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Childcare Bill 2015-16: Analysis for Commons Committee Stage

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Summary

The *Childcare Bill [HL]* had its Second Reading in the Commons on 25 November 2015; the Bill proceeded to Committee Stage without a division. It has already been debated in the House of Lords. This legislation applies to England only.

Commons Second Reading

This note was originally published prior to Second Reading in the Commons. A new section 13 has been added to take account of the key changes announced during Second Reading which included:

- nearly £300 million to fund a 32p increase in the hourly average funding rate for free childcare for 3 and 4 year olds, and a 30p increase for 2 year olds;
- the cost of the extended entitlement policy rising to “more than £1 billion a year ... by 2019–2020”;
- £50 million capital allocation to support the creation of early years places;
- eligibility criteria for parents changing to:
 - 16 (previously eight) hours per week working at the National Living Wage (or National Minimum Wage for under 25s) or equivalent;
 - an income cap to be introduced, set at £100,000;
- an early years funding formula review to be conducted;
- the Government would seek the removal of clause 1 of Bill 84.

It should be noted that a Bill cannot be amended at Second Reading stage; as such, the proposals above are likely to be subject to debate at Committee and subsequent stages.

The Bill as introduced for Second Reading (Bill 84)

At present, all three and four year olds are entitled to 15 hours of free childcare over 38 weeks – a universal provision that is not affected by the circumstances of the parent or child, including their parents’ income.

The *Childcare Bill* proposes:

- an “extended entitlement” to an additional 15 hours of free childcare for 38 weeks of the year but only for a “qualifying child of a working parent”; and
- a duty on local authorities to publish information about childcare and related matters.

The second of these proposals is relatively uncontroversial – it was not debated during Lords stages.

In contrast, there was considerable debate about the provisions relating to extended entitlement. Key issues and changes to the Bill during its passage through the Lords included:

- concerns that the legislation was a “skeleton Bill” with most of the detail to be determined (through statutory instruments) after it had received Royal Assent; Peers amended the Bill, against the Government’s wishes, so that all statutory instruments made in regard to the extended entitlement had to be debated by the House (i.e. be subject to affirmative resolution);
- funding – since the policy was announced during the 2015 General Election campaign by the Conservative Party, there have been two developments in this respect:

- originally, the policy was to be funded by cuts to pension tax relief. Prior to the Bill's introduction in the Commons, the Government has stated that it will be funded through "an increase in public spending";
- during the election campaign, the Conservative Party stated that the extended entitlement policy would cost £350 million per year. The latest Government estimate is that it will cost £840 million per year.

The Department for Education has launched a funding review, which has included a "call for evidence" from childcare providers. It expects that the findings of the review will inform decisions made in the Government's 2015 Spending Review; the Chancellor of the Exchequer is expected to make his Spending Review statement to the House on 25 November 2015.

Notwithstanding this, the Bill was amended by the Opposition, the effect of which is to prevent the extended entitlement (and the information duty on local authorities) being introduced until the Government has undertaken an independent review of the funding of free childcare, and put in a place a "sustainable funding solution" for both the existing universal childcare entitlement and the extended entitlement, taking into account the findings of the independent review.

- entitlement – extended entitlement eligibility was originally proposed for a household where the parent(s) or carer(s) worked more than eight hours at the national minimum wage. At Report Stage, the Government announced that this definition would be broadened in the regulations, to include circumstances relating to incapacity for work, caring responsibilities or temporary absence from the workplace (e.g. maternity leave).

Peers also debated the proposal in the Bill that the duty to secure the extended entitlement is placed on the Secretary of State, rather than local authorities (who currently have the duty to secure the universal 15 hours of free childcare). The Government explained that the duty on the Secretary of State was intended to "demonstrate to parents the importance we attach to providing free childcare provision", although the Bill gives the Secretary of State the power to deliver the new entitlement through local authorities. The Bill was not amended in this regard.

In terms of implementation, the Government expects the extended entitlement to be available across England from September 2017, although a number of (yet to be announced) pilot areas (called "early implementers") will test the scheme from September 2016.

The Parliamentary website has links to the different versions of the Bill and associated explanatory notes, copies of the Parliamentary debates and other relevant material at:

<http://services.parliament.uk/bills/2015-16/childcare.html>

1. Background

1.1 Introduction of the free childcare policy

Since 2000, free childcare for young children has been universally available for younger children for part of the week:

In 1998 the Labour government announced that it would introduce a free entitlement to part-time early education for all 3 and 4 year olds in England. This followed a similar policy announced by the Conservative government in 1996 for all 4 year olds. The policy became effectively universal across England for 4 year olds by 2000 (helped by a shift towards an earlier school starting age), but expanded more slowly for 3 year olds, becoming effectively universal across England by 2005.¹

The provision was initially for five sessions of two and a half hours provision per week for 33 weeks per year, before being increased to 38 weeks of the year for all three and four year olds in 2006.

Under the Coalition Government, the entitlement was increased to 15 hours over 38 weeks for all three and four year olds from September 2010, following a number of pilots under the Labour Government.² In addition, the provision was made available for two year olds if certain conditions were met, including that their parents or carers were eligible for certain means tested-benefits, or if the child was looked after by a local authority.³

The entitlement can be “spread” over a greater number of weeks (with the agreement of the childcare provider).

The free early education and childcare can be taken at nurseries and nursery classes, playgroups and pre-school, childminders and Sure Start Children’s Centres.⁴

The Government has noted that take-up of the universal 15 hours of free childcare is “consistently more than 95%”.⁵

1.2 What will the *Childcare Bill* add?

Whereas the current entitlement of 15 hours (for 38 weeks) for three and four year olds is available universally, the proposals in the *Childcare Bill* for an additional 15 hours per week (over 38 weeks) of free childcare will only be available for a “qualifying child of a working parent”, as it is termed in the legislation.

¹ Institute for Fiscal Studies, [The impact of free early education for 3 year olds in England](#), 22 October 2014, p1

² LaingBuisson, , *Children’s Nurseries – UK Market Report*, 13th edition, October 2014, pp82–83

³ For more details, see GOV.UK, [Help paying for childcare – 5. Free childcare and education for 2 to 4-year-olds](#), webpage [taken on 20 November 2015]

⁴ GOV.UK, [Help paying for childcare – 5. Free childcare and education for 2 to 4-year-olds](#), webpage [taken on 20 November 2015]

⁵ [HL Deb 16 June 2015 c1082](#)

Box 1: Key terms relating to the provision of free childcare

- universal 15 hours of free childcare over 38 weeks – the existing provision available to all parents and carers of three and four year olds (and some two year olds);
- extended entitlement – the proposed additional 15 hours of childcare over 38 weeks that, if the *Childcare Bill* receives Royal Assent, will be available to those households that have a “qualifying child of working parents” where the child is aged three or four years old.

1.3 Other childcare support

Tax Free Childcare

The proposals to provide additional free childcare sits alongside the planned introduction of the Tax Free Childcare policy, which was legislated for by the Coalition Government and which the Conservative Party stated in its Manifesto that it would introduce.

In summary, the Government will contribute 20p in every £1 of the first £10,000 of childcare costs, per child, per year for children up to the age of 12 years, amounting to a maximum of £2,000 per child. For disabled children up to the age of 17 years, the government will still contribute 20p in every £1, but for the first £20,000 of childcare costs, per child, per year, up to a maximum of £4,000 per child.⁶ The policy is expected to take effect from early 2017, having been delayed due to a legal challenge.⁷

Existing support for childcare

The Library has published two briefing papers entitled:

- [*Government support for childcare under the Labour Government 1997-2010*](#); and
- [*Government support for childcare and childcare reform under the Coalition Government*](#)

which set out recent policy developments in relation to childcare.

The Parliamentary Under Secretary of State for Schools, Lord Nash, summarised recent policy measures taken to help with childcare costs during Second Reading in the House of Lords in June 2015:

In the previous Parliament we increased the free entitlement for three and four year-olds from 12.5 hours a week to 15 hours a week. Take-up of this offer is consistently more than 95%. We introduced a new free entitlement for the 40% most disadvantaged two year-olds and we legislated for tax-free childcare, which will save up to 1.8 million families up to £2,000 per child on their annual childcare bill. We are also introducing universal credit, which includes an element to support parents with their childcare costs, even if they work only a few hours a week. On top of this, we introduced a new entitlement for mothers and fathers to share parental leave.⁸

⁶ Turn2Us, [Tax Free Childcare – How will Tax Free Childcare work?](#), webpage [taken on 20 November 2015]

⁷ GOV.UK, [Tax-Free Childcare: 10 things parents should know](#), 3 July 2015

⁸ [HL Deb 16 June 2015 c1082](#)

2. Announcement of the policy

2.1 Conservative Party manifesto and Queen's Speech

In its 2015 General Election manifesto, the Conservative Party said that "because working families with children under school age face particularly high childcare costs, in the next Parliament we will give families where all parents are working an entitlement to 30 hours of free childcare for their three and four year-olds".⁹

This was confirmed in the Queen's Speech at the commencement of the new Parliament: "Measures will be brought forward to help working people by greatly increasing the provision of free childcare".¹⁰

A briefing issued by the Government at the time stated that:

The main benefits of the Bill would be to:

- Help hard-working families with the costs of childcare and support parents in work.
- Help ensure that parents are able to access information about the additional free childcare being introduced and about other childcare provision or services which may help them to meet their childcare needs.

The main elements of the Bill are:

- To provide for an increased entitlement to 30 hours a week of free childcare (for 38 weeks of the year) to be made available to eligible working parents of three and four year olds
- To require local authorities to publish information about the provision of childcare in the local authority area, and other services or facilities which might be of benefit to parents or prospective parents, or children or young persons in their area.¹¹

⁹ Conservative Party, *The Conservative Party Manifesto 2015*, April 2015, p27

¹⁰ [HL Deb 27 May 2015 c5](#)

¹¹ 10 Downing Street, *The Queen's Speech 2015*, 27 May 2015, p25

3. House of Lords Second Reading

3.1 General support for the Bill

Lord Nash introduced the Bill for the Government and noted that the "*Childcare and Early Years Survey of Parents* tells us that 22% of working couples found it difficult or very difficult to pay for childcare; for lone working parents that rises even higher to 38%".¹²

He explained that the proposed measures in the Bill would mean that:

working families will receive more childcare support than ever before, creating a saving for families of more than £2,500 a year per child and making more high-quality provision available for parents. The Bill takes that support even further. The Government are delivering their commitment to supporting people at every stage of their lives and reducing the cost of childcare by providing an extra 15 hours of free childcare for hard-working families. I wish to reassure noble Lords that the new entitlement will not impact on parents' ability to access the current 570 hours of free early education per year for all three and four year-olds. The Bill will guarantee working parents a total of 1,140 hours of free childcare per year.¹³

Lord Nash also highlighted the other key provision of the Bill, namely that it would "require local authorities to publish information ... about childcare and other services ... which will support parents to make informed choices".¹⁴

Speaking for the Opposition, Baroness Jones of Whitchurch, the Opposition Education Spokesperson, said that the aspirations in the Bill were "aspirations we share" but added that "the devil is in the detail and, sadly, we are being massively constrained in our scrutiny role because of the lack of fairly crucial information today". She said:

We do not have the previous evaluation [of the existing universal 15 hours of free childcare], we do not have the funding formula and we do not have the draft regulations. This all begs the inevitable question of why the Bill is being rushed through, when a little bit more time and preparation might have delivered a popular and workable scheme.¹⁵

Baroness Pinnock, for the Liberal Democrat Party, said "we very much welcome the basis of this Bill" but concurred with Baroness Jones regarding the lack of detail in the Bill as presented, and said that "Our concerns are the four Fs—funding, flexibility, focus and fairness".¹⁶

¹² [HL Deb 16 June 2015 c1082](#)

¹³ [HL Deb 16 June 2015 cc1082–1083](#)

¹⁴ [HL Deb 16 June 2015 c1083](#)

¹⁵ [HL Deb 16 June 2015 c1085](#)

¹⁶ [HL Deb 16 June 2015 c1087](#)

4. The Bill's reliance on delegated legislation: a "skeleton" Bill?

4.1 Points raised during Second Reading

During Second Reading, it was noted that the detail of the policy would be determined as regulations rather than on the face of the Bill; this approach was criticised by several Peers.

For the Opposition, Baroness Jones said that:

It feels like we are starting with a blank script when we want to debate a fully formed policy ... we are not prepared to hand over the detail of the policy to a series of negative and affirmative resolutions which may or may not have the parliamentary scrutiny they deserve.¹⁷

Her views were echoed by her colleague on the Labour benches, Lord Touhig, who described it as "a missing Bill", explaining that "its objectives are worthy and noble, but in 20 years' service in this House and the other place I have never seen a Bill so lacking in detail and so dependent on secondary legislation to give its ambitions practical meaning and outcome",¹⁸ and that "this Second Reading debate has had one key characteristic: an almost endlessly repeated request for more information".¹⁹

The Conservative peer, Lord True, said "I do not believe that a rushed skeleton Bill is a good way to make policy or to draw on the wisdom of Parliament".²⁰

Lord Nash justified the form of the Bill and its early introduction before much of the detail had been decided, saying that:

The introduction of the Bill, with a strong duty on the Secretary of State, sends a clear message to parents and providers about the Government's commitment. They are expecting us to deliver on our manifesto commitment. They will be able to plan in the knowledge that they can expect this further support for working families, and the market can continue to grow in anticipation.

Although the detail that will go into regulations is important, so are the primary powers that we are taking. We will listen very carefully to the issues that the House has raised tonight and will raise in Committee, and I will write with further details to support scrutiny in Committee.

By considering and challenging us on the legal framework at this stage, the House will contribute significantly to the shaping of this policy, but it is equally important to take time to consult providers, parents and local authorities before operational details are fixed.²¹

¹⁷ [HL Deb 16 June 2015 c1087](#)

¹⁸ [HL Deb 16 June 2015 c1123](#)

¹⁹ [HL Deb 16 June 2015 c1124](#)

²⁰ [HL Deb 16 June 2015 c1104](#)

²¹ [HL Deb 16 June 2015 c1130](#)

Box 2: A brief primer – what is the difference between Parliament’s consideration of a Bill and the consideration of secondary legislation (e.g. statutory instrument, or SI)

A Bill (primary legislation) is considered on a number of occasions in the Commons and Lords; there is a debate on the general principles of the Bill at Second Reading, and a Bill can be amended at Committee Stage, Report Stage, and (in the Lords only) Third Reading.

