HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

9th Report of Session 2013–14

Children and Families Bill: Government Amendments and Government Response

Energy Bill: Government Response

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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 15 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 Andrews
Baroness Gardner of Parkes
Baroness Farrington of Ribbleton
Baroness Fookes
Lord Haskel
Countess of Mar
Lord Marks of Henley-on-Thames
Rt Hon. Lord Mayhew of Twysden QC DL
Baroness O'Loan
Baroness Thomas of Winchester (Chairman)

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.

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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 dprr@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

Ninth Report

CHILDREN AND FAMILIES BILL: GOVERNMENT AMENDMENTS AND GOVERNMENT RESPONSE

1. We considered this Bill in our 7th Report (HL Paper 49). The Government have now provided a response by way of a letter from Lord Nash, Parliamentary Under Secretary of State for Schools, printed at Appendix 1. The Bill is now at Committee stage. The Department for Education have prepared a supplementary delegated powers memorandum which relates to amendments they have tabled.[1] As clauses 1 to 9 of the Bill are due to be considered in Committee on 9 October, we have considered the amendments to clauses 1 to 9 in advance of looking at the other amendments.

2. Of the relevant amendments, the amendment to clause 4 gives effect to our recommendation that the powers conferred under new section 4A of the Adoption and Children Act 2002 ("the 2002 Act") should be subject to the affirmative procedure on the first time of their exercise.

3. The other two amendments which affect delegated powers make changes to clause 6 which concerns the Adoption and Children Act Register. Amongst other things, clause 6 inserts a new section 128A into the 2002 Act to confer a power on the Secretary of State to make regulations allowing prospective adopters to search and inspect the Register. In our earlier Report we recommended an increase in the level of parliamentary scrutiny, with the regulations being made subject to the affirmative procedure.

4. The first of the two amendments requires only the first exercise of the powers under new section 128A to be subject to the affirmative procedure; the second amendment allows subordinate legislation making powers under the 2002 Act to be exercised so as to make different provision for different areas. The Government explain that the first set of regulations under section 128A will only apply to a limited number of local authority areas that have agreed to participate in the piloting of prospective adopter access to the Register. In the Government's view, this first set of regulations will contain all the details of how the Register will be opened up to prospective adopters and the safeguards that will be put in place. Any further regulations, including those opening up prospective adopter access in all local authority areas following the pilot, are not likely to make any substantive amendments to the first regulations. For this reason, it is argued, it is not necessary for those further regulations to be subject to the affirmative procedure.

5. We are not convinced by this argument. This is the first time that prospective adopters will be allowed direct access to sensitive personal data about children. The Government have no doubt decided to pilot this access only in a limited number of local authority areas in order to ensure that the provisions underpinning it, including the safeguards they afford, are appropriate and effective before prospective adopter access is rolled out more widely. The use of a pilot suggests an acceptance that the first set of

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[1] http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/

regulations may not provide the final answer and that substantive changes may be required in the light of the experience gained through the pilot. **In the circumstances we do not consider the case has been made for limiting the affirmative procedure to the first exercise of powers. We therefore remain of the view that the affirmative procedure should apply on each occasion when the powers are exercised.**

ENERGY BILL: GOVERNMENT RESPONSE

6. We considered this Bill in our 5th Report (HL Paper 34) and 6th Report (HL Paper 41). The Government have now responded, by way of a letter from Baroness Verma, Parliamentary Under Secretary of State, Department of Energy and Climate Change printed at Appendix 2.

APPENDIX 1: CHILDREN AND FAMILIES BILL: GOVERNMENT RESPONSE

I am grateful to the Delegated Powers and Regulatory Reform Committee for their report on the Children and Families Bill (7th Report of Session 2013-14) and am writing to explain how I am taking forward their recommendations.

The Committee's Report made recommendations on two Parts of the Bill; Part 1 (Adoption) and Part 3 (Children and young people in England with special educational needs). The Government has now tabled amendments to the Bill to respond to the majority of the Committee's recommendations. I thought it would be helpful to set out, below, the approach we are taking in relation to each of the powers on which the Committee commented.

Part 1: Adoption

Clause 3:

Clause 3 introduces a new power for the Secretary of State to direct local authorities to outsource their adoption functions relating to recruitment, assessment and approval of prospective adopters. The Committee's Report recommended that the exercise of the power in respect of groups of local authorities or all local authorities should be subject to the affirmative procedure. The Committee's Report sets out their consideration that it would only be appropriate for the power to be exercised directly in respect of an individual local authority and then only because of that local authority's poor performance in its adoption functions. I understand the Committee's interpretation of the power as something to be exercised in relation to individual underperformance. However, the arguments we made in *Further Action* on Adoption explain the rationale for the power as a response to a systemic problem, not one of individual local authority making. The national problem of the shortfall in adopters demands a sustainable, national response.

