

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

8th Report of Session 2015–16

**Childcare Bill [HL]:
Government
Amendments**

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake

Baroness Fookes (*Chairman*)

Lord Flight

Baroness Gould of Potternewton

Lord Jones

Lord Lisvane

Countess of Mar

Lord Moynihan

Lord Thomas of Gresford

Lord Tyler

Registered Interests

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

Publications

The Committee's reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hlddelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee's terms of reference.

Eighth Report

CHILDCARE BILL [HL]: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our Second Report of the current Session.¹ This report concerns Government amendments tabled for Report Stage. A supplementary delegated powers memorandum has been provided by the Department for Education (DfE). Amendments are numbered in accordance with the Marshalled List published on 12 October 2015.

Balance of provision between the bill and secondary legislation

2. In our earlier report, we observed that the Bill had rightly been described at Second Reading as a “skeleton” and we criticised what we saw as the remarkable imbalance between the provision in the Bill and what was being left to regulations. The Minister’s undertaking at Committee Stage² to reflect on our report and table appropriate amendments at Report Stage had led us to hope that these Government amendments might redress that imbalance.
3. We welcome the efforts that the Government has made to respond to some of our earlier criticisms about the scope of the powers in the Bill: for instance, the power to confer functions on an unspecified public body is now to be removed and it is clear that functions are instead to be conferred on local authorities. Nonetheless, we are surprised and disappointed that many of our recommendations have not been acted upon. 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.
4. We further note that, despite the recommendation in paragraph 13 of our Second Report about the level of scrutiny that would be appropriate for regulations under a skeleton Bill of this kind, the Government now propose the affirmative procedure for most powers *on first exercise only* (see the new subsection (4A) inserted in clause 2 of the Bill by Amendment 29). We are not persuaded by paragraph 4 of the supplementary memorandum that these scrutiny proposals are adequate in the case of this Bill, and we give two examples below of why we believe that is not the case. The first relates to conditions of eligibility (paragraphs 6-9 below), and the second to the creation of offences (paragraphs 10 and 11).

¹ 2nd Report, Session 2015–16, HL Paper 12.

² HL Debs, 1 July 2015, col 2083.

Amendments 7 & 8 – Conditions of eligibility

5. Amendments 7 and 8 add new paragraphs (d) and (e) to clause 1(2) and insert new subsections (2A) and (2B) in that clause:
 - paragraph (d) makes it a condition of eligibility that a child’s parent (or the parent’s partner) must satisfy conditions specified in regulations, which may (under new subsection (2A)) include conditions about paid work;
 - subsection (2B) enables the regulations to make provision about who is or is not to be regarded as a partner, what is or is not paid work, and when a person is or is not to be treated as “in” paid work.

6. Paragraph 7 of the supplementary memorandum sets out the following seven sets of circumstances in which it is intended that a household will be eligible for free childcare:
 - both parents or, in the case of lone-parent families, one parent, is in paid work. This will be defined as earning the equivalent of 8 hours per week on national minimum wage, including through 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 parents is temporarily away from the workplace on parental, maternity or paternity leave;
 - both parents are employed but one or both parents is temporarily away from the workplace on adoption leave;
 - both parents are employed but one or both parents 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 (assessed by reference to eligibility for, or receipt of, specific benefits).

7. We welcome this development in the Government’s policy on eligibility. We are, however, mystified about why the clearly defined circumstances listed in paragraph 7 are to be specified in regulations, rather than set out on the face of the Bill. In paragraph 8 DfE say that “the Government believes that this level of detail is most appropriately specified in secondary legislation”, but they do not say why. **The House may wish to press the Government on this point.**

8. 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.**

Amendment 18 – New clause (2)(h): Creation of criminal offences

9. Subsection (2)(h) of the new clause replaces the power in clause 1(5)(k) to create criminal offences. We welcome the fact that this new power is now focused only on the unauthorised disclosure of official information. However, the power is not an insignificant one as it would enable the creation of an offence sufficiently serious to be punishable by imprisonment for up to two years. Again, the effect of having the affirmative procedure for first exercise only of the power would be that the ingredients of the offence could be altered by negative procedure regulations.
10. While DfE indicate, at paragraph 19 of the supplementary memorandum, their intention to “mirror” existing provision creating offences in the Childcare Act 2006, we note that the provision in question is included in the Act itself, not in regulations. **We draw subsection (2)(h) to the attention of the House, so that it may consider whether the requirement for affirmative procedure only on first exercise of the power affords an adequate level of Parliamentary scrutiny for regulations which create, or alter the statutory ingredients of, criminal offences.**

Amendment 18 – New clause (2)(i): Uncertainty about decision-maker

11. Subsection (2)(i) of the first new clause enables regulations to make provision for reviews of, and appeals against, determinations relating to eligibility. While it is to be expected that the regulations should include provision for reviews and appeals, the Bill gives no clue as to the identity of the decision-maker that will make the “determinations”—will it be the local authority, or the “provider” or the “arranger” (all mentioned in subsection (2)(c))? The point is important, because subsection (2)(j) goes on to enable regulations to provide for “a person” to impose financial penalties where false or misleading information has been provided, or there has been dishonest conduct, in connection with a determination.
12. There is also nothing in the Bill about the ultimate destination of amounts received by way of penalties (for instance, that they must be paid into the Consolidated Fund). We are concerned because we have no knowledge of who will be entitled to impose the penalties and there could conceivably be a conflict of interest.
13. We consider that, before agreeing to the inclusion of powers of the kind conferred by subsection (2)(j), the House will wish to be satisfied as to the nature and independence of ‘persons’ who will be making determinations as to eligibility, and (in particular) imposing significant financial penalties (which, according to subsection (5)(a), could be as high as £3,000). **We therefore draw this aspect of subsection (2)(i) and (j) to the attention of the House, so that it may seek from the Minister an explanation of the intended arrangements for making determinations as to eligibility and for imposing financial penalties, and as to the destination of penalty payments.**

Consultation about regulations

14. In paragraph 3 of the supplementary memorandum, DfE say that it is their intention that regulations under clause 1 and the new clause inserted by Amendment 18 should “be subject to a public consultation before final regulations are brought to Parliament for approval”. We agree.
15. **Given, however, the nature of the powers being conferred by those clauses, we consider 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.**

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 12 October 2015 Members declared no interests.

Attendance:

The meeting on the 12 October 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Countess of Mar, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.