At Committee Stage, the Bill is considered line-by-line and each clause and schedule needs to be agreed to, usually by a committee of Members, rather than the whole House. At all the other stages it is the whole House that is involved in the scrutiny of the Bill.

Amendments can be anything from the changing of a single word, to the addition (or removal) of a number of clauses or schedules. The House (or committee) has to agree each amendment, and this may involve a division (vote).

In contrast, delegated legislation, such as a statutory instrument (or SI), is secondary legislation. When a piece of secondary legislation is considered, in the Commons, it is usually debated by a committee rather than the whole House.

Generally, Members cannot make amendments to a statutory instrument.

4.2 Justification by the Department for Education

In its memorandum to the Delegated Powers and Regulatory Reform Committee of the House of Lords, the Department for Education (DfE) explained that:

The specific provisions for delegated legislation being sought in this Bill have been developed on the basis of the following considerations:

- a) the legislative framework must clearly be presented on the face of the Bill with secondary legislation used to provide the detail;
- b) within that framework, the provisions of the Bill must also support effective implementation and contain sufficient flexibility to respond to changing circumstances;
- c) operational, administrative, and technical details are not normally set out in primary legislation. Too much detail on the face of the Bill risks obscuring the principal duties and powers from Parliamentary scrutiny. Use of secondary legislation not only ensures appropriate flexibility but also provides additional opportunities to consult on matters of detail with those that will be affected by the provisions;
- d) In addition, the Government’s desire to consult widely with parents and providers before finalising a delivery model requires the primary legislation to take a wider range of regulation making powers than might normally be the case.²²

²² Department for Education, [The Childcare Bill 2015 – Memorandum prepared by the Department for Education for the House of Lords Delegated Powers and Regulatory Reform Committee](#), June 2015, p2, para 5

4.3 Report of the Delegated Powers and Regulatory Reform Committee

In its report published after Second Reading, the Delegated Powers and Regulatory Reform Committee of the House of Lords was critical of the nature of the Bill.

It noted that the Bill as introduced was “almost entirely enabling” and that it “contains very little substantive provision about either of the topics for which it seeks to provide”.²³ The Committee concurred with the description of the Bill as being a “skeleton” Bill, and sought to draw the attention to the House to the provision of clause 1 of HL Bill 009 which had caused the Committee “considerable concern”.²⁴ After analysing clause 1, the Committee said:

The remarkable imbalance between the provision that appears in the Bill itself and what is to be left to regulations, and the scarcity of explanation in the memorandum, has led us to question whether members will be in a position to contribute meaningfully to debates at Committee Stage and Report Stage.²⁵

The Committee noted that in its memorandum the Government had stated that “operational, administrative and technical details are not normally set out in primary legislation” and that it had expressed its “wish ‘to consult on matters of detail’ and to ‘consult widely ... before finalising a delivery model’”.²⁶ The Committee contested that “the Government’s stated approach to delegation is flawed”:

While the Bill may contain a legislative framework, it contains virtually nothing of substance beyond the vague “mission statement” in clause 1(1).²⁷ It is quite inaccurate to describe the nature of the provision authorised by clause 1(4) (particularly in view of the possible ingredients envisaged by subsection (5)) as “operational, administrative and technical detail”.

We do not accept the Government’s attempt to dignify their approach to delegation by referring to a need to consult. We of course acknowledge the need for consultation as a precursor to the formation of policy; but this should in our view have followed the well-established sequence of a Green Paper setting out proposals, followed by a White Paper containing the Government’s legislative intentions, and finally the presentation of a Bill.

We note that the Minister said that “the introduction of the Bill, with a strong duty on the Secretary of State, sends a clear message to parents and providers about the Government’s commitment”. That is not, in our judgment, a proper use of legislation: the purpose of an Act is to change the law, not to

²³ Delegated Powers and Regulatory Reform Committee, *Childcare Bill [HL] etc.*, 2015–16 HL 12, 26 June 2015, p3, para 1

²⁴ *Ibid*, p3, paras 2 and 3

²⁵ *Ibid*, 26 June 2015, p5, para 6

²⁶ *Ibid*, 26 June 2015, p5, para 7

²⁷ This refers to clause 1 of the Bill as introduced ([HL Bill 009 2015–16](#)); for Second Reading in the Commons, this is now clause 2. Clause 1(1) stated that “The Secretary of State must secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year”. This worded is replicated in clause 2(1) of [Bill 84](#) presented to the House of Commons for Second Reading.

“send a message” – a point made repeatedly in the last Parliament on the bill that became the Social Action, Responsibility and Heroism Act 2015.

The Committee concluded that “the power conferred by clause 1(4) is inappropriately wide” and recommended that greater detail be provided in the Bill and more information be provided about the proposed regulations.²⁸

Turning to the procedure proposed for the regulations, the Committee said it was “surprised” that the negative procedure “is considered appropriate for any of the powers under clause 1”, and recommended that “that the draft affirmative procedure should apply on the exercise of all powers conferred by clause 1”.²⁹

4.4 Report of the Constitution Committee

The Bill as introduced for Second Reading in the Lords also drew criticism from the Lords’ Constitution Committee in its Report, published on the first day of the Committee Stage.

Having previously noted “a tendency by the Government to introduce vaguely worded legislation that leaves much to the discretion of ministers”, the Committee said that “the Childcare Bill [HL] is a particularly egregious example of this development”.

It explained that the Bill as drafted:

confers wide discretionary powers on the Secretary of State, including Henry VIII powers, with few indications as to how those powers should be used to achieve the objectives set out in the Bill.

[...]

We do ... wish to express our concern at this further evidence of legislation that gives ministers broad powers to achieve legislative objectives with few restrictions as to how secondary legislation should be framed to achieve that goal.

Legislation of this type increases the power of the Executive at the expense of Parliament. The Childcare Bill [HL] is an example of a continuing trend of constitutional concern to which we draw the attention of the House.³⁰

4.5 Government response at the start of Committee Stage, and debate

At the start of Committee Stage on 1 July, Lord Nash told Peers that, following discussions, Report Stage would not happen until October. During the hiatus, the Government “intend[ed] to prepare and publish our response in good time before Report, including tabling government amendments where appropriate”, adding:

It is our intention to provide a full update to the House on how we will deliver this extended entitlement and also an update on our plans to pilot it in 2016. This will take account of our

²⁸ Delegated Powers and Regulatory Reform Committee, *Childcare Bill [HL] etc.*, 2015–16 HL 12, 26 June 2015, p6, para 11

²⁹ *Ibid*, 26 June 2015, p6, paras 12 and 13

³⁰ Constitutional Committee, *Childcare Bill [HL]*, 2015–16 HL16, 1 July 2015, paras 1–3

consultations with parents, providers, local authorities and employers over the summer, the helpful contributions which I anticipate from your Lordships tonight and of course the recommendation of the Delegated Powers Committee which asked for clarity about how we intend to use the powers.³¹

In regard to the Delegated Powers and Regulatory Reform Committee's report, the Minister said that the Government would "respond formally ... in time for Report" and would "also of course pay careful attention to the views that the Delegated Powers Committee has expressed about affirmative procedure".³²

However, the regulations that would provide much of the detail would only be available after Parliament had finished its scrutiny of the Bill; Lord Nash said that "it is our intention to consult fully on draft regulations and guidance in the first part of 2016 after Royal Assent".³³

For the Opposition, the Shadow Leader of the House of Lords, Baroness Smith of Basildon, observed that "the Minister has been brought to the House to make quite an unusual statement before the start of Committee today", adding "I think it is an indication of the concern that has been expressed around your Lordships' House that he has chosen to do so today".

She said that "the way in which the Government have brought forward the Bill has serious implications for how we as a House consider legislation and fulfil our constitutional obligation as a revising Chamber. We cannot revise that which is not there", and that "for this House to do its job it must have more than the bones of a policy to scrutinise".

Baroness Smith called on the Government to accept the recommendations of the Delegated Powers and Regulatory Reform Committee's report, and ensure that the draft regulations and also the funding report ("the most crucial piece of information", as she described it) were available before Report Stage.³⁴

Lord Wallace, for the Liberal Democrats, took a similar position, describing the Bill as having "the hallmark of a party policy announcement during a general election, with the Government now desperately trying to figure out what it means and how to put it together", and said that "the comments of the Delegated Powers and Regulatory Reform Committee ... are some of the strongest that I can recall".³⁵

Closing the debate, Lord Nash reaffirmed that regulations would not be available "until after Report" but added "we will report by then on the findings of the funding review". He contested that "the Bill is very clear on what it sets out to achieve. It places a duty on the Secretary of State to make available 30 hours of free childcare for working parents".³⁶

³¹ [HL Deb 1 July 2015 c2074](#)

³² [HL Deb 1 July 2015 cc2074-2075](#)

³³ [HL Deb 1 July 2015 c2075](#)

³⁴ [HL Deb 1 July 2015 cc2075-2077](#)

³⁵ [HL Deb 1 July 2015 c2077](#)

³⁶ [HL Deb 1 July 2015 c2083](#)

4.6 Further report of the Delegated Powers and Regulatory Reform Committee before Report Stage

The Delegated Powers and Regulatory Reform Committee published a follow-up report following the publication of both the Government amendments, to be debated at Report Stage, “to provisions in the Bill that confer powers on the Secretary of State to make delegated legislation” and associated supplementary memorandum to the Committee.³⁷ The report was published the day before Report Stage of the Bill in the House of Lords.

While the Committee “welcome[d] the efforts that the Government has made to respond to some of our earlier criticisms about the scope of the powers in the Bill”, it said “nonetheless, we are surprised and disappointed that many of our recommendations have not been acted upon”, continuing:

It appears to us that the amendments add very little of substance to the face of the Bill: for the most part they adjust the existing delegated powers by removing some, varying others and adding more, while re-parading many in a new clause. Although the changes to some delegated powers may give the House a clearer idea of how the powers *could* be exercised, it remains unclear how they *will* be exercised.³⁸

In its June 2015 report, the Committee had recommended that the regulations be subject to the affirmative procedure.³⁹ The Government had responded by proposing the affirmative procedure for most powers on first exercise only, except for some limited circumstances,⁴⁰ arguing that the approach:

follows the precedents of parliamentary scrutiny adopted elsewhere in childcare legislation, for example under Part 3 of the Childcare Act 2006, and will enable the government to the quickly and efficiently update the delivery details of the extended entitlement in future, should this be necessary.⁴¹

³⁷ Department for Education, [The Childcare Bill 2015 – Supplementary Memorandum prepared by the Department for Education for the House of Lords Delegated Powers and Regulatory Reform Committee \(October 2015\)](#), p1, para 1

³⁸ Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\]: Government Amendments](#), 2015–16 HL 37, 13 October 2015, p3, para 3 (original emphasis)

³⁹ Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\] etc.](#), 2015–16 HL 12, 26 June 2015, p6, para 13

⁴⁰ The limited exceptions are “where regulations seek to: i) substitute a different amount for the maximum financial penalty which may be imposed for dishonest conduct, or false or misleading information or statements made in connection with a determination of a child’s eligibility for childcare; or ii) amend or repeal primary legislation”. [Department for Education, [The Childcare Bill 2015 – Supplementary Memorandum prepared by the Department for Education for the House of Lords Delegated Powers and Regulatory Reform Committee \(October 2015\)](#), pp1–2, para 4]

⁴¹ Department for Education, [The Childcare Bill 2015 – Supplementary Memorandum prepared by the Department for Education for the House of Lords Delegated Powers and Regulatory Reform Committee \(October 2015\)](#), p2, para 4

The Committee said that, given the reasoning provided by the DfE, it was “not persuaded ... that these scrutiny proposals are adequate in the case of this Bill”.⁴² For example, the Committee said that:

The first-time affirmative procedure that the Government now propose for regulations under clause 1 would mean that the initial (affirmative) regulations would include the eligibility conditions; but conditions could subsequently be altered – and conceivably removed – by negative procedure regulations. We do not regard that as satisfactory, and, in the absence of provision about eligibility on the face of the Bill, **we recommend that regulations under clause 1(2)(d) and (2B) in particular should require the affirmative procedure whenever made.**⁴³

While the Government had stated that “draft regulations made under clauses 1 and 2 [i.e. the “Duty to secure 30 hours free childcare available for working parents” and the “Discharging the section 1(1) duty”]⁴⁴ will be subject to a public consultation before final regulations are brought before Parliament for approval”,⁴⁵ the Committee recommended that “there should be an obligation to consult – fully and allowing reasonable time for such consultation – not only in relation to the first regulations to be made under each of those clauses, but also on proposals for any subsequent regulations under them. We recommend that the Bill be amended accordingly”.⁴⁶

4.7 Amendments at Report Stage

Despite the Government tabling amendments to address criticisms of the Bill, at Report Stage Baroness Jones of Whitchurch, for the Opposition, noted the further report of the Delegated Powers and Regulatory Reform Committee, which she described as “scathing”.

In response, Lord Nash said that he “hope[d] that the package of support published earlier this month, the policy statement and the government amendments I have tabled, deliver on those commitments” that he had made at Committee Stage. He judged that Baroness Jones “rather overstated the case by saying these [comments by the Delegated Powers and Regulatory Reform Committee] were scathing, though I note that there are areas where the committee would like us to be clearer in our intentions”.⁴⁷

The Government tabled amendment 12 to remove clauses 1(4) to 1(7), and tabled amendment 18 to create a new clause 2 at Report Stage. Lord Nash explained that:

⁴² Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\]: Government Amendments](#), 2015–16 HL 37, 13 October 2015, p3, para 4

⁴³ *Ibid*, p4, para 8 (original emphasis)

⁴⁴ Clauses 1 and 2 referred to in the supplementary memorandum were clause 1 of the Bill as considered at Committee Stage, and new clause 2 to be introduced at Report Stage by amendment 18. To add to the complication, these became clauses 2 and 3 after Report Stage because the Opposition secured the addition of a new clause 1.

