

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

14th Report of Session 2012-13

Public Bodies Orders:

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Shipbuilders) Order 2013**

**Draft Public Bodies (Abolition of the Aircraft and
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Order 2013**

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Amendment Regulations 2012**

**Prosecution of Offences Act 1985 (Specified
Proceedings) (Amendment No. 3) Order 2012**

Plus 6 Information Paragraphs on 12 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 2.

Publications

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

Information and Contacts

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

Statutory instruments

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

Fourteenth Report

PUBLIC BODIES ORDERS

A. Draft Public Bodies (Abolition of British Shipbuilders) Order 2013

Introduction

1. The draft Public Bodies (Abolition of British Shipbuilders) Order 2013 has been laid by the Department for Business, Innovation and Skills (BIS) under section 1 of the Public Bodies Act 2011 (“the 2011 Act”), with an Explanatory Document (ED).

Overview of the proposal

2. British Shipbuilders (BS) was established under the Aircraft and Shipbuilding Industries Act 1977 (“the 1977 Act”) as a public corporation that owned and managed large parts of the British (but not Northern Irish) shipbuilding industry. It subsequently privatised all its active shipbuilding subsidiaries and the one remaining engine manufacturer. No longer a trading enterprise, it effectively operates as a “shell” company: its main remaining function is to act as the vehicle through which long-term industrial disease liabilities of former employees are managed. BS does not have funds of its own for this purpose, and is dependent on the financial backing of the Secretary of State. If agreed, the draft Order would abolish BS and its subsidiaries, and transfer the property, rights and liabilities of BS and its subsidiaries to the Secretary of State.

Role of the Committee

3. 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 consider taking oral or written evidence in order to aid its consideration of the orders.

Consultation

4. BIS carried out a 12-week consultation from February to April 2012 on the proposal to abolish BS and transfer the residual liabilities to the Secretary of State. The consultation document was made widely available to all interested stakeholders and the wider public on the Department website. The Department also sent the consultation document directly to 23 organisations and to the devolved administrations. The Government’s response to the consultation has been published.¹

¹See: <http://www.bis.gov.uk/Consultations/abolition-of-british-shipbuilders-corporation?cat=closedwithresponse>

5. BIS received four responses. Two expressed no concerns arising from the proposed abolition. The other two responses sought reassurance on the responsibilities which would pass to the Secretary of State, including: continued publication of information and statistics about the impact of asbestos exposure in the industry; arrangements for transferring responsibility for future claims against parent companies of nationalised shipbuilding companies; arrangements for on-going Court action after the transfer date; and maintenance of protection for claimants who develop industrial disease where exposure occurred during their employment with a “sold subsidiary” company during the period of nationalised ownership. BIS has explained the assurances that the Government have given on these issues.

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

6. 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). BIS refers to these tests in paragraph 7.10 of the ED.

Efficiency

7. BIS states that abolishing BS and transferring liabilities to the Secretary of State is consistent with reducing unnecessary bureaucracy and overheads. BS exists only as a corporation to manage industrial disease and pension claims in respect of former employees; the draft Order provides that compensation will in future be paid by the Secretary of State rather than BS. This will mean greater flexibility to create more efficiencies, including streamlining the back office functions as they will be absorbed within the existing structure of the Department.

Effectiveness

8. BIS says that the Department has met the costs and liabilities of BS for a number of years; the abolition of BS will provide a long-term solution by transferring the responsibilities of BS to the Secretary of State; claimants will make claims direct to the Secretary of State rather than via a third party.

Economy

9. BIS states that the draft Order will deliver a better deal for taxpayers as the current costs of running BS will be largely absorbed within the existing budget of the Department; abolition of BS will provide annual savings of £15,000 in respect of the employment of a company secretary; and it will no longer be necessary to complete separate accounts for BS and lay them before Parliament.

Accountability

10. BIS says that the abolition of BS will not result in any lack of accountability to Ministers as accountability will be transferred to the Secretary of State.

Safeguards

11. Section 8(2) of the 2011 Act specifies two conditions, namely: that an Order does not remove any necessary protection, and that it does not prevent any

person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. BIS states (at para. 12 of the ED) that the Minister considers that the conditions in section 8(2) of the Act are satisfied in respect of the draft Order. All property, rights and liabilities of BS are being transferred to the Secretary of State. Any rights a person may have had to bring a claim against BS will transfer such that any claim will be exercisable against the Secretary of State.

Conclusion

12. Given that the main remaining function of BS is to act as the vehicle through which long-term industrial disease liabilities of former employees are managed, we see it as particularly important to consider whether the draft Order removes any necessary protection. We note that the Government have given a number of assurances to allay concerns in this regard; we take these to show that the draft Order does not remove any necessary protection.
13. We consider that, on balance, the Government have demonstrated that the draft Order serves the purpose of improving the exercise of public functions as set out 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.

