

# HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

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15th Report of Session 2012-13

## **Public Bodies Orders:**

**Draft Public Bodies (Abolition of the Disability Living Allowance Advisory Board) Order 2013**

**Draft Public Bodies (Abolition of the Railway Heritage Committee) Order 2013**

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## **Statutory Instruments:**

**Employment and Support Allowance (Sanctions) (Amendment) Regulations 2012**

Plus 7 Information Paragraphs on 9 Instruments

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Ordered to be printed 20 November 2012 and published 22 November 2012

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Published by the Authority of the House of Lords

*London:* The Stationery Office Limited  
£price

HL Paper 66

*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*

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

*Registered interests*

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

*Publications*

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

*Information and Contacts*

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

*Statutory instruments*

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

# Fifteenth Report

## PUBLIC BODIES ORDERS

### **A. Draft Public Bodies (Abolition of the Disability Living Allowance Advisory Board) Order 2013**

#### *Introduction*

1. The draft Public Bodies (Abolition of the Disability Living Allowance Advisory Board) Order 2013 (“the Order”) was laid on 15 October under section 1 of the Public Bodies Act 2011 (“the 2011 Act”). The Order was laid by the Department for Work and Pensions (DWP) with an Explanatory Document (ED). No Impact Assessment has been provided on the grounds that the Board is in practice defunct and abolition will result in notional savings of about £5,000 per year.

#### *Overview of the proposal*

2. The draft Order would abolish the Disability Living Allowance Advisory Board (“the Board”) which was established in 1991 to advise the Secretary of State on such aspects of the Disability Living Allowance and Attendance Allowance that he referred to it. The Department states that no such request has been made under this or the previous Government, since 2008 and that the Board has essentially outlived its usefulness. Other avenues of consultation are now used in preference to the Board.
3. The constitution of the Board is prescribed by its governing regulations<sup>1</sup> and it must consist of a Chairman and between 11 and 20 members which must include people from the fields of physiotherapy, occupational therapy, social work, nursing disabled persons, medical practice and at least one member with experience of caring for a disabled person.

#### *DWP’s argument for abolition*

4. The 2010 Public Bodies Review applied the general principle that public bodies should only exist at arm’s length from Ministers where the body is required to perform a technical function, requires impartiality and is needed to establish facts independently. The Government’s view is that although the Board satisfied the three tests, the performance of the Board’s technical function would be better suited to the DWP’s own team of in-house medical advisers (ED paragraphs 4.5-4.8). For comparative purposes we therefore asked what experts the DWP employ. They replied:

There are six members of the medical advisory team, all of whom are qualified doctors. In paragraph 4.7 [of the Explanatory Document] however we also mention that they can commission external advice as and when required in the form of “start and finish groups”. For example for the development of Personal Independence Payment (PIP), the benefit which will replace Disability Living Allowance for people of working age, the group comprised considerable technical experience -

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<sup>1</sup> Disability Living Allowance Advisory Board Regulations 1991 (SI 1991/1746)

including representatives from general practice, nursing, social work, physiotherapy, occupational therapy, psychiatry and community mental health - as well as those with considerable experience of working with and supporting disabled people. It had 10 members, including two representatives of disability organisations, both of whom are disabled people themselves. Such groups supplement internal and external resource like the medical advisers and Equality 2025.

*Role of the Secondary Legislation Scrutiny Committee*

5. 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)". Following its first consideration of the draft Order, the Committee identified a need to pursue further enquiries on whether the consultation requirements had been fully met, accordingly we triggered the enhanced affirmative procedure which extended the scrutiny period to 60 days from the date of laying.<sup>2</sup>

*Statutory Consultation*

6. The Public Bodies Act places a great deal of emphasis on the need for consultation, as well as the mandatory provisions in section 10 on who should be consulted there is a requirement in section 11(2)(d) that the Explanatory Document should "*contain a summary of representations received in the consultation*".
7. Following its initial consideration of the Order, the Committee was not satisfied on the information provided that the requirements of section 10(1)(b) had been met. Section 10(1)(b) states that a Minister proposing to make an order must consult "*such other persons as appear to the Minister to be representative of interests substantially affected by the proposal*". Paragraph 8.1 of the Government's ED said that "*Since no other persons are affected by the proposal a public consultation was neither required or necessary*". The Committee took the view that this was insufficiently clear about the rationale for that assumption and wrote to the Minister seeking clarification on the point. The Chairman's letter and the Minister's response are attached at Appendix 1.
8. The Minister's response gives a fuller explanation of how she considers the section 10(1)(b) consultation requirement had been addressed: "*I considered whether the wider public, notably disabled people, would be substantially affected by the proposal ... We therefore concluded that no one other than the Board would be substantially affected by the proposal to abolish the Board. Hence no obligation to consult arises under section 10(1)(b) of the Public Bodies Act 2011*". While we are disappointed that this explanation was not given in the original ED, we consider it appears to satisfy the minimum requirements of the Act as to consultation.
9. There is, however, a distinction between the letter of the law and the spirit of the law. There are a number of easily identifiable representative groups and charities, which are currently taking an active interest in the Disability Living Allowance and its transition to the new Personal Independence Payment under the Welfare Reform Act 2012. The Government did not consult them

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<sup>2</sup> SLSC 12th Report session 2012-13, HL Paper 55

on the grounds that they have no “substantial” interest in the abolition of the Board.