⁴⁵ Department for Education, [The Childcare Bill 2015 – Supplementary Memorandum prepared by the Department for Education for the House of Lords Delegated Powers and Regulatory Reform Committee \(October 2015\)](#), p1, para 3

⁴⁶ Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\]: Government Amendments](#), 2015–16 HL 37, 13 October 2015, p6, para 15

⁴⁷ [HL Deb 14 October 2015 c238](#)

Amendment 12 removes some of the provisions which were of particular concern to noble Lords, for example the wide power to impose obligations on any public body or to reproduce any provision of the Childcare Payments Act. Amendment 18 would replace powers which have been criticised as being too wide in their scope with a more targeted set of powers. In particular, we have taken powers which will enable us to create gateways for government departments and local authorities to be able to share information they hold for the purposes of checking a child's eligibility for the extended entitlement. Information-sharing gateways will, of course, need to be subject to appropriate safeguards and that is why we are clear that unauthorised, onward disclosure of information obtained through those gateways ought to be subject to a criminal offence, a matter which I will speak to shortly as I know it is of great concern to the House.⁴⁸

Amendments 12 and 18 were agreed.⁴⁹

The Government also tabled amendments at Report Stage that would have required “the first regulations” made under what was then clause 1 (now clause 2 in Bill 84 as presented for Commons Second Reading) or new clause 2 (now clause 3) to be subject to the affirmative resolution; as the Delegated Powers and Regulatory Reform Committee noted, this would not apply if regulations already made were being amended (or withdrawn).

Only regulations made under new clause 2(6) (regarding financial penalties), or any regulations that amended or repealed provision made by an Act would be subject to the affirmative resolution on every occasion.

Baroness Jones and Lord Touhig tabled amendment 27 that sought to require every statutory instrument containing regulations under what was then clause 1 (now clause 2) or new clause 2 (now clause 3) to be subject to the affirmative resolution.

Replying for the Government, Lord Nash, recognising the earlier criticisms, said that he was now “in complete agreement with noble Lords and with the [Delegated Powers and Regulatory Reform] committee’s report that it would be appropriate for regulations to be approved by a debate in both Houses [i.e. subject to the affirmative resolution]” and he “hope[d] this will reassure noble Lords that we have listened”.

Contrasting the Government's amendments with Opposition amendment 27, Lord Nash said that “we believe it is right that initially we should deal with the regulations under the affirmative procedure, rather than the negative procedure as originally planned. However, we do not believe it is necessary to make them affirmative each time”, adding:

We need to strike the right balance between the mechanics of the affirmative process—for example, the need to find time in the parliamentary timetable for debates in both Houses, no matter

⁴⁸ [HL Deb 14 October 2015 c258](#)

⁴⁹ Amendment 18 as amended by amendment 20A was agreed; see sections 6.4 and 6.7 for details of amendment 20A.

how small the change—and the ability of government to respond efficiently and effectively to support delivery of the new entitlement, should this be necessary. That is why the government amendments in this group envisage that regulations made under Clause 1 and regulations made for the purpose of discharging the Secretary of State's duty will be subject to a debate the first time the powers are exercised but that subsequent regulations made under the Bill would be subject to the negative resolution procedure.⁵⁰

Lord Touhig said "I regret very much having to put Amendment 27 before the House but, frankly, the Government leave us no choice" because of its "cavalier attitude". While acknowledging that "some concessions" had been made by the Government, he said that they were "not enough to persuade us on this side not to table Amendment 27". Lord Touhig cited the Delegated Powers and Regulatory Reform Committee's report and invited the Minister to commit to tabling a new amendment at Third Reading to make all the regulations in the Bill subject to an affirmative resolution.⁵¹

Lord Nash declined, and noted that "each time the regulations that underpin the current entitlement have been amended, which is only four times, they have been subject to a public consultation" and that "the current entitlement is subject to a negative procedure and we are not persuaded that this situation is sufficiently different to warrant finding parliamentary time for changes which may be minor". He also offered assurances that "the department will continue to follow this good practice and will consult on any material changes to regulations made under Section 1 and regulations made for the purposes of discharging the Secretary of State's duty under what will become Section 2".⁵²

Lord Touhig asked that the opinion of the House be tested.

On Division, amendment 27 was agreed, with 159 Peers voting content, and 137 voting not-content.

4.8 Analysis of Clause 5 of Bill 84

Following the amendments made in the Lords, the extended entitlement regulations will be subject to the affirmative resolution each time they are laid. As the explanatory notes state:

This clause allows regulations to be made which make different provision for different purposes, make consequential, incidental, supplemental, transitional or saving provision or amend, repeal or revoke any measures made in another Act. The regulations may also confer a discretion on any person. Any regulations made under section 2 or 3 will be subject to affirmative resolution by each House of Parliament.⁵³

⁵⁰ [HL Deb 14 October 2015 cc289-290](#)

⁵¹ [HL Deb 14 October 2015 cc290-291](#)

⁵² [HL Deb 14 October 2015 c292](#)

⁵³ [Bill 84-EN](#), p7, para 32

5. Funding the proposals

5.1 The impact on families and expected take-up

The Government has stated that the extended entitlement will be “available to up to 600,000 families and worth around £5,000 a year – including the £2,500 they can already save from existing free childcare offers”.⁵⁴

However, the Government has not, to date, indicated how many families it expects to take up the offer of extended entitlement, or if they expect them to take the full 15 hours or just a part of it.

In an interview in *Nursery World* in October 2015, the Parliamentary Under Secretary of State for Childcare and Education, Sam Gyimah, said:

The reason why we are having a very detailed funding review of the cost of providing childcare, which has never been done before, by the way, is to specifically look at these figures.

[...]

The reason the question of take-up and capacity is not a straightforward one to answer is that it depends on where you are in the country.⁵⁵

More details might be expected when the outcome of the review (see section 5.4) is announced, and when the full impact assessment (IA) on extended entitlement is available, although the Government has stated that this “will be published when we undertake a formal public consultation on the draft regulations in 2016”.⁵⁶

5.2 How the policy will be funded

When David Cameron announced the policy of 30 hours of free childcare at the launch of the Conservative Party manifesto on 14 April 2015, the Conservative Party tweeted that it would be “Paid for by reducing pension tax relief for wealthiest. Costing takes account for Universal Credit & TaxFree Childcare”.^{57, 58} Similarly, a Conservative Party briefing issued on 21 April 2015 stated that the cost of the policy “will be paid for by reducing the tax relief on pension contributions for people earning more than £150,000”.⁵⁹

⁵⁴ GOV.UK, [Government brings forward plans to double free childcare for working families](#), Press release, 1 June 2015

⁵⁵ [“Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours”](#), *Nursery World*, 19 October 2015

⁵⁶ [HL Deb 14 October 2015 c290](#)

⁵⁷ Twitter (CCHQ Press Office @CCHQPress), [14 April 2015](#)

⁵⁸ As the Institute for Public Policy Research notes, the introduction of extended entitlement to childcare is expected to create savings from tax credits/universal credit and other elements of the welfare budget (“dynamic” effects). [IPPR, [Extending The Early Years Entitlement – Costings, Concerns And Alternatives](#), October 2015, p9]

⁵⁹ [“Election 2015 live: Cameron promises to double free childcare and revive right to buy – 1.18pm: Conservatives offer working parents 30 hours of free childcare – Details”](#), *The Guardian*, 21 April 2015

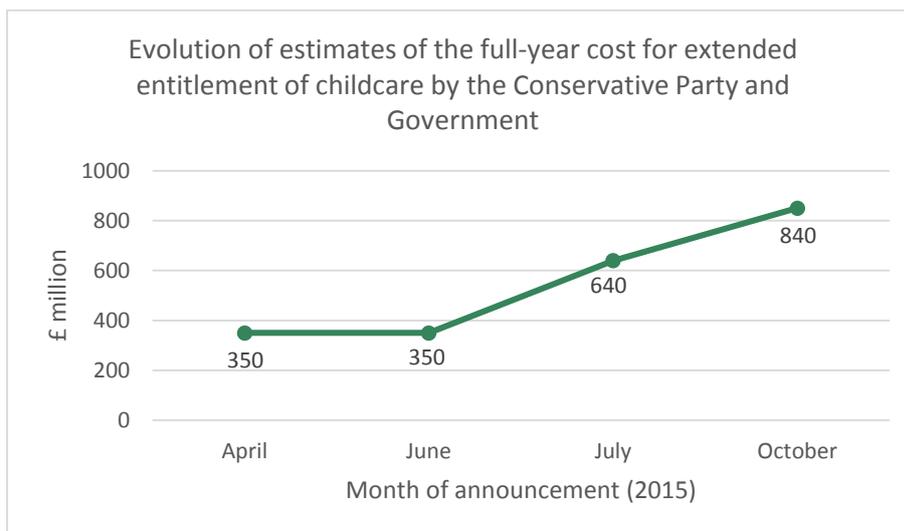
This position was restated by Lord Nash when he told Peers on 3 June 2015 that the cost of the extended entitlement would “be delivered from reducing the tax relief on pensions for those earning more than £150,000 a year”.⁶⁰

However, the 26 October 2015 version of the explanatory notes published alongside the Bill as introduced to the Commons stated that: “The additional 15 hours free childcare entitlement for working parents of three and four year olds will be paid for by the Department for Education and will therefore result in *an increase in public spending*” (emphasis added).⁶¹ This appeared to represent a shift in the funding position from that stated previously.

5.3 Estimates of the cost of the policy

Conservative Party and Government estimates

Since the extended entitlement was first announced during the 2015 General Election campaign, the cost of the extended entitlement policy appears to have increased substantially, as the graph below demonstrates:



The sources of the information for this chart are explained below.

When the extended entitlement policy was announced during the General Election, *The Guardian* cited a Conservative Party briefing which stated: “The new 30 hours entitlement policy will cost just under £350 million a year once fully implemented”.⁶²

In response to the question “how their proposed plans to increase free early-years childcare will be funded”, Lord Nash told the House of Lords on 3 June 2015 that “our current estimate is that this will cost around £350 million”.⁶³ He did not indicate which year the figure related to.

⁶⁰ [HL Deb 3 June 2015 c412](#)

⁶¹ [Bill 84-EN](#), p8, para 40

⁶² “Election 2015 live: Cameron promises to double free childcare and revive right to buy – 1.18pm: Conservatives offer working parents 30 hours of free childcare – Details”, *The Guardian*, 21 April 2015

⁶³ [HL Deb 3 June 2015 c412](#)

The June 2015 explanatory notes to the Bill as introduced to the Lords did not give a precise indication (or, with reference to section 5.2, indicate the source of the funding), but stated that:

The additional 15 hours free childcare entitlement for working parents of three and four year olds will be paid for by the Department for Education from money provided by Parliament. The cost of the additional entitlement will be considered as part of the normal Budget and Spending Review process.⁶⁴

The *Budget 2015* Red Book, published in July 2015, provided a more detailed costing for the policy:⁶⁵

2016–17	2017–18	2018–19	2019–20	2020–21
£15m	£365m	£640m	£660m	£670m

It should be noted that, at the time of the Budget statement, the Government’s intention was (and currently remains) to launch the policy across England in September 2017 – therefore the cost of the policy during the 2017–18 financial year would apply only in the months of September to March inclusive (hence the markedly lower cost compared to subsequent years).

In October 2015, Lord Nash told Peers that the cost of the policy in 2018–19 (the first full year of operation) would be £840 million including “Barnett consequentials”,⁶⁶ although this estimate was also based on the current hourly rate paid to providers – the Government has committed to increasing the rate of funding.⁶⁷ As the Government Whip Baroness Evans of Bowes Park told Peers at Report stage:

We have already committed £840 million of new funding to deliver the extended entitlement, and that is before we deliver on our pledge to increase the hourly funding rate.⁶⁸

The 26 October 2015 version of the explanatory notes published alongside the Bill as introduced to the Commons were similar to those for the Bill as introduced in the Lords (save for the change referring to the increase in public spending noted above, see section 5.2) and did not include an estimate of the cost.⁶⁹

Estimates by others

The Opposition has expressed doubt in regard to the estimated cost of the policy, citing different sources. During Report Stage, Baroness Jones said:

The Pre-school Learning Alliance, which speaks for many in the private nursery sector, has estimated that the cost will be at least

⁶⁴ [HL Bill 009–EN](#), p5, para 24

⁶⁵ HM Treasury, [Budget 2015](#), 2015–16 HC 264, July 2015, p72, Table 2.1

⁶⁶ The term “Barnett consequentials” refers to the Barnett formula – additional spending on an England only policy causes additional funding to be allocated to the devolved countries of the UK under the Barnett formula. For more information, see the Library briefing paper, [The Barnett formula](#).

⁶⁷ [HL Deb 14 October 2015 c245](#)

⁶⁸ [HL Deb 14 October 2015 c288](#)

⁶⁹ [Bill 84–EN](#), p8, para 40

20% more than the Government's original estimate of £350 million. It stresses the need for a sustainable mechanism to ensure that funding rates cover delivery costs in the long term, and that is what we are seeking. Meanwhile, a recent IPPR report says that the Government have grossly underestimated the cost of this scheme, which they calculate to be £1.6 billion in 2017-18: £1 billion more than the Government's estimate. The National Association of Head Teachers found that almost 80% of the nurseries based in schools are cross-subsidising the places from the rest of the school budget, as they are running at a loss, and that two-thirds thought that they would have to reduce the number of children they could accommodate if the new entitlement went ahead.⁷⁰

The October 2015 report by the IPPR referred to by Baroness Jones, entitled *Extending The Early Years Entitlement – Costings, Concerns And Alternatives* said that "The government's policy costing, at £365 million in its first year, is inexplicably low in comparison to other estimates, as well as to current funding. IPPR puts the cost of this extension at £1.6 billion annually" in 2015/16 prices. While acknowledging that the Government's calculations took into account consequential savings ("dynamic effects"), the IPPR said that this would be "likely to account for only a small fraction of the differential between the two costings ... Taking into account potential dynamic effects, our costing suggests a funding gap of around £1 billion in 2017/18".⁷¹

5.4 The Government's funding review

Announcement of the review and terms of reference

The announcement of the review was made at Education Questions on 15 June 2015 by the Mr Gyimah who told the House that "a cross-Government review of the cost of providing childcare is under way to inform decisions on the funding required to secure sufficient quality childcare provision at good value for money to the taxpayer and consistent with the Government's fiscal plans".⁷²

The terms of reference of the review (which were only published in October 2015)⁷³ stated that:

The main questions that the Review will consider are:

- How much does it currently cost providers to deliver an hour of childcare for 2, 3 and 4 year olds? How does this vary regionally; by type of provider; and by the needs of particular groups of children?
- How does the market operate currently (for different providers)? What are likely provider responses to changes in Government funding, including increasing the free offer to working families? What funding is needed to incentivise providers to enter the sector and meet demand?