B. Draft Public Bodies (Abolition of the Aircraft and Shipbuilding Industries Arbitration Tribunal) Order 2013

Introduction

14. The draft Public Bodies (Abolition of the Aircraft and Shipbuilding Industries Arbitration Tribunal) Order 2013 has been laid by the Department for Business, Innovation and Skills (BIS) under section 1 of the Public Bodies Act 2011 (“the 2011 Act”), with an Explanatory Document (ED).

Overview of the proposal

15. The Aircraft and Shipbuilding Industries Arbitration Tribunal (“the Tribunal”) was established to determine any question or dispute which was expressly required to be subject to arbitration by the Aircraft and Shipbuilding Industries Act 1977 (“the 1977 Act”). The Tribunal was formed in 1978, considered two applications which it determined by 1981, and has not met since. In the ED, BIS states that the Tribunal has been defunct for 30 years, and that no further cases will need to be considered by it. If agreed, the draft Order would abolish it.

Role of the Committee

16. 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 consider taking oral or written evidence in order to aid its consideration of the orders.

Consultation

17. BIS carried out a six-week public consultation on the proposal to abolish the Tribunal, from 2 February to 15 March 2012. The Department states in the ED that it was done on a “focused and targeted” basis. The consultation document was made available to all interested stakeholders and the wider public on the Department’s website. BIS sent the consultation document directly to the devolved administrations, BAE Systems, the four former British Shipbuilders’ shipyards still in existence and the Shipbuilders and Shiprepairers Association. BIS received two responses: both supported the proposed abolition of the Tribunal. The Government have published their response to the consultation.²

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

18. 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). In this respect, the ED states simply that, having considered these factors, the Minister considers that abolishing the Tribunal “provides the opportunity to tidy up the regulatory landscape and serves the purpose of improving the exercise of public functions”.

Safeguards

19. Section 8(2) of the 2011 Act specifies two conditions, namely: that an Order does not remove any necessary protection, and that it does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. In the ED, BIS states that the Minister considers that the conditions are satisfied in respect of this Order, since the Tribunal has been defunct since 1981; it has no employees or assets and receives no funding; and after a 30-year time lapse there are no further applications for the Tribunal to consider.

Conclusion

20. We note the relatively perfunctory nature of the Explanatory Document, as evidenced by the broad-brush statement which we quote at paragraph 18 above. We also note that, in the consultation paper which BIS published in February 2012, the Department stated that the consultation period would run for only six weeks because the proposed abolition of the Tribunal was a deregulatory measure designed to tidy up the regulatory landscape of a defunct public body, and because “time is limited as we are working towards a commencement date of 1 October 2012.” The impression given, that administrative convenience was a key factor in BIS’ decision to arrange consultation over six weeks rather than 12, adds to a sense that the Department has seen abolition of the Tribunal as a relatively low-key exercise which did not require much effort by the Government.
21. **We expect the Government to give full weight to the proposed use of powers under the Public Bodies Act 2011, in particular by allowing**

²See: <http://www.bis.gov.uk/Consultations/abolition-of-aircraft-and-shipbuilding-industries-arbitration-tribunal?cat=closedwithresponse>

interested parties adequate time to comment, and by providing appropriate explanation of their intentions to Parliament. However, we consider that, on balance, the Government have demonstrated that the draft Order serves the purpose of improving the exercise of public functions as set out 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.

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

C. Draft Animals (Scientific Procedures) Act 1986 Amendment Regulations 2012

Date laid: 29 October

Parliamentary Procedure: affirmative

Summary: The Regulations update the provisions of the Animals (Scientific Procedures) Act 1986 to transpose European Directive 2010/63/EU on the protection of animals used for scientific purposes which must be implemented by 1 January 2013. The Committee notes that there is widespread interest in the implementation of the Regulations but concludes that the Home Office has been largely successful in dealing with so complex a matter. A number of points have been raised by interest groups but may extend beyond the confines of the current instrument. However those points of contention and the Home Office's response are published on the Committee's website for the interest of the House.

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

22. These draft affirmative Regulations have been laid by the Home Office accompanied by an Explanatory Memorandum (EM), an Impact Assessment (IA) and a Transposition Note.
23. The Regulations update the provisions of the Animals (Scientific Procedures) Act 1986 (the 1986 Act) to transpose European Directive 2010/63/EU on the protection of animals used for scientific purposes which must be implemented by 1 January 2013. The House will wish to note that the Directive was the subject of an inquiry by Sub-Committee D of the Lords European Union Committee which published its Report on 10 November 2009. The Committee's Report and the Government's response were debated on 10 February 2010.³
24. Directive 2010/63/EU establishes revised measures for the protection of animals used for scientific purposes to replace those set out in Directive 86/609/EEC which formed the basis of the Animals (Scientific Procedures) Act 1986. The revised Directive has three main objectives:
 - to rectify wide variations in the implementation of Directive 86/609 by Member States;
 - to strengthen the protection of animals used in scientific procedures; and
 - to promote "the 3Rs" strategies that Replace, Reduce and Refine the use of animals in scientific procedures.