10. Although the Board has not met for four years, it is possible that representative groups might object to the removal of an avenue of independent advice, particularly on the medical aspects of the Allowance which are now to be taken in-house. The Government argue that there are adequate alternative consultation arrangements in place, such as Equality 2025 and the Office for Disability Issues, but these are DWP-sponsored bodies. If it is the case that the representative groups agree that the Order does not remove any necessary protection or otherwise affect their interests, we would have expected the Government to have obtained confirmation from them that they were content for the Board to be wound up. One of the Committee’s main objections to the lack of consultation is that only the Government’s opinion is being heard.

#### *The Consultation Principles*

11. The second half of the Minister’s letter goes on to make a further argument for not conducting a public consultation – by reference to the Cabinet Office “Consultation Principles”<sup>3</sup> - on the grounds that “*to consult beyond the board members would be disproportionate, ineffective and serve no purpose*” and “*formal consultation should take place where there is scope to influence the policy outcome*.” We consider the reference to this guidance as irrelevant. **The consultation provisions in the Public Bodies Act are statutory requirements: they are not “optional”; and are not able to be overridden by the Cabinet Office’s consultation principles.**
12. It may be useful to address another misconception in DWP’s paperwork accompanying the order, namely that the assumption that the 2011 Act requires a formal public consultation. In fact the Act does not specify how a consultation must be undertaken. In this case, for example, a brief targeted consultation involving the key disability interest groups might have been expected. There is also no statutory requirement for the length of a consultation exercise – section 11(3) of the 2011 Act requires only that there should be at least 12 weeks between the start of the consultation period and the Order being laid – it does not specify that the consultation itself must last the full 12 weeks. The Act allows plenty of scope for the consultation to be proportionate.

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

13. 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 and effectiveness*

14. The DWP considers that this Order serves the purpose of efficiency because the Board duplicates other avenues of comment. DWP states that it will be more efficient to seek any further advice in the future on disability benefits

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

through tailored consultation rather than by maintaining a standing non-departmental public body. Medical opinion will be available from doctors employed by the Department (ED paragraph 7.8-9). DWP is a sponsor or employer in these relationships. The only external body consulted on this matter, the Board itself, expressed its concern about independent scrutiny of the Department's policy towards disabled people (ED paragraph 8.2). **The Explanatory Document suggests that other existing avenues may perform the advisory function more efficiently but the Minister will need to articulate more fully in debate how their advice is more effective than that produced by the Board when it was active.**

#### *Economy*

15. The Department considers abolition of the Board could save the Department money on fees and expenses (approximately £20,000, equivalent to about £5000 a year, over the current spending review period) (ED paragraph 7.10). The savings are notional since the ED states that the Board has been in practice defunct since 2008. It is certainly cheaper to run one NDPB rather than two but the DWP has not explained the comparative costs of Equality 2025 or of its in-house medical staff and why that source of advice is to be preferred.

#### *Accountability*

16. The Department considers that the abolition of the Board will increase accountability to Ministers because obtaining advice from in-house medical advisers will result in more direct control, accountability and responsibility for involving the right people at the right time in the development of Government policy (ED paragraph 7.11). Because the Board could only meet at the Minister's direct request we consider the degree of the Minister's discretion over whom to consult and when has not changed.

#### *Safeguards*

17. 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. Paragraph 7.12 of the ED confirms that the Minister believes that the alternative sources of advice from Equality 2025 and the medical experts within the Department, and "task and finish groups" will provide equivalent protection. However as stated previously there is some concern about the degree of independence that those offering the advice will have, it would therefore have been more convincing if the Minister's view had been supported by some of the external groups interested in the operation of Disability Living Allowance.

#### *Conclusion*

18. In its consideration of this draft Order, the Committee has found that the Explanatory Document lacked proper evidence to underpin the Government's case. **As we have stated previously in our consideration of draft Public Bodies Orders, we expect the Government to present a**

**well-argued case that all the tests in the 2011 Act have been satisfied and the case should be backed by objective evidence.**<sup>4</sup>

19. **While the Committee concludes that the Minister’s supplementary evidence appears to explain sufficiently why DWP considered there was no legal obligation to consult under section 10(1)(b) of the Public Bodies Act, we do not consider the Minister’s approach is necessarily in keeping with the spirit of the consultation requirement.** In our view, it would have been better to conduct a small, low key consultation targeted at bodies who might reasonably be identified as having an interest (if not a substantial interest) in the operation of Disability Living Allowance to substantiate the Minister’s view that the abolition of the Board will not be detrimental. **We attach some significance to the decision by Parliament to include consultation requirements on the face of the Act, rather than relying on the Government’s general approach to consultation. The House may wish to explore this point further in debate.**

## **B. Draft Public Bodies (Abolition of the Railway Heritage Committee) Order 2013**

### *Introduction*

20. The draft Public Bodies (Abolition of the Railway Heritage Committee) Order 2013 (“the Order”) was laid on 29 October under section 1 of the Public Bodies Act 2011 (“the 2011 Act”). The Order was laid by the Department for Transport (DfT) with an Explanatory Document (ED). No Impact Assessment has been provided on the grounds that the costs are negligible.