⁷⁰ [HL Deb 14 October 2015 c237](#)

⁷¹ Institute for Public Policy Research, *Extending The Early Years Entitlement – Costings, Concerns And Alternatives*, October 2015, pp3 and 9

⁷² [HC Deb 15 June 2015 c7](#)

⁷³ [HL Deb 14 October 2015 c239](#)

- What do the most efficient provider organisations do to control costs? Are these things that Government should be expecting from the whole sector? How can we incentivise this behaviour from providers?
- Are there things that Government currently does which increase provider costs?⁷⁴

The call for evidence from childcare providers

Launch of the call for evidence

On the same day as the Minister's announcement of the review, the DfE issued a document entitled [Review of the cost of providing childcare: call for evidence](#). Responses were invited until the closing date of 10 August 2015.

The DfE explained that to help deliver the extended entitlement, the Government had "this call for evidence is part of a process of gathering the necessary evidence which will inform the review. The evidence will improve our understanding of what factors contribute to the cost of providing childcare for early years providers".⁷⁵

In terms of what should be submitted, the DfE said that it "welcomes any information you wish to provide to inform the review" and that:

We particularly welcome any information you may be able to provide on the following:

- Existing studies and research about the cost of childcare, for example assessments carried out by local authorities on the cost of childcare locally.
- Evidence from early years providers about the factors that make up the cost of providing childcare, and how much of the total cost they represent.⁷⁶

Analysis of findings from the call for evidence, and criticism of it

In October 2015, the DfE published [Analysis of responses to the call for evidence on the cost of providing childcare](#). It was noted that the call for evidence "received over 2000 responses between 15 June and 10 August, with the majority of responses submitted coming from providers".⁷⁷

In summary, the analysis noted that:

There was consistency across most responses on the key categories of expenditure that were identified and on the key themes that were mentioned under each of those categories. The five key categories of expenditure were: staff-related costs, running costs (excluding salaries), consumables, costs incurred as a result of Government policy and costs resulting from the

⁷⁴ Department for Education, [Terms of Reference: Review of the cost of providing childcare in England](#), October 2015, p1

⁷⁵ Department for Education, [Call for evidence: review of the cost of providing childcare](#), 15 June 2015, p5, para 1.4

⁷⁶ *Ibid*, p6, para 2.1

⁷⁷ Department for Education, [Analysis of responses to the call for evidence on the cost of providing childcare](#), October 2015, p4, para 7

provision for children with additional needs, including children with special educational needs and disability.⁷⁸

However, many of the responses appeared to provide only limited information to the DfE:

The majority of responses listed the factors which providers perceive to be their main areas of expenditure, but these were often not supported by figures. This means that we have been unable to understand which costs are as a result of delivering the [existing] entitlement [to 15 hours of free childcare] and which are not.⁷⁹

The DfE also noted that “while we have been able to identify what providers perceive to be their main areas of expenditure, we were unable to determine from the responses what providers’ unit costs were”.⁸⁰

The call for evidence, however, did not specifically ask for details of unit costs (although the DfE did say it might contact those who had provided submissions to discuss their evidence),⁸¹ a point also made by those in the sector – *Children and Young People* now reported that the Chief Executive of the London Early Years Foundation, June O’Sullivan, had said “What it [the call for evidence] did not ask for is ‘detailed information’ on costs”, and that the Chief Executive of the Pre-school Learning Alliance, Neil Leitch, had said “The overriding feeling I get is that they [the DfE] are blaming the sector for not giving them the data they never asked for”.⁸²

Following the publication of the DfE’s analysis, Ms O’Sullivan said she was “baffled by this response ... The DfE is now telling us it cannot understand the costs”,⁸³ and Mr Leitch described the call for evidence as “an exercise in futility”.⁸⁴

As noted below (section 5.5), one concrete finding was that “some respondents” reported a funding shortfall of the funding they received for the existing 15 hours of free childcare.⁸⁵

November 2015 update on the review

An update on the progress of the review was given by the Minister, Sam Gyimah, on 10 November:

I announced in the summer that a government review of the cost of providing childcare was underway. The review which began well before clause 1 was inserted into the Bill, is being led by the Department with external support from Deloitte. Findings from

⁷⁸ Department for Education, [Analysis of responses to the call for evidence on the cost of providing childcare](#), October 2015, p6, para 15

⁷⁹ *Ibid*, p6, para 12

⁸⁰ *Ibid*, p6, para 13

⁸¹ Department for Education, [Call for evidence: review of the cost of providing childcare](#), 15 June 2015, p6, para 2.2

⁸² [“‘Baffling’ DfE report raises fears over free childcare expansion”](#), *Children and Young People Now*, 12 October 2015 (subscription required)

⁸³ *Ibid*

⁸⁴ [“DfE ‘unable to understand’ cost of childcare following review”](#), *Children and Young People Now*, 2 October 2015

⁸⁵ Department for Education, [Analysis of responses to the call for evidence on the cost of providing childcare](#), October 2015, p6

the review will inform decisions made as part of the Spending Review.

The government review is considering a significant body of evidence on the provision of childcare across a range of provider types, including private, voluntary and independent providers, childminders and schools. As part of the review, we have engaged extensively with providers from across the sector. Our call for evidence received over 2000 responses, the majority of which were from providers and our online questionnaire had over 19,300 responses.⁸⁶ We held a series of roundtables over the summer across the country and have also worked with 10 large employers (including Carillion, John Lewis Partnership, Rolls Royce and BT), and through them have engaged over 180 parents in a series of events. These have provided a valuable opportunity to engage with providers face to face.⁸⁷

5.5 Funding rates for free childcare

The sufficiency of current funding rates for the universal 15 hours of free childcare and the issue of cross-subsidisation

Under existing Government policy, all three and four year olds are entitled to 15 hours of free childcare. As the consultancy LaingBuisson reported in the latest edition of its *Children's Nurseries – UK Market Report*, the level of funding provided does not always match the standard hourly rate charged by a childcare provider:

hourly rates for 3 and 4 year olds paid by local authorities [for the existing 15 hours of free childcare] can vary markedly between maintained [state-run] and private/voluntary providers and across regions because prices are determined locally at the discretion of local authorities.

LaingBuisson argued, therefore, that “fair, transparent and consistent funding across sectors remains an issue that has yet to be resolved by central Government”, and cited the following case study of Stoke-on-Trent City Council:

At the start of 2014, the council reported that it was paying three different rates: £5.19 in nursery schools, £3.90 for private and voluntary providers and £2.39 in nursery classes in primary schools. Under the re-structuring in September 2014, it introduced a new standard rate of £3.70 an hour per child for all providers to provide 15 hours a week for 3 and 4 year olds, though for nursery schools the new rate is to start in September 2015.⁸⁸

The report cited a number of recent studies on the funding gap:

The level of funding paid by local authorities to provide early years placements for 3 and 4 year olds had been consistently criticised by most children's nursery providers for being insufficient to cover costs of provision. LaingBuisson's 2012 survey found that 60% of nurseries reported this funding to be loss-making. Other surveys

⁸⁶ Details of the findings of the online questionnaire can be found in Annex A of the DfE's [Childcare Bill: Policy Statement](#) (October 2015), pp24–30.

⁸⁷ [PQ 14818](#), 10 November 2015

⁸⁸ LaingBuisson, *Children's Nurseries – UK Market Report*, 13th edition, October 2014, p93

in June 2012 by the Pre-School Learning Alliance and the National Day Nurseries Association [NDNA] reported similarly high proportions claiming the 3 and 4 year old funding was insufficient, at 62% and 76% respectively. A more recent survey by the NDNA in December 2013 (*NDNA Insight Report 2013/14*) reported the proportion at 78%, confirming little change.⁸⁹

The report noted that “an interesting development in Scotland has seen capping of subsidised places supplied by the private/voluntary sector. Since local authorities in Scotland have a duty to provide sufficient subsidised places, authorities choose to provide places in-house at council-run nurseries as a first preference”.⁹⁰

The Pre-school Learning Alliance’s October 2014 report into funded childcare places delivered in private, voluntary and independent (PVI) childcare settings operating from non-domestic premises in England (produced by Ceeda) entitled *Counting the cost* found that:

On average, one hour of quality early education and childcare for funded three and four year old children in England costs £4.53. Comparison with LEA budgets delegated to PVI providers in 2013/14 shows an average funding shortfall of -£0.65 per hour (17%). Funding gaps widen to 20% in the London region.

[...]

This research suggests that if settings do not or cannot absorb funding deficits, the consequence of continued under-funding is likely to be increased childcare costs for families and/or a retraction in the supply of funded places; both being scenarios which undermine policy objective to increase the affordability, quality and accessibility of early years education.⁹¹

For childcare provision in schools, following a survey of 791 members undertaken in July 2015 the National Association of Head Teachers (NAHT) found that 71% received less than £5 per hour for the free childcare places for 3 and 4 year olds, and that “the majority of respondents (58.50%) said they did not receive enough funding to cover the cost of places for three and four year olds”. In terms of how underfunded nurseries cover the funding gap, it was found that:

The overwhelming majority of respondents (79.80%) were cross-subsidising their funding from the rest of the school budget. A further 12.12% were cross-subsidising from paid-for nursery funding. The small minority of remaining respondents used a combination of these methods, had received additional lump-sums from their LA [local authority], or used fund-raising events to raise the cover the extra cost.⁹²

The Lords Select Committee on Affordable Childcare reported on this issue of cross-subsidisation:

There is evidence that the funding shortfall in the rates offered to PVI [private, voluntary and independent] providers for delivery of the free early education entitlement is met in some settings by

⁸⁹ LaingBuisson, *Children’s Nurseries – UK Market Report*, 13th edition, October 2014, p92

⁹⁰ *Ibid*, p93

⁹¹ Ceeda, *Counting the cost*, October 2014, pp4–5

⁹² National Association of Head Teachers, *An early years place for all: NAHT survey on extending childcare provision in schools*, September 2015, pp4, 5 and 6

cross-subsidisation from some fee-paying parents. This means that parents are subsidising themselves, or other parents, in order to benefit from the Government's flagship early education policy.

The intention of the free early education policy is that 15 hours of early education per week are accessed at no cost to the parents. We recommend that the Government reviews the current distribution of resources within the overall budget for early education and childcare support to ensure that the free early education entitlement is delivered without additional cost to parents.⁹³

The DfE's analysis of responses to its call for evidence from childcare providers noted that "some respondents ... reported their perceived funding shortfall when comparing their local authority's funding rate [for 15 hours of universal free childcare] with the price they charged parents". The DfE document also included the following quote, presumably from a childcare provider:

The current amount paid does not allow us to cover basic daily costs. In order for us to continue meeting the requirements of the government we need an increase in funding. At present we have been forced to up our fundraising efforts to meet our financial needs. The funding currently provided is less than our hourly charge which in relation to other local providers is already low.⁹⁴

The possible impact if the extended entitlement's funding rate is lower than the private rate currently paid

The DfE believes that "the new extended entitlement will pay for the additional hours parents are already purchasing from an early years setting".⁹⁵

This was also the message from Sam Gyimah who told *Nursery World* earlier in October 2015 that "a huge number of people who buy more than 15 hours already will continue to buy more than 15 hours. What will change is that where before they paid for these hours themselves, the Government will now be paying for the additional hours".⁹⁶

If parents and carers have an existing childcare place for a three or four year old for 30 hours (the first 15 hours of which are free to them under the existing entitlement, the remainder paid for by them at the "private rate") and then claim the extended entitlement under the new policy, then, other things being equal, if the rate paid for the free extended entitlement is lower than the rate the parent or carer was paying privately then this would create a funding gap for the childcare provider.

A report by the Institute for Public Policy Research (IPPR) published in September 2015 highlighted that the possible consequences of such a

⁹³ Lords Select Committee on Affordable Childcare, *Affordable Childcare*, 2014–15 HL 117, 24 February 2015, p11, paras 18–19

⁹⁴ Department for Education, *Analysis of responses to the call for evidence on the cost of providing childcare*, October 2015, p6

⁹⁵ Department for Education, *Childcare Bill: Policy statement*, October 2015, p16

⁹⁶ "Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours", *Nursery World*, 19 October 2015

funding gap under the proposed extended entitlement provision could be a reduction in supply:

Underfunding the 30 hours offer would lead to a smaller, less flexible market as providers (both for-profit and not-for-profit) either exit, reduce the breadth of services that they offer, take on fewer children, or refuse to offer the free hours (see for example NAHT 2015 and Gaunt 2015). This would reduce parental choice and potentially push up costs for paid hours or other services outside of the free offer, such as childcare for most under-3s, wraparound care and holiday care, while also pushing down quality. Families in poorer areas may be particularly adversely affected. Already faced with fewer local providers, some parents would experience reduced access to childcare, and less flexible provision, which would in turn impact upon their access to work, particularly to jobs that involve non-standard hours.⁹⁷

5.6 Debate in the Lords and new clause 1

Committee Stage

At Committee Stage, Baroness Jones tabled an amendment that would introduce a new clause 1 requiring the Secretary of State “before the end of 2017” to undertake a number of steps including “a review of the cost of providing childcare”.⁹⁸ In his response, Lord Nash noted the Government’s ongoing funding review and said that it had “committed to increase the average funding rate paid to providers”.⁹⁹ The amendment was withdrawn.