³ European Union Committee – Sub Committee D, 22nd Report (2008-09): *The revision of the EU Directive on the protection of animals used for scientific purposes* (HL Paper 164)

25. The EM states that many of the provisions of the new Directive are similar to current United Kingdom legislation and practice. The EM clearly sets out where the new Regulations differ: for example, paragraph 7.5 explains that the new Directive extends protection to some invertebrate species and to animals bred primarily for tissues and organs. It also explains where the UK has retained its more stringent protections: for example, in relation to dogs, cats and horses (EM paragraphs 7.6-7).
26. The Committee has received two letters from interest groups; one from Animal Aid and the other from the National Anti-Vivisection Society which are published in full on our website⁴. They raise questions about the way the draft Regulations transpose the new Directive, in particular;
- how the “the secrecy clause” is carried forward in section 24 of the 1986 Act, which they say is contrary to the spirit of transparency in the new Directive;
 - how Article 38’s requirements for the impartial scrutiny of scientific proposals are implemented;
 - the implementation of the Article 58 requirement for thematic reviews about the promotion of the 3Rs in reducing the amount of experimentation on animals; and
 - the composition of the monitoring committees under Article 49 and their terms of reference.
27. In the interests of balance the Committee has sought a response from the Home Office on the specific points raised. This is also published in full on our website. Broadly their response is that:
- the consultation response on section 24 of the 1986 Act did not reveal a clear consensus about whether the provision should be replaced or repealed and so work is continuing. No immediate action is required in relation to the transposition of the Directive and once changes are agreed they can be implemented through domestic law;
 - the Home Office do not interpret Article 38(4) to require the publication of applications for comment by the general public, the requirement for independent assessment will be met, as now, by the Committee for the Protection of Animals used for Scientific Purposes;
 - the obligation for thematic reviews is on the European Commission rather than on individual Member States and does not require transposition into domestic legislation. However the public consultation did include a request for suggestions from respondents about the structure of the thematic review process and this is being taken forward through collective discussions; and
 - the monitoring Committee is in the process of review and replacement; regulations 20 replaces the current sections 19 and 20 of the 1986 Act with a more flexible approach that does not specify the size and qualifications of the Committee. These will be dealt with in a “working protocol” to be agreed initially with the Committee Chair, when appointed, and will be published. It will also set out the issues which will be automatically submitted to the Committee for advice and cover other

⁴ See our publications page www.parliament.uk/seclegpublications

important issues such as the promotion of the 3Rs. However the remit of the Committee in regulation 20(2) remains unchanged from the 1986 Act which is “In its consideration of any matter the Committee shall have regard both to the legitimate requirements of science and industry and to the protection of animals against avoidable suffering and unnecessary use in scientific procedures.”

28. The Committee notes that there is widespread interest in the implementation of the Regulations but concludes that the Home Office has been largely successful in dealing with so complex a matter. The points raised by interest groups may extend beyond the confines of the current instrument. However those points are published, together with the Home Office’s response, for the interest of the House.

C. Prosecution of Offences Act 1985 (Specified Proceeding) (Amendment No. 3) Order 2012 (SI 2012/2681)

Date laid: 26 October

Parliamentary Procedure: negative

*Summary: This Order extends Specified Proceedings (an administrative process currently used to prosecute certain road traffic offences such as speeding) to a wider range of low level offences. While the Explanatory Memorandum makes it clear that these proposals will be piloted in a number of pathfinder areas to identify a best practice model, the system can then be rolled out nationally without further recourse to legislation or to Parliament. The Committee is concerned that the objective behind the proposal is administrative efficiency which, while laudable, does not necessarily take into account the impact of the proposal on individuals and on rates of reoffending. **The Committee therefore strongly recommends that a report evaluating the pilots and addressing the issues outlined in our report is put before Parliament before the national adoption of the scheme.***

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

29. This Order has been laid by the Attorney General’s Office and is accompanied by an Explanatory Memorandum (EM). Supplementary information on how the instrument will work in practice has been provided and is published at Appendix 1.
30. The instrument extends the range of offences that the police can prosecute in magistrates’ courts, while making provision for additional circumstances in which the Crown Prosecution Service (CPS) must take over the conduct of proceedings for such offences.
31. This instrument extends Specified Proceedings to the following offences:
- Criminal damage where the value of the property involved is no more than £5,000 (not including arson);
 - Careless or inconsiderate driving;
 - Failing to comply with a traffic direction;
 - Failing to stop, report an accident or give information or documents;

- Consumption of alcohol in a designated public place;
- Disorderly behaviour while drunk in a public place;
- Being drunk in a highway, other public place or licensed premises;
- Failing to give a sample for the purposes of testing for the presence of Class A drugs;
- Failing to attend an assessment following testing for the presence of Class A drugs;
- Trespassing or throwing stones on the railway;
- Knowingly giving a false alarm of fire;
- Behaviour likely to cause harassment, alarm or distress;
- Throwing fireworks in a thoroughfare;
- Contravention of a prohibition or failure to comply with a requirement imposed by or under fireworks regulations or making false statements;
- Depositing and leaving litter.