At this stage, therefore, I am not minded to amend the clause so that the affirmative procedure is used. I understand the strength of views expressed about the need for this power to be exercised with caution and I am committed to making a suitable amendment having listened further to the views of the House at Committee Stage.

Clause 4:

Clause 4 introduces personal budgets for adoptive parents. The Committee's Report recommended that regulations should be subject to the affirmative procedure, at least in relation to the first use of the power; we agree and have tabled amendments to address this.

Clause 6:

Clause 6 provides a power for the Secretary of State to make regulations allowing approved prospective adopters to search and inspect the Adoption and Children Act Register. The Committee's Report sets out its concern that the regulations will be subject to the negative procedure as it is in the regulations that the Secretary of State will ensure that adequate safeguards are in place for accessing this information.

The Government understands the Committee's concerns that the regulations must contain adequate safeguards and should be subject to parliamentary scrutiny. The first set of regulations the Government makes under section 128A will only apply

to a limited number of local authority areas that have agreed to and have been selected to take part in the prospective adopter access pilot. The first set of regulations will also contain all of the details on how the Register will be opened up to prospective adopters and the safeguards we have put in place and ensuring that this first use of the power is subject to the affirmative procedure will ensure that these important provisions are scrutinised by the House. Any subsequent amendments, including opening up prospective adopter access to all local authority areas following the pilot, are not likely to be substantive amendments.

I have therefore tabled an amendment to the Bill so that affirmative procedure is used in the first instance, with any subsequent changes to these regulations subject to the negative resolution procedure. I believe this is adequate as subsequent changes are likely to be minor in nature.

Part 3: Special Educational Needs

Clause 36:

Clause 36 includes a power to make provision requiring attendance at an assessment meeting. The Committee's Report considered that who may be required to attend and the sanction for non-compliance should be set out on the face of the Bill. In response the Government believes that there are two options: maintaining the requirement to attend and to introduce more details and a sanction on the face of the Bill; or to remove the delegated power to make provision requiring attendance.

One of the central parts of the new system is that parents and young people will be involved more fully in the process and from much earlier therefore we do not believe that a requirement to attend assessment meetings is absolutely necessary. The Government has consulted with pathfinders which have suggested that safeguarding legislation is the best route for any issues caused by parents not presenting their children for assessment, where there are welfare concerns. We have therefore tabled an amendment to remove the delegated power to make provision requiring attendance from the face of the Bill.

Clause 44:

Regulations under Clause 44 (7)(b) make provision about circumstances in which it is not necessary for a local authority to review an Education Health and Care Plan or secure a reassessment. The Committee's Report raised concerns that this regulation making power is wider than under existing legislation where it is subject to the negative procedure.

I would like to reassure the Committee and the House that the intention is not for the power to be wide ranging to allow derogation from the duties to review and re-assess imposed under the Clause. The Government's approach in Part 3 has been less prescriptive than existing legislation, where this is appropriate and necessary to allow learning from the pathfinders and understand where local flexibility will have a positive effect on the system, before finalising the detail of regulations.

The only circumstances in which the Government envisages this being applied are to replicate current legislation, both in relation to time and where the local authority considers it is not necessary to undertake a re-assessment (for example because it considers the child or young person's needs have not changed significantly). This includes specifically where a reassessment has taken place in the last 6 months. We do not wish to specify these circumstances on the face of the Bill at this stage in case strong evidence from the pathfinders suggest any further appropriate use.

Clause 49:

Clause 49 introduces personal budgets for the parents of a child or a young person who wishes to have one. The Committee's Report recommended that the affirmative procedure should apply in the first exercise of clause 49 powers; we agree and have tabled amendments to the Bill to achieve this.

Clause 51:

Clause 51 sets out the right of appeal to the First-tier tribunal In respect of special educational matters within Education, Health and Care assessments and plans. The Government understands the Committee's concerns about a different approach in this legislation to the Education Act 1996 in which the powers of the Tribunal on determining appeals are set out on the face of the Act. I would like to provide strong reassurance to the Committee and House that this different approach has not been taken because we envisage the powers being exercised differently but to make it more helpful to readers of the legislation.

The current legislation sets out the Tribunal's determination powers in a number of sections and in a schedule to the 1996 Act. The decision to set out the powers in regulations was to bring them together along with the timescales for implementing determinations for simplicity. I hope that this explanation reassures the Committee and the House of the need for the delegation, which we do not believe should be subject to the affirmative resolution. However I will of course listen to the view of the House in Committee if it believes that setting out the powers on the face of the Bill is a better approach, accepting this may be more confusing for the readers of the legislation.