### *Overview of the proposal*

21. The Government are proposing to abolish the Railway Heritage Committee (“RHC”) and to transfer its functions to the Board of Trustees of the Science Museum. The Science Museum Group (“SMG”) comprises:
- the Science Museum London;
  - the Museum of Science and Industry (Manchester);
  - the National Coal Mining Museum (Wakefield);
  - the National Media Museum (Bradford); and
  - the National Railway Museum (York).
22. The functions and scope of the RHC are set out in the Railway Heritage Act 1996 (“the 1996 Act”). The RHC is responsible for identifying and designating records and artefacts of the railway industry that are of sufficient interest to warrant preservation and it considers proposals for disposal by the owners of such items. Members of the RHC’s main committee and three sub-committees possess a considerable degree of knowledge and expertise in this area which they are able to utilise to good effect. In addition, the industry itself will sometimes volunteer items for designation and members of

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<sup>4</sup> 53rd report session 2010-12 (HL Paper 262)

the public can also draw items to the attention of the RHC either directly or through its website.

23. Some of the RHC's searching is done systematically. For example, Network Rail provides constant intelligence on signal boxes coming up for closure to a member of the RHC's Artefacts Sub-committee who will then visit them and draw up an inventory of the contents for consideration. The same individual also compiles lists of all new locomotive namings and deletions of naming so that an assessment can be made of whether to designate given nameplates. There is a slightly different system in Scotland whereby another member provides a full list of all infrastructure changes for each meeting. All these exercises are undertaken on an entirely voluntary basis.
24. In practice, the RHC assesses items against published criteria using a scoring system if necessary for more borderline cases. The Secretary issues a Designation Notice to the organisation concerned, and an up-to-date list of all designated items is available on the RHC's website. Once designated, items may not be disposed of without the RHC's consent. If an owner tried to sell a designated item – abroad or otherwise – the transaction would be void although there is nothing to stop an owner transferring an item abroad within their ownership. There is also no sanction that can be applied if an item is destroyed without permission.

#### *DfT's argument for abolition*

25. The 2010 Public Bodies Review applied the general principle that public bodies should only exist at arm's length from Ministers where the body is required to perform a technical function, requires impartiality and is needed to establish facts independently. The Government concluded that the RHC met none of these tests and therefore should be abolished.
26. However it was argued during the passage of the 2011 Act that the right of designating important or historic items of railway heritage for preservation should not be lost but transferred to the Science Museum Group. The overall effect is one of streamlining the process by transferring the power of designation to a larger group where economies of scale can be identified from using administrators for a wider range of duties.

#### *Role of the Secondary Legislation Scrutiny Committee*

27. 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.

#### *Statutory Consultation*

28. The Government have carried out consultation in accordance with section 10 of the Act, a targeted 6 week consultation aimed at those with railway and heritage interests, which was also made available to the public on the DfT's website. A total of 32 responses were received: the majority of respondents appeared to be pleased with the proposal to maintain the designation

function and transfer it to the Board of Trustees of the Science Museum and recognised the need for the rationalisation of functions or expressed the view that the exercise of the designation function is more important than the vehicle through which it is delivered. There was strong support for the Board of Trustees of the Science Museum being ideally placed to take on the role in the future, especially if it appoints external panel members to ensure that there is no conflict of interest between it carrying out the designation function and its role as the governing body of the National Railway Museum.

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

29. 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*

30. The ED argues that the decision to abolish the RHC is consistent with reducing unnecessary bureaucracy, overheads and management layers. The RHC's Main Committee currently has 8 members. The RHC also has three sub-committees: the Records Sub-committee which has 12 members; the Artefacts Sub-committee which has 15 members and the Scottish Sub-committee which has 9 members. A number of these members serve on more than one of the committees. The Railway Heritage Designation Advisory Board (RHDAB) which will replace it will have a Chair and around 10 members, some of which will be drawn from the RHC to ensure a smooth transition of expertise.
31. The Board of Trustees of the Science Museum is responsible for the whole of the SMG which incorporates the National Railway Museum which is currently the main recipient of the artefacts designated under the 1996 Act.
32. In addition, currently the composition and proceedings of the RHC are set out in the Railway Heritage Scheme Order 2005; however, once the functions are transferred to the Board of Trustees of the Science Museum, they will be governed by the provisions of Paragraph 16 of Schedule 1, Part II to the National Heritage Act 1983. Under these provisions the Board of Trustees of the Science Museum have power to regulate their own procedure, there will therefore be greater flexibility for the Board of Trustees of the Science Museum to create a more efficient organisation.

*Effectiveness*

33. The National Railway Museum is the main recipient of the artefacts designated by the RHC. The ED states that the transfer of those designation powers will enable much closer working between those designating the artefacts and the recipients of those artefacts which will lead to a reduced regulatory burden and effective streamlining of working practices.

*Economy*

34. The ED states that the current costs of running the RHC, currently around £100,000 a year, will be largely reduced and absorbed within the existing budget of the SMG. The current Secretary of the RHC, whose salary has

been covered by DfT, is due for retirement around the time of the RHC's abolition and so no redundancy costs are incurred. The back-office functions will be more streamlined as they will be absorbed within the existing structure of the SMG.

#### *Accountability*

35. The ED states that the abolition of the RHC will transfer accountability for decisions made to the Board of Trustees of the Science Museum which is an executive non-departmental public body sponsored by the DCMS. DCMS will have ministerial responsibility for the designation power once it has been transferred.
36. As raised in the consultation exercise, a potential conflict of interest could arise between the Board of Trustees of the Science Museum carrying out the designation function and its role as the governing body of the National Railway Museum resulting in designated items going to the National Railway Museum rather than other museums and archives which might also have an interest. However, it is intended that the appointment of external (non Science Museum Group) members to the RHDAB will ensure that the National Railway Museum does not receive unfair preference. The final composition of the RHDAB is yet to be determined although it is expected that most of its members will be non-SMG members and it will also include representation from Scotland and Wales.