These offences are listed on pages 2 to 3 of the Order by reference to the relevant section of the Act. However in several cases, the section quoted includes more than one offence and offences with a significant variation in penalty, for example, section 11 of the Fireworks Act 2003. The current wording in the Order by referring to “the offence” does not make wholly clear the policy intention that all offences in that paragraph should be included in the Specified Proceedings Scheme.

32. The Attorney General’s Office states that the objective of the extension of Specified Proceedings to a wider range of offences is to use the efficient process used for certain road traffic offences such as speeding for a wider range of low level offences. It will work in the following way, having identified a straightforward case in which the Police expect a guilty plea and where they do not anticipate any complicating or aggravating factors, which would necessitate the involvement of the CPS, the police will then commence proceedings by way of Special Proceedings, that is by summons or postal requisition, rather than by the current process involving an appearance at a magistrates’ court. This Specified Proceedings route will not be available for cases involving those under 16, or where the case is commenced by way of charge (as these cases are usually more serious). The criminal justice system allows for proceedings and sanctions to be escalated to take account of repeated offending, and this will continue as under existing legislation. The instrument does not require any offence to be dealt with under specified proceedings, but allows the police to use this procedure in uncontested, low level straightforward cases.
33. A statement of facts or written copy of the witness statements will be sent with the summons/requisition. On receipt, the defendant may choose to indicate a guilty plea by post. If he does so, the content of the case papers will then be presented to the bench of Magistrates by the court legal adviser, and the Court may decide on the appropriate penalty in his absence, which will then be communicated to the defendant by post. If the defendant fails to respond to the summons, the Court may consider the evidence in his absence under the Specified Proceedings route and, where satisfied of guilt, convict

him and impose a penalty in his absence (the procedure for this and for contesting it is explained in Appendix 1). As one of the new offences covered in this Order is criminal damage is an either-way offence which can be treated as summary where the defendant indicates a guilty plea, there is a slightly different procedure involved as the defendant appears to be required to attend court. If the defendant pleads not guilty or the Court indicates that it is considering a custodial sentence, the case will become de-specified, and the CPS will take over the case.

34. The Attorney General's office makes clear that the instrument does not change the procedure that applies for these offences only the identity of the prosecuting authority. However the list of offences to be subject to this administrative procedure is extensive and some of them appear less than clear-cut. The speeding offences, on which the process is modelled, are usually supported by accurate evidence, for example, a photo from a speed camera. However some of the offences on the list are more subjective – for example, the question of what constitutes harassment, or how a value is put on criminal damage. **So the Committee questions how many of those types of cases will prove suitable for prosecution by this route, and how many will be de-specified at an early stage.**

Impact

35. Although the argument for adopting these streamlined procedures is a reduction in bureaucracy that will save Police, court and prosecutor time, we note that no figure has been given for the potential savings that will result. **The House would expect to see an estimate of savings in any evaluation report on the outcome of the pilot exercises.**
36. The Committee also questions whether, by making it easier for the offender to simply pay a fine, some of the deterrent effect of a court appearance may be lost. **We would therefore expect to see some assessment of whether individuals tried by this administrative process have a higher rate of reoffending than those that have been required an appearance in court.**
37. The Committee also notes that under the provisions of this Order the defendant can be tried in absentia if he does not reply to the original summons. If someone is not expecting such a summons then they may well throw it out with the rest of the “junk mail”. **The House may be interested to know what the Attorney General's estimate is of the percentage of non-respondents expected to be tried in this way and whether the outturn of the pilot exercises exceeds that percentage.**

Public consultation

38. The impetus for this change all appears to come from the courts administration: while any attempt to reduce costs and bureaucracy is laudable, it should not be at the expense of the rights of the ‘man in the street’. The Attorney General's Office confirms that there has been no public consultation on this change on the grounds that “the instrument does not make changes to the legal rights of members of the public”. That does not necessarily mean that the change will have no impact on members of the public and the way they behave, and **the Committee is concerned that the views of court users has not been sought.**

Conclusion

39. While the Explanatory Memorandum makes clear that these proposals will be piloted in a number of pathfinder areas to identify a best practice model, the system can then be rolled out nationally without further recourse to legislation or to Parliament. The Committee is concerned that the objective behind the proposal is administrative efficiency which, while laudable, does not necessarily take into account the impact of the proposal on individuals and on rates of reoffending. **The Committee therefore strongly recommends that a report evaluating the pilots and addressing the issues outlined above is put before Parliament before the national adoption of the scheme.**

OTHER INSTRUMENTS OF INTEREST

Draft Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012

Draft Charitable Incorporated Organisations (Consequential Amendments) Order 2012

