farms in Cumbria still remaining under some form of restriction. This compares to the 9,800 UK holdings, and more than 4 million sheep, originally placed under restriction following the Chernobyl accident. During 2011, an updated risk assessment was carried out which considered the radiological dose which could be received by consumers of sheep meat. The independently peer-reviewed assessment demonstrated that current levels of radiocaesium in sheep present a very low consumer risk, even to those who eat a lot of sheep meat. It further demonstrated that the *Mark and Release* monitoring programme was now having a negligible impact on further reducing the already very low consumer doses and in the rare situation where a sheep over a level of 1,000 becquerels per kilogram could enter the food chain, this would not be a food safety concern. Accordingly this instrument revokes the Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) (England) Order 1991 and all subsequent amendments in their entirety.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

Draft Instrument subject to affirmative approval

Disabled People's Right to Control (Pilot Scheme) (England) (Amendment) Regulations 2012

Instruments subject to annulment

- SI 2012/2590 Transfer of Functions (Secretary of State for Culture, Media and Sport) Order 2012
- SI 2012/2619 Materials and Articles in Contact with Food (England) Regulations 2012
- SI 2012/2625 Housing (Empty Dwelling Management Orders) (Prescribed Period of Time and Additional Prescribed Requirements) (England) (Amendment) Order 2012
- SI 2012/2630 Police Appeals Tribunals Rules 2012
- SI 2012/2631 Police (Performance) Regulations 2012
- SI 2012/2632 Police (Conduct) Regulations 2012
- SI 2012/2636 Merchant Shipping (Passenger Ships on Domestic Voyages) (Amendment) Regulations 2012
- SI 2012/2652 Motor Vehicles (Tests) (Amendment) (No. 2) Regulations 2012
- SI 2012/2658 Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) (England) (Revocation) Order 2012
- SI 2012/2660 Crime and Disorder (Formulation and Implementation of Strategy) (Amendment) Regulations 2012
- SI 2012/2661 Community Emissions Trading Scheme (Allocation of Allowances for Payment) Regulations 2012
- SI 2012/2665 Zootechnical Standards (England) Regulations 2012
- SI 2012/2669 Police Act 1997 (Criminal Records) (Amendment No. 3) Regulations 2012

APPENDIX 1: INTERESTS AND ATTENDANCE

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

For the business taken at the meeting on 6 November 2012 Members declared no interests.

Attendance:

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