#### *Safeguards*

37. The Minister considers that the conditions in section 8(2) of the 2011 Act are satisfied in respect of the RHC as the designation functions being transferred to the Board of Trustees of the Science Museum will continue to be exercised. Abolition does not remove any necessary protections nor does it affect the exercise of any legal rights or freedoms either directly or indirectly. The Committee noted with interest that the responses to consultation indicated that there was an appetite to extend the scope of the power to designate to new areas of the industry, and to introduce some further simplification of the process. The very positive reaction to the consultation confirms the Minister's view that this necessary protection should be preserved.

#### *Conclusion*

38. The Government present a convincing argument that the overall effect of the transfer of the designation power to the Science Museum group will result in streamlining the process by including it in a larger group where economies of scale can be identified from using administrators for a wider range of duties. Although the economies realised are comparatively small, the improvements to efficiency are more substantial, with the potential for the more flexible structure possible under the Science Museum governance rules to provide further efficiencies in the future. **We conclude that the Government have demonstrated that the draft Order serves the purpose of improving the exercise of public functions and is in compliance with the test set out in the 2011 Act, and we are content to clear it within the 40-day affirmative procedure.**

## 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. Employment and Support Allowance (Sanctions) (Amendment) Regulations 2012 (SI 2012/2756)**

*Date laid: 5 November*

*Parliamentary Procedure: negative*

*Summary: These Regulations are part of a wider package of measures which seek broadly to align the Employment and Support Allowance (ESA) and Jobseeker's Allowance (JSA) sanctions regimes with the model to be introduced under Universal Credit. These Regulations apply stronger sanctions to those who are capable of work-related activity and have been placed in the ESA Work-Related Activity Group (WRAG). The revised sanctions will have two parts: an open ended period and a fixed period. The open-ended part will be lifted when the claimant meets the compliance condition, for example attending a Work-Focused Interview or the required work-related activity. The open-ended part of the sanction will be followed by a fixed sanction period of up to 4 weeks. The amount of the fixed sanction will be increased: in place of the current system which reduces only the Work-Related Activity Component, (currently £28.15), under the revised regime ESA claimants will be sanctioned 100% of the prescribed ESA amount for a single person (currently £71.00).*

**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.**

39. The Explanatory Memorandum states that reform of the Employment and Support Allowance (ESA) sanctions regime is part of a wider package of measures<sup>5</sup> which seek broadly to align the ESA and Jobseeker's Allowance (JSA) sanctions regimes with the model to be introduced under Universal Credit. Similar changes to the JSA sanctions regime have already been made.<sup>6</sup> The Department for Work and Pensions (DWP) states that the introduction of ESA in 2008 signalled recognition that many disabled people and people with health conditions can and should move towards employment if they are given support and encouragement.
40. DWP state the revised regime is intended to make the consequences of non-compliance clearer. Requirements (and therefore sanctions) for those receiving ESA will only apply to those who are capable of work-related activity and have been placed in the ESA Work-Related Activity Group (WRAG). All requirements will take account the claimant's health and cannot include requirements to apply for a job, undertake work or undergo medical treatment.

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<sup>5</sup> Page 28 of the White Paper *Universal Credit: welfare that works*, <http://www.dwp.gov.uk/docs/universal-credit-fulldocument.pdf>

<sup>6</sup> Jobseeker's Allowance (Sanctions) (Amendment) Regulations 2012 (SI 2012/2568) included in our [9th Report of session 2012-13](#)

41. Currently claimants who fail to attend a work-focused interview or to undertake work-related activity without good cause receive an open ended sanction which is lifted when they re-engage. The effect of the sanction is to reduce the Work-Related Activity Component (WRAC) by 50%. After 4 weeks of non-engagement this increases to a 100% reduction of the WRAC (the WRAC is currently £28.15).
42. The revised sanction for ESA claimants is designed to reflect the increased importance of meeting work-related requirements and more of the benefit may be sanctioned. The revised sanctions will have two parts: an open ended period and a fixed period. The open-ended part will be lifted when the claimant meets a compliance condition or agrees to do so on a scheduled date. This will normally be the original requirement or, in the case of work-related activity, a suitable alternative as appropriate. The open-ended part of the sanction will be followed by a fixed period of 1 week for a first failure, 2 weeks for a second failure within 52 weeks of the first and 4 weeks when it is a third or subsequent failure which is within 52 weeks of the last previous failure (except when the subsequent failure occurs within 2 weeks of the previous failure). When claimants re-engage within one week of the failure or before a decision to sanction has been made only the fixed period will apply. In the case of multiple sanctions, they will run concurrently. If, after a sanction begins, the claimant is moved out of the Work-Related Activity Group and therefore no longer subject to the requirements of Work-Focused Interviews and work-related activity, the sanction will end at that point.
43. The amount of the sanction will be increased. Instead of the sanction reducing only the Work-Related Activity Component, under the revised regime ESA claimants will be sanctioned 100% of the prescribed ESA amount for a single person (currently £71.00). They will retain the WRAC, any premiums and any additional amounts such as mortgage costs. Those claiming for a partner will receive the couple rate less the prescribed amount for a single claimant. The sanctionable amount is being increased to align with the equivalent sanction for claimants under Universal Credit. The new regime will include access to hardship payments for sanctioned claimants who meet the criteria set out in the instrument.