40. The Charitable Incorporated Organisations (CIO) is a new corporate legal structure for charities that is expected to appeal to small to medium sized charities. Most registered charities (there are currently over 130,000) are established as an unincorporated trust or an unincorporated association: they have no legal personality of their own, and so contracts must be entered, and property held, by the named charity's trustees which exposes the trustees to potentially unlimited personal liability for the financial liabilities of their charity. Around 30,000 charities have instead chosen to incorporate as a company limited by guarantee, giving the charity its own legal personality and the directors (trustees) the benefits of limited liability. However, incorporating as a company results in dual registration with, and reporting to, both Companies House and the Charity Commission. The CIO, as an incorporated structure, provides limited liability for its members and trustees, making it easier for charities to attract and retain trustees, and for the charity to contract or hold property. Unlike the company structure, the CIO will only be regulated by the Charity Commission under charity law, ensuring a considerable reduction in the regulatory burden.
41. For procedural reasons these two affirmative instruments are being laid first, the main detail about the new corporate structure will be included in the Charitable Incorporated Organisations (General) Regulations 2012 ("the General Regulations") which will be subject to negative resolution. The General Regulations cannot be made or laid before Parliament until these affirmative instruments have been approved. However, because the General Regulations are fundamental to understanding the current instruments the Cabinet Office has published them in draft, appended to the Explanatory Memorandum to the Draft Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012. Once these affirmative regulations have been approved by Parliament, the aim is for the General Regulations to be made at the same time as these affirmative instruments. As the General Regulations form a fundamental part of the CIO package the Cabinet Office state that they would anticipate being able to respond to any questions about them during the debates on the associated affirmative instruments.

Draft Civil Legal Aid (Merits Criteria) Regulations 2012 and four other instruments

42. These affirmative Regulations make provision for the "merits criteria" which the Director of Legal Aid Casework must apply when making a determination about whether an applicant qualifies for civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the 2012 Act). Legal aid is not generally intended to be more generous than private funding and the Ministry of Justice state that the merits criteria are generally intended to model the kinds of rational judgements that would be

made by a reasonable privately-paying person of modest means in deciding whether to bring or continue with litigation. For example one of the criteria is the prospects of success test (regulations 4 and 5) which requires the Director to assess whether the case has more than a 50% chance of succeeding. Less stringent prospects of success criteria apply to cases with certain features (for example, cases with an overwhelming importance to the individual, cases which are of significant wider public interest or where the substance of the claim relates to a breach of Convention rights). This is the first in a series of statutory instruments which will implement Part 1 of the 2012 Act by 1 April 2013.⁵

43. The Legal Services Commission is developing a comprehensive training package for providers, which will be delivered from February 2013, and guidance for providers on merits and procedures is currently being drafted and will be published prior to implementation. Further Regulations will be laid before April 2013, including the Civil Legal Aid (Procedure) Regulations 2012 which will be accompanied by guidance for the public on the telephone gateway and the domestic violence gateway.
44. **The Committee noted some variations in the terminology used in the Regulations and expects the guidance to make absolutely clear why these distinctions are made.** For example, regulation 39(d) includes a test of reasonableness requiring the individual to have “exhausted all reasonable alternatives to bringing proceedings” whereas regulation 53(b) does not include a similar test and requires the individual to have “exhausted all administrative appeals”, which would appear to be a higher threshold.

Draft Electoral Registration Data Schemes (No. 2) Order 2012

45. The Government intends to require electors to register individually from 2014 in order to modernise the electoral registration system and tackle fraud. A number of pilot exercises are being run using the data matching of government information to identify potentially eligible electors missing from the register, and to confirm existing electors on the register prior to the transition to Individual Electoral Registration. This Order enables the third phase which builds on the results of two previous pilot schemes.⁶ It will allow registration officers in 22 areas in England, Wales and Scotland to select one or more pilot schemes aimed at finding potentially eligible electors currently missing from the register. The options are: improving registration rates among recent home movers (using data held by the Department for Work and Pensions (DWP) and Royal Mail); improving registration rates among young people (using data held by DWP and the Department for Education or the Welsh Government); and improving registration rates among students (using data held by DWP and the Student Loans Company). A further strand of piloting will allow electoral registration officers for four districts in two-tier local government areas to match their register against data held by the corresponding county council with the aim of increasing registration rates among young people. The outcome will help to inform a decision on whether

⁵ On the current list see also the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012, Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012 (SI 2012/2683), Civil Legal Aid (Family Relationship) Regulations 2012 (SI 2012/2684) and Civil Legal Aid (Prescribed Types Of Pollution of the Environment) Regulations 2012 (SI 2012/2687)

⁶ See also the Electoral Registration Data Schemes Order 2011 (S.I. 2011/1466) and the Electoral Registration Data Schemes Order 2012 (S.I. 2012/1944).

it would be appropriate to change the law that prevents routine sharing of such data in two-tier areas.