Clause 54 and 55:

Clauses 54 and 55 allow for piloting and the roll out of children's right of appeal against local authority decisions. The Committee's Report recommended that the affirmative procedure should apply when clause 54 and 55 powers are used; we agree and have tabled amendments to the Bill to achieve this.

Clause 68:

Clause 68 sets out the approvals process for the SEN Code of Practice. The Committee's Report recommended that the approvals process should be subject to the affirmative procedure. This follows substantial consideration of this issue by the Education Select Committee during pre-legislative scrutiny which concluded in the draft Bill being amended to apply the negative procedure. I fully recognise the importance of the Code of Practice and the interest in changes made to it, I believe that this interest will be strongest with the publication of the first Code of Practice following Royal Assent of the Bill.

I have therefore tabled an amendment to the Bill so that the approval of the new Code will be subject to the affirmative procedure in the first instance, which will secure an automatic debate in both Houses on the changes of the Code to reflect the new system. However, I still believe that requiring approval of any amendments to the Code by affirmative procedure will mean that, as now, the Code becomes out of date over time. The fact that a full debate would be required in both Houses to make even the most minor amendment to ensure the code is up to day, is likely to discourage such amendments being made. Therefore, the amendment I have tabled will mean that, after the initial approval of the Code any future amendments will be subject to the negative procedure thereafter, following a period of consultation as set out on the face of the Bill. I believe this is a balanced approach reflecting the significant changes made to reflect the new

system, but allows for the document to remain up to date and useful to parents and practitioners in the future.

I hope that the Committee and the House as a whole find this response useful in their further consideration of the Children and Families Bill. I would like to thank the Committee again for their work.

I am copying this letter to Baroness Hughes of Stretford and Baroness Jones of Whitchurch, and to all Peers with an interest in the Bill. I shall place a copy of this letter in the House Library.

Lord Nash

Parliamentary Under Secretary of State for Schools

Department for Education

2 October 2013

APPENDIX 2: ENERGY BILL: GOVERNMENT RESPONSE

I am writing to provide further information on delegated powers under the Energy Bill in reference to the provisions added by Government amendment in Grand Committee, and in response to the invitation to provide further information on the energy resilience clause.

New provisions introduced at Grand Committee

Annex A contains a supplementary memorandum which relates to the new clauses added to the Bill.[2]

The first of these was introduced in response to an independent review of fuel poverty by Professor Sir John Hills. The new clause seeks to update the Warm Homes and Energy Conservation Act 2000 so that **a new statutory target on fuel poverty** can be established, through secondary legislation, supported by a new statutory strategy. In principle, we intend to frame a target around energy efficiency in fuel poor homes: recent fuel poverty statistics have shown the importance of improving the quality of the homes of the fuel poor if we are to make real progress. This has been included under Part 6, Chapter 1 of the Bill.

Additionally, in response to debate in both Houses on the issue of support for community energy projects, we also introduced provisions which **enable extension of the Feed-in Tariff (FITs) scheme to support community energy projects up to 10MW** in size from the original 5MW limit. This has been included under Part 6, Chapter 2 of the Bill.

Finally, provisions were added following Government's commitment to consider methods to further improve access to markets for independent generators (under Part 2, Chapter 6). Many independent developers gain their route to market via contracts known as 'power purchase agreements' (PPAs) with suppliers (or 'off-takers'). These clauses **will allow for the implementation of an off-taker of last resort scheme** which will ensure that generators have access to a 'backstop' power purchase agreement on specified terms with a credit-worthy off-taker. The price paid for the electricity under these PPAs would be significantly below the price expected to be available in the open market, ensuring this is a genuinely 'last resort' mechanism. The mechanism would be implemented by an obligation on certain suppliers to offer 'backstop PPAs' under certain circumstances, and the costs and/or benefits to the offtaker would be socialised across suppliers.

The introduction of CfDs means that generators should be able to find PPAs on better terms outside the off-Iaker of last resort arrangement, which is why it is referred to as a 'last resort'. However, by guaranteeing access to the market on specified terms, the offtaker of last resort mechanism would enable investors and lenders to understand the 'backstop' price that the generator will receive for its power. This would provide investors and lenders with greater certainty over route to market and PPA risks and is expected to enable them to accept a wider range of possible off-takers, including those other than the large vertically integrated companies, shorter term PPAs and potentially other trading arrangements.

Further information on fees for services provided for energy resilience purposes

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[2] Not printed, see http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/

The Committee's 51h Report invited the Department to provide further explanations regarding clause 134(3)(b). Further information about the powers for this clause is also attached in Annex B.