## OTHER INSTRUMENTS OF INTEREST

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### ***Borough of Stevenage (Ferrier Road) Compulsory Purchase Order 2009***

44. The Order authorises the compulsory acquisition by Stevenage Borough Council of part of Chells Recreation Ground in Stevenage. The land is open space land; since no equally advantageous land is being offered in exchange, the compulsory purchase order has to go through the special parliamentary procedure before it can have effect. Between 16 October, when the Order was laid, and 5 November 2012, there was an opportunity for people specially and directly affected by it to indicate that they would like to petition a Joint Committee of both Houses of Parliament against the Order. No such objections were received, and therefore no joint committee will consider this Order. Following the end of the petitioning period, the Order is subject to a 21-day resolution period during which either House can propose to annul the Order.

### ***Draft Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013***

45. The Social Fund (“the Fund”) is reserved to the UK Parliament and is the responsibility of the Department for Work and Pensions (DWP); the Fund includes community care grants and crisis loans for living expenses. The Welfare Reform Act 2012 (“the 2012 Act”) contains provisions to abolish the Fund, including community care grants and crisis loans; DWP intends to bring the relevant provisions of the 2012 Act into force from 1 April 2013.
46. For an interim period of two years from April 2013, the Scottish Government have decided that local authorities, using their powers under the Local Government in Scotland Act 2003, should provide newly created assistance to those members of the community who might previously have applied for a community care grant or a crisis loan. In future, the Scottish Government may bring forward primary legislation to provide new assistance.
47. In the Explanatory Memorandum (EM) to this Order, the Scotland Office explains that its purpose is to amend Schedule 5 to the Scotland Act 1998 to provide a new exception to the social security reservation: the legislative competence of the Scottish Parliament will be widened so that it can provide for such newly created assistance. The Order also modifies certain devolved enactments made prior to the Order, so as to provide a basis to enable the Scottish Ministers and local authorities to offer the new assistance.
48. In the EM, the Scotland Office states that there is no impact on the public sector other than on the local authorities which will be delivering the new arrangements; and that the funding being transferred from DWP includes a separate element for administration and set-up costs, which the Scottish Government will transfer to local authorities. We understand that, in 2013-14, programme funding of just under £24 million, and administrative funding of just over £5 million, will be transferred from DWP to the Scottish Government; and that, in 2014-15, programme funding of the same amount, and administrative funding of just over £4.5 million, will be transferred. We also understand that beyond 2014-15 the position will depend on whether the Scottish Government legislates to provide new assistance.

***Industrial Injuries Benefit (Injuries arising before 5th July 1948) Regulations 2012 (SI 2012/2743)***

***Industrial Injuries Benefit (Injuries arising before 5th July 1948) (Amendment) Regulations 2012 (SI 2012/2812)***

49. The Department for Work and Pensions (DWP) laid a deregulatory instrument on 5 November to bring the last 125 claimants of pre-1948 Industrial Injuries Benefit into the main scheme to simplify administration. Unfortunately, they then had to lay a correcting instrument 4 days later because of technical inaccuracies in the original instrument. The Explanatory Memorandum to the correcting instrument makes it clear that, on this occasion, no claimants will be inconvenienced by the correction, but it demonstrates a lack of rigour in DWP's preparation of legislation that the House is being asked to consider correcting Regulations alongside the original Regulations. Given DWP's plans to bring forward significant legislation on Welfare Reform in the next few months, which will affect some of the most vulnerable members of society, we take this opportunity to remind the Department of the need to take particular care in the preparation of legislation.

***Feed-in Tariffs Order 2012 (SI 2012/2782)***

50. The Feed-in Tariffs ("FITs") scheme is the Government's main policy measure to encourage deployment of small-scale low-carbon electricity generation in Great Britain. The scheme was originally implemented in part through the Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 ("the 2010 Order": SI 2010/678), which gave the Secretary of State and the Gas and Electricity Markets Authority (Ofgem) functions bearing on the scheme's administration.
51. Since February 2011, the Government have carried out a comprehensive review of the scheme, in three phases. The first phase included consideration of tariff levels for relevant technologies. Because falling costs of solar PV and substantially increased take-up posed a risk to the scheme's budget, the Government decided to introduce reduced tariffs for large-scale solar installations in August 2011, and for smaller-scale solar installations in March 2012. The second phase addressed the problem that the FITs scheme was not designed to respond to rapid changes in the market. The Government proposed a cost-control mechanism for solar PV which was able to respond by reducing tariffs at three-monthly intervals. In our Fifth Report of the current session,<sup>7</sup> we drew to the special attention of the House the Feed-in Tariffs (Specified Maximum Capacity and Functions) (Amendment No. 2) Order 2012 (SI 2012/1393) which helped to give effect to that mechanism.
52. The third phase of the review ("Phase 2B") was based on a consultation on tariffs for non-PV technologies and scheme administration issues, and ran from February to April 2012. 303 written responses were received; the Government published their response, and a summary of the consultation, in July 2012.<sup>8</sup>

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<sup>7</sup> HL Paper 22

<sup>8</sup> See: [http://www.decc.gov.uk/en/content/cms/consultations/fits\\_rev\\_ph2b/fits\\_rev\\_ph2b.aspx](http://www.decc.gov.uk/en/content/cms/consultations/fits_rev_ph2b/fits_rev_ph2b.aspx)

53. The Feed-in Tariffs Order 2012 revokes and remakes the 2010 Order, with amendments to implement changes to the administration of the FITs scheme following the comprehensive review. Changes which have been decided in the third phase of the review include a process for preliminary accreditation to provide a guarantee of support to renewable generators; enhanced support for participation in the FITs scheme by schools and communities; granting Ofgem greater powers of enforcement in relation to the scheme; and an extension of the Secretary of State's duty to publish data about deployment of eligible installations, to include data about technologies other than solar PV.