Baroness Jones also tabled an amendment (amendment 14) to what was then clause 1 that required the establishment of an “independent review of the free childcare entitlement funding system” and for the Secretary of State to “establish a comprehensive and sustainable funding solution” taking into account the findings of the review. She explained that the amendment “seeks to tease out more information about the nature and scope of the [Government’s] review, who will be consulted, what the timetable will be and how the outcome will be financed”.¹⁰⁰

In response, Lord Nash said that “The [funding] review will report in the autumn and will inform our decisions on the level of funding that providers require to deliver quality childcare, and as I said, we will report on these findings by Report”.¹⁰¹

With the opportunity to discuss the findings of the review at Report Stage, Baroness Jones withdrew the amendment.¹⁰²

Report Stage

However, despite the assurances of the Minister, the funding review was not produced by Report Stage, prompting Baroness Jones to say

⁹⁷ IPPR, *Extending The Early Years Entitlement – Costings, Concerns And Alternatives*, October 2015, p9

⁹⁸ [HL Deb 1 July 2015 c2084](#)

⁹⁹ [HL Deb 1 July 2015 c2093](#)

¹⁰⁰ [HL Deb 1 July 2015 c2158](#)

¹⁰¹ [HL Deb 1 July 2015 c2161](#)

¹⁰² [HL Deb 1 July 2015 c2163](#)

that “without the cash being made available, the Bill is worthless. Without knowing the true costs of the scheme, the Government are not in a position to make any promises on it”. She said that there were “real questions about how these new places are to be funded and what will happen if they are not fully funded. This was to form a central part of the funding review and, sadly, this is what we have been denied so far”.

She also warned of possible dire consequences for the childcare sector if the policy was under-funded, citing the issue of cross-subsidisation:

At its core, this is not about the Government’s disregard of Parliament, important though that is. It is important because we do not believe that the offer being made for free childcare in this Bill is viable without a considerable injection of money. Quite frankly, we do not believe that the Chancellor will be persuaded to find the necessary additional funds to make the scheme work. Why is this important? The current nursery providers gave evidence to the Select Committee on Affordable Childcare that the current scheme is being run at a loss, with complicated systems of cross-subsidy. Put simply, if you increase the free hours, you reduce the opportunities for cross-subsidy, and the whole scheme collapses.¹⁰³

The Opposition therefore tabled amendment 1 at Report Stage which would create new clause 1, the effect of which would be to prevent the extended entitlement to childcare coming into effect until a “funding solution” had been put in place, taking into account the findings of an “independent funding review”. This built upon amendment 14 tabled at Committee Stage, but went further by preventing the extended entitlement (and also the information duty on local authorities) from coming into effect until the review and funding solution had been completed.

Baroness Pinnock (Liberal Democrat) said that “I do not see how, as Members of this House ... we can fulfil our responsibilities unless we have that information [on funding]. We support the Bill, but the funding is fundamental”, adding:

How can we assure ourselves of the quality of childcare that will be provided if the amount of funding that is available is not declared? How can we be sure that training for staff in childcare can be made available if the funding is not there? How can we be sure that the number of places will be available if the amount of funding does not support an increase in the number of places that will be required?¹⁰⁴

For the Government, Lord Nash said that the Government opposed amendment 1, saying “I hope noble Lords will agree that placing in primary legislation a requirement to conduct a review, which is already under way, is not necessary and could in fact delay the positive progress that has already been made if the Government were required to stop and begin again once the Bill receives Royal Assent”.¹⁰⁵

¹⁰³ [HL Deb 14 October 2015 cc237-238](#)

¹⁰⁴ [HL Deb 14 October 2015 c240](#)

¹⁰⁵ [HL Deb 14 October 2015 cc247-248](#)

While observing that “much of the success of the extended entitlement rests on sustainable levels of funding” and that “we need to get the funding for the entitlement right”, he argued that the amendment would “simply risk delaying substantially implementation for working parents”.

He said that the Government “want to establish a sustainable funding solution that addresses concerns about the delivery of the existing entitlement and supports providers to deliver the extension to the entitlement. We have no interest in a solution that will not work for providers”, and noted that “under the last Government we expanded childcare very substantially and successfully and we fully intend to do so again”.¹⁰⁶

Lord Nash noted the Government’s review of childcare funding, which he described as “most detailed national review of childcare that has ever been conducted”, and assured the House that “there are no plans for the Bill to reach Royal Assent before that review concludes”.¹⁰⁷

He added that “the Budget and the spending review are the appropriate times for the Government to set out their spending plans and Parliament debates those plans at the appropriate time. Legislating for the childcare entitlement is not the time to have this debate”.¹⁰⁸

The funding review, Lord Nash said, would continue to be a Government review – rather than an independent review as proposed in amendment 1 – arguing that “the timings of different review options, as well as the cost to the taxpayer, were significant factors leading to our decision for this to be a government review with an element of external validation and scrutiny”.¹⁰⁹

Closing the debate, Baroness Jones noted that Lord Nash “did not address why the Bill is being rushed through in advance of the outcome of the funding review being known, which might, as we have heard, fundamentally alter the shape of the package that will be on offer because of the complexities which I think we all now understand” and contested that “this amendment is not about delaying the Bill” and that it “would not alter the implementation date of the Bill”.¹¹⁰

The matter was decided on Division: 222 Peers voted in favour of amendment 1, and 209 were “not-content”.

Also during Report Stage, Baroness Pinnock (Liberal Democrat) tabled amendment 24 to introduce a new clause seeking to require the Secretary of State to provide sufficient funding for the extended entitlement so that providers did not have to cross-subsidise.

Speaking against the amendment, Baroness Evans of Bowes Park said:

¹⁰⁶ [HL Deb 14 October 2015 c245](#)

¹⁰⁷ [HL Deb 14 October 2015 cc245 and 246](#)

¹⁰⁸ [HL Deb 14 October 2015 c246](#)

¹⁰⁹ [HL Deb 14 October 2015 c247](#)

¹¹⁰ [HL Deb 14 October 2015 cc249–250](#)

We are clear that this funding must be sufficient to ensure that providers are funded adequately to be able to deliver the additional requirements set out in the Bill.

We have listened to providers' concerns that increasing Government-funded hours will limit their ability to cross-subsidise from parent-funded hours, and that delivering at current rates may not be sustainable. That is why the Prime Minister has committed to increase the average hourly funded rate paid to providers. As was mentioned earlier, we are the only party to have made this commitment. We have already committed £840 million of new funding to deliver the extended entitlement, and that is before we deliver on our pledge to increase the hourly funding rate.¹¹¹

The amendment was withdrawn by Baroness Pinnock.

5.7 Reaction to the inclusion of new clause 1

Following the adoption of amendment 1 which inserted the new clause 1 into the Bill, the following comments were reported by *Nursery World*:

Neil Leitch, chief executive of the Pre-school Learning Alliance, said, 'We are delighted that that the House of Lords has listened to the concerns of the early years sector and made this vital amendment to the Childcare Bill.'

'It is imperative, now, that this clause remains part of the Bill as it continues its journey through Parliament. Up until this point, the Government's funding review has been disjointed, rushed and unfocused. The Government should now commit to undertaking a full, in-depth review of childcare funding, ensuring that a credible, sustainable solution to underfunding is put in place before the plans are rolled out.'

Purnima Tanuku, chief executive of National Day Nurseries Association (NDNA), said, 'It's really good that there is such robust scrutiny of the Childcare Bill happening in the House of Lords. We at NDNA are speaking to politicians across the spectrum who understand the nursery sector's concerns about the funding of expanded free childcare.'

'It is vital that a sustainable funding solution is in place before reform goes ahead. This solution must work for the long-term and incorporate both the additional financial pressures of National Living Wage on childcare providers and the need for employers to be able to offer their workforce the right training, development and career progression.'

'It is really important that the Government now responds to this amendment and ensures that funding review findings are fully published and scrutinised. The Government must work with the sector to come to a solution to benefit childcare providers and parents.'

Anna Feuchtwang, chief executive of the National Children's Bureau, said, 'The House of Lords has sent a clear message that the 30 hours of free childcare for working families should be adequately funded. Only then will it be provided by well-trained staff and available to all children, including those with special educational needs and disabilities. Only if these two elements, quality and accessibility, are guaranteed can the Childcare Bill

¹¹¹ [HL Deb 14 October 2015 cc286-289](#)

deliver on its promise to improve children's early development, while helping busy families remain in work.¹¹²

5.8 Analysis of Clause 1 of Bill 84

Clause 1 has the effect of preventing the other clauses (clauses 2 to 6) relating to the additional 15 hours of free childcare coming into effect until the following conditions are met:

- 1 an independent review of the free childcare entitle funding system, "including a large-scale analysis of the cost of delivering funded places", has been established and
- 2 a "comprehensive and sustainable funding solution" has been put in place which "takes into account the complete findings" of the independent review and also "addresses the funding of existing childcare and the additional requirements on childcare providers arising from this Act".¹¹³

Clause 1(2) sets out who the independent review shall consult, and clause 1(3) requires the Education Secretary to "publish a report outlining the reasoning" for any differences where the funding solution does not follow the recommendations of the independent funding review. Such a report is to be laid before each House of Parliament under clause 1(4).

¹¹² ["Lords vote for independent funding review ahead of 30-hours roll-out"](#), *Nursery World*, 15 October 2015

¹¹³ [Bill 84](#), clause 1(1)

6. The amount of the extended entitlement and responsibility for delivering it

6.1 The number of hours of the current universal 15 hours entitlement

There is currently provision for 15 hours of free childcare for all 3 and 4 year olds. The *Duty to Secure Early Years Provision Free of Charge) Regulations 2014* (SI 2014/2147) as amended state that:

an English local authority must secure that the prescribed early years provision is available for each young child for a period of 570 hours in any year and during no fewer than 38 weeks in any year.

The 570 hours of childcare over 38 weeks is equivalent to 15 hours per week.

The 38 week period is intended to mirror the length of term-time in schools, although guidance from the DfE highlights that a flexible approach can be taken towards the entitlement: “To secure flexible delivery, local authorities should ... Ensure that parents and providers are aware that there is no requirement for all early education places to be delivered only over 38 weeks of the year or in line with maintained school term dates”.¹¹⁴ Lord Nash noted during the Committee debate on the Bill, the existing universal 15 hours of free childcare “can be stretched over more weeks per year when parents wish and providers offer the option to do so”.¹¹⁵

In its February 2015 report, the House of Lords Select Committee on Affordable Childcare said that:

A key distinction between different types of settings is how the hours are delivered. In the maintained sector they are usually delivered in three-hour sessions across five mornings or afternoons. In the private sector the hours are delivered flexibly; for example, a child attending a private nursery for two days a week, may receive a discount on their monthly fees equivalent to 15 free hours for 38 weeks of the year.¹¹⁶

6.2 The number of hours under the proposed extended entitlement

What was clause 1 (now clause 2) of the Bill as introduced into the Lords made a similar provision in respect of the extended entitlement:

¹¹⁴ Department for Education, [Early education and childcare – Statutory guidance for local authorities](#), September 2014, pp8 and 9, Section A2 and para A2.4

¹¹⁵ [HL Deb 1 July 2015 c2113](#)

¹¹⁶ Lords Select Committee on Affordable Childcare, [Affordable Childcare](#), 2014–15 HL 117, 24 February 2015, p37, Box 3

The Secretary of State must secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year.

Whether or not these hours can be spread is yet to be confirmed: Sam Gyimah said in October 2015 that “a lot of parents asked whether the hours are for 38 weeks of the year or could be spread it throughout the year. We need to look at that”.¹¹⁷

6.3 The duty on the Secretary of State to secure the extended entitlement

A key difference between the existing universal provision of 15 hours of free childcare and the proposed extended entitlement is that it will be the Secretary of State, rather than local authorities, who will be responsible for securing the extended entitlement.

This difference was raised at Committee Stage in the Lords, when Baroness Jones of Whitchurch argued that Bill would create “a system of dual responsibility for delivering the free childcare allocations, with the proposed duties seemingly being shared between the Secretary of State and local authorities”. She described this possibility as a “potentially farcical situation”, as “local authorities will be responsible for delivering the first 15 hours and the Secretary of State will be responsible for the next 15 hours, even though the local provider is likely to be one and the same organisation”.¹¹⁸

In response, Lord Nash said that “the Government think that it is right for the primary legislation to put the duty to secure the extra 15 hours on the Secretary of State in the first instance, to demonstrate to parents the importance we attach to providing free childcare provision and to give them confidence that the Government will deliver on their manifesto commitment”. He noted that “the Bill gives the Secretary of State powers to deliver the new entitlement through local authorities”.¹¹⁹

A further amendment was tabled at Report Stage by Lord Touhig that, as with Baroness Jones’s Committee Stage amendment, would have changed the duty to secure the extended entitlement to local authorities, as the Opposition sought “further clarity”.

Lord Nash told Peers that the “Government are in full agreement with the spirit” of the amendment and “agree that local authorities are best placed to ensure that working parents are able to access 30 hours of childcare free of charge”.