The Government is thoroughly considering the DPRRC's recommendations from its 5th and 6th reports and will respond to the House in due course. I look forward to receiving the further response from the Committee on the attached supplementary memorandums after the recess, and my Department will consider any recommendations fully.

I hope that you find these points of clarification helpful. However, should you have any further queries, I would be happy to meet to go into further detail. I am copying this letter and supplementary memorandum to all of the member of the DPRRC and the members of the Lords' Informal Scrutiny Group for the Energy Bill, and I shall lay a copy in the libraries of both Houses for reference.

Baroness Verma

Parliamentary Under Secretary of State

Department of Energy & Climate Change

30 July 2013

ANNEX B

RESPONSE TO DELEGATED POWERS AND REGULATORY REFORM COMMITTEE 5TH REPORT: CLAUSE 134: FEES FOR ENERGY RESILIENCE SERVICES

In its 5th Report, the Committee asked for further explanation for the inclusion of paragraph (b) of Clause 134 (3) conferring powers on Secretary of State to give direction, as well as making regulations, for the purpose of specifying the level of fees for providing energy resilience functions in the event of a disruption or threatened disruption to energy supplies.

In addition, the Committee also noted that the fees are not expressly limited by reference to the costs incurred in providing the services - as is the case with (for instance) the fees introduced in subsections (3H) and (31) in clause 135(3).

Clause 134 relates to circumstances where Government would only be in a position to provide services to business if it were able to recover some or all of the cost it incurs in doing so. The services provided would be discretionary and businesses would be in a position to take advantage of them should they wish to do so - balancing the effects on revenues, and meeting contractual obligations, against cost of the service.

Government will work with businesses in the energy sector to identify what services could be of value to them in the context of their contingency planning. Any fees would be set for specific services (which will likely relate to a very specific subset of the industry) and would be charged to the businesses that receive those services.

The requirement for the services proposed (such as provision of assets (facilities, vehicles and products) and of personnel to support recovery or remediation of impacts of disruptive events would arise in the event of a significant, unexpected disruption, and thus it may be necessary to plan and provide services in a situation of urgency. Despite this, there will be situations where it will be appropriate and feasible to set out the level of fees to be charged for a particular service in secondary legislation, as the Committee highlights, and Government would aim to do so in those circumstances. However, it is likely that there will also be circumstances where it is not feasible to work within the timetable required for secondary legislation, and the flexibility afforded by a ministerial direction would be helpful or required in those situations. Without this flexibility, it may be that in some cases the provision of the services would be difficult to deliver within the optimum timescale, with consequential loss of benefit to businesses and the economy.

There are two key considerations which support the need for greater flexibility in setting of fees:

1. The situations in which businesses would require services HMT can provide by their nature (in the event of an emergency) are unpredictable and difficult to define. As such, in at least some cases the actual service to be provided will not be clear (although the underlying assumptions can be defined) until such time as the service is requested by a business. For example, depending on the severity of flooding, location and other considerations, of a large critical business, different equipment or man power would be required to support the business. Although in discussion

with businesses we can identify what may be required and reach a general agreement around costs, the exact costs, and timescale for delivering those services, will be dependent on the specific circumstances. In addition, it may be that costs to Government of provision of those services change over the timescale the service is required, due to availability of different personnel, or better equipment becoming available etc. Flexibility to reduce the charges quickly would ensure consistency in our approach to defining and setting of the charges.

2. It is necessary to maintain flexibility to change the fees in response to a change in market rates, especially for services where rates significantly vary over time - this would be proper and right and ensure that we did not provide businesses with a commercial advantage with implications for State Aid. In some cases, the rates will need to be monitored on a regular/on-going basis and could potentially require changes to the rates proposed either at short notice (timescales which are not compatible with laying new regulations) or frequently as market rates change.

The intention, as indicated above, is that in most situations regulation will be used to set the rate of fees. In the event that a direction is considered essential to ensure delivery of the service, either due to unusual circumstances or urgency, the Secretary of State will provide a clear explanation to Parliament why this approach were needed to deliver the best outcome for Government and the economy.

In relation to the amount of fees to be charged, the intention of the provision is that fees cannot exceed the costs incurred in connection with providing the service, and cannot be used as a revenue-raising measure. We consider that this is the effect of the provision as drafted, but will consider whether this can be made clearer on the face of the Bill, without risking raising a contrary presumption in relation to fee-raising powers elsewhere on the statute book, which are not expressly limited.

APPENDIX 3: 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.

No interests were declared at the meeting on 9 October 2013.

Attendance:

The meeting on the 9 October 2013 was attended by Baroness Farrington of Ribbleton, Baroness Fookes, Baroness Gardner of Parkes, Lord Haskel, Baroness O'Loan and Baroness Thomas of Winchester.