***Child Support (Meaning of Child and New Calculation Rules)  
(Consequential and Miscellaneous Amendment) Regulations 2012***

54. There are currently two child maintenance schemes in operation, the 1993 scheme and the 2003 scheme. These two schemes are to be gradually replaced by a new, simplified scheme which is provided for by the Child Maintenance and Other Payments Act 2008. Our 8th Report (HL Paper 36) drew attention to the draft **Child Support Maintenance Calculation Regulations 2012**<sup>9</sup> which set out revised allowances and deductions and revised the weekly default maintenance rates for each child. The current Regulations support the previous Regulations by clarifying the circumstances under which children aged 16-19 qualify for support under the scheme (regulations 2 and 3). The current Regulations also facilitate a deduction of earnings order, an administrative order that requires an employer to make deductions from an employee's earnings and pay them to the Department to satisfy the employee's child maintenance liability. Under the new scheme the Department will not know the non-resident parent's net earnings and so regulation 4 transfers to employers the responsibility for ensuring that deductions do not exceed 60% of a non-resident parent's net earnings. These Regulations put in place the last of the changes required to implement the new scheme which is intended to commence operation in mid-December 2012.

***Consumer Credit (Green Deal) Regulations 2012 (SI 2012/2798)***

55. The Government intend to launch the Green Deal scheme on 28 January 2013.<sup>10</sup> Under a Green Deal plan, energy efficiency measures are to be installed in a property and then paid for wholly or partly in instalments which are collected on energy bills for the property. Many Green Deal plans, particularly in the domestic sector, will be consumer credit agreements regulated under the Consumer Credit Act 1974 ("the 1974 Act"), which gives debtors under such agreements a right to repay outstanding credit early. Where early repayment is made, creditors are entitled to claim limited compensation, subject to certain conditions; and they are able to claim a higher level of compensation in exceptional circumstances.
56. The Consumer Credit (Green Deal) Regulations provide that additional compensation may only be claimed where the Green Deal plan is over 15

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<sup>9</sup> Made as SI 2012/2677

<sup>10</sup> In our Fifth Report of the current session (HL Paper 22), we drew to the special attention of the House a number of statutory instruments laid by DECC and relating to the Green Deal. These included the draft Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012.

years in length. They also set out the method which providers must use to calculate the amount of compensation they are entitled to claim.

57. In the Explanatory Memorandum (EM) to the Regulations, the Department for Energy and Climate Change (DECC) states that Green Deal plans are an exceptional type of credit: it is expected that many plans will be of a particularly long length, in excess of the more usual 7-10 year credit arrangement. DECC considers it appropriate to allow an extra degree of compensation to be charged in certain limited circumstances, to enable Green Deal providers to recover a fair level of compensation.
58. In the EM, DECC provided limited information about the consultation process on the early repayment rules. We have obtained a fuller account of the consultation responses and the Government's final response, and this is enclosed in Appendix 2.

***Family Procedure (Amendment No. 4) Rules 2012 (SI 2012/2806)***

***International Recovery of Maintenance (Hague Convention 2007 etc.) Regulations 2012 (SI 2012/2814)***

59. These statutory instruments make rules of court to enable the operation of the 2007 Hague Convention on the International Recovery of Child Support and other forms of Family Maintenance, which facilitates the acquisition and enforcement of family maintenance with an international element. The changes enable the use of the standard forms prepared by the Permanent Bureau of the Hague Conference on Private International Law, designate the Lord Chancellor as the Central Authority for England and Wales, and provide for the establishment, recognition and enforcement of maintenance decisions under the Convention, including by provision for driving disqualification orders for enforcement of child maintenance.<sup>11</sup>

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<sup>11</sup> See section 40B of the Child Support Act 1991 inserted by [section 30](#) of the Child Maintenance and Other Payments Act 2008

## **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.

### **Special Procedure Order**

Borough of Stevenage (Ferrier Road) Compulsory Purchase Order 2009

### **Draft Instrument subject to affirmative approval**

Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013

Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No.2) Order 2012

### **Instruments subject to annulment**

- SI 2012/2711 Veterinary Medicines (Amendment) Regulations 2012
- SI 2012/2740 Electricity (Exemption from the Requirement for a Generation Licence) (Curen) (England and Wales) Order 2012
- SI 2012/2743 Industrial Injuries Benefit (Injuries arising before 5th July 1948) Regulations 2012
- SI 2012/2745 Nursing and Midwifery Council (Constitution) (Amendment) Order 2012
- SI 2012/2754 Nursing and Midwifery Council (Education, Registration and Registration Appeals) (Amendment) Rule Order of Council 2012
- SI 2012/2755 NHS Bodies (Transfer of Trust Property) Order (No. 2) 2012
- SI 2012/2782 Feed-in Tariffs Order 2012
- SI 2012/2785 Child Support (Meaning of Child and New Calculation Rules) (Consequential and Miscellaneous Amendment) Regulations 2012
- SI 2012/2786 Excise Goods (Holding, Movement and Duty Point) (Amendment) Regulations 2012
- SI 2012/2791 Health Service Branded Medicines (Control of Prices and Supply of Information) Amendment Regulations 2012
- SI 2012/2798 Consumer Credit (Green Deal) Regulations 2012
- SI 2012/2806 Family Procedure (Amendment No. 4) Rules 2012
- SI 2012/2812 Industrial Injuries Benefit (Injuries arising before 5th July 1948) (Amendment) Regulations 2012
- SI 2012/2814 International Recovery of Maintenance (Hague Convention 2007 etc.) Regulations 2012

## APPENDIX 1: DRAFT PUBLIC BODIES (ABOLITION OF THE DISABILITY LIVING ALLOWANCE ADVISORY BOARD) ORDER 2013: CORRESPONDENCE

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### Letter from Chairman to Esther McVey MP, Minister for Disabled People, DWP

The Secondary Legislation Scrutiny Committee of the House of Lords gave initial consideration to this Order at its meeting today and has asked me to write seeking clarification about the consultation process undertaken and how this meets the statutory requirements set out in the Public Bodies Act 2011.