While noting that “Government Amendment 18 proposes to insert a new clause into the Bill which will provide for the Secretary of State to be able to discharge her duty through local authorities”, the Minister was adamant that the Government did “not wish to remove this duty

¹¹⁷ [“Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours”, *Nursery World*, 19 October 2015](#)

¹¹⁸ [HL Deb 1 July 2015 c2111](#)

¹¹⁹ [HL Deb 1 July 2015 c2114](#)

[on the Secretary of State] from the Bill, even with very clear intentions that it will be discharged through English local authorities”, because:

the manifesto commitment to provide three and four year-olds of working parents with 30 hours of free childcare is a significant one and a priority for this Government to deliver. We know that childcare is the issue for parents, and that it inhibits many from going back to work, or from working more, when they would otherwise choose to do so. For that reason, the Government believe that it is right for the Secretary of State to be named in the Bill because parents will, ultimately, hold her to account for delivery of the entitlement.¹²⁰

6.4 Requirements on local authorities

While the duty to secure the extended entitlement falls to the Secretary of State, in terms of discharging this duty the Bill, as currently drafted, proposes that extended entitlement regulations may:

- a) require an English local authority to secure that childcare of such a description as may be specified is made available free of charge for children in their area who are qualifying children of working parents;
- b) make provision about how much childcare is to be so made available for each child, and about the times at which, and periods over which, that childcare is to be made available;
- c) make provision about the terms of any arrangements made between English local authorities and providers or arrangers of childcare for the purposes of meeting any requirement imposed under paragraph (a) or (b).¹²¹

In regard to paragraph b, at Report Stage Baroness Pinnock (Liberal Democrats) tabled amendment 20A which sought to provide “greater flexibility in the periods of time over which the 15 hours’ additional free childcare can be offered”, in particular in regard to the working week and during school holidays. Baroness Pinnock noted that “Questions from those in the sector have indicated that one facet of the Bill they would particularly like to see is what they call a stretch of the hours over a longer period, not only during a week but also over the school holidays. That would be a tremendous help to many working families”.¹²²

In reply, Lord Nash said that the Government would “set out in in statutory guidance provisions about flexibility which local authorities should consider, as well as work that local authorities can do to enable parents to take the entitlement in a pattern of hours that best meets their needs ... and we will ensure that the early implementation pilots focus on the issue of flexibility”. On childcare during school holidays, he added that the Government had “recently announced two new measures which will enable childcare providers to open school sites

¹²⁰ [HL Deb 14 October 2015 cc257 and 258](#)

¹²¹ [Bill 84](#), clause 3(2)

¹²² [HL Deb 14 October 2015 c256](#)

outside school hours and give parents the right to request childcare ... These new powers will help with the availability of childcare".¹²³

However, Baroness Pinnock asked to test the opinion of the House on amendment 20A because she felt that the Bill should provide a "much clearer definition of expectations in the flexibility that we are going to allow when providing childcare".

Amendment 20A was agreed on division, with 195 contents and 169 not-contents.¹²⁴

6.5 Impact of extended entitlement to demand for places

As noted above in section 5.5, the DfE believes that the extended entitlement will not create extra demand:

We know that the majority of working families with three- and four-year-olds already use more than 15 hours of childcare. This means that many children will already be in a place and will not require a new one. Rather, the new extended entitlement will pay for the additional hours parents are already purchasing from an early years setting, helping working families with the cost of childcare.¹²⁵

This was also the message from the Sam Gyimah who told *Nursery World* in October 2015 that:

A huge number of people who buy more than 15 hours already will continue to buy more than 15 hours. What will change is that where before they paid for these hours themselves, the Government will now be paying for the additional hours. So, I think there is a lot of scaremongering around the new number of places, or people are not understanding that we are doubling entitlement but not doubling demand.

The reason the question of take-up and capacity is not a straightforward one to answer is that it depends on where you are in the country. There might be a capacity need in some areas but an oversupply in others, and you have different types of provider dominant in different parts of the country.

I've seen a lot of back-of-the-envelope figures, but the right way to do it is what we're doing, which is to look at it this on a geographic basis and to understand the picture exactly as it is in every part of the country, rather than doing a generic piece of analysis which actually will not answer the question.¹²⁶

The DfE said that "there is natural growth in the childcare system we can, and should, encourage new providers to enter the childcare market or existing providers to expand".¹²⁷

¹²³ [HL Deb 14 October 2015 cc259-260](#)

¹²⁴ [HL Deb 14 October 2015 cc281-282](#)

¹²⁵ Department for Education, [Childcare Bill: Policy statement](#), October 2015, p16

¹²⁶ "Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours", *Nursery World*, 19 October 2015

¹²⁷ Department for Education, [Childcare Bill: Policy statement](#), October 2015, p16

6.6 Lords debate on capital funding

Committee Stage

During the Committee Stage debate in the Lords in July 2015, the issue of capital funding for childcare providers to meet the 30 hours free childcare was raised, when Baroness Jones of Whitchurch asked “will any capital funding be included to allow for the expansion of premises or the creation of new premises?”,¹²⁸ and Baroness Pinnock remarked:

There is going to be a significant demand for capital expenditure. For instance, providers in the state sector in nurseries attached to primary schools currently provide 15 hours through a morning session and an afternoon session. If there is going to be only one session of 30 hours, there will need to be a 50% increase in the amount provided. Capital funding will be necessary to do that, and it would be good to know whether any capital money is going to be available for either the voluntary or the state sector to do that.¹²⁹

In his reply for the Government, Lord Nash said:

The noble Baroness, Lady Pinnock, talked about the scale of the increase facing us. We have introduced an offer relating to two year-olds and raised the offers for three and four year olds from 12 to 15 hours, and the sector has coped well with that. However, the increase is nothing like the 50% that she spoke about. Many children will be in reception classes in primary schools at the age of four and many will already be taking up the offer—parents will be paying for it themselves—so the challenge is not as great as it might appear at first blush. As I say, we are confident that the sector will be able to respond. I hope that the noble Baronesses and the noble Lord will agree that the Government’s firm commitment in respect of the review and funding for early education addresses their concerns. I therefore urge them not to press the amendments.¹³⁰

The amendments were withdrawn.

Report Stage

The issue was also raised during Report Stage, when Baroness Pinnock tabled amendment 25 which proposed the following new clause: “The Secretary of State may provide capital funding to ensure that local authorities and other providers are able to provide the capacity of childcare places required in their area”.¹³¹

Baroness Evans of Bowes Park argued against the amendment:

The Government have already made a £100 million investment of capital in early years to support the expansion of provision for two year-olds. We believe there is existing capacity in the system to help deliver the new entitlement, and we are continuing to talk to local authorities to increase our understanding and evidence of where this is. The Government are committed to funding the extension of the entitlement at a level that ensures choice and flexibility for parents, is sustainable for providers, and is fair to the

¹²⁸ [HL Deb 1 July 2015 c2158](#)

¹²⁹ [HL Deb 1 July 2015 c2159](#)

¹³⁰ [HL Deb 1 July 2015 cc2161–2162](#)

¹³¹ House of Lords, [Revised marshalled list of Amendments to be moved on Report](#), 13 October 2015, p8, amendment 25

taxpayer. Decisions on the level of funding, including any capital, will be made in the forthcoming spending review.¹³²

The amendment was not moved.

6.7 Analysis of clauses 2(1), 3(2)(a-c and k), 3(3) and 3(8) of Bill 84

Clause 2(1) of the Bill provides a similar flexibility to SI 2014/2147, stating that:

The Secretary of State must secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year.

As discussed above, the duty is on the Secretary of State to secure the extended entitlement. However, under section 3(2)(a–c) the Secretary of State can make regulations that may:

- a) specify descriptions of the type of childcare that is to be made available (subsection (2)(a));
- b) set out how much childcare is to be made available and the times at which, and periods over which, that childcare to be made available (subsection (2)(b)) reflecting sufficient flexibility as set out in subsection (3) [in regard to parents who work outside of the hours of 9am to 5pm, Monday to Friday, and childcare provision during school holidays]; and
- c) make provision about the terms of any arrangements between local authorities and providers of childcare (subsection (2)(c)). The Secretary of State may, for example, impose a requirement that any contractual arrangements between a local authority and a childcare provider must include a clause which would enable the local authority to terminate the arrangements in particular circumstances.¹³³

Further, under 3(2)(k), extended entitlement regulations may “require English local authorities, when discharging their duties under the regulations, to have regard to any guidance given from time to time by the Secretary of State”.

Under clause 3(8), where a local authority “fails to secure free childcare for working parents in accordance with any requirements imposed on it by extended entitlement regulations”, then the Secretary of State would be able to “intervene to secure proper performance of that function”. This mirrors the provision in section 15 the *Childcare Act 2006* relating to the existing universal entitlement of 15 hours of free childcare.¹³⁴

¹³² [HL Deb 14 October 2015 cc287–288](#)

¹³³ [Bill 84–EN](#), p5, para 20

¹³⁴ *Ibid*, p5, para 21

7. Who would be eligible for extended entitlement

7.1 A “qualifying child of working parents”

Original definition

The Bill as introduced to the House of Lords defined the term “qualifying child of working parents” as being a “young child” who: who is under compulsory school age; who is in England; and, who is of a description specified in regulations made by the Secretary of State.

In regard to the definition of “working parents”, at Second Reading Lord Nash explained that:

the definition of ‘working’ has been determined to include: working parents with children aged three and four; where parents are working part time or full time, the only requirement is that each parent is working the equivalent of eight hours per week, which is the same threshold as the tax-free childcare scheme; the entitlement can be accessed by parents who are employed or self-employed; and lone parents who are working to support their families.¹³⁵

Peers tabled a number of amendments to the definition, which were debated at Committee Stage.¹³⁶ While none of the amendments were agreed, at the subsequent Report Stage the Government announced that it would amend its original definition.

Government amendments made at Report Stage to broaden the definition

Baroness Evans of Bowes Park explained that the Government had “considered carefully the debate in Committee about parents who may not be in a position to meet the minimum income threshold, for reasons which may be connected with incapacity for work, caring responsibilities or because they are temporarily away from the workplace”.

The Government therefore broadened the eligibility criteria; the Government’s amendments, which were agreed, would “enable the Government to include, within regulations, those parents who are out of work or temporarily away from the workplace”. Baroness Evans said:

The Government believe that including parents who meet these criteria within the entitlement provides an appropriate balance in supporting parents to work where they can do so but also avoiding undue disruption to providers and children due to short periods of parental absence outside the workplace.¹³⁷

The Bill was amended to allow conditions to be set through regulations which would permit households where both parents were not working, in certain circumstances, to qualify. Baroness Evans set out these

¹³⁵ [HL Deb 16 June 2015 c1083](#)

¹³⁶ [HL Deb 1 July 2015 cc2116–2126](#)

¹³⁷ [HL Deb 14 October 2014 cc274 and 275](#)

additional groups,¹³⁸ which were also stated in the Government's *Policy Statement* on the Bill (see section 7.4 below).

Addressing concerns about the extent of delegation provided for in the Bill (see section 4) with specific reference to the definition of working parents, Baroness Evans noted that there were precedents from legislation with similar intentions:

I am aware that noble Lords may question why we do not intend to set this level of detail out in primary legislation. As explained, eligibility will broadly align with that for tax-free childcare. The Childcare Payments Act 2014, which established tax-free childcare, sets out general conditions of eligibility, including the need to be in qualifying paid work. However, it is secondary legislation which sets out what is meant by qualifying paid work and when a person is to be regarded as being in such work. Those regulations are obviously highly technical, cross-referring to benefits, allowances and credits established under a number of pieces of primary legislation. Similarly, the approach that the Government have taken in this Bill is to signal in primary legislation that parents will be expected to meet conditions as to paid work in order for their children to qualify.

[...]

We think it is appropriate that the technical detail as to which allowances will mean that a parent can continue to be regarded as being in paid work ought to be left to secondary legislation, and we feel that this strikes the right balance. This will also mirror the approach taken to the entitlement to 15 hours of free childcare for certain eligible two year-olds, where the detail as to which children are eligible is set out in regulations. The secondary legislation for the new entitlement will be laid and approved by each House using the affirmative procedure on their first use, therefore providing the opportunity for debate in both Houses.

[...]

By putting this level of detail in regulations, we will be better able to amend eligibility to ensure that we continue to provide places to those whom we want to benefit.¹³⁹

7.2 Disabled children and children with special educational needs

Although there is no specific provision on the face of the Bill, the DfE's policy statement acknowledged that "families with disabled children and children with special educational needs can too often experience challenges in accessing childcare".

In regard to the existing universal entitlement for 15 hours of free childcare, the Government noted that "while the legal framework is clear that all eligible children must be able to take up a place under the existing and new entitlement, in practice we are hearing that the system does not always deliver for all children".

It therefore proposed that "in the 'expressions of interest' process the government will seek to encourage innovative approaches to providing

¹³⁸ [HL Deb 14 October 2014 cc274-275](#)

¹³⁹ [HL Deb 14 October 2015 c276 and c279](#)

flexible childcare for working parents whose children are disabled or have special educational needs".¹⁴⁰

7.3 Consideration in the Lords of specified groups

During Committee and Report Stages amendments were tabled seeking to include certain other groups in the eligibility criteria for the extended entitlement.

Baroness Evans reminded Peers that "the purpose of the extended entitlement is to help parents go out to work if they want to". As such, the extended entitlement would not apply to the following groups unless they also met the eligibility criteria:

- those on zero hour contracts – Baroness Evans said that "the contractual position of parents will not determine whether they are eligible for the additional childcare" and that those on zero hour contracts "will be eligible in the same way as anyone else if, on average, they earn at least eight times the minimum wage per week"
- undertaking work-related training – it was noted by Baroness Evans that "the Government already provide support to help with the costs of childcare to parents in recognised education courses" in addition to the existing 15 hours of free childcare to all 3 and 4 year olds;
- single parent carers – Baroness Evans explained that to qualify they would have to "work in addition to their caring responsibilities". For couples, however, if one parent receives benefits for undertaking caring responsibilities the household would qualify for the extended entitlement "as the other parent is working";
- volunteers – they would be not be eligible unless they also met the working criteria; Baroness Evans said "parents who work part time and wish to combine this with some voluntary work will, of course, be able to do so".¹⁴¹
- grandparents – during Committee Stage, Lord Nash stated that they would only be eligible for the extended entitlement if they met the other criteria, rather than because they were grandparents *per se*.¹⁴² The *Policy Statement* added that "Childcare as defined in the Childcare Act 2006 does not include informal care provided by grandparents or other family members and the government does not plan to change this".¹⁴³
- homeless families – Lord Nash noted that "housing authorities and children's services work together locally to ensure that the needs of children in homeless families are met. The Housing Act

¹⁴⁰ Department for Education, [Childcare Bill: Policy statement](#), October 2015, p17

¹⁴¹ [HL Deb 14 October 2015 cc275–276](#)

¹⁴² [HL Deb 1 July 2015 c2124 and c2126](#)

¹⁴³ Department for Education, [Childcare Bill: Policy Statement](#), October 2015, p11

1996 places a duty on authorities to co-operate with social services where children may be homeless intentionally or threatened with homelessness intentionally".¹⁴⁴

7.4 Analysis of clause 2(2–4, 7 and 8) of Bill 84

Definition of a “qualifying child of working parents”

Subsection 2 of clause 2 states that in regards to the term a “qualifying child of working parents”, a qualifying child is a “young child” who: (a) is under compulsory school age; (b) is in England (as to be determined in regulations); and, (c) is of a description specified in regulations made by the Secretary of State.