Draft Electricity and Gas (Energy Companies Obligation) Order 2012

Draft Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) (Amendment) Regulations 2012

46. In our 5th Report of the current session,⁷ we drew to the special attention of the House a number of statutory instruments laid by the Department for Energy and Climate Change (DECC) and relating to energy efficiency. These included the draft Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 (“the Framework Regulations”),⁸ and the Draft Electricity and Gas (Energy Company Obligation) Order 2012 (“the ECO Order”).
47. In relation to a “Green Deal” plan, the Framework Regulations created an authorisation regime to regulate the conduct of key players in the provision and installation of energy efficiency improvements. They included conditions to be met when a Green Deal plan was established, and requirements to ensure that people moving into a property were made aware of a Green Deal plan in advance.
48. The Government intend to launch the Green Deal scheme on 28 January 2013. In the Explanatory Memorandum (EM) to the draft Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) (Amendment) Regulations 2012 (“the draft Amendment Regulations”), DECC explains that Regulation 42 of the Framework Regulations requires Green Deal providers to produce a document with information about the Green Deal plan agreed for any property; in England and Wales, that document will be the Energy Performance Certificate (EPC); in Scotland, the recommendations report. At present, Regulation 42 is not due to come into force until 28 January 2013, when customers will be able to enter into Green Deal plans. The draft Amendment Regulations bring forward the commencement date, for certain purposes, to ensure that the Secretary of State and the Scottish Ministers can act in advance of 28 January 2013 to require EPCs, and recommendation reports, to include information about Green Deal plans.
49. The draft Electricity and Gas (Energy Companies Obligation) Order 2012 implements the Energy Companies Obligation policy which places three obligations on energy suppliers who have more than 250,000 domestic electricity and/or gas customers: a carbon-saving obligation: a carbon-saving community obligation: and a home-heating cost reduction obligation. In the EM, DECC states that the draft Order is similar in content to the draft ECO Order 2012 which was approved by both Houses in July 2012 but which has not been made. DECC states that the Government wish to make this revised draft Order to ensure that “in-use factors” are applied when calculating the carbon savings attributable to energy efficiency measures installed under ECO. Such factors are designed to ensure that the carbon-savings calculated

⁷ HL Paper 22

⁸ The Framework Regulations were made on 6 August 2012, as SI 2012/2079.

for energy efficiency measures reflect their actual performance once installed in domestic properties.

50. We note from the EM to the draft Amendment Regulations that the Government intend to bring forward additional statutory instruments relating to the Green Deal. We hope that the Government's use of secondary legislation to implement this policy is not increased by the need for further amending instruments which make good shortcomings in instruments recently approved by the House.

General Medical Council (Licence to Practise and Revalidation) Regulations Order of Council 2012 (SI 2012/2685)

51. The General Medical Council is the independent regulator for doctors in the UK and it has been developing and piloting a process of revalidation for some time. This Order puts the agreed system into full operation. Revalidation of medical practitioners will usually be carried out at five yearly intervals and uses an evaluation of a medical practitioner's fitness to practise in order to assess whether their licence to practise should be renewed. The programme of review and initial revalidation should be completed by 31 March 2016 with the following interim stages:
- By the end of December 2012 – All doctors in senior leadership roles, including the four UK Chief Medical Officers and all second-level responsible officers;
 - By 31 March 2013 – All first-level responsible officers and other senior doctors;
 - By 31 March 2014 – All responsible officers will make at least one revalidation recommendation and at least 20% of all doctors will have had a recommendation made about them;
 - By 31 March 2015 – 60% of all currently licensed doctors will have had a recommendation made about them.

Plant Health (Forestry) (Amendment) Order 2012 (SI 2012/2707)

52. The Order introduces emergency measures against the fungal disease *Chalara fraxinea*, also called *Chalara* dieback of ash. The Order was laid by the Forestry Commission on 29 October and came into force on the same day. In the Explanatory Memorandum (EM) to the Order, the Forestry Commission states that the import trade in ash planting material normally begins in November: urgent action was necessary to restrict the movement of ash trees for planting to those deriving from pest-free areas, because of evidence that infected ash trees were supplied from Germany, the Netherlands and Belgium during 2011 and 2012.
53. The Order was foreshadowed on 25 October, when the Secretary of State for the Environment, Food and Rural Affairs stated that, subject to the outcome of a consultation exercise (which concluded on 26 October), he intended to introduce a ban on imports and tight restrictions on ash movements in Great Britain on 29 October.⁹ In the EM, the Forestry Commission explains that the consultation exercise was carried out, over an eight-week period to 26 October, on a pest risk assessment prepared to evaluate the risk of

⁹ HC Deb 25 October 2012 col 1064

Chalara entering the UK and causing damage. Three strategy options were canvassed: eradication, supported by legal restrictions on ash imports and movements, if the disease was not found to be widely established; suppression, without legal restrictions on ash imports and movements, if the disease had become established with limited distribution; and no official measures, in the event of widespread distribution of the disease. There were 56 responses, which all supported the policy to maintain freedom from *Chalara*, with legislative restrictions on ash imports and movements. However, 29% of responses agreed with both the suppression and eradication options depending on whether the pest was already established.