The consultation requirements are listed in section 10 of the 2011 Act. The Explanatory Document (ED) provided explains how the requirements in subsections 10(a) and 10(c) to (g) have been satisfied but does not adequately explain how the provisions of 10(1)(b) have been addressed: that is the requirement for the Minister to consult “*such other persons as appear to the Minister to be representative of interests substantially affected by the proposal.*”

As is our usual practice, the Committee’s Secretariat initially asked DWP officials to explain how the requirements of section 10(1)(b) have been satisfied and the response was:

“It was felt that to offer a public consultation when there was no real opportunity to influence the outcome would have been misleading and served only to pay lip service to the spirit of consultation.”

However the Committee took the view that this was not sufficient to explain either how the statutory requirement had been met or why the government took the view that the statutory requirement was not relevant in this case.

We would therefore be grateful if you, as Minister responsible for this draft Order, could provide a clearer explanation of either why you consider the requirement of section 10(1)(b) was not relevant in this case or how DWP has complied with the requirement. **We would be grateful to receive your response by Wednesday 7 November.** Please note that any material provided may be published.

**Lord Goodlad**

**30 October 2012**

### Response from Esther McVey MP, Minister for Disabled People, DWP

You have asked me to consider the provisions of section 10(1)(b) of the Public Bodies Act 2011 and in particular my requirement to consult such other persons as appear to me representative of interests substantially affected by the proposal.

Section 10(1)(b) of the Public Bodies Act 2011 states that there is a requirement for the Minister to consult “such other persons as appear to the Minister to be representative of interests substantially affected by the proposal.”

The function of the Disability Living Allowance Advisory Board as laid down in the Disability Living Allowance Regulations 1991 is “to give advice to the Secretary of State on such matters as he may refer to them for consideration”. Only the Secretary of State can seek advice from the Board. The Board cannot provide advice of its own volition.

I considered whether the wider public, notably disabled people, would be substantially affected by the proposal.

The functions of the Board have been progressively reduced over the years, as set out in detail in the background section included as an Annex to this letter. This means that the only remaining purpose of the Board is to provide advice on matters relating to Disability Living Allowance (DLA) and Attendance Allowance (AA), and that only the Secretary of State may refer to them. However in recent years the Board has not been called upon to provide advice - because this advice can now more easily and cost-effectively be obtained from elsewhere. The current Secretary of State has never exercised the option to go to the Board for advice. The last time a Secretary of State requested advice was in 2008.

The Government accepts that it is desirable to have recourse to independent expertise as an aid to policy formulation. However, the Government does not consider that the closure of the Board would adversely affect its ability to have that recourse. The views of the disabled community are available from numerous sources in the wider disability community which provide the Department with comments/thoughts outside the personal experience of the limited number of disabled members of the Board.

We therefore concluded that no one other than the Board would be substantially affected by the proposal to abolish the Board. Hence no obligation to consult arises under section 10(1)(b) of the Public Bodies Act 2011

The Government considered Cabinet Office guidance on the consultation requirement in the Public Bodies Act along with the Department of Business, Innovation and Skills Code of Practice<sup>12</sup> on consultation which states in its first criterion that 'formal consultation should take place where there is scope to influence the policy outcome'. What that criterion is addressing is to ensure that (in the absence of a statutory requirement for a public consultation) public consultations are undertaken only where necessary. In the case of the Public Bodies Act 2011, there is no blanket requirement for a public consultation in all cases, and hence it is necessary to consider in each case whether a public consultation is relevant and achieves anything.

The closure of the Board would impact only upon the Secretary of State's ability to seek advice which he could obtain from other more appropriate sources. I and my Ministerial colleagues feel that this is a case where to consult beyond the board members would be disproportionate, ineffective and serve no purpose. We are confident, therefore, that our decision in the case of the Board not to undertake a public consultation was in line with current government guidance.

I apologise that the earlier response to the Committee did not clearly answer your question about s.10(1)(b) of the Public Bodies Act.

## **Annex**

### *Background*

The Disability Living Allowance Advisory Board (the Board) is an advisory Non Departmental Public Body established under the Disability Living Allowance and Disability Working Allowance Act 1991. The Board is not part of the decision making process for benefits but provides independent advice to the Secretary of

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<sup>12</sup> Now replaced by Cabinet Office guidance *Consultation Principles*

State on matters relating to Disability Living Allowance and Attendance Allowance. The Board cannot provide advice unless specifically asked to do so and cannot be asked to provide advice on issues other than those relating to DLA/AA.

### *Reasons to close the Board*

When the Board was first established, it had the power to give advice to a medical practitioner who is an officer of the Secretary of State on any case or question referred to such a medical practitioner. However, following the repeal of section 54 of the Social Security Administration Act 1992, the Board no longer has that function. The Board was also expected to provide input to the drafting of medical guidelines for the use of Departmental Doctors and Adjudication Officers (now Decision Makers) working on DLA and AA. However, the Disability Handbook has since been replaced by on-line guidance written by doctors in the Department's Health, Work and Wellbeing Division, only calling on outside help as and when necessary.