Clause 2(2)(d) adds that it can also include a young child “in respect of whom any conditions relating to a parent of the child, or a partner of a parent of the child, which are specified in such regulations, are met” – the conditions “may, in particular, relate to the paid work undertaken by a parent or partner”.

Clause 2(4) allows the Secretary of State to make regulations that make provision about when a person is, or is not, to be regarded as another person’s partner, and as to what is, or is not, paid work (and may also specify circumstances in which a person is, or is not, to be regarded as in such work).

The DfE’s *Childcare Bill: Policy Statement* listed those households which would be eligible for the extended entitlement:

Eligibility for the free entitlement will include households where:

- both parents are working or one parent working in lone parent families, for their children aged three- or four-years-old. This will be defined as earning the equivalent of 8 hours per week on national minimum wage and this can include self-employment;
- both parents are working (as above) and in receipt of tax credits and/ or universal credit;
- both parents are employed but one or both parent is temporarily away from the workplace on parental, maternity or paternity leave;
- both parents are employed but one or both parent is temporarily away from the workplace on adoption leave;
- both parents are employed but one or both parent is temporarily away from the workplace on statutory sick pay;
- one parent is employed and one parent is has substantial caring responsibilities (based on specific benefits received for caring); or
- one parent is employed and one parent is disabled or incapacitated (based on specific benefits).

¹⁴⁴ [HL Deb 1 July 2015 c2123](#)

Parents will remain eligible for the free entitlement if they access tax credits, Universal Credit, Tax-Free Childcare and other childcare schemes to help pay for any additional childcare they need in addition to their free entitlement.¹⁴⁵

It was noted that “parents on an apprenticeship, who by definition will be working full time, will be able to benefit from the extended entitlement”.¹⁴⁶

The *Policy Statement* explained that:

The government believes that including parents who are temporarily away from the workplace will help families to maintain their childcare arrangements, supporting the transition back to work at the end of their parental leave or period of ill health and avoiding disruption to the child. It also avoids disproportionate administrative burdens on small providers of checking and identifying periods of leave (which can be as short as 1-2 weeks) and disruption to their business.

The government believes that ensuring that households where one parent is employed and one parent has substantial caring responsibilities or is disabled or incapacitated are eligible for 30 hours of free childcare will support these households to maintain one parent in employment or enable them to increase their hours of work while continuing to ensure that the other parent is supported with their own needs.

[...]

The government believes it is right to ensure that there will be a short grace period for families whose circumstances change. This will give parents the opportunity to regain employment and will also give providers certainty that if they offer a place under the new entitlement they will not lose that place immediately if a parent's circumstances change.¹⁴⁷

Additionally, under clause 2(2)(e), a qualifying child of working parents will also include a young child “in respect of whom a declaration has been made, in accordance with such regulations, to the effect that the requirements of paragraphs (a) to (d) [of clause 2(2), see above] are satisfied”. Regulations made under 2(4) may “make provision about the form of any declaration, the manner in which it is to be given and the period for which it has effect”.

In terms of when the declaration might be made, Baroness Evans said that “if a parent's circumstances change [e.g. they lose their job] their child will remain eligible for the extended free entitlement for a short period”.¹⁴⁸

Definition of a “young child”

A child is a “young child” during the period starting with the child's birth and “ending immediately before the 1 September next following the date on which the child attains the age of 5”.

¹⁴⁵ Department for Education, [Childcare Bill: Policy Statement](#), October 2015, p10

¹⁴⁶ [HL Deb 14 October 2015 c275](#)

¹⁴⁷ Department for Education, [Childcare Bill: Policy Statement](#), October 2015, pp10–11 and 12

¹⁴⁸ [HL Deb 14 October 2015 c276](#)

Clause 2(6) requires regulations to set out when a child becomes eligible for the extended entitlement. The explanatory notes state that “the intention is that regulations will specify that children will qualify for the free childcare entitlement under [clause 2] subsection (1) at the start of the school term following which they turn three”.¹⁴⁹

Definition of a parent

A parent is defined in clause 2(8) as being anyone with parental responsibility for the child (as defined in the *Children Act 1989* as amended),¹⁵⁰ or who has care of the child.

Circumstances in which a child is, or is not, in England

Further to clause 2(2)(b), clause 2(7) allows regulations to set out the circumstances in which a child is, or is not, considered to be in England for the purposes of the extended entitlement.

¹⁴⁹ [Bill 84-EN](#), p4, para 14

¹⁵⁰ For more information, see the Library briefing [Parental Responsibility](#).

8. Other provisions relating to eligibility

8.1 Checking eligibility and associated criminal penalties

The Bill as originally introduced into the Lords proposed that “regulations could make provision requiring information or documents to be provided by a person to the Secretary of State or another person. The regulations may also make provision about the disclosure of information by any Minister of the Crown, Her Majesty’s Commissioners for Revenue and Customs, or any other person, for the purposes of checking eligibility for free childcare”.¹⁵¹

This broad power was criticised by the Delegated Powers and Regulatory Reform Committee in its June 2015 report,¹⁵² and at Report Stage the Government tabled amendments to reduce the scope of the power. Lord Nash explained that the effect of the amendment was to create “powers which will enable us to create gateways for government departments and local authorities to be able to share information they hold for the purposes of checking a child’s eligibility for the extended entitlement”; the amendment was agreed.

In terms of safeguards, he added that “unauthorised, onward disclosure of information obtained through those gateways ought to be subject to a criminal offence”.¹⁵³ He said:

The Government’s intention [is] to ensure that personal information, which will also often be sensitive, is not disclosed to those who have no right to see it.

In relation to the level of sanction for the offence, the term of two years that we propose aligns with that provided for in Section 13B of the Childcare Act 2006. Moreover, it is important to remember that this is not a fixed penalty but a statutory maximum and that ultimately the sanction in any particular case will be a matter for the courts ... The Bill creates a criminal offence only where sensitive information is disclosed without authorisation, which is designed to protect parents and their information.¹⁵⁴

8.2 Appealing an eligibility decision

At Report Stage, the Government tabled amendments – which were agreed – to allow a decision on a child’s eligibility for extended entitlement to be challenged. Lord Nash said that “it is right that parents are able to challenge that decision and that is why the Government’s proposed new clause enables them to make regulations

¹⁵¹ [HL Bill 009-EN](#), p3, para 13

¹⁵² Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\] etc.](#), 2015–16 HL 12, 26 June 2015, p4, para 5

¹⁵³ [HL Deb 14 October 2015 c258](#)

¹⁵⁴ [HL Deb 14 October 2015 c259](#)

providing for a right of review in relation to a determination of eligibility with an onward right of appeal to the First-Tier Tribunal".¹⁵⁵

8.3 Penalties for false or misleading declarations of eligibility

The Bill as originally introduced stated that, under clause 1(4), regulations could create criminal offences in connection with the provision: "for the purposes of enabling any person to check whether a child is a qualifying child of working parents, make provision about the disclosure of information held by a Minister of the Crown, the Commissioners for Her Majesty's Revenue and Customs or any other person".

At Committee Stage, Baroness Jones called for clarity on this provision given her concerns that "we do not know who might be covered by this possible regulation. Would it be individual parents, individual nurseries or childminders, or even local authorities?".¹⁵⁶

In their October 2015 *Policy Statement*, the Government clarified that criminal offences would only relate to unauthorised information sharing, and tabled amendments to this effect which were agreed.

Rather, in regard to "false or misleading declarations made or provided in connection with a determination of a child's eligibility for the new free entitlement and dishonest conduct in the process of making this determination", a financial penalty could be applied.

The DfE added that "the maximum amount of any penalty would be £3000. A person who receives a financial penalty will be able to appeal to the First-tier tribunal against the imposition of the penalty or the amount of the penalty".¹⁵⁷

During Report Stage, Lord Nash said "the maximum amount of any penalty will be £3,000. Again, it is only a maximum and there remains discretion to impose a much lesser penalty, depending on the circumstances". He added: "I hope that noble Lords will agree that that is a more proportionate approach to tackling any dishonesty on the part of parents or providers seeking to benefit from the extended entitlement than the imposition of criminal sanctions".¹⁵⁸

8.4 Analysis of paragraphs e to j of clause 3(2) and clauses 3(5) and 3(6) of Bill 84

Checking eligibility and associated criminal penalties for unauthorised, onward disclosure of information

Paragraphs e to g of clause 3(2) state that the extended entitlement regulations may:

¹⁵⁵ [HL Deb 14 October 2015 c258](#)

¹⁵⁶ [HL Deb 1 July 2015 c2164](#)

¹⁵⁷ Department for Education, *Childcare Bill: Policy Statement*, October 2015, p12

¹⁵⁸ [HL Deb 14 October 2015 c259](#)

- make provision requiring information or documents to be provided to the Secretary of State, HMRC [HM Revenue and Customs] or an English local authority. Regulations may, for example, require parents to provide information relating to their employment status or documents such as their child's birth certificate, for the purpose of confirming the child's eligibility for free childcare;
- that provision would be made for the purpose of enabling any person, for example an English local authority or a childcare provider, to check whether a child is a qualifying child of working parents; [and]
- make provision about the sharing of data by a Minister of the Crown, HMRC or an English local authority for the purpose of eligibility checking.¹⁵⁹

Clause 3(2)(h) states that the extended entitlement regulations may also "provide for criminal offences in connection with the unauthorised, onward disclosure of information obtained" for the purpose stated in the last bullet point above.

As the explanatory notes state:

The intention is to replicate the criminal offence contained in section 13B of the *Childcare Act 2006*, which makes unlawful disclosure of information supplied for use in determining eligibility of children for free early years provision under section 7 of that Act a criminal offence.¹⁶⁰

However, unlike the *Childcare Act 2006*, this provision will be stated in regulations rather than on the face of the Bill.

Under clause 3(5), the maximum penalty to be provided for such a criminal offence shall not exceed two years imprisonment (whether or not accompanied by a fine).

Appealing an eligibility decision

Under clause 3(2)(i), the extended entitlement regulations may "make provision for reviews of, or appeals to the First-tier Tribunal against, determinations relating to a child's eligibility for [extended entitlement] childcare". The explanatory notes add that "The Government intends to exercise this power so as to provide a right of appeal against a decision that a declaration of eligibility made by a parent is invalid".¹⁶¹

Financial penalties for false or misleading declarations of eligibility

Clause 3(2)(j) "makes clear that extended entitlement regulations may provide for the imposition of financial penalties on parents in connection with false or misleading statements made, or information provided, in connection with a determination of a child's eligibility for the extended entitlement and dishonest conduct in connection with the process of making this determination".¹⁶²

¹⁵⁹ *Bill 84-EN*, p5, paras 22–24

¹⁶⁰ *Ibid*, pp5–6, para 24

¹⁶¹ *Ibid*, p6, para 25

¹⁶² *Ibid*, p6, para 26

Under clause 3(6)(a), the maximum fine in relation to clause 3(2)(j) is £3,000, although clause 3(7) states that “the Secretary of State may by regulations substitute a different amount for the amount for the time being specified in subsection (6)(a)”.

Clause 3(6)(b) states that “a person who receives a financial penalty must be able to require a review of the imposition of the penalty and/or its amount with an onward right of appeal to the First Tier Tribunal”.¹⁶³

¹⁶³ [Bill 84-EN](#), p6, para 26

9. Information sharing and local authority school budget

9.1 Amendments moved at Report Stage

At Report Stage, Baroness Evans of Bowes Park moved government amendment 22 which inserted a new clause into the Bill. As the Government Whip explained, the amendment would allow the DfE to “monitor take-up of the extended entitlement and that the existing legal framework for the allocation of funding by local authorities to childcare providers is updated to reflect this new entitlement”.¹⁶⁴

The amendment was agreed to.

9.2 Analysis of clause 4 of Bill 84

Clause 4(1) will amend the *Childcare Act 2006* so that the Secretary of State can require providers of the extended entitlement to provide the same “basic” information regarding take-up as those childcare providers delivering the current universal 15 hours of free care currently do. The explanatory notes state that “this will ensure that information about take-up of the extended entitlement can be monitored and that funding for the entitlement is properly allocated to local authorities and in turn providers”.¹⁶⁵

Under clause 4(2)(a), new section 45A will be inserted into the *School Standards and Framework Act 1998* “so as to provide that any duty imposed on a local authority in regulations made under section 3 of this Act (“extended entitlement regulations”), is to be treated as an education function of the local authority”. This will allow local authorities to fund the extended entitlement from their individual schools budget, as they currently do for the existing universal 15 hours entitlement.¹⁶⁶

Clause 4(2)(b) will amend section 47ZA of the *School Standards and Framework Act 1998* to mirror for the extended entitlement the current provision for the funding of the 15 hours of universal childcare in instances where a local authority proposes to allocate money to a childcare provider (other than a maintained school) out of its individual schools budget.¹⁶⁷

¹⁶⁴ [HL Deb 14 October 2015 c286](#)

¹⁶⁵ [Bill 84-EN](#), p6, para 29

¹⁶⁶ *Ibid*, p6, para 30

¹⁶⁷ *Ibid*, pp6–7, para 31

10. Publication of information (Clause 6 of Bill 84)

There was no debate or amendments made to clause 6 in Committee or Report Stage, or Third Reading.

The clause would amend section 12 of the *Childcare Act 2006* as amended by inserting new sub-sections 6A to 6C. Under section 12(1) of the *Childcare Act 2006* as amended, a local authority must establish and maintain a service providing information. Section 12(2) states:

The service must provide to parents or prospective parents information which is of a prescribed description and relates to any of the following—

- a) the provision of childcare in the area of the local authority;
- b) any other services or facilities, or any publications, which may be of benefit to parents or prospective parents in their area;
- c) any other services or facilities, or any publications, which may be of benefit to children or young persons in their area.

Under clause 6, regulations may require local authorities to publish information of a prescribed description at prescribed intervals and in a prescribed manner.¹⁶⁸

Clause 6 proposes that “the information to be prescribed for publication under this clause may be similar to that information” listed in (a) to (c) of section 12(2).