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

Charitable Incorporated Organisations (Consequential Amendments) Order 2012
 Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012
 Civil Legal Aid (Merits Criteria) Regulations 2012
 Electoral Registration Data Schemes (No. 2) Order 2012
 Electricity and Gas (Energy Companies Obligation) Order 2012
 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012
 Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) (Amendment) Regulations 2012

Draft Negative Instrument subject to annulment

Amended Guidance Issued under section 182 of the Licensing Act 2003

Instruments subject to annulment

- SI 2012/2659 Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) and Civil Enforcement of Parking Contraventions Designation (No. 2) Order 2012
- SI 2012/2672 Health and Social Care Act 2012 (Consequential Amendments – The Professional Standards Authority for Health and Social Care) Order 2012
- SI 2012/2680 Social Security (Credits) (Amendment) (No. 2) Regulations 2012
- SI 2012/2683 Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012
- SI 2012/2684 Civil Legal Aid (Family Relationship) Regulations 2012
- SI 2012/2685 General Medical Council (Licence to Practise and Revalidation) Regulations Order of Council 2012
- SI 2012/2687 Civil Legal Aid (Prescribed Types of Pollution of the Environment) Regulations 2012
- SI 2012/2707 Plant Health (Forestry) (Amendment) Order 2012
- SI 2012/2709 Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) (Amendment No. 2) Order 2012
- SI 2012/2712 Police (Amendment No. 4) Regulations 2012
- SI 2012/2723 Energy Act 2004 (Amendment) Regulations 2012
- SI 2012/2732 Local Policing Bodies (Consequential Amendments No. 2) Regulations 2012

SI 2012/2733 Local Policing Bodies (Consequential Amendments and Transitional Provision) Order 2012

SI 2012/2734 Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012

**APPENDIX 1: DRAFT PROSECUTION OF OFFENCES ACT 1985
(SPECIFIED PROCEEDING) (AMENDMENT NO. 3) ORDER 2012 (SI
2012/2681): SUPPLEMENTARY INFORMATION**

General

This instrument extends the range of offences which the police can prosecute, while specifying additional circumstances in which they may not prosecute (for example where the accused is under 16, or the proceedings are commenced by way of charge). The SI does not change the procedure which a magistrates' court may apply in a case prosecuted by the police – that continues to be governed by the Magistrates' Courts Act 1980 and the Criminal Procedure Rules. Those apply to police prosecutions in the same way that they apply to CPS prosecutions.

Policy intent

The policy intent is to extend the existing police-led model of prosecution to a wider range of offences, in line with the Government's commitment to simplify and expand this prosecution model.

Currently, the police-led model is used for a large number of road traffic offences, such as speeding, driving without insurance and failing to produce a driving licence. We are working with police, the Crown Prosecution Service and the courts to make this prosecution model more efficient and effective for both practitioners and defendants, many of whom currently attend court where there is no legal requirement for them to do so.

The instrument extends the police-led model to a number of new offences. The intention is to make these prosecutions simpler and more proportionate for both practitioners and defendants, many of whom are not legally required to attend court, and allow the police to retain discretion in prosecutions in the type of high volume, low level cases which they deal with every day.

Legislative changes

The instrument does not change the legal processes that can be followed for the offences listed; the change is to the identity of the prosecuting authority.

Proceedings for the listed offences can be instituted either by summons, postal requisition or charge. The effect of the instrument is that proceedings will not be specified if commenced by charge – the practical effect is expected to be that an increased number of cases will be initiated by summons or postal requisition rather than by charge. This does not impact on a defendant's legal rights.

Proceedings for the listed offences listed can be dealt with in the absence of the defendant in certain circumstances (detailed below in (4)). The SI does not change these existing provisions.

The instrument does not impact on the right to trial by jury. The only offence listed in the instrument that can be tried in the Crown Court is criminal damage. Under section 22 of, and Schedule 2 to, the Magistrates' Courts Act 1980, an offence of criminal damage is treated as though it were triable only in a magistrates' court if it is clear to the court that the value of the damage does not exceed £5000. The instrument provides that proceedings for criminal damage are specified only if it is the prosecution's case that the value of the damage does not exceed this sum, but this does not affect the powers of the court or the rights of the

defendant in terms of the final determination of value. There is nothing in this instrument that impacts on the right of a defendant to elect to have their case heard in a jury trial at the Crown Court, or the power of a magistrates' court to commit a defendant to the Crown Court for trial or sentence.

Attendance by the defendant

The committee asked whether the ability to prosecute cases in the absence of the defendant is a significant change in process, and what would happen if a defendant was away and did not receive a summons or postal requisition and returned to find they were sentenced in their absence (the example suggested was if a person is away for three months on business).

The circumstances in which a magistrates' court can try a defendant in his or her absence are set out in section 11 of the Magistrates' Court Act 1980. Section 12 of the Act also allows a court to accept a plea tendered by post in certain circumstances, and sentence the defendant in his or her absence.