Work undertaken by the Board over the years concentrated mainly on medical reports on specific conditions or illnesses. This was usually because the department had detected a potential issue. For instance the department noted that DLA spending on "behavioural disorder" cases (which included Attention Deficit Hyperactivity Disorder [ADHD] cases) had increased much more rapidly than spending on other child recipients. In light of this the Board was asked to advise:

- whether there has been an increase in the number of children diagnosed with ADHD generally and, if so, suggest reasons for the increase; and
- could the increased numbers of children in receipt of DLA be directly related to the increase in diagnosis or were there other reasons?

The Secretary of State will still commission work if he thinks this is necessary, using task and finish groups as and when required, and ensuring that the appropriate specialisms are covered. Even with the wide breath of professions covered by DLAAB it was still necessary on occasion to co-opt professionals with particular expertise, as in the ADHD study where a Consultant Child and Adolescent Psychiatrist was asked to provide advice.

Nowadays, medical opinion is available from Doctors in the Department's Health, Work and Wellbeing Division of the Department, or can be commissioned by them if needed. This is a larger resource available to the Secretary of State than is available through the health care professionals and medical practitioners who are Board members.

The views of the disabled community are available from numerous sources in the wider disability community which would provide the Department with comments/thoughts outside the personal experience of the limited number of disabled members of the Board.

Having recognised the need to involve experts in the development of the reform of DLA the department designed the assessment for Personal Independence Payment, in collaboration with a group of independent specialists in health, social care and disability, including disabled people. The group includes individuals from a range of professions, such as occupational therapy, psychiatry, physiotherapy, social work, general practice and community psychiatric nursing, as well as representatives from Disability Rights UK and Equality 2025. The group therefore encompasses a wide variety of relevant expertise.

*Inactivity of the Board*

Senior officials met the Chair of the board regularly and the future of the board and its inactivity were discussed in 2009. No decisions were made but even so no work was commissioned. In 2010, as the Public Bodies Bill provided a legislative opportunity to close the board the Secretary of State and my predecessor decided that the Board should be one of the bodies listed for abolition as it was in effect moribund. This decision was conveyed to the Board by the Chair and Maria Miller, as Minister for Disabled People, met all the board members in December 2010.

**Esther McVey**

**Parliamentary Under-Secretary of State and Minister for Disabled People**

**6 November 2012**

## APPENDIX 2: CONSUMER CREDIT (GREEN DEAL) REGULATIONS 2012 (SI 2012/2798): FURTHER INFORMATION

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### Further information regarding the consultation on early repayment rules

The “Green Deal and Energy Company Obligation Consultation Document”, published on 23 November 2011, included details of the proposals to enable Green Deal Providers to claim some enhanced compensation where the Green Deal Plan exceeds 15 years in duration and the interest rate is fixed at the time the repayment is made. The Consultation set out (at paragraphs 45-56 of section 3) the background and rationale behind this proposal and explained the effect of the new section 95B of the Consumer Credit Act 1974. The consultation also explained that Green Deal Providers should only charge customers the amount necessary to cover their objective loss. The Consultation stated that the calculation of the compensation under section 95B will be in accordance with a formula laid down in regulations and outlined that the compensation calculation will subtract both the amount the creditor can obtain by re-lending the money on the market, and any savings they will make on administrative costs as a result of the repayment, from the total interest that the creditor would have obtained under the agreement had the customer not repaid early. Therefore if Green Deal Providers are able to re-invest the money repaid early, for example in another Green Deal at a similar rate or higher, it may be that no extra compensation is payable. If, however, the Green Deal Provider can only re-invest the money at a lower interest rate, the customer is liable to pay the difference to the Green Deal Provider. A draft of the Consumer Credit (Green Deal) Regulations was published alongside the Consultation.

The proposals on the early repayment rules were included in the consultation as part of the wider section (3.4) which set out a number of other proposed amendments to the Consumer Credit Act to ensure that the Green Deal scheme could operate effectively. The question asked was “What are your views on the Government’s proposals regarding changes to the Consumer Credit Act for Green Deal Plans?”

245 responses were received to this question overall. The majority supported the proposals and felt they were sensible and comprehensive. A minority of respondents felt that no fees should be levied in order to protect customers or that the usual Consumer Credit Act 1974 rules should apply, with no enhanced compensation. In relation to the proposed early repayment rules specifically, some respondents felt that potential fees for early repayment could deter customers from taking up the Green Deal. Other respondents felt that this needed to be balanced against the risk of higher interest rates for all if fees were not permitted, and supported the proposed approach. However, most felt the proposals struck the right balance between protecting consumers and ensuring the cost of finance for all could be kept as low as possible.

Following the Consultation, and in light of the responses received, the Government reached the view that its approach was proportionate and struck the right balance between ensuring consumers are protected while allowing providers to be able to recover a reasonable level of compensation in the event of early repayment. Therefore the Government has proceeded with the proposed early repayment rules as set out in the Consultation.

**DECC**

**13 November 2012**

### APPENDIX 3: INTERESTS AND ATTENDANCE

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

For the business taken at the meeting on 20 November 2012 Members declared the following interests:

***Feed-in Tariffs Order 2012 (SI 2012/2782)***

Baroness Eaton and Lord Scott of Foscote, as owners of some solar panelling used for small-scale generation of electricity.

***Attendance:***

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