In addition:

New subsection (6C) provides that the requirement on the Secretary of State when making regulations under section 12(2) to have regard to the needs of parents of disabled children for appropriate information will also apply to the information she prescribes under new subsection (6A).¹⁶⁹

¹⁶⁸ [Bill 84-EN](#), p7, para 33

¹⁶⁹ *Ibid*, p7, para 35

11. Territorial extent

Although the Bill extends to England and Wales (clause 7 of Bill 84), its provisions apply only to England.

On 22 October 2015, the House of Commons approved Standing Order changes that gave effect to the Government's plans to introduce "English votes for English laws" (EVEL).¹⁷⁰ The Standing Order changes affect Government bills, specified motions and instruments.

The *Childcare Bill [HL]* was introduced in the Commons after the Standing Orders were changed.¹⁷¹ Accordingly, the Speaker had to consider whether the Bill or parts of the Bill should be subject to the new procedures; and, if so, issue a certificate stating what elements of the Bill relate to England only or to England and Wales. A Bill, amendment, new clause, new schedule, motion relating to a Lords Amendment or affirmative instrument falls to be certified if, in the Speaker's opinion, it passes two tests:

- a. it must apply exclusively to England or to England and Wales (disregarding any minor or consequential effects outside the area in question).¹⁷²
- b. it must be within devolved legislative competence.

On 18 November 2015, the Speaker issued the following certificate:

Childcare Bill [Lords]

The Speaker has certified, for the purposes of Standing Order No. 83J, and on the basis of material put before him, that, in his opinion, Clauses 2, 4 and 6 of the Childcare Bill [*Lords*] (Bill 84) relate exclusively to England on matters within devolved legislative competence, as defined in Standing Order No. 83J.¹⁷³

Information on the procedures that apply to certified provisions in bills can be found in the Library Briefing Paper, [English votes for English laws](#) (CBP 7339).

¹⁷⁰ [HC Deb 22 October 2015 cc1159–1255](#)

¹⁷¹ The Bill was introduced on 26 October 2015

¹⁷² In the case of Finance Bills and certain financial instruments, the test is whether it extends to England, Wales and Northern Ireland

¹⁷³ House of Commons, [Votes and Proceedings](#), 18 November 2015

12. Implementation timetable

12.1 Implementation timetable for the Bill

Under clause 8, while sections 1, 7 (territorial extent) and 9 (short title) come into force on the day that the Bill becomes an Act, section 2 to 6 are dependent on the criteria in section 1 being fulfilled. Once they have, sections 2 to 6 will come into force on such day as the Secretary of State appoints.

12.2 The Government's intended timetable

While the Bill does not specify precise dates for the introduction of the extended entitlement, the Government has stated that:

- In September 2016, extended entitlement will be launched in pilot areas ("early implementers");
- In September 2017, it will be made available across the whole of England.¹⁷⁴

The pilot areas have yet to be announced, although the DfE noted that it had received "an overwhelming response to the invitation we issued on 26th August for expressions of interest in being involved with early implementation, with over 1000 local authorities and providers registering their interest, including nurseries, schools and childminders".¹⁷⁵

¹⁷⁴ GOV.UK, [Government brings forward plans to double free childcare for working families](#), press release, 1 June 2015; GOV.UK, [A year until first working parents receive doubled free childcare](#), Press release, 26 August 2015

¹⁷⁵ Department for Education, [Childcare Bill: Policy Statement](#), October 2015, p4

13. Analysis of Commons Second Reading debate

13.1 Publication of funding review

The Second Reading debate took place on 25 November 2015, immediately after the statement by the Chancellor of the Exchequer, George Osborne, on the Spending Review and Autumn Statement.

The DfE published [Review of childcare costs: the analytical report](#) on the day of the Second Reading debate. Mr Gyimah stated in the report that:

On the basis of this review, I am pleased to be able to confirm that the government is allocating funding for a substantial uplift to the funding rate. We will be investing over £1 billion more per year by 2019-20, including £300 million for a significant uplift to the rate paid for the two-, three- and four-year-old entitlements. The new rates will be £4.88 for three- and four-year-olds, including the EYPP [Early Years Pupil Premium], and £5.39 for two-year-olds.¹⁷⁶

Looking ahead, the Government also promised a fundamental review of how free childcare is funded. Mr Gyimah added that:

We know that the current funding system creates unfair and unjustifiable differences between areas, and between types of providers.

We are committed to introducing a fairer and more transparent way of distributing funding for the entitlements, which will see more funding passed on to providers at the front line. We will consult on proposals to do this in the new year.¹⁷⁷

13.2 Key changes proposed by the Government

Summary

- an “increase in funding includes nearly £300 million for a significant uplift to the rate paid for the two, three and four-year-old entitlements. That will deliver a new national average funding rate paid to providers. Both rates will increase by at least 30p per hour. For three and four-year-olds, the new average rate will be £4.88, including the early years pupil premium and the rate for two-year olds will be £5.39”;¹⁷⁸
- the cost of the extended entitlement policy increased to “more than £1 billion a year ... by 2019-20”;¹⁷⁹

¹⁷⁶ Department for Education, [Review of childcare costs: the analytical report](#), DFE-00295-2015, 25 November 2015, p1

¹⁷⁷ *Ibid*

¹⁷⁸ [HC Deb 25 November 2015 c1416](#)

¹⁷⁹ [HC Deb 25 November 2015 c1416](#)

- £50 million capital allocation to support the creation of early years places;¹⁸⁰
- “parents will be able to access the 30-hour entitlement if they each work at least the equivalent of 16 hours per week at the national living wage—or national minimum wage for those aged under 25—including those who are self-employed” – previously it had been a minimum of eight hours per week;¹⁸¹
- in his Spending Review statement, the Chancellor announced that eligibility to the extended entitlement would be limited to “parents ... with incomes of less than £100,000” – previously there was no means test for eligibility;¹⁸²
- “we will conduct an early years funding formula review, as we want to understand how providers cater for children with disabilities and special educational needs”;¹⁸³
- the Government would seek the removal of clause 1 (independent review of funding) as inserted during Lords stages.¹⁸⁴

Revised eligibility criteria

In his Spending Review statement, the Chancellor had said that the extended entitlement would “now be available only to parents working more than 16 hours a week and with incomes of less than £100,000”.¹⁸⁵

On the 16 hours – which had previously been eight hours (see section 7) – the Secretary of State for Education, Nicky Morgan, explained:

One of the key messages from parents during the consultation was a desire for a simpler system. We confirmed in the other place that eligibility for the 30-hour entitlement will align with tax-free childcare. As the Chancellor set out, parents will be able to access the 30-hour entitlement if they each work at least the equivalent of 16 hours per week at the national living wage—or national minimum wage for those aged under 25—including those who are self-employed. In the case of lone-parent households, the same threshold will apply. This makes it a significant offer of additional support and means that anyone earning more than £107 a week, at this year’s minimum wage rate, will be eligible.¹⁸⁶

The December 2015 version of the DfE’s [Childcare Bill: Policy Statement](#) explained that:

Parents do not necessarily need to actually work 16 hours a week, but rather their earnings must reflect at least 16 hours of work at NMW or NLW, which is £107 a week at the current NMW rate.

¹⁸⁰ Department for Education, [Childcare Bill: policy statement](#), December 2015, p18

¹⁸¹ [HC Deb 25 November 2015 c1421](#)

¹⁸² [HC Deb 25 November 2015 c1369](#)

¹⁸³ [HC Deb 25 November 2015 c1414](#)

¹⁸⁴ [HC Deb 25 November 2015 cc1418–1419](#)

¹⁸⁵ [HC Deb 25 November 2015 c1369](#)

¹⁸⁶ [HC Deb 25 November 2015 c1421](#)

This includes those parents on zero contract hours who meet the criteria.¹⁸⁷

In regard to the new income cap, which is to be set at £100,000 per annum, Ms Morgan said that:

We are making a significant commitment to investing in the early years, but doing so at a time when we are facing difficult decisions across all spending areas. At the centre of these difficult decisions has been the belief that it is right for those with the broadest shoulders to bear the greatest burden. We therefore intend to introduce an income cap, whereby parents who earn more than £100,000 per annum will not be able to access the additional entitlement.¹⁸⁸

Higher funding rates

Ms Morgan confirmed that the average funding rates would increase by at least 30p to £4.88 (from £4.56) for the free childcare funding for 3 and 4 year olds (including the early years pupil premium), and to £5.39 (from £5.09) for free childcare for eligible 2 year olds,¹⁸⁹ and said that the DfE was “confident, based on the evidence we have gathered, that that increase will provide high-quality childcare for children in Islington and elsewhere in the country”.¹⁹⁰

It was subsequently confirmed the £4.88 rate would apply both to the existing universal 15 hours of free childcare and the additional 15 hours for qualifying children of working parents proposed in the *Childcare Bill*.¹⁹¹

The cost of this change was estimated by the Government to be “nearly” £300 million.¹⁹²

Revisions to the cost of the extended entitlement policy

Given the cost of increasing the average funding rate, the Secretary of State said that the cost of the extended entitlement policy had increased to “more than £1 billion a year ... by 2019-20”.¹⁹³ This compared to the figure of £840 million a year given prior to the announcement of the higher rates.¹⁹⁴

The cost of the extended entitlement would have been higher but for the new eligibility criteria. The Government estimated that the changes to the eligibility criteria for both the extended entitlement and the separate Tax Free Childcare policy announced in the Spending Review would together save £215 million by 2019–20.¹⁹⁵

¹⁸⁷ Department for Education, [Childcare Bill: policy statement](#), December 2015, p8

¹⁸⁸ [HC Deb 25 November 2015 c1421](#)

¹⁸⁹ Department for Education, [Childcare Bill: policy statement](#), December 2015, p6

¹⁹⁰ [HC Deb 25 November 2015 c1417](#)

¹⁹¹ [HC Deb 25 November 2015 c1452](#)

¹⁹² [HC Deb 25 November 2015 c1416](#)

¹⁹³ [HC Deb 25 November 2015 c1416](#)

¹⁹⁴ [HL Deb 14 October 2015 c288](#)

¹⁹⁵ HM Treasury, [Spending Review and Autumn Statement 2015](#), November 2015, Cm 9162, p44, para 1.160

Demand and supply for the extended entitlement

The DfE has noted that it is unsure of demand for the extended entitlement:

The actual number of new childcare places that will be needed [following the introduction of extended entitlement] depends on a number of important factors, including:

1. how many eligible parents take up the new entitlement;
2. the extent to which eligible parents already pay for additional hours of childcare over and above the existing 15 funded hours;
3. how quickly eligible parents choose to make use of all of the additional 15 hours to which they would be entitled; and
4. the level of spare capacity in the system.

Where a four-year-old is attending a school reception class, they will not access the entitlement to 30 hours free childcare in addition. We are gathering more evidence of how many eligible parents are likely to take up the new entitlement, and how many hours they are likely to take up, through the national conversation that is underway with parents, providers and employers.¹⁹⁶

On supply, Mr Gyimah noted that there would be an increase in capital expenditure: “£50 million is being made available to increase the number of places in early years provision”, and added that “now that free schools can bid for funding to create nurseries, we project that 4,000 nursery places will be created through that programme”.¹⁹⁷

The Government was confident that the childcare sector could deliver the extended entitlement:

We believe there is some existing capacity in the system to help deliver the new entitlement, and we are continuing to talk to local authorities to increase our understanding and evidence of where there is capacity in the system. We are also considering whether the capacity is in the right location to meet demand and whether it’s available at the times working parents will need it.

We know that the majority of working families with three- and four-year-olds already use more than 15 hours of childcare. This means that many children will already be in a place and will not require a new one. Rather, the new extended entitlement will pay for the additional hours parents are already purchasing from an early years setting, helping working families with the cost of childcare.¹⁹⁸

Independent review of childcare funding (Clause 1)

The Secretary of State argued against clause 1 – which had been inserted by the Lords and would require an independent funding review to be completed before the main provisions of the Bill could be brought into force – and called on Opposition members to support the Government in removing clause 1.¹⁹⁹

¹⁹⁶ Department for Education, [Childcare Bill: policy statement](#), December 2015, p17

¹⁹⁷ [HC Deb 25 November 2015 c1454](#)

¹⁹⁸ Department for Education, [Childcare Bill: policy statement](#), December 2015, p18

¹⁹⁹ [HC Deb 25 November 2015 c1419](#)

Government review of early years funding formula

Ms Morgan noted that the DfE would conduct an early years funding formula review, with a consultation to take place in 2016:

Part of the reason for having the funding formula review, which is part of the wider review of school funding, is to ensure that we talk to the local authorities, and the other bodies that receive the money, to find the best ways of doing this. In my opinion, that should involve maximum transparency so that people know how much money is being given by the Government, how much the local authority is receiving and how much is being passed on. That would enable the childcare-providing businesses and the families who were potentially going to be paying additional costs to know exactly how much money was not making it through to the frontline. We need to have that review and ensure that we get contributions from across the country.²⁰⁰

The review would help the DfE to “understand how providers cater for children with disabilities and special educational needs”, as well as “disadvantaged children ... funding for the early years”.²⁰¹

The new national funding formula for early years would be introduced in 2017–18.²⁰²

Roll-out of extended entitlement and “early implementers” pilots

The Government plans for the national roll-out of the extended entitlement to take place in September 2017, although it would be available in pilot areas in September 2016. Ms Morgan said that “about 1,800 local authorities and providers have already come forward to register their interest in taking part in the early implementer pilots”.²⁰³

The DfE added that:

On 26 August, the Department for Education invited local authorities and providers to register their interest in implementing the extended free childcare entitlement from September 2016.

[...]

The deadline to apply to become an early implementer was 20 November and we are currently sifting applications. We will announce the successful areas in the New Year.²⁰⁴

²⁰⁰ [HC Deb 25 November 2015 c1418](#)

²⁰¹ [HC Deb 25 November 2015 cc1414 and 1417](#)

²⁰² Department for Education, [Childcare Bill: policy statement](#), December 2015, p7

²⁰³ [HC Deb 25 November 2015 c1419](#)

²⁰⁴ Department for Education, [Childcare Bill: policy statement](#), December 2015, p19

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