A person who has been convicted and sentenced in absence and knew nothing about the proceedings can swear a statutory declaration within 21 days of the discovery of the proceedings. This will cancel the conviction.

Where proceedings are commenced by summons or postal requisition, and the defendant is sentenced in his or her absence, a custodial sentence may not be imposed (section 11(3) and (5) Magistrates' Courts Act 1980).

In proceedings for criminal damage (which is triable either in a magistrates' court or the Crown Court) section 17A of the Magistrates' Courts Act 1980 requires the defendant to be present in court to indicate his or her plea.

The instrument does not (and indeed cannot) amend these provisions, extend the circumstances in which a person can be tried or sentenced in their absence, or change the procedures to be followed in that regard.

Nature of offences and evidence presented

The committee queried what evidence will be taken into account in the new offences, for example the cost/value of criminal damage, and the nature of the offences chosen.

The instrument maintains the current requirement that, for proceedings to be specified, a summary of the facts relied upon by the prosecution, or copies of the prosecution witness statements, must be served on the defendant with the summons or postal requisition. In cases of criminal damage, it is expected that the statement of facts will set out the extent of the damage and the prosecution's assessment of its value.

It is intended that the police will prosecute cases that are factually straightforward and are expected to result in a guilty plea. It is therefore expected that, as is currently the case in specified proceedings, the defendant will be willing to accept the facts as presented by the prosecution. However, the instrument does not restrict the existing ability of the defendant to dispute the facts in any way.

If the defendant wishes to dispute the statements of facts, he is able to do so ahead of entering a plea at court.

If the defendant pleads guilty at court but wishes to dispute any of the evidence presented against him (a Newton hearing) the effect of this instrument is that the case will be despecified and handed over to the Crown Prosecution Service.

If the defendant pleads not guilty, the case is despecified and handed to the Crown Prosecution Service.

Maximum fine levels

The committee asked which of the new offences are subject to a fixed penalty notice and, where they are not, the maximum fine available to the court. Also indicated is the maximum penalty where this is different, although the effect of this instrument is that if the court indicates that it is considering imposing a custodial sentence the case becomes despecified and is handed to the Crown Prosecution Service.

A fixed penalty notice may be issued for all the listed offences with the exception of the following. As requested, the maximum fine for each offence is indicated:

- Careless or inconsiderate driving - maximum fine at court is £5000 (the court may also consider disqualification)
- Failing to comply with a traffic direction – maximum fine at court is £1000
- Failing to stop, report an accident or give information or documents - maximum fine at court is £5000 (section 170 of the Road Traffic Act offences can also attract a maximum of 6 months imprisonment)
- Failing to give a sample for the purposes of testing for the presence of Class A drugs - maximum fine at court is £2500 (maximum term of 3 months imprisonment)
- Failing to attend an assessment following testing for the presence of Class A drugs - maximum fine at court is £2500 (maximum term of 3 months imprisonment)

Previous offending history

The committee asked what measures there are in place to identify cumulative bad behaviour where repeat offences are normally treated more severely than a first offence.

The policy intent is to retain discretion in prosecutions with the police in the type of high volume, low level cases they deal with every day. Police will have the discretion to use specified proceedings where they believe these are appropriate. This is likely to be when a Fixed Penalty Notice is not deemed appropriate (this tends to occur because of the severity of the offence or because it is a repeat offence) and the case is likely to be uncontested, straightforward and dealt with in a Magistrates' Court.

The criminal justice system allows for proceedings and sanctions to be escalated to take account of repeated offending, and this will continue as under existing legislation. The instrument does not require any offence to be dealt with under specified proceedings, but allows the police to use this procedure in uncontested, low level straightforward cases.

Pathfinders

The committee asked whether all the listed offences will be tested in all areas, and asked that we confirm the extent of the Order.

The intention is to test all the new offences in all pathfinder areas, ahead of national implementation. We are working with the pathfinders on the details of the timetable for local implementation and evaluation.

The Order does not limit the scheme to the pathfinders. The intention is to test the best way of delivering these changes ahead of wider, national adoption of the expanded specified proceedings.

Consultation

You also asked whether any user groups were involved in the policy formulation.

Public consultation has not been undertaken as the instrument does not make changes to the legal rights of members of the public. As set out in the Explanatory Memorandum, consultation has been carried out with the Association of Chief Police Officers and representatives of the judiciary, including the Magistrates Association, Justice Clerks' Society, National Bench Chairs' Forum, Chief Magistrate's Office, the Judicial College, and the Senior Presiding Judge's Office, to test both the practicality and potential impact of the proposed changes.

Home Office on behalf of the Attorney General

7 November 2012

APPENDIX 2: INTERESTS AND ATTENDANCE

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

For the business taken at the meeting on 13 November 2012 Members declared the following interests:

Draft Charitable Incorporated Organisations (Consequential Amendments) Order 2012

Draft Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012

All members present declared interests in connection with their involvement in a range of charities.

Attendance:

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